

determination in one part and individual determination in another. Once the mass admission of refugee is allowed it will not be difficult for individual persons seeking independent refugee status to do so. The Model legislation will be much more meaningful if it is incorporated into national laws. International Law principles lack enforcement procedures, as was typically seen in Bosnian case. It is hoped that refugee law principles will be incorporated as part of the constitution or immigration laws already in existence. The national legislation would therefore guarantee better chances of implementation.

### **The necessity for the ratification of the Convention relating to the Status of Refugees.**

The UN Convention relating to the Status of Refugees (1951) and its 1967 protocol represented the first attempt by the world community to establish a definition which was not limited to a specific group. New legal instruments, rules and regulations have since evolved at regional level, including the OAU Convention of 1969 dealing with the problems of Africa, the 1984 Cartagena Declaration catering to Latin American problems, the 1966 Bangkok principles propounded by the AALCC and the 1970 addendum thereto. In a pragmatic way, adjustments have been made in the law and practice governing the work of the UNHCR. But, there remain serious gaps in the overall framework. The 1951 Convention nevertheless remains a vitally important international instrument "providing the foundation" for refugee protection around the world.

As a first step, it is necessary to bring the states in Asian region to the Convention relating to the Status of Refugee, 1951 and its Protocol of 1967. For this purpose, public awareness towards refugee problem is necessary especially in the Asian region, as public opinion will prove a useful mechanism in the acceptance of international standards in the national legislation. The utilization of the mass media like satellite television will be effective for increasing public awareness of the Convention. Also to hold a regional seminar on the Convention and on the international protection of refugees would be useful. In this sense, the Conference to be held in Doha in March 1994 will provide a good forum to highlight the importance of ratifying the Convention.

### **The proposed draft structure of the AALCC Model Legislation on Refugees.**

There is an imminent need for enactment of Domestic legislation on Refugees. This is so because the refuge population has grown to an alarming

figure of 19 million, out of which the majority is unfortunately found in the Asian-African region. Since the adoption of the 1951 Convention the international attitude has radically changed. Therefore the existing refugee law is unable to cater successfully to all the new situations and changes. There is an urgent need for international legal instruments such as the 1951 Convention to be implemented at national level and further be supplemented and enforced through national legislation.

The following principles are the proposed main headings of the draft model legislation. This is in fact the initial framework, which if approved by the Committee will be further elaborated, after a study of all existing international, regional and national legislation on "refugees" and present a comprehensive piece of legislation which could be of immense benefit to states desirous of enacting appropriate "national legislation" on refugees keeping their individual and particular needs in mind. As mentioned earlier this draft structure of the Model Legislation on Refugees was submitted to the Thirty-second Session of the Committee held in Kampala and the same is being reproduced for the consideration of the Committee for its adoption or approval.

### **The draft structure of the Model Legislation**

- (1) Preamble
- (2) New Definition of "refugees" should at least reflect the enlarged definitions provided for in the 1969 OAU Convention, 1984 Cartagena Declaration and 1966 Bangkok principles as expanded by the 1970 Protocol thereto which would facilitate states to adopt it to their particular requirements;
- (3) Basic principles of the Treatment of Refugees
  - (i) State Sovereignty;
  - (ii) Non-refoulement;
  - (iii) Non-discrimination;
  - (iv) Fair and Equal treatment;
  - (v) Family Unity and other humanitarian practices.
- (4) Rights and Duties of Refugees
- (5) Penal Clauses in case of the violation of laws
- (6) Assistance, measures given to refugees by the recipient country
- (16) Miscellaneous clauses.

Historically, the term refugee was used in various instruments prior to 1951 to refer to the ethnic or territorial origins of different uprooted groups, and to their loss of national protection. There was in these instruments no reference to persecution in the sense that this term is currently employed. For example, various pre-war instruments or arrangements provided for the issuance of documents to "Russian refugees" (in 1922) and to "Armenian refugees" (1924)—in both cases referring to their national origin and to their loss of protection by the Governments of the USSR or of the Turkish Republic respectively. These provisions were, in 1928, extended to "Turkish, Assyrian and Assyro-Chaldean refugees" followed by a Convention for "refugees coming from Germany" in 1938, which likewise referred to persons of German origin lacking protection of the German Government.

The first formal reference to persecution as part of the refugee definition came in the 1946 Constitution of the International Refugee Organisation (hereinafter called the IRO), a temporary specialized agency of the United Nations and the predecessor of UNHCR. Paragraph 7 (a) (i) of Section C of the Constitution of the IRO referred to a "persecution or fear, based on reasonable grounds owing to race, religion, nationality or political opinions"<sup>3</sup> as being a valid objection to repatriation. Paragraph 3 of Section A of Part I extended IRO's competence to the "victims of Nazi persecution" still within their country of origin. IRO's Constitution also made reference for the first time to "displaced persons" as well as refugees—a concept which came to be extensively applied to UNHCR's mandate.

Thereafter the United Nations Declaration of Human Rights in 1948 alluded to everyone's right to seek asylum from "persecution", without further defining the term, and the General Assembly employed the term "well-founded fear of persecution" for specified reasons as the central criterion in determining the ambit of UNHCR's Statute.

This definition was essentially repeated in the 1951 Convention relating to the Status of Refugee while its application was limited to victims of persecution as a result of events occurring before January, 1951. The extent and scope of the term "refugee" was, however, expanded in as much as it included "membership of a social group" as one of the possible causes of persecution. States parties could also, if they desired, restrict the causative events to those occurring in Europe. The 1967 Protocol to the Convention removed both the temporal limitation as well as the optional geographic limitation from this definition.

3. Section B. p. 232.

The definitions of the term "refugee" in the Convention and Protocol have, since 1967, remained unchanged, although it may be recalled that Recommendation E of the Final Act of the Conference of Plenipotentiaries which adopted the Convention in 1951, urged all States parties to extend its benefits as far as possible to persons who did not fall within its strict ambit. While this, of course, is not binding on States it is indicative of the general agreement, at that time, of the need for a liberal interpretation of the term refugee, by States in determining who should receive international protection.

This need also became very apparent in regard to UNHCR's activities, and by the 1960s the need for groups outside the original statutory definition to be assisted was clear, particularly in the wake of the General Assembly Resolution on the Granting of Independence to Colonial Peoples and independence movements in Africa.

Consequently there was a series of General Assembly resolutions, extending over the next two decades, which formally endorsed the High Commissioner's involvement with a much broader category of exiles. Thus in 1959 the General Assembly requested the High Commissioner to use his "good office" to transmit contributions to "refugees not within the competence of the United Nations" (without defining this phrase further). Then from 1961 to 1963 a series of General Assembly resolutions endorsed UNHCR activities for refugees within the High Commissioner's mandate "or those for whom he extends his good offices".

This liberalizing trend was reinforced in 1969 by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which added to the statutory refugee definition an important expansion of the term so far as it applied in Africa, viz., that:

"Refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"

This expanded definition remains the most formal extension of the refugee concept accepted by Governments, and has, following proposals made at the Arusha Conference on Refugees in Africa in 1979, been endorsed by the General Assembly as applying to UNHCR's activities in the African continent.

At the same time the General Assembly continued to request UNHCR to undertake programmes generally benefitting persons outside the ambit and

scope of the original definition of the term refugee. The High Commissioner was requested, in 1972, to continue to participate, at the invitation of the Secretary-General, in those humanitarian endeavours of the United Nations for which UNHCR had particular expertise and experience. In the following year he was requested, by the General Assembly, to continue his assistance and protection activities for refugees within his mandate as well as for those "for whom he extends his good offices or is called upon to assist".

The next reference to "displaced persons" came in 1975, with a General Assembly resolution requesting the High Commissioner to continue his assistance to Indo-Chinese "displaced persons", a category which was to appear in every resolution endorsing the office's activities for the next five years. Particularly important among these was the General Assembly resolution 31/35 which endorsed ECOSOC resolution 2011 of that year, in which UNHCR's assistance to displaced persons, defined as "the victims of man-made disasters requiring urgent humanitarian assistance", in addition to its aid to refugees was approved. The term has remained undefined except for the ECOSOC resolution mentioned above, although it has been suggested that the "man-made disasters" referred to in this definition might appropriately be described as those outlined in the expanded OAU definition. Nevertheless UNHCR's activities certainly benefit many more "displaced persons" than strictly defined refugees: the millions of uprooted victims of external wars or civil strife normally falling within this category.

The application of the concept of displaced persons led to an acceptance of international responsibility for specified national or ethnic groups, similar to that reflected in the pre-1951 refugee instruments. Concurrently, however, individual eligibility procedures have continued to be applied, particularly by traditional resettlement or receiving countries, often more strictly than in the past. Ironically this resulted partly from continuing pressure on third countries to provide resettlement opportunities for displaced persons granted temporary asylum, particularly in South East Asia.

The liberal use of the displaced persons concept and *prima facie* group determination procedures in countries of first asylum, while essential to enable prompt and proper assistance to be given, has also led to a number of other difficulties in practice. One of these is how to sift out those not entitled to receive help—such as economic migrants—when individual screening is not done, or how to exclude those displaced persons who are not entitled to protection, such as war criminals or armed activists. As regards economic migrants it must be observed that there is no international instruments or authority to deal with such persons, and traditionally, they have been subjected

to the juridical process of emigration-cum-immigration rather than the customary principles of non-refoulement and asylum. Experience has shown that the plight of these peoples could be such as to make their lives unbearable in the country of origin and those conditions could be so serious as to amount to persecution or a "well founded fear of persecution". It is for consideration whether the proposed legislation should seek to include and cover the economic refugees in providing for international protection for economic migrants solutions must be sought from dimensions other than those of the causative end of the outflow and at the recipient end of the outflow.

A new turn was given to the concept of International protection when the ECOSOC referred to persons "who have been forced to flee from their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country." It would have been observed that this definition of internally displaced persons does not conform to the traditional understanding of the term of refugee i.e. an asylum seeker who has actually been granted or has received protection outside his own country of origin or habitual residence, to whom asylum has been granted from the authorities of the country of origin and is recognized as a person who is entitled to enjoy certain rights under international law. This is by reason of the fact that in customary international law a refugee is a person who is outside the protection of the State or is unwilling to seek the protection of the State of his nationality or habitual residence. There is thus a need to consider the distinction to be drawn between the terms to be employed and the scope to be given to the Model Legislation. The Committee may wish to consider whether or not the Secretariat should seek to incorporate especially, distinctly, enunciated definitions of some key terms to be employed in the proposed model legislation. The future work of the Secretariat on the work on the task of Model legislation of rights and duties of refugees would now rest on the directives which the Committee's Tokyo Session may give.

The Secretariat of the Committee has managed with assistance of the Office of the UNHCR to obtain all the existing national legislations pertaining to refugees. The Secretariat is grateful to the UNHCR for their assistance in making copies available to AALCC through the officers of the "CDR" division, Geneva. The Secretariat of the AALCC is in the process of a thorough examination of these municipal instruments and has been working towards an expanded definition of the term "Refugees". The Secretariat, however, is of the view that the question of the expansion of the definition of the term requires to be discussed further. The Committee at its forthcoming Session may wish to give consideration to the extent and scope of the key term around which the

proposed model legislation is to be drafted. The guidelines that the Committee may wish to furnish would enable the Secretariat to fulfill its mandate at an early date.

The Secretariat would also like to thank all the member Governments who have replied to the letter requesting them to send their national legislation pertaining to refugees.

### **Report of Round Table meeting between UNHCR and AALCC on June 3, 1993 at UNHCR Headquarters Geneva**

The AALCC's 32nd Session was held in Kampala, (Uganda) from 30th January, 1993 to 6th February, 1993. Among the participants were Mr. Y Makonnen (UNHCR), Mr. Kioko (OAU) and the Secretary-General of AALCC. One of the resolutions of the Session called for closer interaction between the AALCC, UNHCR and OAU in undertaking joint studies and exchanging information on:

- (i) A model legislation for refugees, and,
- (ii) Creation of Safety Zones for the displaced persons in their country of origin.

The AALCC presented background papers on the two topics at the session. Following the session, the Secretary General of the AALCC had informal discussions on 18th February 1993, at Addis Ababa, with Mr. Y. Makonnen (UNHCR) and Mr. Kioko (OAU), where it was decided to hold if possible a tripartite meeting, between the OAU, UNHCR and AALCC. In particular, it was agreed:

- (i) to reactivate the OAU/UNHCR working group on refugees, and also include the AALCC, and
- (ii) reactivate the study on model legislation.

In line with this, a tripartite meeting was made possible with the interest and support of UNHCR and was held in Geneva on the 3rd June, 1993.

This meeting commenced with a welcome address and introduction by Mr. Shun Chetty. Discussions in the meeting focussed on Model Legislation. Initiating the discussion Mr. Chetty pointed out that the African region is more enlightened on legislation by virtue of the 1969 OAU Convention. In practice their treatment of refugees had all along been quite satisfactory. The situation in the Asian Region, on the other hand, is otherwise. This region has no binding legislation on the subject and the only guiding principles are in terms of the 1966 Bangkok Principles, which are recommendatory in nature. Further, due

to pressure of numbers the countries involved were unable to do much for the refugee flows.

Accordingly, the need was felt for active co-ordination between UNHCR and AALCC. The UNHCR was well aware of the fact that resort to refugee law in the Asian Region is a difficult proposition, as law, policy and politics were closely interlinked. If an attempt could be made through AALCC annual sessions to achieve this it might be quite useful in view of senior level representation. Though there had always been close co-operation between UNHCR and AALCC, of late, because of technical and professional interest, both the organizations have enhanced their co-operation. The 1994 Tokyo Session would provide an appropriate forum to address various legal issues at a higher level.

Traditionally some major Asian countries have treated refugees well. The majority have however, been reluctant on enacting legislation and signing the 1951 Convention and the 1967 Protocol for varied reasons including political, economic and social pressures from within a particular country. In Asia, it was the large groups or mass exodus which sought protection as opposed to individuals seeking asylum in other parts of the world.

The model legislation proposed to be taken up by the AALCC particularly for the Asian region could deal with mass determination in one part and individual determination in another. Once mass admission of refugees is allowed it would not be difficult for individuals seeking independent refugee status to do so. The rights and duties in the first part would be for the group as a whole, followed by rights and duties for an individual, after one had been accorded refugee status independent of the group. The Zimbabwe Refugees Act of 1983 provides a model piece of legislation for determining individual refugee status. Attention at present had to be focused on:

- (i) Application of refugee law to large groups, and
- (ii) The nature of mass influx and the manner of dealing with it.

Ms. Karola Paul clarified that individual assessment seemed difficult as in effect it would amount to finger pointing to the country of origin which is likely to be unacceptable to the majority. On the contrary, refugee law principles could be incorporated as part of the Constitution or Immigration laws already in existence. In this connection, she also made reference to the very useful workshop organised jointly by the UNHCR and the AALCC in 1991. It would be a matter of pride and achievement if Asian countries were to be more generous in dealing with the situation as a consequence of the joint efforts of AALCC/UNHCR and OAU.

Mr. Frank X. Njenga also held the view that the African treatment of refugees, particularly political, was more generous despite their political, economic and social hardships. He cited Mozambique and Somalia as examples. He was of the view that the Zimbabwe Refugee Act had sought to do away with the connotation of finger pointing. It would be very useful if the Zimbabwe Act together with the 1969 OAU convention could be used as a basis for framing a legal framework for the Asian region.

The model legislation would be much more meaningful if it were incorporated into national laws. It is because these are far more effective domestically than to international law principles which may lack enforcement procedures.

The lack of willingness to accept international standards has been well illustrated by the unfortunate Bosnian example, which has shown that International Protection and non-refoulement has at best been reduced to good intentions. The national legislation would be more respected:

- (i) being law of the land, there were better chances of implementation;
- (ii) for fear of international criticism; and
- (iii) national as well as international public opinion.

The question of incorporation of existing principles could be left to the individual states. Therefore, a national legislation, keeping all the factors in mind would be much more useful than embarking upon a lengthy task of a new model legislation. Of course, the question of incorporation of the existing principles could be left to individual states.

Ms. Karola Paul considered that studying all existing national legislations and making an inventory would be a big step forward.

Mr. J.F. Durieux quoting an article of his, published in the Refugee Law Journal (Vol. 3 No. 4, 1992) cited the example of Mexican and Belize laws. The latter had benefitted a lot because of a "legal vacuum", the legal vacuum was easy to fill as there was no legislation in that area. Most of the member countries of AALCC did have existing legal principles on refugees, albeit scattered the various legislations. Further, he referred to a study done in the Middle East seeking to incorporate Islamic Law principles for furtherance of refugee law. The need of the hour, in his opinion, was to have a set of flexible principles which could be incorporated in national law.

Mr. Chetty pointed out that in some Asian countries it was even difficult

to find bits and pieces of enabling legislations as some of them provided asylum on purely humanitarian considerations. Examples were cited of India and Thailand, among a few, which had depended on customary practice. Mr. Chetty expressed the view that the goal was to bring the countries in Asian region to accede to the 1951 Convention, as a first step.

It was agreed to:

1. Hold a regional seminar on International protection which would cover if possible, all the area referred to above.
2. Form an inventory of all legislations available with the UNHCR CDR division.
3. Evolve ways and means of elaborating the 1966 Bangkok Principles.
4. Continue work on the model legislation which would help states desirous of doing so to incorporate flexible principles on refugees into their existing legal instruments.

## B. Establishment of "Safety Zones" for the Displaced Persons in the Country of Origin

The Secretary-General of the United Nations in his Report on Preventive Diplomacy, Peacemaking and Peacekeeping, entitled "An Agenda for Peace" *inter alia* has observed that "Poverty, disease, famine, oppression and despair abound to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national borders"<sup>1</sup> It is now estimated that the number of refugees is 19 millions and that internally displaced persons are estimated to be more than 20 millions. The most recent are to be found in Afghanistan, Iraq (the Kurds), Cambodia, former Yugoslavia and some members of the Commonwealth of Independence States (CIS) which have been savaged by the ethnic wars. Somalis have also been uprooted due to civil war. The worst droughts of the century in several countries have resulted recently in numerous displaced persons and drawn active UN interventions. More recently the Office of the United Nations High Commissioner for Refugees has drawn attention to the plight of the internally displaced persons in Burundi and appealed for material and financial assistance for them.

1. See U.N. Secretary General Boutros-Boutros Ghali *An Agenda for Peace* Preventive Diplomacy, Peacemaking and Peacekeeping. Report of the Secretary General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31st January 1992 (United Nations, New York 1992) p 7.