

LEGAL STATUS AND THE PROTECTION OF REFUGEES UNDER THE EXISTING LEGAL FRAMEWORK OF SOUTH ASIAN COUNTRIES: SPECIAL FOCUS ON BANGLADESH AND INDIA



1. Introduction

The 1951 Refugee Convention is the main document for the protection of refugees. A large number of refugee-rights and state-duties have been enumerated by this Convention and its Protocol of 1967 additionally. The Convention and Protocol are legally binding for the contracting states whenever they come to deal with or to regulate refugees. Whatever the Convention or Protocol states, the refugees in south Asian Countries (except Afghanistan) are not able to resort or enjoy the benefits of these enumerations as of right because governments in this part are yet to accede to the Convention of 1951 and the Protocol of 1967. Despite the long-standing complex refugee problem in the South Asian area countries here have not taken any meaningful action to acceding to the Convention or to frame any local or regional arrangement, i.e., the Organization of the African Union Convention of 1969 or Schengen (1985) and Dublin (1990) arrangements or Cartagena Declaration (1984) of Latin America. The concern countries have not paid any heed either to enact any National Legislation relating to the regulation of millions of refugees in South Asian Countries. However, historically the refugees of these countries have been dealt with through ad hoc administrative arrangement partly under the auspices of immigration laws relating to the treatment of foreigners and partly at under the support of and collaboration with United Nation Human Rights Commission (UNHCR). As the title of the study suggests, the main purpose of this paper is to examine the legal status and protection of Refugees in South Asian Countries - beyond the scope of 1951 Convention and its Protocol - in order to elucidate the currently available protection schemes. The paper will also discuss the level of performance carried by the states, specifically the India and Bangladesh. Reference to the respective problems and challenges they face in addressing refugee issues in and outside their own border will be compared. Finally, a list of recommendations for possible solution will come to conclude the paper.

2. Preliminary overview of the scenario of refugees in South Asia

The poignant history of refugee cases in South Asia has always been complexly problematic. The largest migration of South Asians occurred in 1947, accompanying the partition of India into two nations - India and Pakistan, primarily on the basis of religion. In the nine months between August

1947 and the spring of the following year, at least 18 million people, by unofficial counts, were forced to flee their homes and became refugees; at least a million were killed in communal violence. This is evident from a review of twelve important population movements in the region since the partition of the sub-continent in 1947 and these include: India-Pakistan refugee flows, 1947-48, involving 15,000,000 Hindus and Muslims; exodus of Burmese Indians amounting to about 1,000,000 during 1948-65; exodus of Sri Lankan Indian and Tamils to the tune of about 1,000,000 from 1954 which is still continuing; flight of about 10,000,000 Bangladeshis to India in 1971; 'stranded Pakistanis' in Bangladesh numbering nearly 300,000; flight of some 200,000 Burmese Muslims to Bangladesh in 1978; flight of about 100,000 Chakmas to India in 1981; nearly 3,000,000 Afghans fled from Afghanistan to Pakistan during 1978-93, of whom a substantial number has returned; flight of Tibetans to India from 1958 to 1963 numbering about 100,000; exodus of nearly 60,000 Bhutanese of Nepali origin to Nepal in 1990-91; and the two controversial and unwanted population flows from Bangladesh to Assam in India and the two-way flow between Nepal and India. Even though these cases are different and distinct from each other, violence remains their common denominator.

In the most recent few decades, countries of south Asia have been facing and producing a large amount of refugees. The refugees of these countries live under oppressed condition. Refugee right is infringed by the host country or her concern officials, and sometimes even by the citizens of the host country, too. The form of exploitation varies from violation of human rights to child labour, the mental and physical torture to sexual assault.. No matter what happens, refugees cannot reach out any responsible body as of their rights because they are treated as a foreigner in the respective country. However, in some limited extends, they have been provided provisional treatment on account of humanitarian ground. These way only host countries presumably try to fulfill their obligations arisen out of their participation g into some international Human Rights instrument.



3. The situation of Refugees in India

India has been the host nation of refugees originating from several neighboring countries including Tibetans from Tibet, Lhotsampas from Bhutan, Tamils from Sri Lanka and Chakmas from Bangladesh. The immediate reasons which led to escape of Dalai Lama and subsequent mass exodus of Tibetans to India after China had annexed Tibet in 1959 were large scale religious persecution, physical torture, forced sterilization, destruction of families, obstruction on social practices and confiscation of property. According to the U.S. State Department's Country Report on Human Rights Practices for 1998, 315,493 refugees were residing in India. According to another estimate, some 3,45,000 refugees were living in India alone at the beginning of 2002; 1,44,000 from Sri Lanka, 110,000 from Tibet Autonomous Region (TAR), 52,000 from Myanmar, 15,000 from Bhutan, 12,000

from Afghanistan and 5,000 to 20,000 from Bangladesh. According to another study, approximate refugees and asylum seekers in India from Tibet is around 110,000. Excluding migrant workers, the population of refugee from Nepal stands at 100,000 (However, this number is usually suppressed in honour of Indo-Nepal Friendship Treaty.) From Sri Lanka total strength of conflict-induced refugees of Tamil origin stands at 99,600, and from Myanmar it is currently 50,000. From Bangladesh the mass exodus following the 1971 war has come down to 35,000, following repatriation of refugees while from Afghanistan 30,400 refugees and asylum seekers who are mainly Hindus and Sikhs. From Bhutan the ethnic Nepalese population settled in India amounts to 10,000 refugees and asylum seekers.

4. Legal status, protection and Rights of Refugees in India

The Indian government, however, has signed neither the Refugee Convention nor its Protocol, and Indian law does not offer any special language or provisions for refugees despite the large number of them seeking India's protection. Under Indian law, the term "foreigner" is the only reference to aliens of any kind; this places refugees, immigrants, and tourists in the same broad category.

In India, refugees are granted only limited rights under its Constitution. Other crucial rights and freedoms that are mentioned under the 1951 Convention, such as, freedom of internal movement, right to employment, right to elementary education, right to free access to courts, right of association, right to acquisition of movable and immovable property, and right of public assistance, etc., are not available to refugees in India.

In the past, a number of ad hoc legislative instruments were passed by the British Indian and the Indian government next for refugees, evacuees and displaced persons. Some of these include: East Punjab Evacuees Act, UP Land Acquisition Act, East Punjab Refugees, Mysore Administration of Evacuee Property Act, and Mysore Administration of Evacuee Property Act.

After the Constitution of India came into force, the Acts, including the, Immigrants Act, Administration of Evacuee Property Act, Evacuee Interest Act, Displaced Persons Act, Influx from Pakistan Repelling Act, Displaced Persons Supplementary Act, Refugee Relief Taxes (Abolition) Act, were passed for dealing with refugees, evacuees and displaced persons.

At present, in the absence of any centralized national refugee legislation the provisions of various statutes like, the Foreigners Act, the Registration of Foreigners Act, the Passport (Entry into India) Act, and the Passport Act, are stretched to be made applicable to the refugees in India.

Apart from abovementioned legislations, the refugees are also subjected to the Indian Evidence Act, the Indian Penal Code and the Criminal Procedure Code. Refugees committing any offence under the Indian Penal Code are tried by the law in a similar fashion as any other ordinary citizen would be tried.

5. The judicial approach as regard to the treatment of Refugee

In *NHRC v. State of Arunachal Pradesh*, the Supreme Court of India, while declaring that refugees hold the right to life and personal liberty under Article 21 of the Constitution of India, observed:

"We are a country governed by the Rule of Law. Our Constitution confers certain rights to every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty

except according to procedure established by law.”

The ‘procedure established by law’ under the Constitution does not simply refer to the ‘process of law’ but the ‘due process of law’ by which any person could be deprived of his life and personal liberty. This means that the power of the Government of India to expel a foreigner which was held to be absolute by the Supreme Court in *Hans Muller of Nuremburg v. Superintendent, Presidency jail, Calcutta*; *Louis de Raedt v. Union of India* and in *Arunachal Pradesh v. Khudiram Chakma* can now be challenged before the court of law.

6. Regarding refugee rights under international law in the Indian municipal law

Article 51 of the Constitution of India stated that the state shall endeavour to foster respect for international law and treaty obligations. The question of whether the international covenants can be relied upon by the courts while deciding the cases was clearly answered by the apex court in *People’s Union for Civil Liberties v. Union of India*. The Supreme Court held:

“The provisions of the Covenant which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can certainly be relied upon by the courts as facets of those fundamental rights and hence enforceable as such.”

This was further corroborated and expounded by the Supreme Court in the case of *Vishaka v. State of Rajasthan* wherein the apex court observed:

“Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and contents thereof, to promote the object of the constitutional guarantee.”

In relation to refugee rights, the Gujarat High Court in *Kfaer Abbas Al Qutaifi v. Union of India* held that the principle of non-refoulment, due to its presence in a number of international treaties such as Universal Declaration of Human Rights, has become a part of customary international law and it is therefore binding on Indian Courts. The court also went on to hold that the principle forms a part of the Constitution of India and the protection is available to the refugees as long as their presence is not prejudicial to the national security.

The above decision however cannot be considered to be binding on the Government which has the exclusive authority to decide whether to grant asylum or not to any foreigner as well as to expel her or not. However, the decision lay down that the principle of non-refoulment should be respected by the Government of India before deportation.

In the light of above decisions, could it be said that the international conventions to which India has acceded and which influence refugee rights either directly or indirectly, be considered to be binding on India? Article 14 (1) of the Universal Declaration of Human Rights states:

“Everyone has the right to seek and enjoy in other countries asylum from persecution.”

Article 13 of the International Covenant on Civil and Political Rights lays down that:

“An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose, before the

competent authority or a person or persons especially designated by the competent authority.”

Article 22 of the Convention on the Rights of the Child states:

“State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether accompanied or unaccompanied by his or her parents or by any other person, receive appropriate protection and humanitarian instruments to which they said States are parties.”

Article 21, the Constitution of India, summarily conveys in it all the above mentioned provisions of the international conventions, which are again supported by the judicial decisions cited earlier. Article 21 reads, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Here, the chosen word ‘person’ denotes that life or liberty doesn’t discriminate between citizens and non-citizens; any procedure must be carried out by law for all whatever the national identity is.

Thus, it could be said that the principle of non-refoulement becomes legally binding for Indian government given the fact that India has acceded to all the stated international conventions, its constitution shares the same fundamental guarantees commonly found in the conventions and its highest court also attested same guarantees for whoever came to live in its territory.

7. Reasons for not acceding to the 1951 Convention on Refugees

India refrained from signing the United Nations General Assembly Resolution 319 IV of 1949 which was to put in place the Convention Relating to the Status of Refugees 1951. India’s first objection to the Convention was based on the Euro-centric definition of ‘refugee’ which emphasized only on the violation of civil and political rights while undermined the violation of the social, economic and cultural rights. Additionally, the definition did not take into account the protection of those individuals or groups who were escaping the situation of internal wars or generalised violence. The Convention, in opinion of both India and other South Asian countries, failed in its drafting to reflect the requirements of the South East Asian region. The problems of mass influx and mixed flow had not been addressed by the Convention. Apart from this, the Convention, India found, had not expanded the principle of international burden-sharing. As put by B. S. Chimni, the Western countries resort to ‘burden shifting’ instead of ‘burden sharing’. Besides, the Indian Government was also worried about the additional financial burden that the Convention would put on it, once it would accede to it.

The reasons cited above may not appear to be really persuasive. However, India’s signing of the 1951 Convention without enacting an enabling legislation would not have made India’s position much more appreciable.

8. Scenario of Refugees in Bangladesh

The Birth of Bangladesh was full of experience of refugees. During the liberation war in 1971, an estimated 10 million people (one out of every seven of that time population) took refuge in neighboring country India. At present Bangladesh has been hosting thousands of Rohingya, a Muslim ethnic minority group from the northern Rakhine state of Myanmar, as refugees for last 17 years. A country which once or more in every year faces the wrath of natural calamities in the form of flood, torrent and drought has also to carry diverse implications emanating from the refugees

crisis. Bangladesh had been giving shelter to refugees from Myanmar in 1978 and 1991. From April to June in 1978, about 200,000 Rohingya refugees (Muslims) took shelter in Chittagong and its adjoining areas in Bangladesh. They were housed in refugee camps in co-operation with UNHCR. Eventually, they were sent back in accordance with 1978 Agreement between Bangladesh and Myanmar. Later on, about 250,000 Rohingya fled to Bangladesh in late 1991 and early 1992 although many of them were repatriated back to Myanmar. By the end of 2003, fewer than 20,000 were remaining. These Rohingyan refugees share many similarities in terms of colour, complexion and language with local inhabitants. On the other hand of this progression, in 1981 around 15000 Chakma tribal people from Bangladesh from Chittagong Hill Tracts (CHT) went to seek refuge in Tripura, the other side of India-Bangladesh border line. Subsequently, all of them returned with development of the Peace Agreement signed by Bangladesh Government with the Leaders of movement for autonomy of CHT.

9. Legal protection regarding Refugees in Bangladesh

Although Bangladesh has been hosting refugees for a long time it is not a State party to the UN Convention Relating to the Status of Refugees 1951 or its Protocol of 1967. It is to be mentioned, however, that despite Bangladesh is a member to the Executive Committee of UNHCR (EXCOM) it has not developed any domestic legal framework to deal with the issue of asylum and refugees.

Although there are few provisions in the Constitution, which could be translated for the protection of refugees, there is an absence of common understanding behind. In Bangladesh refugees are treated as foreigner and they are subject to the laws of alien. In the case of legal protection, there is no particular law which deals with the refugee and asylum seekers and hence the foreigners are treated by some orthodox laws as like as Passport Act, 1920; the Passport Rules 1955; The Bangladesh Passport Order 1973; Naturalization Act, 1926; Registration of Foreigners Act, 1939; the Registration of Foreigners Rules, 1966; the Foreigners Act, 1926; the Foreigners Order, 1951; the Citizenship Act, 1951; the Bangladesh Citizenship (Temporary Provisions) Order, 1972; the Bangladesh Control of Entry Act, 1952; the Extradition Act, 1974; The Code of Civil Procedure, 1908; and the Children Act, 1974. On the other hand in case of Constitutional perspective in a limited extend, there are few provisions in the Constitution which can be said for the indirection towards protection of refugees. 18 fundamental rights have been enumerated in the Constitution but these all are not available for the refugees or any other resident foreigner.

Under Article 32, 33, 34, 35, 41 and 44 of the Bangladesh Constitution, any person can invoke the constitutional protection in Bangladesh. Article 31 stipulates the right to protection of law, right to life and personal liberty, safeguard from arrest and detention, prohibition of forced labour and protection in respect of trial and punishment. All of them are equally applicable for people living inside the country. According to Article 32, no person shall be deprived of life and liberties save in accordance with law. It is to be noted that under these articles any person, irrespective of citizenship status, cannot be deprived of his or her life or liberty within the territory of Bangladesh. So indirectly any refugee in Bangladesh may enjoy such rights under the constitutional provisions as stated earlier. Furthermore, according to the Article 25, State shall base its international relations on the principles enunciated in the United Nations Charter. Bangladesh had accepted Refugees on the ground of Humanitarian concern, to respect recognized international principle and the principle enunciated in the United Nations Charter. The Preamble, Articles 1, 55 and 62 reiterates the observance of human rights for all peoples of the world. It can be concluded that in Bangladesh the

refugees have got indirect legal protection but not any special legal protection particular designed for 'refugee'.

10. Reasons behind not acceding to the Refugee Convention

Some agencies of Bangladesh government took several initiatives to make its a party to the 1951 Convention but the attempts have not seen the success yet. The main reasons seem to be is that no country within the Indian sub- continent becomes a party to the Convention (Except Afghanistan). Another reason is that once Bangladesh is a party to the Convention, it will be legally obliged to accept whoever comes under the guise of refugee from other countries. Bangladesh is already too much overpopulated with poor resources to voluntarily undertake such obligations. No matter it has been providing shelter to those who have already arrived , it does not opt for a formal acceptance which would essentially perpetuate mass-influx.

11. Recent Rohingya inflows and the violation of international law

Bangladesh, though not a signatory state to the convention and the Protocol, for last 21 years it has been facing millions of Rohingya from the northern Rakhine state of Myanmar. Rohingya inflows took place in 1979 and 1991-92 when the Myanmar Army government refused them to recognize as Myanmar national arguing they look like Bangladeshis or sub-Indian. This Muslim group is considered by Myanmar officials as illegal immigrants from Bangladesh. But this viewpoint payees no attention to the fact that border area of any country will have people who may look like the people in other-side. Many ethnic Indians bear similarities to Chinese people while they are living beside the border between India and China..

Brutal violence in Arakan State in western Myanmar erupted on June 3, 2012, when an estimated 300 Arakan Buddhists attacked a bus of traveling Muslims and killed 10 passengers. Bangladesh faced another Rohingya inflow following the recent sectarian violence in the Rakhine state. Refugees have been trying to enter into Bangladesh through its land and sea. Government officials halted them en-route. Now there is a question that whether the recent Rohingyas inflow demands for refugee status. Bangladesh government's view doesn't go in favour of the escapees as there has been no war like situation in Myanmar. It is the state authority who has been unwilling to protect them from the continued sectarian violence. Bangladesh Foreign Minister Dipu Moni argued same in the parliament.... it is not that Rohinngyas don't have a place to go; the state is not ousting them, rather trying to solve the problem. But Rohingyas are unable or unwilling to avail themselves of the protection of Myanmar government and that's why they are entitled to get refugee status under the convention's definition.

For decades, the Rohingyas have routinely suffered abuses by the Myanmar army. Extrajudicial killings, forced labor, land confiscation, and restricted freedom of movement are common crimes there that raise the question as to how much the state authority of Myanmar is willing to protect Rohingyas from the persecution. In 2012, the Rohingya refugees were attacked by a helicopter shortly after leaving the seashore of Myanmar. . Out of six boats three boats completely sank after being fired from a helicopter killing all of them. The government authorities kept turning a blind eye to the crimes done by Rakhine people. A few Rakhines who were arrested from Sittwe, Kyauktaw and Maungdaw were also released after few days. Police authority was, rather, arresting old and young Rohingyas from every village of Sittwe, Maungdaw, Rathedaung and Kyauktaw townships and framing them with false charges. A relief blog OCHA's report states that the World Food Program

(WFP) had provided 725 metric tons of food commodities (rice, pulses, oil and salt) to over 92,000 affected people in five townships, Sittwe, Pauktaw, Maungdaw, Rahtedaung and Buthidaung. The government report also shows that it has received donation nearly 200 million Kyat for Arakan crisis. However, all aid supplies are reached to government designated relief centres where authority places Rakhine family members only. Bsc Hla Maung's house in the Ambala area (down town) was attacked by a group of Rakhines and looted all goods and cash when Police and Paramilitary forces were surrounding it outside. One man reportedly died in a hospital in Chittagong after he was allegedly shot by Myanmar forces when he was fleeing. Human Rights Watch thus argued that he Myanmar government had not taken adequate steps to stop sectarian-violence between Arakan Buddhists and ethnic Rohingya Muslims nor had it brought the responsible to justice. The army who are deployed to restore the law and order rather pose regular risks of arbitrary arrests, enforced disappearances, and torture.



In response to the above-mentioned crises, Bangladesh has closed its boarder, suspended the maritime trade and communication arrangements between St. Martin and Mohakhali islands of Ukhaia for several days, deployed additional platoons of guards at the border outposts and increased surveillance through beefing up security apparatus mobilizing the Border Guards Bangladesh, Coast Guards and the Navy. It is said in favor of

Bangladesh government that Bangladesh is not bound to accept Rohingya under international law because it has not signed any treaty or convention relating to the acceptance of the refugees. "Bangladesh never signed any kind of international Act, convention or law for allowing and giving shelter to refugees" said Dipu Moni in Parliament. That is why Bangladesh has no obligation under international law to keep its border open to allow Rohingya refugees, she argued further. In contrary, Director of Human Rights Watch Bill Frelick said "Bangladesh is putting the lives of those fleeing violence - including young children - at risk by sending them back to Burma." His view is, Bangladesh has, thus, violated the principle of Non-refoulment under the international law

Although Bangladesh is not a party to the 1951 Refugee Convention or its 1967 Protocol but it is a state party to other conventions or treaties e.g. the Universal Declaration of Human Rights; the UN Declaration on Territorial Asylum; the International Convention on Civil and Political Rights; the Convention against Torture; the Convention of the Rights of the Child etc. The Principle of non-refoulment has been incorporated by these conventions either by direct or indirect reference. For example, Para 1 Article 3 of the Convention against Torture, 1984, contends 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The principle of non-refoulment is an established norm of customary international law which is followed by civilized nations and gained a normative character.. So how it can be said that Bangladesh is not bound by any international obligation of providing shelter to Rohingya refugee? It is said that it is question of humanity not question of legality.

This sectarian violence has turned to be a humanitarian crisis with burning Rohingya houses raping their women, and murdering men and children. On 28 June 2012, 5 Rohingya women from

Aungmyingala quarter who went to the market of Sittwe to buy foods after starving for two weeks. They were brutally beat by a group of Rakhine people and handed over to police station with false accusation. Finding severely injured, Police sent them to hospital. One of them died an hour later and the condition of the rest are still unknown. Source from Maungdaw Township confirmed that on 20/06/2012) a group of Nasaka forces entered to 3 Rohingya houses in the pretext to check illegal residents. Upon entering into the houses, the forces routinely raped 13 women aged between 13 years to 65 years.

The above discussion leads to the conclusion that as a civilized nation, Bangladesh has not only a legal obligation under international law but also moral duty to allow Rohingyas to enter into its territory and afford protection. By denying access of the Rohingyas and refusing them from giving protection Bangladesh has discolored its image in international arena as a responsible member of the UNO. Since Bangladesh is facing Rohingya problem, it has to come forward to solving this problem in permanent nature by raising the issue before the UNO with significance. In this case Bangladesh along with OIC, SAARC and different international organizations may create pressure on UNO for solving the Rohingya problem decisively.

12. Concluding Remarks



It can be concluded that for more than 60 years the Convention of 1951 has been the key instrument to determine the status of refugees. Though it has already provided a series of rights, with the passage of time it requires to be reformed in some aspect in order to address new issues relating to the climate-refugees and other socio-economic refugees. On the other, hand in the south Asian viewpoint it can be said that although no country of South Asia has acceded in the Refugees Convention of 1951 but many of them have been consistently providing shelter and other provisions, willingly or unwillingly, to the refugees. But, the approach adopted till now by the hosting states in South Asia has been limited to the attempt for connecting the home state in dialogue to determine the duties and rights of the states and refugees. However, most of the time, bilateral negotiations are impeded by cross-functioning governmental processes that lead to time lapse up-to years to decades to reach to an amicable arrangement. The refugees themselves are seldom represented in these negotiations. South Asia needs to focus on the ways to prevent refugee flows that is result by both political and economic motive. Instead of keeping in wait what to do once the refugees are already settled in their respective territories they should collectively strive to design the means to prevent the refugee arrival. Here needs a concerted regional mechanism. It would, hence, be useful if SAARC would formally involve dealing with this humanitarian cataclysm in a comprehensive manner. Although, SAARC does not permit "bilateral and contentious issues" to be brought into its agenda, what has to be understood is that almost all South Asian countries are affected in one way or the other by the presence of refugees and movement of illegal immigrants.. It cannot be denied

that people from all directions, without any bias or prejudices to any particular country, have historically moved to places in search of safety and economic opportunity. Support and supervision for the refugees therefore has much to do with humanitarian grounds than just managing the overall state and regional security. Put aside all the legal duty, principles and practices that achieved the status of jus cogens in customary international law are to be observed by all the civilized nations and South Asian countries, be it India or Bangladesh here, do not avail any exception.

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Author's Bio

Mr. M.Z. Ashraful is a PHD candidate at South Asian (SAARC) University under SAARC Silver Jubilee Scholarship. Earlier, he earned his second LL.M in Legal Studies from the same university after completing both his first LL.M and LL.B from Metropolitan University. Holding the position of Assistant Professor at Metropolitan University, Mr. Ashraful is an accomplished researcher with numerous international publications. Attending in the 5th Biennial Conference of South Asian Society of International Law, 2015 in Thailand, he presented there a research paper. Among many others, his notable papers are published in Mediterranean Journal of Social Science and International Organization of Scientific Research Journal of Humanities and Social Science. He has been trained by many prominent professors and researchers through the participation in series of workshops and seminars held in many different parts of South Asia. Ashraful's research interest mainly revolves around International Law with special focus on "Conflict of Laws" and "Comparative Law". He can be reached at ashraf@metrouni.edu.bd