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On

“Refugee Rights and International Law: The Rohingya Crisis in Bangladesh”

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Submitted To

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Letter of Transmittal

To

Sunzida Akter

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Subject: Submission of Research Monograph on “**Refugee Rights and International Law: The Rohingya Crisis in Bangladesh**”

Dear Sir,

This is a great pleasure to submit the Research Monograph on “**Refugee Rights and International Law: The Rohingya Crisis in Bangladesh**” as a partial requirement for the fulfillment of my LL.B course under the Department of Law of the Sonargaon University (SU).

I have given due efforts to make this Research Monograph as fruitful one and to make it as informative as possible. I hope that this paper will not be the formality of academic course completion rather it will be a source of information for other purpose on this topic.

Yours sincerely

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Declaration

I do hereby declare that the Research Monograph Title “**Refugee Rights and International Law: The Rohingya Crisis in Bangladesh**” prepared solely by me and which has been submitted to the department of Law, Sonargaon University (SU) for achieving the LL.B (Hon’s) Degree. This is an original work of mine. No part of this research, in any way or in form, has been submitted to any University or Institution for any Degree, Diploma or for other similar purposes.

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Supervisor Certificate

This is to certify that the work presented in this dissertation is based on the work, carried out by the author herself under my supervision in Department of Law, Sonargaon University (SU).

It is also certifying that the work presented here is original and suitable for submission as the style and contents, for fulfillment of LL.B. program.

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Thank you

Eyasin Miah

Abstract

This thesis mainly aims at the problems of the refugee has been among the most complicated issue before the work community for a long time. Many discussions have taken place for searching or a more effective way to protect and assist these vulnerable groups of human being. Human rights, democracy and development are core elements of the United Nations Charter. The later part of the last Century (20 century) underscored the importance of the respect for and observance of human rights as one of the fundamental obligations of the member states. The treatment of the refugees come within the ambit of human rights.

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Chapter 1

INTRODUCTION

Greek writer Euripides nearly 2500 years ago stated that “there is no greater sorrow on earth than the loss of one's native land”. Ever since mankind has existed there have been refugees. But, the beginning of this century of the “homeless man”, the number of refugees has arisen significantly and an especially in its second half. It is the major concern of human rights law.

From time immemorial people have moved from their country of origin to another country for variety of reasons. Sometimes it is voluntary, and other time isn't. In case of voluntary movement, it is described as a migration. This means that the individual is not compelled to move from the country of origin or nationality but moves of his own choice to another country to improve his/her quality of life. Furthermore, he migrant enjoys the protection of his/ her State.¹ There is another situation where an individual does not enjoy the protection of the State is forced to move from the country of origin or nationality because of perceived danger or in security of his/ her life. In such forced circumstances, the individual takes refuge in another Country and becomes a refugee.²

1.1 What is Refugee Law?

Refugee law is a branch of International law which deals with the rights and protection of related to, but distinct from, International Human Rights Law and International Humanitarian Law, which deals respectively human rights in general, and the conduct of war in particular.

1.2 Sources of Refugee Law

Refugee law encompasses customary law, peremptory norms, and international legal instruments. The only international instrument is the UN Convention, with

¹ Harun Ur Rashid, Refugee Law, First Edition, page-1.

² Ibid .

an optional Protocol, while various regional bodies have instruments applying only to member states. The instruments include:

- the 1951 United Nations Convention Relating to the Status of Refugees
- modified by the 1967 Protocol Relating to the Status of Refugees which a country has to have signed separately
- The 1966 Bangkok Principles on Status and Treatment of Refugees adopted at the Asian-African Legal Consultative Committee in 1966.
- the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
- the 1984 Cartagena Declaration on Refugees for Latin America
- the 1976 Council of Europe's Recommendation 773 (1976) on the Situation of de facto Refugees
- The 2004 European Union's Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted.

1.3 Definition of Refugee

The definition of a 'Refugees' in international law is of critical importance for it can mean the difference between life and the death for an individual seeking asylum. Definitions in international law it may be noted depart from the ordinary meaning of the word 'Refugees'. In everyday speech the word 'Refugees' is used to describe a person who is forced to flee his or her home for any reason for which the individual is not responsive, he it persecution, public disorder, civil war, famine, earthquake or environmental degradation.

1.3.1 Early definitions:

Analysis of the international Refugees accords entered into between 1920 and 1950 reveals three distinct approaches to Refugees definition. Each of these perspectives- Judicial, Social and the individualist- was dominant during a part of the initial decades of Refugees law.

i. The Judicial Perspective:

From 1920 until 1935, Refugees were defined in largely juridical terms, which meant that they were treated as Refugees because of their membership in a group of persons effectively deprived of the formal protection of the government of its state of origin.

ii. The social perspective:

In contrast to the initial judicial focus, the Refugees agreements adopted between 1935 and 1939 embodied a social approach to Refugees definition. Refugees defined from the social perspective are the helpless casualties of broadly based social or political occurrences which separate them from their home society.

iii. The Individualist prospective:

The third phase of international refugee protection, comprising the accords of the 1938-1950 was revolutionary in its resection of group determination of refugee status. A refugee by individualist standards is a person in search of enrage from prescribed in justice of functional incompatibility with her home state.

1.3.2 Different definitions:

Several attempts have been made to define the term 'Refugees' in course of twentieth century. The definition contained in different international instruments during the period of the League of Nations is the subject of reading.

It provides the historical backdrop against which contemporary definitions need to be considered. These include the definitions contained in the 1951 convention on the status of Refugees (hereafter the 1951 convention), the 1969 OAU convention Governing the specific aspects of Refugees problems in Africa (hereafter the OAU convention) and the Cartagena Declaration on Refugees 1984 (hereafter the Cartagena declaration).³

³ Immigration and Refugees policy : Global and Domestic issues.

A. According to the 1951 United Nations Convention relating to the status of Refugees:

The most widely accepted definition of a 'Refugees' is that continued in the 1951 convention⁴. The mandate of the convention intends to any person who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country for his nationality and is unable 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 as a result of such events, is unable or owing to such fear, is unwilling to return to it.⁵

B. The 1967 protocol:

The key feature of the protocol of 31 January 1967 relating to the status of Refugees (hereafter the 1967 protocol) was that it removed the temporal and geographical limitations contained in the 1951 convention.⁶ However, as reading it points out, there was no attempt to reconsider the definition of term 'Refugees'. This meant that most third world Refugees continued to remain de facto included, as their flight is frequently prompted by natural disaster, war, or political and economic turmoil rather than by persecution, at least as that term is understood in the western context.⁷

C. According to National Refugee Laws in South Asia:

Any Person who is outside his or her Country of origin and who is unable or unwillingness to return to and unable or unwillingness to avail himself or herself

⁴ The Benign Aquino Lecture in Human Right- Refugees and Human Rights-Guy Goodwin –Gill.

⁵ The convention Refugees definition James C.Hath way.

⁶ The Law of Refugees status- Buffer Worth's.

⁷ On the gender question general see the polity press, Cambridge, 1994.s

of the persecution on account of race, religion, sex, and national ethnic indent membership of a particular social group or political opinion.

D. Asian-African consultative Committee:

A refugee is a person who, owing to persecution or well-founded fear at persecution for reasons of race, color, religion, political belief or membership of a particular social group leaves the state of which he is a national, or the country of his nationality, or, if he has no nationality the State or country of which he is a habitual resident or being outside such State or Country is unable or unwilling to return to it or to avail himself of its protection.

1.4 Are we all Refugees?

The final reading of chapter one is included to encourage reflection on the ‘Striking Similarities between the universal condition and the plight of Refugees. It is perhaps important to emphasize that Warner is not questioning the usefulness of the legal category of Refugees but merely pointing towards certain parallels between the Refugees condition and the existential condition of humankind.

1.5 Stateless persons

‘Refugees’ are to be distinguished from the stateless persons. While the 1951 convention addresses the problem of Refugees alone, the international legal rights of stateless person are addressed in the convention relating to the status of stateless persons, 1954, which came into force in 1960. It defines a ‘state less person’ as a ‘person who is not considered as a national by any state under the operation of its law.’

1.6 Basic elements of constituting a refugee

There are four requisites fundamental elements of a refugee status as

- A. They are outside the country of origin or nationality.
- B. They are unable or unwilling to avail themselves of the protection of that country or to return.

C. Such inability or unwillingness is caused by a well-founded fear of being persecuted. And

D. The persecution feared is based on race, religion nationality, membership of a particular social group or political opinion.

1.7 Who is not a Refugee?

The person who is involved in this following works shall not gain the status of Refugee:

- a. A crime against peace
- b. A crime against humanity
- c. Serious non-political crime
- d. Acts contrary to the United Nations under Article 1(D), (F) of the 1951 Convention and Art.3 of OAU Convention.
- e. A person is a soldier of a state.

1.8 Loss of Status as a refugee

A refugee shall lose his status as a refugee, if he or she does the following activities:

- a) He voluntarily returns permanently to the State of which he was a national or the country of his origin of which he as a habitual resident; or
- b) He has voluntarily renounced himself of the protection of the State or Country of his nationality; or
- c) He voluntarily acquires the nationality of another State or Country and is entitled to the protection of that State or Country; or
- d) A refugee shall lose his status as a refugee if he does not return to the State of which he is a national, or to the Country of his nationality, or to the Country of his nationality, or if he has no nationality, to the State or Country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or Country after the circumstances in which he became a refugee has ceased to exist.

1.9 Rights and duties of Refugee

The 1951 convention details the civic and socio-economic rights of refugee which must be respected. In addition, there are the regional and universal human rights instruments which read in conjunction with the refugee specific human regime, ‘Set a wide-ranging, if perhaps not fully adequate or integrated’ measure of respect for the basic dignity of refugee.

1.9.1 The Human Rights of Refugee (Summary):

The human rights of refugees include the following indivisible, interdependent and interrelated human rights:

- The human rights to seek and enjoy asylum from persecution.
- The human rights not to be forcibly returned to the country he or she is fleeing if such a return would pose a threat to the life, security, or freedom of the refugee.
- The human rights to freedom of movement, freedom to choose his or her residence, freedom to leave any country, including his or her own, and to return to his or her country.
- The human rights to freedom from discrimination based on race, color, gender, language, religion, nationality, ethnicity, or any other status.
- The human rights to equal protection of the law, equal access to the courts, and freedom from arbitrary or prolonged detention.
- The human rights to a nationality.
- Human rights to life.
- The human rights to protection from torture or ill-treatment.
- The human rights to freedom from genocide and “ethnic cleansing”.
- The human rights to an adequate standard of living, including adequate food, shelter and clothing.
- The human rights to work and to basic labor protections.
- The human rights to the highest possible standard of health and to access to health care.
- The human rights to live in a healthy and safe environment.

- The human rights to education- to free and compulsory elementary education, to readily available form of secondary and higher education, and to freedom from all types of discrimination at all levels of education. The human rights to protection from economic and sexual exploitation, particular for refugee women and children.
- The human rights to participation in decision-making which affects a refugee=s life, family, and community.
- The human rights to sustainable development.
- The human rights to peace.

1.9.2 Duties of Refugee

Much has been written on the rights of refugees; less so on their duties. And yet, refugees are no different from other individual. They must conform to the laws and regulations of the country in which they find themselves⁸. The question arises. However, whether refugees have any duties over and above such general obligations and what conflicts, if any, may exist with respect to their fundamental rights.⁹

⁸ UnDoc.A/conf.2/96

⁹ GAOR, Fifth session, supplement No.2

Chapter 2

HISTORICAL BACKGROUND OF REFUGEE PROBLEM

2.1. Ancient Time

The concept of the meaning that a person who fled into a holy place could not be harmed without inviting divine retribution was understood by the ancient Greeks and ancient Egyptians. However, the right to seek asylum in a church or other holy place, was first codified in law by King Ethelbert of Kent in about 600 A.D.

The term "refugee" is sometimes applied to people who may have fit the definition, if the 1951 Convention was applied retroactively. There are many candidates. For example, after the Edict of Fontainebleau in 1685 outlawed Protestantism in France, hundreds of thousands of Huguenots fled to England, the Netherlands, Switzerland, Norway, Denmark and Prussia. Various groups of people were officially designated refugees beginning in World War I.

The first international coordination on refugee affairs was by the League of Nations' High Commission for Refugees. The Commission, led by Fridtjof Nansen, was set up in 1921 to assist the approximately 1,500,000 persons who fled the Russian Revolution of 1917 and the subsequent civil war (1917–1921), most of them aristocrats fleeing the Communist government. In 1923, the mandate of the Commission was expanded to include the more than one million Armenians who left Turkish Asia Minor in 1915 and 1923 due to a series of events now known as the Armenian Genocide. Over the next several years, the mandate was expanded to include Assyrians and Turkish refugees.¹⁰ In all of these cases, a refugee was defined as a person in a group for which the League of Nations had approved a mandate, as opposed to a person to whom a general definition applied.

2.2 Middle Age

Similar laws were implemented throughout Europe in the Middle Ages. The related concept of political exile also has a long history: Ovid was sent to Tomis

¹⁰ [http:// e.wikipedia. org/wiki/Refugee](http://e.wikipedia.org/wiki/Refugee)

and Voltaire was exiled to England. Through the 1648 Peace of Westphalia, nations recognized each others' sovereignty. However, it was not until the advent of romantic nationalism in late eighteenth century Europe that nationalism became prevalent enough that the phrase "country of nationality" became meaningful and people crossing borders were required to provide identification.

The 1923 population exchange between Greece and Turkey involved some two million people, most forcibly made refugees and *de jure* denaturalized from homelands of centuries or millennia, in a treaty promoted and overseen by the international community as part of the Treaty of Lausanne.

2.3 Modern Period

Generally the modern period is started from 1930 to till today. From In 1930, the Nansen International Office for Refugees was established as a successor agency to the Commission. It's most notable achievement was the Nansen passport, a passport for refugees, for which it was awarded the 1938 Nobel Peace Prize. The Nansen Office was plagued by inadequate funding, rising numbers of refugees and the refusal by League members to let the Office assist their own citizens. Regardless, it managed to convince fourteen nations to sign the Refugee Convention of 1933, a weak human right instrument, and assist over one million refugees. The rise of Nazism led to such a severe rise in refugees from Germany that in 1933 the League created a High Commission for Refugees Coming from Germany. The mandate of this High Commission was subsequently expanded to include persons from Austria and Sudetenland. 150,000 Czechs were displaced after October 1, 1938, when the German army entered the border regions of Czechoslovakia surrendered in accordance with the Munich Agreement.¹¹ On 31 December 1938, both the Nansen Office and High Commission were dissolved and replaced by the Office of the High Commissioner for Refugees under the Protection of the League.¹² This coincided with the flight of several hundred thousand Spanish Republicans to France after their loss to the Nationalists in 1939 in the Spanish Civil War.¹³

¹¹ [http:// e.wikipedia. Org/wiki/Refugee](http://e.wikipedia.Org/wiki/Refugee).

¹² [http:// e.wikipedia. Org/wiki/Refugee](http://e.wikipedia.Org/wiki/Refugee).

¹³ Abudr Razzaq; A State of Refugee ; Rohingyas in Bangladesh.

Chapter 3

RESPONSE OF CONCERNED INSTITUTIONS & PEOPLE AND LEGAL INSTRUMENTS TO MITIGATE THE PROBLEM

3.1 Concerned Institutions

There are many Concerned Institutions are working for the development of the status of the refugees. These organizations help to codify the certain rights, duties and obligation for the refugees.

3.1.1 Leigh of Nation:

The League of Nations was an international organization founded as a result of the Treaty of Versailles in 1919–1920. At its greatest extent from 28 September 1934 to the 23 February 1935, it had 58 members. The League's goals included disarmament, preventing war through collective security, settling disputes between countries through negotiation, diplomacy and improving global quality of life. The diplomatic philosophy behind the League represented a fundamental shift in thought from the preceding hundred years. The League lacked its own armed force and so depended on the Great Powers to enforce its resolutions, keep to economic sanctions which the League ordered, or provide an army, when needed, for the League to use. However, they were often reluctant to do so. Sanctions could also hurt the League members imposing the sanctions and given the pacifist attitude following World War I, countries were reluctant to take military action. Benito Mussolini stated that "The League is very well when sparrows shout, but no good at all when eagles fall out. After a number of notable successes and some early failures in the 1920s, the League ultimately proved incapable of preventing aggression by the Axis Powers in the 1930s. The onset of the Second World War suggested that the League had failed in its primary purpose, which was to avoid any future world war. The United Nations replaced it after the end of the war and inherited a number of agencies and organizations founded by the League.

3.1.2 Commission for Refugees:

Led by Fridtjof Nansen, the Commission for Refugees looked after the interests of refugees including overseeing their repatriation and, when necessary resettlement. At the end of the First World War there were two to three million ex-prisoners of war dispersed throughout Russia,¹⁴ within two years of the commission's foundation, in 1920; it had helped 425,000 of them return home. It established camps in Turkey in 1922 to deal with a refugee crisis in that country and to help prevent disease and hunger. It also established the Nansen passport as a means of identification for stateless peoples.

3.1.3 Committee for the Study of the Legal Status of Women:

The Committee for the Study of the Legal Status of Women sought to make an inquiry into the status of women all over the world. It was formed in April 1938, and dissolved in early 1939. Committee members included Mme. P. Bastid (France), M. de Ruelle (Belgium), Mme. Anka Godjevac (Yugoslavia), Mr. H. C. Gutteridge (Great Britain), Mlle. Kerstin Hesselgren (Sweden),^[46] Ms. Dorothy Kenyon (United States), M. Paul Sebastyen (Hungary) and Secretariat Mr. Hugh McKinnon Wood (Great Britain).

3.1.4 Red Cross:

The impact of international institutions upon the various sovereign nations that continue to join them, however, gradually grows, to the extent of affecting domestic legislation.¹⁵ This trend is clearly demonstrated in the influence of international institutions upon China's domestic processes, which is a focus of concern and debate within academic circles.

How does an international institution influence a state's behavior? Peter Gourevitch's article, 'The Second Image Reversed', which comprises research into the domestic effects of international institutions (i.e. international organizations legally established in a certain field, their treaties and rules, including the system of norms supporting these organizations), has renewed the interest of international relations scholars in this topic. The emphasis of current research is on system- or

¹⁴ <http://e.wikipedia.org/wiki/Refugee>.

¹⁵ <http://cjp.oxfordjournals.org/content/2/1/73.full#FN4>(last visited 8th March 2021)

state- and society-level analysis, or analyses of individual decision makers. Although explanations given at these levels are of help in understanding of certain aspects of this phenomenon, those arising from analysis of the relationship between the International Red Cross and China fall far short of satisfactory

This article chooses as a case study the effects of International Red Cross Movement norms on China's Red Cross legislation. It has two main points of focus: first, although acceleration of the process of international interaction has lead to establishment, one after another, of international institutions in various fields that perform increasingly important international government functions, whether or not sovereignty is permeable to them remains a question of hot debate among scholars in the field. If, by means of a case study of Chinese Red Cross legislation, it can be shown that international institutions indeed 'permeate' domestic legislation—the densest of sovereignty walls—there is reason to predict that international institutions relating to fields that do not seriously corrode sovereignty have the potential for similar or even greater effects.

Second, from a perspective of substitutability, China's Red Cross legislation is a 'least likely' case. From a domestic structure perspective, China in general can be defined as, what Thomas Risse-Kappen calls, a 'state-dominated' country. This implies that the International Red Cross movement and its norms should meet great resistance to entry into China's domestic discourse but, once internalized, could produce an effect with relative ease. Yet, although no great changes have occurred in China's domestic structure, the International Red Cross Movement has nevertheless smoothly entered its domestic discourse.¹⁶

From an institutional design perspective, countries incline towards observance of international rules when they are administered by an institution with a strong oversight mechanism. As the Red Cross Movement does not possess effective oversight mechanisms, however, no significant change has occurred in the Red Cross simply as a result of Red Cross legislation.

From an organizational culture perspective, an organization's salience within the bureaucracy determines whether or not the organizational culture of a country promotes its observance of the international institution. A common social

¹⁶ Ibid

organization such as the Red Cross, however, is obviously not possessed of the level of salience within the bureaucracy that Jeffrey Legro finds is the case with the military. There is neither an organization concerned with vital interests within the International Red Cross Movement, nor a powerful and influential figure doing its utmost to promote Chinese Red Cross legislation. Consequently, the above explanations do not satisfactorily explain the case in question of Red Cross legislation. In-depth analysis of this case explains the advantages and disadvantages of these theories, as well as the process and principles of internalization that the international institution undergoes at the unit level of behavior.

3.2 Related Instruments

A number of International Instruments establish and define basic standards for the treatment of refugees. The most important are the 1951 United Nations Convention Relating the Status of Refugees, and The Protocol Relating to the Status of Refugees.

3.2.1 The Convention Relating to the Status of Refugees, 1951:

In the late 40as and early 50as millions of people in Europe , uprooted by the second world war , were displaced and were unwilling to return to the countries of origin that has come under communist Soviet Union . At that time attention to refugee issues focused mainly on the need to find permanent homes for these displaced European people. It may be noted that the cold war between two super powers the US and the Soviet Union began by this time and the European countries and the US were determined that the refugees should not return to the communist countries .

To deal with the displaced people, a conference was held in Geneva under the auspices of the UN. The purpose of the conference was to formulate legal provisions principally for the refugees from the Eastern European communist countries. It was attended by 26 states, 16 of them are European and 10 non European countries (USA, Israel, Iraq, Turkey, Egypt, Canada, Australia, Colombia, Brazil and Venezuela). The conference adopted the convention relating

to the status of refugees on 28th July 1951. The convention came into force on 22nd April 1954.

The 1951 Convention, which was drafted as a result of a recommendation by the newly established United Nations Commission on Human Rights, was a landmark in setting standards for the treatment of refugees.

The provisions of the convention consist of three parts .Such as:

- a. Definition of a refugee
- b. Enumerate the conditions under which a refugee loses his/her status .and
- c. Indicate the circumstances in which a person cannot claim the status of a refugee. It must be noted that the provisions of the convention are legally binding only on the countries that are parties to the convention.

The convention had initially limited application because it referred to the refugee, who acquired such status as a result of events occurring before January, 1951. This limitation was removed by the 1967 protocol. The 1951 convention and its 1967 protocol continue to be the principle legal instruments of the refugees. 130 countries are parties to the convention (as of 1998) which serve to underline the universal character of the instrument. It is interesting to note that no country from the Indian sub-continent is yet a party to the convention.

The present day duty of protection of the refugees arises principally from the previsions of the convention. Although almost every country, specially the developed countries, has a refugee and special humanitarian programmers as part of the government policy, lately the Western countries are imposing restrictions on the entry of refugees in their territories.

3.2.2 The Protocol Relating to the Status of Refugees, 1967:

The 1951 Convention could benefit only persons who had become refugees as a result of events occurring prior to 1st January 1951.

Throughout the late 1950 and 1960 new refugee groups emerged and particular in Africa. These refugees in need groups emerged in particular in Africa. These refugees were in need of protection which could not be granted to them under the limited time frame of the 1951 Convention those who drafted the Charter of the United Nations had in mind the painful memories of generalized

violence and mass suffering and called upon its signatories to save a generation from the scourge of war. They asked the United Nations to help for the achievement.

3.2.3 Geneva Convention:

The 1949 fourth Geneva Convention Relative to the Protection of Civilian Persons in time of war. Article 44 of this Convention whose aim is the protection of civilian victim's, deals with refugee and displaced persons. Article 73 of the 1977 additional protocol stipulates that refugees and stateless persons shall be protected persons under parts 1 and 3 of the Fourth Geneva Convention.

3.2.4 International Refugee Organization:

At its second in the latter part of 1946. The General Assembly established the International Refugee Organization (IRO). The Organization took over the tasks of the United Nations Relief and Rehabilitation Agency (UNRRA). It received a temporary mandate to register, protect resettle and repatriate refugees.¹⁷

3.2.5 The Convention relating to the Status of Stateless Persons, 1953:

The 1953 Convention relating to the Status of Stateless Persons defines the term 'stateless person' as a person who is not considered as a national by any State under the operation of its law. It further prescribes the standards of treatment to be accorded to stateless persons.

3.2.6 The 1961 Convention on the Reduction of Statelessness:

A State party to this Convention agrees to grant its nationality to a person born in its territory who would otherwise be stateless. The State also agrees, subject to certain conditions, not to deprive a person of his nationality if such deprivation would render him stateless. The Convention specifies that a person or groups of persons shall not be deprived of their nationality on racial, ethnic, religious or political grounds.

¹⁷ Dhaka Seminar 2004; Rohingyas Minority, Fundamental Rights Denied.

3.2.7 The 1967 United Nations Declaration on Territorial Asylum:

This Declaration of the United Nations General Assembly lays down a series of fundamental principles in regard to territorial asylum. It states that the granting of territorial asylum.

3.2.8 Universal Declaration of Human Rights, 1948:

Universal Declaration of Human Rights, 1948 has twenty Articles. Among them the most important Articles are mentioned below:

****Article 13:***

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

****Article 14:***

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

****Article 15:***

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Chapter 4

BANGLADESH AND REFUGEE ISSUE

4.1 Refugees in Bangladesh

To a Bangladesh national, the refugee's situation is unit familiar. The people of Bangladesh had been subject to genocide and crimes against humanity in 1971 by the Pakistan's military junta. Around 10 million Bangladeshi nationals had leave for India to escape from the murderers of Pakistan army. Many of the Bangladeshi nationals became refugees in India for a nine-month period till Bangladesh emerged as independent country in 16 December 1971. During the war of independence in 1971, an estimated 10 million population of the then East Pakistan sought refuge in India.

That means one out of every seven took refuge. Soon after the independence as a sovereign States, failure to arrive at an acceptable solution to the hill people's demand for a 'special status, for Chittagong Hill Tracts, resulted in military conflict between the government and the hill people. This led to a series of exodus of hills people from Bangladesh to India and other countries. It was only in 1997-98 that after the signing of an agreement between the government and representative of the political wing of the Shanti Bahini that about 60,000 hill refugees returned to their homers from India, some after fifteen years in exile.¹⁸ Again, since the independence, Bangladesh has been hosting about a quarter of a million 'stateless persons', known as Urdu-speaking community or Biharis. Most in this group of people have their origin in the Indian State of Bihar and had opted for Pakistan in 1947 and settled in the region which now comprising Bangladesh.

A section of the community preferred integration into the new State of Bangladesh, other section opted for Pakistan. However, after some initiative undertaken. While the issue remains to be sorted out by the governments of Bangladesh and Pakistan, tens of thousands languish in sixty-six squalid camps around the country in a 'state of statelessness.

¹⁸ Md. Akhtaruzzaman, Legal Protection of Refugee under Bangladesh Laws, pp 156m 157

Though a 2003, High Court judgment mentioned that those who born after 1971 in camps are Bangladeshi citizens, however it is still waiting for a policy decision of the Government of Bangladesh (GOB). Some legal experts recommended for public announcement by the GOB in this regard.

In, addition, Bangladesh had to host about 250,000 Rohingya refugees from the adjoining Rakhine State (formerly Arakan) of Myanmar in 1978 and about a similar number in 1991-92. While the refugees from the first influx were sent back within 16 months, repatriation of the latest caseload have been subjected to much controversy, with about 26,000 refugees currently being waiting for repatriation in two camps in the district of Cox's Bazaar. In addition, Bangladesh has also been hosting a small population of urban refugees from Myanmar, Iran, Somalia and few other countries.

Thus, Bangladesh is a refugee producing and receiving country. However, the Government of Bangladesh (GOBJ is yet to accede to the 195 I Convention and its 1967 Protocol. There is also no national legal regime on this. Bangladesh had accepted the refugees because of humanitarian concern. Bangladeshi is a responsible member of the UN and is conscious of its role in the promotion of and respect for human rights. Bangladesh is committed to undertake humanitarian aid to the refugees when ever is necessary. Many local non-Governmental organizations have been engaged in advancing the cause of human rights including that of the refugees in the country.

Article 25 of the Bangladesh constitution states that “The state shall base its national relations on the principles of respect for.... international law and the principles enunciated in the United Nations charter. Furthermore article 32 of the 1972 Bangladesh constitution states that “No person shall be deprived of life and liberty saves in accordance with law”.

Under article 39 of the constitution freedom of thought, freedom of speech and expression are granted in Bangladesh. Bangladesh's is a democratic country and the people of Bangladesh have a tradition to resist the authoritarian nature of the government. Bangladesh's successive democratic governments are fully committed to respect the provisions of the constitution. The fundamental rights as

enumerated in part III of the constitution are justifiable by the higher judiciary in the country under article 103 of the constitution.

4.1.1 Burma Refugees in Bangladesh:

Since 1991, Bangladesh has been the main country of refugee for members of the Muslim Rohingya minority in Burma's Arakan state, many thousands of whom have fled gross human rights violations prepared by the Burmese government. In 1991-92 alone, discrimination, violence and the imposition of forced labor practices. By Burmese authorities triggered an exodus of some 250,000 Rohingya across the border into Bangladesh. Most of these refugees returned between 1993 and 1997 under a repatriation program arranged through the auspices of the United Nations High Commissioner for Refugees (UNHCR). The future of 22,000 Rohingya who remain in refugee's camps in Bangladesh, however, remains unclear. Donor countries, frustrated by the lack of progress in finally resettling these remaining refugees, have reduced the level of support available to them. Meanwhile, continuing discrimination against, attacks upon, and other widespread violations of the rights of Rohingya in Burma have led to new refugee outflows into Bangladesh. More than 100,000 Rohingya, who have not been formally documented as refugees, now live in Bangladesh outside the refugee camps.

This report describes the key obstacles which have to now prevent the satisfactory resolution of this major refugee problem, with particular attention to emulation of the agreed repatriation program. The primary obstacles are to be found on the Burmese side of the border. Burma's ruling State Peace and Development Council (SPDC), which replaced the State Law and Order Restoration Council (SLORC), persists in its policy of denying Burmese soil. As a direct consequence, Rohingya are treated as aliens in their own country and are being subjected to restrictions on their freedom of movement, arbitrary function and extortion by local officials.¹⁹ Rohingya villagers also continue to be required to undertake forced labor by local Burmese officials, who sometimes threaten to have them killed if they refuse to comply.

¹⁹ HBRS- Page 86-103

4.1.2 Bihari Refugee in Bangladesh:

Refugee's international is concerned about the pricing and persistent humanitarian and protection issues facing the stateless Bihari. The Rahigya refugees population and displaced religious minorities in Bangladesh.

The Biharis (Stand and Pakistanis) of Bangladesh are particular concern to refugee international. The Biharis, an Urdu speaking Muslim minority originally from the Hindu region of Bihar, have been stateless since the day of Bangladesh independence. At the partition of 1947, the Biharis became a part of East Pakistan, but their past support for western Pakistan caused tension between the Bihari and the newly independent nation of Bangladesh. Bangladesh has refused to provide full citizenship to the Bihari due to their previous support of western Pakistan while Pakistan, on the other hand, fears the large influx of Biharis who live in 66 camps in 13 regions across the country. The Bihari face over crowded living quarters, poor drainage and sanitation systems, inadequate education and health care facilities. Most importantly the Bihari continue to remain stateless after more than thirty years of hardship. Little has been done to improve their current conditions and no plausible solution has been reached.

4.2 Refugee Protection in Bangladesh

In this part of the article an attempt will be made to find out existing legal provisions, if *any*, which could be translated for the protection of asylum seekers and or refugees.

Bangladesh is neither a State Party to the 1951 Convention nor its 1967 Protocol. It also does not have any domestic (national) law, which covers the issue of asylum seekers and refugees. In practice, foreigners here, irrespective of asylum seekers or visitors are treated under some aged old laws, which are insufficient to meet the need of the time.²⁰

However, during 1978 and 1991-92, the asylum seekers from Myanmar were provided refugee under executive decisions. They were granted *prima facie* refugee and are also not consistent with each other. This resulted in differences in

²⁰ Convention Relating to the Status of Refugees, 1951

authority's approaches-such varying criteria for solutions and varying standards of treatment to refugees.

Bangladesh is a State Party to major international human rights instruments, among them significant ones are the Universal Declaration of Human Rights.

International Covenant on Civil and Political Rights; International Covenant on the economic, Social and Cultural Rights; Convention on the Rights of the Child²¹ mention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture etc. Several Provisions of all these international instruments oblige a State party to provide protection for asylum seekers and refugees. The country is also committed to the principle of non-refoulement being party to the above-mentioned instruments.²²

The Declaration and Programmed of Action of the World Conference on Human Rights²¹ also reaffirmed the right of every person to seek and enjoy asylum.

Some of the existing constituent provisions could be translated for the protection of refugees. For example Article 27 of the Constitution provides equal protection of law for all. Article 31 provides that not only the citizens are entitled to have the protection of law but the foreigners (non-citizen) who for the time being are staying in country are also entitled to have so.²³ The Constitution also guarantees right to life and personal liberty; safeguards from arbitrary arrest and detention prohibition of forced labor; right of fair than freedom of movement. Assemble association, profession or occupation, religion, right to property etc.

4.3 Law for the protection of refugees exists in Bangladesh

- ***Constitutional Provisions and Practices:***

There is no a single provision in the Constitution of Bangladesh which directly deals with refugee protection. Despite this fact, the following provisions have direct and indirect bearing on refugee protection.

²¹ Salomon, K., The Refugees in the Cold War: Toward a New International Refugee Regime in the Early Post war Era. Lund University Press, Lund, 1990

²² Ruth Marshall, Refugee Magazine, Issue, 99, I-1995

²³ The Convention came into force in 1960

- ***Fundamental Rights:***

The Constitution of Bangladesh has provided for two types of fundamental rights. One group of rights is granted only for citizens of Bangladesh exclusively and other group of rights is applicable for both citizens and non-citizens. Article 31 guarantees the right to protection of law for citizens and non-citizens. It provides that "To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."²⁴

In a number of cases, the Supreme Court of Bangladesh has interpreted the principles laid down in Article 31 of the Constitution. I would like to venture on a few cases in this regard. In Abdul Latif Mirza vs. Bangladesh²⁵ case the Supreme Court of Bangladesh explained the scope of Article 31 in the following way:

"....no person shall be deprived of life or personal liberty saves in accordance with law. The principle of natural justice is inherent in every society aspiring for a civilized living and according to the third paragraph of the Preamble of the Constitution; the fundamental aim of the Slate is to "ensure a society in which the rule of law, the fundamental human rights and freedom, equality and justice, political, economic and social shall be secured." The decision of the apex court clearly indicates that right to enjoy protection of law is a right applicable for both citizens and non-citizens which certainly include refugees. The Court states no person rather than no citizen shall be deprived of protection of law. In a very recent case (ETV Ltd. vs. Dr. Choudhury Mahmood Hasan) Supreme Court explained Article 31 and observed: "..... every person is subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within rule of law."

²⁴ Article 31, The Constitution of the People's Republic of Bangladesh

²⁵ 31 DLR (AD), p.1

In this case, the Supreme Court has declared that yet protection of law is fundamental rights of all persons be they are citizens or non-citizens (refugees). The decision has also reminded the obligations of citizens and refugees alike by subjecting them to ordinary law of the state. The constitution has guaranteed fundamental rights to life and personal liberty

of that person whether she/he is a citizen or a foreigner who happens to be in the territory of Bangladesh the constitution enumerates that “no person shall be deprived of life or personal liberty save in accordance with law”²⁶. By incorporating the provision on protection of life and liberty of every person, the constitution has provided a basis for protection of refugees. It can be easily presumed that the framers of the Constitution never intended to confine "life" within narrow meaning of right not be killed.” In *Peerless General Finance and Investment Company Limited v Reserve Bank of India*²⁷ the Indian Code held that “right to life includes the right to live with basic human dignity with the necessities of life such as nutrition, clothing, food, and shelter over the head, facilities for cultural and socio-economic well being of every individual.”

Therefore by granting the right to life of every person, the constitution not only protects the refugees from arbitrary killing, but it also extends to their dignity and bare necessities of life.

The Constitution clearly indicates in Article 32 that restriction on personal liberty is permissible only on the ground of law. In *Anisual Islam Mahmood v Bangladesh*²⁸

The Supreme Court held "...To curtail fundamental rights of personal liberty enshrined in the constitution, it is essential that the detaining authority must have reports and materials, that is jurisdictional facts for exercising power to detain the detainee under the Special powers Act.”

²⁶ Article 32, The Constitution of the People’s Republic of Bangladesh

²⁷ *Peerless General Finance and Investment Company Limited v Reserve Bank of India*, 1992. P38

²⁸ *Anisual Islam Mahmood v Bangladesh*, 44 DLR, p.1.

The Constitutional scheme has provided for safeguards as to arrest and detention of every person including refugees. Article 33 states that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice".²⁹ The same article further requires the detaining authority to produce the arrestee before the nearest magistrate within twenty four hours of such arrest. Refugees have been protected from exploitation resulting from forced labor. All forms of forced labor are prohibited by the Constitution. Any act in contravention of this provision is punishable offence³⁰.

Article-35 provides for certain rights in respect of trial and punishment of refugees. These rights are protection against ex-post facto laws, double jeopardy, torture or cruel, inhuman or degrading punishment or treatment. The Constitution also guarantees the right to, speedy; and public trial by an independent and impartial court.

Enforcement of fundamental rights enshrined in the Constitution is declared a fundamental right in itself³¹. According to Article 102 of the Constitution any person aggrieved may file application before the High Court Division for enforcement of fundamental rights enunciated in part III of the Constitution. After the decision of *Dr. Mohiuddin Farooque v Bangladesh* case,³² the concept of aggrieved person has widened to such an extent that any person now can file writ petition before the High Court Division in the form of public Interest Litigation (PIL) for the cause of refugees. In this case the Supreme Court held: "..... that the expression 'person aggrieved' means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its

²⁹ Article 33, the Constitution of the Peoples Republic of Bangladesh

³⁰ Ibid, Article 34.

³¹ Ibid, Article 44

³² *Dr. Mohiuddin Farooque v Bangladesh* case, 49 DLR. P.1.

constitutional or statutory obligations. It does not, however, extend to a person who is an interloper and interferes with things which do not concern him.”

Part II of the Constitution of Bangladesh enumerates certain Fundamental Principles of State policy (FPSP). These principles have been declared as guiding star for overall governance of Bangladesh. They shall be guide in law making, in interpretation of the constitution and other laws and other works of the states.

Article 11 has direct bearing on the protection of refugees. it states that "the Republic; shall be democracy in which fundamental human rights and freedoms and. respect for the dignity and worth of the human person shall be guaranteed."

Article 17 provides for: “The state shall adopted effected measures for the purpose of-

“(a) establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law,"

Government of is duly bound to promote international peace, security and solidarity through non-interference in the international affairs, peaceful settlement of international disputes and respect for international law and principles enunciated in the United nations Charter.³³ UNHCR mandated for refugee protection, has been created under the UN charter. International refugee law regime is a distinct branch of international law. By undertaking constitutional obligation to respect international law and principles enunciated in the UN charter, Bangladesh has undertaken the responsibility to protect refugees.

- ***Penal Code:***

According to section 2 of these codes, every person with in the territory of Bangladesh is subject to the jurisdiction of criminal course and tribunals Constituted for administering criminal justice in Bangladesh. Therefore,

³³ Article 25, the Constitution of the People’s Republic of Bangladesh

refugees who are victims of criminal offence are entitled to seek remedy before appropriate criminal codes of tribunal.

- ***The Code of Civil Procedure, 1908:***

Section 83 of the code states that citizen of Bangladesh and alien friends residing in Bangladesh can always file suits in the civil courts for establishing their civil rights. And enemy alien, however, can't file a suit without the permission of the government. Unlike criminal case, a refugee can get remedy from our civil courts for infringement of her/his civil right but a refugee from and enemy state is required to have prior permission for seeking redress

- ***The Bangladesh Citizenship(Temporary Provisions) Rules, 1978:***

These rules deal with granting of permanent residence and citizenship to any person seeking right of permanent residence in Bangladesh or citizenship of Bangladesh. Boat the applicants seeking for citizenship of permanent residence have to fulfill a number of conditions prescribed in sections 3 and 4 (B) of the Rules.

- ***The Foreigners Act, 1946:***

The purpose of this act is to regulate the entry of foreigners into Bangladesh, their presence therein and their departure there from. According to section 3 of this Act, “the Government may by order make provisions, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribe class or description of foreigner, for prohibiting, Regulating or restricting the entry of foreigners into Bangladesh or their departure there from on their presence or continued presence.”³⁴

Although in Bangladesh there are some kinds of legal framework for the protection of refugees, but Bangladesh is not a party in any international instruments especially in 1951 Convention and its protocol for the protection of the rights of refugees. And Bangladesh Government

³⁴ The Foreigners Act, 1946, Act No. XXXI of 1946

attributes many reasons for the non-excision of 1951 convention and 1967 protocol.

4.4 Reasons for which Bangladesh justifies its position for non-signing the Convention

According to an author³⁵, the definition of refugee in the 1951 Convention is regional rather than universal. There is a view that the Convention is a product of the cold war and is Eurocentric. The definition of a refugee is too restrictive in the contemporary context and does not meet the today's needs. The Convention had left out, among others; two important elements. It is silent on voluntary repatriation of refugees and does not dwell on the responsibility of the State that causes the flow of refugees.

The main arguments that the government of Bangladesh have advanced from time to time to justify its position for non-signing the convention or protocol are:

- (a) No country within the Indian sub-continent became a party to the Convention,
- (b) Once Bangladesh is a party to the Convention, it will be legally obliged to accept refugees from other countries and
- (c) Bangladesh is not only an over populated country but also is a poor country and to take such obligations under the Convention could be difficult and onerous.
- (d) The Convention is Euro-Centric in nature. Moreover, it deals with political refugees and do not address many other situation.
- (e) The problems relating to refugees can be better dealt with through bilateral means.
- (f) Accession to Convention and Protocol may invite undue intervention by UN agencies.
- (g) Accession may put strain on limited resources of the country.
- (h) Accession may create an opportunity for economic migrants to abuse the system.

³⁵ Marjoleine Zeick, UNHCR and Voluntary Repatriation, 1997.

- (i) It may encourage evasive tendency of the rich countries of the North as to refugee situation in poor South.
- (j) There is a claim of a hospitable history of refugee Protection.

Although there are several reasons for non-excision of 1951 convention and 1967 protocol there is a need to develop a legal regime for the protection of refugees in Bangladesh.

4.5 Judicial Decision in Bangladesh Having Relevance to Refugees' Rights

Judicial decisions or court cases having hearing on asylum or refugee issues in Bangladesh are significantly few. However, in India judicial activism has put forward the legal regime despite of absence of relevant national laws. The most significant ruling comes out from the Supreme Court of India in the case, National Human Rights Commission vs. State of Arunachal Pradesh and another. It recognized among others the right to life and personal liberty of refugees.

In Bangladesh, among the reported cases, the mentionable one is Saiful Alam Dilder vs. Government of Bangladesh, which has relevance in this context. This was about an attempted extradition of Mr. Anup Chetia and others by the Government of Bangladesh (GOB). Here the petitioner sought issuance of a rule as to why the decision of the Government to extradite Mr. Chetia and others who have been fighting for the 'right to self-determination' should not be stayed.

The High Court Division of the Supreme Court of Bangladesh relying on the Special Powers Act, 1974 and the Extradition Act 1974 rejected the claim of the petitioner. Section 3(1) of the Special Powers Act empowers the government to make an order directing any person to remove himself from Bangladesh in such a manner as it may specify in the order to prevent him from doing any prejudicial act. Section 2 (f) has given meaning of the expression 'prejudicial act'. According to section 2 (f) (ii) 'prejudicial act' among others means "act to prejudice the maintenance of friendly relations of Bangladesh with foreign states".

The Court thus observed:

".....in a case where a citizen of a foreign country intends to stay in Bangladesh and if the Government is satisfied that extradition of such person is called for in order to maintain friendly relations of Bangladesh with foreign states, the

Government can on the strength of section 3 (I) read with section 2 (f) (H) of the Social Powers Act, 1974, extradite such citizen to his own country in absence of any extradition treaty between the Government and such foreign states ".

According to the Court, in a case where a citizen of a foreign country, intends to stay in Bangladesh and if the Government is satisfied Thai extradition of such person is called for in order to maintain 'friendly relations' of Bangladesh with foreign States, the Government could on the strength of section 3 (I) and section 2 (f) (H) of the Social Powers Act,¹ 1974, extradite such citizen to his/her own country in absence of any extradition treaty between the Government of Bangladesh and such foreign States".³⁶

In a writ petition in the High Court Division, the petitioner sought direction upon the respondent not to release the convicts on completion of their sentence till their applications seeking political asylum filed as back as on 3 September 1998 are disposed of by respondent No.1 namely the Government of Bangladesh. The Court issued a rule directing the respondents to allow the convicts to stay inside the prison as a measure of safe custody or protective custody till the applicants for political asylum are disposed of. The matter is still pending before the court and accordingly the convicts are staying in jail. Further, the government has taken no decision yet as to political asylum.

4.6 Limitations in Bangladesh laws case Reference

- Dr Momen of the kutupalang refugee camp said congested living is the reason for quick spread of diseases like malaria, diseases, skin and venereal diseases among refugees. He mentioned that 15 to 20 refugees are treated every month for venereal diseases.
- A KG-1 student of the refuge, Taslima, 10. Who was born in the refugee camp? Told BDNEES in plain Bangles "Sir. When it rains, we experience water inside our rooms.
- The floors get muddy we spend the whole night sleeplessly; putting plastic papers in our heads,"

³⁶ Ibid. 162-163

- Mohammad Saber, 23, of the same refugee camp. Said he clandestinely studied up to class nine outside the camp and now is teaching around 450 refugee students. He commented that there are many meritorious students here who are being deprived of higher education.

4.7 Criticism

We know that there is no law present in Bangladesh relating to the refugees and protect them from violation of rights no conventions are in Bangladesh. Bangladesh government shall not take any steps to protect them from their establishments of rights even they can't handle any matter relating to the refugees for this reason refugees in Bangladesh lead miserable life. It's a blow against the human rights; it is not acceptable for us.

4.8 Recommendation to the Bangladesh Govt.

The framing of law on refugee protection can be done in three ways by according to international refugee instruments, by developing a regional instrument for Bangladesh and other states of South Asia and/or by framing national legislation.

I. Accession to International Instruments:

The basic instruments of international refugee protection are the 1951 Convention Relating to the Status of Refugee and its 1967 Protocol. Accession to the convention can provide civil society institutions with a basis from which to campaign against any violations of the conventions (nationally, regionally and internationally) and provide South Asian states with a legitimate base from which to exert pressure on Western countries to dismantle the non-entrée regime.

II. Framing of a Regional Instrument:

Regional instruments constitute another important structure of refugee protection. The OAU Convention of 1969 reflected the frame of minds of political leadership of a continent engaged in anti-colonial movements. It broadened the scope of the definition of refugees to include those fleeing apartheid, colonial oppression and

generalized violence and emphasized voluntary repatriation as a solution to refugee problems in Africa.

In Europe, the Schengen (1985) and Dublin (1990) agreements were directed to develop a common strategy to deal with asylum seekers within the continent. To address their own regional needs, Latin American states opted for non-binding Cartagena declaration (1984). The Declaration was formalized by the nongovernmental sector only, yet the governments of the region tend to follow it as a matter of policy. The Cartagena Declaration further broadened the scope of the refugee detention to include foreign aggression, internal conflicts and those fleeing massive violation of human rights.

And analyses of various regional approach that the coordination and cooperation of the concerned states are essential for the success of such an initiative, and that the consistent application all standards and indeed promote the prediction of refugees and encourage voluntarily repatriation.

III. Framing of National Legislation:

If we consider the refugee problems I think BANGLADESH should adopt national legislation for the protection of asylum seekers and refugees. Because this will enable to handle the problem in more humane and effective ways and enhance country's image in terms of implementation of obligations promised through signing and ratification of different human rights instruments. Enactment of a law in Jatiya Sangsad regarding the refugee issue is a need of the hour though Bangladesh has not yet signed the International Refugee Convention 1951. The opinion came from a workshop on 'Refugee Rights and Role of the Media' organized on August 18, 2005 at a city hotel by the United Nations High Commissioner for Refugees (UNHCR).

Advocate Naim Ahmed said that the Jatiya Sangsad should pass the law to save the country's interest as, often seen in global examples; the smaller or weaker states have to face enormous pressure from the stronger neighbors in this regard. He said that 'Signing the Convention would help reduce present problems in bilateral dealings in this regard'. Advocate Naim Ahmed of the Supreme Court

said though Bangladesh did not sign the UN Convention on refugees, it could not stop Rohingya migration to it.

He said “unidentified Rohingyas are coming in large number to the country is likely to cause more social or economic problems, by spreading out across the country”. So it may be recommended that if Bangladesh signs the convention, there will be a legal framework to identify if they are ‘economic migrants, criminals or refugees’. And the international community will also come forward to help solve the problems. Naim Ahmed thought that, “Bangladesh might face pressure from stronger neighbors in the absence of any legal framework on refugee issues.”

In the workshop on Refugee Law organized by Bangladesh Bar Council recommend that “it would be better for the Bangladesh Government to accede to the UN Convention on the Status of Refugees and adopt national legislation on asylum and refugee issues. Considering the geopolitical situation of the country the government should initiate this”.

In this workshop program Mr. Christopher Beng Cha Lee, UNHCR Representative in Bangladesh urged that “The Government of Bangladesh to ensure humanitarian treatment to the foreigners, especially to the asylum seekers and refugees in the country. He said that Article 31 of Constitution of Bangladesh ensures basic human rights also for the refugees. Bangladesh is also under obligation to ensure basic human rights for the refugees as party to major human rights instruments. However, unfortunately, the freedoms of movements of the refugees in camps are restricted. They are not even allowed to carry money by the officials. The refugee children are also deprived of proper education in the camps.

The UNHCR Representative observed that good treatment to foreigners here in Bangladesh could facilitate to have good treatment for Bangladeshi citizens who are around 5 million in other countries.

“There are some Bangladeshis abroad who are in this irregular status and refugee like situation. The positive attitude of the Government of Bangladesh in dealing with foreigners here would provide a moral and logical ground to bargain with other governments who host Bangladeshis,” Mr. Lee said. According to him acceding to the Convention could be one of the positive steps.

If we see the definition of refugees, the definition lack refugees national protection, because they are people who have fled their country for fear of their lives and liberty on grounds of race, religion, nationality, political opinion or social group. If Bangladesh exceed international instrument and frame national legislation then it would be helpful for the Bangladesh government to protect the interest of refugees. Because the international community through UNHCR seeks to ensure that they receive international protection until their problem is resolve. The protection of refugees includes not only admission to safety but also covers their treatment and basic human rights. At the legal level, accession to international refugee instruments and the adoption of appropriate national laws on refugees is important for providing a framework for governments within which they can set out their policies for the admission and treatment of refugees. If Bangladesh ratified international instruments then the international community through UNHCR and the NGOs can solve the problem of refugees, because both these bodies are involved in planning, co-ordination and implementation of the refugee programs. Many NGOs have been engaged in resettlement of displaced persons.

Because of their flexibility NGOs are able to intervene quickly to provide essential relief to the refugees. UNHCR depends on them to provide invaluable information about the unfolding crises. NGOs play an indispensable role of the conscience of the world. NGOs raise awareness of sensitive politicians and the public to humanitarian issues. NGOs play a key role in bridging the gap between relief and development helping the refugees to integrate with the local populations. So it maybe recommend that it would be helpful for the Bangladesh Government if they accede the international instruments and framing national legislation regarding the refuge issues, because international community ensure the protection of refugees until their problem is resolved.

Chapter 5

CASES ON REFUGEE LAW

The source of most of the cases described below is drawn from the records of UNHCR and, as such, the name of the refugee or asylum seeker does not appear in many of the cases because of reasons of privacy.

Chan v. The Minister of Immigration: 1989: High Court

Facts of the case:

Chan Yee Kin is a citizen of China and was a member of a faction of Red Guards which lost the struggle for control of that organization in his local area. He was questioned by police and was detained for 2 weeks in 1968. He tried to escape but was caught and received increasing periods of detention. In 1974 he escaped to Macau and stowed away on a ship to Australia which he entered illegally in 1980.

He applied for refugee status on 29 November 1982. He was refused the status of a 'refugee' within the meaning of the 1951 Refugee Convention. He challenged the decision to the single judge of the Federal Court. The Court set aside the decision of the Immigration department and referred to the Minister for reconsideration. The Minister appealed to the Full Federal Court against the decision. The Full Federal Court upheld the appeal. Mr. Chan went to the High Court against the decision of the Full Federal Court.

Decision:

The court held that the definition of a 'refugee' involved a mixed subjective and objective test. The question whether or not a person had the status of a 'refugee' within the meaning of the 1951 Convention was one of determination upon the facts as they existed when the person concerned sought recognition as a 'refugee'. Although Art. 31 and 33 stands strictly life security and freedom of such person's might be threatened. There was a general acceptance that a threat to life or freedom amounted to persecution. Some would confine persecution to a threat to

life or freedom, whereas others would extend it to other measures in disregard of human dignity.

Comment:

This case is important as it dealt with the interpretation of the definition of a 'refugee' as stipulated in the 1951 Convention. The definition, according to the Court, needs both subjective (mental) and objective (facts) test.

Srilankan national's v. Minister of Immigration; 1987 (Federal Court)

Facts of the case:

The applicants were Sri Lankan Tamil nationals and entered Australia via India without entry permit (visa). Because of this reason as a matter of law they were deemed not to have entered Australia. The applicants sought refugee status but it was denied by the delegate of the Immigration Minister. Because of their status they were not entitled to judicial review of the administrative decision.

Even if the Court had jurisdiction, it was not improper for the delegate of the Immigration Minister to consider various factors that led the applicants to leave India for Australia. The Minister considered the definition of a 'refugee' under 1951 Refugee Convention and refused the status.

The applicants challenged the decision of the Minister in the Federal Court. It was argued on behalf of Australian government that the applicants had no *locus standi* before the Court because they were deemed not. To have entered into Australia.

Decision:

The Court rejected the challenge by the applicants and upheld the denial of refugee status of the applicants on the following grounds:³⁷

The Court held that since they lacked entry permits they were deemed not to have entered Australia and, as such, the decision of the delegate of the Minister was not taken under the Migration Act 1958. As such, the decision did not fall under judicial review.

³⁷ Dhaka Seminar 2006 (Rohingyas hr standard for law Enforcement officials.)

The Court further rejected the contention that the Minister's delegate considered information irrelevant for the purposes of making refugee determination. The applicants argued that the following inquiries were irrelevant such as, information when they were in India, why they had left, that they did not have political profiles of interest to Sri Lankan authorities, that their harassment by the Sri Lankan Army had not been specifically directed at them, that they held only generalized fear of returning to Sri Lanka, that they were able to leave the country by ordinary means, that they had not applied anywhere for refugee status and that they could return to India.

The Court concluded that it was not impermissible for the Minister's delegate to have regard to all the matters which he took into account, since it was relevant to consider whether the real reason for the applicants wishing to enter Australia was to improve their economic position. Thus even if the Court had jurisdiction to consider the denial of refugee status it would not find that the Minister's delegate improperly exercised his power.

The Court in rejecting the applicants' challenge found that the delegate relied on a correct reading of the Convention definition of a 'refugee'. Furthermore, the decision to refuse the refugee status did not violate the principles of natural justice because the applicants were accorded the opportunity to include support material with their applications.

Comment:

It appears that the arrival in the first country of refuge (India) by the Sri Lankan refugees had diminished their claims as refugees in Australia. The refugees cannot be choosers of a country of refuge.

Sri Lankan national v. Minister of Immigration: 1986: Federal Court

Facts of the case:

The female applicant is a Sri Lankan Tamil national. She was on her way to Fiji and stopped in Australia in October 1985. She was provided a temporary permit but she overstayed making her a prohibited non-citizen. She unsuccessfully applied for refugee status and was ordered to be deported. She preferred an appeal

against the Deportation order to a single Judge of the Federal Court which upheld the deportation order. The applicant lodged an appeal against the decision to the Full Court of the Federal Court (3 judges). It was argued that she was not informed on what information the refugee status was denied and such denial was against the principles of natural justice. It was also argued that deportation order failed to consider the consequences of the deportation to the applicant or that the decision was made without regards to the merit of the case.

Decision:

The Full Court noted that although the Department of Immigration was required to accord fairness and natural justice to the applicant, there was no blanket requirement that the applicant be informed of all information received by the Department. Here the information found prejudicial to the applicant i.e. that she entered Australia by subterfuge. Additionally the Full Court found that handwritten minutes had been submitted to the Minister's delegate discussing her fear of persecution and outlining difficulties the applicant would face if deported. Thus both the effects of deportation and the applicant's individual status had been considered by the trial judge. The Full Court dismissed the applicant's appeal.

Comment:

A genuine refugee cannot claim the status if that person's conduct does not measure up to honesty. This case points to the fact any duplicity or dishonesty will destroy the credibility of a person who wishes to claim the status of a refugee.

Elizabeth's Case³⁸

The case at issue involves Elizabeth Kuma, a national of Ghana and member of the Ewe tribe, who along with her son and³⁹ daughter, arrived in Hong Kong in 1996 and sought temporary asylum there. The basis for her claim was that

³⁸ Source: internet www.law.gonzaga.edu/academic-program/Files/GJIL/Vol.4-ASuccessfulcase

³⁹ C R Abrar. "The Need for Regional Cooperation and National Laws for Refugees in Asia.

Elizabeth had a real fear that her daughter (age 3) would be subjected to female genital mutilation in her own country at the insistence of her husband's family.

Elizabeth's husband, Stephen Boateng, was an Ashanti Muslim, of the Wala tribe who had come from the State of Wan, in northern Ghana. In February 1996 when Stephen's mother who had a great deal of influence in the family, told her son that his daughter would be "circumcised".

Elizabeth had heard from other women in her community about the harmful effects that FGM could have, and had known another mother whose child had died during the procedure. She told her husband that she was opposed to it, her husband beat her. Because of a deep reluctance by the authorities in Ghana to intervene in family matters, Elizabeth never considered going to the police for protection.

Elizabeth, fearing for the safety of her daughter, went to Cairo along with her daughter and her son (age 5). Her husband followed her to Cairo and ordered Elizabeth to return to Ghana. When she objected, he again beat her and threatened to kill her if she did not return to Ghana or hand the children over to him. Then Elizabeth went to Canada via Hong Kong, She arrived at Kai Tak Airport in Hong Kong on 25 May 1996 and was allowed to enter the territory. Four days later when at the airport on their way to Canada, she and the children were challenged over the passports. Elizabeth and the children were arrested, detained in Hong Kong. Fortunately for Elizabeth and her two children, she wasn't detained pending her removal from Hong Kong. She was given conditional release and allowed into the community. Then the Director of Immigration issued a removal order.

She made a submission to the United Nations High Commission for Refugees. In her submission, Elizabeth cited the case of Khadra Hassan Farah. Elizabeth argued that FGM has been accepted in the decided cases cited above as persecution.

The UNHCR concludes that, "a woman can be considered to be a refugee if she or her daughters/dependants fear being compelled to undergo FGM against their will; or if she fears persecution for refusing to undergo or allow her daughters to undergo the practice". Following the decision, the UNHCR made a request to the

Hong Kong Immigration Department that she and her two children should be granted temporary asylum in the territory.

Palestinian-Lebanese v. the Minister of Interior: Administrative Court: 1986

Facts of the case:

A Palestinian who had been living in Lebanon travelled to Austria with a Lebanese passport in December 1982 and applied for refugee status. The application was refused on the ground that the applicant had not made credible that he had been persecuted or had to fear persecution in Lebanon as one of the grounds of the 1951 Refugee Convention.

On appeal the applicant argued that when the Palestine forces had to leave Lebanon in 1982 Palestine civilians remained unprotected and exposed to the executions of the various militias in Lebanon. Furthermore the Lebanese government had expressed that all Palestinians would have to leave Lebanon. The applicant had only been able to escape persecution in Lebanon by remaining in hiding. The appeal was unsuccessful because all Lebanese were equally at risk by the activities of militias and their activities did not constitute 'persecution'.

The applicant then went to the Administrative Appeals Court.

Decision:

The Court held that the decision of the Interior Ministry could not be upheld. The Court found that the Ministry had not taken sufficiently into account the situation in Lebanon. The Court reasoned that in the light of events in Palestinian camps in Lebanon, the applicant could be at a risk and this aspect was not examined by the Ministry. The Court allowed the appeal finding that the Ministry had not properly evaluated the facts of the case and annulled the decisions denying the applicant the status of a refugee.⁴⁰

Comment:

It appears that the higher Court assessed the facts of the case more favorably than the Ministry did. The issue was related to the facts of the case and its evaluation. The higher Court found that some aspect of the applicant's risk had not been sufficiently taken into account by the Ministry.

⁴⁰ As one observer notes: The partition, related massacres and migrations

Sri Lankan national v. Immigration Appeal Board: 1984: Federal Court of Appeal

Facts of the case:

A Sri-Lanka Muslim Tamil alleged persecution at the hands of Sinhalese Buddhist 'thugs' who were members of the ethnic and religious majority in the area. During the period at issue, there were numerous ethnic clashes such as the riots in August in 1977 when the Tamils of the area had to seek refuge in a mosque while their homes were looted and burned. The police allowed the rampage only becoming involved after the riot ran its course. The applicant believed that the police, of Sinhalese origin, aggravated the situation by being indifferent.

Thereafter, the applicant was threatened on numerous occasions by a group of Sinhalese. He became a merchant seaman and spent two years at sea. Upon return the same group told him that they would kill him because he was indoctrinating the Tamils. He bribed his way to join another ship in Japan and he arrived in Vancouver (Canada) aboard a Greek ship destined for Russia, after which the crew would be returned to their countries of origin. He left the ship and applied for refugee status.

The Immigration Appeal Board rejected his claim on the basis that civil war did not constitute 'persecution' within the scope of the 1951 Convention. The applicant appealed to the Federal Court of Appeal in Vancouver:

Decision:

The Court found that the applicant was able to establish his well-founded fear of persecution within the meaning of the definition of the Convention. The police did not offer any protection for his safety. While the police did not prosecute him their tacit approval of the violence against him supported his unwillingness to avail himself of police's protection. The court held that the applicant had met both objective and subjective test.

The Court allowed the application, set aside the decision of the Immigration Board and referred the matter back to the Board to be dealt with in a manner not inconsistent with these reasons.

Comment:

The case is related to the evaluation of facts leading to persecution. The higher Court found that the circumstances of the case were sufficient to bring the applicant within the definition of a refugee under the Convention. Persecution or fear of persecution on the basis of one ground either race or religion is adequate to claim the status of a refugee. The applicant was not only persecuted because of his race but also because of his religion.

Abdur Rasul Deghani v. Minister of Employment and Immigration: 1993:
Federal Court of Appeal

Facts of the case:

The applicant is a citizen of Iran and arrived in Canada in 1989 without valid travel documents. He claimed refugee status. At the airport he entered a primary examination line and was subsequently referred to a secondary examination before an immigration officer. The applicant was questioned as to his claim for refugee status under the 1951 Convention. In answering the questions the applicant omitted important factual details such as persecution to claim his status. In addition, in response to a question about the basis of his refugee claim the applicant said that he wanted to work for himself and the future of his children who want to study.

The immigration officer concluded that the applicant could not establish his claim and refused refugee status. The case went to a Tribunal which dismissed his case and ordered him to leave Canada. The applicant lodged for a judicial review to the Federal Court of Appeal of the order of expulsion.

Decision:

The Federal Court considered whether the applicant was detained within the meaning of section 10(b) of the Canadian Charter of Rights during his secondary examination at the airport where he waited for four hours. The Court did not go into merits of the case because it was a judicial review. (Judicial review could only examine whether the procedure of arriving at a decision was unreasonable or lawful).

The Court dismissed the appeal on the ground that the actions taken by the immigration officer was related to his duties in examining persons seeking to enter the country.

Comment:

The immigration officer considered the applicant as an 'economic' refugee and not a refugee under the 1951 Convention as he failed to mention his fear of persecution in his country.

Burmese nationals v. the State Government of Manipur:

1990: The Gauhati High Court, Imphal Branch.

Facts of case:

Eight B. mese (Myanmar) nationals, aged from 12 to 58 entered the state of Manipur in eastern India and they were detained for their illegal entry in Manipur jail. They petitioned to the High Court for their release to enable them to seek the assistance of UNHCR office in New Delhi for the status of refugees.

Decision:

The High Court held that the refugees had a right to be protected against deportation under international law. The Burmese has fundamental rights guaranteed under the Constitution of India (Articles 10, 21 and 22). The Court rejected the argument of the Manipur state government that they were not in a position to take the Burmese persons to UNHCR New Delhi office for the purpose of obtaining refugee status. To enjoy the rights by the petitioners, arrangements should be made for them to go to New Delhi and a person should accompany them.

The Court ordered the release of all the Burmese nationals to enable them to go to New Delhi for status determination. The Court further ordered that they should report to a named police station upon arrival in New Delhi.

Comment:

Refugee seekers who enter Indian illegally should be permitted to approach the office of UNHCR in New Delhi for status determination. They could not be sent back (principle of non refoulement incorporated in the 1951 Refugee Convention) Although India was not a party to the Refugee Convention, the High Court held that deportation could not be done under international law. It appears that the Court regarded the principle of non-refoulement as part of the customary rule of international law and, as such, it was binding on India. This precedent is important as Bangladesh High Court Division of the Supreme Court may be guided by the decision in a refugee case.

Pakistani nationals v. Minister of Immigration: 1991: Court of Appeal***Facts of the case:***

Pakistani citizens arrived in New Zealand on 15 January 1991 without passports and were deemed to have entered the country unlawfully. They were detained under Immigration Act 1987. The Pakistani nationals sought refugee status. Police interviewed them and found that they fitted the general profile of terrorists. Accordingly, they were being expelled from the country. The applicants requested for a review which was unsuccessful and then appealed to the Court of Appeal.

Decision:

The Court found that the police did not provide security clearance and the Minister was entitled to rely on that advice on such a matter. The Court reasoned that a substantial doubt as to a security risk could well justify for a refusal of refugee status. The Court dismissed the appeal finding that the applicants had not been treated unfairly or unreasonably and the Minister had not misused his discretion under law.

Comment:

All refugees have to go through security clearance from the police and if security clearance is not provided, the applicants do not have remedy under the 1951 Refugee Convention (Article 32).

.David Hellman v. Immigration Review Tribunal: 2000 Federal Court

Facts of the case:

David Hellman is a 17-year-old American citizen. His parents were divorced and his father migrated to Australia and became an Australian citizen while his mother remained in the US. David came to Australia because he wanted to escape from his mother who was described as an enthusiastic follower of orthodox Jewish sect. He sought refugee status on the basis that he feared assaults and abuse, being forced to become a priest, and being taken to a foster home. He also alleged that he might be harmed because of his knowledge of criminal conduct by members of his mother's religious community.

His application for refugee status was rejected by the Immigration Department. He filed an appeal to the Immigration Review Tribunal. The Tribunal found that David Hellman had a well-founded fear of persecution but not that was because of his membership of a particular social group. Persecution on account of his particular social group would have satisfied one of the criteria of the 1951 Refugee Convention.

The Tribunal further held that being a member of the Hellman family and having beliefs different from those of his mother did not amount to membership of a social group. Nor did the Tribunal accept that US authorities had failed to protect him. The Tribunal confirmed the decision of the Immigration Department. He there-after lodged an appeal to the Federal Court.

Decision:

The Court could not find any error in the Tribunal's reasoning and conclusions and rejected the appeal of David Hellman.

Comment:

This case rested on the proof that David Hellman was a member of a particular social group and on account of that he had a well-founded fear of persecution. He could not prove that he belonged to a particular social group. Further, he was a US

citizen and the US authorities would be able to protect him from his mother. He had no case to stand on in the facts presented to the Court.

Iranian national v. Secretary of State: 1994: Immigration Appeal Tribunal

Facts of the case:

The applicant was a female 15 years old Iranian when she arrived in the United Kingdom and sought refugee status. The basis of her refuge was the physical abuse by her father. Having initially been refused refugee status, the Adjudicator granted her status. The Secretary of State appealed the decision to the Immigration Review Tribunal.

Decision:

It was argued on behalf of the Secretary of State that the applicant could have availed herself of the protection of Iranian authorities. The Tribunal found that women could not per se constitute a social group and she was not persecuted as a member of a social group within the definition of a refugee under the 1951 Convention.

The appeal was allowed and the applicant was disqualified from refugee status.

Comment:

The applicant was refused refugee status because the Iranian authorities could have given protection against violence from her father as it was found that her father was an alcoholic and the violence was alcohol-related.

Chapter 6

CONCLUDING REMARKS

6.1 Recommendation

I want to recommend to the government for some protection of the refugee and to establish their rights to take some steps as under:⁴¹

1. Full nationality and citizenship rights of rohingyas.
2. Myanmar against there and until causes of insecurity exists in the country.
3. Pressure on Myanmar government to return to the rohingyas there homesteads land and properties unfairly confiscated by the Myanmar authorities.
4. Specified health and education programs are implemented for the rohingyas family staying in Bangladesh as refugee.
5. That the law enforcing agencies and there officials are not above law and not beyond the jurisdictions of legal actions.
6. To impart appropriate training to the officials of law enforcing agencies.
7. Notes with concern that through the Arakani rohingyas are Muslims yet that are treated as minority community and deprived of all civil and Human Rights in a predominantly Muslim country like Bangladesh.
8. Advises the rohingyas and rakhain communities of Arakan to forge a strong and solid unity so as to be able to collectively realize that civil liberties and Human Rights and attain freedom from the unlawful action and rightness atrocities of despotic rules.
9. Supports to the fundamental freedom and universal human rights of the entire mankind irrespective of nationality, region and color. Especially pleads for ensuring comprehensive human rights and security of minority communities throughout the word.
10. To collect funds committed by European Union of Rohingya and Rakhain refugees and immediately undeniably undertake necessary interventions to alleviate disgraceful miseries of the Refugees.

⁴¹ <http://en.wikipedia.org/wiki/Refugee>(last visited 4th April. 2021)

6.2 Conclusion

Like other South Asian countries, Bangladesh has a tradition of hosting a large number of refugees for a long period. Here, refugees are subjected to same laws as for foreigners. These hardly consider protection need of an individual, especially in case of women and children. Again, due to lack of any explicit legal regime, asylum seekers and refugees are dealt under *ad hoc* administrative arrangements, which by their very nature could be arbitrary and discriminatory, and do not accord any right to the refugees.

On the other hand, in the absence of a legal framework and access to asylum procedure in Bangladesh, newly arrived Rohingyas are forced to stay illegally here and be prone to various vulnerabilities including engagement in illegal activities and even in terrorism.

Over the time, the Rohingya refugees have a significant impacts on the economic, social, cultural, environmental, and law and order situations in Bangladesh. At the latest, it has added to the security concern. It is reported that a section of the Rohingyas have link with domestic terrorist groups like JMB and guerilla group operative in Myanmar-India- Bangladesh borders who receive funds from abroad.

Therefore, the Government should be serious on the matter. It is a high time that Government of Bangladesh adopts a comprehensive policy on Rohingya refugee issues with a view to resolve the problem through bilateral and multi-lateral means. For this, pro-active diplomacy is required.

The law should have provisions, among others, on the definition of refugees, asylum procedure, rights and obligation, status of mixed-mirages, cancellation and cessation processor of refugee status etc. The 'Model Refugee Law' drafted by the Eminent Persons' Group (EPG) in 1997 could be a benchmark for further movement in this regard.

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