The Law and Politics of Regional Solution of the Refugee Problem:
The Case of South Asia

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Introduction
It has yet to be sufficiently appreciated that a regional instrument can reconstitute the international refugee regime in a fundamental way through redefining the relative obligations of different regions of the world to the global refugee problem. In Part II of this paper I argue that from an inter-regional perspective the regional approach is, in the post 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. It is based on a set of erroneous assumptions: that the causes of refugee flows lie within the region, that each region is equally equipped in material terms to deal with the problem, that physical proximity should be the fundamental test in defining the obligations of States towards refugees, that cultural similarities necessarily facilitate regional solutions, that refugee flows threaten the stability of the region, and that mobility across regions threatens the identities of peoples in other regions.

A regional approach should be endorsed only as an integral element of an international approach based on solidarity as opposed to segregation and exclusion. I recommend in this context 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. It is inter alia based on the understanding that the causes of global refugee flows often lie outside the region as also the idea that it is the obligations of all peoples and States, in particular rich States, to bear the burden of the global refugee problem.

In Part III of the paper I examine the regional approach from an intra-regional perspective and contend that 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. I also suggest an agenda of research in the context of creating conditions that will facilitate the adoption of a regional declaration or convention. Apart from identifying some issues which call for investigation, I suggest that the politics of the region is undertheorized with few texts exploring alternative visions of its future. The literature is dominated by the language of political realism which cannot come to terms with the humanitarian dimension of problems. It needs to be displaced by an approach which even as it respects the concerns of States carves out space for humane solutions. Part IV briefly states the conclusions of the paper.

II The Inter-regional Perspective
From an inter-regional perspective, a regional approach to the refugee problem in South Asia calls for a brief review of recent developments in Europe and North America. These developments are enlisted to sustain the thesis that the espousal of a regional approach in the poor world is currently part of a strategy of containment which seeks to shift the burden of caring for refugees to the poor world.

Europe and North America: The Emergence of de facto Regional Regimes
An important element of the strategy of containment is the linguistic ploy of not terming the emerging regimes in Europe and North America as regional responses to the global refugee
problem. Instead, it is customary to begin any discussion of regional conventions with a reference to the OAU Convention governing the specific aspects of refugee problems in Africa, 1969 (hereafter the OAU Convention) and to recommend it as the basis for elaborating a regime for other poor regions. Two points need to be made here. First, it is forgotten that the 1951 Convention itself began life essentially as a regional instrument. Its geographical and chronological limitations were only removed, under the pressure of Cold War politics, in 1967 by the Protocol Relating to the Status of Refugees. Second, that in the period after the Cold War the original regional character of the instrument is being restored. A series of restrictive legal and administrative measures have been taken by States in Europe and North America to ensure that they do not have to offer protection to refugees from other regions.

Furthermore, where mass influx within the region is concerned, as in the case of refugees from former Yugoslavia, the 1951 Convention has been sought to be replaced by a temporary protection regime.

The move towards establishing a non-entrée regime began in the early eighties when an overwhelming majority of asylum seekers were of non-European origin. It also, significantly, ‘led to renewed interest in the 1980s in .... “regional solutions” which might result in diminishing the numbers of extra-regional arrival’. The non-entrée regime has been put in place by a series of measures. Some of these may be touched upon. First, there are the restrictive visa policies and carrier sanctions; the latter making airline carriers liable to fines for carrying passengers without proper papers. Second, “international zones” have been demarcated in airports where physical presence does not amount to legal presence and from where summary and arbitrary removal is permissible. Third, safety zones have been created inside countries - as in Northern Iraq and former Yugoslavia - to stop asylum seekers moving out and seeking refuge. As it turned out, these safe zones were the most unsafe you could imagine. Fourth, the principle of non-refoulement has been given an extremely narrow interpretation. For example, in Sale v. Haitian Centers Council [113 S.Ct 2549 (1993)] the US Supreme Court decided that the act of interdicting Haitian refugees on the High Seas and returning them to their country of origin irrespective of the claims to having a well founded fear of persecution was not violative of Article 33 of the 1951 Convention. This decision met with near universal disapproval and has been described by the High Commissioner for Refugees as ‘a setback to modern international refugee law’. Fifth, most countries in Europe, and the US since April 1, 1997, are implementing the “safe third country” concept whereby an asylum seeker is denied access to a comprehensive asylum determination procedure because they could apparently have sought protection in countries they passed through to reach their ultimate destination. The concept has grave consequences for the asylum seeker as has led to chain deportations, often back to the country from which the refugee fled. In an unfortunate decision the German Federal Constitutional Court in May 1996 upheld the German safe third country law legitimizing its practice in other countries as well. A recent report of the United States Committee for Refugees (USCR) however recommends that “the use of national safe third country national laws and practices should be discontinued imme diately”.

Sixth, still on the same theme, mention may be made of attempts to harmonize internal procedures in Europe which have led to the adoption of two conventions known as the Dublin and Schengen Conventions which have recently entered into force. The USCR has recommended the scrapping of these conventions as well in so far as the criteria used for determining claims of asylum seekers is concerned. It recommends that “the country where the asylum seeker first
chooses to seek asylum, rather than the country of first arrival, should normally assume responsibility for adjudicating the asylum claim”.8 Seventh, asylum seekers have been held in offshore camps which have been effectively declared rights free zones. For example, when the US started holding Haitian and Cuban refugees at Guantanamo Bay, a territory leased out from Cuba, a U.S. Court of Appeals ruled in Cuban American Bar Association (CABA) v. Christopher [43 F.3d 1412 (11th Cir.1995)] that refugees in “safe haven” camps outside the US did not have Constitutional rights of due process or equal protection, and were not protected against forced return. This is, according to Bill Frelick of the United States Committee on Refugees (USCR), “an open invitation for abusive and arbitrary conduct”.9 Eighth, where an asylum seeker manages to cross these hurdles a very restrictive interpretation is given to the definition of “refugee” contained in the 1951 Convention. For example, asylum seekers fleeing former Yugoslavia, most of whom met the 1951 Convention definition, have been denied refugee status. Some countries (Canada, for example) have also invoked the internal flight alternative (IFA) test to deny refugee status.10 Together, these interpretations and measures manifest a language of rejection which threatens the very institution of asylum.

For refugees within the region a temporary protection regime has been established which has replaced the 1951 Convention. While it can be argued that protection was always conceived as temporary, vide Article I(C) of the 1951 Convention which contains the cessation clause, international refugee law was in practice firmly wedded to an exile bias. As Goodwin-Gill has noted, the Convention “was drafted at a time when voluntary repatriation was effectively obsolete. There was no talk then of temporary protection, temporary refuge, dealing with causes, promoting the condition for safe return, or preventing the necessity for flight”.11 The concept of temporary protection was introduced in the context of refugees fleeing conflict in the former Yugoslavia. Four points may be noted here. First, the concept coexists with the construction of the non-entrée regime which makes access to the industrialized world difficult. Second, as already mentioned, even those refugees who fall squarely within the definition of the 1951 Convention are only receiving temporary protection.12 Third, the rights of individual given temporary refuge are considerably circumscribed under the temporary protection regime. Fourth, the concept of voluntary repatriation has been replaced with that of safe return. It can tolerate a degree of coercion to promote the return of refugees to the country of origin. In sum, the de facto regional regime which has emerged in Europe has replaced the 1951 Convention where intra-regional flows are concerned and contained its impact in the instance of extra-regional flows.

Africa: Anti-colonial Struggles and the OAU Convention

Any attempt at framing a regional convention in the Third World has for its ready reference the OAU Convention. While there is little doubt that it is an exemplary text in many ways it is often forgotten that it was arrived at in the context of anti-colonial struggles in Africa:

Reflecting the historical experience of Africa, much as the 1951 convention did for Europe, this formulation came into existence largely as an expression of political solidarity on behalf of the ongoing struggles against white rule in southern Africa, as well as retrospectively in Algeria, which drove large number of persons to seek refuge in other countries.13

The political context is of critical relevance in appreciating the absence of regional conventions in the other regions, as also in appreciating the core features of the OAU
Convention. For example, the definition of “refugee” clearly bore the imprint of the anti-colonial political context. As Cimade et al put it: Soon after obtaining their independence, most African countries had to face the problem of refugees, most of whom came from countries which were not as yet independent. The new States assembled in a Pan-African organization and reached an agreement which enlarged the definition of a refugee.... In accepting this definition, the countries which signed the agreement do not seem to have looked beyond the struggle they were waging against colonialism. Likewise, the solution of voluntary repatriation was also arrived at in an anti-colonial context. Refuge was given, to quote Goodwin-Gill, “in anticipation of repatriation on independence, with appropriate, international assistance in rehabilitation being given to those returning”. For instance, the General Assembly of the United Nations (UNGA) requested the High Commissioner in 1974 “to take appropriate measures in agreement with the Governments concerned, to facilitate the voluntary repatriation of refugees from territories emerging from colonial rule and, in co-ordination with other competent bodies of the United Nations, their rehabilitation in their countries of origin”. It is true that since the Convention came into force in 1974, African member States have reaffirmed its usefulness in dealing with post-colonial refugee flows. But in the post-colonial context a firm link has been established in practice between the obligations undertaken under the Convention and the principle of international burden sharing. The lack of the Western world’s commitment to burden sharing is the principal reason why African States no longer display the same kind of solidarity with refugees as they did in the past.

The Principle of Burden Sharing and Regionalism

If the intent of advocating a regional solution is that of burden shifting then it violates the principle of solidarity and burden sharing. In the Asian context attention may be drawn to the adoption of an addendum to the 1966 Bangkok principles by the Asian-African Legal Consultative Committee (AALCC) in 1987 calling for greater international burden-sharing. It expresses the belief of countries of the Asian and African regions that the principle of burden sharing should be given a global and not a regional interpretation. The additional principles adopted are: I. The refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and as such the principle of burden sharing should be viewed in this context.

II. The principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for refugees whether within or outside a particular region, keeping in perspective that durable solutions in certain situations may need to be found by allowing access to refugees in countries outside the region due to political, social and economic considerations.

III. The principle of international solidarity and burden sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of
treatment of refugees, support to States in protecting and assisting refugees, the provision of
durable solution and the support of international bodies with responsibilities for the protection
and assistance of refugees.

IV. International solidarity and cooperation in burden sharing should be manifested whenever
necessary, through effective concrete measures in support of States requiring assistance,
whether through financial or material aid or through resettlement opportunities. It is true that a
balanced approach may be called for in terms of burden sharing but it is not certainly one, to cite
Goodwin-Gill once again, “which inequitably raises the interests of one country (or group of
countries) over another. Refugee problems are, by definition, international problems, and their
resolution is the responsibility of the community of nations. South East Asia showed how vast
numbers could be moved successfully to new locations beyond the region”.20

Accession to 1951 Convention and the Non-entrée Regime: Need for Constructive Linkage
It is often asked as to why no State in the South Asian region is a party to the 1951 Convention
or the 1967 Protocol. There are several reasons which are cited: the Eurocentric character of the
1951 Convention, the historical peculiarity of the region, the lack of control over borders, the
ethnic ties which exist across borders, and the lack of sufficient resources. What I want to
suggest is that while some of these concerns are met by the 1951 Convention, the more
significant reason why States should refuse to accede to it is the fact that the Convention is being
dismantled by the very States which framed the convention. It is my submission that any talk of
accession should also be linked to the withdrawal of measures that constitute the non-entrée and
temporary protection regimes. That is to say, the countries of the region should collectively argue
that they would consider acceding to the Convention only if the Western world was willing to
withdraw those measures which violate the principle of burden sharing and instead practice
burden shifting. One has to be careful here not to be taken in by new formulations which would
have the Western world give resources in exchange for the poor world offering asylum.21 This
commodification of refugees must be rejected out of hand.

III The Intra-regional Perspective
In this part of the paper I argue that attempts at arriving at a regional declaration or a convention
must be preceded by the enactment of national legislation and stress the need to pursue a
research agenda which will facilitate and build on these legislations to shape a common approach
for the region. Indeed, it is my understanding that a premature attempt to arrive at a regional
solution may even prevent the passage of national legislations.

The Outlook of Political Realism
My approach, to begin with, takes cognizance of those features of the prevailing political
environment of the region which are highlighted by, among others, the adherents of political
realism. They make the following points. First, 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. Second, there is the historical experience that “some
of the spill-overs of internal conflicts and turmoil have not only vitiated bilateral relations but
even threatened regional security and peace, as was evident during 1971 between India and
Pakistan and also between India and Sri Lanka during the eighties”.22 Third, in the post Cold
war era issues “emerging from spill-over of internal conflicts ... will demand greater attention”
necessitating careful consideration of the issues involved in arriving at a common approach.23 Fourth, the bilateral mode of resolving contentious issues has been for long the dominant mode of dispute resolution and it is unlikely that the ruling elites in the region will break from this tradition with reference to the refugee problem.24 Fifth, the power asymmetry, geographical proximity, and the divergence in the nation and State-building processes which characterize States in the region reduce the possibilities of arriving at a common approach.25

Sixth, there is the inability of States in the region to patrol its porous borders.26 Coupled with the fact that cultural ties connect peoples across borders facilitating the movements of migrants and refugees the lack of control over borders has become a key obstacle to its adoption.27 Seventh, the countries of the region are differently positioned in terms of receiving refugees from within the region. For example, the island status of Sri Lanka has excluded it from being a host to asylum seekers. Likewise, Bhutan’s relatively remote location has meant few refugees.28 While Pakistan and Bangladesh have received refugees except the Biharis stranded in Bangladesh, they are from outside the South Asian region Myanmar and Afghanistan as it is presently constructed.29 India “is the only country that is either contiguous to, or has a large coastal line with, all the other six States, while none of them have any common borders with each other”.30

Together, these features are said to occlude a regional solution to the refugee problem. The shared vocabulary of realism between the ruling elites ensures that even where such an approach is mooted, it is rejected the next instance. For example, it is felt by some commentators that there are issues which could possibly be dealt with within a multilateral framework: An emerging issue that may have the potential of being dealt in a multilateral framework could be the question of refugees and illegal immigrants. There is the question of Bhutanese refugees in Nepal, where some Nepalis are asking for India’s involvement in finding a solution since the refugees had gone to Nepal via India and, as such, India becomes the country of first asylum. Similarly, illegal immigrants from Bangladesh are coming not only into India but also Nepal and even Pakistan (Bihari Muslims) 31. But even as this possibility is stated they are compelled to add: but then, Bangladesh neither accepts that its people are emigrating for economic and other reasons to its South Asian neighbors, nor will it agree to deal with the question in a multilateral framework. India would not also like to get involved in the refugee dispute between Bhutan and Nepal where, whatever stance it adopts, short of accepting and absorbing all the Bhutanese refugees itself, it is bound to displeasure either or both of its small neighbors.32 Each State is concerned that the one which first abandons the principle of power politics will have to pay heavy costs.

**Displacing the Language of Realism**

The language of political realism, it hardly needs to be added, is not peculiar to South Asia. For example, the international refugee regime has from the very beginning been hostage to foreign policy interests; it was an integral part of Cold War politics. The vocabulary of political realism has been internalized by the ruling elites in the diverse regions of the world, even corroding long held traditions of solidarity and internationalism. This framework is entirely unsuited to the resolution of humanitarian issues but is unlikely to be displaced by a new paradigm which does not take cognizance of certain objective realities or the history of mutual suspicions and acrimony between States in the region engendered by the realist vision.33 To put it differently,
the language of realism cannot be displaced if it is opposed with the language of utopian idealism. To illustrate the point, Meghna Guha Thakurtha writes that States in the region should “recognise that with globalization of the labour market, State boundaries should no longer provide a barrier for a person’s search for employment”.

While open borders is an ideal worth pursuing it is not a realizable goal in the near future. Its espousal at present will only strengthen those political forces which oppose international relations based on morality and solidarity.

On the other hand, unless the language of realism is displaced there is little hope for establishing a refugee regime in the region based on the spirit of solidarity and internationalism. I would like to advance in this context the concept of relative autonomy where humanitarian issues are concerned. That is to say, the displacement of the language of realism does not mean that the special existential, ideological, and security concerns of individual States of the region are not to be taken into account. It merely implies that these concerns are to be given weight within a framework which recognises the distinctive essence of humanitarian problems. It, among other things, calls for eschewing an omnibus language of national security to address humanitarian issues.

The possibility of a critique of the particular features identified by political realists eventually rests on the understanding that the regional identity is ‘socially constructed’. It is an ‘imagined community’ in which some features are stressed over others in order to either promote visions of conflict or that of solidarity. The forging of a regional identity devoid of suspicion and mistrust thus calls for a redefinition of the different ‘national’ perceptions of the region in a spirit of internationalism. In this regard, the language of morality needs to be injected into the discourse of regional politics.

In addition, it calls for dialogue and co-operation between left and democratic forces, in particular working class organizations, in the region. These forces alone can replace the language of power politics with the language of morality and solidarity. It needs to be remembered that a vast majority of those who are forcibly displaced, or who are marginalized after displacement, come from the poorest sections of society. These people are displaced by modes of thinking which “place the State above the people, the security of the nation State above people’s security, the removal of real or imaginary threats to the State more important than persisting threats to the people and their survival”. Therefore, these forms of thinking are unlikely to engender a humane discourse which expresses empathy with the pain of the victims. Indeed, the very issues which a regional approach requires to address (the protection of minority rights, economic migrants, etc.) are those which are used by ruling elites to either come to power or sustain their regimes.

**Root Causes of Refugee Flows**

The left and democratic forces also need to come together to struggle against the policies of neo-colonialism whose burden is being largely borne by the poor in the region. There is growing evidence of the critical link between neo-colonialist policies and what are termed “ethnic” conflicts. Recent years have seen the breakout of genocidal violence in former Yugoslavia and Rwanda. Research has revealed that these “ethnic” conflicts were sparked in an economic environment shaped by structural adjustment policies recommended by international financial institutions. Thus, there is a clear external or international dimension to the root causes of
refugee flows which needs to be addressed. The opposition to such policies should be an integral part of the democratic struggle of peoples to displace the language of political realism.\textsuperscript{39} In this process the solidarity of the working peoples has to play a key role.\textsuperscript{40} To put it differently, the opposition to neo-colonial forces is the focus around which the left and democratic forces in the region must lay the foundations of a new humanitarian order.\textsuperscript{41}

At the domestic level, attention needs to be paid to the general promotion of democratic norms and human rights, in particular the defence of minority rights. As Kamal Hossain has noted, involuntary movements in the region can be: broadly ascribed to human rights violations, resulting from the existence of elite-dominated political systems and a pervasive climate of religious and ethnic intolerance, reinforced by high levels of poverty, landlessness and unemployment. Sadly these conditions seem likely to persist. A 1997 report on human development in South Asia, for example, States that the area is emerging as the poorest, the most illiterate, the most malnourished and the least gender-sensitive region in the world.\textsuperscript{42}

In these contexts States parties to human rights conventions must be called upon to facilitate their implementation through incorporating them in domestic laws. For example, while India has ratified both the 1966 civil and political rights and the social and cultural rights covenants it has not passed legislation incorporating them into domestic legislation. While the courts in the country have invoked their spirit from time to time it would greatly facilitate matters to have appropriate legislations implementing them. The establishment of national human rights commissions is also an important step in the promotion of human rights, particularly that of vulnerable groups like refugees. For example, the Supreme Court of India was able to intervene and protect the rights of Chakma refugees in the case of National Human Rights Commission (NHRC) v. State of Arunachal Pradesh (AIR 1996 SC 1234) because the NHRC took the matter before it. The Supreme Court held that “the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise.”

\textbf{Need for National Legislations}

The general defense of human rights must be coupled with a campaign for national legislations on refugees. The stress on national legislations, as opposed to a regional declaration or convention, is placed on several grounds. First, a premature attempt to arrive at a regional solution could mean the scuttling of national legislations 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. It is worth recalling here that the 1969 OAU Convention was arrived at in the context of anti-colonial struggles which united the States and peoples of the region. Second, the regional solution may assume the form of a non-binding declaration with little actual impact on the behaviour of States. On the other hand, its presence may be said to exclude the need for national legislations. Third, the scope of a regional declaration or convention will be confined to refugees from the region whereas national legislations can be more comprehensive in their coverage. Fourth, national legislations could address the problem of internally displaced persons (IDPs) which is entirely ruled out, and appropriately so, in the regional context. This point is of significance when it is remembered that no State in the region is a party to the 1951 Convention. Fifth, in view of the nature of inter-States relations in the region any attempt to arrive at a regional instrument will converge on a minimalist regime. Sixth, any
regional instrument will eventually have to be implemented at the national level. It is felt that the absence of experience in this regard could be an handicap at arriving at a sensible regime. It is my belief that the passage of national legislations will allow the 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. It is at this point that a fruitful dialogue for a regional solution could be initiated with greater confidence among the participants.

**Clarifying Concepts**
The drafting of national legislations, and later a regional instrument, calls for considerable research into diverse aspects of the problem of forced displacement. It must, to begin with, clarify fundamental terms like refugees, IDPs, economic migrants, illegal migrants, Stateless refugees, persons in refugee like situations, etc. In my view the collapse of these distinct categories into one another has confounded matters. For example, confusing refugees with economic migrants has meant that there is little sympathy for the cause of refugees in the poverty ridden countries of South Asia. Likewise, confusing refugees with IDPs is to arouse the legitimate hostility of governments as the problem of IDPs, vide the fundamental principles of sovereignty and non-intervention, squarely falls within the national jurisdiction of States. This matter is of much importance at a time when the line between IDPs and refugees is increasingly sought to be blurred at the international level.

The national legislations will have to adopt a definition of “refugee” keeping in view the peculiarities of the region and the nature of refugee flows. In other words, neither the 1951 Convention nor the OAU Convention definition of a refugee needs to be blindly adopted or rejected without a careful study of the needs of the region. This is where research into the hitherto experience of the countries of the region in handling refugee flows is called for, in particular in identifying the weaknesses in the extant systems in providing assistance and protection to refugees.

**Determination of Status**
Any regime for the protection of refugees requires that adequate procedures for the determination of status and the protection of refugees be provided for. This calls for the setting up of appropriate national bodies, including a provision for an appellate authority. In this respect attention will need to be given to a range of issues including the structure of the national bodies, training of officials, the provision of legal aid, interpretation facilities, etc. In this context, the experience of countries in other regions will need to be examined.

**Rights and Duties of Asylum Seekers and Refugees**
It is often the complaint of States in the region that the rights regime embodied in the 1951 Convention is unsuited to the condition in the poor world as they do not have the resources to fulfil their obligations. In this respect there is a need for research to determine the minimal core of assistance and the bundle of rights to be applicable in situations of mass influx. A good starting point could be the UNHCR Executive Committee Conclusion No.22 on Protection of Asylum Seekers in Situations of Large-scale Influx which was adopted in 1981. However, it is also important to review (if only to reject them) the temporary protection regime(s) established in Europe in terms of the rights which have been granted to those given protection.
The conditions under which the detention of an asylum seeker or a refugee is permitted would need to be clarified. In this context several questions need to be addressed. For example, what are the restrictions which can be placed on the movements of asylum seekers and refugees? Is confining refugees to camps amount to a policy of detention? What are the grounds which can be invoked for the detention of refugees?

There is also the need to consider in some detail the financial arrangements for looking after the refugees both at the national and regional levels. At the regional level the question is whether the expenses incurred in looking after refugees should be borne by individual States or the region as a whole through a fund set up for the purpose. At the national level the question is whether the expenditure is to be borne by the union or the State governments.

Lastly, there is a need to spell out the duties which refugees owe to the host country in the background of the principle of non-intervention into the internal and external affairs of States.

The Problem of Repatriation: The Need for Case Studies
The solution of voluntary repatriation is today widely referred to as the ideal or preferred solution to the global refugee problem. Yet this solution is the least researched. In this context, what is called for is a study of the peculiar factors which inhibit or promote repatriation in the region. Detailed case studies of the repatriation of particular groups of refugees could offer rich insights into the problem. For example, take the case of the repatriation of Rohingya Muslim refugees from Bangladesh. It has raised a good deal of controversy. On the one hand, there are allegations of coerced repatriation, and on the other, of vested interests which want to retain them as refugees. Likewise, in the case of repatriation of Sri Lankan Tamil refugees from India there have been allegations of coerced repatriation even when the UNHCR has certified that the repatriations have been by and large voluntary. What explains these different conclusions? Can clear legal guidelines be drafted to ensure that involuntary repatriation is not practiced? Is there a need to distinguish between spontaneous and voluntary repatriations in the region? What should be the role of governmental and non-governmental agencies where refugees return spontaneously to the country of origin? These questions call for a considered response.

The Problem of Stateless Persons
An important question which needs to be addressed concerns the problem of repatriation in relation to Stateless persons in the region. There are, as we know, three large groups of Stateless persons in the region: the Bihari Muslims in Bangladesh, Bhutanese Nepalese refugees from Bhutan, and the Rohingya Muslims of Burma. Their fate has not received the attention it deserves. The traumatic experience of these groups needs to be recorded, and solutions found to their problem. In this context, the accession to the 1954 and 1961 conventions on Statelessness need to be explored.

Mechanisms to Implement the Regional Instrument
An important aspect of arriving at a regional regime is to debate the need for a body to oversee the implementation of the agreement. In case there is a need for such a body its objectives, institutional structure, financial implications would need to be considered. In this respect there is a need to look, for example, at the experience of the OAU Bureau for Refugees.
review of the manner in which the European Union countries have coordinated their policies on refugee and allied issues will need to be examined.

**Role of the UNHCR**

What role should the UNHCR be assigned in the national or regional scheme of things? What has been the hitherto experience of States in the region with the Office of the High Commissioner? Are the States comfortable with the ongoing transformation of the institution from a refugee to a humanitarian organization? Should the organization be assigned a role in status determination? Will the UNHCR be given access to all refugee groups? Will States accept international assistance channelized through the UNHCR?

**IV Summation**

I have argued in this paper that it is crucial to examine the meaning and implications of a regional approach from an inter-regional standpoint in order to ensure that it does not impose inequitable burdens on some regions of the world. In this context I recommend the strategy of constructive linkage which requires the countries of South Asia to call upon Western States to withdraw the worst features of the non-entrée regime-constituting a de facto regional regime - as a pre-condition for arriving at a regional regime. This strategy should also be extended to the question of acceding to the 1951 Convention.

In so far as the intra-regional perspective is concerned an appropriate approach is one which is sensitive to the history, geography and politics of the region but which does not reinforce the climate of distrust and suspicion which presently characterises it. In this regard there is a need to displace the language of political realism which dominates all political discourse.

At the academic level, this calls for theorizing with alternative frameworks and vocabularies which show greater sensitivity to the humanitarian dimension of problems. The central idea should be to insist on the relative autonomy of the humanitarian from other dimensions of a problem. At the societal level, it calls for the alignment of the left and democratic forces to embed participatory democracy within States, and struggle against international policies which create the environment in which violent conflicts play themselves out. This understanding finds support in the fact that the OAU Convention, the only existing regional convention, was arrived at amidst, and was deeply marked by, anti-colonial struggles against imperialism. That is to say, the alternative discourse has to be, in a bid to unite the peoples and States of the region, embedded in anti-imperialist concerns and struggles.

Meanwhile, what is urgently required is the passage of national legislations in the countries of the region. It is my understanding that a premature attempt to arrive at a regional declaration or convention may inter alia lead to the adoption of a non-binding instrument with a minimalist content which does not offer effective protection to refugees. At the same time, the absence of a regional instrument is no excuse for the passage of domestic laws which guarantee assistance and protection to refugees. In the context of both national and regional instruments there is a need for collaborative work by concerned academics and activists of the region.

*An earlier version of this paper was presented at the “Conference of Scholars & other Professionals Working on Refugees and Displaced Persons in South Asia” organized by the*
Endnotes

1 Together these measures constitute what Hathaway has called the non-entrée (no entry) regime. See, James C. Hathaway, “The Emerging Politics of Non-entrée”, in Refugees No. 91, 1992, pp 40-41.


8 Ibid.


10 Goodwin-Gill, op. cit., pp. 74-75.


14 The Cartagena Declaration, 1984 despite having exercised some influence is not a binding instrument.


16 Goodwin-Gill, op cit, p. 182.

17 UNGA res.3271 (XXIX), 10 Dec.1974. As the recent State of the World’s Refugees: A Humanitarian Agenda puts it: “When refugees did go back to their homes in large numbers, as they did in the case of countries such as Algeria, Angola, Mozambique and Zimbabwe, it was generally in the context of successful anti-colonial struggles ...”. (Centre for Documentation and Research, UNHCR, Oxford University Press, Oxford, 1997) p. 164.

18 As Bill Frelick says, “Africa, which for decades stood as a shining example of solidarity and hospitality; retreated from fundamental principles. On both sides of the continent, the spirit of

19The Report of the Asian-African Legal Consultative Committee (AALCC) on the adoption of the addendum at the outset affirms the principle of burden sharing: In the light of the exchange of views and the material placed before the Committee .... the conclusion could be drawn that the principle of international solidarity in dealing with the refugee situations and the concept of burden sharing in that context appear by now to be firmly established in the practice of States. See, Collection of International Instruments and other Legal Texts Concerning Refugees and Displaced Persons vol. II (UNHCR, Geneva, 1995) pp.63-64.


22S.D.Muni, “Coping with the Contentious Issues in South Asia”, in L.L.Mehrotra, H.S.Chopra and G.W.Kueck eds., SAARC 2000 And Beyond (Omega Scientific Publishers, New Delhi, 1995) pp.78-97 at p.80. From the perspective of India, Kapur writes that “though all the difficulties that India is faced with internally cannot be attributed solely to the instability of her immediate environment (some of them are also due to internal issues), it can hardly be denied that the destabilization of Assam is partially due to influx of refugees into the area from Bangladesh, that the growing difficulties in Tamil Nadu are connected with the ethnic turmoil in Sri Lanka, that the Punjab and Kashmir imbroglios are linked to neighbouring Pakistan, and that the instability of the whole of the northeastern tribal belt has some connection with the continuously unstable situation that has afflicted Myanmar since independence.” Harish Kapur, India’s Foreign Policy 1947-92 (Sage, New Delhi, 1994) p. 91. On this subject, see also, Shelton U. Kodikara ed., South Asian Strategic Issues (Sage, New Delhi, 1990).

23Muni divides the contentious issues in the region into five categories: colonial legacies, political and ideological issues, issues of strategic conflict and military balance, the spillover of internal conflicts and turmoil in a given country on its neighbours, and issues arising out of resource and developmental conflicts. S.D. Muni, op.cit. pp.79-81.

24 Kapur lists the advantages of the bilateral approach for India: it can take into account the unique features of each relationship; can avoid the internationalization of contentious issues in South Asia; and avoid a situation where all other countries unite against her. Kapur, op cit, pp. 101-103. “The past experience of those contentious issues that have been resolved suggest that the dominant mode of resolving contentious issues has been bilateral.” Muni, op cit, p. 86. 25Muni, op cit. p. 83.


27.... the issue of cross-national ethnic and religious minorities poses enormous difficulty for States within the region. For example, no South Asian country is able to defend its claim of
domestic jurisdiction while dealing with the struggles of ethnic and religious minorities. Even when each South Asian country is most reluctant to interfere in the domestic affairs of another country, and entertains its claim of domestic jurisdiction, contemporary events have repeatedly proved that ethnic minority explosions not only strain bilateral and multilateral relations but sometimes even create inter-State crises.” Partha S. Ghosh, Cooperation and Conflict in South Asia (Manohar, New Delhi, 1995) Reprint of 1989 edition.


30Kapur, op cit, p.89.

31Baral and Muni, op cit, p.91.

32Ibid.

33The “Gujral doctrine” was a move away from the more regressive dimensions of this vision. See for details, Bhabani Sengupta, “India in the Twenty-first Century”, International Affairs (Royal Institute of International Affairs, London) vol. 73, no. 2, pp. 308-9.

34Meghna Guhathakurta, “Rivers and Refugees”, in South Asia: Vision and Perspective (South Asian Regional Dialogue, Lahore, 1994) pp.517-533 at p.531. She further notes that “according to international law the right to earn one’s livelihood is a fundamental human right”. Ibid.


38Michelle Chossudovsky, “Economic Reforms and Social Unrest in Developing Countries”, Economic and Political Weekly July 19-25, 1997, pp.1786-1788; James Petras and Steve Vieux, “Bosnia and the Revival of US Hegemony”, New Left Review No.218, July-August 1996, pp. 9-12; Anne Orford, “Locating the International” Harvard International Law Journal vol.38, No.2 (1997). These writings underline the need for avoiding simplistic labels like “ethnic conflicts” to describe strife in the region. For example, Baral and Muni write: “If we look at the factors generating refugees in South Asia in a comparative context, we find that ... the explosion of internal ethnic and secessionist wars, where massive military operations are involved affecting ordinary people (emergence of Bangladesh, struggle for a separate Tamil Eelam in Sri Lanka, and Soviet Military intervention in Afghanistan), create mass exodus of refugees in the shortest span of time”. Baral and Muni, op cit, p. 23.

39Usually any discussion of the causes of refugee flows in the region has excluded the discussion of external or international causes of refugee flows. See Baral and Muni, ibid, p. 9. They simply do not take cognizance of the neo-colonial phenomenon, particularly in the era of globalization.


41For example, the trade unions of the SAARC region have come together and opposed the


43For example, “no South Asian country must allow its territory to be used against the internal and external interests of another”. Bhabani Sen Gupta, “Conflict Resolution in South Asia”, in South Asia: Vision and Perspective (South Asian Regional Dialogue, Lahore, 1994) pp.267-306 at p.301.


45The World Refugee Survey op.cit., p.126.

46To quote one observer: “.... parties with vested interest have emerged who want to keep the Rohingya issue alive. They are the NGOs who are receiving liberal doses of aid in the form of humanitarian relief; the profiteers who are benefitting from selling the relief (There were even reports of racketeers bent on illegal trafficking of women from these camps) and parties like Jamaat-e-Islami and the Freedom party who are keen to back a movement for a Muslim Rohingya State from the soil of Bangladesh”. Guhathakurta, op. cit, p.527.


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