

PROTECTION FOR FORCED MIGRANTS IN SOUTH ASIA: PROSPECTS AND CHALLENGES

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ABSTRACT

None of the states of South Asian region have become the state party to the 1957 Refugee convention or its 1967 protocol. Despite its significant impact on economic, cultural and political environment in the region and the rights and freedoms of the population concern, South Asian countries have not yet ready to develop a formal legal framework to address the issue at any level of their governance. With the recent development which took place in global arena, it can be argued that refugee problem has spread in a massive scale than it appear to be, in the region. None of the state in the region is ready to accede to the 1957 Refugee Convention or its 1967 Protocol. Further, to address the issues relating to forced migrants the States of the region prefer to negotiate among countries and work out bilateral agreements where they can come up with political solutions rather than creating a legally binding instrument for the region. Thus, this qualitative research paper argues that even in the absence of a specific law governing the forced migrants, there is a positive obligation under other international human rights conventions which each of the States in the region is a state party, to protect this population. Further, it suggests that it is much more effective to develop a regional mechanism to address the issue which can strike balance between the rights of forced migrants as well as the sovereign states of the region.

Keywords: Forced migrants, South Asia, protection mechanism

INTRODUCTION

Although, none of the states of South Asian region have become the state party to the 1957 Refugee convention or its 1967 protocol, they host a considerable number of refugees and asylum seekers in their territories. There are forced migrants, from within and outside the region, in South Asia. Further, when considering South Asian countries, those can be categorized as both under the category of refugee generating states and refugee hosting states. Basically, Afganishtan, Sri Lanka, Bangladesh and Bhutan are considered as main countries in the region, which generate/d refugees while Pakistan, India and Nepal considered to be the main states which host large number of refugees within the region. According to the statistics provided by UNHCR as at June 2017, Pakistan hosts the largest number of forced migrants in the South Asian region, which is estimated around 1.4 million¹ while India hosts the 200383 forced migrants in the region.²

Despite its significant impact on economic, cultural and political environment in the region and the rights and freedoms of the population concern, South Asian countries have not yet ready to develop a formal legal framework to address the issue at any level of their governance. With the recent development which took place in global arena, it can be argued that refugee problem has spread in a massive scale than it appear to be, in the region. None of the state in the region is ready to accede to the 1957 Refugee Convention or its 1967 Protocol. Further, to address the issues relating to forced migrants the States of the region prefer to negotiate among countries and work out bilateral agreements where they can come up with political solutions rather than creating a legally binding instrument for the region. Thus, this qualitative research paper argues that even in the absence of a specific law governing the forced migrants, there is a positive obligation under other international human rights conventions which each of the States in the region is a state party, to protect this population. Further, it suggests that it is much more effective to develop a regional mechanism to address the issue which can strike a balance between the rights of forced migrants as well as the sovereign states of the region.

LACK OF LOCAL LAWS RELATING TO PROTECTION OF FORCED MIGRANTS IN THE REGION

India

Despite the fact that the significant number of forced migrants has entered into India since its independence, the Indian domestic law does not provide any legislation for the protection of asylum seekers and refugees in the state. Accordingly, all

¹ United Refugees, "UNHCR - Pakistan" (*Unhcr.org*, 2016) <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487016&submit=GO>> accessed 6 November 2017.

² <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4876d6&submit=GO>> accessed 6 November 2017

the asylum seekers and refugees in the country governed by the 1946 Foreigners Act, which defines a 'foreigner' as anyone who is 'not a citizen of India'³. In addition The Citizenship Act 1955 (as amended) defines all foreigners who enter India without valid travel documents as 'illegal migrants'.⁴ Accordingly, it can be observed that the Indian domestic law does not make any difference between asylum seekers, refugees and other illegal migrants who enter into the state. For the purpose of Indian law, asylum seekers are merely one variety of foreigners and subject to the same sweeping powers regulating their entry and removal from the country.⁵

Pakistan

Currently, Pakistan hosts the largest forced migrant population in the South Asian region⁶. But, Pakistan does not have any piece of legislation which is applicable to refugees or asylum seekers in the country. According to the Foreigners Act 1946 (as amended by ordinance n 2000), the foreigner means a person who is not a citizen of Pakistan. This legal provision seems to be identical to the Indian legal provisions relating to the this area of law. Furthermore, in the Pakistani Citizenship Act no. 11 of 1951 defines the term 'alien' as 'a person who is not a citizen of Pakistan or a Commonwealth citizen'.⁷ This provision should read with the definition of 'Commonwealth citizen', given under the same section, which means 'a person who has a status of a Commonwealth citizen under the British Nationality Act, 1948'.⁸ Before the year 2000, though Pakistan followed a flexible policy towards illegal migrants in the country, it introduced an amendment to the Foreigners Act of 1946, which introduced prohibition of assistance to any illegal migrants who enter into the country. Specially, after the 9/11 attack Pakistan took serious measures to restrict illegal migrants entering the state by introducing a state agency named National Alien registration Authority (hereinafter NARA) with mandate to register all the illegal migrants in the country. This agency decided to offer registration to the illegal migrants who enter into country before 2001. Although currently it provides a wide scale assistance to the forced migrants in the country in collaboration with UNHCR⁹ all operations carried out under the humanitarian basis rather than on a legal basis which provides rights and protection for the forced migrants in the country.

Nepal

The legal situation relating to forced migrants in Nepal is similar to the countries which are discussed above, Nepal also does not have any local legislation which provides protection and recognizes the rights of refugees in the country. According to the record of the UNHCR Nepal currently host around 40000 refugees from which around 25000 holds the nationality of Bhutan.¹⁰ According to the definition provided by the Article 2 (a) of the Foreigners Act 1958, 'foreigner' means any person who is not a citizen of Nepal at any time. Article 3 of the above mentioned Act also provide with sweeping powers relating to the foreigners, including their entry,¹¹ exit¹², place of residence in the Kingdom of Nepal¹³ and compel them to give any undertaking¹⁴. Hence, the domestic legal regime does not provide differentiate among forced migrants and other illegal foreigners in the kingdom of Nepal.

REASONS FOR THE REFUGEE INFLOW IN THE REGION

A pilot observation on the situation of region relating to refugee flow, it can be clearly observed that the most of the forced migrants are inflow due to the direct state persecution or the state's failure to provide the national protection to its citizens from the violence. Many regional scholars in the field of refugee law list out the causes which are pertaining to the refugee influx in the region of South Asia. Narayan Sharma¹⁵, while quoting Mahendra P Lama, highlighted six different factors as

³The Citizenship (Amendment) Act, 2004, No.6, Acts of Parliament, S 2(1)(b), 2004 (India)

⁴ Ibid, s 2.

⁵ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015) 33 Wisconsin International Law Journal, 48

⁶ United Refugees, "UNHCR - Pakistan" (*Unhcr.org*, 2016) <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487016&submit=GO>> accessed 6 January 2016.

⁷ s.2

⁸ ibid

⁹ United Refugees, "UNHCR - Pakistan" (*Unhcr.org*, 2016) <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487016&submit=GO>> accessed 6 January 2016.

¹⁰ United Refugees, "UNHCR - Nepal" (*Unhcr.org*, 2016) <<http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487856&submit=GO>> accessed 6 January 2016.

¹¹ The Foreigners Act 1958 (Nepal), Art 3, 2 (a)

¹² ibid Art 3, 2 (b)

¹³ ibid Art3, 2 (d)

¹⁴ ibid Art3, 2 (f)

¹⁵ Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review. <http://www.mcrg.ac.in/WC_2015/Reading/D_Regional_Mechanism.pdf> accessed on 5 January 2016

being the root causes of the refugee generation. Principally religious persecution, cultural discrimination, ethnic conflicts, environmental hazards, the fight for political independence and human rights violations are the main root causes for the refugee problem in the region.

In addition to above mentioned reasons, another writer in the area of the refugee studies observed that there are some other factors which induced forced migrants in the region. According to C. Amalraj, 'manufactured' minority complex of the majority communities, Border disputes between countries, Arms race, Geopolitical considerations, forced land colonization, lack of proper citizenship laws, cultural discrimination and suppressions, refusal to sign International Instruments and population transfer¹⁶ have contributed to increase the uprooted population in the region of South Asia.

According to the above mentioned factors, it can be argued that in most of the cases of forced migrants in the region are the direct result of human generated causes in which national states plays a major role. On that basis, it can be argued that States in the region should actively take steps to manage the forced migrants in the region while taking initiatives to solve the problem addressing its root causes. Furthermore, these steps should be based on the legal rights and responsibilities agreed by the states rather than humanitarian measures taken from time to time in an *ad hoc* manner.

THE NECESSITY FOR DEVELOPING A LEGAL FRAMEWORK TO MANAGE FORCED MIGRANTS IN THE REGION

As discussed above, it is clear that refugee problem has spread in a massive scale than it appear to be, in the region South Asia. Despite its significant impact on economic, cultural and political environment in the region and the rights and freedoms of the population concern, South Asian countries have not yet ready to develop a formal legal framework to address the issue at any level of their governance. There is neither a willingness to enact a domestic piece of legislation nor an enthusiasm to adopt a regional instrument to set out relevant normative and legal framework to deal with the problem. Ironically, none of the state in the region is ready to accede to the 1957 Refugee Convention or its 1967 Protocol. The States of the region prefers to negotiate among countries and work out bilateral agreements where they can come up with political solutions rather than creating a legally binding instrument which would be applicable to the entire region. And this argument is supported by the observation of other writers as well where they observe that, '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 country of origin, with the emphasis on sovereign jurisdiction'.¹⁷ Further, the refugee hosting South Asian countries are of the view that this mode [bilateral agreements] of dealing with the refugees give them flexibility to negotiate with the host country.¹⁸

Accordingly, when there is no any specific law to address the issues relating to refugees and asylum seekers, all of them are subjected to the same laws and regulations pertaining to the illegal migrants who are necessarily a different category in nature to the refugees and asylum seekers. Hence, it creates a legal vacuum in the area of rights and freedom relating to the refugees and it leaves them in a much more vulnerable situation.

Scholars observe that there are adverse impacts of this approach towards refugees and they argue that it reduces the possibility of finding a durable solution to the problem. For an example, Sharma states that, the existing mod 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.¹⁹ He supported this argument with the example of India's treatment towards Tibetan refugees and Sri Lankan refugees in the country particularly after the assassination of Rajiv Ghandhi.

Above mentioned contention can be further proved by the writing of the other scholars as well. The position of Tamil refugees in India changed dramatically following the 1991 assassination of Rajiv Gandhi in *Sriperumbudur* by [...] a Tamil suicide bomber with strong links to the Liberation Tigers of Tamil Ealam (LTTE).²⁰ Following this observation Sanderson explained the way the Indian government changed its assistance policies with respect of Tamil refugees in the country through relocating refugee camps and restricting social and economic services.²¹

¹⁶ John Joshva Raja, *Refugees And Their Right To Communicate* (World Association for Christian Communication 2003).

¹⁷ Rose Varghese, "The Contemporary Refugee Problem And Concept Of Asylum In South Asia", *Second Regional Consultation on Refugee and Migratory Movement* (1995).

¹⁸ Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p112

¹⁹ Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p112

²⁰ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015) 33 Wisconsin International Law Journal.p62

²¹ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015) 33 Wisconsin International Law Journal.p63

The sole purpose of a mechanism is not only to treat refugees while they are in exile but also to endure to work out a durable solution. Further, when creating a mechanism to deal with the problem of refugees there are many factors which should be taken into consideration. Among these factors International Human Rights norm ad principles plays a major role. Hence, it is essential to have a legal mechanism to fulfill these requirements, other than a mere bilateral agreement which is based on purely or substantially political motives of the host country and the country of origin. Eventhough, refugee hosting countries of the region continuously maintain the position that the bilateral agreements provide much more flexibility to seek solutions for the refugee problem it can be argued that there are many instances where it has proved to be an utter failure. For an example, writers stress the failure of Nepal-Bhutan bilateralism in relation to the Bhutanese refugees in Nepal.²²

Considering special needs and situation of the forced migrants, it can be argued that it is essential to differentiate their claims from the claims of other illegal migrants, which can preferably done through a comprehensive legal framework developed in order to address Refugee Specific issues.

THREE POSSIBLE WAYS OF PROVIDING LEGAL PROTECTION TO THE FORCED MIGRANTS IN THE REGION

When considering the possible models of providing proper protection through a legal instrument, Professor Abrar suggested three possible ways²³ which include acceding to the international refugee instruments, developing a regional mechanism or enacting a domestic legislation

POSSIBILITY OF ACCEDING TO INTERNATIONAL REFUGEE INSTRUMENTS

Given the fact that none of the states of the region are a state party to the 1957 Refugee Convention or to its 1967 Protocol, they have consistently maintained the position of their unwillingness to become a state party to any of those instruments. States have put forward many reasoning for their position of not becoming a state party to these international instruments and Professor Abrar point out seven main reasons²⁴ of them which are given below in bullet points.

- [T]he perception that the 1951 convention is a cold war instrument, titled in favour of 'political refugees' and therefore inappropriate for the South Asian situation where the mass exodus of refugees is caused mainly by generalized conflict

Above fact is very well evident in the speech delivered by the Arundhati Ghose²⁵, in 48th session of the Ex.Com of the UNHCR in 1997 where she observed that 'International Refugee Law is in a state of flux and it is evident that many of the provisions of this convention [Refugee 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...'.²⁶

- [B]ureaucratic wariness of the perceived 'interventionist' activities of the UN and other international agencies
- [T]he 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 mobilization
- [T]he 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 origin
- [T]he belief that, as a region, South Asia has been generous to refugees and the accession to the convention would not necessarily improve the condition of refugees
- [T]he derogation by developed countries of international refugee protection principles
- [T]he possibility of economic migrants benefiting from the Convention principles

The close perusal of above reasons shows that most of the reasons put forward by the countries in the region are purely based on the political motives rather than on a sound legal argument for not to sign the international instruments.

Furthermore, some renowned scholars like Professor B.S.Chimni strongly support the position of the States of South Asian region that of not to become a state party to the international refugee instruments while suggesting that they should refrain from

²² Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p113

²³ Chowdhury R Abrar, *Legal Protection Of Refugees In South Asia* <<http://www.fmreview.org/FMRpdfs/FMR10/fmr10.8.pdf>> accessed 3 January 2016.

²⁴ Chowdhury R Abrar, *Legal Protection Of Refugees In South Asia* <<http://www.fmreview.org/FMRpdfs/FMR10/fmr10.8.pdf>> accessed 3 January 2016.p.22

²⁵ Permanent Representative of India to the United Nations

²⁶ Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p111

acceding in future as well.²⁷ He argued that any negotiation towards acceding the said instruments should be coupled with the withdrawal of the measures that constitute the non *entrée* and temporary protection regimes. But, this suggestion is challenged by professor Abrar stating that 'linking the accession issue to making demands for changes in the convention may lead to the further erosion of already weakened international refugee principles'²⁸. In addition to that, Professor Abrar favours the position of acceding to the international refugee instruments and he argued that accession would provide South Asian states with a legitimate basis for exerting pressure on Western countries to call off the non *entrée* regime.

However, South Asian states have chosen the option of not becoming a state party to international refugee instruments and they have not shown any kind of a green signal towards acceding to them in near future. On that basis, it is an illusion to expect them to provide protection for refugees in their territories under these instruments.

POSSIBILITY OF ADOPTING A REGIONAL LEGAL INSTRUMENT

In the area of international law, regional legal arrangements have played a vital role in protecting the rights of the people of the world in various situations. Either they have acted as a supplement regime to a principal instrument or an independent legal regime which governs the particular situation in the region. Either way, these instruments are capable of setting up common legal standards and norms which are applicable throughout the states which has become a state party to the instrument in the region, subject to the status of the incorporation mechanism of international law in the domestic legal regime. Accordingly, this section will examine the possibility of introducing a refugee specific regional legal instrument to the South Asian region.

LESSONS FROM OTHER REGIONAL INSTRUMENTS IN THE FIELD OF REFUGEE PROTECTION

Countries have adopted different regional legal instruments to address their own regional needs in terms of refugee protection. There are three main regional instruments in this area of law, namely OAU convention adopted by African union, the Dublin agreement adopted by the European Union and the Cartagena Declaration adopted by the Latin American region. Further, it can be observed that all three of these instruments contain the provisions which are specific to their region.

In the Article 1 of the OAU convention, the definition of refugee has been expanded to cover those who, fleeing apartheid, colonial oppression and generalize violence²⁹ which are specific concerns of the African region. Further, Schengen³⁰ and Dublin³¹ agreements applicable to the European region contain the provisions in order to develop a common strategy to address the registration and other needs relating to the refugee population in the region. The Latin American region has adopted a non binding yet much more influential Cartagena Declaration to cater their own region specific needs. In its conclusion, the Declaration concludes that the definition of refugees should include the people who flee due to foreign aggression, internal conflicts and those fleeing massive violation of human rights as well.³²

Accordingly, it can be argued that if the South Asian region come up with a regional instrument which contains provisions relating to the refugees in the region, it can include the specific provisions which address the regional specific issues. Hence, it allows the states of the region to negotiate and frame the instruments while taking into account all the issues relating to management of forced migrants in the region. Further, the parameters of this kind of a regional instrument allow them to consider country specific problems in depth compared to an international convention or protocol, at the drafting level. This measure can be a solution for the reasons which the states of the region put forward for not becoming a state party to the main international instruments relating to the refugees.

INTERNATIONAL OBLIGATIONS IN PLACE UNDER INTERNATIONAL HUMAN RIGHTS LAW

Despite their continuous unwillingness to accede to the international legal regime pertaining to the refugees, most of the countries in the region have entered into a series of other international conventions which contain *inter alia* the important provisions relating to the protections of refugees. Accordingly, it can be argued that, these legal obligations arising from those conventions can act as hurdles upon governments' discretion with respect to the policies relating to treatment of forced migrants in their territories. Hence, although there is no one specific single piece of legal document, it can be argued that the legal protection for refugees is not a brand new phenomena in the South Asian region.

²⁷ B S Chimni, "The Law And Politics Of Regional Solutions Of The Refugee Problem: The Case Of South Asia" (RCSS Policy Studies 4 1998).

²⁸ Chowdhury R Abrar, *Legal Protection Of Refugees In South Asia*
<<http://www.fmreview.org/FMRpdfs/FMR10/fmr10.8.pdf>> accessed 3 January 2016.p22

²⁹ *OAU Convention Governing The Specific Aspects Of Refugee Problem In Africa*
<<http://www.unhcr.org/45dc1a682.html>> accessed 8 January 2016.

³⁰ Eur-lex.europa.eu, "The Schengen Area And Cooperation" (2016) <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33020&from=EN>> accessed 8 January 2016.

³¹ Eur-lex.europa.eu (2016) <[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819(01)&from=EN)> accessed 8 January 2016.

³² *Cartagena Declaration* <https://www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf> accessed 8 January 2016.

Apart from Bhutan, rest of the countries in the region such as India, Pakistan, Sri Lanka, Bangladesh and Afghanistan have already signed or ratified the core instruments of International human rights law³³, such as the International Covenant on Civil and Political Rights (hereinafter ICCPR), the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), the Convention on Rights of the Child (hereinafter CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW) and the Convention Against Torture (hereinafter CAT). Each of these treaties, properly constructed, contains important protections for the rights of asylum seekers and refugees, and, in particular, the right of *non refoulement*.³⁴

The protection granted under the ICCPR

Under Article 6 (1) of the ICCPR, there is an absolute protection of right to life which guarantees against the arbitrary deprivation of life. In addition, this convention guarantees the freedom from torture or cruel, inhuman or degrading treatment. Further, United Nations Human Rights Committee in their General Comment no.31, noted that :

“the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”³⁵

Accordingly, it can be argued that the states parties in the region of South Asia to the convention now bear a basic obligation of due diligence to ensure that individuals facing removal from their territory will not be subject to a violation of their rights under the ICCPR as a whole which indirectly impose a duty upon the countries, towards the protection of the rights of refugees as well.

The protection granted under the ICESCR

Scholars argue that, even though, ICESCR is frequently dismissed as a source of protection from *refoulement* due to the progressive nature of its enforcement, there are a number of provisions in the convention which are drafted so as to be immediately binding on the states.³⁶ Accordingly, some scholars argue that there are many provisions in the ICESCR which are readily enforceable in the same way, as the provisions contain in the ICCPR. Since, the Committee on Economic, Social and Cultural Rights has not yet addressed the issue of *refoulement*, it is premature to comment on the protection which it provides through the ICESCR, but, there is every reason in both principle and law to assume and expect them to infer an obligation of *non-refoulement* from the ICESCR on the similar terms³⁷ as the Human Rights Committee imposed an obligation on the State parties to the ICCPR.

The protection granted under the CRC

The authoritative guidance with respect of the principle of *non refoulement*, issued by the Committee on the Rights of Child is as follows:

“[I]n fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.”³⁸

³³ Ohchr.org, "Human Rights Committee" (2016)

<<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>> accessed 10 January 2016.

³⁴ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015)

33 Wisconsin International Law Journal.p.70.

³⁵ United Refugees, "Refworld | General Comment No. 31 [80], The Nature Of The General Legal Obligation Imposed On States Parties To The Covenant" (*Refworld*, 2016) <<http://www.refworld.org/docid/478b26ae2.html>> accessed 10 January 2016.

³⁶ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015)

33 Wisconsin International Law Journal.p.81.

³⁷ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015)

33 Wisconsin International Law Journal.p.86.

³⁸ General Comment No.6 of the Committee on the Rights of the Child,

United Refugees, "Refworld | General Comment No. 6 (2005): Treatment Of Unaccompanied And Separated Children Outside Their Country Of Origin" (*Refworld*, 2016) <<http://www.refworld.org/docid/42dd174b4.html>> accessed 10 January 2016.

Scholars argue that, although, the committee, particularly refers to the Article 6 and 37 of the Convention in the above general comment, the protection from refoulement under the CRC relates to the entirety of the Convention³⁹ and any forceful return of a child to another country where he or she will be subjected to deprivation of the rights granted through the Convention, will amount to an unlawful refoulement in breach of conventional obligation of state parties. Accordingly, it can be argued that all the countries in the region who are state parties to the CRC already bear an international obligation towards child refugee in their respective territories to provide protection against refoulement.

The protection granted under the CAT

In contrast to the above mentioned human rights conventions which provide implied protection from refoulement the CAT expressly grants the protection from refoulement in its Article 3.⁴⁰ Interestingly, the guarantee expressed in Article 3 is limited to the torture as defined in Article 1(1) of the CAT. Hence, the application of this Article limited to preventing removal to a jurisdiction where there are "substantial grounds for believing" that an individual will fear "severe pain or suffering" that is "intentionally inflicted" for such purposes as "obtaining from him ... information or a confession" or "intimidating or coercing him," and where the mistreatment is inflicted "by ... or with the consent or acquiescence of a public official."⁴¹

Hence, it can be argued that as a state party to the CAT, states of the region bear an international obligation to adhere to the provisions enshrined in the convention. As civilized nations of the world the South Asian countries could not neglect the international provisions which are based on the higher norms of human values.

In addition to the international human rights instruments discussed above all the countries in the region are bound by the customary international law which contains the principle of *non refoulment*. Hence, it can be argued that the basic legal principles relating to the refugees, their rights and duties of the host states and state of origin are already more or less applicable to the states of the South Asian region. Arguably, adopting a refugee specific regional legal instrument would not add any extra burden on the governments of the countries concern instead it would rather formalize and regulate the irregularities which have surrounded the problems relating to the forced migrants management in the region at present.

WHY DO WE NEED REGIONAL LEGAL INSTRUMENT?

It is interesting to observe that the scholarship relating to the question of necessity of having a regional mechanism is divided very clearly. While some very strongly advocate for a regional mechanism for dealing with refugee situations in the region, others dismiss with the equal passion such an argument.⁴² Further, both sets of scholars have their own reasoning for the position that they support for.

V. Vijayakumar, a scholar who supports the idea of having a regional legal regime, list out the following reasons to prove that necessity in his paper which he presented at the 4th Regional Consultation on Refugee and Migratory Movement in South Asia .

- The complexity and size of population movement in South Asia defy *ad hoc* responses
- 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
- The commonality of problems, policies and practices in the South Asian States are conducive for a regional approach.
- A regional approach would allow South Asia to address its specific concerns on refugees.
- A regional approach would help improve cooperation and solidarity among the countries.
- A regional approach could define a clear and useful role for the UNHCR.
- A regional approach can improve the prospect for solutions.⁴³

In addition to this writer, Professor Abrar⁴⁴ and Assistant professor Narayan Sharma⁴⁵ also endorse the above reasons in order to support the claim for a regional legal regime.⁴⁶

³⁹ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015) 33 Wisconsin International Law Journal.p.87.

⁴⁰ Ohchr.org, "Convention Against Torture" <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>> accessed 10 January 2016.

⁴¹ Mike Sanderson, "The Role Of The International Law In Defining The Protection Of Refugees In India" (2015) 33 Wisconsin International Law Journal.p.90.

⁴² Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p.118

⁴³ v. Vijayakumar, "Developing A Regional Approach To Refugee Problems In South Asia" (Dhaka, 1997).

⁴⁴ Chowdhury R Abrar, *Legal Protection Of Refugees In South Asia* <<http://www.fmreview.org/FMRpdfs/FMR10/fmr10.8.pdf>> accessed 3 January 2016.

⁴⁵ Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p121.

In contrast, B.S Chimni, strongly advocate against the claim of necessity for regional legal regime for South Asia. He argues that the argument in favour of a regional regime is based on the misconceptions which are given below. The causes of the refugee flows lie within the region, Each region is equally equipped in material terms to deal with the problem, Physical proximity should be the fundamental test in defining the obligations of states towards refugees, Cultural similarities necessarily facilitate regional solutions, The refugee flow threatens the stability of the region, Mobility across regions threatens the identities of people in the region⁴⁷

He argues for a strategy of constructive linkage, which calls for greater burden sharing by more affluent regions of the world as a pre-condition for negotiating a regional regime. Although, in a nationalistic view, this argument seems very attractive, but in reality, other scholars question this position raising the concerns relating to the possibility of bringing affluent countries to the negotiation table.⁴⁸ Further, Chimni, suggest that any regional regime should build upon the lesson learnt or experiences developed through the domestic legislations in the states of the region where he appear to be in under the impression that the national legislations have more possibility of seen the light of the day compared to a regional regime.

Further, he noted that the *inter alia* political realism of the region thwarts the emergence of a regional mechanism due to suspicion and distrust which discourage the regional affairs among the states of the region. Given the above mentioned insecurity among states of the region Sharma required an explanation as to why those very countries, which refrain from cooperating for a regional mechanism, would obligate themselves by legislating a national law.⁴⁹

Professor Abrar, list out some arguments which have put forward by the scholars who advocate for a domestic legislation as opposed to a regional regime. According to them, 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 used by ruling elites to turn the ordinary citizen hostile to even a national regime for refugees.'⁵⁰ In addition, Professor Abrar noted the argument that, a non binding regional instrument may have little impact, but may provide enough justification of thwarting any national legislation. But given the history of adhering to the international legal instruments signed by the states of the region, this argument could not sustain because, becoming a state party to a regional or international legal document has never resulted in discouraging a domestic legislation in the same area of law rather it has encouraged the initiative of the state parties of the region. Another argument put forward against a regional regime that the scope of a regional instrument will be confined to general issues affecting the region while a national legislation can go into much more detailed and therefore be more comprehensive. When considering this argument, it can be dismissed by noting that there is no any barrier against adopting a national legislation which addresses the country specific issues⁵¹, due to a regional instrument and it is important to note here that both a national legislation and the regional instrument can act complementary to each other.

Hence, it can be observed that a regional legal regime has much more significant advantages over a national legislation. Smrithi Talwar⁵², argued that a regional framework depoliticize the act of granting asylum while increasing the accountability of administrative ats within a state and it can promotes the burden sharing responsibilities within the region by establishing a balanced approach to the problem of refugee flows.

Further, a regional regime can provide with a common set of standards which can be used when considering the rights and duties relating to the refugees in the South Asian region, which are based on the legal norms rather than political motivations of the countries concern. Hence, it provides a much more certain and predictable conditions for the forced migrants in the region in terms of their refugee claims.

Furthermore, a regional regime would allow the states of the region to fulfill their other conventional responsibilities in terms of refugee protection and hence it becomes compatible with the human rights norms and other International law norms which impose obligations on the state parties.

In addition a regional regime would create a platform for further negotiations where necessary, based on the legal norms which would promote the sustainability, credibility and accountability while providing a legal basis for the solutions. Also, it could provide readily available remedies and/or procedures to follow in case of an urgent situation and this will help to reduce the

⁴⁷ B S Chimni, "The Law And Politics Of Regional Solutions Of The Refugee Problem: The Case Of South Asia" (RCSS Policy Studies 4 1998)p1.

⁴⁸ Narayan Sharma, "Refugee Situation In South Asia: Need For A Regional Mechanism" 1 Kathmandu Law Review.p119.

⁴⁹ ibid

⁵⁰ B S Chimni, "The Law And Politics Of Regional Solutions Of The Refugee Problem: The Case Of South Asia" (RCSS Policy Studies 4 1998).

⁵¹ such as issues relating to IDPs in the country

⁵² Smrithi Talwar, "Building A Regional Consensus On Asylum: The Indian Perspectives" (2000) 1 Bulletein, IHL and Refugee Law.p.251.

negative impacts of *ad hoc* measures. Furthermore, given the realities of the region today, arguably, that there can be more environmentally induced forced migrants in the region from Maldives and Nepal due to environmental hazard in the near future and the region should be prepared to reduce any kind of a crisis. Hence, it is essential to be prepared to address these issues well in advance by placing proper management mechanisms to handle the situation and it can only be done through well principled regional legal instruments which would attract greater cooperation on all the states in the region.

CONCLUSION

As should be now be evident, the South Asian region has a long standing practice of receiving and hosting forced migrants in their territories in the gesture of humanitarian terms. Although, none of the states in the region have not become a state party to the international legal regime pertaining to the protection of refugees and asylum seekers, they are proud members of the number of other human rights treaties which have the supplementary impact on the 1951 convention and its 1967 protocol. Further, Most of those instruments contain the provisions relating to the principle of *non refoulement* and thus they impose a positive obligation on the state parties to refrain from any kind of an act which could amount to a violation of a treaty obligation which they are bound to respect.

Arguably, it is evident that the concept of protection for refugees or other forced migrants in the territory is not an alien concept for the states in the region. Hence, it is much more advisable to conclude a comprehensive legal regime for the region, which would be based on the basic human rights law norms and Rule of Law. This kind of a regional mechanism can provide a solid foundation for the countries in the region to negotiate with each other on the pre decided procedure which would help to reduce the political tension among them. Further, this kind of a regional instrument would definitely provide a legal foundation for the region on which they can seek for international assistance and cooperation from the affluent countries rather than depending on individual claims which would put forward by each country.

In terms of the protection and rights of the refugees and other forced migrants in the region, a regional legal regime would be very beneficial for them when it comes decisions relating to their status as refugees and rights relating to the said status which would lead towards proper protection. Because, a regional legal instrument would create a common criteria which would reduce the arbitrariness and discretion attached to the *ad hoc* mechanisms adopted by the countries in the absence of a legal regime.

Most importantly, the examples drawn from other regions show that a regional legal regime can address the issue of National Security of States in the region as well and further, it has the capability of balancing the conflicting interest of the refugees and the refugee hosting countries, on legal principles.

Finally, the regional initiatives taken up in the region for framing a regional mechanism, long standing tradition of hosting forced migrants in the region and commitment towards respecting the obligations imposed by the international human rights instruments show that there is a some kind of a consensus among the stakeholders of the problem to come up with a legal mechanism which can fulfill the legal lacuna in the area of refugee law in the region. Further, media, media personnel and social media networks contribute towards promoting awareness among people and campaign in favour of the rights of refugees and its human rights aspects. Hence, it can be concluded that it is high time for the countries in the region to take prompt actions to place a binding legal instrument for the region before its too late. A long way to go !

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