RIGHT TO ENVIRONMENTAL PROTECTION UNDER INTERNATIONAL LAW

LIAQUAT ALI SIDDIQUI

INTRODUCTION

The concern for environmental protection has gained its momentum since the middle of the present century with the publication of a large number of scientific materials showing how the degrading human environment has become an overall threat to the existence of all the living species including man and the planet itself. This concern has resulted to various movements at all levels.[1] Many legislations have been passed at national level and Declarations, Conventions, Treaties have been adopted at regional and international levels. Some environmental legal scholars have argued that a recognition of a 'right to environment' would adequately protect the environmental interests at all levels. Environmental problems are mostly global in nature and an ultimate solution requires a concerted effort of all the members of the world community. The recognition of a 'right to environment' at international level would tremendously influence national and international legal issues. This article, therefore, intends to examine *inter alia*, the relevant international

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Assistant Professor Department of law University of Dhaka Bangladesh.

instruments and theoretical issues to see whether a right to environment is recognized under international law.

INTERNATIONAL ENVIRONMENTAL TEXTS

In this section different International Declarations, Conventions, Treatise and other Documents related to environmental protection will be examined.

THE STOCKHOLM DECLARATION : UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT

The United Nations Conference on Human Environment, held at Stockholm, Sweden from 5 to 16 June 1972, was the first largest gathering ever held on human environment. The conference adopted a Declaration of twenty-six principles on human environment 'to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'.[2] The Declaration was adopted by a vote of 114 to none, with 10 abstentions. With the approval of 114 member states of the world community, the Declaration has received a universally recognized significance.

The Declaration begins with certain proclamations and in the first paragraph it tries to establish a relationship between the human rights and environment. It says, "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights even the right to life itself." In the paragraph two, it says, "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world.".[3]

The first Principle of the Declaration has more closely established a relationship between the human rights and environment. It says, "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".[4] Principle 2 of the Declaration says, "the natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."[5] Principle 21 of the Declaration says, "States have, in accordance with the Charter of the United Nations and the Principles of International law, the Sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."[6]

Principle 1 recognizes certain fundamental rights i. e. rights to freedom, equality and adequate conditions of life. Although it does not directly recognize environmental protection as one of the fundamental rights, it envisages 'environmental protection' as a means to achieve those fundamental rights. It is observed that the above type of formulation stops short of proclaiming a right to environment, although it clearly establishes a relationship between human rights and environmental protection.[7] Similarly Principle 2 recognizes the importance of safeguarding natural resources and other samples of natural ecosystems, for the benefit of present and future

generations. According to Principle 2 environmental protection is a precondition for the benefit and well-being of peoples. Principle 21 of the Declaration recognizes a right of states to exploit their own resources but at the same time places a responsibility on their shoulders not to cause damage to the environment of other states or of areas beyond their jurisdiction. The Stockholm Declaration did much to recognize the biosphere as a legitimate subject of International law.[8]

BRUNDTLAND COMMISSION REPORT : WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT

In 1983 the United Nations General Assembly created the World Commission on Environment and Development (WCED),[9] and Gro Harlem Brundtland, the leader of the opposition in Norway, was made the Chairman of the Commission. In October 1987, the Commission presented a report 'Our Common Future', to the General Assembly.[10] The report recognizes, inter alia, the following legal Principles —(i) that all human beings have a fundamental right to an environment adequate for their health and well-being (Art. 1), (ii) that there should be sustainable use and management of natural resources, development of environmental assessments, and public participation in the planning process (Arts. 2-5), (iii) that states have an obligation to assist other states and to cooperate regarding environmental rights and obligations (Arts. 6-8), (iv) that states have an obligation to use transboundary and extraterritorial national resources in a reasonable and equitable manner (Arts. 9-20). Thus the report in Article 1 has recognized a right to environment more explicitly than the Stockholm Declaration.[11]

DECLARATION OF THE HAGUE : INTERNATIONL SUMMIT

An International summit on the protection of the global atmosphere was held at the Hague in March, 1989. The Declaration was signed by twenty-four states. The Declaration reaffirms the links between environmental protection and human rights.[12] It says, "the right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all states throughout the world. Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected." Thus the Declaration states that environmental protection is directly related to the enjoyment of other rights including the basic rights of 'right to live'.[13]

Again, it says, "Because the problem is planet-wide in scope, solutions can only be devised on a global level. Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dingnity in a viable global environment, and the consequent duty of the community of nations vis-a-vis present and future generations to do all that can be done to preserve the quality of the atmosphere."[14] Thus in the above paragraph, the Declaration, has clearly recognized 'the right to live in dignity in a viable global environment.'

RIO DECLARATION AND OTHER UNCED TEXTS : UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED)

In June, 1992, twenty years after the Stockholm Conference on the Human Environment, the United Nations

convened a second international conference in Rio, Brazil called the United Nations Conference on Environment and Development.[15] UNCED adopted the following instruments[16]—

(i) Rio Declaration on Environment and Development,

(ii) Agenda 21,

(iii) Non-Legally Binding Authoritative statement of Principles for a global consensus on the Management, Conservation, and Sustainable Development of all types of Forests.

In addition to the above instruments, two treaties were concluded and opened for signature as part of the UNCED process. These are-

(iv) the United Nations Framework convention on climate change[17] and

(v) the convention on Biological Diversity.[18]

A careful study of the above documents adopted in Rio will show that in no where a 'right to environment' is recognized. It was expected that as a further extension of post-Stockholm texts, the Rio Declaration would contain a clear statement about the right to environment.

The UNCED Texts do not even establish a relationship between human rights and environment. It is stated that the term human right is used only three times in the Rio texts[19]; once in calling for an end to human rights abuses against young people,[20] a second time in stating that "indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination,[21] and finally, in referring to the human right to housing.[22]

The Preamble of Rio Declaration, reaffirms the Stockholm Declaration. Principle 1 of the Declaration says, "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[23] Thus it avoids to clearly declare a right to environment.

In the Declaration, even some well-recognized environmental rights go without the names of rights. Thus principle 10 says, "Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . . effective access to judicial and administrative proceeding including redress and remedy shall be provided."

Agenda 21 does not also recognize a right to environment although it makes a few references to human rights. Public participation in environmental protection process is recognized but not as a matter of right.

In chapter 3, while discussing about the programme of combating poverty it speaks of a parallel process of creating a supportive international environment. However, this chapter does not take account of existing human rights provisions about freedom of hunger or right to food. In chapter 7 it speaks of right to adequate housing as a basic human right which is enshrined in the Universal Declaration of Human rights and the International Covenant on Economic, Social and Cultural Rights. However, in chapter 29, on the role of workers and their trade unions, the link between human rights and sustainable development is clearly established. It says, "For workers and their trade unions to play a full and informed role in support of

sustainable development, governments and imployers should promote the rights of individual workers to freedom of association and the protection of the rights to organize as laid down in ILO Conventions".

It was expected that Rio conference would go one step forward than the previous position. But unfortunately the UNCED Texts adopted at Rio, do not appear to be satisfactory so far 'right to environment' issue is concerned. The reasons why Rio conference did not satisfy many peoples expectation may be many. Dinah Shelton, gives the following explanations for the lack of agreement on human rights. First, the focus of the meeting was North-South issues of economic development and global environmental protection. Unlike human rights, the linkage of environmental protection and economic development presents the possibility of traditional trade-offs and bargaining power for each side. In contrast, most states feel that they gain little from pushing human rights. Each state has its own problems and the commitments tend to take on a unilateral—or erga omnes-character, rather than bargained-for reciprocal rights and duties.

Second, human rights leadership generally comes from NGOs and victim groups. Apart from women's and some indigenous organizations, human rights NGOs were generally absent from UNCED preparatory meetings and the Conference itself.

Third, there have been suggestions, however unwarranted, that human rights are a luxury the developing world cannot afford. Developing states now asked to make sacrifices for the environment may be unwilling to tackle both environmental protection and human rights; other states may conclude that self-interest makes environmental protection the priority.

Another element limiting the appeal of human rights at UNCED may be the current human rights focus on the rights of indigenous populations. Indigenous rights often are closely tied to environmental protection, especially for those living in rain forests.[24]

Apart from the above reasons, the fact that recognition of a right to environment at International level, would open the doors to the developing countries to claim compensation as of right from the developed countries for their greater liablity in environmental pollution, is also important.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

No global Human Rights instrument has yet adopted a right to environment. However, Universal Declaration of Human Rights and other human rights instruments guarantee certain rights i. e. right to life, health, property etc. which may be used as a means of environmental protection.[25] Under Article 6(1) of the 1966 UN Convention on Civil and Political Rights, it was argued by an individual petition that the dumping of nuclear wastes in a Canadian town violated the right to life of its inhabitants and future generations, although it was dismissed on the ground of failure to exhaust local remedies.[26] Article 12 of the UN Covenant on Economic and Social Rights, 1966, refers to the right to improvement of environmental and industrial hygiene.

Two human rights treaties, on the regional level, include a right to Environment. African Charter of Human and Peoples Rights, 1981, was the first human rights treaty to contain a right to environment. Under Article 24 it states that all peoples have a right to a general satisfactory

environment favorable to their development.[27] Such a right appears to be a collective right rather than individual right and is comparable to rights such as self-determination or economic and social rights, whose implementation by states is subject to political supervision by various UN organs and not by individual enforcement through judicial bodies. The organization of American States similarly included the right to a healthy environment under Article 11 of the Additional Protocol to the American Convention on Human Rights, adopted in San Salvador in 1988.[28] The European Convention on Human Rights however, does not contain any such provision and the state parties have failed repeatedly to adopt proposals for a protocol elaborating a right to environment. European Court of Human Rights, on the other hand, has recognized that environmental degradation can result in violation of rights guaranteed by the convention.[29] In 1990 Economic Council for Europe (UNECE), adopted a Draft ECE Charter on Environmental Rights and Obligations for submission to UNCED. Article 1 states, "Everyone has the right to an environment that is adequate for his general health and well-being".

There is no explicit statement recognizing a right to environment in the convention on the Rights of the Child, 1989. However, it requires the state parties to take appropriate measures to implement the Child's right to health which include inter alia, the provision of nutritious foods and clean drinking water 'taking into consideration the dangers and risks of environmental pollution',[30] The convention also emphasizes on the education of environmental sanitation.[31] The United Nations Sub-commission on the Prevention of Discrimination and Protection of Minorities has adopted a few resolutions showing inter relationship of the enviroment and human

rights. In a resolution it reaffirms that the movement of toxic and dangerous products endangers basic human rights such as the right to life, the right to live in a sound and healthy environment and the right to health, and calls on UNEP to find global solutions to the problem.[32] In anouther resolution, affirming the inextricable relationship between human rights and the Environment, it appointed a special rapporteur to study the relationship between environment and human rights. The UN Human Rights Commission also adopted a resolution in 1990 stressing the importance of the preservation of life-sustaining ecosystems to the promotion of human rights.[33]

There are also norms of humanitarian law which prohibit destruction of or a damage to environment. Thus, the 1977 Protocols to the 1949 Geneva Conventions ban employing methods or means of warfare which are intended, or may be expected, to cause wide-spread, long-term and severe damage to the natural environment. Also, Article 1 of the Environmental Modification Convention, 1977, Provides that each state party undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or sever effects as the means of destruction, damage or injury to any other state party.

Similarly, Inhuman Weapon Convention, 1981, prohibits making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

THEORETICAL CONSIDERATION

Theoretical arguments may be shown to establish a link between human rights and environmental protection. It is argued that there are three approches to linking human rights and environemental protection. Each has some support in international and national texts.

First existing human rights guarantees of life, health, property, safe and healthy working conditions, freedom from hunger, etc. can be violated or theatened by environmental degradation. In such cases, procedural mechanisms to remedy infringements of the rights may be invoked to stop the environmental harm causing the human rights violation. This uses environmental protection as a means to further human rights.

Second, specific, mostly procedural, human rights may be applied or modified for application in protectiong the environment. These environmental rights include the right to participate in government, access to information and procedural due proccess, including non-discriminatory access to remedies. This approach uses human rights as a means to enhance environmental protection.

Third, right to a safe and healthy or ecologically balanced environment as a new human right may be recognized, merging environmental and human rights, considerations.

Some scholars say links between human rights and the environment derive from, the fact that human health and existence, legally protected as the right to health and the right to life, are dependent upon environmental conditions. They conclude that this link requires recognition of a right to environment as an independent human right. Others promote the idea of a right to environment as a means of

accomplishing environmental protection, as a prerequisite to fully ensuring the right to life.[34]

However, many scholars have expressed doubt whether recognition of a right to environment would at all provide greater protection for the environment than what is available under existing International law or what could be made available simply through better regulation.[35] Stone's view is that giving rights is not the same as interoducing more protective rules. He argues that 'rights' introduce a flexibility and open-endedness that no rule can capture.[36]

The right to environment is not an abstract idea Which is defficult to define rather like other rights i. e. right to liberty and security of person, it can be implemented through procedural safeguards.[37] It does not, however imply one's right to an ideal environment but in reality a right to have the present environment conserved, and protected from any significant deterioration and also improved in some casses.

CONCLUSION

From the above discussion it appears that in the first UN conference on Human Environment, held at Stockholm in 1972, the members of the world community could not reach to an agreement to recognize a right to environment although it established a link between human rights and the need for environmental protection. After twenty years, in the second UN Conference on environment and Development, held at Rio, in 1992, the members of the world community, again failed to reach to an agreement to establish a right to environment. Even the performance at Rio was more frustrating. In view of the above facts it can

clearly be laid down that no right to environment has yet been established under International law.

International Human Rights instruments do not similarly recognize a 'right to environment' as one of the fundamental human rights, although many environment related rights are recognized by human rights instruments i. e right to have information, to take part in decision making process etc. Regional organizations and national consitutions have increasingly proclaimed some form of a 'right to environment' or environmental rights and duties. This rights are mostly collective rather than individual, and may be implemented by supervision on state actions rather than judicial action.

It appears that International, regional texts on environmental protection and human rights reflect a general trend toward recognizing a link between human rights and environmental protection.

Although the more common view is that an independent right to environment has not yet become part of International law, it is expected that the growing concern at all levels will contribute toward recognition of such a right in near future.

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HUMAN RIGHTS UNDER EMERGENCY SITUATIONS

SHAHNAZ HUDA

INTRODUCTION

After the two horrific and devastating World Wars people began to be concerned about human rights and the protection of such rights. But before that, as early as in 1215, that venerable document, the *Magna Carta*, proclaimed : "to none will we sell, deny or delay right or justice." [1]

THE FRENCH DECLARATION OF 1789

The French Declaration on the Rights of Man and Citizens, 1789, echoing Voltaire, Rousseau and Montesquieu, in its second article declared: "The aim of all political associations is the conservation of the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression." [2]

THE AMERICAN DECLARATION OF INDEPENDENCE OF 1776

The American Declaration, in its preamble held these truths to be self-evident: that all men are created equal, that they are endowed by their creator with certain inalienable

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Lecturer Department of Law University of Dhaka.

rights, that among these are life, liberty and the pursuit of happiness.[3] It is apparent, therefore, that human rights have been cherished and been struggled for since time immemorial and it has always been endeavoured to protect the individual against tyrannies of those in power.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

On the 10th of December, 1948, The Universal Declaration of Human Rights stated in its preamble that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. [4]

Echoing these documents different states recognise or incorporate in their national constitutions a table or Bill of Rights which seeks to guarantee those basic rights which are generally known as human rights. These fundamental rights are recognised as basic to the existence of human rights as human beings. The idea of derogation of these fundamental rights or fundamental principles in times of emergency is common to all legal systems.[5] Generally it is seen that all constitutions or special laws make provisions in legal terms for situations of crisis when States of Emergency may be invoked. These provisions are not always clear and are often set forth in ambiguous terms referring to such vague concepts such as "maintenance of peace or of public order, imminent national danger, internal disorder, subversion, insurrection and danger threatening the fundamental, liberal and democratic order." The primary justification seems to be the threat of imminent danger and

the concept of self defence in order to thwart this danger.[6] Now, what does the word 'Emergency' connote. Emergency may be defined as an unexpected occurnce, an event not usual or foreseen. It is an unforeseen combination of circumstance which calls for immediate action. It is a situation which results from temporary conditions which place institutions of the state in a precarious position which leads the authorities to feel justified in suspending the application of certain principles. [7]

In emergency situations states are faced with conficting obligations— on the one hand the commitment to protection of individual rights of its citizens and on the other the protection of the existence of the state itself in extreme conditions, or in less severe conditions the safeguarding of public order and safety.[8] Leaders are often compelled to compromise the rights of the individual in the face of threat to the state itself or to order and safety. Most people would naturally support the view that there are some basic rights which ought never to be compromised. It is widely recogniseed that the worst human rights abuses occur in cases where individual rights can be curtailed on the excuse that the security of state requires such curtailment. The Secretary General of the International Commission of Jurists in his introduction on an ICJ report on States of Emergency opined that the most serious violations tend to occur in situations of tension when those in power are or think they are threatened by forces which challenge their authority if not the established order of the society. That is why he thinks that there is an under tandable link between cases of grave violations of human rights and States of Emergency.[9] Nevertheless states as well as international bodies have always recognised the necessity for derogation of certain rights in times of urgency or

emergency. It is regarded not only as prudent, justified or necessary but vital in cases to arm the executive body of those in authority with wide powers which are almost plenary in nature, to face situations where there may, in truth, be a grave urgency which threatens the nation.[10] It cannot be disputed that there may, in truth, be situations where the state may be under threat of widespread violence or grave and dangerous risk of disturbance. Examples are the situations prevailing in Kashmir or Shri Lanka or a dozen Latin American countries. These countries, which are mostly underdeveloped and economically backward with tottering and temporary governments, often tend to be poised on a volcano which at any moment may explode. The Honorable former Chief Justice of India, P. N. Bhagwati once said that the tendency to advocate Draconian measures to protect the society against real and imagined ills appear plausible even to the most human rights conscious, or in his own words, 'well intentioned citizen.' He points out, however, that a look at history will show examples of ' disastrous consequences of the smothering and suppression of human rights by the dictates of Expendiency and, therefore, he strongly contends that there should be some non-derogable rights, such as right of personal liberty, to life, of freedom from *expost facto* criminal laws which cannot be taken away; that care should be taken to ensure that in no situation, however grave, should basic human rights be allowed to be derogated from, because once there is a derogation for an apparently able cause, there is always a tendency in the weilders of power in order to perpetuate their power, to continue derogation of human rights in the name of security of state.[11] States of Emergency provide ample opportunity to dictators and oppressors to perpetaute an oppressive regime, destroy democratic

processes and to deprive a large part of the citizens of a country of their basic human rights. These states of Emergency 'spill over their permissible edges with depressing regularity' and as a result grave and horrible injustices occur.[12]

ICJ REPORT

In 1983 the International Commission of Jurists published a report on the impact on human rights brought about by States of Emergency.[13] This report dealt with the legal and historical background as well as the current position of States of Emergencies proclaimed in fifteen countries around the world including India, Canada, Colombia etc. South American countries have provided examples of 'the paradigm state of emergency' where emergency is declared by a military government which after seizing power by means of a *coup d'etat*, has suspended or dissolved parliament, reduced the judiciary's power drastically and has practised flagrant abuses of human rights.[14] To give an example of such a Latin American country we may take the case of Colombia. Article 121 of the Colombian Constitution of 1886 gives the President the power in cases of 'external war or internal disturbances' to declare a 'State of Siege'. This gives the Government the power to decree that certain crimes committed by civilians will be tried by Military Court Martial under Military Penal Law. Since 1957 there has been numerous applications of Art. 121 and 'solutions of problems which could have been dealt with by the democratic institutions has been delegated to the armed forces.' These states of siege have been declared to combat guerrilla movements in Colombia but has not been confined to only such movements where the

need for special measures may have been rightfully felt. They have been used in cases of lobour unrest, political disturbances etc. Frequent recourse was had to legislative decrees under the States of Siege. An example of one such decree is Decree No. 0070, 1978 which gave special criminal immunity to members of the police or armed forces who commit homicide when investigating kidnappings, extortion, or drug trafficing. On April 13th, 1984, a group of secret police agents broke into a house in Bogota which they suspected was the hiding place of kidnappers, waited till they returned home and opened fire, killing seven people who were totally unconnected with the kidnapping. To cut a long story short, the States of Seige of Emergency declared in this typical Latin American state has, in the opinion of the Inter-American Commission on Human Rights, to a certain extent hampered the full enjoyment of civil freedoms and rights.[15]

INDIA

Closer to home we may cite the example of India which is the largest democracy in the world. Article 352 of the Indian Constitution of 1950 proclaims that if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or interal disturbance, he may, by proclamation make a declaration to that effect. Art 359 states that when the proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (which guarantees certain fundamental rights) as may be mentioned in the order and all proceedings pending in any

Court for the enforecment of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order. During the States of Emergency declared, preventive detention laws were used widely. State of Emergency was proclaimed in 1962 which continued till 1967, in 1971 again and in 1975 when the Government of Indira Ghandi was in danger of being swept out of power. Questions arose as to the legitimacy or the necessity of the proclamation of Emergency in 1975. The consequence of such a proclamation was the increased use of preventive detention measures against political opponents, suspension of the rights to apply to courts for enforcement of fundamental rights which resulted in ill-treatment of prisoners, increase of corruption, nepotism etc. Fundamental rights which guaranted equality before law, protection of life and property, civil liberties, protection against arrest and detention without being informed of the grounds of arrest, duty to produce arrested persons before a magistrate withing 24 were suspended. From the Indian experience so far mentioned we see that even in a country which has a strong commitment to the rule of law, developed system of checks and balances, a strong legal system, vigilant judiciary etc. emergency powers are liable to be extended both in time and in scope beyond what is strictly[16] required by the exigencies of the situation.

EMERGENCY UNDER MUNICIPAL LAW

Four types of legislation generally provide for States of Emergency. *Firstly* Emergency Regimes Proper, where in advance of the situation constitutional provisions or special laws provide for measures to counteract conventional states

of war, siege, disturbances, internal crisis, disorder, disturbance, catastrophy etc. *Secondly* Measures of Legislative Empowerment, where the constitution empowers the transfer to the Executive of legislative powers whereby the Executive is authorsied in specific cases to legislate by 'orders', 'emergency laws', 'decree laws' regulatory decrees, proclamations etc. *Thirdly*, not *a priori* but *posteriori* by means of ratification. *Fourthly* and lastly Emergency Powers Through Self Empowerment by the Executive which are sometimes called 'special powers' and here the Parliament does not intervene; the head of the Executive is only required to notify in advance certain official bodies, e.g., Council of Ministers.[17]

In practice we see examples of cases where states of Emergency are not notified although a state may be under an obligation by an international instrument to notify other states which are parties to such instrument. Again even after being officially terminated we see examples of cases where a State of Emergency continues. As a result various measures are taken which curb and take away rights and guarantees of the citizens of a country which can only officially be taken or done during emergency, e.g., as in the cases of Surinam and Uganda etc. In Haiti and Paraguay, States of Emergency became permanent as a result of there being no time limit provided for in the constitution of those countries. There may again be cases where there is a tendency to "institutionalise emergency regimes by those in power who try to logicate by talking of restricted or gradual democracy."[18]

EFFECTS

Apart from effects on human rights directly, States of Emergency result in the subjugation and subordination of

the legislative and judicial powers of the government to the Executive and even that to the military powers. Usually, like in the cases of Liberia and Bolivia, the Parliament stands suspended and the legislative powers are exercized solely by the Executive. The Judicial powers are also brought, whether directly on indirectly, within the control of the Executive either by the Executive appointing reliable judges, i.e., judges loyal to them or by the maintenance of superiority of Emergency courts over ordinary courts.

EFFECT ON THE RULE OF LAW

The effect of states of Emergency on the Rule of Law is that there seems to be a tendency towards heightened secrecy, restrictions on the right of defence, the death penalty being used more frequently, extention of the factors that constitute complicity, e.g., Uruguayan Legislation provides for punishment of assistance to political prisoners by placing it in the same category. It one of the basic principles of the Rule of Law, i.e., presumption of innocence, is undermined, the principle of non-retroactivity of criminal law is violated.[19]

INTERNATIONAL TREATIES

Almost all national constitutions contain Emergency provisions. International and regional instruments also make provisions for derogation of rights in case of Emergency. This means that measures for the protection of human rights contained in these instruments may be derogated from in times of national crises.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights allows the States Parties to the Covenant to take measures derogating from their obligations under the Covenant in times of public emergency which threatens the life of the nation. Article 4(1) states," In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination on the grounds or race, colour, sex, language, religion or social origin." Art. 4 (3) states "Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made through the same intermediary on the date on which it terminates such derogation." [20]

AMERICAN CONVENTION ON HUMAN RIGHTS

Another important landmark in the development of human rights is the American Convention on Human Rights adopted in 1969 by the Organisation of American States. Art. 27 of the Convention, like other treaties for the protection of human rights, allows States Parties to

derogate from their obligations in times of emergency. Art. 27, states In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention ....." As in the case of other treaties certain articles of the American Convention on Human Rights are made non-derogable and the State is required under clause 3 of Art. 27 to inform other States Parties through the Secretary General of the OAS of the suspension of rights, the reasons for suspension and the date set for the determination of the suspension. The Inter- American Commission on Human rights, one of the organs established by the American Convention for its implementation has the power to review suspected derogation *sua sponte* which means that theoritically at least, the Inter-American Commission may respond with great efficiency to violation of human rights under so-called States of Emergency.[21] According to the Commission's annual report of 1980-81, during that period six parties to the American Convention—Bolivia, Colombia, El Salvador, Grenada, Haiti and Nicaragua suspended guarantees although out of these six only two complied with the provision requiring parties to the Convention to notify such suspensions under Art. 27 (3). The Commission itself raised the question of compliance in the case of Bolivia only and no other State trans Parties complained.[22]

It is quite clear, therefore, that although treaties, such as those discussed above, do provide measures for the protection of human rights by trying to ensure that these rights are not derogated from unless strictly necessary, nevertheless in the absence of greater enforceability of such provisions individual liberty during such situations continues to be hampered.

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

In the European context the European Convention for the Protection of Human Rights and Fundamental Freedoms in Art. 15 also allows any 'High Contracting Party' to take measures derogating from its obligations under the Convention in times of war or other public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation. Clause (3) of Art. 15 requires any derogation to be notified to the Secretary General of the Council of Europe of the measure and the reasons for it as well as the date of termination.[23] The famous Greek case is an example of how powerful this convention can be. The Greek Govt. by royal decree of April 1967, of which the Secretary General of the Council of Europe was notified, suspended the application of various articles of the Greek constitution in view of internal dangers threatening public order, safety and security of the state, The Greek Govt. invoked Art. 15 of the European Convention as basis for suspension. Four countries independntly, Denmark, Sweden, Norway and the Netherlands, applied to the European Commission on Human Rights that the Greek Govt. had violated various articles of the Convention relating to fair trail, protection against retroactivity of criminal law, freedom of throught, conscience religion, expression etc. They contended that the Greek Govt. failed to show that the conditions necessary for permitting derogations from the Convention were in fact prevailing. The respondent Greek Govt. submitted that the Commission was not competent to examine the applications because they concerned the actions of revolutionary Govt. and also as regards Art. 15 of the Convention that a government enjoyed a margin of appreciation in deciding

whether there existed a public emergency threatening the life of the nation and the measure required to be taken. The European Commission undertook extensive investigation in order to see whether the Greek Govt. was guilty of gross human rights violations or not and after careful evaluation of all evidence at its disposal concluded that torture had been inflicted in various cases. The Commission opined that there was no public emergency threatening the life of the nation and therefore the Greek derogations were invalid. To cut a long story short the Committee of Ministers of the Council of Europe, on the basis of the Commission's report was of the opinion that Greece ought to be suspended from membership of the Organization. Greece in the end itself withdrew from the Council of Europe and it was only after the restoration of democracy in 1974 that she resumed her membership in the Council. [24]

It is obvious, therefore, that most international and regional instruments for the preservation of human rights also provide exceptions where suspension of guarantees lawfully takes place. Most of these treaties have attempted to provide strict guidelines in order to ensure that these allowable suspensions are not taken advantage of. How much States Parties adhere to these guidelines is in reality questionable and most lawful human right abuses continue to take place unabatedly in emergency situations.

NATIONAL CONSTITUTIONS

As mentioned earlier, national constitutions also provide suspension clauses where in cases of emergency, seige etc. protection of fundamental rights becomes less important than in times of peace. The ICJ report on States of Emergency provides an extensive study on such situations of

States of Exception or States of Siege where different countries have used or misused the derogation clauses contained in their constitutions. To name a few countries, Argentina, Canada, Eastern Europe, Ghana, Greece, India, Malaysia, Northern Ireland, Zaire, Uruguay etc. are ones whose constitutions contain such clauses.

THE BANGLADESH CONTEXT

In Bangladesh, State of Emergency has been declared four times since its birth. The Constitution of the People's Republic of Bangladesh came into force exactly one year after its independence as a sovereign nation on the 16th December, 1972. Initially this constitution contained a list of fundamental rights which were guaranteed to the citizens of Bangladesh. Article 26 of the Constitution declares that all laws inconsistent with the fundamental rights guaranteed by the Constitution shall be void to the extent of the inconsistency and that the state shall not in future make any law repugnant to the fundametal rights.[25] The fundamental rights which found place in Part III of the Constitution followed the principle laid down in the Universal Declaration of Human Rights, 1948, the International Convenant on Civil and Political Rights, 1966, and the Optional Protocol to the Int. Covenant on Civil and Political Rights, 1966. After 1972 various constitutional amendments were made which resulted in curtailment of the fundamental rights guaranteed initially by the 1972 Constitution. The 2nd Amendment to the Constitution 1973, among other things inserted Part IX A relating to emergency provisions. [26]

The new provisions contained in Articles 141A, 141B and 141C empowered the President to issue a Proclamation

of Emergency on being satisfied that "a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance."[27] This proclamation required for its validity the counter signature of the Prime Minister and may be revoked by subsequent Proclmation. It shall be laid before the Parliament and shall cease to operate at the expiration of one hundred and twenty days, i. e., four months, unless approved by the parliament. Art. 141B provided for the suspension of certain Articles during Emergency including those guaranteeing freedom of movement, of assembly, association, freedom of thought and conscience, of profession or occupation and rights to property.[28] Art. 141 C, inserted by the 2nd Amendment, provided also for the suspension of enforcement of fundamental rights during emergencies. It provides that the right to move any Court for the enforcement of the fundemental rights conferred by the Constitution as well as all proceedings pending in any court for the enforcement of such rights shall remain suspended during the Proclamation of Emergency or for a specified shorter period.[29] Thus what started of as a perfect Constitution guaranteeing the rights of the people soon began to be used as means of perpetuating various regimes by the suppression of those rights which in any way might provide the citizens the means of fighting against oppression.

On December 28th, 1974 the then President Muhammadullah proclaimed a State of Emergency which was countersigned by the Prime Minister Sheikh Mujibur Rahman.[30] The right of any person to the rights conferred by Articles 27, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42 and 43 of the Constitution and all other proceedings pending in any court for the enforcement of the said rights was to

remain suspended for the period during which the Proclamation of Emergency was in force.[31] These articles whose enforcement were suspended included the right to equality before law,[32] right to protection of law,[33] of life and personal liberty,[34] safeguards as to arrest and detention,[35] protection in respect of trial and punishment,[36] freedom of movement,[37] assembly,[38] association,[39] of throught and conscience,[40] of profession or occupation,[41] rights to property[42] and protection of home and correspondence.[43] The Constitution of 1972, ideal at its inception, soon turned into something less than perfect where the Executive could use its own sweet will to curtail the basic rights of those for Those protection provisions had been made in Part III of the Constitution of Bangladesh. The State of Emergency, proclaimed on 28th of Dec. 1974, continued upto the 26th of Nov. 1979, i. e., even after changes in the Government had taken place and various events such as the assassination of Sheikh Mujibur Rahman, the military *coup d'etat* of 15th August 1975, the declaration of Martial Law, Khondokar Moshtaque Ahmed taking over as President on the 15th of August 1975, had taken place. In spite of the attemps by the Executive to erode the rights in the Constitution the judiciary has been vigilant in trying to safeguard, as far as possible within the limitations imposed by States of Emergency, the people's rights. In the case of *Akram Hossain Mondol* vs. *Govt. of Bangladesh*, the Additional District Magistrate passed an order of detention with a view to preventing the detenu from acting in a manner prejudicial to the security of Bangladesh and/ or the maintenance of the public order within the meaning of rule 2(e) of the Emergency Powers Rules, 1975. The grounds stated in the order of detention were prejudicial acts as defined by rule 2 (e) and these

prejudicial acts were grounds of preventive detention as they were included in 5(i) of the said Rules. The detaining authority had mentioned the grounds of detention disjunctively as it was not quite sure as to which of the prejudicial acts the detenu was likely to act. It did not know definitely whether the detenu acted or was even likely to act prejudicially to the security of the state or the public safety or the maintenance of public order. This showed that the detaining authority passed the order without due application of mind and the order was passed rather casually and such order of detention could not be justified and accordingly would be declared to be made without lawful authority.[44] This was only one of the case where the Judiciary of Bangladesh played a laudable role in safeguarding the fundamental rights of the people.

In 1977 Major-General Ziaur Rahman became President and remained so until the 30th of May 1981 when he was assassinated in Chittagong. The Acting President Justice Abdus Sattar issued a Proclamation of Emergency on that day (i. e. the 30th of May 1981), and again the right to move any court for the enforcement of the fundamental rights was suspended. This State of Emergency lasted till Sept. 1981. Again in 1982 another upheaval took place and Martial Law was proclaimed by the then Chief of Army Staff Lieutenant General Hussain Muhammad Ershad who became the Chief Martial Law Administrator. Later on he became the President and on November 27th, 1987 and then in Nov. 1990 two other States of Emergency were proclaimed under Art. 141A of the Constitution. It was quite obvious that instead of a grave emergency threatening the security of Bangladesh or internal disturbance, war or aggression it was in order to perpetuate that particular regime when it came under threat of being toppled by mass upsurge that the provisions relating to States of Emergency were used.

Human rights violations become rampant, specially in a country like ours which is not only economically backward but also politically unstable.

CONCLUSION

It is clear, therefore, that although emergency provisions find place in most national, international and regional treaties and though they aim at confronting situations which threaten national security they are used usually as measures or means of putting down what may sometimes be a quite justifiable and popular uprising against an autocratic regime. The Universal Declaration of Human Rights in its preamble states, "... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,[45] Thus in order to prevent situations where the Government or the Executive is confronted with an unmanageable mass campaign human rights of all citizens ought to be valued and protected. This will prevent them from taking recourse to violent rebellion to counteract which Emergency provisions are used. The Emergency provisions contained in the national, regional and international treaties must have rigid guidelines within which they may be used and not otherwise. There has to be rules which must make clear what exactly is meant by emergency, whether it includes threat to the government to mean internal strife, whether such states of exception can continue indefinitely etc. It must be remembered that situations of emergency do not automatically justify human rights violations - there must be certain fundamental rights which must be made truly inanlienable and non-derogable, even in the most provoking situations. The Constitution must contain a list of rights which are considered by

international law to be non-derogable and specifically state that they will not be affected by States of Emergency or for that matter any other situation. The Constitution should also enumerate the situations which justify departure from the normal lagal order. Legislative approval must be required and the duration of the State of Emergency must be for a specific period and no longer. Judicial remedies are important safeguards of human rights and Courts should have jurisdiction in cases of human rights violations. It ought to become the duty of the judiciary to ensure that the Executive does not, in order to perpetuate its power and cover its misdeeds, cross the limits placed on its power to declare a State of Emergency.[46] The constitution must not become the curtain or cloak behind which the dictator wields power. Steps have to be taken which will ensure that whereover a citizen's legal rights is derogated from steps are taken to identify and implement safeguards against its abuse. [47]

Personal liberty of citizen can only be hampered on the most serious of grounds and any detention order must be based strictly on legal rules and human rights violations of detainees must be guarded against vigilantly. The civilian judiciary must have the power during the continuance of the State of Emergency to review individual cases of detention to ensure that the stated grounds for detention are valid and sufficient, that proper procedures have been followed and that the detention is lawful.

On the termination of the State of Emergency the fundamental rights that have been suspended must be automatically restored and the opportunity given to all those persons who have grievances and allegations of abuses of human rights of going to Court. In short we require a

committed Executive which aims at the protection of people's rights and not of its own power. This can come only through a system of checks and balances when any abuse by the Executive is automatically countered by a strong legislature and a vigilant judiciary, i. e., a system of Separation of Powers. The legislature ought to comprise of persons who are truly representive of the people so that they can guard against any attempts by the Executive to encroach upon the rights of the citizen. The Judiciary's role is of course that of a protector. Judicial somnambulance, indifference or timidity has been called a greater threat to human rights enforcement than the aggression of violators because the greatest bulwark against state authoritarianism or arbitrariness would then be gone.[48] In times of Emergency when the Executive has taken advantage of derogation clauses it must be ensured that persons arrested or detained under Emergency law are not held incommunicado, all arrests must be made public and administrative internment of unlimited duration must be prohibited.[49]

In the international and regional levels universal ratification of human rights treaties governing States of Seige must be encouraged together with the right of individuals to petition directly.[50] The machineries of the UN should be used to pursuade ratification of international conventions, covenants, bills of rights at the earliest opportunity by all countries. In this connection it may be mentioned that Bangladesh has not ratified the International Covenant on Economic, Social and Cultural Rights, 1966; the International Covenant on Civil and Political Rights, 1966; the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. Ratification will ensure to a certain extent that countries,

where frequent change of government occur, will not be able, on any plea whatsoever, to circumvent or take away the basic rights of its citizens. The United Nations as well as other regional organizations should take appropriate steps to ensure that states which are parties to the International Covenants and other treaties do not deviate from the requirements which must be fulfilled before a State of Emergency can validly be declared. States Parties must be vigilant to protest against human rights violations in other countries and the human rights commitee must take the help of the UN General Assembly and its relevant subsidiary bodies to guard against gross violations of human rights in the countries under its purview. What we require is thus a strengthening of the consciousness of individuals as well as individual states so that not one single violation of human rights go unchallenged. "The need to maintain law and order cannot be denied. An extraoridnary situation may require extraordinary measures, but the rule of law is to maintain law and order in accordance with law and not in disregard of it." We may echo these words and say that situation, may require special measures to protect national security and to maintain peace, law and order but this must be done not in disregard of the rights of the very poeple whose collective security means national security. It is quite possible to protect the nation without endangering individual rights. Short term security is not worth it if it means that individuals have to suffer.[51]

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★ Lecturer, Deptt. of Law, Dhaka University

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PROTECTION AND ASSISTANCE FOR REFUGEES IN ARMED CONFLICTS AND INTERNAL DISTURBANCES

SUMAIYA KHAIR

1. INTRODUCTION

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

Lecturer Department of Law University of Dhaka.

In this paper I have attempted to make a general analysis of the refugee situation and its protective machinery in armed conflicts & internal disturbances and draw a critical conclusion by making some positive recommendations with a view to improving the position of refugees in international and municipal law.

2. CONCEPT OF REFUGEE

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

A refugee is commonly defined as a person who is obliged to flee his habitual place of residence and seek refuge elsewhere. The reasons dictating, his flight may be varied; flight from oppression, prosecution, threat to life & liberty, deprivation, poverty, war or civil strife; flight from the consequences of natural disasters, earthquake, flood, drought, famine etc. Thus the reasons for flight may be characterized as either natural disasters of 'man-made' disasters.[3]

In the legal sense, the use of the term "refugee" is confined to any person who flees his country due to man-made disasters, e.g., political reasons. It is in this sense that the Statute of the Office of UNHCR[4] defines a refugee as any person —

"Who is outside the country of his nationality, or if he has no nationality, the country of his former residence, because he has or had well founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."[5]

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

Because of the second element, a refugee is a stateless person, either *de jure* or *de facto*.[6] Having severed all contacts with his country which he has been compelled to leave because his life or liberty was in danger, a refugee no longer enjoyed the protection normally granted by a state to its nationals abroad. In the country of refuge he is an unprotected alien in the absence of the usual consular & diplomatic protection which aliens may claim from the state of its nationality. The need to provide a substitute for such protection is a fundamental element of the refugee concept[7] and the difficulties faced by the refugee prompted the international community to assist this category of refugees. The need for international action on the refugee problem

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

Historically, the refugee definition used in various instruments normally referred to ethnic or territorial origins of different uprooted groups and to their loss of national protection. The first formal reference to persecution as part of the refugee definition was made in the 1946 Constitution of the International Refugee Organization (IRO), a predecessor of UNHCR. This definition spelt out not only the reasons which make a person a refugee, but also associated those reasons with a

"fear of persecution of reasonable grounds owing to race, religion, nationality or political opinions". IRO's constitution also made reference for the first time to "displaced persons" as well as refugees— a concept to be extensively applied to UNHCR's mandate quite a number of years later. The United Nations Declaration of Human Rights in 1948 similarly referred to everyone's right to seek asylum from 'persecution' and this concept was to continue to prevail in 1950 when the Statute of the UNHCR was drawn up. It was repeated in the 1951 Convention Relating to the Status of Refugees the application of which was limited to victims of persecution as a result of events occuring before January 1st, 1951. However, this restriction was removed by the Protocol of 1967 for, as new groups of refugees emerged, this restriction became more & more discriminatory & unacceptable.[9]

The definition of the term"refugee" in UNHCR Statute and in the 1957 Convention contains certain restrictions designed to exclude persons who are not deemed worthy of the United Nations protection. Those specifically excluded are persons who enjoy the protection of their own countries or persons who are recognized by their country of residence as having the same rights & obligations as nationals of that country. Equally excluded are persons receiving assistance from other United Nations organs or agencies, e. g., the Palestine refugees who are the concern of the United Nations Relief & Worlds Agency for Palestine Refugees in the Near East (UNRWA).[10] However, the 1951 Convention & the 1967 Protocol are considered as the basic components of the present day international refugee law.

In 1967 the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa contended 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 or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[11] It seems, though, that by this extension of the term ' refugee' only victims of man-made disasters are covered, leaving out victims of natural disasters. However, the OAU Convention is a great step forward in the development of refugee law globally where a much larger group of persons are offered protection.

3. STATUS OF REFUGEE

The core elements in general international law define a refugee as a person outside his country, who is unable or unwilling to return there owing to justified fear of being persecuted on grounds of race, nationality or political opinion. A person fleeing from persecution faces insurmountable difficulties where friends are few and the world is indifferent. He is considered an alien on account of language, customs and laws. The country of refuge is unable to deal with the problems presented by the alien as her legislative & administrative machinery are ill-suited for such special problems.

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

The next paragraph specifies, however, that "Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the fromalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that state had he not become a refugee."[17] Thus, the rule established in the interest of persons who have severed all relationship with the country of their actual or former nationality does not affect the rights previously acquired by them in the latter country.

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

Moreover, the international community has an interest in the status and well-being of the persons requiring protection because the refugee is a person of concern to the international community.[13] While states are conscious of the potential threat to their own security which a massive influx may pose, none can however claim to return a refugee to

persecution. States may designate asylum-seekers as "displaced persons", "stateless persons", "illegal immigrants", "aliens", "boat-people," "stowaways", etc. and thus, assert for itself a greater freedom of action.[14]

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

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

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

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

4.(i) GRANTING OF ASYLUM AND THE PRINCIPLE OF NON-REFOULEMENT

Generally speaking, the term "asylum" is used to designate the protection which a state grants to a foreign citizen. A major weakness of traditional international law was its failure to recognize asylum as a human right. The adoption of the UN Charter, however, paved the way for emphasizing the humanitarian aspect of asylum, treating it as a right of the individual & the corresponding duty of the state to grant it. But the traditional international law regards asylum as a right of the state to be granted at its discretion. The discussions on the Declaration on Territorial Asylum indicated that although there was some support for the view that asylum should be treated as a right of the individual the traditional conception that asylum was a sovereign right of the state continued to prevail.[19] The Universal Declaration of Human Rights provides in Article14 that everyone has the right to enjoy asylum from persecution. States, therefore, remain under an obligation to grant asylum to refugees in the sense of lasting protection. General Assembly resolutions have often maintained that the grant of asylum is a peaceful and humanitarian act which is not to be taken as unfriendly by any other state. The state granting asylum is under a duty to take reasonable care to ensure that its hospitality is not abused to the detriment of other states.[20] Article 4 of the 1967 Declaration of Territorial Asylum directs states not to permit people granted asylum to engage in activities contrary to the purposes and principles of the United Nations. The Preamble to the 1969 OAU Convention distinguishes between a refugee in search of an ordinary and peaceful life and one who flees solely for the purpose of fomenting subversion from outside. The latter's

activities are not to be encouraged. ART. II of the OAU Convention proclaims that member states shall use their best endeavours..... to receive refugees and to secure the settlement of those who are unwilling or unable to return. In Latin America the 1954 Caracus Convention ensured the territorial state's sovereign right to grant asylum, the duty of other states to respect such asylum and the exemption from any obligation to surrender persons sought for political offences or persecuted for political reasons.[21] The Convention provides that the "state granting asylum is not bound to settle him in its territory but it may not return him to his country of his origin unless this is the express wish of the asylee."[22] The 1951 Convention contains no direct provisions on asylum, yet Art. 31 grants protection to refugees entering illegally, but at the same time maintains that no refugee can expect, as a matter of right, to regularise his stay in the state of first refuge. In the Preamble to the 1951 Convention parties admit "that the grant of asylum may place unduly heavy burdens on certain countries."

The most essential component of refugee status & of asylum is the protection against repatriation or return to a country where a person has sufficient reasons to fear persecution. This protection has found expression in the principle of *non-refoulement* which constitutes the very basis of the institution of asylum. However, non-refoulement is not equivalent of granting of asylum. The person concerned might have to move on to another country and even if he was allowed to stay in the territory of the state which did not return him, he would not necessarily enjoy the benefits accorded to an asylee. Article 33 (1) of the 1951 Convention on the Status of Refugees declares-

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

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

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

The principle of non-refoulement has been reiterated in almost all recommendations of the UN General Assembly regarding refugees.[24] The Conference relating to the Status of Stateless Persons of 28 September 1954 approves the principle of non-refoulement contained in Article 33 of the 1951 Convention. The UN Declaration on Territorial Asylum states in Art . 3(1) that—

"No person referred to in Art. 1 para 1 shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum,

expulsion or compulsory return to any state where he may be subjected to persecution."

In other words, non-refoulement could be availed of not only by the asylee if within the territory but also by those requesting asylum at the border of the state. However, the principle of on-refoulement is subject to two very wide exceptions, i. e., in the case of overriding reasons of national security or in order to safeguard the population. There is enough evidence to indicate that Regioal Organisations have made notable provisions for asylum & non-refoulement in various Conventions, e.g.—

(i) The Convention on Territorial Asylum adopted at Caracus on 28th March 1954 , Art. 3;

(ii) The American Human Rights Convention adopted in Nov. 1969, Art. 22(8);

(iii) Resolution on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe, 29th September 1967;

(iv) The Asian African Legal Consultative Committee at its sessions in Cairo (1964), in Baghdad (1965) and in Bangkok (1966), specially Art. III relating to granting of Asylum to a refugee;

(v) The OAU Convention Governing Specific Aspects of the Problem of Refugees in Africa, Art. II (3), 1969. [25]

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

The adoption of the concept of "temporary refuge" in the context of admission and non-refoulement was a very

significant development. The proper function of temporary refuge is to facilitate admission and obtain satisfactory solutions. In certain large scale influx situations where a state receives millions of people, it may face difficulties in accomodating them and providing adequate food, clothing and medicine. In such situations, their accomodation is of a temporary nature and they are held at the threshold of the community in order to maintain law & order within the receiving state. Naturally, the country of refuge becomes concerned about their early returns & resettlement, particularly where the influx continues. It is in such cases that the grant of temporary refuge facilitates admission and continuous presence in the country of refuge. It also acts as an indication to the international community that the country of refuge would welcome satisfactory durable solution. [26]

4.(ii) INTERNATIONAL SOLIDARITY & BURDEN SHARING

International solidarity and co-operation in dealing with large scale influx of refugees is of great singnificance in the development of the international protection system. International solidarity relates to all aspects of refugee problem including security and well-being of refugees, defence of their rights, political and moral support to states in protecting refugees, search for durable solutions, etc.

The country of refuge may be in grave difficulties in handling the entire burden of the refugee single-handedly. It may need emergency assistance and support of others in finding a lasting solution to the problem.

The initial outlook of international action in favour of refugees tended to be individualistic where there was an inclination on the part of the states to regard refugee

problems as the primary responsibility of the receivng states. Present attitude, though improved, still seems in practice to be very selective. For example, massive aid has been provided for the refugees in South-East Asia (though support did not come from all quarters), but until recently international concern for refugee situations in Africa has not been proportionate to the size of the refugee problem in Africa.[27] The individualistic approach is quite evident in the 1951 Convention relating to the Status of Refugees where there is no specific provision on international solidarity & cooperation except for a Preambular paragraph stating—

"Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation".

The deficiency was remedied when both the Carnegie draft Convention and the consolidated text of articles prepared by the 1975 United Nations Group of Experts contained a common article 5 on international solidarity. The Carnegie draft Convention stated that:

"When in the case of sudden or mass influx, or for other compelling reasons, a state experiences defficulties in granting or continuing to grant the benefits of this Convention, other Contracting States, in a spirit of international solidarity, shall take appropriate measures as individuals, jointly, or through the United Nations or other international bodies, to share equitably the burden of that state."

A similar provision appears in the 1967 Declaration on Territorial Asylum in which Article 2(2) privides,

"Where a state finds difficulty in granting or continuing to grant asylum, states, individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden of that state."

Article II (4) of the 1969 OAU Convention, however, contains a more forth-right provision. It states :

"Where a member state finds difficulty in continuing to grant asylum to refugees, such member state may appeal directly to other member states and through the OAU, and such other members states shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the member state granting asylum."

A somewhat weaker formulation is found in Principle 4 of Resolution 14 (1967) on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe-where it states--

"Where difficulties arise for a member state in consequence of its action in accordance with the above recommendations, Governments of other membr states should, in a spirit of Eurpean solidarity and of common responsibility in this field, consider individually, or in cooperation, particularly in the framework of the Council of Europe, appropriate measures in order to overcome such difficulties."

The principle of burden-sharing implies that the international community will make every effort to relieve the burden placed on the state granting refuge. The sharing of responsibility whether through international funds or resettlement opportunities in their countries cannot be

severed from the concept of regional responsibility & solidarity. The principle of burden-sharing should not be regarded as a pre-condition to the observance of basic humanitarian principles.[28] Solidarity in dealing with refugee influx is not only a humanitarian obligation but a requirement of self interest, because failure to provide adequate assistance may directly affect other states. Problems can only be minimised or avoided if solidarity is expressed promptly and effectively. Narrow political considerations should be discarded because playing politics with human beings is not only cruel but short-sighted as such attitude almost always imports more misery.

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

5. PROTECTION OF REFUGEES IN INTERNATIONAL LAW

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

Analysis of the internationsl protection system cannot be made without examining the causes of the present mass flows. The obvious causes of mass exoduses are violations of basic civil and political rights—but violations of economic, social and cultural rights have made a significant impact on the problem. Violation of basic rights may be seen both at the international and the domestic level. Sufferings of victims of natural disasters or man-made disasters, such as riots and internal strife, always arouse a special compassion. Deprived of the protection and support of their community, such persons are left to fend for themselves in this bitterly cruel world.

The concept of international protection first materialized after the First World War and in 1930 international protection made its official entry into international affairs when the Assembly of the League of Nations directed its competent bodies to ensure the legal and political protection of refugees. This attitude culminated in the creation of the Office of United Nations High Commissioner for Refugees (UNHCR) on Ist Jan. 1951 followed by the Convention Relating to the Status of Refugees of 28 July 1951. Between two World Wars, however, a series of international instruments relating to refugees were adopted. On 12 Feb. 1946 the United Nations General Assembly in Resolution 8(I) laid down the principle that the refugee problem "is international in scope and nature." This principle is confirmed in the Preamble to the Refugee Convention which states:

"..... that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem, of which the United Nations has recognised the international scope and nature, cannot therefore be achieved without international cooperation ....."[31]

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

The Office of the UNHCR or the 1951 Convention relating to the Status of Refugees relates primarily to humanitarian function. It is therfore obvious that the international community should consider situations involving large scale influx of refugees from every relevant persective. Some of the universal treaties relating to refugees that are available are :

(a) the 1951 Convention relating to the Status of Refugees;

(b) the 1967 Protocol relating to the Status of the Refugees;

(c) the 1957 Hague Agreement relating to Refugee Seamen;

(d) 1973 Protocol to the 1957 Hague Agreement;

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

(i) the 1954 Convention relating to the Status of Stateless Persons ;

(ii) the 1961 Convention on the Reduction of Statelessness ;

(iii) the 1961 Geneva Convention relating to the Protection of Civilian Persons in Time of War;

(iv) the 1977 Protocal additional to the 1949 Geneva Convention relating to the Victims of Internal Armed Conflicts.

International instruments on human rights are also relevant-

(a) Universal Declaration of Human Rights, 1948;

(b) International Covenant on Civil & Political Rights, 1966;

(c) International Covenant on Economic, Social and Cultural Rights, 1966;

(d) Final Act of the International Conference on Human Rights (Proclamation of Tehran), 1968;

(e) International Convention of the Elimination of All Forms of Racial Discrimination, 1965;

(f) Convention on the Non-applicability of Statutory Limitations to War Crimes Against Humanity, 1968; etc.

6. INTERNATIONAL PROTECTION OF REFUGEES IN ARMED CONFLICTS

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

(a) PROTECTION OF REFUGEES UNDER THE FOURTH GENEVA CONVENTION OF 1949 ON THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

Article 44 on refugees provides :

"In applying the measures of control mentioned in the present Convention the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy state. refugees who do not in fact enjoy the protection of any government".

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

Article 70 para 2 provides -

"Nationals of the occupying power who before the outbreak of hostilities have sought refuge in the territory of the occupied state, shall not be arrested, prosecuted, convicted or deported from the occupied territory except for offences committed after the outbreak of hostilities which according to the law of the occupied state, would have justified extradition in time of peace."

This paragraph deals with the protection of persons who escaped from their country before the outbreak of hostilities and found refuge or asylum in the occupied country.

A tragic consequence of armed conflicts and war is that a large number of people are forced to leave their homes to find themselves dispersed in different countries. The International Committee of Red Cross (ICRC) through its Central Prisoners of War Agency contributed greatly in establishing contacts between people separated from their families. Article 26 of the fourth Geneva Convention 1949 which is concerned with the reunion of dispersed persons with their families provides-

"Each party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage in particular the work of organisations engaged in this task provided they are acceptable to it and conform to its security regulation."

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

(b) PROTECTION OF REFUGEES PROVIDED BY THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS ON AUGUST 12, 1949

During the discussion regarding the formulation of Additional Protocols to the Geneva Conventions, the Representative of U.N. Secretary General expressed the hope that the Conference whould consider the insertion of a draft article stipulating that refugees & stateless persons would be considered as "protected persons" under the provisions of Article 4 of the Fourth Geneva Convention 1949. The Conference eventually adopted as Article 73 of Protocol I :

"Persons who before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or state of residence shall be protected persons within the meaning of Parts I & III of the Fourth Convention, in all circumstances and without any adverse distinction".

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

This entails the involvement of the ICRC & the UNHCR in concrete humanitarian actions relating to the protection of refugees in armed conflicts.[34] As for reunification of dispersed families, Article 74 of Protocol I provides-

"The High Contracting Parties and the Parties to the Conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organization engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective regulations."

For the first time a specific provision regarding the reunion of dispersed families was introduced in an international Convention.

7. ROLE OF UNHCR

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

UNHCR's functions may be broadly classified into-

(i) Promotion of grant of asylum:

(ii) Reunion of families;
(iii) Application of the doctrine of non-refoulement;
(iv) Maintenance and material assistance;
(v) Voluntary repatriation;
(vi) Assimilation or resettlement;
(vii) Supervision;
(viii) Coordination; and
(ix) Public relations.

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

8. REFUGEES IN INTERNAL LEGISLATION OF STATES

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

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

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

For example, Indonesia & the Philippines offered regional processing centres in their domestic territories which would receive Indo-Chinese refugees from other ASEAN countries who had received guarantees of resettlement elsewhere. Regional solidarity is also

expressed by religious or ideological affinities. For example, Islamic Solidarity has been expressed in many ways in refugee situations as far apart as Pakistan & Malaysia. Malaysia which was unwilling to provide permanent residence to any Vietnamese because of the delicate ethnic situation prevailing in Malaysia, was able to accept & accomodate quite a large number of Muslim refugees from the Philippines and Kampuchea. Similarly Western or Christian solidarity has a long history since the early days of the League of Nations.[37]

Many states have accepted the fact that refugees deserve protection and assistance. The grant of asylum is itself a protective measure which is expressly acknowledged in the constitutions of some states. Ratification of the 1951 Convention and the 1967 Protocol may directly influence local laws followed by the enactment of specific refugee ligislation and adoption of adequate administrative procedures. However, legislative incorporation may not be expressly demanded but effective implementation requires some form of procedure whereby refugees may be identified and protected against expulsion. In Australia neither the 1951 Convention nor the 1967 Protocol has been expressly incorporated in its municipal law and the refugee is dealt by the discretionary powers of the Migration Act of 1958, as amended. France determines refugee status by following the Preambular provision of the 1958 Constitution which includes a statement on the principle of asylum & a series of laws & administrative decrees. In the United Kingdom the entry, residence and removal of foreigners are controlled by the Immigration Act of 1971 which does acknowledge a class of persons who should be accepted and not deported on account of a well-founded fear of persecution. As for the United States legislation, it

expressly incorporates the refugee definition of the Convention and Protocol.[38] Countries which have no domestic legislation to implement the Convention have nonetheless accepted refugees, for e.g. Burundi, Cameroon, Nigeria and Sudan had more than one million refugees in their populations in 1981. Pakistan hosts a substantial bulk of Afghan regugees while Thailand shelters refugees from Kampuchea, Laos and Vietanam. Palestinian refugees are scattered in Labanon, Jordan, Syria and the Gaza Strip.[39] Once permitted to reside permanently in the receiving state, the refugee becomes subject to the law of that counrty and as such enjoys the guarantees given to all persons under its jurisdiction. The protection afforded by internal legislation is vital because international protoction can function as a supplement to the protection accorded by internal institutions.

9. CONCLUSION

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

The law relating to the refugee problem, therefore, must be more than just a bundle of rules relating to the status and

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

The challenge before the international community is to develope international solidarity in humanitarian action through active & sincere co-operation for promoting justice, peace and the develoment of the peoples. Though international solidarity cannot be made a precondition for compliance with basic humanitarian principles without such solidarity the prospect of many millions of people in the future, and for the world as a whole, is bleak. In terms of the modern problems in different parts of the world, the 1951 Convention relating to the Status of Refugees is only of limited applicability. Though it is the only universal instrument avaliable it does not contain adequate provisions on admission, refugee status, asylum, international solidarity in burden-sharing etc. The vacuum created by the 1951 Convention relating to the Status of Refugees may be minimized to some extent by gerneral practice of states and by the extension of general principles of law to the refugee situation. Regional action, of which the OAU Convention 1969 is a prime example, has an important part to play in the protection of refugees. States which are not parties to

the Refugee Convention or any international instrument concerning refugees are bound by customary international law to provide minimum standards of treatment respecting fundamental human rights of the refugee and this is usually found in national legislations. States should be engaged in a global discussion for the effective solution of the refugee problems. Recent events, however, show that refugee problems can no longer be confined within regions because lately it is seen that the refugee situation extends beyond the regional perspective to encompass the entire international community. If global contribution is not made, then a serious imbalance will develope that will make it difficult to find a satisfactory system of international management and control of refugee problems at the global level. For some reason, the Asian contribution to global consideration of the refugee situation has been quite negligible. There is, however, a growing awareness that the primary need in the modern world is for global solidarity in order to deal with problems of large scale refugee influx.

States have to be aware of the origins of the refugees as well as he consequences. States shall run a greater risk if the exodus of refugee attains unmanageable proportions. More international attention may be given to the possibiliy of eventual voluntary repatriation as a remedial response to the problems of mass exodus. Though there is no express provision for the dissemination and teaching of international refugee law, these activities are essential for the effective functioning of the legal protective system. The observance of the rights of the refugees depends upon the general social consciousness of the refugee problems and the effectiveness of the law when human rights of refugees are researched, documented and publicized. The need to strengthen international forces in the defence and

promotion of the fundamental rights of refugees is stronger today than ever before. While human rights may be traced in the UN Charter which ensures protection of the human rights as one of its cardinal principles, the Universal Declaration of Human Rights 1948 art. 14(i) is more emphatic when it states that "everyone has the right to seek and enjoy asylum from persecution." There is definitely a causal link between the protection of human rights of refugees on the one hand and international peace & security on the other. If nations could be made to respect these righs then that would spell considerable achievement for mankind.

Today when the world is torn by armed conflicts, wars, hostilities human misery has increased manifold. Recent situations in the Gulf have further added to the already mammoth problems existing in the international arena. The refugee problem threatens to grow to monstrous proportions where maintenance of national & international peace and security would be almost impossible. In a world where peace is a elusive phenomenon, solutions to such problems seem to be equally elusive. Unless there is a world-wide co-operation and respect for the ideals for which each state stands there can be no lasting cure to human despair and men will continue to be the victims of inhuman conduct and cruel persecution. A satisfactory approach to the refugee problems requires states to deal with the protection and assistance aspects since they both relate to the well-being of the refugee. Where a man has no home, life, liberty & property become meaningless. To safe-guard a man's right to enjoy the freedom of his home legal responses are necessary where such rights & obligations of states may be determined in relation to the refugees, other states and the entire international community. The gap

between theory and practice must be removed for the effective implementation of the protective systems available to grapple with the refugee problems. Nations should join hands in making this world a better place to live in for generations to come. The humanitarian nature of the refugee situation requires expression of international solidarity by material assistance coupled with the adoption of fundamental principles in practice for the effective solution of the refugee problems.

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HUMAN RIGHTS IN ISLAMIC LAW AND MODERN INTERNATIONAL LAW : A COMPARATIVE STUDY

DR. A. B. M. MAFIZUL ISLAM PATWARI

1. PRELIMINARY REMARKS

Louis Henkin in the "Introduction" to his edited work *The International Bill of Rights* has written, "HUMAN RIGHTS is the idea of our time."[1] This is the general view of almost all the jurists of the western world on human rights. But this generally followed idea is misnoma. In fact, human rights is not an idea of our time. It is an idea which took a positive shape fourteen hundred years before by Islamic law as found in the Holy *Quran* and the *Sunnah*. Human Rights took an international character by Islam. Islam has guaranteed some human rights and fundamental freedoms which are found expressed in the international law of our time.

The western jurists who do not have an idea about Islam or who are ideologically opposed to Islam try to forget the contribution made by Islam towards the development of the concepts of human rights and fundamental freedoms in the international spheres. The Holy *Quran* and the *Sunnah* have made in several occasions references to rights of the different sections of the people of a society. These rights

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Professor and former Chairman Department of Law University of Dhaka and President Humanist and Ethical Association of Bangladesh.

are also extended to the enjoyment of the non-Muslims in an Islamic State. In other words, Islam has granted a full-fledged Bill of Rights which is to be accepted throughout the world by the Muslims as well as by the non-Muslims.

In order to establish this view, our first purpose would be to present Islamic provisions concerning human rights and fundamental freedoms, then to present human rights as provided by the international instruments, and thereafter a comparative study between the two systems will be made with a view to finding out some recommendations and conclusions.

2. ISLAM AND HUMAN RIGHTS

A. Equality of All Persons

The foundation of the social system of Islam rests on the conception that all human beings are equal and belong to one universal brotherhood. It announces that all men in the world have sprung from the same parents,[2] (Adam and Eve), and, therefore, are brothers and are equal in their status as human beings. Islam rejects all distinctions of birth, class, race, colour and language. Anyone who believes in one Allah as his Lord and accepts the guidance of the Prophet as the law of This life can be a member of the Muslim society.

According to Islam, mankind belonged to a single tribe and single life pattern. "Mankind was single nation, but differed later."[3] Moreover, Allah divided men into different races, tribes and classes so that they could be easily identified. "I made you into nations and tribes, that you may recognise one another."[4] Thus, in the eye of Islam, the artificial classification of society on the basis of differences

of tribe, caste, complexion, language etc. is quite meaningless.

Islam places women at the same level as men with respect to their right to property, honour, marriage, education etc. "Let the women live in the same style as you live."[5] It ensures her right to life by protesting in strong language against the malpractice of burying the new-born female issue. "When the female infant buried alive will be questioned for what crime she was killed."[6]

Islam created a revolutionary change in the status and position of slaves. Islam encourages gradual abolition of the institution of slavery. In the Quran it is clearly stated that the higher way available to the believers to do is to "free a slave." It forbids enslavement of Muslim men and women, and repeatedly advises humane treatment of slaves regarding food, clothing, abode etc. The Prophet spoke of servants and slaves as brethren since all have descended from the same father, Adam. In this way, slaves in Islam enjoy ranks and positions unparalleled in the history of the world.[7]

From the above discussion it is evident that Islam ensures equality of treatment to all persons— even women and slaves have been given unique status and position, making them equal in the eye of Islamic law. On this point Dr. Ahmad Galwash writes, "Equality of right... was the distinguishing feature of the Islamic commonwealth. A convert from a humbler clan enjoyed the same rights and privileges as one who belonged to the noblest Koreish."[8]

B. Right to Life, Wealth and Prestige

Islam ensures the security of life through imposing ban on killing man except on reasonable grounds. In the Holy Quran, Allah said, "Kill not one another." [9] Allah also said,

"Do not take life— which Allah made sacred, except just cause. If any one slew a person unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole people. And if anyone saved a life, it would be as if he saved the life of the whole people."[10] Again, Allah forbade the killing of a believer (*Mumin)* in the following language, "Who so slayeth a believer of set purpose, his reward is hell for ever. Allah is wrath against him and He hath cursed him and prepared for him an awful doom."[11]

Islam introduced the system of compensation (*Qisas)* for committing murder wrongfully and, thus, it saved the society from the curses of blood-fued and revengeful murder. "If anyone is slain wrongfully, I have given his heir authority to demand *Qisas* or to forgive, but let him not exceed bounds in the matter of taking life (as a retaliation)."[12]

Islam not only established the right to life, but it also guaranteed security to wealth, prestige and family life. The Quran states, "Do not eat up your property among yourselves in vanity."[13] It also states, "Do not squander your wealth among yourselves in vanity."[14] In the Farewell Pilgrimage, the Prophet said, "Your lives and your properties and your honours are sacred to one another like the sacredness of this day of yours in this city of yours."[15] The Prophet on another occasion said, "The blood, property and honour of a Muslim must be sacred to every Muslim."[16]

In this way, the Quran as well as Sunnah protects right to life, wealth and prestige and ensures a free society in which no one, even the non-Muslims, shall be deprived of life, property and honour without due procedure of law.

C. Right to Personal Freedom

Islam ensures the right to personal freedom. It says that no man may be wrongly arrested, detained or coerced in any manner, not justified by law. In *Muwatta* of Imam Malik it is written, "In Islam no man may be imprisoned without justice." Thus, no man can be arrested without any specific charge against him; and no charge can be made without proper investigation into the facts. Without trial no one may be punished, and in the trial everyone would have the right to defend himself. No one may be held responsible for any crime committed by others including relatives like father, son etc. On this point the Quran is very much explicit," No one can bear the burden of another." [17]

Right of privacy is also ensured by Islam. In the Quran it is said, "Do not enter houses other than your own without first announcing your presence and invoking peace upon the folk thereof."[18]

As Islam claims a pure family life as well as an ideal society, it recognises right to marry and to found a family. In an Islamic family the housewife is the manager of the household affairs and the caretaker of the children. As the wife is the guardian of children, so also the husband has been made the guardian of the family including his wife. In this way, Islam ensures the right to found a family in one hand, and integrates family life through the general supervision of a male member over all the members of the family.

D. Democratic Freedoms

Islam recognises the democratic rights of the citizens. It recognises universal franchise. Right to criticise the

government has been recognised in an Islamic State. Thus, the existence of the opposition party is acknowledged in Islam. They have the right to organise political meeting and gathering.

Every man is entitled to the freedom of his thinking and religious beliefs. "There is no compulsion in religion."[19] Freedom of speech is recognised in Islam. But it does not recognise any excess or harsh speech. In the Quran it is said, "Allah loveth not the utterance of harsh speech save by one who hath been wronged."[20] Thus Islam, subject to limitation, recognises freedom of expression and freedom of the press.

E. Rights of the Religious Minority

Regarding the religious rights of the non-Muslims, Islam is very liberal and it extends them full freedom to observe their respective religion. It ensures all types of social rights to the non-Muslims. Non-Muslims enjoy full security of their lives and properties. Similarly, they enjoy full rights of educational facilities. They enjoy maximum political rights.[21]

F. Right to Economic Security

Islam recognises the right of every person, irrespective of caste, creed and religion, to meet their basic ecomomic needs like food, shelter, clothes, education etc. In respect of employment and earnings equal opportunities are open to all. Everyone is allowed to adopt any profession or service according to will and ability. He will have full freedom to enjoy his earnings which will not be dispossessed from him through confiscation or other coercive methods. If anyone

fails to meet his basic needs through personal income, despite his hard efforts to do so, he is entitled to financial assistance from the society. Besides this, special grants are also offered by the State to the unemployed, the disabled and the family of the diceased person. In this way, Islam offers complete security of basic needs to the society.

G. Enforcement of the Rights

Islam not only guarantees some human rights and fundamental freedoms to the Muslims and non-Muslims but at the same time provides procedures for the enforcement of these rights if and when they are infringed by any person. The enforcement procedures are dual in nature: one will be conducted by the State machinery, the court; and another will be conducted in the next world. If any right is infringed by any party the aggrieved person has the right to petition before the court for the enforcement of this infringed right.

Another procedure has been provided in the Quran that if anybody does mischief, infringes the rights of others, he will be severely punished in the next world. The Quran said, "Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency, and ye believe in Allah."[22] Then it has been warned by referring to some historical events, "Those of the children of Israel who went astray were cursed by the tongue of Dawid, and of Jesus, son of Mary. That was because they rebelled and used to transgress. They restrained not one another from the wickedness they did. Verily evil was that they used to do."[24] In the Quran a distinction between right conduct and indecency has been made with a view to giving a clear picture of awful doom which will happen in the next world. In the Quran it has been laid down," There may spring from you a nation who invite to goodness, and enjoin right

conduct and forbid indecency. Such are they who are successful. And be ye not as those who separated and disputed after the clear proofs had come unto them. For such there is an awful doom. "[24]

From the above discussion it is evident that Islam recognises human rights and fundamental freedoms and along with them procedures for enforcement which are peculiar in nature— dual procedures, which are not found in the modern system. The contribution made by Islamic law to the development of human rights and fundamental freedoms has been summarised by Bosworth Smith in his *Mohammed and Mohamadanism* in the following words:

> "It recognised individual and public liberty, secured the person and property of the subjects, and fostered the growth of all civic virtues. It communicated all the privileges of the conquering class to those of the conquered who conformed to its religion, and all the protection of citizenship to those who did not. It put an end to old customs that were of immoral and criminal character. It abolished the inhuman custom of burying the infant daughters alive, and took effective measures for the suppression of the slave-traffic, it prohibited adultery and incestuous relationship; and on the other hand, inclucated purity of heart, cleanilness of body, and sobriety of life".[25]

These words reveal the fact how much Islam contributed to the development of human rights and fundamental freedoms in the world.

3. HUMAN RIGHTS IN INTERNATIONAL LAW

To-day it is generally believed, "The concept of international protection of human rights is firmly established in international human rights law."[26] The international protection of human rights has been established in international law after the second world war. Before the second world war, besides Islamic State's human rights were protected by national instruments, the *Magna Carta*, 1215, Petition of Rights, 1627, Bill of Rights, 1688, Act of Settlement, 1702, American Declaration of Independence, 1776, American Bill of Rights, 1791, and French Declaration of Rights of Man and Citizen, 1789, were important national istruments in which some human rights and fundamental freedoms had/have been protected. From these instruments three important concepts relating to human rights and fundamental freedoms have originated: principle of inalienability, principle of inviolability and doctrine of rule of law.[27]

The Charter of the United Nations Organisation, 1945, was the first international instrument by which international protection of human rights have been legally recognised. In the Preamble the peoples of the United Nations record their determination "to re-affirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations, large and small .... " Human rights and fundamental freedoms have been mentioned in Articles1, 13, 55, 56, 62, 68 and 76 and specific functions have been endowed to the General Assembly, to the States Parties to the United Nations, to the Economic and Social Council as well as to the Trusteeship Council.

Following the Charter, on the 10th December, 1948, the General Assembly adopted and proclaimed the Universal

Declaration of Human Rights as "a common standard of achievement for all peoples and all nations."[28] The Declaration proclaims, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[29] It also sets out the basic principle of equality and non-discrimination and regards the enjoyment of human rights and fundamental freedoms.[30]

The Universal Declaration of Human Rights, 1948 , proclaims two kinds of rights: civil and political rights and ecomomic, social and cultural rights. Civil and political rights, mentioned in Articles 3-22, are as follows: right to life, liberty and security of person; freedom from slavery and servitude; freedom from torture or cruel, inhuman or degrading treatment or punishment; right to recognition as a person before the law; equality before the law and equal protection of law; right to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; right to a fair trial and public hearing by an independent and impartial tribunal; right to be presumed innocent until proved, guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and residence; right of asylum; right to a nationality; right to marry and to found a family; right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; right to peaceful assembly and association; right to take part in the government of one's country and to equal access to public service in one's country.

The economic, social and cultural rights, recognised in Articles 22-27, include the right to social security; right to work and free choice of employment; right to equal pay for equal work; right to form and join trade unions, right to

rest and leisure; right to a standard of living adequate for health and well-being; right to education; right to participation in the cultural life of the community; right to protection of the moral and material interests resulting from one's authorship of scientific, literary or artistic productions.

Article 28 recognises that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized. Article 29 provides that in the exercise of his rights and freedoms, everyone shall be subject only to the limitations that have been established by law to secure due recongition and respect for the rights and freedoms of others and to meet the just requirements of morality, public order and general welfare in a democratic society. These human rights and fundamental freedoms shall not be exercised contrary to the purposes and principles of the United Nations. Article 30 states that no State, group or person may claim any right to do anything aimed at destroying the rights and freedoms set out in the Declaration.

All these rights contained in the Universal Declaration of Human Rights, 1948, were declaratory because the Declaration was not a legally binding treaty. But it has got some moral and political significance. Mrs. Roosevelt went to the extent of saying that it was a *Magna Carta* of mankind. It has some attributes of *jus cogens*. Another significance lies in the fact that it is now considered to be an authoritative interpretation of the United Nations Charter, spelling out in considerable detail the meaning of the phrase human rights and fundamental freedoms.

Whatever merit and significance the Declaration may have, it was not a treaty which was legally binding on the

Member States of the United Nations. So, steps were taken to give legal effect to these provisions of the Declaration in the form of covenants. Thus, in 1966 two international covenants on human rights were adopted: International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. In addition, the Optional Protocol to the International Covenant on Civil and Political Rights was also adopted in that year. The two Covenants proclaim almost all the rights mentioned in the Universal Declaration of Human Rights with a view to giving legal coverage under international law. Some new rights have been introduced by the International Covenant on Civil and Political Rights. An important one is in Article 27 which states," In those States in which ethnic, religious or linguistic minorties exist, persons belonging to such minorities shall not be denied the right, in cummunity with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

The international instruments contain provisions relating to implementation of human rights and fundamental freedoms. The Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights, 1966, is responsible for supervising implementation of human rights set out in the Covenant. The Optional Protocol to the International Covenant on Civil and Political Rights, 1966, enables the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violation of any of the rights set forth in the Covenant. The Committee on Economic, Social and Cultural Rights is responsible for the implementation of economic, social and cultural rights set forth in the International Covenant on

Economic, Social and Cultural Rights, 1966. It should be noted in this connection that the International Court of Justice has no jurisdiction in connection with the enforcement of human rights contained in the International Bill of Rights.

From the above discussion it is evident that the Charter of the United Nations Organisation, 1945, was the first international instrument which internationalised human rights and fundamental freedoms. The Universal Declaration of Human Rights interpreted and explained human rights and fundamental freedoms mentioned in the Charter of the United Nations Organisation. The International Covenant on Economic, Social and Cultural Rights, 1966, International Covenant on Civil and Political Rights, 1966, and the Optional Protocol to the International Covenant on Civil and Political Rights, 1966, have given legal validity to the rights proclaimed by the Universal Declaration of Human Rights, 1948. These four instruments altogether are regarded as International Bill of Human Rights.

Undoubtedly, the International Bill of Human Rights represents a milestone in the history of human rights. It has a far-reaching impact on the adoption of European Convention on Human Rights, 1950, Inter-American Convention on Human Rights, 1969, and African Charter on Human and Peoples' Rights, 1981. Following the Bill many of the Constitutions of the World adopted a Bill of Rights. National, regional and international courts have frequently cited principles set out in the International Bill of Human Rights in their decisions and opinions. In fact, the International Bill of Rights remains the beacon that lights all present and future efforts in the field of human rights, both nationally and internationally.

4. A COMPARATIVE STUDY BETWEEN THE TWO VIEWS

From the above observation it is apparent that the International Bill of Rights, by guaranteeing certain human rights and fundamental freedoms, has created far-reaching impact throughout the world in the protection and promotion of human rights. Undoubtedly, this is a positive development in the history of human civilization. But if we look into the matter in other way the contribution of Islam in this field will be more visible to us, because long before the Charter of the United Nations and the International Bill of Human Rights were adopted, Islam's appeal for human rights and fundamental freedoms was heard and was able to prove its worth and effectiveness as it was addressed to all human beings without distinction as to race, sex, colour or creed. One of the Islamic jurists went to the extent of saying," To the students of the Quran not one word, in the Preamble or in the objectives of the Charter and not a single article in the text of Universal Declaration of Human Rights will seem unfamiliar."[31]

The principle of equality befofe law and equal protection of law, the rights of women, freedom from slavery and servitude, the rights of the ethnic, religious or linguistic minorities etc. were all guaranteed by the holy Quran and Sunnah and they are again found guaranteed by the International Bill of Rights.

As regards enforcement of human rights Islam recognised dual procedures: One procedure would be carried on by State maçhinery, the court; another procedure would be conducted in the next world by judging physical acts of the people. It, thus, creates some extra-legal and supra-worldly impact upon the believers and thereby they would abstain from violating the rights of others or

doing any evil things. The worldly procedure for enforcement of human rights has been accepted by the international instruments and accordingly, some authorities have been given to the human rights committees for the implementation of human rights as guaranteed by the international instruments. So, it can be said that the procedure guaranteed by Islam for the enforcement of human rights has been partially adopted by the international instruments.

There is a fundamental difference between the Islamic concept of human rights and western concept of human rights which has been accepted by the international instruments. Human rights in Islamic law are based on the premise that man acts as the representative of Allah on the earth. The western world somehow believes that the mechanical conformity to the pattern of conduct, prescribed by the law of the State or some such authority is sufficient to secure public order and universal peace. In other words, its procedure is to proceed to influence from outside the inner condition of man and somehow it believes that institutions, social, economic, political, etc. have a way of influencing the individual character. "Islam, on the other hand, begins by inviting man to accept the paramountcy of the power of the Lord, his own servitude and bondage to the will of his Master who is the Sovereign Ruler of the universe; in the last resort it redeems him by prescribing upon him norms of behaviour by which he is to regulate his life."[32] In this connection the view of Professor D. De Santillana may be mentioned:

"We may agree with the Muslim jurists, when they teach that the fundamental rule of law is liberty .... God has set a bound to human activity in order to make legitimate liberty

possible for all; without the 'bounds of God', liberty would degenerate into licence, destroying the perpetrator himself along with the social fabric. This bound is precisely what is called law which restrains human action within certain limits, forbidding some acts and enjoining others, and thus restraining the primitive liberty of man, so as to make it as beneficial as possible either to the individual or to society."[33]

We can see the echo of this idea in verse 13 of *Surah Al-Balad* in the holy Quran.

Here lies the fundamental difference between the concepts of human rights as found in Islamic law and in modern international or western law.

5. CONCLUSION

The above discussion reveals the fact that human rights as guaranteed by Islam have been substantially reproduced in the modern international instruments. But the fundamental difference is evident in the spirit, in the concept and in the enforcement procedure. This distinctive character of human rights as guaranteed by Islam, *inter alia*, remains the beacon that has been lighting for fourteen hundred years in all efforts in the field of human rights in the Islamic world.

This discussion also reveals the fact that human rights as guaranteed by Islam have been found in the different verses of the holy *Quran* and in the different *Hadiths* of Prophet Muhammad (SM). On the other hand, human rights as proclaimed or guaranteed by international instruments are found in a concrete shape in which there are signs of the development of modern science and technology. In the

modern instruments human rights have been interpreted and explained which are comprehensible to the ordinary man. On the other hand, the words of the holy Quran are very much brief, sometimes they are symbolic in nature which are not comprehensible to the ordinary man. Sometimes misunderstanding is created in connection with the interpretation of particular verse or verses. Moreover, as it has been pointed out earlier, the western jurists, either being ignorant of the Islamic principles or being antagonistic towards Islamic principles, put emphasis only on the modern development which has been made after the second world war.

This fallacious idea of the western jurists on human rights will have to be removed by presenting before them a consolidated Bill of Rights prepared with reference to the relevant Quranic verses and the hadiths of Prophet Muhammad (SM). The views of Islamic jurists may also be taken into consideration. The Organisation of Islamic Conference may come forward in this direction and prepare a Bill of Rights in collaboration with the United Nations Commission for Human Rights.

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HUMAN RIGHTS UNDER EUROPEAN, INTER-AMERICAN AND AFRICAN SYSTEMS— A COMPARATIVE STUDY

Dr. A.B.M. MAFIZUL ISLAM PATWARI

1. INTRODUCTION

One of the greatest achievements of the Charter of the United Nations, 1945, is that it has, for the first time in the history of the world, legally internationlised human rights and fundamental freedoms. In pursuance of this internationally recognised legal instrument, in 1948 the Universal Declaration of Human Rights was adopted, which was proclaimed by Mrs. Roosevelt as *Magna Carta* of mankind. The Universal Declaration of Human Rights, without having any legal basis, has explained the terms human rights and fundamental freedoms as mentioned in the Charter of the United Nations.

One year after the adoption of the Universal Declaration of Human Rights an inter-European organisation called the Council of Europe was formed. Article 1 of the Statute of the Council of Europe categorically mentions that one of the aims of the Council of Europe is the maintenance and further realization of human rights and fundamental freedoms. Article 3 of the said Statute states that "every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundametal freedoms.." Thus it is apparent that "human rights have a very special place in the philosophy of the

Council of Europe."[1] This philosophy was materialised very soon.

2. HUMAN RIGHTS UNDER EUROPEAN SYSTEM

One year after the formation of the Council of Europe, the Council adopted European Convention for the Protection of Human Rigths and Fundamental Freedoms, in brief European Convention on Human Rights.

The European Convention on Human Rights, before enumerating human rights and fundamental freedoms, in Article 1 declares that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.

The Convention provides that everyone's right to life shall be protected by law.[2] No person shall be subjected to torture or to inhuman or degrading treatment or punishment.[3] No one shall be held in slavery or servitude.[4] Everyone has the right to liberty and security of person.[5] The right to fair trial by independent judiciary is guaranteed.[6] Freedom from *ex post facto* laws and punishement is ensured.[7] Everyone has the right to respect for his private and family life, his home and correspondence.[8] Freedoms of thought, conscience, religion, expression, opinion, peaceful assembly and association are guaranteed.[9] Right to marry and found a family is also ensured.[10]

Article 14 of the Convention prohibits discrimination on any ground such as sex, race, colour, language, religion etc. Right of derogation exercised by any higher contracting party in time of war or public emergency is guaranteed.

Besides the Convention, eight Protocols to the Convention protect some additional rights. Protocol 1 protects three rights: right to property, right to education and right to election. Protocol 4 enumerates four rights: freedom from imprisonment for civil debt, freedom of movement and of residence, freedom from expulsion and prohibition of the collective expulsion of aliens. Protocol 6 abolishes death penalty. Protocol 7 provides that any person who is convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. It also provides for compensation in cases of miscarriage of justice for the right not to be subjected to double jeopardy as well as for equality of rights and responsibility between spouses.

All these above rights are enumerated in the Convention as well as Protocols adopted later on as integral parts of the Convention. All these rights are "certain of the rights stated in the Universal Declaration."[11] But the fundamental difference between the Universal Declaration and the Convention lies in the fact that the latter is not only a legally enforceable instrument but it provides machinery for the enforcement of rights as stated therein (Protocols inclusive). On this point Thomas Buergenthal comments, "Today the human rights system estabished by the Convention is not only the oldest but also the most advanced and effective of those currently in existence."[12]

3. ENFORCEMENT OF HUMAN RIGHTS

The Preamble to the European Convention on Human Rights, 1950, provides that the adoption of the Convention has been regarded as "the first steps for the collective enforcement of certain of the rights stated in the Universal

Declaration." of Human Rights, 1948. This sort of provision for collective enforcement is the most important, and the most original feature of the Convention. Before taking resort to the collective enforcement under the system as provided for in the Convention two conditions must be satisfied: one is under Article 13 which provides that the person whose rights and freedoms as set forth in this Convention are violated shall have "an effective remedy before a national authority;" another in Article 26 which states that the European Commission on Human Rights may deal with the matter after all domestic remedies have been exhausted within a period of six months from the date on which the final decision was taken. Thus, by recognizing the rule of exhaustion of domestic remedies, the generally recognized rules of international law have been given due respect in the case of collective enforcement of the rights and freedoms as set forth is the Convention.

The Convention under Article 19 has created two organs to ensure the observance of the engagements undertaken by the High Contracting Parties: the European Commission on Human Rights and the European Court of Human Rights. Besides these two, there is another organ, the Committee of Ministers which is provided for in the Statute of the Council of Europe and which under Article 13 of the said Statute is the executive organ of the Council of Europe.

The tasks of the Commission in respect of enforcement of rights as set forth in the Convention are exhaustively listed in Articles 24-25 of the Convention. Article 24 states that any High Contracting Party may refer to the Commission any alleged breach of the provisions of the Convention by another High Contracting Party. The Commission, under Article 25 (1), may receive petitions

"from any person, non-governmental organization or group of individuals claiming to be victims of a violation by one of the High Contracting Parties of the rights set forth in the Convention..."

Both Articles 24 and 25 of the Convention introduced striking innovations by the normal canons of international law.[13] Henry Delvaux on this point writes, "The great innovation introduced by the Convention is that an individual, or group of individuals, who considers that his fundamental rights have been infringed may complain directly to the European Commission on Human Rights of the State which considers responsible for such violation."[14] C.M.H. Waldock, on the status of an individual guaranted under Article 25, writes, "The Convention is at once the highest achievement of the Council to date and a new landmark in the development of the status of the individual in international law."[15] J.E.S. Fawcett has given the same line of observation :

> "The first paragraph (of Article 25) embodies the vital and remarkable rights of individual petition, vital because the efficiency of the Convention depends in great part upon it, and remarkable because it carries the individual beyond the traditional limits upon his status in international law. No longer dependent for the protection of his Convention rights upon diplomatic intervention by the State, of which he is a national, the individual may bring an application against any contracting State, which has made the necessary declaration, even if he is a national of that State, and even if he is not a national of any contracting State, and in doing so, he exercises not only a procedural right, such as been granted by other treaties to

individuals, but acts in his own behalf to indicate his own rights and freedoms."[16]

This sort of right of individual petition has been regarded as the corner-stone of the European system of protection.

There are two conditions, under Article 26 of the Convention, precedent to the Commission's jurisdiction : first, all domestic remedies must be exhausted and second, the Commission must then be seized of the petition within a period of six months of the final decision by the State authorities. The rule of exhaustion of domestic remedies is well-known to international lawyers and is based on both justice and common sense. In the case of *Nielson* v. *Denmark*, the Commission clearly stated the principle in the following words :

"The rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual."[17]

If no domestic remedies are available, then clearly there is no need to have recourse to them before the applicant can address himself to the competent international organ. Equally, if there are domestic remedies which are theoretically available but there is unreasonable delay on the part of the national courts in granting a remedy, then the applicant should not be penalised as a result. "International law has long recognised this limitation on the domestic remedies rule; it was to take account of it that the words,' according to the generally recognized rules of international

law, were included in Article 26 of the European Convention."[18]

The European Court of Human Rights as referred to in Article 19 of the Convention is the second European institution for the collective enforcement of the rights and freedoms as set forth in the Convention. The establishment of the court was not simultaneous with the entry into force of the Convention, because a serious difference of opinions arose during the negotiations on the fundamental question whether a European Court of Human Rights should be created at all. As the acceptence of its jurisdiction was optional for the Contracting Parties, it was to require the acceptance of eight of the parties to Convention under Article 56 which came about only on the 3rd September, 1958.

As regards the judgments of the Court, "the Convention is concise and clear."[19] The judgement as provided in Article 51 of the Convention must be reasoned, it is taken by a simple majority vote, with members having the right to append either individual or dissenting opinions. Articles 52 and 53 of the Convention provide that the judgment of the Court shall be final and binding on the parties to the case. The execution of the judgment of the Court is an executive function rather than a judicial one and the Committee of Ministers under Article 54 "shall supervise its execution." "It is here", as D. W. Bowett comments, "that the system may have its weakest link, bearing in mind the nature of the Committee."[20]

From the above discussion it is evident that "the year 1959 has been the creation in Europe of a new international court of justice which, to judge by the quality of its members, is second to none in the world and whose

activities in the future may have a profound effect on the development of international law. This is the European Court of Human Rights"[21] Within the passage of time it has been observed that the expectation of the jurist has been fulfilled to some extent and the European Court of Human Rights has been playing its due role in the protection of human rights and development of its concept in the course of giving judgments of the cases brought before it in accordance with the provisions of the Convention.

As pointed out earlier, the Committee of Ministers has not been mentioned in Article 19 of the Convention as the body entrusted with the collective enforcement of the rights and freedoms as set forth in the Convention. The Committee of Ministers is the executive organ of the Council of Europe the major aim of which is to maintain and realise human rights and fundamental freedoms. So, the Committee has a definite role in connection with the maintenance and realisation of human rights and fundamental freedoms. With this end in view the Convention has provided some specific responsibility relating to the collective enforcement of human rights and fundamental freedoms.

The Committee of Ministers of the Council of Europe has definite role to play in the collective enforcement of the rights and freedoms as specified in the Convention. Its role can be categorized under the three heads: administrative role in the arrangement on the election and function of the European Commission of Human Rights and the European Court of Human Rights; judicial role in deciding whether there has been a violation of the Convention if the matter in dispute is transmitted in the form of Report to the Committee of Ministers by the Commission: and finally.

supervising role in the execution of the judgements of the European Court of Human Rights. In playing its role in connection with the collective enforcement of the rights and freedoms as mentioned in the Convention, the Committee of Ministers has emerged as the third body upon whom the observance of the engagements undertaken by the High Contracting Parties in the Convention has been entrusted.

Before closing this issue one point of human rights relating to the development made by recent case law may be mentioned. Within the short period of thirty years the European Commission on Human Rights and the European Court of Human Rights, while interpreting the provisions of European Convention on Human Rights, have enunciated or innovated new jurisprudential principles of Human Rights which have been regarded by some jurists as the golden treasures of mankind. The relevant cases have been discussed in another work written by me. Here we mention the names of some of the cases: *Harbhajan Sing* v. *The United Kingdom; Paton* v. *The United Kingdom; Arrowsmith* v. *The United Kingdom, Golder* v. *The United Kingdom; Richard Hordyside* v. *The United Kingdom; the Republic of Ireland* v. *The United Kingdom; Tyrer* v. *The United Kingdom; Campbell and Cosans* v. *The United Kingdom; Sunday Times* v. *The United Kingdom; Abdul Aziz Cabales and Balkandali* v. *The United Kingdom; Malony* v. *The United Kingdom; Belgium Linguistic case etc.*

All these case prove the fact that the European Convention on Human Rights is a living instrument which made the Council of Europe a living institution.

4. EUROPEAN SOCIAL CHARTER

The Eurpean Social Charter, 1961, adopted by the Council of Europe, establishes a regional European system

for the protection of economic and social rights. The Charter proclaims the right to work, to just conditions of work, to safe working conditions, to fair remuneration, to organize, and to bargain collectively. It declares the right of children of young people, and of employed women to protection. Right of the family to social, legal and economic protection, right of mothers and children to social and economic protection, and the right of migrant workers and their families to protection and assistance are recognised. Right to vocational guidance and training, to protection of health, to social security, to social and medical assistance, and the right to benefit from social welfare services. It establishes the right of physically and mentally handicapped persons to training and rehabilitation, and the right to engage in gainful occupations in the territory of other Contracting Parties.[22]

The Contracting Parties are obliged to comply with their obligations in the domestic implementation of the rights. It will have to be reported to the Council of Europe. If any State does not accept any specific right, it will have also to be reported to the Council of Europe. These reports are intially reviewed by a Committee of Experts. The Parliamentary Assembly of the Council of Europe receives the conclusions of the Committee of Experts and gives its views thereon to the Committee of Ministers.[23]

All these rights as recognised by the European Social Charter complement the European Convention on Human Rights, 1950. But the fundamental difference lies in the fact that the rights guaranteed by the Convention are enforceable rights whereas the rights recognised by the Charter are not enforceable rights. The European Commission of Human Rights and the European Court of

Human Rights have no jurisdiction to supervise the enforcement on these rights. Thus, in Europe it is evident that the civil and political rights are enforceable whereas economic and social rights are not enforceable.

5. HUMAN RIGHTS UNDER INTER-AMERICAN SYSTEM

The Inter-American human rights system has two distinct legal sources : one has evolved from the Charter of the Organisation of American States and the other is based on the American Convention of Human Rights, 1969. The Charter-based system applies to all 32 member States of the Organisation of American States and the Convention system is legally binding only on the States Parties to it.

Actually, the Charter of the Organisation of American States made very few references to human rights. Article 3(J) [now Article 5 (J)] states that "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex." Article 13 [now 16] declares that "each State has the right to develop its cultural, political and economic life freely and naturally." The State shall respect the rights of the individual and the principles of universal morality.

The Charter did not define fundamental rights of the individual. However, in the same year (1948) American Declaration of the Rights and Duties of Man was adopted which proclaims 27 human rights and 10 duties. The rights are as follows : right to life, liberty and security of person, to equality before the law, to residence and movement, to a fair trial, to protection from arbitrary arrest, to due process of law, to nationality and asylum. Freedoms of religion, expression, assembly and association are proclaimed. Rights

to privacy, property, health, education, benifit of culture, work, leisure time and to social security are guaranteed.

Duties to society, towards children and parents, to receive instruction, to vote, to obey the law, to serve the community and the nation, to pay tax and to work are proclaimed. Duties with respect to social security and welfare as well as the duty to refrain from political activities in a foreign country are also proclaimed.

It may be mentioned that initially the Inter-American Commission on Human Rights was not an integral organ of the Charter. In 1960 it was established by a statute for the promotion of human rights as set forth in the American Declaration of the Rights and Duties of Man. The Commission became the formal organ of the Organisation of American States in 1970. "By designating the Commission as an OAS Charter organ and by charging it with the promotion of 'the observance and protection of human rights' the amended Charter conferred on the Commission an institutional and constitutional legitimacy it had not enjoyed previously."[24]

The Commission again become an integral machinery of the American Convention on Human Rights, 1969. Now, the Commission has dual functions: functions in relation to all members of the Organisation of American States,[25] function in relation to the States Parties to the Convention.[26]

The American Convention on Human Rights prodaims *inter alia* , the following rights : right to judicial personality, right to life, right to humane treatment, freedom from slavery, right to personal liberty, right to a fair trial, freedom from *ex post facto* laws, right to compensation for miscarriage of justice, right to privacy, freedom of conscience and religion, freedom of thought and

expression, right of reply right of assembly, freedom of association, rights of the family, right to nationality, right to property, right to a name, rights of the child, freedom of movement and residence, right to participate in the government, right to equal protection of the law, and the right to judicial protection.[27] These guarantees are supplemented by a broad non-discrimination clause and an undertaking by the States Parties to take progressive measures for the full realization of the rights.[28] The Convention allows the States Parties to derogate from their obligations "in time of war, public danger, or other emergency that threatens independence or security."[29]

As regards enforcement machinery it may be said that the American Convention establishes two organs : Inter-American Commission on Human Rights and Inter-American Court of Human Rights. The Convention gives the Commission standing to refer cases to the Court and provides, in addition, that the Commission shall appear in all casses before the Court.[30] The Court has contentious jurisdiction and advisory jurisdiction. The Court is empowered to award money damages and render declaratory judgments. The Convention does not establish any specific mechanism to supervise the enforcement of the judgments of the Court. It can only send a report to the General Assembly of the Organization of American States, and the Assembly may discuss the matter and may adopt whatever political measures it deems appropriate.[31]

The Court, however, has delivered its judgments in a number of cases, which enunciated some legal principles. It is expected that the Court, in course of time, will emerge as a judicial body comparable to its counterpart in Europe.

6. HUMAN RIGHTS UNDER AFRICAN SYSTEM

The Organization of African Unity established in 1963, adopted the African Charter on Human and Peoples Rights in 1981. The African Charter establishes a system for the protection and promotion of human rights that is designed to function within the institutional framework of the Organization of African Unity.

The rights guaranteed by the Charter can be divided into civil and political; economic, social and cultural; and group rights. The Charter guarantees without qualification the right to equality before the law, human dignity and inviolability. It prohibits all forms of degrading treatment and exploitation, especially slavery, torture and degrading punishment. It guarantees the right to fair hearing and prohibits retroactive criminal punishment. Other rights are qualified— these include the right to life, liberty; freedom of conscience, expression, association, movement, assembly, information and participation in government. These may be derogated from by law.

The Charter guarantees equal rights to the public service and to public property and services. The mass expulsion of non-nationals is prohibited. The Charter protects the right to property, to work under equitable and satisfactory conditions, to equal pay for equal work, to education and to good health.

The Charter re-affirms the right to self-determination and equality of people. "Nothing shall justify the domination of a people by another." States are called upon to eliminate "all forms of foreign economic exploitation particularly that practised by international monopolies". The Charter guarantees the right to national and international peace and security. Asylees must not engage in subversion while taking

shelter. The Charter emphasizes the emergent concept of the common heritage of all mankind evident in the current law of sea and of outer-space.

The Charter emphasizes the right to development and urges member states to ensure a favourable atmosphere for its existence. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The Charter also ensures that all peoples shall have the right to a general satisfactory environment favourable to their development.[32]

The Charter recognises the duties of individuals to the family to preserve its harmonious development and cohesion, respect parents and maintain them in the case of need; to the nation to serve the nation, preserve its independence, integrity, security and solidarity and pay taxes; to Africa to promote the achievement of African unity and preserve its positive cultural values; to other legally recognised communities and to the international community.[33]

The Charter set up an 11-member African Commission on Human and Peoples' Rights with the duty of promoting and overseeing the observance of the rights through studies, symposium, recommendations, education, documentation, conferences, dissemination of information and co-operation with local or national human rights bodies. A State may communicate a breach of the rights by another State to the Commission after an unsuccessful communication with the violator. There may be communications from non-State entities to the Commission after exhausting local remedies.

The Commission shall then investigate and make recommendation to the parties for a peaceful settlement. It

shall refer cases of serious breaches to the Assembly of Organization of African Unity to whom it shall make annual reports. The Assembly may request further study of the situation.[34] "Although what the Assembly does thereafter is not stated, it may be presumed that it can exercise its general powers under the OAU Charter to take appropriate action or make appropriate recommendations."[35]

Thus, it is evident that the African Charter on Human and Peoples' Rights, 1981, guarantees not only human rights but some new rights, e. g., the right to development which is recognized as the third generation right. One peculiar feature is that it embodies the duties of the individual towards family, nation, Africa, and international community. As regards measures of safeguard only African Commission on Human and Peoples' Rights has been established. The measures of safeguard, in this sense, re weaker ones than those of the European and American systems.

7. DIFFERENCES AMONG THE THREE SYSTEMS

There are cartain points of differences among the three regional instruments. They may be summarised as follows:

1. The European Convention and the American Convention proclaim human rights and fundamental freedoms whereas the African Charter proclaims not only rights but also duties of individuals.

2. The European Convention and the American Convention do not mention human and peoples' rights, whereas the African Charter codifies individual as well as peoples' rights.

3. The European Convention and the American Convention guarantee only civil and political rights— that is, first generation rights, whereas the African Charter guarantees civil and political rights, economic, social and cultural rights and right to self-determination, right to development, right to protection of environment— that is, the first generation rights, second generation rights and third generation rights.

4. In the case of European and American systems, restrictions and limitations on the exercise of rights they proclaim are few in number whereas in the case of African system the States Parties are permitted to impose extensive restrictions and limitations on the exercise of the rights it proclaims.

5. The European Convention and American Convention contain derogation clause during the continuance of emergency, whereas the African system does not contain any such derogation clause.

6. The European Convention and the American Convention provide for the establishment of Commissions on Human Rights and Courts of Human Rights whereas the African Charter contains no provision for the establishment of a Court.

7. The enforcement machineries of the European system and American system are stronger because of the existence of the Court whereas the enforcement machinery of the African system is weaker. It is weaker for two reasons: first, there is no Court; second, there is no effective system for implementing the decision of the Commission.

8. The rights recognised by the African Charter are large in number. In comparison to it the European and American

Conventions guarantee only few rights. But the Courts, specially the European Court, are expanding the dimension of rights by interpreting the provisions of the Convention. These two machineries of instruments have made the systems living ones, by enforcing the rights as provided for in the Conventions.

9. The European Convention has a far-reaching consequence on the national constitutions as adopted after its adoption by the Council of Europe. The Colonial Clause as provided in Article 63 of the Convention has provided the applicaton of the Convention even in the colonies of the Parties to the Convention. But there is no such provision in the American system or in the African system.

From the above over-all discussion and analysis it is observed that the three regional instruments have provided certain human rights and fundamental freedoms. The African Charter has provided some new rights which are now-a-days propounded by some eminent jurists on human rights. The exercise of the human rights and fundamental freedoms by the peoples of three regions has created a new era in the history of human civilization. It makes us remind that human rights is only a national affair, but it has some regional and international aspects which put pressure upon national authority not to curtail or infringe them on any plea they may take.

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