



Who is a refugee under international law?

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THE Second World War not only killed millions people but also made homeless millions people. At that time basic human rights (e.g., right to live, enjoyment of property, right to seek asylum) were recognised by the United Nation Charter (1945) and the United Nations Declaration on Human Rights (1948) but, nevertheless, the world community realised that these international instruments were not enough for the protection of the refugees. As a result in the 1951 Refugee Convention was adopted.

Convention refugee definition

Today, the international law on refugees consists of the Statute of the office of the United Nations High Commissioner for Refugees (UNHCR). The Convention relating to the Status of Refugees (Convention), and the Protocol Relating to the Status of Refugees (Protocol).

The Refugee Convention defines 'refugee' as a person with well-founded fear of persecution due to his or her race, religion, nationality, political opinion or membership of a particular social group (Article 1A(2)). At the time these treaties were ratified, international concern was on educated Europeans left homeless after the Second World War as well as those fleeing communism, but the 1967 Protocol made the Convention applicable regardless of place and time.

Hathaway, a well known refugee law scholar, identified six essential elements of the refugee convention definition: 1) alienage; 2) genuine risk; 3) serious harm; 4) failure of States protection; 5) ground for the persecution; 6) needs and deserves protection. However, the core obligation of the convention is 'non-refoulement', i.e. not sending someone in to a situation of persecution (Article 33(1) of the 1951 Refugee Convention).

More than two-thirds of the world's states are parties to this treaty, and it is to be said that the remaining states are also legally bound to respect the refugee definition as constituting customary international law. However, it says nothing about the procedures for determining refugee status, and leaves to the states the choice of means as to implementation at the national level. Later, in 1979, a Handbook was issued by UNHCR, which mentions the procedure and criteria for determining refugee status.

Five convention grounds of refugee status

Protection is at the heart of responsibility that the international community bears towards refugees. 'Protection' here implies both 'internal protection',



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in the sense of effective guarantees in matters such as life, liberty, and security of the person; and 'external protection', in the sense of diplomatic protection, including documentation of nationals aboard and recognition of the right of nationals to return. The 'right to return', in particular, is accepted as a normal incident of nationality. In order to grant protection individuals have to show that they have a 'well founded of persecution' under one of the five convention grounds, all of which have been correspondingly developed in the field of non-discrimination. The five convention grounds are - race, religion, nationality, political opinion and member of a particular social group.

1. Race

UNHCR Handbook provides, "race ...has to be understood its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority with a larger population. Discrimination for reasons of race has found worldwide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution" (paragraph 68).

2. Religion

UNHCR Handbook provides "Persecution for 'reason of religion' may assume various forms, e.g. prohibition of membership of a religious

community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community" (paragraph 72).

Moreover, Article 18 of the 1966 Covenant on Civil and Political Rights, elaborating upon Article 18 of the Universal Declaration of Human Rights (1948), prescribes that every one shall have the right to freedom of thought, conscience and religion, which shall include the freedom to have or to adopt a religion or belief of choice and the freedom to manifest such religion or belief.

3. Nationality

Nationality in Article 1A(2) of the 1951 Convention, usually interpreted broadly, to include origins and the membership of particular ethnic, religious, cultural, and linguistic communities. The UNHCR Handbook notes, the term 'nationality' is not to be understood only as 'citizenship'. It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to a well founded fear of persecution (paragraph 74).

4. Political Opinion

The 1951 Refugee Convention also adduces fear of persecution for reasons of 'political opinion'.

'Political opinion' actual or imputed is probably the least disputed of all the grounds included the convention definition, not list because it implies some direct relationship to the state.

The UNHCR Handbook outlines what constitutes 'political opinion' as a ground for persecution: Holding political opinions different from those of the Government is not in itself a ground for claiming for refugee status, and an applicant must show he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant (paragraph 80). Persecution for reasons of political opinion implies, therefore, that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities.

5. Membership of a particular social group

Under the refugee definition 'membership of a particular social group' is the fifth ground of refugee status. The UNHCR Handbook includes a definition of 'social group' which is notable for its breadth and simplicity: "a particular social group normally comprises person of similar background, habit or social status." (paragraph 77). Whilst noting that mere 'membership of a particular social group' will not normally be enough to substantiate a claim of refugee status, the UNHCR Handbook thus accepts that "there may, however, be special circumstances where mere membership can be sufficient ground to fear persecution." (paragraph 79). Recently, in a landmark decision in Shah and Islam the UK court gave more specific definition of 'membership of a particular social group.' The UK court held that Pakistani women, against whom false adultery allegation was given, are member of a particular social group as they were unprotected and discriminated by the State.

Persecution

The Refugee claimant must apprehend a form of harm which can be characterised as 'persecution'. As it is noted in the UNHCR Handbook, the phrase a 'well founded fear of persecution is central to the definition of a refugee and is said to exist if the applicant can establish, to a reasonable degree that his continued stay in his country of origin has become intolerable. This fear may be based on personal experience, or on the experience of persons similarly situated (paragraph 42 & 43).

Surprisingly, persecution is not defined in the 1951 Convention or any other international instrument. The UNHCR recognised that there is no universally accepted definition of persecution,

but from Article 33 of the Convention it may be inferred that 'a threat to life or freedom' or one of the five enumerated grounds is always persecution. The Handbook further acknowledges: "Other serious violations of human rights for the same reason would also constitute persecution." (paragraph 51).

Is the 1951 refugee definition deficient?

The 1951 Convention relating to the Status of Refugees has already celebrated its fiftieth anniversary. With just one 'amending' and updating Protocol adopted in 1967 it continues as the central feature in today's international regime of refugee protection. However, the 1951 Convention is often said to be a relic of a bygone era. Signs of decrepitude are identified in its failing focus it's inability to accommodate the 'new' refugees from ethnic violence and gender based persecution; in its deafness to national, regional and international security concerns; in its inflexibility when faced with the changing nature of flight and movement.

Hathaway identified various well known problems of interpretation from the refugee definition; e.g. the question of whether the 'well foundedness' of an individual's fear of persecution is to be determined on the basis of subjective and /or objective criteria; to what extent persecution is directed against some members of a group justifies other members fears of being persecuted themselves; and how these grounds for persecution are to be interpreted.

Moreover, the feminists view was critical; they pointed out that the Refugee Convention does not cover gender persecution. Women are neglected by the Convention, and their experiences are not reflected in the Convention as it was written by the male's point of view. The feminist argued that women's persecution is different from man and it is not reflected in the refugee definition because a woman may be persecuted as a woman (e.g. rape, female genital mutilation) for the reasons of gender. As a result the question begged is whether the Convention responsive to the gender persecution, or whether a specific definition is needed for the women refugees. Furthermore, the refugee definition does not include 'economic migrant' or 'natural disaster'.

Later, in 1991, The United Nations High Commissioner for Refugee issued Guidelines for women asylum claimants rather than changing the existing refugee Convention. This proves that the refugee Convention is a 'living instrument' which also covers the women refugee claimant under the category of 'membership of social particular group.' Other countries (e.g. Canada, Australia, US, UK) also issued their own Guidelines. These Guidelines provide a framework for analysing and interpreting the claims of women asylum seekers as well as guidance for interviewing women applicants and assessing the evidence they present. Two broad categories of gender-related claims are identified: those where the persecution constitutes a type of harm that is particular to applicant's gender, such as, rape or female genital mutilation, and those where the persecution may be imposed because of the women's violation of societal norms. Moreover, in practice, jurisprudence of different countries has been developed, which ensures that gender-persecution is a ground for refugee status.

Finally, after the Second World War world community established the UN, declared the Universal Declaration of Human Rights; later adopted the 1951 Refugee Convention, the 1967 Protocol, the 1979 Refugee Handbook, and the 1991 UNHCR Gender Guidelines. Moreover, some countries already adopted own national Guidelines for women refugees. All these have been done for better protection of life, to ensure human rights. However, under the 1951 Refugee Convention, still natural disaster and economic migrants are not subject of refugee status. Moreover, at present, many countries, e.g. UK, US, are imposing lots of restriction on refugee status by the name of state security and terrorism. Therefore, we are waiting for the future when all 'genuine' refugee claims will get justice.

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Sexual abuse and our Children: Time to speak out

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HOME, which we believe to be the safest place for our children, is also the most convenient place for the perpetrators of child sexual abuse. Child sexual abuse includes a wide range of sexual behaviours that take place between a child and an older person. It is not well defined in our legal system. There are many forms of sexual abuse not synonymous with rape. It has different forms and names.

From the experience of some case studies of Breaking the Silence-- a non governmental organisation, which has been working in this issue for the last 11 years, has identified many forms of sexual abuse that people in general are not familiar with. Any discussion on this subject is usually considered as a taboo.

Who are the perpetrators of child sexual abuse?

The term, 'child sexual abuse' is not defined in our domestic laws. According to Julia Whealin, from the National Center for Post Traumatic Stress Disorder, legal definitions of what constitutes child sexual abuse usually require that the perpetrator be older than the victim. For example, in some states perpetrators must be at least five years older than their victims for the behaviour to be considered child sexual abuse.

From a survey conducted by NCPST, about 60% of perpetrators are non relative acquaintances, such as a friend of the family, babysitter, or neighbour. About 30% of those who sexually abuse children are relatives of the child, such as fathers, uncles, or cousins. Strangers are perpetrators in about 10% of child sexual abuse cases. However, women are found to be perpetrators in about 14% of cases reported against boys and about 6% of cases reported against girls.

Children: most vulnerable victims

A victim is someone who suffers directly or threatened physically and emotionally as a result of the commission of a crime. A person can also be a victim though s/he has not suffered directly.

In *Sakshi vs. Union of India and Ors., Writ Petition (Crl.) No. 33 of 1997* case the Supreme Court observed that the laws relating to rape are not adequate to cover various sexual atrocities against women or children.



Normal children, who are abused do not have enough strength to protect themselves and most of the time they remain silent about the incidents of sexual abuse. That only encourages such crimes.

Laws regarding sexual abuse

According to article 34 of the Convention on the rights of the Child, "States Parties undertake to protect the child

in any unlawful sexual activity:

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials."

Section 10 of Repression against Women and Children Act 2000 states that, if a man in order to satisfy

although "improper attitude" has not been defined.

In some extent, physical abuse is defined but there is nothing about psychological abuse. This act provides rigorous imprisonment of not more than ten years and not less than three years with fine for sexual harassment. It also state that, if anyone outrage the modesty of women or make obscene gestures, will be sentenced to rigorous imprisonment for not more than seven years and not less than two years with fine.

Some myths about child sexual abuse

There are some myths regarding child sexual abuse, like:

= Child sexual abuse only occurs in poor families. From a data of Breaking the Silence, out of 26 cases, there was one victim from a rich family, 13 abused children were from middle class families, three from lower middle class and nine from poor economic background.

= Child sexual abuse produces physical injury; Many forms of child sexual abuse do not involve force. Such as, fondling which child recognises as being of a different type from usual. But its effect is long lasting. Sometimes traumatised children lose their interest in life and may even try to commit suicide.

= Perpetrators of child sexual abuse are either mentally ill or subnormal; It is very difficult to recognise such perpetrators. Most of the time they are looking for opportunities.

= Children appearing bright and attractive are subject to sexual abuse; even babies in arms and toddlers are also suffering from abuse.

Counselling a way out

For the abused children, support from their own family is a must. In our country, a few non-governmental organisations and some psychologists provide expert counselling for the victims and their parents.

We should remember that the abused children are our children and we must take action against child sexual abuse immediately and punish the perpetrators. Enforcement of our current laws are required and sexual abuse should properly be defined at first.

From Law Desk.

from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage

his unlawful sexual desire touch a sexual organ or any other part of the body of a woman /child with his organ or by any other object, it will be considered as sexual harassment. This section indicates two things, namely, "touching of a female organ" and "improper attitude".

BRAC's Human Rights and Legal Education: A boon to the rural poor

KAVITA CHARANJI

UNGING flip charts, cassettes and guidelines, 7, 000 volunteers working on BRAC's Human Rights and Legal Education (HRLE) programme, bring legal education to the rural poor. The aim of HRLE, which comes under the Human Rights and Legal Service (HRLS) of BRAC, is to keep women Village Organisation (VO) members abreast of their basic rights and laws in a formal manner. The reasoning is that vulnerable community members could use legal awareness to protect themselves from illegal, unfair or discriminatory practices.

As Elina Zubaidy, Senior Sector Specialist (Human Rights and Legal Services) of BRAC Development Programme, puts it: "Legal awareness is a basic and fundamental pre-requisite to live a life of dignity. People, particularly in the villages, are unaware of how to take legal action and are being exploited everyday--in the family, society, state and every sphere. If the rural poor are made aware of their rights they can understand when they are being exploited. With legal education, they can stand up for their legal rights and thus gain empowerment."

In its HRLE programme, BRAC covers 25 lakh people in 61 districts and 1.40 lakh village organisations (VOs). In contrast with other NGOs which focus on one or two laws, HRLE runs a training course on seven basic laws: the Muslim Family Law, Muslim Law of Inheritance, Hindu Family Law, Hindu Law of Inheritance, Land Law of Bangladesh, Constitutional Law of Bangladesh and the UN Declaration of Human Rights.

There is, on the whole, a low level of knowledge about laws in the villages. However, some districts have a higher degree of legal awareness. Among them are Manikganj, Jessor, Bogra, Rangpur, Mymensingh and Gazipur.

At the grassroots level, BRAC also has a one-day Local Community Leaders' Workshop where people at the grassroots level discuss issues such as an overview of the laws covered through HRLE classes and the means of ensuring the implementation of these laws within the local community. As of December 2004, 8,504 such workshops were held.

There are a number of case studies which throw light on the impact of HRLE. Take the example of 14-year-old Shirina Khatun from the Moleshpur upazila of Jhenaidah district. Desperate to get his young daughter married, her father finalised her wedding with Abdul Kuddus from Chuadanga. When the Law Implementation Committee (LIC) members heard the news, they decided to firmly oppose this move. They approached the father and told him about an HRLE class in which they had learnt about penalties resulting from an early marriage-one-month imprisonment with Taka 1, 000 fine. Eventually the members were able to convince him not to get his daughter married.

These instances may be a drop in the ocean. But then every tiny step which can help the poor and dispossessed learn and stand up for their legal rights is a stride in the proper direction.

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