

Refugee Situation in South Asia: Need of A Regional Mechanism

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Abstract

Large section of the people in South Asia have very poor socio-economic standard. Yet South Asia hosts a big chunk of refugee populations of the world. Most often human lead reasons like religious persecution, cultural discrimination, human rights violation, social discrimination, minority complex of the majority communities and so forth have resulted into generation of refugees in the region. Though refugee is a common problem of the region there is no regional arrangement to deal with the situation, and neither any country of the region has signed refugee convention. So far countries have relied upon bilateral setup to address the problem, which has failed miserably in case of Nepal and Bhutan. Even though, in recent times some regional organizations have taken initiatives in this matter, a regional mechanism is crucial for a durable solution of the problems faced by the region.

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INTRODUCTION

South Asia constitutes over 20 percent of the world population. The human development index (HDI) in terms of longevity, knowledge and standard of living is dismally very low¹ which indicates to a poor socio-economic standard of the people in the region with over 500 million people in the region still living below the poverty line.² Asia is the largest refugee-hosting continent with 41 percent of the total refugee population of the world.³ In particular South Asia hosts the fourth largest concentration of refugees in the world⁴ constituting roughly about 12 percent of the total refugee population of the world.⁵ A large chunk of the South Asian population either lives as refugees in one or the other neighboring countries or as internally displaced in their own countries as a result of persecution, war, human conflict or forced relocation.

Refugees in South Asia constitute from those within the region and outside. The principal refugee generating countries from within the region are Bhutan, Sri Lanka and Bangladesh and “are gradually coming under the category of principal sources of world’s refugees and asylum seekers.”⁶ India is the major refugee hosting state from within the region apart from some refugee groups it continues to host from outside the region. Other refugee hosting states in South Asia are Pakistan, Nepal and Bangladesh. The major refugee groups India has hosted or continues to host are the Tibetans,⁷ the Bangladeshis during the liberation war of Bangladesh,⁸ the

¹ Mahendra P. Lama: “Refugee Situation in South Asia: Critical issues in perspective”, Bulletin on IHL and Refugee Law, vol. 3, no.1, 2000, p. 87

² Id. at p. 88

³ Adopted from, S. S Wijeratne: “Importance of regional cooperation and the need for formulation/adoption of Regional refugee Instruments”, Fifth Regional consultation on Refugee and Migratory Movements, Kathmandu, Nepal, November 1998

³ Tapan K Bose “Protection of Refugees in South Asia, Need for a legal framework” SAFHR paper series, Kathmandu, Nepal, January 2000, p. 7

⁴ Id

⁵ Supra n. 1, p. 88

⁶ Mahendra P Lama, supra n. 1, p. 89

⁷ Around 1,10,000 refugees from Tibet are re-settled in India in the states of Himachal Pradesh, Jammu and Kashmir, Sikkim, Uttar Pradesh, Orissa, Arunachal Pradesh, Karnataka, Madhya Pradesh, West Bengal and Maharashtra. Many have resettled on their own.

⁸ During the Bangladesh liberation war almost 10 million Bangladeshis escaped to India in 1972 who were contained in temporary camps in the Indian side of the border. After

Chakmas from Bangladesh,⁹ the Sri Lankan Tamil refugees,¹⁰ refugees from Myanmar¹¹ and refugees from Bhutan¹² amongst others.¹³ Pakistan has

Bangladesh became free, these refugees returned spontaneously. The care and maintenance accorded to such a mass refugee influx is a success story of India's handling of refugee situations.

⁹ In early 1986, approximately 51,000 refugees belonging to ethnic and religious minority groups, mostly Buddhist Chakmas fled the Chittagong Hill Tract (CHT) Region of Bangladesh. The security forces and the Muslim Bangladeshi settlers in the CHT allegedly perpetrated massacre, gang rape, arson and harassment. The fighting between the Bangladeshi army and Mukti Bahini, a Jumma insurgent group further aggravated the tension which forced the tribal to flee Bangladesh and enter seek refugee in India. In 1994, around 25, 000 refugees repatriated after an agreement was reached between the refugees, the government of Bangladesh and India. There are widespread allegations that India pressured the refugees to accept repatriation. Following a visit of a high level delegation of the government of Bangladesh to the refugee camps in North-East India in March 1997 and the subsequent meetings between the refugee leaders and the government representatives and signing a peace agreement between the government of Bangladesh and the armed wing of the tribal, the Shanti Bahini, most of the Chakams were repatriated to Bangladesh. However, 65,000 stateless persons belonging to Chakma and Hajong tribes are still living in India's northeastern states, who are mainly oustees of the Kaptai Dam that was built by the government of Pakistan (before Bangladesh was liberated). Their application for Indian citizenship is by and large pending and live as stateless persons in northeastern India. The Human Rights Commission of India and the Indian Judiciary has taken efforts to safeguard the rights of these. See, Tapan K Bose, SAFHR Paper Series, supra n. 3, Pp. 26-28. See also the series of Chakma cases decided by the Indian Judiciary, namely, Khudiram Chakma vs. Union Territory of Arunachal Pradesh, AIR 1992, Gauhati 105; National Human Rights Commission vs. State of Arunachal Pradesh, (1996), 1 SCC 743; State of Arunachal Pradesh vs. K Chakma, AIR 1994, SC 1461.

¹⁰ An estimated 1,10,000 Sri Lankan Tamil refugees were living in India at the end of 1998, in organized camps and scattered outside. The camp population was approximately 70,000, where some assistance from Indian government was received. See, Tapan K Bose, SAFHR Paper series, supra n. 3, p. 23. The above figure is despite the repatriation of over 54,000 Sri Lankan Tamils from India, since 1992. However, since 1995, repatriation has stopped with the resumption of war between the LTTE and the Sri Lankan forces. Besides the exodus of refugees, there are approximately 689,989 internally displaced receiving dry rations, cash and WFP assistance. See, Mahendra P Lama, "Managing Refugees in South Asia," RMMRU Occasional Paper Series (4), Dhaka, April 2000, Pp. 13-17. There are reports of Tamil asylum seekers sneaking into India fearing fresh violence in Sri Lanka in January 2006. The sand dunes at the Palk Straits contiguous at the Bay of Bengal and Indian Ocean provide a safe route for the escapees to sneak into India during darkness. See Swati Das "Terrain Helps Refugees Escape," Times of India, Friday, January 20, 2006. There are reports that the influx of Tamil refugees is going up in January 2006. A batch of 32 refugees crossed over to India, 24 from Thndamannar in Yalpanam (Jaffna District) and arrived in Arichalmunai on the Indian side from Pesalai in Sri Lanka at 2.30 AM and another batch of eight refugees from Pesalai arrived at Othapatti in Dhanushkodi at 3 AM on Friday, January 20 2006. This is believed the highest crossover in 2006. See, Swati Das, "Lankan Refugee Influx to TN up" The Times of India, Bangalore, January 21, 2006.

hosted a huge influx of Afghan refugees from Afghanistan and some refugees from Iraq, Somalia, Iran and others.¹⁴ Nepal has hosted an over 20,000 Tibetan refugees for over 4 decades now and over 1,00,000 Bhutanese refugees are camped in the UNHCR managed camps in eastern Nepal.¹⁵ Bangladesh has been a host to Rohingya refugees from Myanmar.¹⁶

¹¹ Following the 1988 military coup, an estimated 1000 Burmese pro-democracy student activists took refuge in the northeastern states of Mizoram and Manipur in India. Indian authorities did not welcome them and some 80 students including young girls were forcefully sent back to Myanmar. It is reported that a few of these deportees were arrested at the border by the Myanmar army, while the rest sneaked back to India. In addition, an estimated 50,000 Chin indigenous people from the Chin state of Myanmar are living in India's Mizoram state in refugee-like circumstances, some of whom have been living in India for as many as 44 years. More of these people have sneaked into India following the 1988 military crackdown in Myanmar. See, Tapan K Bose, *supra* n. 3, p. 28-29.

¹² An estimated 20,000 Bhutanese refugees live in various parts of India, especially West Bengal, Sikkim, Assam and northeastern states, although the exact figure is not known. India does not recognize the refugee status of the Bhutanese owing to the Treaty relation between Bhutan and India, which allows Bhutanese to travel and stay in India, on the basis of reciprocity. No empirical study has been conducted on the number and condition of Bhutanese in India. They are dispersed in different areas and earn their living on their own with no external assistance.

¹³ At the end of 2004, there were 11,071 mandate refugees in India and an estimated 160,000 refugees from Tibet, Sri Lanka and Bangladesh (Chakmas) who are dealt with directly by the government of India. See, 2006 Country Operation Plan for India, available online at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?> (Accessed on 13th January 2007).

¹⁴ An estimated 1.2 million refugees mainly from Afghanistan were hosted by Pakistan in the 1990's. The heightened cold war and the Soviet invasion of Afghanistan in 1979 and 18 years of civil war has forced a huge influx of Afghan refugees seek asylum in Pakistan. After the restitution of democracy in Afghanistan with Hamid Karzai as the President, there has been repatriation of most of the refugees. However, the economy that is in shambles owing to a prolonged civil war has prompted many Afghans stay back in Pakistan as re-integration in a poor economy is a difficult reality to come by. Pakistan and with the help of the UNHCR and other implementing partners have done a wonderful job in the question of maintaining and protecting these refugees. Pakistan hosted approximately 2,400 from other countries, including 900 Somalis, 900 Iraqis (mostly Kurds), 500 Iranians, mostly Baha'is and 100 others in 1998. See, Tapan K Bose, *supra* n. 3, p 43. Pakistan has hosted the largest refugee population in the world and has received Nansen award for its humanitarian gesture to accommodate and protest refugees. (See, Mr. Justice Nasim Hussain Shah, "Pakistan: Country Update," Fourth Informal Consultation on Refugee and Migratory Movement in South Asia, Dhaka, November 1997, p. 40.

¹⁵ While the Tibetans stay in different parts of Nepal mainly in the urban areas, the Bhutanese refugees stay in organized camps in eastern Nepal. Nepal and Bhutan entered into a bilateral exercise in 1993 and agreed to verify and classify the refugees in four different categories. Although the verification of over 12,000 people from one of the

Bangladesh also hosts over 2,50,000 stateless Bihari Muslims, many of whom consider themselves citizens of Pakistan, which Pakistan disputes. Their controversy continues right from the time Bangladesh got its liberation from Pakistan that actually brought controversy as to the citizenship status of these people. Bhutan hosted some 5,000 Tibetan asylum seekers in the 60's and got them integrated by way of naturalization. That apart, Bhutan and Sri Lanka have been largely refugee generating countries. Maldives remains aloof from this phenomenon although there are growing signs of dissent against the continued rule of President Abdul Gayoom.¹⁷

CAUSES OF REFUGEE FLOWS IN THE REGION

One of the features of refugee situation in South Asia is that mass transnational movement of people characterizes them. What are the causes of refugee flows in the region then? Why have the states in South Asia failed to address this human suffering? Does it indicate a failure of the state system in the region to develop an inclusive polity, based on pluralism that people belonging to all backgrounds are given a socio-political and economic space in their political system? These and other similar questions shall be addressed in this section. A cursory observation on refugee

camps is long completed, repatriation is not undertaken. The refugees continue to remain in the camps for about a decade and a half now.

- ¹⁶ The influx of Rohingya refugees seeking asylum in Bangladesh reached its peak in 1992 following a crackdown by the Myanmar army against the democracy movement in 1988. In early 1990's more than 2,70,000 Rohingyas fled Myanmar owing to widespread human rights abuses. In April 1992, the Junta government of Myanmar and the government of Bangladesh entered into an agreement to repatriate the Rohingyas to their country of origin. Owing to the controversial nature of repatriation as to its voluntariness, UNHCR was taken in to monitor the process in 1993. (See, Tapan K Bose, supra n. 3, Pp. 18-19. It is estimated that as of 2003, an estimated 21,500 Rohingyas lived in organized camps in Bangladesh and an estimated 100,000, lived illegally in various parts of Bangladesh without access to protection and humanitarian assistance. See, "Forgotten People: The Rohingyas of Burma," Refugees International, March 2003, available online at <http://www.refugeesinternational.org/content/article/detail/870/> (Accessed on 23rd January 2007).
- ¹⁷ See P K Balachandran "Rival Maldivian Factions Rely on International Support," Hindustan Times, Colombo, 27 August 2004, available online at http://www.maldivesculture.com/news/politics_maldives_august2004.htm (Accessed on 17th January 2007). See also, http://www.maldivesculture.com/news/state_terrorism_maldives.htm (Accessed on 17th January 2007), wherein a report dated 27 August 2004 notes that over 1,000 Maldivians were "arrested in State Sponsored Terrorism."

situation in the region reveals that most of the refugee influxes are a result of direct state persecution or the state failing to accord national protection to its people. Refugee observers in the region attribute a myriad of factors as being the causes of refugee influx.

Mahendra P Lama catalogues six different factors as being the root causes of refugee generation, ranging from the fight for political independence, Human Rights violation including social discrimination and de-citizensing, Economic alienation including poverty, forced colonization and landlessness, Religious persecution, cultural discrimination and population transfer, Environmental dislocation by high dam projects, deforestation, desertification and natural disasters, to armed conflicts and violence.¹⁸ An examination of the above factors reveal that in most of the cases, the root causes are human generated, with the state as one of the actors but for one: natural disasters. Most of the refugee flows in the region can be attributed to human generated causes, rather than those of natural disasters, although there are human displacement by natural causes, especially in India and Bangladesh, where, in most of such cases people do not cross the international borders but remain within the national boundaries of the state concerned as internally displaced peoples (IDPs).

Another refugee observer in the region brings forth a set of other factors as being the root causes of refugee generation in South Asia: According to him, the causes of refugee flow in the regions are “Manufactured” Minority complex of the majority communities, Border disputes between countries, Arms race, Geo-political consideration, Forced Land colonization, Lack of proper citizenship Laws, Cultural discrimination and suppressions, Refusal to sign International Instruments and Population Transfer.¹⁹ As one examines these factors responsible for human population movement one lands to the inescapable conclusion that state is the main actor in generating refugees in South Asia as in other parts of the world. This idea is supported by the thesis that although the movement of people “has been a constant phenomenon in human history, but the “forcing of people” from their

¹⁸ See Mahendra P Lama, “Managing Refugees in South Asia,” RMMRU Occasional Paper Series (4), Dhaka, April 2000, p. 7.

¹⁹ See generally, Fr. C. Amalraj, “Redeeming Compassion,” in Joshva Raja (Ed.), *Refugees and their Right to Communicate: South Asian Perspectives*, Bangalore: United Theological College, 2003.

established habitats emerged with the birth of a territorial nation state.”²⁰ A refugee observer in South Asia supports this idea that the state system is at the root of refugee generation and notes that “the upsurge in refugee flow in the post-cold war era...was primarily caused by nation states induced factors, such as the state repression for political or ethnic reasons or failure of the state to provide economic, social and environmental sense of security to the people.”²¹

Most of the factors noted above as being causes of refugee generation in the region are a sub-set of the larger cause, namely the post-colonial state formation process in South Asia. Examine any of the refugee influxes in the region, save perhaps a few, one invariably lands to the conclusion that it is the state formation process in South Asian countries that remains at the core of refugee generation in the region. The population movement from India to Pakistan in the aftermath of partition is one of the biggest known displacements in human history. This has its roots in the state formation process of two separate dominions of India and Pakistan. The 1971 movement of over 10 million Bangladeshis to India is also a result of nation building process of the state of Bangladesh. The influx of Chakma refugees to India from Bangladesh follows the firstly assimilationist and later exclusionist policy of the Bangladeshi government in its effort to build an Islamic state based on the culture of the mainstream Bengalis. The Kaptai Dam oustees are a victim of the economic face of the nation building process of Bangladesh. The revivalist cultural nationalism based on the culture of the Drukpas manifest in its “One Nation One People” policy has rendered over a hundred thousand southern Bhutanese refugees. The nation building process in Sri Lanka based on the culture of majority Sinhalese is the central reason behind the political bedlam in that state and the subsequent refugee influx to India.

The sectarian refugee generating governments of the South Asian states, have undermined with impunity the existing plural culture of the state and have denied a modicum of socio-political space to minorities within their

²⁰ Lok Raj Baral and S D Muni, “Refugees, South Asia and Security,” in S D Muni and Lok Raj Baral (Eds.), *Refugees and Regional Security in South Asia*, Delhi: Konark Publishers, 1996, p. 1.

²¹ Bhumitra Chakma, “Refugees: The Experience in Bangladesh,” in Joshva Raja (Ed.), *Refugees and their Right to Communicate: South Asian Perspectives*, Bangalore: United Theological College, 2003, p. 64.

region. In order to sustain their political agenda, governments have manufactured their own “threat perceptions.” One glaring instance is the manufactured threat of “Greater Nepal” that Bhutan fiercely popularized in order to perpetrate its exclusionist agenda against the Nepali Bhutanese. Popularizing the sentiment of the myth of “Greater Nepal” a highly placed Bhutanese official says that *“Her (Bhutan’s) very survival as a nation state is threatened by a dissident group which has been able to politicize and blur the issue of illegal immigration with demands for Human rights and political change...A section of these people who have rejected everything that is Bhutanese including national identity, language and political traditions, threaten to take over the country with the support of ethnic kins who comprise the largest and the most aggressive trans-national migrant people in the region (Emphasis supplied).”*²²

States have perpetrated all sorts of human rights abuses in the garb of safeguarding *national* interests. What is “national interest” or “national identity” is defined and re-defined by those with vested interests in the continuity of the prevailing political system or in re-defining “national identity” or “national ethos.” “National interest” has indeed become a marketable commodity that states successfully popularize whenever questions of the rights of minorities come for international scrutiny. Most of the refugee situation in the region would have never come to being, if states would not have preferred for sectarian political system. This is explanatory of the fact as to why India has not generated refugees despite the presence of a diverse population in terms of religion, culture, language, etc. A plural culture in governance is the only way out to accommodate the aspiration of all the groups within a state, and that is the ultimate solution to all the refugee situations in the region.

MECHANISMS (ABSENCE THEREOF) TO DEAL WITH REFUGEES IN THE REGION

South Asian countries are not parties to the refugee convention, although India, Pakistan and Bangladesh are members of the Ex. Com. which is the highest decision making body of the UNHCR. Also, there is no regional arrangement to deal with refugee situations. That notwithstanding, South

²² Jigme Y Thinlay, “Current Situation in Bhutan,” in Bhutan: Society and Polity, Ramakant and R C Mishra (Eds.), New Delhi: Indus Publishing Company, 1998, p. 254.

Asian countries have hosted refugees from a diverse background, from within the region and outside. It has been a conscious policy of the South Asian countries not to sign ratify the refugee convention.²³ South Asian countries feel that the refugee convention is irrelevant for in the new refugee realities especially in the developing countries, characterized by mass influxes. Their hesitation to accede to the convention also stems from the belief that contentious issues can best be discussed bilaterally, rather than legalistically. The perceived “interventionist” activities of the United Nations agencies if protection to refugees is accorded in accordance with the refugee convention also discourages the countries in the region to ratify the refugee convention.²⁴ For whatever reasons, countries in South Asia have opted not to ratify the refugee convention and having had to deal with

²³ South Asian countries cite their own reasons for not ratifying the 1951 refugee convention. Explaining the rationale behind not ratifying the refugee convention, Arundhati Ghose, Permanent Representative of India to the United Nations told the Ex. Com of the UNHCR in its 48th session in 1997 that the refugee convention adopted in the European context prevailing in the aftermath of the war has lost its relevance now and has failed to address the new refugee realities. She said: “International Refugee Law is in a state of flux and it is evident that many of the provisions of this convention, particularly those which provide for individualized status determination and social security have little relevance to the circumstances of developing countries today who are mainly confronted with mass and mixed inflows. Moreover, signing the convention is unlikely to improve in any manner the actual protection which has always been enjoyed and continues to be enjoyed by refugees in India.” Explaining its rationale in not ratifying the refugee convention, Justice Nasim Hassam Shah notes that Pakistan is a developing society having very limited resources and could not afford to fulfill the convention obligations should it choose to ratify the convention. He says: “It (Pakistan) considers that it can ill afford to guarantee all the rights stipulated in the convention, such as the most favored treatment in wage earning employment, stipulated in Article 17 of the convention, the right to elementary education and access to higher studies as laid down in Article 22, right to Social Security as laid down in Article 24, unrestricted freedom of movement and residence as provided by Article 26 and the facilitation of the refugees’ assimilation and naturalization as laid down in Article 34, and so on. All these privileges entail economic obligations which go beyond its economic resources. Such obligations constitute the main impediments in the way of Pakistan acceding to the 1951 refugee convention and its 1967 Protocol.” See, Mr. Justice Nasim Hussain Shah, “Pakistan: Country Update,” supra n. 14, p. 40-41.

²⁴ For other reasons cited by South Asian Countries for not ratifying the refugee convention, see, Bradman Weerakon, “Regional Initiatives to Promote Awareness of and Accession to the 1951 Refugee Convention and other Relevant Human Rights Instruments,” Fourth Informal Consultation on Refugee and Migratory Movements in South Asia, Dhaka, November, 1997, Pp. 49-50. See also, statement of Arundhati Ghose, Permanent Representative of India to UN and the statement of Mr. Justice Nasim Hussain Shah of Pakistan in the Fourth Informal Consultation on Refugees in South Asia, held at Dhaka in 1997, in *ibid*.

mass influxes of refugee situation in different periods of time, they have exercised a more flexible option of dealing with such situations based on their administrative convenience and expediency. There also absents any specific legislation at the national level dealing with refugees.

It should be borne in mind that it is the exclusive prerogative of a state whether or not to allow an alien to stay in the country. However, this state prerogative needs to be balanced with the state's international obligation. The principle of *non-refoulement* prohibits a person to be expelled to a territory where his/her life and/or liberty is threatened.²⁵ Because no law in South Asian countries distinguishes a refugee from another alien, the laws applicable to aliens generally are also applied to refugees including some constitutional guarantees available generally to all aliens.²⁶ The distinction between a refugee and an alien starts only when protection is accorded to the asylum seekers in recognition of their particular situation.

Refugee hosting South Asian countries are of the view that this mode of dealing with the refugees gives them flexibility to negotiate with the host country. A legalistic way, they argue, unnecessarily complicates the issue and brings in hostility between the countries involved. However, the existing mode of *ad hoc* treatment of refugees in the region has at least two adverse impacts: One, it has the propensity to discriminate against refugees belonging to different backgrounds. While some may be accorded with very favorable treatment, others may not, dependent upon the need of real politic of the host country with that of the origin. The difference in treatment accorded in India to the Tibetan refugees on the one hand and that to the Sri

²⁵ The principle of non-refoulement is enshrined in Article 33 of the refugee convention. Because of its widespread practice, it is now considered as a customary principle of international Law.

²⁶ The laws applicable to aliens, as also to refugees in India are the pre-independent enactments like Passport (Entry into India) Act 1920, Registration of Foreigners Act 1939 and the Foreigner's Act 1946. Prior to the commencement of the constitution, three Indian states have passed refugee specific legislation. East Punjab Refugees Rehabilitation (Buildings and Buildings site) Act, 1948, the East Punjab Refugees Rehabilitation (Housing Building Loans Act 1948), the East Punjab Refugees Rehabilitation (Loans and Grant) Act 1948, Patiala Refugees (Registration and Land Claims) Act 1948, and the United Province Land Acquisition (Rehabilitation of Refugees) Act, 1948. Indian courts have interpreted the constitutional guarantee under Article 21 of the Constitution to be available to refugees as well. Very similarly to that of India, asylum in Pakistan, Bangladesh and Nepal are treated under law at par with general aliens. Special treatment starts only when their claim is recognized and special treatment is accorded for their humanitarian need and protection.

Lankan Tamils on the other, especially after the assassination of Rajiv Gandhi explains the fallibility of this *ad hoc* system and the acute need of a clear refugee regime in South Asia. Two, the purpose of a mechanism should not just be the treatment of refugees while in exile. It should persevere to find a durable solution and in the context of the mass influxes of refugees moving across the borders in our region, the relevance of repatriation in conditions of honor and dignity cannot be undermined. This is more possible when there is a specific regime in place. The rationale forwarded by refugee hosting South Asian countries that bilateralism enables a flexible method of solution seeking exercise cannot always be true especially after the utter failure of the Nepal-Bhutan bilateralism in the solution seeking process of the Bhutanese refugees in Nepal. This bilateralism retains the possibility of rendering most of the Bhutanese refugees stateless. Further, there is a need in the region to de-politicize the act of host states granting asylum to seekers.²⁷ This gesture of the asylum countries has often marred the bilateral relationship between the host and the asylum countries, as is the case between Nepal and Bhutan.²⁸

REGIONAL INITIATIVES

Three specific situations were observed in relation to refugee protection in South Asia: One, the countries in the region have consciously opted out of the international refugee regime; two, they are reluctant to put to place a regional mechanism to deal with the trans-national involuntary movement of people and their asylum and protection concerns; and three, the countries in the region prefer an *ad hoc* arrangement to specific refugee situations as demands their pragmatic politics of the day, their long record of humanitarian gesture in granting asylum and protecting people in need, notwithstanding. However, in the recent years, there is a growing realization

²⁷ Declaration on Territorial Asylum Adopted by UN General Assembly Resolution 2312 (XXII) of 14 December 1967 recognizes that “grant of asylum by a State to persons entitled to invoke article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State.” Further, Article 14 (1) of the UNDHR states, “Everyone has the right to seek and enjoy asylum from persecution.”

²⁸ The current relationship between Nepal and Bhutan is a uni-dimensional and refugee centric. It is marred by accusation and counter-accusation and is largely hostile. The bilateralism has given an escapist route to Bhutan and is continually avoiding the bilateral process and in the process, right of its citizens in exile is under wholesale invasion.

in the region, both at the governmental and civil society level that they need to move forward. The region therefore, has witnessed a number of regional initiatives related to refugee movements since the recent past. Although no binding instrument has been concluded thus far, the series of initiatives in the region is indicative of the growing realization amongst the policy makers that something effective needs to be put to place. Pressure from the end of rights activists, civil society, academics and NGO's is mounting on the governments to work for some sort of a refugee regime for the region, be it at the national or regional level or by way of ratifying the refugee convention.

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO)

An important regional initiative in the region is the Asian-African Legal Consultative Organization (AALCO), an intergovernmental consultation group, consisting of forty-four members, that meets annually to discuss issues of concern to the region and the status and treatment of refugees has been in its agenda since its 6th session held at Cairo.²⁹ The AALCO (erstwhile) Asian African Legal Consultative Committee (AALCC), in its 8th session at Bangkok in 1996 adopted a set of principles concerning the status and treatment of refugees known as the Bangkok principles. The committee in its 40th session held at New Delhi in 2001, deliberated on those principles in accordance with the changing experiences on refugees of the member states. It covered some important areas like refugee definition, asylum and standard of treatment to refugees, durable solutions, burden sharing, etc. Some of the initiatives taken in this forum are progressive in nature and can have far reaching consequences to refugee protection, if adopted in some binding forms.

Developing from the definition of the OAU convention Governing the specific Aspects of Refugees in Africa, (hereinafter referred to as the OAU

²⁹ The countries involved in the consultations are, Bangladesh, Bahrain, Botswana, China, Cyprus, Egypt, Gambia, Ghana, Indonesia, India, Iran, Iraq, Japan, Jordan, Kenya, Kuwait, Korea, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Pakistan, Philippines, Qatar, Republic of South Africa, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Sultanate of Oman, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, Yemen. See, Pia Oberoi "Regional Initiatives on Refugee Protection in South Asia", *Bulletin on IHL and Refugee Law*, (vol. 3. No. 1) 2001, p. 227.

convention), the AALCO provides for an expanded definition of the term “refugee” which includes “every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”³⁰ The most progressive elements envisaged by the AALCO are the issue of Right to Return,³¹ Right to Compensation³² and Burden Sharing.³³ All these elements reflect the refugee realities in the developing countries, which are characterized by mass influx movement of people across the borders. Unless right of refugees to return is recognized, asylum gets legitimized and the country of origin despite having engineered to causes of refugee flow often go scot-free. The right to compensation envisaged in Article IX takes care of that concern. Burden sharing envisaged incorporated therein takes cognizance of international participation in a refugee situation in true spirit of international solidarity.

INFORMAL CONSULTATIONS ON REFUGEE AND MIGRATORY MOVEMENTS IN SOUTH ASIA

Initiated by the UNHCR, a group of eminent persons from the South Asian countries began informal consultations on Refugee and Migratory Movements in South Asia. The first consultation in the series was held in 1994 in Geneva. One of the central aims of the consultation is “to find ways

³⁰ Article 1 (2) of the AALCO definition of “refugee”. Article 1 (1) of the AALCO definition is the same as that of the 1951 Refugee Convention definition.

³¹ Article VI of the AALCO’s Bangkok principles on status and Treatment of Refugees as adopted on 24th June 2001 at the AALCO’s 40th session, New Delhi. The Article states that “a refugee shall have the right to return if he so chooses to the state of which he is a national or the country of his nationality or if he has no nationality to the state of which he is a habitual resident and in this event it shall be the duty of such a state or country to receive him.”

³² Article IX of the Bangkok Principles, *ibid*. It provides for compensation to a refugee from the country of his origin or nationality as the case may be. Article IX (1) states: “A refugee shall have the right to receive compensation from the state which he left or to which he was unable to return.” Such compensation shall be for such loss “as bodily injury, deprivation of personal liberty in denial of human rights, death of the refugee or of the person whose dependant the refugee was, and the destruction or damage to property and assets, caused by the authority of the state or country, public officials or mob violence.” (Article IX (2) of the AALCO).

³³ Article X of the AALCO.

to reconciling the narrow political interests of states with their international humanitarian responsibilities.”³⁴ In its fourth Regional Consultation session held at Dhaka in 1997, the Eminent Persons’ Group (EPG) adopted a Model National Law on Refugees in South Asia, in order to guide the respective governments of the South Asian countries legislate national laws in similar lines. The model law covers a series of provisions required for the protection of refugees while remaining in the host country, rights and duties of the refugees and the country of asylum, *inter alia*. The model law reflects the refugee reality in the region and makes a specific provision on a mass influx situation,³⁵ which actually is the characteristic of refugee flow in the region and also recognizes the voluntary character of refugee repatriation.³⁶

The model law reflects the growing sentiments of the people in South Asian countries as to the need of a national law on refugees that a person qualified to be a refugee is accorded appropriate treatment in the host country, that they are not discriminated against, that their human rights are respected and safeguarded and that the voluntary character of repatriation is ensured and that the return happens in conditions of dignity and safety. The fundamental of refugee protection consists in the principle of *non-refoulement*, which is included in the model law.³⁷

THE ASIA PACIFIC CONSULTATION

Convened by the government of Australia, in 1996, representatives of twenty-four countries including five South Asian states participated in a consultation program on Regional Approaches of Refugees and Displaced Persons in Asia. Its third meeting co-hosted by the UNHCR and the Royal Thai government and co-chaired by the UNHCR and IOM was held in Bangkok attended by eighteen countries, including Bangladesh, India, Nepal and Sri Lanka from South Asia. These were an attempt to provide a

³⁴ Pia Oberoi, “Regional Initiatives on Refugee Protection in South Asia,” *supra* n. 29, p. 282.

³⁵ Article 15 of the National Model Law.

³⁶ Article 17 of the National Model Law states that “the repatriation of refugees shall take place at their free volition expressed in writing or other appropriate means which must be clearly expressed. The voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of safety to the country of origin shall be respected.”

³⁷ Article 6 (a) of the Model National Law.

regional forum to address issues of migration.³⁸ It emphasized on the need to distinguish between the various categories of displaced persons and that stressed on the need to provide protection to asylum seekers and refugees within population movements.³⁹ Such an initiative indicates the growing recognition by the governments in the region of the reality that refugees are a real phenomenon in South Asia and that their concerns cannot remain being ignored for a long period of time.

SOUTH ASIAN NGO CONSULTATIONS AND OTHERS

Two local NGOs, the Other Media and South Asian Forum For Human Right (SAFHR) organized a regional consultation entitled “Refugees and Forced Migration-Need for National Laws and Regional Co-operation” at New Delhi in 1998. The primary aim of the New Delhi initiative was to evolve a common instrument to address refugee movements in South Asia. A varying range of topics was discussed in the forum. The participants recognized the role of media and recommended it to play a more pro-active role in highlighting the concerns of refugees in the region. Further, in 1999 a Judicial Symposium on Refugee Protection was held in New Delhi. It was for the first time that the International Association of Refugee Law Judges decided to hold its meeting in South Asia, in recognition to the initiative being taken in South Asia by the development of a Model National Law, as well as to facilitate North-South dialogue on refugee and asylum issues.⁴⁰ The symposium was amongst others attended by members of the National and State Human Rights Commission, Judges of the Supreme Court, High Courts and District Courts of India, senior advocates from Indian Bars, Academics, Senior Judges from other South Asian Countries and UNHCR representatives. It was an ideal forum for the participants from South Asia to learn from the experiences of elsewhere, especially the South African representatives who shared their OAU convention experiences.

³⁸ Adopted from Pia Oberoi, “Regional Protection on Refugee Protection in South Asia,” supra n. 29, p. 284.

³⁹ Ibid.

⁴⁰ Report on Judicial Symposium on Refugee Protection, New Delhi, 1999, p. 1.

RATIONALE FOR A REGIONAL MECHANISM IN SOUTH ASIA

Scholarship in South Asia is vertically divided as to the need for a refugee mechanism in South Asia. While some very strongly advocate for a regional mechanism for dealing with refugee situations in the region, others dismiss with equal passion such an arrangement. They forward their own set of reasons to sustain their claims. I review some of such arguments and offer my own conclusions as to whether or not there is a need and possibility for such an arrangement in South Asia.

B S Chimni dismisses the argument that a regional arrangement is the need of South Asia. He argues, “from an inter-regional perspective, the regional approach is, in the cold war era, an exclusionary device which is advocated *inter alia* to help reduce the burden of the global refugee problem on the affluent regions of the world. The principal idea is to stop extra-regional flows of refugees so that the poor regions alone are compelled to carry the burden of refugees.”⁴¹ He is of the view that “a regional approach should be endorsed only as an integral element of an international approach based on solidarity as opposed to segregation and exclusion.”⁴² He recommends “a strategy of constructive linkage which calls for greater burden sharing by the more affluent regions of the world as a pre-condition for negotiating a regional regime.”⁴³ From an intra-regional perspective, he suggests “a regional declaration or convention in South Asia must follow and build on individual legislations in the countries of the region which need urgent enactment.”⁴⁴

Examining the issue from an inter-regional perspective, Chimni tends to suggest that South Asian countries should not go for any regional

⁴¹ The author argues that the arguments in favor of a regional mechanism are based on some erroneous assumptions, (1) that the causes of refugee flows lie within the region, (2) that each region is equally equipped in material terms to deal with the problem (3) that physical proximity should be the fundamental test in defining the obligations of states towards refugees, (4) that cultural similarities necessarily facilitate regional solutions (5) that refugee flows threaten the stability of the region and (6) that mobility across regions threatens the identities of peoples in other regions. See, B S Chimni, “The Law and Politics of Regional Solutions: The Case of South Asia,” Paper Presented at the Conference of Scholars and other Professionals, Working on Refugees and Displaced Persons in South Asia, February, Rajendrapur: Bangladesh, February 1998, p. 1.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

mechanism unless the more affluent countries of the north come to negotiate with the countries in South Asia for “constructive linkage”, wherein the former would shoulder greater burden sharing in the refugee situations in the region. The author does not however, offer any way out as to how the affluent countries of the world could be brought to the negotiating table. One might suggest that this would be the role of the governments in South Asia to use their diplomatic skills to bring the developed countries for a greater participation in the refugee situations in the region. One fails to fathom as to why would the developed countries choose to obligate themselves by agreeing to shoulder burden in South Asia, when they can actually do without, the rhetoric of international solidarity and burden sharing notwithstanding.

Chimni suggests that a regional regime should essentially be preceded by a national legislation on refugees in each of the countries of the region and upon that foundation, a common regional mechanism should emerge. He notes that the “political realism” of the region thwarts the emergence of a regional mechanism as, amongst others, “the general environment of suspicion and distrust which vitiates inter-state relations in the region is not conducive in the immediate future to a common approach to the refugee problem.”⁴⁵ He cites a number of other grounds which impede the emergence of a regional regime on refugees.⁴⁶ Noting that not all the South Asian countries are equally positioned to receive refugees as India is, he doubts that those which do not need to host refugees would agree for a regional mechanism. The author appears to suggest that a national law is more easily possible than a regional one, without however explaining as to why those very countries, which refrain from cooperating for a regional mechanism, would obligate themselves by legislating a national law. That apart, what would be the utility of a national legislation on refugees in those countries where refugees do not reach? A national legislation is welcome, but would all the countries put up that unanimity? These are few questions that Chimni tends to ignore as he argues in favor of a national legislation on refugees.

⁴⁵ B S Chimni, “The Law and Politics of Regional Solutions: The Case of South Asia,” supra n. 41 p. 10.

⁴⁶ Ibid, Pp. 10-12.

V. Vijayakumar, unlike Chimni sees merit in a regional mechanism for refugees in South Asia but retains some doubt as to its immediate possibility,⁴⁷ although remains optimistic in the “new climate of cooperation among the South Asian states” which “argues in favor of developing a regional approach on refugees based on commonly accepted principles and practices in the region.”⁴⁸ Expressing optimism on the “rich humanitarian tradition” of South Asia, with “sufficient commonality of problems, policies and practice among South Asian states” he observes that “all countries in the region have received refugees, all have sought to find durable solutions to the refugee problems” and that they “share similar legal and administrative systems.”⁴⁹ He cites the following reasons that make a regional regime necessary for South Asia:⁵⁰

1. The complexity and size of population movements in South Asia defy ad hoc responses.
2. The complex mix of refugees, economic migrants, displaced and stateless persons, necessitate criteria to be developed to distinguish the different groups and ensure appropriate responses to different groups.
3. The commonality of problems, policies and practices in the South Asian States are conducive for a regional approach.
4. A regional approach would allow South Asia to address its specific concerns on refugees.
5. A regional approach would help improve cooperation and solidarity among the countries.
6. A regional approach can improve the prospect for solutions.

⁴⁷ Expressing doubts as to the commitments of the South Asian Countries in forging a regional regime in the immediate future, V. Vijayakumar notes, “Despite the strong arguments favoring a regional approach to refugee problems, it would be naïve to believe that South Asian Countries can be easily persuaded to develop a regional framework for handling refugee problems. The political consensus that forged the OAU Convention, the Schengen and the Dublin agreements in Europe or the CPA in South East Asia is clearly missing among governments in South Asia.” See, V. Vijayakumar, “Developing A Regional Approach to Refugee Problems in South Asia,” Draft paper presented for the Fourth Regional Consultations on Refugee and Migratory Movements in South Asia, Dhaka, November 1997, p.6

⁴⁸ V. Vijayakumar, *ibid*, p. 5.

⁴⁹ *Ibid*. Pp. 5-6.

⁵⁰ *Ibid*, Pp. 5-7.

7. A regional approach could define a clear and useful role for the UNHCR.

It is a matter of fact that none of the countries in the region are too enthusiastic for a refugee regime, either at the national or regional level. However one would wrong the region to pause till the assistance and cooperation of the developed countries of the north to come by for setting our own house in order. Whether or not external participation is possible, South Asian countries should move forward in the issue of refugee management and protection.

A regional regime has some significant advantages over a national regime. As suggested by a refugee observer, “a regional framework depoliticizes the act of granting asylum, increases accountability of administrative acts within a state and promotes burden sharing within the region by establishing a balanced approach to the problems of refugee flows.”⁵¹ It is important that the act of granting asylum is depoliticized since that has been a cause of tension between the refugee hosting state and the country of origin. The relationship between Nepal and Bhutan is sufficiently illustrative of this phenomenon, with Bhutan often accusing Nepal of harboring stateless and voluntarily emigrated people to generate international sympathy against Bhutan.⁵² The existing bilateralism may be flexible but refugees’ rights can be invaded as and when states’ expediency calls for. The concept of burden sharing is equally important. Only a regional framework can address this concern. The most important argument in favor of a regional regime stems from the fact that none of the South Asian countries, especially those who are refugee hosting ones would choose to legitimize asylum. A “home-

⁵¹ Smrithi Talwar, “Building a Regional Consensus on Asylum: The Indian Perspectives”, *Bulletin, IHL and Refugee Law*, (Vol. 1, No. 2) 2000, p. 251.

⁵² The RGOB is now procrastinating the bilateral process accusing that the refugee camps are infested with the Maoists and that the repatriation of such people would Bhutan to danger. Speaking to the National assembly in its 82nd session the Bhutanese foreigner minister stated that a Bhutan Gorkha Liberation Front (BGLF) and a Bhutan Communist Party (BCP) had been formed and the BCP had links with the Maoists in Nepal. The Maoists were also recruiting people in the camps and some of these people had been participating in Maoists attacks in Nepal. About 2000 of them have moved to India and established their camps on the Indo-Bhutan border. If such people were allowed to come to Bhutan, there was a risk that our country would be infested with Maoists. See, the *Translations of the Proceedings and Resolutions of the 82nd Session of the National Assembly of Bhutan*, p. 98, available online at <http://www.nab.gov.bt/sessions/82nd%20resolutions.pdf> (Accessed on 28th January 2007).

ward” looking regional mechanism similar to that of the AALCO’s Bangkok principles, should take care of the concerns of both the refugee hosting country and those of the refugees as well. It is indeed difficult to fathom as to why the country of origin that generates refugees and imposes a human predicament of multiple dimension should go scot-free. Therefore, the right to compensation that the AALCO’s Bangkok principles envisage is a step in the right direction.

The regional initiatives taken up in South Asia as shown by the South Asian States in their participation in the AALCO, the Informal Consultation on Migratory movements, the civil society participation, the membership of India, Bangladesh and Pakistan in the Ex. Com of the UNHCR, the long standing tradition of most of the countries in the region of hosting asylum seekers, the rights provided to aliens including refugees by national constitutions of most of the countries in the region and the expansion of such rights in favor of the refugees by the judiciary in South Asian countries (especially India) are indicative of the fact that there is a consensus building up at various levels in favor of a specific refugee regime. NGO’s and media participation is growing in favor of refugees and their rights. More needs to be done. States in South Asia should capitalize this environment and come up with a regional regime; a regime that not only takes care of the asylum issues but that of durable solutions as well.

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