

Legal protection of refugees in South Asia

by Chowdhury R Abrar

Since 1947, 30-40 million people have crossed the borders of South Asian states in search of refuge and almost every country has produced and/or received refugees.

The region continues to be an area of major refugee flows and, against a backdrop of burgeoning social, economic and ethnic tensions, the issues relating to these population movements are likely to become more complex.

The increase in refugee flows has been accompanied by a growing reticence of states to provide asylum. Apart from the political and security considerations, receiving states have become increasingly weary of the adverse economic, social and environmental consequences that accompany refugee flows. In addition, the ever more restrictive asylum policies of a growing number of Western countries have dampened the interest of at least some countries in the developing world in upholding the ideals of international refugee protection and acceding to international refugee instruments.

Although the refugee problem is grave in South Asia the countries concerned have not developed any formal structure to deal with the issue. Nor is there a regional initiative. Refugees are subjected to the same laws as illegal aliens. As there is no refugee-specific law, asylum seekers and refugees are dealt with under *ad hoc* administrative arrangements which by their very nature can be arbitrary and discriminatory, according few rights to refugees. The most important hindrance towards developing a formal refugee regime in South Asia has been the adherence to the policy of working out political solutions through bilateral negotiation between the host country and the country of origin, with the emphasis on sovereign jurisdiction.¹ It is in this context that this paper stresses the urgent need for developing a legal regime for refugees in South Asia.

Structures of refugee protection

The framing of law on refugee protection can be done in three ways: by acceding to international refugee instruments, by developing a regional instrument for South Asia and/or by framing national legislation.

i. Accession to international instruments

The basic instruments of international refugee protection are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The regional conventions and declarations that have since been adopted draw heavily on the Convention. So far no South Asian state has expressed interest in acceding to the Convention. Many reasons have been put forward to explain this:²

- the perception that the 1951 Convention is a Cold War instrument, tilted in favour of 'political refugees' and therefore inappropriate for the South Asian situation where the mass exodus of refugees is caused mainly by generalised conflict



- bureaucratic wariness of the perceived 'interventionist' activities of UN and other international agencies
- the apprehension of policy makers that the consequences of signing the Convention might entail obligations that they may not be able or prepared to meet in terms of resource mobilisation
- the perception that the Convention is being abused by refugee groups in the developed countries who are collecting funds for terrorist activities in their countries of origin³
- the belief that, as a region, South Asia has been generous to refugees and that accession to the Convention would not necessarily improve the condition of refugees
- the derogation by developed countries of international refugee protection principles
- the possibility of economic migrants benefitting from the Convention principles

It is time for a serious moral challenge to be posed by the developing world

BS Chimni has argued that South Asian states should refrain from acceding to the Convention as the instrument is being dismantled by the very states which framed the Convention, and that any talk of accession should also be linked to the withdrawal of measures that constitute the *non-entrée*⁴ and temporary protection regimes.

Chimni's formulation merits serious consideration given the fact that asylum as an institution has come under severe threat from the Western countries. It is time for a serious moral challenge to be posed by the developing world and South Asia could very well take the lead in this regard. One may fully share Chimni's concerns about the policies of the Western countries; however, linking the accession issue to making demands for changes in the Convention may lead to the further erosion of already weakened international refugee principles. Accession to the Convention can provide civil society institutions with a basis from which to campaign against any violations of the conventions (nationally, regionally and internationally)⁵ and provide South Asian states with a legitimate base from which to exert pressure on Western countries to dismantle the *non-entrée* regime.

ii. Framing of a regional instrument

Regional instruments constitute another important structure of refugee protection. The OAU Convention of 1969 reflected the frame of minds of political leadership of a continent engaged in anti-colonial movements. It broadened the scope of the definition of refugees to include those fleeing apartheid, colonial oppression and generalised violence and emphasised voluntary repatriation as a solution to refugee problems in Africa.

In Europe, the Schengen (1985) and Dublin (1990) agreements were directed to develop a common strategy to deal with asylum seekers within the continent.

To address their own regional needs, Latin American states opted for a non-binding

Cartagena Declaration (1984). The Declaration was formalised by the non-governmental sector only, yet the governments of the region tend to follow it as a matter of policy. The Cartagena Declaration further broadened the scope of the refugee definition to include foreign aggression, internal conflicts and those fleeing massive violation of human rights.

An analysis of various regional approaches⁶ suggests that the coordination and cooperation of the concerned states are essential for the success of such an initiative, and that the consistent application of standards can indeed promote the protection of refugees and encourage voluntary repatriation.

Those who argue for a regional instrument point out that, in spite of accession to quite a few international human rights instruments and constitution guarantees and in spite of generous asylum practices and lenient judiciaries in many countries of South Asia, there have been occasions when protection for refugees has been jeopardised by the absence of legal principles. It is further suggested that foreign policy and domestic political considerations have often prevailed over general protection principles, putting refugees in vulnerable situations.⁷ The proponents of the regional approach argue that:

- The complexity and size of population movements in South Asia defy *ad hoc* responses.
- There is sufficient commonality of problems, policies and practice among the South Asian states to develop a regional approach.
- A regional approach would allow South Asia to address its specific concerns on refugee issues, help improve cooperation and solidarity among countries, improve prospects for solution and help define a clear and useful role for UNHCR.

However, there are those who argue in favour of a national legislation, as opposed to a regional declaration or convention. Firstly, they argue, a premature attempt at a regional solution could mean the "scuttling of national legislation as the process of negotiation will raise politically sensitive issues which may be used by ruling elites to turn the ordinary citizen hostile to even a national regime for refugees"⁸. Secondly, a non-binding regional instrument may have little impact but may provide enough justification of thwarting any national legislation. Thirdly, the scope of a regional instrument will be confined to general issues affecting the region while a national legislation can go into much more detail and therefore be more comprehensive. Fourthly, any attempt at arriving at a regional agreement is likely to result in a minimalist regime. And, finally, issues surrounding IDPs which, for obvious reasons, have no place in a regional instrument can be effectively addressed in national legislation. Chimni states further that the "passage of national legislations would allow states in the region to identify and debate their individual concerns, both at the level of security and resources, and thereby bring to the fore the divergent perceptions to the refugee problem. They would also accumulate critical experience in their implementation."⁹

The South Asian countries have yet to de-link refugee issues from their national security concerns and do not share the broad worldview of perceiving them as humanitarian and human rights concerns. In this context it is most unlikely that a regional instrument, either in the form of a declaration or a convention, is likely to emerge. Even if it does, in the absence of national regimes such an instrument is likely to be constrained by a number of factors and the rights of

refugees are likely to be compromised. This leaves us with the option of national legislation.

iii. National legislation

Given the realities of South Asia, efforts should be geared towards developing comprehensive national laws which uphold the universal principles of international refugee protection while taking into account the distinctive traits of the region.

Initially, the second half of the 1990s saw some initiatives at an unofficial level towards developing a regional refugee protection regime in South Asia. The constitution of the Eminent Persons Group (EPG) for South Asia by UNHCR in November 1994 was an important step in this direction. At its first meeting, the Group agreed to hold annual regional Consultations to promote public awareness and identify mechanisms and strategies for moving towards accession or, alternatively, formulating a regional instrument adapting the Convention to the needs of the South Asian region. The Colombo Consultation of 1995 underscored the need for a South Asian regional legal regime for refugees and a common Declaration reconfirming the validity and relevance of the definitions contained in the international refugee law instruments as well as the 1969 OAU Convention and the 1984 Cartagena Declaration. The principal focus therefore was on the development of a regional normative framework that would address the needs of refugees, stateless persons and IDPs.

It was at the New Delhi Consultation of 1996 that there was a strategic shift in favour of a model law for refugees that would be applicable at the national level. The Consultation also emphasised the need for better public awareness-building about refugees and IDPs and concluded that national legislations would permit a better understanding of commonalities in principles, policies and practices, and would eventually enable a regional legal framework to be drawn up.¹⁰

It was at the Dhaka Consultation of EPG in November 1997 that a model national law was approved. This model law is the first step in the process of building a regional consensus on preventing, managing and solving the problems accompanying refugee flows in a comprehensive and humane manner.

The purpose of the law is to establish a procedure for granting refugee status to asylum seekers, to guarantee them fair treatment and to establish the requisite machinery for its implementation.

The model law incorporates 'ethnic identity' in its categorisation of people who would qualify to gain refugee status and in a note establishes that membership of a particular social group will also include gender-based persecution. In that respect, the model law provides a comprehensive definition suiting the needs of the region.¹¹

The model law reaffirms the principle of *non-refoulement* and lays down rules for application of refugee status; it provides for setting up an implementing agency (the 'Refugee Commissioner') and an appellate body (the 'Refugee Committee') and rules for determination of refugee status; and it explicitly sets out the rights and duties of refugees and provides for appropriate procedures in case of mass influx. An important safeguard for those who enter illegally has been provided and, in order to ensure the voluntary nature of repatriation, the model law makes it necessary that refugees express their wishes in writing or through other appropriate means. The model law provides a basic framework by embodying procedures for the determination of refugee status including legal assistance and interpreters' services.

Accession to other international instruments

There are several other international instruments¹² that have major relevance for the protection of refugees and IDPs. Civil society institutions may urge states which are not signatories to these conventions/covenants to accede to these instruments and also press those states that have acceded but have not made enabling national legislations to do so. All countries of South Asia have acceded to the Convention for the Elimination of Discrimination against Women, the Child Rights Convention and the International Convention for Elimination of all forms of Racial Discrimination. Accession to these conventions obliges states to uphold and protect the rights of women, children and racial and ethnic minorities in refugee situations. South Asian states should also consider signing the Convention Relating to Status of Stateless Persons.

Conclusion

In assessing various aspects of international refugee protection, including the implications of ratifying international refugee instruments, developing a regional instrument and framing national legislations for the South Asian countries, this article concludes that the adoption of national legislations would be an effective first step. It calls for state accession to those other international instruments with implications for refugee protection in the region and urges South Asian countries to engage with Western states in dismantling the *non-entrée* regime which is undermining the basic principles of international refugee protection.

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1 The Basic Principle of the SAARC (South Asian Association for Regional Cooperation) charter enshrines that 'contentious' bilateral issues would not be brought in for discussion. See 'The Contemporary Refugee Problem and the Concept of Asylum in South Asia' by Rose Varghese in *Proceedings of the Second Regional Consultation on Refugee and Migratory Movements*, Colombo, 25-27 September 1995. See also *Managing Refugees in South Asia* by Mahendra Lama, Occasional Paper 4, RMMRU, Dhaka, 2000.

2 Bradman Weerakoon 'Regional Initiatives to Promote Awareness of and Accession to the 1951 Refugee Convention and other Relevant Human Rights Instruments' in *Proceedings for the Fourth Informal Consultation on Refugee and Migratory Movements in South Asia*, Dhaka, 10-11 Nov 1997. See also 'The Need for Refugee Laws in South Asia' in (C R Abrar and Shahdeen Malik ed) *Towards National Refugee Laws in South Asia*, RMMRU, Dhaka, 2000.

3 Article 44, 9th SAARC Summit, Male (May 1997).

4 Various legal and administrative measures drawn up by the US and European countries to restrict the entry of asylum seekers from other regions.

5 Tapan Bose *Protection of Refugees in South Asia Need for Framework*, SAFHR Paper Series 5, South Asia Forum for Human Rights, Kathmandu.

6 See V Vijaykumar 'Developing a Regional Approach to Refugee Problems in South Asia', presented to the Fourth Regional Consultation on Refugee and Migratory Movements, cited earlier.

7 *Ibid.*

8 B S Chinnai *The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia*, RCSS Policy Studies 4, Regional Centre for Strategic Studies, Colombo, 1998, p12.

9 *Ibid.*

10 SAARCLaw has also contributed substantially to developing model national legislation for refugees. SAARCLaw is a regional body recognised by SAARC which brings together national associations of judges, legal administrators, academics and lawyers from the five SAARC countries. Its Delhi Seminar of May 1996 favoured framing national legislations before formulating a regional instrument.

11 For a comparative review, see S S Wijeratne and Wei Meng Lim Kabaa in *Towards National Refugee Laws in South Asia*, RMMRU, Dhaka, 2000.

12 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention Against Torture.