REGIONAL BLOCS' RESPONSES TO REFUGEE PROBLEMS: LESSONS FOR SOUTH ASIA

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REESHMA K. NAIR

South Asian Studies Division
Centre for South, Central,
South East Asian and South West Pacific Studies
School of International Studies
Jawaharlal Nehru University
New Delhi - 110067
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CERTIFICATE

Certified that this dissertation **"Regional Blocs' Responses to Refugee Problems: Lessons for South Asia"**, submitted by Miss. Reeshma K. Nair, in partial fulfillment of the requirements for the award of the Degree of **Master of Philosophy**, is her original work. This dissertation has not been submitted for any other degree of this or any other University.

We recommend that this dissertation be placed before the examiners for evaluation.

Prof. Uma Singh
(Chairperson)
CHAIRPERSON
Centre for South ... South East and
South We... ...a... Studies
Schoo. of .... Studies
Jawaharlal Nehru University
New Delhi-110067

Prof. Mahendra P. Lama
(Supervisor)
SUPERVISOR
Centre for South,
Asia and South ... ... South East
Schoo. of International Studies
Jawaharlal Nehru University
New Delhi-110067

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ABBREVIATIONS

CAT	Convention Against Torture
CHT	Chittagong Hill Tracts
CIREFCA	International Conference on Central American Refugees.
CPA	Comprehensive Plan of Action for Indo-Chinese Refugees
ERRP	Emergency Rehabilitation and Reconstruction Plan
EU	European Union
FTA	Free Trade Area
GDP	Gross Domestic Product
HDI	Human Development Index
HMG	His Majesty's Government
HPI	Human Poverty Index
ICRC	International Committee for Red Cross
IDP	Internally Displaced Person
IFA	Internal Flight Alternative
IRO	International Refugee Organisation
LDC	Least Developed Country
LTTE	Liberation Tigers of Tamil Elam
MAD	Mutually Assured Destruction
MNC	Multi National Corporation
NATO	North Atlantic Treaty Organisation
NEFA	North East Frontier Agency
NGO	Non Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
PTA	Preferential Trade Agreement
RRAN	Rehabilitation and Resettlement Authority for the North
SAARC	South Asian Association for Regional Cooperation
SAPTA	South Asian Preferential Trading Arrangement
SEA	Single Europe Act
SLORC	State Law and Order Restoration Council
TNC	Trans National Corporation
UN	United Nations
UNDP	United Nations Development Programme

UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Social and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNRRA	United Nations relief and Rehabilitation Agency
US	United States of America
USSR	Union of Soviet Socialist Republic
WHO	World Health Organisation

PREFACE

International migration with its international, regional, national and local repercussions is increasingly becoming a matter of concern to all the regions of the world. Although the movement of people from one place to another has been an age old phenomenon, it is only in recent times that it has assumed greater threat in terms of local, national, regional and international security and the conduct of international relations. In the post cold war period, refugee movements figure prominently in political and security discourses. Increasing attention is being paid to ethnic conflicts that generate refugees and subsequently cause foreign policy problems for neighbouring countries. It is also being acknowledged that refugee movements not only create but also exacerbate conflict within and between states. In the present world situation, refugees are seen as a threat to security, stability, economy, culture and society of the host country.

All the regions of the world, be it Africa, Europe, Latin America or South Asia are effected by this problem. Another facet of today's refugee problem is the fact that it cannot be handled effectively by an individual state. In the region of Africa, Latin America and South Asia, most refugee movements are intra-regional. In Europe refugee movement has acquired a regional dimension due to the creation of Western Europe as a 'border free' region.

In order to manage the refugee movement within their region, Europe, Latin America and Africa have adopted regional measures under the aegis of their regional organisations. The South Asian region, which is host to approximately fourteen percent of the world's refugee population, does not have any legal framework to deal with the refugee issue. None of the countries have specific refugee legislation. Neither are they party to the UN refugee Convention nor do they have a regional instrument to deal with the refugee issue.

The purpose of this research work is to propose that present form of refugee crisis can be more effectively handled at a regional level rather than by individual states. Secondly, it also makes an attempt to analyse whether a regional instrument in

itself would be sufficient to handle the refugee problem in South Asia. Is national legislation a pre-requisite for the evolution of a regional refugee regime in South Asia? What kind of a regional refugee regime should these countries adopt? What would be the impediments in evolving a regional approach? And what would be the consequences of a regional instrument for managing refugees in South Asia? These are some of the issues that this research would take up.

In order to accomplish this task, this research work covers a number of areas. Firstly, it looks at the role of regionalism especially in the changing world order. Within this the various dimensions of regionalism and the increasing importance of regional organisation in dealing with emerging issues of human security are discussed. Secondly, the international instruments to deal with refugee problems are analysed. An attempt is made to look into the provisions of 1951 UN Convention on Refugees and the 1967 Protocol, its utility and limitations in the present world scenario.

Analysis of the approach of other regional organisations, that is, OAU, EU to the issue of migration is also undertaken. Within this the context of emergence of a regional policy towards refugees, its provisions and its actual implementation in these regions are analysed. Further, this research work analyses the nature, extent and direction of the phenomenon of forced migration in South Asia. The legal and constitutional stand of the South Asian countries vis-à-vis forced migration, their actual policy towards it and their international stand on this issue. Finally it looks into the possibility of regional refugee regime in South Asia. The attempts made in this direction so far, the scope for a regional refugee regime in the future and the impediments in this direction are enumerated.

This work is divided into four chapters. The first chapter is titled "Regionalism and Forced Migration". This chapter deals with the definition of regionalism, its theoretical underpinnings, its various dimensions with special emphasis on security dimension and the role that regional organisation can play in the unfolding world order, especially in the area of human security. This chapter also looks into the phenomenon of forced migration and how it has become threat to international, regional and national security.

The second chapter is titled "International and Regional Responses to Forced Migration". The international responses to the refugee problem, the 1951 UN Convention, its 1967 Protocol and the achievements and drawbacks of this Convention are discussed in this chapter. This chapter further deals with how regional organisations have responded to the issue of forced migration in their region. Special emphasis is placed on West Europe, Africa and Central America. The context in which a regional policy on refugees emerged in these areas, the definition of refugees endorsed by these regions and their policy towards refugees is discussed in this chapter.

The third chapter entitled "Forced Migration in South Asia" examines the nature, extent and direction of forced migration in the South Asian region. Major causes for refugee movements in this region are also analysed.

The fourth chapter is titled "Policies Towards Refugees in South Asia: National Legislations and Regional Approach". In this chapter the policy that has been so far adopted by the states of the region to deal with this issue and their stand on the international refugee conventions are analysed. The attempts towards a regional refugee regime in South Asia, impediments in it and the prospects of evolving the common regional policy on refugee movements are also discussed in this chapter.

CHAPTER 1

REGIONALISM AND FORCED MIGRATION

Regionalism as a means of consolidating relations with countries of a particular geographical region or like-minded ones emerged in the post second world war period. This was primarily aimed at enhancing their economic interest and promoting and preserving their politico-strategic goals. The second half of the 20th century has often been referred to as the "age of integration". The desire and endeavor for regional integration seems to be gaining ground in different parts of the world, be it western Europe, Latin America, South Asia or South East Asia. In the post world war period, the emergence of a multi-polar world, disintegration of Union of Soviet Socialist Republic, reduction in big power intervention and rise of new economic powers have created conditions for more autonomous regional spaces to emerge. Joseph Nye opines that regional frameworks are the most effective ones in which to achieve order and stability within particular regions. This essentially emanates from a sense of common interest that prevails among them.[1] Regional organisations have become a significant feature of the emerging new-world order. As a concept, it lies somewhere between nationalism and universalism.[2]

REGIONAL INTEGRATION : A CONCEPTUAL ANALYSIS

Any understanding of the phenomenon of regionalism needs to look into the meaning of the terms region and integration. The *International Encyclopedia of Social Sciences* defines a region as a homogeneous area with physical and cultural characteristics distinct from those of neighbouring areas and thus possess a sense of identity different from the rest.[3] The term 'regionalism' represents the regional idea in action as an ideology, as a social movement, or as a theoretical basis for

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[1] Joseph Nye, *Peace in Parts: Integration and Conflict in Regional Organisation,* (Boston, 1971), p.34

[2] B.C. Upreti, (ed.), *SAARC : Dynamics of Regional Cooperation in South Asia,* (New Delhi, 2000) Vol.I, p.1

[3] *International Encyclopedia of Social Sciences,* Vol. XIII, p.378

regional planning. In the international sphere, a region may consist of a group of nation states possessing a common culture, common political interest, and often a formal organisation.[4] According to Melkote "regions in the language of international politics imply that states in a group are in several respects, inter-dependent mainly because of their geographical relatedness, that this relatedness is a source of cultural and other affinities between these states; that consciousness of area identity can motivate some or all of those states to deal collectively with outside powers; and that policies towards any state in the group should take account of the likely reactions of its neighbours."[5]

Integration refers to a process or series of action which results in the joining together of previously independent units for the purpose of creating a new entity or a whole. According to the *Encyclopedia of Social Sciences* integration is a "process whereby quality of relations among the autonomous social units changes in such a way as to erode the autonomy of each and make it part of a larger aggregate"[6]. According to Rana[7] "integration connotes variegated but structured attempts to reconcile the demands of the growing globalism of welfare and technology with the continuing demands of the sovereign nation state, in an effort to bring about a more rational international order concerned with tackling the linked problem of peace and welfare". Integration can be characterised as regional when it takes place among sovereign states that share a widely recognised geographical identity such as occupation of a common body of land and water. Therefore, regional integration would refer to a series of voluntary decisions by previously sovereign states within a geographical region to remove barriers to the mutual exchange of goods, services, capital or persons.[8]

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[4] ibid, p. 378

[5] Quoted in Rama S. Melkote, (ed.) *Regional Organisations: Third World Perspective,*(New Delhi : 1990) p. ix

[6] Quoted in Thomas George, *State of International Integration Theory,*(New Delhi,!997), p.19

[7] A.P. Rana, "Integrative Possibilities in the Third World", in Rama S. Melkote, (ed.) *Regional Organisations: Third World Perspective,*(New Delhi ,1990), p. 7.

[8] Peter H. Smith, (ed.) *The Challenge of Integration: Europe and the Americas,*(Miami,1993), p. 16

However, integration is not the same as inter-governmental cooperation. While inter-governmental cooperation results from ad-hoc bargaining between sovereign states, the former entails the creation of a new entity that provides recognised frameworks for accommodation among member states on issues relating to mutual exchange of goods, services, capital or persons. Integration thus provides information, establishes common expectations and assures a level of predictability. In this context then, regional organisation is a segment of the world bound together by a common set of objectives based on geographical, social, cultural, economic and political ties and possessing a formal structure.[9]

International experience teaches us that a number of criteria can be used to assess the potential for regional integration.[10] Broadly, these conditions are:

(a) Geographic propinquity- Countries which are geographically contigous or belong to the same geographical region have a greater possibility of coming together to form a regional organisation.[11]

(b) Cultural and political homogeneity or at least like-mindedness- The higher the level of political and cultural homogeneity, the higher the chances of integration. If the countries concerned have similar form of political governance or share a common or at least similar cultural heritage, the possibility of the countries coming together to cooperate regularly, increases.

(c) Economic and infrastructural integration and advantage- The higher the level of economic and infrastructural interdependence or cooperation, the faster is the process of integration.

(d) Common and related security concerns- Threat from common enemies or sources gives an impetus to countries to come together to overcome common threats.[12]

(e) The absence of major political and security disagreements and conflict-Existence of major security or political discords impede the process of

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[9] LeRoy Bennet, *International Organisation: Principals and Issues,*(1995), p. 214

[10] Christopher Clapham, Greg Mills, Ana Morner and Elizebeth Sidiropoulos,"Introduction and Acknowledgement", *Regional Integration in South Africa:* Comparative *Regional Perspective,* (South African Institute of International Affairs, 2001), pp. 10-11

[11] Thomas George, n.6, p. 52

[12] ibid, p.54

cooperation and the absence of the same facilitate cooperation at the regional level.

(f) Effective regional leadership and common membership of international organisations- Sustained and commited effort on the part of the political leadership in the region hasten the process of cooperation at the regional level. Membership of common institutions also helps the countries to interact with one another and devise common institutions or platforms to deal with regional issues.

Although these are the conditions that facilitate regionalism, none of these factors are enough in itself.

However, the concept of region or regional integration is not without controversy. To many theorists and writers the concept of region itself is unclear, dynamic and ridden with diverse connotations. This dynamism emerges from the fact that the geographic boundaries, trade and factor flows, values and identities that regions encompass are in a constant state of flux. According to Whiting, Jr.[13] at least three meanings of the concept of 'region' can be distinguished. This he terms as geo-political unit, organised political cooperation and consolidated political actor.[14] According to him, a geographical unit centered around a defined geographic entity forms the basis for political action. In organised political cooperation the organisation is formal, with membership and decision-making structures that provide the basis of cooperation. Consolidated political actor implies a degree of shared values, shared purposes, and regional identity to which the constituent states cede at least some of the powers that are normally attributed to nation-states.

Further more, for example, some observers do not consider Asia Pacific as a single region. It is rather looked at as an amalgamation of two or according to some observers even three regions. Also, not all geographically defined meanings of

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[13] Van R. Whiting, "The Dynamics of Regionalisation: Road Map to an Open Future", in Peter H. Smith, ed., *The Challenge of Regionalisation: Europe and the Americas,* (University of Miami, 1993), pp.20-22

[14] For details see Van R. Whiting, "The Dynamics of Regionalisation: Road Map to an Open Future", in Peter H. Smith, (ed.) *The Challenge of Regionalisation: Europe and the Americas,* (University of Miami, 1993), pp.20-22

region are land based like Atlantic community, North Atlantic Treaty Organisation (NATO), Asia Pacific Rim, etc. Also, the existence of a variety of regional organisations in the world today creates an ambiguity regarding the concept of regionalism. These differences emerge due to differences in membership, goals of integration, scope and intensity of cooperation, instruments of integration and efficiency and implementation of goals adopted.

EVOLUTION OF REGIONALISM

Though regionalism is a significant feature in international politics, it started gaining currency in the post World War II period. It certainly is not a recent phenomenon. Mansfield and Milner[15] categorise the emergence of regionalism into four waves. The first they trace to Europe of the late 19th Century by which time Europe had started functioning as a single market in many ways. The second wave they trace to the inter-war period, which was seen by many scholars as an alternative to failed multilateral initiatives. The third wave of regionalism emerged in the post second world war period when trade flows became highly concentrated within geographically specified areas. The fourth and most recent wave of regionalism emerged at the end of the cold war. This was the direct result of the subsequent changes in inter state and security relations in the aftermath of Soviet Union's disintegration.[16]

Regionalism or regional integration may be characterised as responses to international and domestic challenges. In post war world, two underlying sets of causes have led nations to become more closely inter-linked. First are the technical, social and cultural changes that have sharply reduced the effective economic distances among nations. Secondly, many of the government policies that traditionally inhibited cross border transaction have been relaxed or even dismantled.[17]

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[15] Edward D. Mansfield and Helen V. Milner, "New Wave of Regionalism", *International Organisation*, 53, 3 Summer 1999, pp.589-627

[16] For details see Edward D. Mansfield and Helen V. Milner, "New Wave of Regionalism", *International Organisation*, 53, 3 Summer 1999, pp.589-627

[17] William Wallace, *Regional Integration: The West European Experience*, (Washington DC, 1994), p.4

The sharply reduced costs of moving goods, money, people and information underlie the profound economic truth that technology has made the world markedly smaller. Technical innovations have increased the knowledge of potentially profitable international exchanges and of economic opportunities abroad. Shortening of social, economic and political distances and movement of people, ideas and information have brought the world closer to levels that were earlier unimaginable.

After the Second World War, most national governments began sometimes unilaterally, more often collaboratively to lower their separation fences thereby making them more permeable. Simultaneously with the transformation of global economy, major changes have occurred in the world's political structure. Firstly, the number of government decision-making bodies in the world has expanded markedly and political power has been diffused more broadly among them. Rising nationalism and in some cases heightened ethnic tensions have accompanied this political pluralism. The history of membership of international organisations documents the sharp growth in the number of independent states.[18]

A second political trend, less visible but equally significant, is the gradual loss of political and economic hegemony of United States. This is manifested by a shift or increase in the economic significance of nations outside Europe and North America such as Japan, Korea, Indonesia, Brazil and Mexico. A world in which economic power and influence are widely diffused has displaced a world in which one or a few nations effectively dominated international decision making. Simultaneously regionalism has been stimulated by the absence of a strong international leadership. As the U.S. became less willing to continue with the leadership role that it once performed, groups of states framed their own solutions to international economic problems. Weakening of the Brettonwoods system of

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[18] For instance, Only 44 nations participated in the Brettonwoods Conference of July 1944 which gave birth to International Monetary Fund (IMF). By end of 1970s, the IMF had 118 member nations and by December 1993, it increased to 178.

rule based trade and monetary regimes have also encouraged the search for regional solutions.[19]

Thirdly, fundamental changes in the formerly centrally planned economies have also given an impetus to growth in regional organisations. Now leaders of formerly centralised economies are adopting reforms based on the western capitalist principles.

Moreover, the "spill over effects" of activities of one nation on their neighbours have also prompted the growth of regional organisations. For example, labour market policies become matters of concern to other nations because workers migrate in search of work. Policies in one nation can trigger migration that floods or starves labour market elsewhere.[20]

Apart from these factors, there are also two simultaneous changes that have pushed nations to cooperate on a regional basis. At one level is the overlapping of issue areas at global and local levels and at another level is the incapability of states to satisfy the demands of their people single handedly. Moreover, regional integration is increasingly looked upon by the smaller nations as means of pooling of resources to cope with competition from outside, to increase the importance of the area and to diminish external dependence.[21]

THEORIES OF REGIONALISM

Regionalism as a phenomenon in international politics has been subjected to theoretical understanding and scrutiny since the beginning of 1960s.[22] Theoretical explanations to the phenomenon of regionalising have been scattered. This phenomenon has often been understood through theories which are not directly

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[19] Robert Gilpin, *Global Political Economy: Understanding the International Economic Order*, (Princeton and Oxford, 2001), p. 356

[20] William Wallace, n.17, p.9

[21] Shiela Page, (ed.) *Regions and Development: Politics, Security and Economics*, (London, 2000), p. 17

[22] S.D. Muni and Anuradha Muni, *Regional Cooperation in South Asia*,(New Delhi,1984),p.1

linked to regional integration but do have some effects on it. These are mostly theories that deal with integration in the international arena.

Among all the approaches to integration, **Federalism** has the longest history within the normative thought in international relations. It is an old idea which has often appeared in plans for political union.[23] Elazar has defined federation as 'a compound polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry in the exercise of these powers.'[24] However, simply put, federalism advocates for creation of supra-national institutions on the lines of federated nation states, to overcome the problem of warfare and anarchy at the global level.

Despite its intellectual appeal, federalism has not been transformed into reality unless under certain unusual circumstances[25] (as ·in the case of U.S. and Switzerland). Evidence has proved that soveirgnity is still a treasured principle and states find it unacceptable to surrender their sovereignty to a federation. Rana opines that regional organisations rather than regional federations seem to be the more plausible option to balance the inadequacies of a nation state and a growing globalism of technology and welfare.[26] Federalism is also criticised on the ground that it paves the way for exploitation of the weaker countries in the federation by the stronger ones. Also, federation is not a feasible option in the present times, as the functions of the state have increased manifold. This would create difficulties in demarcating the functions between central and state authorities. Moreover, federation works better within homogeneous communities and is therefore not suited for heterogeneous societies of today.

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[23] The Historical Incidences where Federal Principles were invoked are mentioned in David Mitrany, 'Prospects of Integration: Federal or Functional?' in A.J.R. Groom and Paul Taylor, (ed.) *Functionalism: Theory and Practice in International Relations*, (London, 1975). Also in Thomas George, *The State of International Integration Theory*, (New Delhi, 1997), pp. 33-87.

[24] Quoted in Dimitris N. Chryssochoou, *Theorising European Integration*,(London and New Delhi, 2001), p.43

[25] Thomas George in his Book *The State of International Integration Theory*, (New Delhi, 1997) derives certain conditions of pre-requisites that help the creation of federations. These, according to him, are external threats and the need for common defence, geographical factors, previous political assocations, similarity in social and political institutions, economic factors, nationality, religion and culture and leadership.

[26] A.P. Rana, n.7 , p. 9

Another approach to international peace and security is **Functionalism**.[27] The functional approach was formulated due to the drawbacks of the federal approach especially in the context of 20th century developments in non-political fields.[28] The functionalist thrust in the regional integration theory concerned itself mainly with economic and social aspects of regional cooperation activities. Exponents of this approach posit that governments tend to forge international institutions in order to meet various functional needs.

One of the main exponents of this theory has been David Mitrany who wrote a highly influential monograph - a *Working Peace System*, in this regard.[29] The problem of war could be solved and the war prone system of national states could be escaped, Mitrany argued, through international agreements in such specific functional and technical areas as health, postal services and communication.[30] Functionalism tries to explain as to why collective action in specific functionally linked area of cooperation is a more attractive action than unilateral state action. It posits that group involvement in peaceful problem solving schemes, supported by the necessary technical expertise is a more efficient alternative for human governance.[31]

According to functionalists the world in the 20th century had become very complex in technical terms and was beyond the nation states capacity to deal with them individually. So, functionalism attempts to identify common international social and economic problems and create regional or global organisations to deal with them. Linked to this elaborate action process is a notion of integration whereby individuals develop a greater awareness of their mutual needs and are prepared to transfer their loyalties, albeit function by function, to the nascent common

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[27] For a more elaborate discussion on theoretical as well as practical perspectives on functionalism see A.J.R. Groom and Paul Taylor, (ed.) *Functionalism: Theory and Practice in International Relations,* (London, 1975)

[28] Thomas George, n.6, p.144

[29] For a more critical understanding of Mitrany's approach see Paul Taylor, 'Functionalism: The Approach of David Mitrany' in A.J.R. Groom and Paul Taylor, (ed.) *Frameworks for International Cooperation,* (London, 1990)

[30] Robert Gilpin, n.19 , p. 350

[31] Dimitris N. Chryssochoou, n. 24, p. 38

institution.[32] Though Mitrany's work is often seen as an argument against regionalism, if one reads his work in more detail, then, there are instances where he is in favour of a regional unit of an open nature.[33] However, this approach is not without criticism.[34] Experience has shown that effective and beneficial cooperation in international institutions make officials adopt a favourable attitude but they seldom become gradually attached to it than their own national community. The main concept, that of 'function' itself is seen by many critics as vague. Functions are not universal. In some functions trans-border cooperation might be required while in others it may not be required. Functionalists failed to consider welfare functions as state-centric and not trans-border operations. Functions like medicare, pension, unemployment benefits, etc. are state-centric as they come from the states resources and are meant for its citizens. Futhermore, functionalism assumes the rationality of the experts. This concept is also an ambiguous proposition.[35]

Inspired by the works of Mitrany, Ernst Haas[36] has developed what he called "Neo Functionalism" and applied this theory to both international institutions and the process of European integration. His writings were later supplemented in the works of Leon Lindberg, Stuart Scheingold, Philippe Schmitter, J.S. Nye and others.[37]

According to Haas political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing nation states.[38] The idea that economic and technological forces are driving the world towards greater political integration is at

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[32] ibid, p.38

[33] A.P. Rana, n. 7, pp. 16-17

[34] For a more critical appraisal of Functionalism as an approach to International Integration see Thomas George, n.6, pp.143-176

[35] ibid, p. 161

[36] Haas' most seminal earlier conceptions are found in two books, *The Uniting of Europe (1958)* and *Beyond the Nation State (1964)*

[37] For a more detailed understanding of Neo Functionalism as an approach to integration see Thomas George, *The State of International Integration Theory*, (New Delhi, 1997) pp.88 - 143, R.J. Harrison, 'Neo Functionalism' in A.J.R. Groom and Paul Taylor, (ed.) *Frameworks for International Cooperation*, (London, 1990) pp.139 - 150, Nina Heathcote, 'Neo Functional Theories of Regional Integration', in A.J.R. Groom and Paul Taylor, (ed.) *Functionalism: Theory and Practice in International Relations*, (London, 1975) pp. 38-52

[38] Quoted in Thomas George, n.6, p.91

the core of neo-functionalism. It assumes that economic and other welfare concerns have become or are becoming more important than traditional national security and inter-state rivalry in an age of modernisation and democratisation.

Creation of supra national institution to handle complex technical problems would gradually bring political elite and interest groups of countries in the world to support further integration as they see benefits in it for themselves. While functionalism assumes that conscious political decisions would accelerate political integration, neo functionalists assume that once the process of economic and technical integration has been launched, unanticipated consequences, spillovers from one functional area to another, and the effects of learning will propel the process towards eventual political and economic unification.[39] Due to their emphasis on unification, neo-functionalists are often seen as "federalists by stealth"[40]. However, in reality, the neo functionalist logic of spillovers and feedback was not working and in 1975 Haas himself repudiated his own neo functionalist theory.

Hoffman says that integration of states on the neo-functionalist model may not be possible because of the diversity of the member states in domestic affairs and consequent difference of world view of the integrating states.[41] The logic of diversity also restricts the integrative process and its spillover effects. The incremental integration process of neo-functionalism

Can be criticised from the point of view of 'high' politics and 'low' politics. The former is often defined as issues vital to the security and national interest of the states while the latter refers to issues considered less important. While integration on issues of low politics may come through easily, cooperation on issues of high politics may be ridden with apprehension. Moreover, neo-functionalism paid little attention to the role of exceptional individual political actors. Infact, many instance of integration have occurred at the instance of an exceptional political leader.[42]

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[39] Robert Gilpin, n.19, p. 352

[40] A.P. Rana, n.7, p. 11

[41] Thomas George, n.6, p.108

[42] ibid, p. 111

Another approach that has been influential in development of thinking about regional institution is the **Neo institutionalism** approach. This puts emphasis on the role of international institutions to help ameliorate market failures and solve collective action problems in economic and political integration. One of its greatest exponents has been Keohane.[43] Scholars favouring institutionalism argue that international institutions or regimes help states in solving collective action problems by way of facilitating reciprocity and issue linkages.[44]

Although a tone of idealism dominated policy rhetoric and academic discussion during inter-war period, with the exception of the League of Nations and Washington Naval disarmament treaties, little of the institutionalists' reforms programme was ever attempted and even less achieved.[45]

The most significant approach by political scientists to economic and political integration since neo functionalism is **Inter-governmentalism** or more specifically, liberal inter-governmentalism.[46] Although like institutionalism, it stresses the importance of international, regional institutions, it differs from the earlier approach as it emphasises on the role of national government, powerful domestic interest groups and on the bargaining among nation states over distributive and institutional issues.

One of the major criticisms of this theory is its over-emphasis on the self-interest of nation states defined in economic terms. The theory has little to say about the institutions formulated during the process of regional integration.[47] Moreover, the international system today does not consist only of nation states. It is shared by

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[43] For a more detailed discussion on Theory of Liberal Institutionalism and Regimes see Stephen D. Krasner, (ed.) *International Regimes,* (Ithaca, 1983), pp. 1-21

[44] Conditions under which regimes or institutions are facilitated are given in Kenneth Oye, 'Cooperation under Anarchy', *World Politics,* (Summer, 1985). Also in Joseph M. Greico, "Anarchy and Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism", *International Organisation,* (Vol.42, Summer, 1988) pp.488 - 507

[45] Charles W. Kegley and Eugene R. Wittkopf, (ed.), *World Politics: Trend and Transformation,* Seventh Edition, (New York, 1999), p. 121

[46] Robert Gilpin, n.19, p. 354

[47] Thomas Risse kappan, "Exploring the Nature of the Beast: IR Theory and Comparative Policy Analysis Meet the EU", *Journal of Common Market Studies,* Vol. 34(1), March 1996, pp. 55-57

other actors such as NGOs and market forces (TNCs, MNCs, etc.). The sovereignty of the state is thus diffused and good governance is a result of good governance of all the three actors (state, NGOs and market forces) even in the regional integration process.[48]

The **Realist** approach to explanations to regionalism emphasises on the power relations, national political interest and inter-state rivalries in the integrative process. Realism regards regional integration as a political phenomenon pursued by states for national, political and economic motives.[49] The realist theory of international politics highlights the anarchic nature of the international system and view nation states as the primary actors. They further say that the states in international relations are motivated by their security concerns which are military in nature and governed by the principles of balance of power vis-à-vis other states or adversaries.

The realists in the success of integration process refer to the existence of a central power or hegemon. For example, in West European integration regional leadership was exercised by France and Germany. Also the realists emphasise on the importance of relative gains and the distributive issues in the desire or decision of the states to enter regional alignments.[50] The realists have, in recent times emphasised that the relative gains issue, politico-military relations among member states and the influence of the hegemonic power would have a bearing on the political economy of regionalism in future.

Realism could not give answers to many questions that were raised and it seemed to lack real world evidence. Realism could not account for significant new developments in world politics. For example, it could not explain the new liberal trade and political institution in Western Europe in the 1950's and 60's, where the cooperative pursuit of mutual advantage rather than narrow self interests appeared

[48] Jorg Friedrichs, "The Meaning of new Medivalism", *European Journal of International Relations*, Vol. 7(4), 2001, pp.491-93

[49] Robert Gilpin, n.19, p.356

[50] Joseph Greico, 'Systemic Sources of Variations in Regional Institutions in Western Europe, East Asia and the Americas', in Edward D. Mansfield and Helen V. Milner, (ed.) *The Political Economy of Regionalism*, (New York, 1997)

to dominate. Other critics began to worry about realism's tendency to disregard ethical principles and about the material and social costs that some of its policy prescription seemed to impose, such as retarded economic growth due to unrestricted military expenditure.[51]

The **Marxist** theory of economic and political integration is another approach to an explanation of regional integration. According to this point of view, technological developments and international competition are forcing the dominant western capitalists class to look beyond the narrow confines of national capitalism and forge a regional economy that would strengthen the international competitiveness of European capitalism.[52] So, according to the marxists, regional organisations are infact ways to extend European capitalism to newer and larger areas. However, their approach of economic determinism omits certain important political and strategic motives responsible for economic integration.

Apart from these, many theorists and scholars have tried to theorise the emergence of regional organisational cooperation between least developed countries (LDCs). Rana in his work 'Integrative Possibilities in the Third World'[53] summarises Lynn Mytelka's 'Three **Models of Integration in the Third World'**. The first model under this is the *Laissez - Faire* Integration Scheme on the pattern of European integration resulting in free trade agreements and customs union intended to increase intra-regional trade. However, this kind of model results in asymmetrical patterns of exchange and to polarisation in the third world countries.

The second model tries to mitigate the problems arising from the first. This model goes a step a further by not only seeking trade expansions but also attempts at equitably distributing the gains that accrue from such trade expansion. The third model goes beyond the first two models by spelling out means to correct the problems of unequal distribution of gains and polarisation. It talks of compensatory corrective mechanism. However, well defined plan for third world integration, the

[51] Charles W. Kegley and Eugene R. Wittkopf,(ed.), *World Politics: Trend and Transformation*, Seventh Edition, (New York, 1999), p.125

[52] Robert Gilpin, n.19, p. 346

[53] In Rama S. Melkote, n.5, p.27

conditions spelt out under this are difficult to achieve and much depends on the political will of the dominant elites and leaders in these countries.

The above mentioned approaches to a theoretical understanding of the phenomenon of regional integration fail to cover all the varied dimensions of this phenomenon. A universal theory or explanation of such a diverse and wide-ranging phenomenon is undoubtedly impossible to formulate.[54] However, any theorising of regionalism in future should take note of the changing concerns within a region. Issues of trade liberalisation, economy, etc. would not be the only issues of concern in the future. Any theorising of the phenomenon of regionalism should take note of issues of gender, ecology, sustainability, human security, etc. Problems arising due to spill over effects of ethnic strifes, environmental degradation, population movement, drug trafficking, terrorism, arms trade, etc. that are now affecting large parts of the world must now be recognised and addressed.[55]

DIMENSIONS OF REGIONAL INTEGRATION

Cooperation on a regional basis can extend to various dimensions. Though classified differently, these dimensions are not mutually exclusive. Rather, they are interrelated in some ways. However, in some regions one dimension is more pronounced than the others.

(i)   Economic Parameter

ElAgraa[56]saysthat "international economic integration is concerned with the discriminatory removal of all trade impediments between the participating nations and with the establishment of elements of cooperation and coordination between them". The major means of achieving economic motives have been through trade liberalisation. Trade liberalisation maximises the gains from inherited competitive

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[54]   Robert Gilpin, n. 19, pp. 359-361

[55]   Morten Boas, Marranne H. Marchand and Timothy M. Shaw, 'The Weave World: Regionalisms in the South in the New Millenium, *Third World Quarterly*, (Vol.20, No.5, 1999) pp.1061 - 1070

[56]   Ali M El Agraa, *The Theory and Measurement of International Economic Integration*, (Basingstoke,1989)

advantage and encourages efficiencies from specialisation and economies of scale.[57]

Unilateral liberalisation imposes high transition costs especially in small nations. However, liberalising first with neighbours if they are major trading partners while still ensuring regionalised protection against more efficient global producers provides many benefits. Contiguity increases the probability of cross border flows and so liberalisation with neighbours often results in significant trade increases.[58]

Generally the direction from economic cooperation to final economic integration is seen to follow a five step path.[59] The first stage is the Preferential Trading Agreement (PTA) where preferential treatment is given to certain products of member countries by way of giving concessions in tariff or customs duty or in terms of non-tariff measures to members. The second stage is marked by the creation of Free Trade Area (FTA) under which tariff and quantitative restrictions between the participating countries are abolished but each country retains its own tariff against non-members.[60] The next is the customs union stage where the participating countries adopt uniform tariff and other trade restrictions vis-à-vis countries outside the union.[61]The fourth stage is the Common Market in which Customs Union is extended to include the free movement of factors of production (goods, services, capital and people).[62]The last and final stage of economic integration is Economic Union which incorporates the previous stages of integration and adds monetary and fiscal policy harmonisation.[63]

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[57] Just as intercontinental railways and highways help achieve continental efficiencies ,so does elimination of border delays The elimination of territorial boundaries has brought about substantial gains from free trade in Europe and North America.

[58] Van R.Whiting Jr. , n.13, p. 24

[59] Robert Gilpin, n.19, p. 343

[60] An example is North American Free Trade Agreement(NAFTA)

[61] Most prominent example is the European Economic Community(EEC) or Common Market created by the 1957 Treaty of Rome

[62] The preamble of Single European Act(SEA) aspired to eliminate the barriers which devide Europe and specified the establishment of common market

[63] The only example is the movement towards European economic integration.

Moreover, technological transformations and the globalisation of industry also contribute to the incentives for regionalisation. Dynamic comparative advantage can be achieved by transforming the availability of capital, labour and technology by devising national or regional policies to improve the savings rate, to train workers or to develop new technologies.[64]

(ii) Developmental Dimension

In the decolonised world, regional grouping is seen as an agency for development. The under-developed world is plagued by the problems of economic imbalances, weak or under-developed infrastructure, lack of internal cohesion, ethnic, racial and linguistic conflicts and problems of state legitimacy. Regional cooperation became imperative for those micro states which either had the option to cooperate within themselves to solve their common problems or to become client states of the developed countries.

Developing countries perceive regionalism as means of achieving import substitution through increased regional capability, reduction in dependence on developed countries by generating resources within the region and through intra regional trade, increased economies of scale and increase in the bargaining power in the international arena.[65] Regionalism has thus become a viable policy option among developing countries in not only elaborating the basic principles of their collective economic diplomacy, but also as a means in enhancing their positions at the numerous negotiations for a new international economic order since the late 1960s.[66] Moreover, regionalism is also perceived by these countries as means to reinforce societal viability, solve environmental problems and resolve regional conflicts.

(iii) Political Parameter

In the political sphere, regional organisations are seen as platform to bring together countries of a particular geo-political region as well as to stand together as a single

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[64] Van Whiting Jr., n.13, pp.26-30

[65] B.C. Upreti, (ed.), n..2, p. 9

[66] Debendra K. Das, (ed.), *SAARC: Regional Cooperation and Development, Perspectives, Problems and Policies,* (New Delhi, 1992), p. 52

block in international forum, thereby increasing their negotiating and bargaining power. According to Leon Linderberg,[67] political integration deals with "a group of nations coming to regularly make and implement binding public decisions by means of collective institutions and, or processes than by formerly autonomous national means." This includes several aspects like rudimentary institutional structure, inter-dependence in policy formation, a sense of mutual identity and obligation.

Joseph Nye[68] differentiates between four types of political integration that have been prominent in literature on integration theory. This he classifies as institutional, policy, attitudinal and security. Institutional Integration is that integration process which leads to common political institutions. In policy integration participating countries act as a group in making domestic or foreign policy. In attitudinal integration, a group of people not only interact and share institutions but also develop a sense of common identity and mutual obligation. And lastly, security community involves the reliable expectations of non-violent relations among states of a given area.

Also, a fundamental point about regional integration, whether it is found in Mercosur or in Western Europe is that it rests on common assumptions about political institutions and frameworks. For cooperation to succeed there has first to be a basic level of political agreement and common set of liberal democratic institutions, extending not just to multi-party democracy but also to effective market economies.[69] Moreover, evidence proves that most regional economic integration efforts have underlying political aims. For example, achieving such political aims as ending French - German rivalry and creating a political entity to increase Europe's international standing and strengthen its international bargaining position has been of vital importance in European integration process.[70] During the period of east-west rivalries, many regional groupings sprang up which were

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[67] Leon Linderberg. "Political Integration as a Multidimensional Phenomenon Requiring Multivariate Measurement", *International Organisation,*(Vol.24 ,Winter 1970), pp. 649-731

[68] Joseph Nye, "Comparative Regional Integration: Concept and Measurement", *International Orgnisation,* (22 Autumn, 1968), pp. 1-21

[69] Christopher Clapham, Greg Mills, Anna Morner and Elizebeth Sidiropoulos, n. 10

[70] Robert Gilpin, n.19, p. 343

supported by either of the ideological blocs and were seen as instruments for maximising the politico strategic concerns of these power blocs.

Furthermore, regional integration is not possible without the support of key elite (businessmen, politicians, academicians, bureaucrats, etc.). Integration efforts at the regional level cannot flourish without a sufficient degree of parallel or congruent bureaucratic capacity both at the national and at the level of inter-governmental or supra-national institution. Regional integration is often conducted as an inter-governmental business and therefore, political undercurrents are difficult to suppress.[71]

Also, the interests or preferences of key domestic elite also affects regional strategies. For example, the form of economic integration, whether PTA or FTA, etc. may benefit or harm the domestic constituents and they may accordingly support or oppose it. Moreover, existing members of a preferential grouping may be able to influence the domestic economic policies and the political institutions of prospective members by insisting that they undertake domestic reforms prior to accession. For example, Spain and Portugal were required to complete democratic transition before being admitted to the European community.[72]

(iv)   Security Dimension

Security parameter also has a bearing on the functioning of regional organisation, since each regional grouping share a common geo-political space. As a result they do have common security concerns, both internal and external. Within the context of the security dimensions of region falls the 'security complex theory' proposed by Buzan.[73] The traditional definition of a security complex is a set of states whose major security perceptions and concerns are so inter-linked that their national security problems cannot be reasonably analysed or resolved apart from one another. The essential logic of the theory is rooted in the fact that all the states in

[71]   Manfred Mols, "The Integration Agenda: A Framework for Comparison", in Peter H. Smith, (ed.) *The Challenge of Integration: Europe and Americas,* (University of Miami, 1993), p.34.

[72]   Edward D. Mansfield and Helen V. Milner, n.15, pp. 589 - 627

[73]   Barry Buzan, *Peoples, States and Fear: An Agenda for International Security Studies in the Post Cold War Era,* (Hemel Hempstead, 1983)

the system are enmeshed in a global web of security inter-dependence. But because most political and military threats travel more easily over short distances than over long ones, insecurity is often associated with proximity.

The normal pattern of security inter-dependence in a geographically diverse anarchic international system is one of regionally based clusters, which Buzan labels as security complex. Security complexes are about the relative intensity of inter-state security relations that lead to distinctive regional patterns shaped by both the distribution of power and historical relations of enmity and amity.[74] The theory further assumes that security complexes, just like balance of power, are an intrinsic part of an anarchic international system and, therefore, can be expected to be found everywhere in the system. And wherever they are not present, two reasons are cited. Firstly, that in some areas local states are so low in capabilities that their powers do not project much beyond their boundaries. The second reason attributed to the absence of security complex is the dominating presence of an outside power which is strong enough to suppress normal operations of security dynamics within the region.

Moreover, if one looks at the functioning of various regional organisations, then the security aspect is not difficult to decipher. The setting up of the European community was an effort to bind the European competitors of the Second World War into a mutually beneficial network of politico-economic relations and institutions. In American case, cross border flows of goods, investments, undocumented migrants, drugs, oil, etc. aroused attention and stability of Mexico became a security concern for the US. In fact, some writers like Whiting Jr. hold the hypothesis that lessened need for cross regional security alliances increase the likelihood of regional integration. He gives the example of how the collapse of Soviet Union and end of cold war became a turning point for Europe, America and Asia. The absence of a common enemy has shifted attention from geo-political and strategic considerations to more economic ones, thereby giving impetus to

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[74] Barry Buzan, "Logic of Regional Security in the Post Cold War World", in Bjorn Hettne, Osovaldo Sunkel and Inotai Andras, (ed.), *Globalisation and New Regionalism,*,(London,1999), p. 8

regionalisation efforts[75]. On the other hand, Joanne Gowa[76] points out that the efficiency gains from open trade promote the growth of national income, which can be used to enhance state's political- military capacity. Whatever be the pattern of relationship between security and regionalisation, power and security relations do have a bearing on the regionalising efforts.

NEW ROLES FOR REGIONAL ORGANISATIONS

In recent times, there has been a shift in the security perspective of regional organisations. The end of the cold war has redefined the security perspectives in many ways. The distinguishing characteristic of post cold war politics is the absence of what international security analyst Lawrence Freedman calls "the strategic imperative". The earlier perception of security was dominated by the realists and neo-realists paradigm. To the realists, the state is the primary unit of analysis and the central actor in international relations. To them threats to security are external and military in nature.

In the early years of the cold war, security of West was mainly concerned with addressing the Soviet threat, which was military as well as ideological, social and economic. Later with the onset of the nuclear arms race, security began to be understood in more military terms.[77] However, by the later years of the cold war, war as a way of maintaining relationships between the states almost became a redundant option due to the acknowledgement of the principle of mutually assured destruction (MAD). However, when the Berlin Wall was breached in November 1989, this ultra stable geopolitical scaffolding provided by bipolarity, disintegrated.[78]

The end of the cold war has seen a more diffused and regionalised international order. Two factors explain this tendency. Firstly is the diffusion of power and

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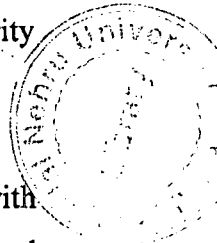[75] Van R. Whiting Jr., n.13, pp. 22-23

[76] In Edward D. Mansfield and Helen V. Milner, n .15, p. 610

[77] Barry Buzan, "Re-thinking Security after the Cold War", *Cooperation and Conflict,* (Vol.32, 1 1997) pp. 5 - 28

[78] Richard Falk, "Regionalism and the World Order After the Cold War", in Bjorn Hettne, Osavaldo Sunkel and Inotai Andras, (ed.) *Globalisation and New Regionalism,,* (London,1999), p. 71

secondly the introversion of the great powers.[79] After the cold war, none of the big powers is willing to take on a strong leadership role in international society and all of them are preoccupied with their own domestic affairs.[80]

Patman[81] identifies the major changes in the post cold war world as democratisation of Eastern Europe, Africa, Asia and Middle-East, onset of the process of globalisation and the emergence of an inter-dependent world. In this new world order contemporary security threats such as breakdown of financial systems, global warming, human rights protection, proliferation of weapons of mass destruction, forced migration and so forth are beyond the control of the individual states and need international and national responses.

However, the end of the cold war has not made the world more secure. Security essentially means what President Theodre Roosevelt called "Freedom from fear". In that sense, post cold war has not reduced the quantum of human suffering but has actually increased it in many parts of the world.[82] New conflicts in the form of intra-state conflicts have mushroomed. The end of the ideological confrontation have in fact given way to resurfacing of localised conflicts based on ethnic tensions, resurgent nationalism and religious extremism.[83]

Cold war had stimulated a sense of external threat and had brought about internal cohesion in most states. However, with the collapse of external threat, the earlier centrifugal pressures were unleashed. Now, the threat of war has been converted into actual civil war in many countries. In these new types of conflicts, force is projected through proxy war by using the method of guerilla warfare, insurgencies

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[79]   Barry Buzan, n.74, p. 12

[80]   The US still plays some leadership role but lacks a mobilising crusade and when it has taken a leading role, it has been in the form of unilateral hegemony, as evidenced in the Gulf war, which is despised by other nations. The EU has been prematurely cast into the role of a great power and has not yet developed the standing to become an internationally domineering power. Japan, though an economic giant, lacks the capability to play a robust international role.

[81]   Robert G. Patman, (ed.) "Introduction", Security in the Post Cold War World, (London, 1999) p. 5

[82]   Bryce Harland, "Reflections on Security", in Robert G. Patman, (ed.) Security in the Post Cold War World, (London, 1999) p. 270

[83]   Regional Security issues in Central/South Asia and Potential for Cooperation at file://A:\Regional security issues in Central-South Asia and potential for cooperation.htm

and terrorism. In some substantial parts of the world, civil order has almost totally collapsed and left behind a condition not unlike the state of nature, as seen by Hobbes - of war of all against all.[84]

Another aspect of security in the post cold war period is the increasing importance of non-military threats to national security. Over the years definition of security has broadened from simple exclusive concern with the strategic relationship of the super powers and the logic of deterrence towards the dynamics of understanding social and economic process. This definition of security has its roots in the intellectual traditions known as peace studies.[85] The root of peace studies is linked to the origin of international relations as an autonomous area of research and study in the early part of the twentieth century. The idealist defined peace during the inter-war period as a situation where there is no formal state of war. Also the concept of peace was one-dimensional which fell within the domain of high politics. In the post-Second World War the perception of security was fraught with bipolar world politics. The cold war disputes and the fear of a nuclear war brought peace studies to the forefront.

Peace studies took various forms. The neo-Marxist perspective reflected in the works of Krippendorff, Lars Dencik and Gunder Frank. They identified capitalism as the key source of war and violent conflicts. The capitalist world market has systematically disadvantaged Asia and Africa.[86] Perception of security thus shifted away from is almost exclusive concern with the strategic relationship between the super powers towards the dynamics of North-South relationship. Galtung in his seminal article, "Violence, Peace and Peace Research" in 1969 developed the idea of structural violence. He distinguished between direct and structural violence which is build into basic social structures. For him peace required elimination of patterns of structural domination. It focussed on social justice and re-distribution of

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[84] Bryce Harryland, n.82, p. 271

[85] Terry Terrif, Stuart Croft, Lucy James and Patrick M. Morgan, *Security Studies Today,*(Cambridge,1999), p.65

[86] Ronald H. Chilcote, *Theories of Comparative Politics: The Search for a Paradigm Reconsidered*, (Oxford, n.d), p.238

power and resources not only among states, rather within the state itself.[87] Peace studies adopt the premise that security is indivisible. They took a long-term perspective of peace to include interests represented by the peace movements such as environmentalists and the feminist arguments on patriarchal nature of international relations. Therefore, security has come to be understood not only in terms of protection from war but also from other potential dangers to survival and well being.

They derive from both international and regional phenomenon like global warming or drugs, smuggling, money laundering, cross border migration, etc. Though these non-military threats to security existed even before the end of the cold war, they have emerged with much greater clarity in the post cold war period. While military security has remained an essential component of security, the element of environment, health, good governance or more specifically issues and concerns of human security have been incorporated into it.[88]

Security has now come to be understood in a comprehensive framework of military, ideological, political, economic, environmental and cultural threats at the local, national, regional and international levels. This was recognised by the UN as early as 1987 when in the international conference on relationship between disarmament and development, convened by United Nations General Assembly defined security as "security is an overriding priority of all nations. It is also fundamental for both disarmament and development. Security consists of not only military, but also political, economic, social, humanitarian and human rights and ecological aspects ....."[89]

The UNDP report of 1994 also defines security in its broader conceptions. "The concept of security has for too long been interpreted narrowly, as security of territory from external aggression, or as protection of national interest in foreign

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[87] Dietrich Fischer, *Non-Military Aspects of Security: A Systems Approach,* (Aldershot, Brookfield, Hongkong, Singapore, Sydney, 1993) p. 6

[88] Rajesh M. Basrur, (ed.) *Security in the New Millenium: Views from South Asia,* (New Delhi, 2001) p.12

[89] Quoted in Dietrich Fischer, n.87, p.9

policy or as global security from threat of nuclear holocaust. It has been related more to nation states than to people..... Forgotten are the legitimate concerns of the ordinary people who sought security in their daily lives. For many of them security symbolised protection from the threat of disease, hunger, unemployment, crime, social conflict, political depression and environmental hazards."[90]

Fischer classifies the non-military threats to security as dangers to survival, health, economic well being, livable environment and political rights.[91] Barry Buzan says that the concept of security encompasses security in five sectors which are – military, political, economic, societal and environmental[92] According to him," Military [93]security concerns the two-level interplay of the armed offensive and defensive capabilities of the state, and the states' perception of each other's intentions. Political security concerns the organisational stability of the states, systems of government and the ideologies that give them legitimacy. Economic security concerns access to the resources, finance and markets necessary to sustain acceptable levels of welfare and state power. Societal security concerns the sustainability, within acceptable conditions of evolution, of traditional patterns of language, culture and religious and national identity and customs. Environmental security concerns the maintenance of local and planetary biosphere as the essential support system on which all other human enterprises depend.

Buzan identifies two issues which are being increasingly securitised.[94] These according to him are the issues of environment and international economy. In case of environment, the securitisation process can be traced back to 1960's when books such as Carson's *Silent Spring* were published which brought environment into the foreground of political and intellectual thinking. These issues have expanded to include issues of pesticides, biodiversity, climate change, resource depletion,

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[90] United Nations Development Programme, *Human Development Report, 1994* (New York, 1994) p.22

[91] Dietrich Fischer, n.87, p. 14

[92] Terry Terrif, Stuart Croft, Lucy James and Patrick M. Morgan, n.85, p.166

[93] ibid, p.167

[94] According to Buzan issues become securitised when leaders, political, societal, or intellectual begin to talk about them. Securitisation broadly raises the issues above normal politics. The priority given to these issues would depend upon how much of a threat it becomes to security.

pollution, threat of meteorites etc. In case of economy the securitisation process began with the relative economic decline of the U.S.

The end of the cold war led to the collapse of the whole military-political agenda that had dominated the world for over forty years. The loss of common interest saw the unraveling of the economic rivalry that had earlier been suppressed.[95]Added to this are the issues of transnational criminal organisations, drug trafficking, arms trade, human rights violations, migration, etc. which have increasingly been recognised as issues threatening human security. Transnational criminal organisations are non-state-bound actors that occur or have presence in two or more countries.

A transnational crime that fits traditional concerns of security is illegal trafficking in weapons or weapons related materials and technologies. Along with this is the concern regarding trans-national organised drug trafficking cartels. These organisations may directly confront the state with the use of force and also erode state legitimacy. Even more worrisome is the possibility that they may obtain weapons of mass destruction such as chemical and nuclear weapons. Drug trade may directly endanger individual citizens. There is a strong correlation between drugs and violence. It may result in crimes against people and property for money to buy drugs and violence by individuals under the influence of drugs.[96]

What can be clearly evidenced from the new security agenda is the fact that the state is becoming less and less important in the security agenda. A range of new referent objects is being set up above, below and alongside the state. Above the state one finds rules, regimes and institutions like the Liberal International Economic Order, Global Climate System, Convention on weapons of mass destruction, chemical weapons, Non-proliferation treaty, etc. These regimes seek to safeguard the whole system. They identify and acknowledge those threats that are global in nature. The state has to concern itself with the set of rules, regulations and legislations contained in these instruments. Any action which goes against the

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[95] Barry Buzan, n.77, pp. 5-28

[96] Terry Terrif, Stuart Croft, Lucy James and Patrick M. Morgan, n. 85, pp.148-156

principles contained in these instruments may result in international embarrassment or even imposition of sanctions.

Alongside the state, ethnic and religious groups have emerged as distinct referent objects. In some states, mostly underdeveloped, security means the security of the elite classes. More and more states today are divided on communal, caste and linguistic affiliations and security in these cases is aimed at safeguarding their interests. These agencies have in some cases become as important, if not more vis-à-vis the agencies of the state.

And below the state is the rising focus on the individual as the ultimate referent object for security.[97] At this level issues such as starvation, unemployment, disease, etc. are becoming increasingly securitised. The state no longer dominates either as the exclusive referent object or as the principle embodiment of threat in the way it did previously.

Many regions of the world today have been subjected to different forms of anarchy, mainly due to the breaking away of the state in these parts. In these circumstances, the international agencies like the U.N. have not been able to play a significant role. Regional organisations are, under these circumstances, being seen as agents for reduction of political violence, attainment of economic well being, promotion of human rights, and benevolent governance, protection of ecological diversity, safeguarding of health and renewable resources in those areas.

Within this context, Richard Falk[98] envisages four roles for regional organisation. The first he says is to contain the negative affects of globalism. These effects he identifies as commercialisation of world economy, insensitivity to the issues of human rights, ecology, sustainability, etc. However, regionalism has not yet emerged as a counter to negative globalism. On the contrary, its main drive has been to facilitate a more effective participation at a global level. For example,

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[97] Barry Buzan, n.74, p. 12

[98] Richard Falk, n.78, pp. 228-250

Sweden to prepare for its participation in the European Union has had to roll back aspects of its exemplary welfare system.

The second role he says is containing the threat of anarchism that has resulted due to the breakdown of governments, increased crimes against humanity, etc. These issues have spillover regional effects and in the event of incapability of the U.N. in playing an effective role in these issues, the role of regional organisations become even more important. Falk ponders over the possibility of NATO intervening in the Yugoslavian crisis, OAS taking the initiative in bringing democracy in Haiti.

Thirdly regionalism is seen as a stepping stone towards global governance. It is seen as a subordinate to international organisations which would perform delegated functions. The UN Charter in chapter VIII seems to envisage such a relationship. The Charter gives ample space for complementary regional roles in peacekeeping settings. Article 52(3) of the UN charter expresses a favourable disposition towards resolution of disputes at a regional level.

Lastly, the regional organisations are seen as promoters of positive global governance like promotion and safeguarding of human rights, resolving regional conflicts, etc. For example, SAARC has come up with Convention on Terrorism, on narcotic drugs trafficking.

According to Buzan, among the various non-military threats to security that exist in the world today, the societal aspect or the issue of migration is going to be one which would easily come within the ambit of regional organisation.[99] Buzan says that in the economic arena, with technological innovations and globalisation of markets, finance and commodity, the regionalising logic might not find many supporters. Similarly, in the environmental arena, mainstream issues do not work on the geographic logic of regions. However, he points out that issues of threat to identity like migration travel more easily over short distances than over long ones.

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[99] Barry Buzan, n.74, pp. 13-19

FORCED MIGRATION AS THREAT TO PEACE AND SECURITY

International migration with its international, regional, national and local repercussion is increasingly becoming a matter of concern to all the regions of the world. Migration is a spatial phenomenon and by definition a migrant is someone who leaves one community and becomes part of another community, at least for some minimum period of time. Therefore, migration requires both temporal and locational criteria.[100] Movement of population from one place to another has been an age-old phenomenon. But its only in recent times that it has assumed greater threat in terms of local, national, regional and international security and conduct of international relations.[101]

For many reasons – war, famine, environmental degradation, impoverishment, persecution - a large portion of the humanity has been on the move.[102] Many causes have been attributed to mass population movements. One of the principal reasons is war and associated activities. Another source of refugees is internal aggression Thirdly refugee movements may be induced due to natural disasters and environmental degradation. Also, many people cross borders in search of a better standard of living.

Scholars have classified migration into various categories. Basis adopted for such classification include cause, duration, distance, direction, volume, velocity, selectivity, organisation, etc. Some have subdivided migration into free (seasonal, nomadic, temporary and permanent) and forced (refugee, slaves and population transfers).[103] Often a distinction is made between migrants, refugees and Internally Displaced Persons (IDPs).

The term migrant is often used to describe a person who crosses international borders attracted by the pull of better economic opportunities and living conditions

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[100] Ram Nath Singh, *Impact of Out Migration on Socio-Economic Conditions,* (New Delhi, 1989) p. 6

[101] *Adelphi papers (268)*, Refugee Movements and International Relations, Summer 1992, p. 5

[102] ibid, pp 3-83

[103] Ra m Nath Singh, n.100, p. 9

like lure of educational facility, higher social status etc.[104] Migration is said to be encouraged by trans-border social, religious, and ethnic linkages, especially in situations where the same community enjoys majority status in one country and that of an oppressed minority in another.[105]

Migrants have been divided into categories like temporary labour migrants (men and women who migrate for a limited period in order to take up employment), highly skilled and business migrants (people with specialised qualifications who occupy senior positions in multinational and transnational corporations and international organisations) and irregular migrants (those who enter a country, usually in search of employment).[106] Over a period of time, many scholars have assessed the repercussions of large scale population movements across borders.

The political economy approach explains international migration primarily by focussing on global inequalities, economic linkages between sending and receiving states including the movement of capital and technology and the role played by trans-national institutions. According to this approach, differentials in wages and employment opportunities, variations in labour demand from one country to another, stimulate movement of population. The propensity to migrate is viewed as being determined by average wages, cost of travel and labour market conditions.[107]

Migration is often seen as a voluntary action and therefore, states argue that migrants cannot be seen at par with refugees who are persecuted in their home state for reasons of race, religion or political opinion. However, studies have pointed out that these distinctions are blurred. In most third world countries, majority of those who are classified as migrants by host governments and

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[104] ibid, p. 10

[105] Tapan K. Bose, "The changing Nature of Refugee Crisis", in Tapan k. Bose and Rita Manchanda, (ed.), States, Citizens and Outsiders,(Kathmandu,1997) p. 48

[106] Naveen Mishra, Population in South Asia : Migration as a Survival Strategy,(New Delhi,2001) p. 2

[107] Myron Weiner, "Security, Stability and International Migration", International Security, Vol.17, No. 3 Winter, 1992/93, pp. 91-126.

international agencies actually belong to the minorities and backward section of society.[108]

Refugees are those who have fled their country of origin mainly on grounds of well founded of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; or those who since they no longer enjoy the protection of their governments, are compelled to flee to escape the violence of armed conflict or widespread violations of human rights. [109]

The First World War resulted in the collapse of four dynastic empires, namely the Ottman, the Romanov, the Hapsburg and Hohenzollern empires.[110] These post-war political transformations induced several refugee movements. The post-war treaties acknowledged that millions of people would be residing as minorities in culturally, linguistically and religiously alien environments. In 1921, the League of Nations established the position of High Commissioner for refugees to address refugee problems. However, its functioning were ridden with problems. The awareness of the Nazi atrocities made most governments to acknowledge the fact that refugee and asylum issues were critical to the safety of the nations and the preservation of human rights. In 1950, the office of the United Nations High Commissioner for Refugees was set up and in 1951, a Convention Relating to the Status of Refugees was adopted by the UN.

Article 1 of the UN convention on Refugees defines refugees as "any person who as a result of events occurring before January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable or owing such fear, is unwilling to avail himself of the protection of the country, or who, not having a nationality and being outside the country of

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[108] Tapan K. Bose, n.105, p.49

[109] Guy Goodwin Gill, *The Refugee in International Law,*(Oxford,1983), p.86

[110] Kenneth Regensburg, "Refugee Law Reconsidered: Reconciling Humanitarian Objectives With the Protectionist Agendas of Western Europe and the United States", *Cornell International Law Journal*, Vol. 29, 1996, pp. 226-262

formal habitual residence as a result of such events, is unable or owing to such fear, unwilling to return to it".[111]

This definition was primarily devised to apply to refugees in Europe who had fled events which occurred before 1951.[112]The 1967 protocol was introduced to undo the spatial and temporal restriction of the 1951 document and to extend its benefits to refugees in other parts of the world. In its Preamble, the 1967 Protocol states that it takes cognisanze of the fact that the 1951 Refugee Convention covers only those who have become refugees as a result of events occurring before 1 January,1951. It further says that it realises that new refugee situations have arisen since the convention was adopted and that these refugees do not fall within the scope of the convention. And therefore, the Protocol under Article 1(2) says that the words "As a result of events occurring before 1 January 1951" and "...as a result of such events" in Article 1(A) (2) stands omitted.[113] This provision did away with the temporal restrictions. Further the geographic restrictions were also removed because refugees before 1951 were primarily restricted to the Western Countries. However, the deletion of the temporal clause brought refugees from the other regions also under the ambit of the refugee convention.

In the subsequent years, regional organisations like the Organisation of African Unity (OAU) and Organisation of American States (OAS) have adopted their own refugee laws to deal with the particular problems of their region. Refugees in these regions were not only the result of persecution, but a result of foreign domination, external aggression, events disturbing public order or massive violations of human rights. The 1969, Convention on Refugee Problems in Africa, adopted by OAU clearly recognised a person as refugee, who has to flee his country as a result of, "external aggression, occupation, foreign domination, or events seriously disturbing public order".[114] Similarly, the Central American nations like Panama

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[111] Manoj Kumar Sinha, *Basic Documents on International Human Rights and Refugee Laws*,(New Delhi,2000), p. 480

[112] *Adelphi papers (268)*, n.109, p. 2

[113] "Protocol Relating to the Status of Refugees", Manoj Kumar Sinha, *Basic Documents on International Human Rights and Refugee Laws*,(New Delhi,2000), p. 493

[114] S.D. Muni and Lok Raj Baral,(ed.), *Refugees and Regional security in South Asia*, (New Delhi,1996) p. 2

and Mexico further developed the OAU definition of refugees by adding the criteria of "massive violation of human rights" in the Cartagena Declaration of 1984.[115] As far as refugees are concerned, international and regional instruments stipulate the principles of protection and *non-refoulement*. This principle dictates that a state may not return a refugee within its borders to his or her home country to face persecution.

Another category of migrants are the Internally Displaced Persons (IDPs) who, though forced to leave their homes, remain within the boundaries of their own country and are not officially recognised as refugees. The U N Secretary General, Boutrous Boutrous Ghali, in his analytical report on IDPs dated 14 February, 1992 defined IDPs as "....persons who have been forced to flee their homes suddenly or unexpectedly in large numbers as a result of armed conflict, internal strife, systematic violation of human rights or natural or manmade disasters, and also who are within the territory of their own country"[116]

The causes of internal displacement are generally developmental, ethnicity related, border related, externally induced, etc.[117] Although IDPs form a category of people whose numbers is increasing by day, they are not entitled to any kind of protection of international agencies and are subjected to live under adverse condition of a hostile domestic environment. In June 1994, Sodako Ogata, the then United Nations High Commissioner for Refugees, in her address to the World Bank said that internal conflicts force about 10,000 persons every day to flee their homes and either cross international borders or become displaced in their own country. The reluctance of the North to admit large number of refugees or even to finance their stay in another country has forced these persons at risk to remain displaced within their own country. In other words, these refuges have been denied the option to flee and the right to search for a more secure haven abroad.[118]

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[115] ibid, p. 3

[116] David A. Korn, *Exodus Within Borders: An Introduction into the Crisis Of Internal Displacement,*(Washington D.C.,1999), p. 25

[117] Samir Das, Sabyasachi Roy Chaudary, and Tapan K. Bose, "Forced Migration in South Asia : A Critical Review" , *Refugee Survey Quarterly,* Vol. 19, No. 2, 2000, pp.48-57

[118] Tapan K. Bose, n. 105, pp. 52-53

GENERAL TRENDS TOWARDS MIGRATION

After the Second World War the international community's attitude to migration was basically positive. The free movement of people was thought to be conducive to economic growth. In many countries it was seen as a process facilitating nation-building process. During the Cold War immigration from the east was seen as a ideological victory for the west.

In the 1960's and early 1970's the European countries had invited some ten million labourers or guest workers and their dependents to contribute to the economic miracle in Europe.[119] There were also another two million persons from former colonies. The immigration policies of America and Australia favoured permanent settlement, the Europeans directed their policies at temporary stay of these guest workers. The economic prosperity of these countries and the high living standards of its population made these countries poles of attraction for people from other regions of the world. However, by mid-70s these countries began to scale down the recruitment of foreign workers. As a result net immigration during 1970's decreased but picked up again during the 1980's.[120]

At the same time, the South began to experience huge flows of refugees escaping conflicts and disasters in equally poor neighbouring countries. The major reasons for South-South flows were conflict and starvation. The root causes of these movements were domestic rather than international.

In the west, after the oil crisis and the consequent economic recession, immigration of labour was curtailed. Also, by 1970's, tendencies towards xenophobia and anti-immigrant propaganda surfaced in many countries. Europe is also confronted with the mass exodus of refugees from the liberated Eastern Europe. All these developments forced the Europeans to rethink their asylum policy. There are attempts at the various levels of EU to harmonise their asylum policy in order to prevent large numbers of people from coming into the region. Joint action among

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[119] Jonas Widgren, "International Migration and Regional Stability", *International Affairs*, Vol.66, 1990,,pp.749-66

[120] ibid, pp.749-66

the EU member states has become imperative in this regard due to the abolition of internal boundaries within the region.[121]

The Gulf States have become poles of attraction to a large number of foreign workers after the establishment of oil industries in the region. Until recently they have a capacity to employ surplus labour from outside. However, lately the oil industry in the Arab region is also becoming less and less dependent on foreign labour. With rapid changes in the oil prices in the 1980s and the expected doubling of the gulf area population within the next 20 years pressure to recruit has reduced. In general none of the Arab countries favour long term settlement and even less, the naturalisation of the foreign worker.[122]

The major causes of migration within and away from the African continent are rooted in their liberation struggles and conflicts over their post-independent internal organisations. Besides this seasonal or long-term labour migration between areas has a long tradition as has the sharing of the common property resources. The Organisation of African Unity (OAU) adopted in 1969 a broader definition of the refugee than that provided for under the 1951 UN Refugee Convention. What renders Africa's refugee situation so poignant is the occurrence of refugee flows among the poorest countries. This places severe strain on their absorption capacity and the frail economies of host societies. Apart from these owing to traditional nomadic life styles, artificiality of many frontiers drawn by former colonial powers, often undocumented and casual migration occurs within and across borders.

Refugee movements already figure prominently in post cold war political and security agenda. Increasing attention is being paid to ethnic conflicts that generate movements of refugees and IDPs which subsequently cause foreign policy problems for neighbouring states. It is also being increasingly acknowledged that refugee movements not only create but also exacerbate conflicts between and within states.

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[121] Inge R. Pinto-Dobernig, "South-North Migration: The Challenge of the 1990's" *PS/S Occassional Papers*, No.2, 1991,p.28

[122] ibid, p.28

Weiner argues that security/stability framework is a more comprehensive approach for analysing international migration vis-à-vis the political economy approach. He says that though political economy approach goes a long way towards explaining a great deal of international population movements, they neglect two critical political elements. First is that international population movement are often impelled, encouraged and prevented by governments or political forces for reasons that may have little to do with economic conditions. Also, the refugee movements, in terms of whether they would be able to cross international boundaries, are determined by the governments of both the host and sending nations.[123] Weiner argues that security/ stability framework complements rather than replace the economic analysis, by adding the political, social and cultural dimensions to it.

Refugees become a threat to security and stability when they are seen as a political threat or security risk to the regime of the host country. They are also perceived as a threat to cultural identity social and economic burden of the host nation. Moreover, they are also seen as issues of contention between sending and host states which might hamper the relations between the two states.[124]

Refugees as a Threat to Interstate Relations

The movement of population across international boundaries does not necessarily generate security problems. But in many cases it does. The impact may vary in severity and manageability. Refugees can be perceived as a threat by the governments of either population sending or population receiving country. Refugees can create or heighten antagonisms between states. Accepting refugees because they have a well-founded fear of persecution is often perceived as a political criticism or even condemnation of the regime and policies of the country of origin of the refugees.[125] The problem becomes more severe when the host nation has a democratic regime which allows their refugees to speak out against the

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[123] Myron Weiner, n.107, pp. 91-126.

[124] Mahendra P. Lama, *Managing Refugees in South Asia,* (Dhaka,2000), p.20.

[125] Terry Teriff, Stuart Croft, Lucy James and Patrick M. Morgan, n. 85, p.159

regime of their country, allow them access to the media and permit them to send information and money back home in support of the opposition.[126]

Refugees and migrants may pose quite a serious challenge when they form the basis of trans-border political and / or military challenge to the home regime.[127] Politically, refugees are usually hostile to home regimes and may use military or terrorist means to oust it. In some cases the host governments may even support these political refugees against their home country by providing them asylum and moral, military, monetary and logistical support. For example, U.S., Pakistan, and others arming Afghan refugees against Soviet occupation of Afghanistan or U.S. arming the Cuban refugees in an attempt to overthrow the Castro regime in the Bay of Pigs.

The home country may take an adverse opinion about the activities of its citizen abroad and hold the host country responsible for it, thereby creating interstate problems.

The support and encouragement of the host country towards the refugee group may have serious repercussions for its own security. Political refugees can turn against their own benefactors. Refuges and migrants have launched terrorist attacks within their country of asylum and have been involved in illegal smuggling of arms, drug trafficking, etc., making governments even more suspicious and reluctant to allow not only refugees but also economic migrants into their country.[128] Illegal immigrants may pose a political threat to regimes in the host country. This is more so in case of democratic countries where the refugees align with the opposition parties to wrest certain benefits from the government. In some democracies they are also used as vote banks.

It is due to these reasons that regional organisations have been cautious in their approach to refugees and in formulating policies in this regard. In West European region, adoption of restricted practices have been justified on the basis that (illegal)

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[126] Myron Weiner, n. 107, ,p. 107

[127] Terry Teriff, Stuart Croft, Lucy James and Patrick M. Morgan, n. 85, p.159.

[128] Myron Wiener, n.107, p. 109.

immigrants and asylum seekers pose security problems. One of the examples of such a relation is the 1990 convention applying the Schengen Agreement of June 1985 which connects immigration and asylum with terrorism, trans-national crim? and border control. Furthermore a security continuum has been produced in EU which connects border control, terrorism, international crime and migration. The security continuum has been extended to the enlargement of EU to Central and East European countries. The European council meeting in Tampere in 1999 on the development of an area of freedom, security and justice emphasised that the candidate member states must take on the Schengen *acquis*.[129]

In the OAU Convention of 1969, a separate article (Article III) prohibits "subversive activities" by verbal means or by arms. In the preface the African states declare that they are "anxious" to distinguish between refugee seeking a peaceful and normal life and those who flee for the sole purpose of fomenting subversion outside.[130] Further the OAU convention under article II (2) says that the grant of asylum is a peaceful and humanitarian act and should not be regarded as unfriendly by any member states. The conference on the situation of refugees in Africa held Arusha, Tanzania in 1979 took special note of the problem of "refugee warriors"[131] in frontline states in the context of liberation movements and call for solution in a humanitarian spirit within the African context.[132]

In a similar vein, the Cartagena declaration on refugee says that the grant of asylum shall not be interpreted as an unfriendly act by the country of origin of the refugee.

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[129] Jef Huysman "The European Union and the Securitisation of Migration", *Journal of Common Market Studies*, Vol.38, No. 5, December, 2000, pp.751-77.

[130] Aristide Zolberg, Astri Suhrke and Sergio Aguayo, *Escape From Violence: Conflict and Refugee Crisis in the Developing World*, (Oxford, 1989), p.276

[131] Those who organise themselves militarily outside their native state and try to attack it militarily.

[132] Sanjukta Banerjee Bhattacharya, "The African Refugee Situation: an overview" in Om Prakash Misra and Anindyo J Majumdar (ed.) *The Elsewhere People: Cross Border Migration, Refugee Protection and State Response*, (New Delhi, 2003) p.237.

Refugees as a Threat to Societal Security

The dangers produced from illegal migrants are not always military in nature, and may occur at domestic rather than international level.[133]Refugees may be perceived as social and economic burden or even cultural danger.

Societies react adversely to immigrants because of the economic cost they impose or because of their purported social behaviour such as criminality, welfare dependency, delinquency, etc.[134]Refugees or immigrants may impose substantial economic costs and strain the infrastructure in housing or land, education, transportation facilities and welfare provisions.[135]In some less developed countries refuges may illegally occupy private lands. They are also seen as an ecological threat as they consume scarce or limited resources like arable land, firewood, fresh water, etc. Immigrants may also increase competition for jobs and thereby result in resentments among native population.

Population of the host nations may also believe that the influx is the result of the home governments deliberate policy to dump unwanted elements such as criminals, ethnic minorities and surplus or unproductive labour.[136] The feeling that migrants are taking away most of the economic benefits and welfare provisions which accrued to the host countries population may lead the latter to physically harm the refugees. The refugees may retaliate to this, thereby initiating a vicious cycle of violence in the society.

Another major concern of the host population is the danger that they may pose a threat to the prevailing culture. Unwanted migrants may frequently threaten inter-communal harmony and undermine major societal values by altering the ethnic, religious, cultural and linguistic composition of the host population. It is generally believed that the more the racial, linguistic, religious and cultural affinity between

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[133] Terry Terrif, Stuart Croft, Lucy James and Patrick M. Morgan, n. 85, p.160.

[134] Myron Weiner, n.107, p.114

[135] Terry Terrif, Stuart Croft, Lucy James and Patrick M. Morgan, n. 85, p. 161.

[136] Myron Weiner, n.107, p.114

the refugees and the host country's population, the more are the chances of acceptability.[137]

The case of refugees being perceived as a threat to cultural society is most evident in EU. Migration is identified as being one of the main factors weakening national tradition and societal homogeneity. It is reified as an internal and external danger for the survival of the national community or Western civilisation. This discourse not only excludes refugees from normal social fabric but also considers them as dangerous to the maintenance of social fabric. Emphasising on restrictions and control over migration also results in a negative portrayal of groups of migrants. Further the development of common migration policy is presented as an instrument for dealing with the rise of racist, xenophobic and extreme nationalist practices in Europe.

Refugee Movements as Foreign Policy Tools

In large parts of the world, on various occasions refugees have been used as tools to achieve foreign policy objectives. Governments may force emigrations to a neighbouring country as a means of putting pressure on the latter to yield to the demands of former. During the colonial period, the imperial powers moved populations from one territory to another in pursuit of their economic interests. Populations are also moved to the nearby area as means to help dominate or colonise that area. In the decolonised world, with independence the foreign settlers were forced to move out as they were regarded as imposed upon them. Forced emigration is also used by the sending states to destabilise or embarrass a country which is a strategic or political adversary.[138]

The export of refugees can also be used as a bargaining chip in trade and bilateral political negotiations. Some countries perceive refugees as national resource

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[137] *Adelphi Papers (268)* , n. 101, p. 41.

[138] Myron Weiner, n.107, ,pp. 100-103.

overseas, who would remit money to their country of origin and thereby contribute to its economy.[139]

On the part of the receiving states, more often than not, political, ethnic and ideological sympathies, rather than humanitarian considerations, motivate states to accept refugees. Some population movements are seen as contributing to the host states power base, national self-confidence or dominant ethnic community.[140] Population movement can also augment the size of the receiving states defence capabilities or military establishment.[141] Refugee policy can also be used to deny refugee status to influxes from across the border to show solidarity with the sending states.[142]Moreover, refugees from geopolitically important regions, like the Afghanese, Indo-Chinese, the east Europeans during the cold war etc., easily find international patrons and sponsors.[143]

Therefore, to view refugee movements simply as the unintended consequences of internal upheavals or economic crisis is to ignore the deliberate attempts by some governments to eliminate from within their borders selected social classes and ethnic groups, and attempt to affect the politics and policies of their neighbours.[144]

The Regional Aspect of Refugee Movement

The geographical destinations of the migrants are determined by various factors. The most important criterion is physical accessibility. The most common option is to cross over the nearest international boundary into the neighbouring country. Cultural and linguistic affinity are also factors in a refugee's determination of the

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[139] For example refugees constitute Veitnam's most valued exports, and remittances from overseas make up over half of the country's hard currency earnings.

[140] The large scale influx of Jewish immigrants from former Soviet Union to Israel was viewed t y Israel as a democratic boost to the state.

[141] The Jewish immigrants from Soviet Union were seen by Israel as a boost to its military power against Arab states.

[142] This explains the different treatment meeted out by the U.S. to Salvadorans, and Haitians as opposed to Cubans and Indochinese. Also the U.S. welcomed all the refugees from eastern Europe during the cold war years. But, in the post cold war period it has become increasingly hostile to refugees coming from that part of the world.

[143] *Adelphi Papers (268)*, n. 101, pp.3-83

[144] Myron Weiner, n. 107, p.103

destination. In the post colonial states cultural and linguistic borders go beyond the territorial borders and therefore chances of crossing over to neighbouring countries within the region increase. Political support of host country is also a criterion in determining the destination of the refugees.[145] All these bring in the regional aspect of refugee flows.

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[145]   Mahendra P. Lama, n. 124, p.14.

CHAPTER 2

INTERNATIONAL AND REGIONAL RESPONSES

TO FORCED MIGRATION

As has already been mentioned movement of people has been an age-old phenomenon. People have moved from one place to another for various reasons. But the rising incidences, magnitude and gravity of such movements have warranted responses at different levels-international, regional and national. This chapter will discuss the reasons for the emergence of such legal and institutional regimes, their gradual evolution, their contribution and their drawbacks. The first part of this chapter discusses the evolution, provisions and omissions of the international refugee regime. The second part deals with how three regional organisations, viz., Organisation of African Unity, Organisation of American States and the European Union have harmonised their asylum policies and the provisions contained thereunder.

INTERNATIONAL REFUGEE REGIME

Holocaust survivor Hugo Gryn stated just before his death that he believed that future history "will call the 20th century not only the century of great wars, but also the century of refugees. Almost nobody at the end of the century is where they were at the beginning of it. It has been an extraordinary period of movement and upheavals".[1]

Michael Marrus has argued that although refugees "have tramped across the European continent since time immemorial, its only in the 20th century that they have become an important problem of international politics seriously affecting relations between states.[2]

Development of International Regime for Refugees

From the emigration of homosapiens from Africa perhaps 100,000 years ago, to the Viking visits to North America, and Chinese and Arab contact with the Indonesian archipelago, migration meant in essence the settlement of the globe.[3] These migrants

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[1] Quoted in Tony Kushner and Catherine Knox, *Refugees in an Age of Genocide : Global, National and Local Perspectives during the 20th Century*, (London and Portland, 1999), p.1

[2] ibid, p.1

[3] David Eltis (ed.), *Coerced And Forced Migration: Global Perspectives*, (California, 2002), p.1

seldom returned to their place of origin and gradually assimilated into the new land and society. However a little over 1000 years ago, the pattern of migration changed. Retraceable connections were launched, while colonisation of the world continued.[4]

Although the phenomenon of the movement of people from one place to another is as old as humanity itself, the practice of forcing people out of their own known habitat began with the birth of the territorial nation state. In an attempt to create homogenous national identity in terms of language, religion and culture, the ruling elite persecuted, exploited and forced out those who didn't confirm to the so called "national identity". The opponents were termed as "minorities" and pushed out of the nation state. Studies point out that between the 15th and 17th century, about a million people were displaced in Europe. This is a huge number considering the population of Europe at that time.[5]

In the 17th century, the religious persecution in France forced about 250,000 Huguenots Protestants to flee to England, Holland and Switzerland. These religious wars of the 16th and 17th century displaced half a million people in Europe. In the latter half of the 18th century, the west started experiencing epochal transformation, extending into political cultural and economic spheres. This period of political revolutions saw the emergence of a tendency on the part of the political elite to establish their political ideology. In this process, opponents were purged and this led to further outflow of population.[6]

During the period of colonial expansion between the late 17th century to early 19th century, millions of Europeans migrated to settle down in new areas like U.S.A. and Australia. In these countries, the European settlers uprooted the indigenous people. Many more were forcibly moved to other areas as slaves or indentured labourers. Military conscription also uprooted many.

[4] ibid, p.3

[5] Tapan K. Bose, "Changing Nature of Refugee Crisis", In Tapan K. Bose and Rita Manchanda (ed.), State , Citizens and Outsiders, (Katmandu,1997), p.41

[6] The incidences and details of European refugees as a result of religious persecution and political Oustings are given in Aristide Zolberg, Astri Suhrke and Sergio Aguayo, Escape from Violence: Conflict and Refugee Crisis in the Developing World, (New York and Oxford,1989), pp.5-18

The development of an International Refugee Regime or the impetus towards it has been a European phenomenon. In fact, the word "refugee" originated in France and its first usage was recorded in 1573 in the context of granting asylum and assistance to foreigners escaping persecution.[7]

However, most scholars trace back contemporary migratory epoch back to the third quarter of the 19th century when the industrial democracy of the transatlantic area began to regulate international migration.[8]

The western nations generation of restrictive immigration policies in the latter decades of the 19th century amounted to the imposition of a new international regime of population movements because the country that generated various types of outflows had no place to send their people. The reasons for this were both political and economic. The political elite wanted to enhance their national identity and solidarity in the face of increasing internal and international tensions and therefore became increasingly restrictive. On the economic front, both the indigenous workers and welfare agencies despised immigration to reduce competition and to minimise welfare costs respectively.[9]

By 1875, US also became increasingly restrictive towards immigration by enacting increasingly severe prohibitions against immigration from Asia and imposing literacy requirements for new immigration from Europe.[10]

However, in the post World War I years, the refugee crisis reached a magnitude unprecedented in the European experience. In fact the international efforts towards a refugee regime were direct consequence of the events and gravity of the post world war refugee situation. During the First World War, 1.5 million Armenians were killed by Turkish forces and another 320,000 fled to other countries in search of safety. About 1.3 million Greeks were repatriated to Greece from Turkey, while about 400,000 Turks

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[7] ibid, p. 5

[8] Bimal Ghosh, "Towards a New International Regime for Orderly Movement of People", In Bimal Ghosh, (ed.), *Managing Migration: Time for a New International Regime* , (Oxford,2000),p. 28

[9] Aristide Zolberg, Astri Suhrke and Sergio Aguayo, n. 6, p. 18

[10] ibid, p. 19

were sent back. The Russian Revolution expelled nearly 2 million Russians from the USSR.[11]

League of Nations

Initially voluntary agencies took the lead in responding to the needs of those displaced.[12] In the face of huge outpouring of refugees from Russia, volunteer service agencies that were trying to alleviate their immediate problems appealed to the League of Nations to establish a central office operating under its authority. Thus, in 1921 the League of Nations created a High Commissioner for Refugees led by Fridtjef Nansen. His "Nansen's Passport" offered legal document to the refugees, providing them with a recognised status and enabling them to start afresh.

However, League of Nation defined refugees according to group affiliations. For example the term Russian refugee was defined as "Any person of Russian origin who does not enjoy or no longer enjoys the protection of the government of USSR and who has not acquired any other nationality".[13]

Similarly Armenian Refugee was defined as "any person of Armenian origin, formerly subject of Ottaman Empire, who does not enjoy or no longer enjoys the protection of the government of Turkish Republic and who has not acquired any other nationality."[14]

Though it started by taking care of Russian refugee situation, the office also assisted displaced Greeks, Turks and Bulgarians. Nansen was succeeded by James McDonald in 1933 who resigned in 1935 saying that his organisation would not be able to manage the human tragedy that was on the anvil in Germany. In the inter-war periods, in spite of international conference at Evian in 1938 and Bermuda in 1943 and creation of Intergovernmental Committee on Refugee to deal with the growing problem, only limited number of refugees could be saved. Just as First World War created mass population displacements and formulation of arrangements for handling them, the

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[11] Tapan K. Bose, n. 5, p. 42

[12] Tony Kushner and Catherine Knox, n. 1, p. 7

[13] Quoted in Joanne Van Selm-Thornburn, *Refugee Protection in Europe: Lessons from the Yugoslav Crisis,* (Hague and Cambridge,1998), p. 28

[14] ibid, p.28

migration from Second World War caused the UN to establish institutions and instruments to regulate refugee definition to handle the refugee crisis.

The Second World War left some 30 million uprooted. The UN Relief and Rehabilitation Agency (UNRRA) was created to oversee the immediate relief and repatriation operation in post war Europe.[15]It helped 7 million displaced persons return to their country. However, UNRRA became embroiled in cold war conflict and was replaced by International Refugee Organisation (IRO) in 1946.[16]

International Refugee Organisation (IRO)

Part I, Section A of the Annex of the IRO stated that a "refugee is a person who has left or is outside his country of nationality or of former habitual residence, and who, whether or not he has returned his nationality, belongs to one of the following categories:

(a)   Victims of the Nazi or Fascist regimes or regimes on their side, whether enjoying international status as refugees or not.

(b)   Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not.

(c)   Persons who were considered refugees before the outbreak of the II World War, for reasons of race, religion, nationality or political opinion."[17]

These definitions were still restricted in terms of geography, time and specific events, although it is more universalised and comprehensive than previous definition. Though temporary organisation, it tried to find solution to the 1.5 million displaced on the continent, it failed due to cold war politics where it could not do anything about the Soviet side of the German refugees.

From its very inception IRO was embroiled in Cold War tensions. The Soviet Union favoured the retention of UNRRA, because of the aid it channeled to East Europe and because of its limited mandate which favoured repatriation over resettlement. The

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[15]   Aristide Zolberg, Astri Suhrke and Sergio Aguayo, n. 6, p. 22

[16]   Tony Kushner and Catherine Knox, n. 1, p. 7

[17]   Quoted in Joanne Van Selm-Thornburn, n. 13, p. 26

Western Bloc on the other hand, insisted that the mandate of IRO be broad enough to offer protection to those who were opposing repatriation due to "valid reasons".

Soviet Union saw this as a tool of the west and criticised the organisation for preventing displaced persons from repatriating. They further said that the refugee camps of the west were being used as centers for anti- communist propaganda. They further alleged that refugees were being used as forced labour and mercenaries. Soviet Union also claimed that the western countries were using refugee organisation to recruit spies and anti-Soviet experts from large number of pro-Nazi east Europeans who had fought against the Soviet Union during the Second World War.[18]

Also, subsequently the outflow of refugees from newly independent Communist regimes, like in Czechoslovakia, expanded the mandate of IRO beyond the Second World War displacees. During this period, the western nations, especially the United States, prevailed upon the IRO to apply the refugee criteria more liberally to include these escapees. The western countries advocated resettlement, as a solution to refugee problem. However, as the war torn economies of Western Europe could not accept an unending number of refugees, pressure was put on the United States, Canada, Australia and other non-European states to admit more number of refugees. Most of these countries welcomed these displaced people.[19]

However, by late 1940's most of the countries became selective with regard to their immigrants. For example, Chile, Argentina and Brazil refused to take Jews. So, by the end of its tenure there were about 400,000 people waiting to be repatriated.[20] With an increase in the rivalry between the Eastern and the Western bloc, IRO realised that refugee problems showed a few signs of disappearing. Moreover, the U.S. started to show reluctance in funding these ever-increasing numbers of refugees. It was against this backdrop that it was decided to terminate the functioning of IRO and replace it with a new international refugee organisation-the Office for the United Nations High Commissioner of Refugees.

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[18] Gil Loescher, *The UNHCR and World Politics: A Perilous Path*, (Oxford, 2001), p.39

[19] ibid, p. 40

[20] ibid, p. 40

The 1951 UN Refugee Convention

However, the present refugee law is based on the 1951 Convention Relating to the Status of Refugees and its amendments in the 1967 New York Protocol. Grahl - Madsen refers to the convention as "the Magna Carta for Refugees and undoubtedly ..... the international instrument of greatest consequence for the status of refugees in the world".[21]

At the inception of the new refugee organisation, the debates regarding the authority, finances and definition of the term refugee revealed significant differences and policy preferences amongst the various governments. The Soviet Union and its allies did not take part in the negotiations leading to the creation of UNHCR and the United Nations Convention Relating to the Status of Refugees. The main objection of the socialist bloc was that it would be an organisation to protect those whom they considered as traitors. Therefore, the planning and drafting of this major refugee instrument was conducted solely by the non-communist Western powers.[22]

Among the drafters, there were sharp differences between the United States and most European governments regarding the new refugee instrument and organisation. The United States sought a temporary refugee agency with narrow authority and limited functions. The Western European countries on the other hand opposed this view and wanted a broader definition of the term refugee. While the United States wanted to limit its financial and legal obligations, the European countries were anxious to secure large scale operational funds for the refugees they were assisting.

Governments were also divided over whether the refugee definition should be universal or confined to the European refugees. The British and Commonwealth countries argued for a broad general definition while the United States argued for a narrow definition which would clearly enumerate the categories needing protection. Again with regard to sharing legal and financial responsibility, the British argued for a wider coverage while the United States and France wanted limited responsibility. Only 26 countries

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[21] Joanne Van Selm-Thornburn, n. 13, p. 28

[22] Gil Loescher, n. 18, p.43

participated in the subsequent negotiations and none except Yugoslavia was from the Soviet block.[23]

Nonetheless this convention made the first attempt to broaden the refugee law beyond protection to specific groups and territories and gave it a universal nature. Article 1(2)(a) of the convention states that the term refugee shall apply to any person who "as a result of events occurring before January 1, 1951 and owing to well founded fear of being persecuted for reasons for race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[24]

The Convention under Article 1(A)(1) also mentions that those people who have been recognized as refugees under the arrangements of 12 May 1926, 30 June 1928 or under the conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of IRO shall also be included in the Refugee category. [25] The arrangements of 1926 define the term "Russian refugee" and "Armenian Refugee". The term Russian refugee was defined as "any person of Russian origin who does not enjoy or no longer enjoys the protection of the government of USSR and who has not acquired any other nationality". The term Armenian refugee was defined as "any person of Armenian origin, formerly a subject of the Ottaman empire, who does not enjoy or no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired any other nationality".

Instruments adopted in 1928 extended the refugee definition to include Turkish, Assyrian and Assyro-Chaldean refugees. In 1938 a convention concerning the status of refugees coming from Germany was adopted. This was followed in 1939 by arrangement for those fleeing Austria in which the arrangement stated that refugees are those persons having possessed Austrian nationality not possessing any other than

[23] ibid, p. 45

[24] Article 1(2)(A), 1951 Convention Relating to the Status of Refugees

[25] Joanne Van Selm-Thornburn, n .13, p. 28

German nationality who are proved not to enjoy, in law or in fact, the protection of the German government.

Chimni[26] points out some of the key outstanding features of the 1951 convention. A key feature is that refugees are people who have crossed international border and therefore, are to be distinguished from internally displaced persons (IDPs). Secondly, it incorporates the principle of *non-refoulement*, the cardinal principle of international refugee law. Article 33(1) of the convention states, "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of the territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[27] The principle of *non-refoulement* entails that no person may be forcibly returned to a territory where is life or freedom may be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[28]

The benefit of *non-refoulement* is not available to a refugee who is regarded as a danger to security of the country in which he or she is present. Article 33(2) provides "the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding a s a danger to the security of the country in which he is, or who having been convicted by the final judgement of a particularly serious crime constitutes a danger to the community of that country".[29]

The third contribution of the convention is that the convention outlines the minimum standard of treatment for refugees including basic rights to which they are entitled. For example non discrimination in regard to race, religion, or the country of origin (Article 3), Freedom to Practice their over religion (Article 4) etc. Article 3 states "the contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or the country of origin".[30] Article 4 of the

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[26] B.S. Chimni, "In International Law", *Seminar*, Vol.463, March 1998, p. 19

[27] Article 33(1), 1951 Convention Relating to the Status of Refugees

[28] Ivor C Jackson, "The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection", *International Journal of Refugee Law*, Vol. 3 No.3, 1991, p.404.

[29] Article 33(2)), 1951 Convention Relating to the Status of Refugees

[30] Article 33(3)), 1951 Convention Relating to the Status of Refugees

Convention stipulates "the Contracting States shall accord to the refugees within their territories treatment at least as favourable as that accorded to their nations with respect to freedom to practice their religion and freedom as regards religion education to their children".[31]

Fourthly, it embodies provision concerning their judicial status, gainful employment and welfare. Article 16 of the convention ensures the right to access courts, Article 17 and 18 mention the Right to Work, Article 22 mentions the Right to education and the Right to Freedom to movement and to travel documents are given in Article 26 and 28 respectively. Article 16 (2) states "a refugee shall enjoy in the contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*".

Article 17 says "the contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to the nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment". Article 18 states "the contracting States shall accord to refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens, generally in the same circumstances as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies".

Article 22 mentions "the contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education". Article 26 provides "each contracting States shall accord to refugees lawfully in its territory the right to choose their place of residence and move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances". Article 28 states "the contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the schedule to this convention shall apply with respect to such documents".

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[31]   Article 4, 1951 Convention Relating to the Status of Refugees

Fifthly, the Convention under Article 35 requires the contracting states to cooperate with the office of the UNHCR.

144 countries of the world are signatories to the 1951 convention.[32] The convention also mentions that refugee has duties to the country in which he is given refugee and should conform to its laws and regulations as well as to measures taken for maintenance of public order.[33]

However, in this convention, the universal approach to refugees was defeated in favour of a Euro-centric legal mandate.[34] The scope of the convention was limited to the events occurring before 1951 and further states were given an option to limit the geographic scope of these events to Europe.

The 1967 Protocol

The 1967 Protocol on the status of refugees was adopted to prospectively remove the temporal and geographic limitations contained in the 1951 Convention. The preface to the 1967 Protocol says that the States party to the protocol realises that the convention relating to the status of refugees covers only those persons who have become refugees as a result of events occurring before 1 January 1951. Further it says that considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may, therefore, not fall within the scope of the Convention. It, therefore, states its desire that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the deadline.[35] The Protocol under its Article 1 (2) states, "for the purpose of the present protocol, the term "refugee" shall mean any person within the definition of Article 1 of the Convention as if the words 'as a result of events occurring before 1 January 1951 .....' and the words '.....as a result of such events', in Article 1A (2) were omitted".[36]

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[32] "Refugees by Numbers, 2002 Edition "http://www.unhcr.ch/cgibin/texis/vtx/basics/+cwwBmeLqzw_wwww.../open.doc.ht

[33] Article 2, 1951 Convention Relating to Status of Refugees

[34] Joanne Van Selm-Thornburn, n. 13, p. 32

[35] "Preface", Protocol Relating to the Status of Refugees of 31 January, 1967

[36] Article 1 (2), Protocol Relating to the Status of Refugees of 31 January, 1967

But even here, no attempt was made to reconceptualise the definition of the term refugee. This meant that most third world refugees continue to remain de-facto excluded as their flight is frequently preempted by natural disasters, war or political and economic turmoil rather than by persecution. Infact the driving force behind the Protocol was the UNHCR's determination to harmonise the refugee definition in the Convention-based scheme with its own, already universal mandate.

Along with this was the determination to avoid any kind of political discussion of the refugee issue in the General Assembly. In order to serve this purpose a short technical Protocol was submitted to the Assembly. With the improvement in communication and transport facilities, a substantial number of Third World refugees have made asylum claims in the Western States. The refugee definition established by the protocol has enabled authorities in developed countries to avoid the provision of adequate protection to Third World asylum claimants, while escaping the political embarrassment entailed by the use of an overtly Euro-centric asylum policy.[37]

The 1951 convention became an instrument of cold war politics. It was used as a political weapon against the socialist states and all refugees from the countries of the eastern bloc were welcome to Europe. This is more evident in the fact that the end of the cold war has seen western countries shutting the doors to refugees, for they no longer possess either ideological or geographical value. The western European countries have adopted a number of restrictive measures such as Visa policies and carrier sanctions, creation of "international' and 'safety' zones, safe third country options etc.[38]

Limitations of the Convention

The convention has not gone unchallenged since its inception. In the 1980s and 90s, the appropriateness of the convention as the sole instrument of international refugee law and particularly the definition of refugee it incorporates has been increasingly

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[37] James C. Hathaway,"A Reconsideration of the Underlying Principles of Refugee Law", in B.S. Chimni,(ed.) International Refugee Law: A Reader,(New Delhi, 2000), p. 62

[38] Discussed in detail in subsequent sections

questioned. The very nature of refugee and refugee movements has changed over a period of time. Population movement is no more an issue of concern only of and within the European continent. Refugees in Africa, Asia and Latin America are increasingly becoming issues of concern. Both the number of refugees and the world affected by them have multiplied.[39]

There is a disagreement between the states regarding the criteria to be applied for determining refugee status. The refugees from the Third World countries essentially do not come under the Convention definition. Moreover, in present times there is a difficulty in separating political cases from economic ones. In poor countries economic problems increase due to political violence. In many areas, economic deprivations, Human Rights violations and political instability are related. For example, refugees from desperately poor countries like Haiti and Albania, where western immigration authorities are confronted with having to decide whether people who are driven abroad by impoverishment that is directly attributed to unequal land tenure system maintained by brutal force need to be given protection. Since states are entrusted with the task of determining refugee status, the responses are often adhoc and arbitrary and uniformity cannot be assured.

There is also a lacuna in states' practice of the principle of *non-refoulement*. States say that it does not apply if they are able to stop the refugees before they enter their borders. For example, Mexican authorities stop the flow from Central America by capturing potential refugees before they cross Mexico's border with Guatemala. Further, many European Countries have adopted restrictive measures to prevent asylum seekers from entering into their country. For example, when 2.5 million inhabitants of former Yugoslavia fled due to 'ethnic cleansing', western governments imposed Visa requirements.[40]

Another drawback of the Convention is that major asylum countries have not yet signed it. Non-signatories include Pakistan, Mexico, India, Bangladesh, Thailand, Malaysia, etc.

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[39] Leon Gordenker, *Refugees in International Politics*, (London and Sydney, 1987), p. 14.

[40] Gil Loescher,*Beyond Charity: International Cooperation and the Global Refugee Crisis*,(New York and Oxford, 1993), p. 140

Further criticisms of the convention are related to the very nature of the document. Many feel that the International regime cannot handle refugee problem because they address only the symptoms and not the cause. This regime lacks provisions for preventive action. Also, there is a general sense of pessimism and defeatism that characterises so much of the discussion on human rights and displacements in the contemporary world.[41]

In Europe, in 1989-90, the East-West movement of 1.3 million people following the seemingly sudden collapse of the communist regimes took most of the Western Governments by surprise. 2.6 million people were dislocated in the conflict in Bosnia and 0.9 million in the Kosovo crisis. In Rwanda and Liberia, displacements have effected as many as one-fourth of the entire population of the country. In Central America, bitter internal conflicts and large-scale violence in El Salvador and Guatemala and political upheavals including the contra movement in Nicaragua have produced more than 2 million refugees and internally displaced persons. Recent estimates of persons uprooted in Central America vary between 2 to 3 million.[42]

Loescher summarises the changes in scope and dimension of the contemporary refugee movements.[43] First change he points out is that the growing number of refugees and IDPs in the world today are no longer the result of ideological conflicts, but of ethnic, communal and religious violence. Very few states in the world today are homogeneous. This heterogeneity often leads to ousting of 'minority' community by the 'majority'. Ethnic antagonisms between the Hutus and the Tutsis, Armenians and the Azeris, Tamils and Sinhalese and Serbs, Croats, Muslims and Kosovar Albanians illustrate the local roots of many refugee exoduses.

Secondly, he says that the present refugee crisis are complex emergencies combining political instability, ethnic tensions, armed conflicts, economic collapse, environmental degradation and the disintegration of civil society. Refugee movements frequently spill

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[41] ibid, p.143

[42] Bimal Ghosh, n.8, pp. 6-7.

[43] Gil Loescher, "Forced Migration in the Post Cold War Era", in Bimal Ghosh (ed.), *Managing Migration; Time for a New International Regime?*, (Oxford and New York, 2000), pp. 193-204.

over borders and aggravate existing problems such as environmental damage and severe food shortages. Refugee emergencies are seldom confined to single countries but often affect entire regions, such as the Great Lakes region, the Horn of Africa, Balkans, etc.[44]

Thirdly, refugee movements have also assumed a new degree of political importance in discourse about global and regional security and are the subjects of increasing discussion in political and military fora such as United Nations Security Council, NATO, etc. In the post-Cold war period, states have come to view refugee movements as potential threat to international and regional security and have been willing in selective instances to invoke an expanded interpretation of the phrase 'threat to peace' in the UN Charter to intervene in internal conflicts involving humanitarian concerns. So, in case of Somalia in 1992, Bosnia in 1992, Croatia in 1993, Haiti in 1993, Rwanda in 1994,etc., Chapter VII of the UN Charter was invoked.

Fourthly, there is a failure on the part of the international agencies and international community to react adequately and provide humanitarian relief. In the post-Cold war, humanitarianism has focused primarily on assistance in delivery of food, shelter and medicine to refugees and war affected populations. The issue of human rights protection of the displaced and threatened population has easily been neglected. For example, in Rwanda in 1994, the critical issue of genocide was not adequately addressed and no substantial measure was taken by the international community to provide protection.

Moreover, there is a weakening of traditional protection and asylum mechanisms in most states and more and more governments are becoming less enthusiastic about receiving refugees. Most of the industrial states of Europe have concluded that preventing entry of asylum seekers by imposing Visa requirements on the nationals of refugee producing states, fining airlines for bringing refugees into their countries and forcibly interdicting refugees at Frontiers is the best way to reduce the flow of asylum seekers.

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[44] Ibid, pp. 193-204

Also, there is now an increased emphasis on repatriation with the easing of tensions and resolutions of many regional conflicts, but alongwith repatriation the issue of re-integration and development have also come up. Without sustained reintegration and reconciliation returning refugees will compete for scarce developmental resources which will lead to further economic and political competition which in turn may lead to further displacement of population.

Further, he says that most refugee movements in the next two decades will occur either as a result of demands for democratisation in many parts of the developing and post-communist world or as the result of the communal violence and the fragmentation of state and civil society. Implosion or restructuring of existing states caused by the nationality disputes and ethnic conflicts and shaped by democratic pressures, environmental degradation and poverty would be the reason for future refugee movement. Easy access to arms and weapons would further aggravate these problems. The failure on the part of the international community to preserve and protect human rights and manage these conflicts will lead to the creation of major refugee flows.

In today's world it is becoming increasingly difficult to distinguish between refugees and migrants when poverty and violence is the direct result of the political system. In terms of numbers, refugees fleeing civil wars, ethnic conflicts and generalised conflicts in Third World and Eastern Europe are a bigger problem for the international community than the Convention refugees. Combined with this is the issue of refugees in the Third World countries. The movement of the displaced persons from one Third World country to another may cause racial, religious and ethnic problems which may pose political, security and societal problems for the host.

Clearly the current international refugee regime is not prepared to handle the changing nature of refugee problem. The definition of refugee has confined protection to those who feared persecution because of their civil or political, as opposed to their socio-economic status. It is now being argued that those who have been forced to flee their homes and hearth because of political persecution and direct threat to their life should be equated with those who have been forced to move by loss of livelihood, man made disasters and natural calamities. Also, today many governmental policies adversely

affect masses of population particularly those of the minority community and economically backward sections.[45]

Moreover, now the agents of persecution are not exclusively restricted to the agents of the state. People have been forced out by religious and ethnic minorities in their states. Furthermore, UN criterion also excludes people displaced en-masse by warfare and those who have been uprooted due to violence but who have not left their country of origin.[46] Also increasingly refugee and relief agencies operate in the midst of conflicts rather than near or immediately after these conflicts, as in earlier cases.[47]

Therefore, there is an urgent need to re-conceptualise, redefine and reframe the international refugee regime in order to accommodate these changing dimensions.

REGIONAL REFUGEE POLICIES

Besides the international regime on refugee issues since the late 1960s regional regimes to deal with the particular aspects of regional refugee problems have also been set up. Three regions stand out in such a development. These are Organisation of African Unity (OAU), Organisation of American States (OAS) and the European Union (EU). Though the countries of these regions, under aegis of their regional organisation, have tried to evolve a common refugee policy for their region, their approach and their intention in doing so have been very different.

African Refugee Regime

The 1969 OAU Refugee Convention Governing the Specific Aspects of the Problem of Refugees in Africa was adopted on 10th September, 1969 by the Assembly of Heads of State and Government in Adis Ababa, Ethiopia. It came into force on 20 June 1974 and

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[45] Tapan K. Bose, *Protection of Refugees in South Asia: Need for Legal Framework*, (Kadmandu, 2000), p 11.

[46] Tony Kushner and Katherine Knox, n.1

[47] Dennis McNamare," Needed: A Recommitment to Refugee Protection", http://csmweb2.emcweb. com/durable/1998/01/02/opin/opin.3.html.

is now one of the most widely ratified treaties in Africa.[48] By 31 December 1999, a total of 45 out of 53 States in Africa were party to the convention.[49]

By 1965 there were some 850,000 refugees in Africa which rose to around one million by the end of the decade. In size, character and needs, these successive refugee groups in Africa were very different from those in Europe.[50] Moreover, refugees in Africa did not benefit from the framework of international legal protection under the 1951 Convention as it had both temporal and geographical restrictions.[51] The OAU Convention was adopted as a regional complement to the 1951 UN Convention. In Preamble of the 1969 OAU Convention the signatory states recognise that "the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of states for refugees and their desire to establish common standards for their treatment".[52]

Root Causes of Population Displacements in Africa

The root causes of forced population displacement in Africa can be attributed to a variety of natural and manmade factors. Most of these factors are closely related. One of the most important causes of population displacement in Africa is the colonial rule. The Phoenicians and Assyrians seem to have been the first to open the way for colonisers to Africa. Their armies occupied the north-east of Africa and pillaged the populations and regions they discovered.[53] All the societies in north and north-west Africa were thrown into disorder in the ninth century by the attacks of the Almoravides. Millions were obliged to emigrate from north-west Africa (Mauritania, Senegal, Mali) to the coastal regions.[54] They introduced slave trade. After five centuries of Moorish domination, Spain and Portugal took over the African slave trade from the Moors.

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[48] Allehone Mulugeta, "Problems of African Refugee Law", http://www.accord.org.za/we.../3bb5b3c76ad0dbcc42256bed00244996!open Documen

[49] UNHCR,*The State of World's Refugees 2000 : Fifty Years of Humanitarian Action*, (New York, 2000), p.55

[50] ibid, p.52

[51] Discussed in earlier section.

[52] Para 9, Preamble, *OAU Convention Governing Specific Aspects of the Problem of Refugees in Africa, 1969*

[53] Michael John, *Africa's Refugee Crisis : What's to be done?*, (London, 1986), p.11

[54] ibid, p.12

Already drained of their populations by the slave trade, the African peoples were subjected to colonial wars for century.[55] All prepared for modern warfare, most of them were obliged to flee or perish. Further compulsory incorporations of Africans in colonial armies also forced many young men to flee or to go into exiles in thousands.[56]

Colonialism in Africa had been generally characterised by a lack of respect for human rights, arbitrariness, absence of rule of law and economic exploitation of human and natural resources. In order to sustain their rule the colonial powers adopted the policy of divide and rule. Certain ethnic groups were given preference over others in the area of education, employment and administration. This created a dominant/subordinate group within the same territory. Development was unequal and skewed.[57] This resulted in conflicts and violence leading to mass exodus and displacement of population.

Liberation Movements sprang up in many countries across the Continent. Since their activities were seen as subversive by the colonial powers, they had to conduct their operations from outside their national boundaries.[58] Immediately after World War II the colonial powers had no choice but to give up their empires and thus 1950's and 1960's saw the onset of decolonisation process in Africa. As the new rulers took over power, those in the population who considered themselves outside the circles of power, or who did not identify themselves with the new rulers, decided to leave the newly independent country.[59] Also, in the post independence period, there was a tendency of "settling scores" by the new leaders against those who did not support the liberation struggle.

In the post independence period, the newly emergent African States were plagued by the problems of underdevelopment and ethnic conflicts. The newly created political borders many times cut across the ethnic borders, thereby creating tensions. Moreover,

[55] The role of the big powers, that is, America, USSR, France and Britain in creating refugees in the African Continent is given elaborately in Michael John, *Africa's Refugee Crisis: What's to be done?*, (London, 1986), pp.29-66.

[56] ibid, p.14

[57] Adama Dieng, "Addressing the Root Causes of Forced Population Displacement in Africa: A Theoretical Model", *International Journal of Refugee Law*, Special Issue, July '95, pp.119-29.

[58] "Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees." http://www.unhcr.ch/cgi-bin/texis/vtx/home/+DWWBme5YZ69wwwwl.../opendoc.ht.

[59] Solomon M. Nkiwane, "The OAU and the Problem of Refugees in Africa", *Africa Quarterly*, 27(3-4), 1987-88, pp. 25-33.

political measures adopted by the new governments for consolidating their regimes, promoting economic development and inviting foreign investment led to mass exoduses.[60]

Along with this, economic recession and deprivation have led to increasing marginalisation and poverty leading to mass exodus of population. While export prices have fallen, the prices of goods imported to Africa have risen. Competition for scarce employment opportunities as well as for basic amenities like food, shelter, housing, education, etc. has increased ethnic tensions, secessionist tendencies, hostilities and conflicts.[61] While the economic performance remains dismal, the continent also has to contend with an annual population growth of 3.1%.[62]

Another important factor that has contributed to intensification of conflict in Africa and resulted in population displacement is the apparent easy availability of arms. These arms are supplied to both sides of conflicts and results aggravating conflicts and creation of large number of displaced persons.[63]

Another very prominent cause of refugee problem in Africa, especially in the post independence period, is the number of internal wars waged in different parts of the continent. The Congo crisis of early 1960's, the Nigerian civil war, the Sudanese conflict, the Chadian conflict and conflicts in Rwanda and Burundi, have all led to massive displacement of population. Along with these are also the activities of the military, in the form of military coups. Also, the apartheid regime in South Africa, indulging in massive violations of human rights, pushed out a large segment of the population of that region.[64]

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[60] Adama Dieng, n. 57, pp. 119-129.

[61] Ibid, pp. 119-129

[62] George Okoth-Obbo, "The OAU/UNHCR Symposium on Refugees and Forced Population Displacement in Africa - A Review Article", *International Journal of Refugee Law*, Special Issue, July '95, pp. 274-299.

[63] Adama Dieng, n.57, pp. 119-129.

[64] George Okoth-Obbo, n.62, pp. 274-299.

Need for and Evolution of Refugee Definition in Africa

With the notable exception of a few cases, the refugee crisis in Africa is predominantly a feature of post independence epoch that started in the 1960's. By 1967, Africa had a refugee population of nearly half a million people, and as civilian rule gave way to military dictatorship, political pluralism to single party state and elected government to Dictatorship, it was evident that the African refugee was to increase in future.[65] In 1964, there were 400,000 refugees in Africa. By the end of 1967, violent liberation struggle in the Lusophone African countries, forced a large number of people to flee. Thus, Africa had 750,000 involuntary migrants scattered across various states.[66] At this juncture it was felt that the definition of the 1951 was limited in its application in the case of African refugees. The principle element of the refugee definition contained in the 1951 Convention is the notion of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. However, most of the African refugees had fled due to generalised violence. Furthermore, by 1960's, third country refugee settlement was seldom offered to refugees from Africa.[67]

Due to the nature of refugees in Africa, by this time it was evident that the problem of refugees in different states of Africa could not be resolved by the concerned state alone. Therefore a need for a joint effort on the part of the states was felt.

The history of the 1969 OAU Convention begins in 1964, and over the next five years efforts continued to formulate an agreement which would result in a satisfactory solution to the refugee developments in Africa. In a resolution adopted by the Council of Ministers of the OAU in Lagos in 1964, a special commission was established to study the problem and provide recommendations to resolve the problems and ensure the welfare of refugees in countries of asylum. The First Draft of the OAU Convention known as the 'Kampala Draft' was produced in 1964. The serious shortcomings in the Draft led the Council of Ministers to set up a committee of legal experts in 1965 to

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[65] Joe Oloka-Onyango, "Human Rights, The OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva", *International Journal of Refugee Law*, Vol.3, No.3, 1991, pp. 453-460

[66] Renu Modi, "Regional Response to the African Refugee Question", in Omprakash Mishra and Anindyo J. Majumdar(ed.), *The Elsewhere People: Cross Border Migration, Refugee Protection and State Responses*, (New Delhi,2003), p. 248

[67] ibid, p. 237

make appropriate revisions. The experts came up with the 1965 'Leo Draft' which was criticised for being more rigid than the 1951 convention.[68] At the Accra Meting of 1965, member states were requested to adhere to the 1951 Convention and apply its provisions to refugees in Africa, disregarding the 1951 date limitation. The rationale behind this request was the OAU's desire to find general guidelines to the numerous problems faced by refugees in Africa.[69]

Two additional drafts of the OAU Convention were completed during 1966 and 1967, directed specifically to the African situation. In the same period, the OAU Council of Ministers decided, at a November 1966 meeting in Addis Ababa, that 'the African instrument should govern the specifically African aspects of the refugee problem and that it should to be the regional complement of the 1951 UN Convention on the Status of Refugees'.[70] In September 1967, in Kinshasa the Council of Ministers again recommended to those member states which had yet to do so to accede to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. The conclusion of the 1967 Protocol, omitting the 1951 deadline was actively supported by the African States; its adoption by the world community contributed significantly to the OAU's decision to abandon its initial intention of elaborating a completely independent African instrument.[71] At the 11th session of the Council of Foreign Ministers in Algiers, in September 1968, the fifth draft of the OAU Convention was discussed.

The final draft of the OAU Convention was approved by the Council of Ministers, with minor amendments, at the 12th ordinary session in 1969. It was adopted by the Assembly of Heads of State and Government at their sixth ordinary session on 10th September 1969.[72]

The Convention entered into force on 20th June 1974 after ratification by 14 states. Much of the drafting of the OAU Convention was a cooperative effort between the

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[68] Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism", *International Journal of Refugee Law,* Vol.3, No. 3, 1991, p. 192

[69] Ivor C. Jackson, *The Concept of Refugee in Group Situations,*(London and Boston, 1999), p.182

[70] Eduardo Arboleda, n. 68, p. 192

[71] ibid, p.193

[72] Ivor C. Jackson, n 69, p. 191

OAU and UNHCR, with the underlying goal to ensure that the OAU treaty was an effective complement to the 1951 Convention.[73]

Achievements of the Convention

Although at the time of inception of OAU in 1963, the increasing incidence of refugee was becoming a serious problem for the African continent, it was only in 1969 that they could come up with a convention relating to the problem of refugees in Africa. Though projected as a regional complement to the 1951 Refugee Convention and its 1967 Protocol, it broadened the refugee protection regime in many ways.

While the convention retained the definition of refugees as enshrined in the 1951 Convention in Article 1 (1) of its convention, Article 1 (2) expanded it. Article 1(2) states that the term refugee shall apply to "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".[74] Therefore the convention stresses that refugees include persons fleeing civil disturbances, violence and war, irrespective of whether or not they have a well-founded fear of persecution.[75] This definition gave legal recognition to the plight of persons seeking from wider effects of *Coups d'etat*, civil strifes and political unrest.

Further, this definition also covers refugees on an individual basis. The Geneva refugee convention does not protect those who are unable to prove the fact of an individual well founded fear of persecution and yet have fled their homes and are unwilling to return.[76] This definition does not make any distinction between persons fleeing independent African states and those emanating from colonial or minority controlled dominions. This allowed the freedom fighters to be included in the refugee definition.[77]

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[73]   Eduardo Arboleda, n.68, p. 193

[74]   Article 1(2) of OAU Convention Governing Specific Aspects of Problem of Refugee in Africa

[75]   B.S. Chimni, n. 26, p.21

[76]   Joe Oloka-Onyango, n. 65, pp. 453-460

[77]   ibid, p. 456

Further, the principle of *non-refoulement* received a broader interpretation in the OAU Convention. Article 2 of the OAU Convention provides that

(1) Member states of the OAU shall use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who for well founded reasons are unable or unwilling to return to their country of origin or nationality.

(2) No state shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.[78]

Moreover, Article 2(5) mentions that if a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum where he first presented himself as a refugee, pending arrangements for his resettlement. Furthermore, Article 2(6) provides that for reasons of security refugees should be settled as far as possible from the frontier of their country of origin.[79] This provision was included so that these refugees may not re-organise themselves outside their country of origin and use the host's territory to foment problems in their home state.

Thirdly, the 1969 convention gives unqualified expression to principle of voluntary repatriation in an international legal context for the first time.[80] Article V entitled "voluntary repatriation" emphasises the essentially voluntary character of repatriation and lists the obligations of the country of origin to facilitate the resettlement of refugees who return.[81] Article V (3) says " the country of origin, on receiving back refugees shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country and subject them to the same obligations. Article V also stipulates that

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[78] Fernando Gonzalez-Martin, "The African Approach to Refugees", http://www.wcl.american.edu/hrbrief/v2i2/africanrefugees.htm

[79] UNHCR, n. 49, p. 57

[80] ibid, p. 57

[81] Article V (1) and (2) of OAU Convention Governing Specific Aspects Of Refugees In Africa, 1969

refugees shall not be penalised for having fled and they shall be given all possible assistance to facilitate their return.

The principle of burden sharing is also elaborated in the convention. Article II (4) states that the member states shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the member states granting asylum. This Article says, "where a member state finds difficulty in continuing to grant asylum, such member states may appeal directly to other member states and through the OAU and such other member states shall in the spirit of African solidarity and international cooperation take the appropriate measures to lighten the burden of the member state granting asylum".

This provision was included to ensure that no particular state should bear the burden of refugees. And wherever a particular state has to bear a greater economic burden, other states of the organisations should come to its rescue. The provision of burden sharing merits attention because African states have recognised the principle at a time when western countries are increasingly showing their reluctance to share the financial burden of the poor countries hosting refugees.[82]

The convention vide Article III places a duty on every refugee to abstain from subversive activities against other member states. This concern is reflected in the Preamble to the Convention itself. It says that the convention is anxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside. Article III states that every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with the measures taken for the maintenance of public order. Through the convention, the African governments also determined that the grant of asylum to the refugee shall be considered a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member state.

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[82] B.S. Chimni, n. 26, p.21

Problems in Implementation

Though the African refugee convention was adopted in 1969 with a lot of optimism, its implementation has not achieved the desired results. As with most international and regional laws, problems have been encountered in implementing the OAU convention at the national level. Most countries have been reluctant to replace their domestic legislations governing immigration, aliens, national security and the like with the convention.[83] In countries where required legislations have been enacted, there is a wide discrepancy between legislation and practice. In some countries legislations have given priority to controlling refugees and to security, economic and political concerns. As a result of this the refugees have to forego many of the rights mentioned in the Convention. Those rights that are subject to the greatest curtailment are the freedom of movement of refugees, their access to employment or other income earning opportunities.[84]

Moreover, the lack of personnel competent enough to process asylum requests and ensure that the convention is observed in countries where national laws have been modified to implement the convention, has become a serious obstacle.[85] For example in the Rwandanese refugee crisis, it is hard to imagine the logistic and operational support that would be required to enable status determination to be carried out in order to screen out the criminal elements.[86]

In spite of the convention the approach of the African states to the refugee problems have been adhoc and mostly political in nature. Responses to the refugee problem have become political with the humanitarian dimension taking a backseat. Also states are increasingly viewing refugees as threat to security. This is partly a result of involvement of refugees in criminal activities. Sometimes the refugees have engaged in subversive activities against their states of origin from the country of asylum. In many instances in Africa, as the refugees flee anarchical and uncontrolled violence in their home countries, they illegally bring with them dangerous weapons. They may use these

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[83] Fernando Gonzalez-Martin, n.78

[84] Office of the UNHCR, "Issues and Challenges in International Protection in Africa", *International Journal of Law Special Issue,* 1995, pp. 55-73

[85] Fernando Gonzalez-Martin, n.78

[86] Office of the UNHCR, n.84, pp. 55-73

weapons to create parallel and sometimes even more powerful communities in refugee hosting areas. This kind of situation developed in Horn of Africa and in Zaire. Closely related to this is the competition between the local residents and the incoming refugees over land and grazing ranges, water sources, etc.

As a result states increasingly resort to detention, expulsion or *refoulement* of refugees. At times they are restricted to remote and marginal locations, and thereby exposed to cross-border acts of banditry, lawlessness, etc.[87] In many instances this has resulted in straining of relations between the countries involved. [88]

The countries of Africa, most of which are economically backward, are severely constrained in providing asylum and protection to refugees due lack of adequate resources to assist, settle and wherever possible integrate refugees. A refugee emergency of the magnitude and rapidity of the Rwandanese refugee crisis is bound to tax the administrative, technical, medical and community capability of virtually any African government far beyond their normal carrying capacity. The growing reluctance of the affluent Western governments in financing and hosting refugees has left the poor African countries overburdened. This economic constraint is making them reject refugees.[89] In recent times African countries have broadened the category of people they call "illegal immigrants" and have turned such people away.

Moreover, definition of refugees incorporated in the 1969 convention does not cover two categories of refugees who are increasing in number in the African continent. These are firstly those people who are forced to move out due to systemic violation of their human rights, poverty and economic misery. Second category consists of those people who have been forced to leave their place of habitat but have not crossed their national boundaries. These so-called "internally displaced persons" constitute 15 million and are almost three times the other refugees in Africa. As a result of these deficiencies many of those who actually deserve protection are not protected. An increasing number of refugees in Africa today consist of those people who find

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[87] ibid, pp. 64-65

[88] "Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems Africa and by the Cartagena Declaration on Refugees" , n.57

[89] ibid

themselves displaced from their traditional homes as a result of drought, famine, civil war, or state policy. This is true in the case of the "Lowero Triangle" in Southern Uganda during the 1980's or the Ethiopia's villagisation programme, to name a few.[90] African refugee law has nothing to say about this situation. Though it covers people displaced due to "events seriously disturbing public order" it does not take into account those who have not crossed national boundaries. Therefore, there is a need to revisit the 1969 convention and broaden the refugee definition to include the new categories of displaced persons.[91]

In spite of the lacunae or drawbacks in the OAU convention, it is not a redundant document. Infact it has been the inspiration and basis for a regional convention on refugees in the Central American region. Also in the context of reforming the 1951 convention, the comprehensiveness of the African convention is often cited. Infact the OAU convention at the time of its adoption in 1969 was a path-breaking document. What is required is to modify the convention to include the new categories of refugees now found in Africa.

Central American Refugee Policy

Taking a cue from the broadened African refugee convention, over a decade later Central America, Mexico and Panama adopted the Cartagena Declaration on refugees. These countries adopted an even broader definition of refugees to include those who had fled as a result of systemic violations of their human rights.

Evolution of a Broader Definition of Refugees in Central America

As independent states Latin American countries have espoused the concept of asylum and refugees throughout their history. The Cartagena Declaration has legal antecedents in the form of the 1889 Montevideo Treaty on International Penal Law enshrining respect for the right of asylum. Also relevant in this regard are the Inter-American Charter on Human Rights and the 1949 Geneva Conventions.[92]An entire chapter of the

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[90] Joe Oloka-Onyango, n.65, pp. 453-460

[91] Allehone Mullugeta, n. 48

[92] "Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems Africa and by the Cartagena Declarationon Refugees" n.57

Montevideo Treaty is devoted to asylum, which is affirmed as an inviolable right of those persecuted for their political beliefs.

The 1889 Montevideo Treaty was followed by a series of regional conventions dealing specifically with the issue of asylum. Conventions were concluded in February 1928in Havana, December 1933 and March 1940 in Montevideo, March 1954 in Caracas and November 1969 in San Jose, Costa Rica.[93] However in these conventions asylees were defined as those persons who were persecuted due to their political leanings. They excluded those who were persecuted for non-political reasons like race or religion. Furthermore, these Latin American instruments were designed to respond to individual cases under very specific circumstances.[94] Both Latin American and European citizens sought asylum in Central and South American countries before 1951. In the 1930's Spaniards fleeing the Spanish civil war found asylum in Mexico. During and after the Second World War, Europeans of other nationalities were generously granted asylum in South American countries.[95]

An important reason for this kind of a specific criteria was that till that time Latin America[96] had not experienced generalised civil war where people have to flee en-masse, seeking refuge. The regional asylum system was established to benefit individuals whose survival was not at stake, and whose burden on the receiving country was easily bearable. It was also assumed that once the conditions that threatened the safety of the individual disappeared he/she would return to the country of origin.

However, the situation changed in the 1960's. With the ever increasing number of persons fleeing Caribbean countries in the sixties and with the political turmoil in the Southern Cone[97] of Latin America in the seventies, the region was faced for the first time with the phenomenon of massive regional population shifts.[98] Latin Americans became aware of the need to complement their generous asylum tradition with

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[93] Eduardo Arboleda, n.68, pp. 87-101

[94] ibid, pp.87-101

[95] ibid, pp. 87-101

[96] Latin America consists of 8 countries, viz., Mexico, Belize, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica and Panama.

[97] It consists of Argentina, Paraguay, Brazil and Uruguay.

[98] Eduardo Arboleda, n.67, pp. 87-101

adherence to the internationally accepted 1951 Convention and 1967 Protocol definition of refugees.[99] Since the 1970's, social conflict had been ravaging the agrarian and highly stratified societies of Nicaragua, El Salvador and Guatemala. The decade long conflicts militarised and polarised the societies affected and displaced between two to three million Central Americans.[100]

The characteristics of these new refugee movements were also different from the earlier ones. The refugees were not high profile or well-known individuals, as in the case till 1970's for whom the asylum laws had been formulated. The refugees in the 1970's were rural, ethnically mixed people who concentrated in remote areas bordering their country of origin.[101] In some cases, particularly among Salvadoran and Guatemalan asylum seekers, whole villages fled in search of protection. Central American countries were not prepared to handle such unprecedented number of refugees who did not fit in the stereotypical mould of a traditional Latin American asylum seeker.[102] Central American countries felt that there was a need to re-vitalise their long standing asylum traditions to deal humanely with the flight of this unexpected victims.

The countries of the region also recognised that the 1951 Convention definition was inadequate to deal with the many thousands of individuals escaping generalised violence and oppressive situations in Central America. In 1981, interested nations met at the Colloquium on Asylum and the International Protection of Refugees in Latin America held at Mexico to discuss the issue of regional refugee in Central America. The Colloquium concluded that there was a need to adopt an encompassing definition of refugees in Central and Latin America. The primary purpose of this Colloquium was to discuss the most immediate and delicate problems presented by the regional crisis in Central America. It also sought to examine the inadequacies of international refugee law and the respective national refugee legislation. It recognised that asylum law was still evolving and that it could not be treated in a vacuum. The

[99]   ibid, pp. 87-101

[100]   Aristide Zoleberg, Astri Suhrke and Sergio Aguayo, n.6, p. 204

[101]   For the causes of political and social turmoil in Latin and Central America in the 1970's see Aristide Zoleberg, Astri Suhrke and Sergio Aguayo, *Escape From Violence: Conflict and the Refugee Crisis in the Developing World*, (New York and Oxford, 1989), pp. 180-220.

[102]   Eduardo Arboleda, n.68, pp. 87-101

tradition of asylum in the region, the social and political circumstances of the region were among the ways to concretise asylum law.

In the three years following the 1981 Colloquium, Central American refugee problems became more acute. Salvadorans and Guatemalans left their countries in unprecedented numbers, Cubans and Haitians in search of better opportunities also contributed to the refugee problem which affected the entire region.[103] The Inter-American Commission on Human Rights in its 1981-82 annual reports made several pertinent observations regarding the shift in the concept of asylum. In the Commissions judgement, the events of the 70s and early 80s represented a shift in the old tradition of granting political asylum. It said that the number of people needing asylum has increased manifold and the make up of the groups requesting political asylum has changed from individual political leaders to large group of people. The asylum seekers now consist of those people who are without financial resources and lack education and job skills. In the event of inadequacies in the existing refugee traditions, poor economic conditions and the reluctance on the part of the governments of the region to accept refugees, the Commission directed the Organisation of American States to take steps to alleviate the situation.

The severity of the situation in Latin America prompted another regional meeting in 1984. From 19-22 November, experts and representatives from ten governments of Latin and Central America met in Cartagena, Columbia. It was this colloquium that resulted in the most encompassing definition for refugee in Latin America. The colloquium was co-sponsored by the University of Cartagena, the Regional Centre for Third World Studies and the UNHCR. It was held under the auspices of the Colombian government.

The major objectives of the Cartagena Declaration was to establish regional legislation dealing specifically with refugees and to make governments in the region more sensitive to the need to eliminate causes leading to the massive displacement of persons from their countries of origin.[104] The declaration in conclusion III (3) says,

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[103] ibid, p. 202

[104] "Persons Covered by the OAU Convention Governing the Specific Aspects of Refugee Problems Africa and by the Cartagena Declaration on Refugees" n.58

"to reiterate that in view of the experience gained from massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention and the doctrine employed in the reports of the inter-American Commission on human rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."

Contribution of the Cartagena Declaration

The Declaration makes explicit reference to reasons deemed to be valid justification for persons to flee their countries of origin such as the categories contemplated in the 1951 convention and in its 1967 protocol, generalised violence, foreign aggression, internal conflicts, massive violation of human rights and other circumstances leading to a serious disturbance of public order. This declaration calls for consideration of the objective situation in the country of origin and the particular situation of the person or group of persons seeking protection as refugees. This definition requires that two conditions be met to be declared a refugee. Firstly, there exists a threat to life, security or liberty. And secondly, the threat results from one of the five factors: generalised violence, foreign aggression, international conflicts, massive violation of human rights or circumstances seriously disturbing public order.[105] Therefore the declaration adopts a very comprehensive definition of refugees.

Furthermore the declaration under its conclusion II (a), (b), (c), (d), (e) says that it is imperative to adhere to the 1951 convention and 1967 protocol and to cooperate with the UNHCR and support its work in the region. Conclusion II (a) says, "to carry out, if they have not yet done so , the constitutional procedures for accession to the 1951 Convention and the1967 Protocol relating to the Status of Refugees". Conclusion II (e)

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[105] Eduardo Arboleda, n. 68, 1995, pp. 87-101

reads, "to support the work performed by the UNHCR in Central America and to establish direct coordination machinery to facilitate the fulfillment of its mandate". The declaration establishes the necessity to meet refugees requirements in the fields of health, education, labour and security {conclusion II (h)} and to respect their human rights {II (o)}. It also states that refugees must take no political action against their countries of origin.

The declaration accepts voluntary repatriation as the durable solution {II (f)}. Voluntary repatriation must be based upon the principle of individually and freely expressed wish of the refugee as well as to be carried out in collaboration with the UNHCR. Another important feature is that of providing for self-sufficiency of refugees by means of developing programmes and projects permitting them to engage in productive and gainful activities {II (i)}. The declaration also enshrines the need for the government of the countries in the area to make efforts directed at removing the causes of the flow of refugees {II (m)}.

Countries such as Mexico and Ecuador have adopted legal measures embodying the principle of Cartagena declaration in their national legislation. The other states of Latin America have observed these principles *de facto*.

The Cartagena declaration provided a much needed common framework to meet the demands of refugee situation in Central America and made governments sensitive to the need of asylum seekers. It has gained the recognition and support of international for a within and outside Latin America, as well as that of the United Nations General Assembly. However, this declaration is not without criticism. New categories of involuntary migrants, who have not been covered under the definition of Cartagena declaration have appeared in the region. Among them are victims of natural disasters, ecological refugees, fleeing areas rendered uninhabitable by a mix of natural and manmade calamities. Apart from them are people forced to move by the expansion of drug empires or the violence generated by drug wars.

Another situation deserving urgent attention is the result of escalating violence in the Andean regions. The civilian population of Peru and Colombia are the main victims of human rights violation, combined with ruthless violence by armed opposition groups or

para-military entities against the backdrop of drug production and trafficking. Analysts have noted that majority of these displaced persons remain in an irregular situation or seek regularisation of their stay as ordinary migrants. Coupled with this is the issue of in-country migration or internal displacement. In Central America concern at the situation of persons displaced within their own territories was expressed in the Cartagena declaration. It called upon national authorities and the competent international organisations to offer protection and assistance to those persons and to help relieve the hardship which many of them face. The wording of this document was very cautious particularly in its reference to 'competent international organisations' since no international organisation has statutory competence over internally displaced persons.

Harmonisation of EU Asylum Policy

West European asylum policy has traveled a wide spectrum from 1951 to the present day, moving from a liberal accommodating one to an increasingly restrictive, disowning one. This policy change has had a bearing on the international refugee regime. The international regime on refugees, as it emerged, was primarily a European document and the theoretical, political and legal discourse on refugees has been dominated by the Europeans. However, the present attitude of West European Governments towards refugees has been a matter of concern. The complexity of European refugee problem is reflected in the words of Sodako Ogata, the former United Nations High Commissioner for Refugees- "whether one examines the tragic displacement in former Yugoslavia, the passionate debate on asylum in Germany, the long discussion on harmonosing immigration and asylum policies in the European communities, the concern over illegal immigration and the battles against xenophobia throughout Europe, the drama and complexity of refugee problem in Europe today is evident".[106]

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[106] Sandra Lavenex, *The Eueopeanisation of Refugee Policies: Between Human Rights and Internal Security*, (Alder Shot, Berlington, Singapore and Sydney, 2001) p. 1

Securitisation of Asylum in West Europe

The securitisation and harmonisation of the European refugee policy has taken place gradually over a period of time. Gil Loescher says that "the formulation of refugee involves a complex interplay of domestic and international factors at the policy making level and illustrates the conflict between international humanitarian norms and the sometimes narrow self interest calculations of sovereign nation states".[107] This is true of the European case. Asylum in Europe changed dramatically from late 1970s to mid 90s not only due to the rise in world's refugee population but also because of other controversial European issues including rise of far right parties, the restructuring of the welfare states and the increasing integration of Europe.

As a result of the talks at Yalta and Potsdam in 1945[108] concerning the political outcome of World War II, the boundaries between Soviet Union and several central European states were re-drawn. This re-drawing of territorial boundaries led to the creation of large number of displaced persons.[109] These people were quickly absorbed by the economic reconstruction of war ravaged Europe. Moreover, one of the major problems of the West European governments in the 1960s was the shortage of manpower and as a result some 10 million guest workers were recruited from Southern Europe.[110] The economic situation and labour market required a cheap and flexible workforce that did not exist in the domestic market. Countries like France, Germany and Netherlands used permissive or even promotional migration policy during this period.[111] Moreover, during the early years of the cold war, Western Europe was generously committed to refugee reception. This attitude was possible because the

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[107] Quoted in Niklaus Steiner, *Arguing about Asylum: The Complexity of Refugee Debates in Europe*, (New York, 2000), p. 6

[108] The Yalta conference attended by Roosevelt, Stalin and Churchill sought to solve several problems relating to Germany, Eastern European countries, Far East and creation of the UN. It decided on the division of Germany into four zones each to be occupied by Britain, France, the United States and Soviet Union. It also decided on the boundary of Poland. The Potsdam Conference concerned the future of Germany and other West European countries.

[109] Charles Westin, "Regional Analysis of Refugee Movements", in Alastair Ager (ed.), *Refugees: Perspectives on the Experience of Forced Migration*, (London and New York, 1990), p. 31.

[110] Jonas Widgren, "Europe and Migration in the Future" in Laila Monahan and Gil Loescher (ed.), *Refugees and International Relations*, (New York, 1989), p. 50.

[111] Jef Huysman, "The European Union and Securitisation of Migration", *Journal of Common Market Studies*, Vol. 38, No. 5, December 2000, pp. 751-77

number of refugees escaping from Eastern Europe was small, as borders, airports and communication were rigorously controlled by the communist regimes.

By late 1960s and early 70s immigration increasingly became a subject of public concern and there was a shift from permissive immigration policy to a control oriented restrictive policy. This was partly the result of oil shocks of 1973-74 that led to the halt in immigration and the expulsion of a million foreign workers. Also during the 1970s tens of thousands of asylum seekers arrived from countries outside Europe including Afganisthan, Angola, Iran, Iraq, Pakistan, Nigeria, Somalia, Sri Lanka, Vietnan, etc.[112] The first developing world refugee emergency to affect Western Europe was the expulsion of seventy thousand Ugandan Asians in 1972. In 1973, there was a large flow of asylum seekers from Chile and neighbouring states. In 1975, European countries were recipients of large number of Vietnamese fleeing their country in the fear of a communist take over. During the 1970s there was also steady flow to Europe of asylum seekers from the Middle East, notably Kurds and Syrian Christians.[113]

In the mid-1980s total European intake for one year amounted to 850,000 compared to US at 600,000 or Canada at 100,000.[114] While 70% of the total immigration until 1970s was accepted on economic grounds by mid 80s, 80-85% of legal immigration was on social and humanitarian grounds. Also during this time immigration became a subject of political discussions. Migration has increasingly been presented as a danger to public order, cultural identity and domestic and labour market stability. Asylum is no more viewed as a humanitarian issue but linked to terrorism, drug trafficking, etc. Simultaneously with the diminishing border control within the EU from 1980's, there has been an increase in external border controls. This was due to the fear that free market would not only improve free movement of law abiding agents but would also facilitate illegal and criminal activities by terrorists, international drug cartels and asylum seekers and immigrants.[115] In the Western European region, the adoption of restrictive practices has been justified on the basis that illegal immigrants and asylum seekers pose a security problem. The 1990 convention applying the Schengen

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[112] UNHCR, n.49, p. 158.

[113] Charles Westin, n. 109, p. 34.

[114] Jonas Widgren, n. 110, p. 51.

[115] Jef Huysman, n. 111, pp. 751-77

agreement of 1985 connects immigration and asylum with terrorism, trans-national crime and border control. The security continuum adopted in EU connects border control, terrorism, international crime and migration. It further requires that the proposed Central and Eastern European members of the EU should take on the Schengen *acquis*.

Migration is also linked to the issue of cultural and racial identity and is perceived as a challenge to the welfare state. Migration is identified as being one of the main factors weakening national tradition and societal homogeneity. It is projected as an internal and external danger for the survival of the national community or western civilization. This discourse not only excludes refugees from normal social fabric but also considers them as dangers to maintenance of social fabric. Closely associated with the phenomenon of migration in Europe are the issues of multiculturalism, European identity, nationalism, xenophobia and racism. Migrants, refugees and asylum seekers are seen as challenging the cultural homogeneity of Europe and this is evident in the political rhetoric and the media coverage. Also, to many, refugees and asylum seekers are the illegal claimants of welfare provisions and competitors in the job market that has already shrinked due to recession.[116]

Construction of "Fortress Europe"

New practices aimed at combating illegal immigration and abuse of asylum have emerged in Europe. These have shifted the balance between refugee protection and immigration control. A host of restrictive practices have been institutionalised in the western world to prevent refugees fleeing underdeveloped countries from arriving at its doorsteps. The Canadian sociologist, Anthony Richmond, has termed it as construction of global apartheid.[117] Firstly, there are restrictive visa policies and carrier sanctions. Citizens of EU member states do not need visas to enter other EU countries. However, persons from third countries are required to possess valid travel documents. Visa restrictions are very difficult subject where refugee movement and protection are concerned. Refugees fleeing persecution cannot be expected to apply for travel

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[116] For details on how refugees have become threat to cultural homogeneity and welfarism in west Europe, see Jef Huysman, "The European Union and Securitisation of Migration", *Journal of Common Market Studies*, Vol.38, No.5, December 2000, pp. 751-77

[117] Quoted in B.S. Chimni, n. 26, pp. 18-22.

documents as it would mean informing their persecutors of the desire to leave. Also during conflict situations foreign embassies closed down.[118] However, the western governments have often imposed visa restrictions on refugees. When 2.5 million inhabitants of former Yugoslavia due to ethnic cleansing, the western governments imposed visa requirements.[119] To reinforce this visa policy, European governments have imposed the provision that airlines will be fined for bringing in passengers who are not eligible to enter member states. For example, UK charges 2,000 pound sterling for bringing in undocumented persons.

Secondly, 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. These international zones are not considered a part of the countries domestic territory and by returning asylum seekers from here does not amount to violation of the principle of *non-refoulement*. Besides this, safety zones have been created within countries of conflict like in Northern Iraq and former Yugoslavia, to stop asylum seekers from moving out of their country and seeking refuge in neighbouring countries. A safety zone may be defined as a clearly demarcated space in which individuals fleeing danger can seek safety within their own country. However, in reality these safety zones are actually one of the most unsafe areas. This principle was invoked during the Gulf War. Some three hundred thousand Iraqi refugees crossed into Turkey. In order to not to admit these Kurds in to its territory, Turkey with the support of its western allies got Security Council Resolution 688 passed which provided for the creation of safety zones in Iraq.[120]

Further, the principle of *non-refoulement* has been given extremely narrow interpretation. States say that the principle of non-refoulement does not apply if they are able to stop a refugee before they enter their borders. For example, Mexican authorities stop the flow of Central American refugees by capturing potential refugees before they cross Mexico's borders with Guatemala.[121]

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[118] Joanne Van Selm-Thornburn, n. 13, p. 63

[119] Gil Loescher, n. 40, p. 140

[120] B.S. Chimni, *International Refugee Law: A Reader*, (New Delhi, 2000)

[121] Gil Loescher, n.40, p. 140

Also most countries in Europe and America since 1997 are implementing the safe third country concept, whereby asylum seekers are denied access to a comprehensive asylum determination procedure because they could have apparently sought protection in one of the safe countries which they crossed to reach their ultimate destination. This approach was made possible by the emergence of central European countries as places where refugees could, at least in theory, find protection. Associated with this is the concept of 'country of first asylum'. This refers to a country which the refugee has crossed before reaching his final destination and where he could have sought refuge.[122] Due to this principle many asylum seekers have been deported. In many cases where the asylum seeker has been able to cross these hurdles, a very narrow interpretation of the refugee definition as contained in 1951 convention is adopted. In many cases people who are suffered persecution at the hand of 'non-state actors' are not considered to be refugees and are often offered a lesser form of protection with fewer rights and benefits.[123] A country like Somalia does not have a government with control over its territory and its people and does not even have international recognition. In countries such as Angola, Columbia and Sri Lanka, groups other the Government exercise power. Refugees fleeing persecution at the hand of these agents are not deemed to be entitled to protection under the 1951 convention definition.

Moreover, asylum seekers have been held in offshore camps which have been effectively declared as rights free zones (for example, Guantanamo Bay was used by US to hold Cuban and Haitan refugees). Also some countries have invoked the internal flight alternatives (IFA), where they have pointed out that a asylum seeker could have moved to another safer area within his or her own country.[124] Many countries of western Europe invoke this provision in case of people fleeing ethnic cleansing in Yugoslavia by pointing out that they could have moved to another safer part of their own country.

Various deterrent measures like increasingly wide spread automatic detention of asylum seekers, the denial of social assistance and the restriction of access to

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[122] Arne Piel Christensen, "Comparative Aspects of Refugee Situation in Europe", *International Journal of Refugee Law, Special Issue, 1995*

[123] UNHCR, n. 49, p. 162

[124] B.S. Chimni, n. 26, pp. 18-22.

employment have been widely applied. In addition restrictions are placed on the rights of refugees already in the country to bring their family members to join them.

Convergence of EU Asylum Policies

Besides these restrictive measures, there have been attempts to harmonise internal procedures in Europe. In fact efforts towards harmonising asylum and immigration policies have coincided with efforts to achieve closer economic and political integration through the creation of single European market. Even before Single European Act (SEA) came into force, a meeting of the ministers responsible for immigration was held in London in the second half of 1986. Here they expressed their concern over the effects that abolition of borders would have on immigration of third country nationals. Subsequently a report, titled Palma document, was submitted to the European Council. This document specified that achievement of an area without internal frontiers would involve the approximation of national laws and their rules of application and scope and the strengthening of external borders by each state. To this end a set of legal, administrative and technical instrument was needed to harmonise the grant of asylum and refugee status.[125]

This common policy, based on the member states obligation pursuant to their accession to the 1951 convention and its 1967 protocol focussed on five aspects: (i) the acceptance of identical international commitment with regard to asylum; (ii) the determination of the state responsible for examining the application for asylum; (iii) simplified or priority procedures for the examination of clearly unfounded requests; (iv) the conditions governing the movement of the asylum seekers between the member states and (v) a study of the need for financing system to fund the economic consequences of implementing the common policy.

Between 1986 and 1993, the only venue for discussion on harmonisation of asylum law in EU was inter-governmental fora. By the end of inter-governmental phase of cooperation, asylum issues were under the considerations of the following fora - the

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[125] Elspeth Guild, "The Impetus to Harmonise: Asylum Policy in the EU", in Fraces Nicholson and Patrick Twomey (ed.), *Refugee Rights and Realities*, (UK, USA and Australia, 1999), p. 316.

Trevi Group set up in 1976, Ad-hoc Group on Immigration set up in 1986, Horizontal Group on Data Processing and the Customs Mutual Assistance Group.[126] The Trevi group was to coordinate efforts against terrorism and its scope was extended in 1980 to include illegal immigration and asylum flows which included 4 sub-groups: (i) terrorism; (ii) police co-operation (iii) serious crimes and drug trafficking and (iv) policing and security implications of SEA.

The function of the horizontal group on data processing was to produce the European information system designed to combat serious crimes and strengthen external border controls and police cooperation in fighting illegal immigration networks through the exchange of information.

The customs mutual assistance group is charged with the coordination of customs and other technical information exchange and maintenance of issues regarding external border controls.

The Schengen Group which came into existence on 14 June 1985 consisted of 5 northern countries namely, Belgium, the Netherlands, Luxembourg, France and Germany. These countries have tried to eliminate frontier control on movement of goods and people between states involved.[127] These provisions were later adopted by the other states of EU except Denmark, UK and Ireland under the 1990 Schengen Convention. This Convention also includes provision to strengthen police and judicial cooperation and to introduce common visa policies and carrier sanctions. It came into force in September 1993 and began to be implemented by individual member countries from March 1995.[128] Issues of concern under the Schengen include visa restrictions, carrier sanctions (explained in the earlier section) and an information system. The Schengen information system is designed to maintain public order and security, including state security and to apply the provisions of this convention relating to the

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[126] For details on the functions of each of these groups see Elspeth Guild, "The Impetus to Harmonise: Asylum Policy in the EU", in Fraces Nicholson and Patrick Twomey (ed.), *Refugee Rights and Realities*, (UK, USA and Australia, 1999), p. 316

[127] Daniele Joly, *Refugees: Asylum in Europe?*, (San Francisco, 1992), p. 98.

[128] UNHCR, n. 49, p. 159.

movement of persons in the territories of the contracting parties, using the information transmitted by the system.[129]

Another convention on asylum policy within the community called the Dublin Convention was signed on 15 June 1990 and has been effective since 1997.[130] This convention includes provisions to identify which member state has the responsibility for examining an asylum application and to ensure that only one state determines any application. This was intended to prevent asylum seekers from applying for asylum in more than one state, with their applications either being assessed several times or not at all. This provision also made it impossible to submit applications for asylum in different member states to increase chances of being accepted.[131] The underlying principle of the convention was to establish a system of responsibility based on the asylum seeker's residence or, in the absence of residence where asylum seeker had entered the EU. Therefore an asylum seeker who entered EU over a land border in Germany and applied for asylum in France would be returned to Germany where his asylum application would be determined.

The Dublin Convention was followed by the London Resolution. Here the European Council adopted on 30 November 1992 three new measures relating to asylum. These were resolutions on manifestly unfounded applications for asylum, the resolution on harmonise approach to questions concerning host third countries and conclusions on countries in which there is generally no serious risk of persecution.[132] The measures adopted at the London Council meeting in 1992 provide an inter-locking web designed to screen out and determine rapidly asylum applications coming within two primary categories; (i) those of the asylum applicants who have passed through a third country outside the EU before travelling to the member state; and (ii) those of asylum applicants from countries which have been determined safe according to a nationally

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[129] Joanne Van Selm-Thornburn, n.13, p. 81

[130] Elspeth Guild, n. 124, p. 318.

[131] For a critical appraisal of the Dublin Convention see, Elspeth Guild, "The Impetus to Harmonise: Asylum Policy in the EU", In Fraces Nicholson and Patrick Twomey (ed.), Refugee Rights and Realities, (UK, USA and Australia, 1999) and Daniele Joly, Refugees: Asylum in Europe?, (San Francisco, 1992)

[132] Elspeth Guild, n.125, p. 323

determined 'white list'. According to the resolution, applications from individuals falling within these categories will be treated as manifestly unfounded applications.

The adoption of Treaty of European Union in November 1993 provided a constitutional basis for the inter-governmental cooperation in the field of asylum which had until then been taking place in legal vacuum. One of the shortcomings of the Dublin Convention as identified by some Parliamentarians was the lack of a judicial dispute resolution mechanism. The Dutch and the Belgian parliamentarians refused to ratify the Convention without an additional Protocol giving Jurisdiction to the European Court of Justice to adjudicate on disputes not only between the parties to the Convention, but also on references from national courts in the context of individual appeals.[133]

Under the treaty of European Union matters relating to asylum policy come under the third pillar. The Treaty of Amsterdam that was signed in October 1997 and came into force in May 1999 has led to the communitarisation of asylum policy within the EU. This treaty sets out an agenda to move asylum matters over a five year period from an area where they are subject to inter-governmental agreement by the member states to one where policy development and decision making fall within the competence of the EU institutions.[134] In the 'third pillar', asylum policy is identified as a matter of common interest. It further requires that matters be dealt with in compliance with the European Convention on Human Rights and the Geneva Convention, but provides that the third pillar is without prejudice to member state action regarding the maintenance of law and order and the safeguarding of internal security.

The new Title IV that has been created transfers into EU the responsibility for:

(i) criteria and mechanism for determining which member state is responsible for considering an application for asylum submitted by a third country national in one of the member states;

(ii) minimum standards on the reception of asylum seekers in the member states;

(iii) minimum standards with respect to the qualification of third country nationals as refugees;

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[133] ibid, p.322

[134] UNHCR, n. 49, p. 169

(iv) minimum standards on procedures in member states for granting or withdrawing refugee status;

(v) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection, and

(vi) promoting a balance of effort between member states in receiving and bearing the consequences of receiving refugees and displaced persons.

While on the one hand, attempts are being made to harmonise EU asylum policy in such a manner that asylum to Europe can be minimised, on the other hand, there have been occasions when representatives of member states have met to re-affirm their commitment to respect the right to seek asylum. In a meeting held at Tampere, heads of states of EU raised the need to evolve common EU asylum policies which would be based on a free and inclusive application of the Geneva refugee convention.[135] The main impediment to this is the lack of political will to honour these proposals.

In spite of these developments the trends in EU asylum policy indicate that it is not the life, security or protection of the individual victims of purges, ethnic cleansing, low intensity warfare or the breakdown of the state that is of principle concern of the West European states. What is at stake is the economic vitality of the European welfare state. In a 'migration strategy' paper prepared during the second half of 1998 under the aegis of the Austrian presidency of the EU proposals for a defence line to protect Europe from illegal migrants seeking employment or asylum. The strategy paper also called for the 1951 Convention to be amended or replaced altogether. Widespread criticism of the paper prompted its withdrawal.[136]

The foregoing discussion points out at how regional organisations have attempted to reach a common policy with regard to the refugee problems in their region. Their ends might not be similar but the means adopted is the regional organisation.

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[135] ibid, p.322

[136] ibid, p. 170

CHAPTER 3

FORCED MIGRATION IN SOUTH ASIA

INTRODUCTION: THE SOUTH ASIAN REGION

The South Asian region consists of seven countries, viz., Bangladesh, Bhutan, India, Nepal, Maldives, Pakistan and Sri Lanka. Closed in by the Himalayas on the North and surrounded by the Indian Ocean on most other sides, South Asia is a distinct geographical entity. Partly for this reason the region has many characteristics of a subsystem.[1] The total area of South Asia is more than four million square kilometers, consisting of diverse physical landscape and environment. The region has two land locked countries- the small Himalayan countries of Nepal and Bhutan, and also two island states- Maldives and Sri Lanka.

All the countries of the region suffer from relatively higher population growth rates. The distribution of population among these countries is also uneven. The countries of south Asian region together represent only 2.3% of the area of the world but harbour nearly 22% of its population. Therefore, the average density of population in this region is very high - 372 persons per square kilometer. The South Asian countries are passing through the second stage of demographic transformation which is characterised by high birth rates and declining death rates. India, the world's second most populous country, contributes to more than three fourth's of the population of this region. Sri Lanka has the least population growth rate at 1.4% and Maldives has the highest growth rate at 3.05%.[2]

In terms of human development[3] the South Asian region cannot boast of very high standards. As per the estimated ranking by the UNDP in its *Human Development Report, 2001*, three countries of South Asia fall under medium human development

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[1] Aristide Zolberg, Astri Suhrke and Sergio Aguayo, *Escape From Violence: Conflict and Refugee Crisis In The Developing World*, (New York and Oxford, 1989), p.135

[2] *Human Development Report*, 2001, UNDP, (New York, 2002), pp.155-56

[3] The Human Development Index measures the overall achievements in a country in three basic dimensions of human development- longetivity, knowledge and decent standard of living. It is measured by life expectancy, educational attainment (combined primary, secondary and tertiary enrollment), and adjusted income per capita in purchasing power parity (PPP) in terms of US Dollars.

category. These countries are Maldives, Sri Lanka and India. The rest four come under the low human development category. The ranking of Bangladesh at 132 is the lowest, followed by Bhutan at 130, Nepal at 129, Pakistan at 127, India at 115, Sri Lanka at 81 and Maldives at 77.[4]

In economic terms the countries of South Asia are among the poorest in the world. Majority of these countries falls under the Least Developed Category. Agriculture is the mainstay of the economic resources and activities of South Asia. Although the proportion of agriculture as a share of GDP has gone down, it still remains the major contributor to national income. It is also the main source of employment in the South Asian region. Almost half of the labour force, on an average in the region, is employed in agriculture. As a result most people are unemployed or disguisedly employed in this sector leading to further marginalisation of the population. This also suggests that the increase in contributions from other sectors have not been able to generate a corresponding increase in employment in the respective sectors. Moreover, a major share of merchandise exports also come from agricultural products. Though in recent times manufacturing sector has become more diversified, textiles and food products are still the main outputs in many countries. Most of the industrial units are sub-optimal, capital intensive, import intensive and over crowded. Therefore the output is way below the optimum level.

All the countries of South Asia have adverse Balance of Payment problems. The value of their imports is more than that of their exports. Most of the South Asian countries have low saving and investment rate. This hampers capital formation, which is an important prerequisite for economic and industrial development. This increases the dependence of South Asian countries on foreign aid and loans.

Coupled with this is the chronic problem of poverty in the region. One estimate puts the number of people living below poverty line at 440 million. Infact, 40-70%of population of South Asia lives below the poverty line. The Human Poverty Index (HPI) devised by UNDP presents a very grim picture of South Asia. This region accounts for nearly half of the world's poor, which is reflected in the

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[4]   *Human Development Report, 2001*, n.2, pp.142-43

extremely low per capita income level and also the low levels of growth. In terms of HPI, out of a total of 162 countries, Bangladesh ranks 73, Nepal 77, Pakistan 65, India 55, Sri Lanka 31 and Maldives 25.[5] The report further says that 25% of the population in Sri Lanka, 35% in India, 34%in Pakistan, 42%in Nepal and 35.6% in Bangladesh lived below the National Poverty Line during 1984-1999.[6] In South Asia 18% of the population is not expected to survive upto the age of 40, 30% do not have access to safe drinking water, 25% do not have access to health facilities and about 80% do not have access to sanitation facilities.[7] Therefore South Asia presents itself as one of the most poverty-stricken states in the world.

However, South Asian states are well endowed in terms of energy and mineral resources. But they are unevenly distributed among the countries of the region.

In terms of history, geography and political setting, countries of the region have both similarities and contradictions. The region is a geographically well-defined unit. Infact for a long period in history these countries have existed as a single sub-continental unit. The countries of this region have common cultural and historical heritage. Their porous borders have facilitated the exchange of art, literature, architecture, music and culture within the region. All these countries experienced the colonial rule and gained independence from it around the same time. All the states of this region have the same economic foundation with primary emphasis on agriculture.

Most of the states of the region are multi-ethnic and multi-religious. Indians consist of the Aryans, Dravidians, Tibeto-Mongoloids, Tibeto-Burmans, etc. Pakistani population consists of five major ethnic groups, which are Punjabi, Pashtuns, Sindhis, Baluchis and immigrants from north India. The Bangladeshis are also mixed races, having emerged through a continous process of assimilation of Aryans, Dravidians and Mongoloid races. In Nepal also the original people consisted of Mongoloid and Caucasoid ethnic groups. In Bhutan there are primarily three ethnic groups viz. Sharchops, Ngalongs and Lhotshampas.

[5] *Human Development Report, 2001*, n.2, pp.149-50

[6] ibid, pp.149-50

[7] *Human Development in South Asia, 2000*, Mahboob-ul Haq Development Center, (Islamabad, 2001), p.16

Similarly, Sri Lanka is also a multi-ethnic nation with Sinhalese and Tamilian population. In Maldives also migrants from Sri Lanka, Western India, Arab countries and Black slaves from Africa coexist.

Major religions also coexist in this region. The percentage composition of the same is depicted in the following table:

Table 1: Religious composition in South Asian Countries

Country	Hindus	Muslims	Buddhists	Christians	Others
Bangladesh	10.51	88.31	0.59	0.32	0.27
India	82.41	11.67	0.77	2.32	2.83
Nepal	86.5	3.5	7.8	0.2	2.0
Sri Lanka	15.0	7.6	69.3	7.5	0.6

Sources: Bureau of Statistics, Statistical Yearbook 1996, Dhaka, 1997

Census of India, Series I, Paper I of 1995, (Religion), Paper I of 1991(Religion), New Delhi

Central Bureau of Statistics, Population Census, 1991, Vol. 1, Part VII, Table No. 20, Kathmandu, 1993

Central Bank of Sri Lanka, Economic and Social Statistics of Sri Lanka, Statistics Department

In terms of foreign policy also, the states of this region have adopted almost similar approaches. In the initial years, all the countries adopted a non-aligned foreign policy stand even though the commitment of some countries waned away in later years.

One of the main features of this region in its international aspect has been the overwhelming power of India relative to that of other states in region.[8] This kind of pre-eminent position that India enjoys in the region has no parallel in any part of the world. India constitutes 73% of the area of the region, 77% of the population, 76% of GDP, 70% of exports and 60% of imports. The power structure moved further in favour of India when Pakistan was divided into West Pakistan and Bangladesh in 1971, thereby loosing half of its population and a sizeable portion of its territory. The other countries of the region came at the very bottom of the conventional scale of power. Sri Lanka, with a population of sixteen million peop'e

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[8]   Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n.1, p 135

and an area of only 65,000 square kilometers, is about the size of an administrative unit of India. The small Himalayan kingdoms of Nepal and Bhutan and the Indian Ocean archipelagic states of Maldives are both geographically and politically dependent and peripheral entities.[9]

This power asymmetry has been the cause of various regional conflicts in this region. In order to counter the pre-eminent position of India within the region, the other states have taken recourse to external powers.

Political Setting in South Asia

Myron Weiner once said in the context of Indo-Pakistan partition that the most violent conflict in the region was not a war between states, but a war between peoples.[10] While writing this he was referring to the Hindu-Muslim-Sikh riots. However, this inference holds true for South Asia even today, as the conflicts that have caused massive devastation and population movements are those which were a result of war between peoples. In the plural states of South Asia, the structure of conflict in the post independence period was to a large extent shaped by the demands for rights, power and protection advanced by groups defined along lines of religion, language and culture.[11]

At the time of independence from the British rule, almost all the nations of South Asia professed the establishment of democratic forms of government. However, a look at the present form of governance in the countries of South Asia depicts how these aspirations failed to materialise. Bhutan has had an uninterrupted monarchy since 1907, and has no written constitution. Nepal has been witness to failed democratic set up, with frequent dissolution of Parliament. In Nepal, an elite group of minority community dominates the politics and economy. Sri Lanka is engulfed in a full- fledged civil war. In Bangladesh, the problems of ethnic and linguistic authority have marred the political processes. After its independence, Pakistan has

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[9] ibid, p. 135

[10] Quoted in Lok Raj Baral, "Political Demography and Security in South Asia", in Sridhar K. Khatri (ed.), *Regional Security in South Asia*,(Kathmandu, 1987), p. 144

[11] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n.1, p. 126

been under military rule for longer period of time, than under civilian administration.[12] In India, the regional and religious parties have started playing an increasing role in the political processes. Clearly, the political system in the region is not representative of the heterogeneity of the region.

The process of nation building in South Asia was from the outset accompanied by a fierce competition for scarce resources, generating uneven political, economic and cultural development among different ethno linguistic and religious groups. European conquerors failed to pay attention to the fact that different ethnic groups, their languages, religion, customs and tradition straddled the territories they ruled. Consequently they bequeathed independence to artificial geographical expressions-warring ethnic nations bound together in the bosom of a single nation.[13] This in turn left many unfulfilled sub-national aspirations.[14]

Invariably, there is a failure to contain minority discontent due to what may be called 'the time lag effect'.[15] This implies that by the time the majority is willing to effect a meager and often meaningless compromise on the demands of the minority ethnic group, but then in the interim an escalation in the latter's demands has emerged. The minorities resort to constitutional and extra-parliamentary forms which bear little or no result. Then, invariably they are taken over by militant groups. The results are always accompanied with bloodshed, with governments attempting to crush the movements using armed force for the purpose.[16]

The third phase is when the majority ethnic leadership decides to make some realistic concessions to the minority nationality, but these usually fall far short of the latter aspirations. They are not actually compromises but, measly attempts to pacify the dwindling ranks of the moderates in the minority elite. In the last stage,

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[12] South Asia Forum for Human Rights, *Shrinking Space: Minority Rights in South Asia,* (New Delhi, 1999), p. 5

[13] A. Jeyaratnam Wilson, "The Politics of Ethnicity and Ethno-Nationalism in South Asia", *Contemporary South Asia,* Vol.2, No.3, 1993, p. 327

[14] Sanjay K. Roy, "Refugees and Human Rights: The Case of Refugees in Eastern and North-Eastern States of India", in Sanjay K. Roy (ed.), *Refugees and Human Rights,* (Jaipur and New Delhi, 2001). p.18

[15] A. Jeyaratnam Wilson, n.13, p. 328

[16] ibid, p.328

political agitation among the disaffected minority nationality or nationalities is taken over completely by armed militant groups. The latter refuse to accept concessions or compromises, all of which have been offered too late. Many of the conflicts in the region, for example, the demand for separate Elam by the Tamils in Sri Lanka, demand for Khalistan in Punjab are the result of this discontent and have passed through these stages.

The sway of economically and politically dominant groups over state resources to the detriment of other groups' legitimate share in power structures and development resources, only served to deepen the existing contradictions in all South Asian societies on regional, ethnic and religious lines.[17] Sharpening disparities between regions and those between different sections of people on the one hand and inadequate distribution of the fruits of economic development on the other generated social and political conflicts. States' inability to initiate developmental processes at a rapid phase and redress the skewed allocations of developmental resources aggravated the problem. Lack of consensus on national fundamental socio-economic agendas, erosion of political institutions and controversies over the distribution of power has been the bone of contention in most countries of South-Asia. Steady erosion of credibility of the State in almost all South Asian countries is accompanied by a growing crisis of governability. Almost all South Asian countries today are confronted with challenges emanating from diverse ethno-linguistic and religious groups.[18]

Most of these States of South Asia are also facing the dilemma of conceding legitimacy to ethnic demands claiming separate loyalties within and outside the federal framework. Growth of militancy and rise of terrorism in several countries of the region pose a further threat to their national security. All these factors individually or in combination have the potential to dislocate population in these countries. Spillover of domestic crisis across borders is not surprising in the region, which has cross border affinity of ethnic, linguistic and religious groups.

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[17] Nancy Jetley,"Introduction", Nancy Jetly ,(ed.), *Regional Security in South Asia*, (New Delhi, 1999), p. vi

[18] ibid, p .x

Forced migratory movements have become a chronic problem in South Asia. Refugee movements put social and economic pressures on receiving countries and become a source of tension and violence in the society.

MAIN CAUSES FOR REFUGEE GENERATION IN SOUTH ASIA

The phenomenon of refugee movements in international relations is as old as the emergence of nation state. Movement of people has been an age-old phenomenon, but the forcing out of people from their established and known habitat emerged with the birth of the territorial nation state, gradually assuming religious, racial or ideological identity and character. The refugee flows are caused by a complex interaction of political, economic and social forces shaped by both indigenous conditions and external pressures.[19]

In theoretical studies of refugee phenomenon, six broad categories of causal factors have been identified as responsible for creating refugees. These are anti-colonial wars and self determination movements, international conflicts, revolutions, coups and regime changes, ethnic, communal and religious conflicts, creation and restructuring of state boundaries, and population transfers.[20]In South Asia ever since the partition of India in 1947, about 35 million people have been involved in the process of migration in search of security against threat to life or property or against religious or other kinds of persecutions, or in search of work or food. Sometimes they have also been pushed as a result of war or they have left their country on ethnic, racial, ideological or religious grounds. Lately migrations have also been taking place for environmental reasons as well.[21]

In case of South Asia several reasons can be attributed to forced population movements. These are not exclusive categories, as in some cases population movement may be induced due to a combination of these factors.

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[19] Mahendra P. Lama, *Managing Refugees In South Asia: Protection, Aid, State Behaviour and Regional Approach*, (Dhaka, 2000), p. 6

[20] Lok Raj Baral and S.D. Muni,, "Introduction: Refugees, South Asia and Security", in Lok Raj Baral and S.D. Muni(ed.) *Refugees and Regional Security in South Asia,*(New Delhi, 1996) p. 9

[21] Partha S. Ghosh, "Cross-Border Population Movements And Regional Security In South Asia", *Conflict Studies,* Vol. 303, October 1997, pp. 1-27

(i) *Colonial Legacy*:

The breakdown of colonial rule and the rationalisation of some of the colonial legacies resulted in refugee movements in South Asia. The largest of such flows was between India and Pakistan, as a result of partition of British India.[22] The partition of Indian subcontinent in 1947 witnessed one of the largest refugee movements recorded in the world history. About 8 million Hindus and Sikhs left Pakistan to resettle in India while about 6-7 million Muslims left India to settle in the newly created country of Pakistan.[23] In the 1960s, East Pakistan witnessed frequent communal strifes causing an exodus of Hindus to India particularly to the neighbouring Indian states of Assam, Tripura and West Bengal. Altogether, about 18 million people migrated between India and Pakistan during the first two decades of independence.[24]

In some countries the withdrawal of colonialist powers brought down the stability that in some ways existed in these countries. A vacuum was created at the centre, which was filled by the authority backed by the majority group. Under these circumstances, in multi-cultural and multi-ethnic societies that they are, the minorities were purged out in an attempt at nation building. These caused major refugee flows from these countries.

In the early part of the century when Burma was a part of British India, substantial numbers of Indians settled in Burma. By 1852, the Chettiyars of Tamil Nadu had started their Banking business in the country. The influx of Indians picked up sharply with the increase in the number of rice mills throughout Burma, since the Burmans were not keen on working in the rice mills. Between 1891 to 1931 the Burma's overall population rose by 81%, while the population of Indians in Burma grew by 143%.[25]

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[22] Lok Raj Baral and S.D. Muni, n.20, p. 9

[23] Mahendra P. Lama, n. 19, p. 1

[24] Partha S. Ghosh, n.21, pp. 1-27

[25] Subir Bhaumik, "The Returnees and the Refugees: Migration from Burma", in Ranabir Sammadar (ed.), *Refugees and the State: Practices of Asylum and care in India, 1947-2000*, (New Delhi and London, 2003), p.187.

But the predominance of Indians particularly in trade and the professions and also in the constabulary evoked bitterness among the Burmese. After Burma became independent in 1948 the new government moved quickly to Burmanise public services. Indian employees in government services were told to leave, Burmese was made the official language and only few Indians were granted citizenship.[26] The feeling of insecurity among the Indian settlers began to grow and in 1949-50 the number of Indian settlers returning was 21,198.[27] When General Ne Win came to power through a military coup in 1962, he introduced the 'Burmese way to socialism'. By 1963 all banks were nationalised and the Indian banks were covered under this. At this time an estimated 1,50,000 Indians, mostly of South Indian origin returned to India.

Likewise in Sri Lanka a large number of persons of Indian origin were rendered stateless as a result of the Citizenship Acts of 1948 and 1949 which deprived them of their citizenship.[28] Under these Acts Sri Lankan Citizenship could be granted only to such a person whose father or grandfather were born in Sri Lanka. As a result, ninety-five percent of the estate workers, who were brought by the British from the Southern State of India in the 19th century, were disenfranchised. The government's attitude towards the estate workers was the outcome of their anxiety that the Sri Lankan Tamils and the Indians would together outdo them politically. However, the Sri Lankan government at no point of time used force to repatriate them.[29]

The foregoing examples project the ways in which the dominant community, in the wake of withdrawal of the colonial authority, enforce their supremacy and gradually impose their policies on the rest. Those whose interests have been negated usually have no other way but to return to their native country, where they are considered unwanted returnees.

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26 Myron Weiner, "Rejected Peoples and Unwanted Migrants in South Asia", *Economic and Political Weekly*, August 23, 1993, p. 1738

27 Subir Bhaumik, n.25, p. 190

28 Lok Raj Baral and S.D. Muni, n.20, p. 10

29 Myron Weiner, n.26, p. 1738

(ii) *Failure of Nation Building:*

The second category of factors responsible for generating refugees in South Asia is related to state and nation building processes which precipitated not only political, ethnic and religious conflicts but created economic and environmental conditions that forced people to migrate within or outside their respective countries.[30] Most of the states in South Asia began with secular and impartial ideas but later started towing the line of the dominant and governing social groups as evident in the case of Pakistan, Bangladesh, Sri Lanka, Bhutan, etc. These acts adversely affected the interests, well being and security of the minority communities in these countries. In the long run it led to their alienation. A number of refugee flows have been generated by this factor in South Asia. The flow of refugees from East Pakistan to India in 1971, South Bhutanese refugees in India and Nepal, Indian repatriates from Myanmar, Rohingyas and Arakanese refugees in Bangladesh, Kashmir refugees in Pakistan, etc. come under this category.[31]

The creation of Pakistan as two territories on either side of India caused problems right from the beginning. The denial of democratic right to the East Pakistan based Awami League to form the government following its victory in the 1970 general elections sharpened the already existing political divide between the East and west wings of Pakistan. This resulted in the liberation movement in East Pakistan. This movement invited massive aggression from Pakistan military causing the exodus of 10 million refugees to India. Subsequently in 1975 upto the assassination of Mujib-ur-Rahman, the first Prime Minister of Bangladesh. The communal violence that followed forced around 1.22 million Hindus to flee Bangladesh.[32]

Another example is the deliberate intention of the leaders of post liberation Bangladeshi regimes to change the demographic composition of Chittagong Hill Tract (CHT) in an attempt to thwart the demand of indigenous Chakmas for more administrative autonomy.[33]

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[30]   Lok Raj Baral and S.D. Muni, n.20, p. 11

[31]   These cases are explained in the successive sections of this chapter.

[32]   Partha S. Ghosh, n.21, pp. 1-27

[33]   Mahendra P. Lama, n.19, p. 7

The CHT in South Eastern Bangladesh covers an area of approximately 5093 sq. miles and about 10% of the total area of Bangladesh. This area is bounded by the Indian states of Tripura on the north and Mizoram on the east and Burma on the south-east.[34] The relations between the hill dwellers and those from the plains have always been strained due to various divisive factors like government-initiated migration, developmental projects, militarisation and curtailment of their autonomy in terms of self- administration.[35] During the British rule CHT was governed by the CHT Administrative Act, 1900. Under this Act differential and special treatment was provided to the residents of the district. After partition as a part of Pakistan the CHT lost its special status and autonomy under an amendment to the Pakistan Constitution in 1963.

On the eve of partition due to their non-Muslim character they opted for merger with India. But the Rad Cliffe award went in favour of Pakistan. Subsequently these people were given unfair treatment, systematically alienated and exploited.[36] The condition of the tribal population of this region was further deteriorated with the construction of Kaptai Hydro Electric Project. At least 54,000 acres of cultivable land, mostly settled by the Chakma tribe were lost in 1957 when government began the construction of the Karnaphuli Hydroelectric Project. Over 400 square miles of land were submerged with far reaching effects on the economy and lifestyle of the tribal inhabitants of that area. Some 100,000 people lost their homes and prime agricultural land. The compensation for lost land was inadequate and over 40,000 Chakmas crossed border to India. The tribal people hardly benefited from the industrialisation of Bangladesh. Tribal employment in major projects like the Kaptai Dam and Chandraghona Paper Mills has been less than 1.6%.[37]

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[34] Syed Aziz-al Ahsan and Bhumitra Chakma, "Problems of National Integration in Bangladesh: The Chittagong Hill Tracts", *Asian Survey*, Vol. XXIX, No. 10, October 1989, p. 961.

[35] D.C. Burman, "Regionalism in Bangladesh: The Study of Chittagong Hill Tracts" in Ramakant (ed.), *Regionalism in South Asia*, (Jaipur, 1983), p. 120.

[36] Navin Mishra and Sudhir Kumar Singh, *Status of Minorities in South Asia*, (New Delhi, 2002), p. 99

[37] Mohd. Humayun Kabir, "The Problems of Tribal Seperatism and Constitutional Reform in Bangladesh", in Iftekaruzzaman (ed.), *Ethnicity and Constitutional Reforms in South Asia*, (New Delhi, 1998), p. 16

In the post liberation period, the Bangladeshi regime started settling the Bengali non-tribal population in the CHT region. These settlers backed by the coercive authority of the state perpetuated atrocities on the Chakmas who fled to India. Several rounds of atrocities and massacre inflicted on the Chakmas led to their mass exodus in 1986.[38] Since then the tribal leaders have been engaged in preparing for political and even military mobilisation to challenge the Government of Bangladesh.

Similarly the ethnic policies followed by the monarchy of Bhutan has forced a large number of minority Lhotshampas to leave the country and take refuge in Nepal and India. The monarch of Bhutan has been dominated by the Buddhists Drukpas. The southern Bhutanese, mostly of Nepali origin who migrated from India and Nepal over the years not only lived under restrictions of movement and residence, but were also denied due share in political and economic decision making. In an attempt to reduce the influence of southern Bhutanese a policy of Bhutanisation (Driglam Namza) was initiated in 1988. As a result of this more than 100,000 refugees left Bhutan to asylum outside their country.[39] Besides this the members of Druk National Congress, mainly consisting of Sarchops, have been forced out by the monarchy for demanding implementation of democracy.[40]

In modern states the rights of the weaker sections of the population in a nation state, those of minorities, of the poor and the displaced are often ignored or encroached upon by the powerful state machinery, the powerful class or an ethnic community which is on a rampage.[41] These states have devised their policies in complete disregard of the necessities and aspirations of the marginal people. Often development in these countries takes place at the cost of these communities.

(iii) *Inter Ethnic Conflicts*:

Among the number of inter ethnic conflicts that exist in the state of South Asia perhaps none has been as vehement in demanding a separate nation state as the Sri

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[38]   Sanjay K. Roy, n.14, p. 29.

[39]   Lok Raj Baral and S.D. Muni, n.20, p. 14.

[40]   Partha S. Ghosh, n.21, pp. 1-27.

[41]   Sanjay K. Roy, n.14, p. 18

Lankan Tamil movement for a separate Elam. The first flow of Sri Lankan Tamil refugees to India in 1980s was directly linked with this conflict. The anti-Tamil riots of 1983 forced about 30,000 Sri Lankan Tamils to take refuge in the neighbouring state of Tamilnadu.[42] Since then there has been a continued flow of Sri Lankan Tamils to India some of whom have settled permanently in India. According to the UNHCR estimates there are 64,000 Sri Lankan refugees residing in India.[43]

In Sri Lanka Sinhalese constitute 74% of the population, Tamils 18.2% and Muslims 7%.[44] The reasons for the present turmoil in the Sri Lankan state and the consequent refugee movement can be traced back to the colonial period. Sri Lanka has two distinct Tamil populations: the Sri Lankan Tamils who migrated to the northern and north eastern parts of Sri Lanka in the 10th century and Sri Lankan Indians who were taken as estate labourers in the Kandyan Highlands by the British in the 19th century. These estate workers were predominantly Tamil speakers from South India. The Sri Lankan Sinhalese regarded the Indians as unwelcome migrants who should return home. Sinhalese political leaders opposed granting voting rights to the estate workers as recommended by the British Donoughmore Commission.[45] The Sinhalese also resisted Tamils who due to their knowledge of English language were able to secure larger share of public employment in the British administration.[46]

With the independence of Sri Lanka, the new Sri Lankan administration started taking consistent measures to alienate the Indian population. The Ceylon Citizenship Act of 1948 and the Indian and Pakistani Residents (Citizenship) Act of 1949 disenfranchise the estate workers. The new citizenship law defined a Sri

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[42] Partha S. Ghosh, n.21, pp. 1-27.

[43] UNHCR, Quarterly Refugee Trends, January -September 2002, UNHCR Geneva, 24 December 2002.

[44] Shelton Wanasinghe, Devolution in a Multiethnic Society, (Colombo, 1995), p. 4

[45] The Donoughmore Commission appointed by the British in 1928 introduced drastic changes in the system of representation in Sri Lanka. It recommended that franchise be given to anyone who had resided in Sri Lanka for at least 5 years. All adults over the age of 21 were granted franchise.

[46] Chelvadurai Manogarn, Ethnic Conflict and Reconciliation in Sri Lanka, (Honolulu, 1987), p.4.

Lankan citizen as somebody whose father or grandfather was born in Sri Lanka. The Citizenship Act disenfranchised 95% of the estate workers.

In the post independence period the Sinhalese Government adopted measures to negate the standard of Tamils in Sri Lanka. This was done through a number of policies. The 1956 Official Language Act declared Sinhala as the only official language of Sri Lanka. This was clearly an Act to sideline the Tamil group. This Act which replaced English with Sinhalese as the language of administration, took its toll of Tamil public service. Further the electoral principles of 'one man one vote' and 'first past the post' winning the seat, gave the Sinhalese an advantage considering their numerical preponderance in the island.[47] Together all these policies led to the alienation of the Tamils and the subsequent ethnic conflict in the island nation.

(iv) *Open Borders:*

Most of the boundaries in South Asia are porous. There are few natural boundaries, mountains or rivers that separate one country from other. These boundaries are often long and heavily populated on both sides. It is exceedingly difficult for the government to patrol all its boundaries.[48] For example, India has a long international land border of almost 14,400 kilometres which has a whole variety including open, porous, closed and fenced. The governments in South Asia also lack the administrative, military or political capacity to enforce rules of entry.[49]

On both sides of the borders people share a common language or religion and feel a sense of common ethnic identity. Individuals who cross borders can often very easily merge with the local community. Moreover, countries in the region do not have effective systems for identifying their own citizens. Birth registration is not compulsory. Land owners and urban employers are not required to check the legal antecedents of their employees. Further, the immigrant communities, both refugees

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[47] Edward Appathurai, "Communal Politics and National Integration in Sri Lanka" in Milton Israel (ed.), *National Unity: the South Asian Experience*, (New Delhi, 1983), pp. 215-23.

[48] Myron Weiner, n. 26, p. 1743

[49] Mahendra P. Lama, "E- Interviews", in C.R. Abrar and Shahdeen Malik(ed.), *Towards National Refugee Laws in South Asia*, (Dhaka, 2000), p. 25

and economic migrants often have local political allies who prevent the host government from taking measures of forced repatriation.[50]

The open border between India and Nepal has resulted in cross border migrations. The Nepalis have migrated largely to the North Eastern States of India and the northern districts of West Bengal and Uttar Pradesh. The Indian census reports show that the Nepal born population of India increased significantly after 1951. Like the Nepalis in India, the Indian population in the Terai region of Nepal has also been growing. In 1952 to 54 the growth rate of the Terai region was 2.4% during 1971 to 81 it rose to 4.11% while the growth in other regions was in the range of 1.5% during the same period. This population growth rate in Terai region has been partly attributed to the Indian migration.[51] Further, the 1950 treaty of peace and friendship between India and Nepal provided for mutual grant of residence, ownership and property, participation in trade and commerce, movement and other privileges of similar nature.[52]

Like the Indo-Nepal open border, the border between India and Bangladesh is also virtually open. The international boundaries between these two countries hardly give the impression of any division due to the mixed population across either side of the border. Ten districts of West Bengal share borders with Bangladesh. These are Cooch-Behar, Jalpaijuri, Darjeeling, North Dinajpur, South Dinajpur, Malda, Murshidabad, Nadia, North 24 Parganas and South 24 Parganas.[53] These districts have population growth rate higher than the rest of the State, which is attributed to migration from Bangladesh.

Another category of clandestine migrants is that of Pakistanis and Indians who cross the borders of Rajasthan and Gujarat in India and Punjab and Sindh in Pakistan. People living in these bordering areas often have kinship ties across the border. Smuggling, drug and arms trafficking take place regularly across these

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[50] Myron Weiner, n. 26, p. 1743

[51] Partha S. Ghosh, *Migrants And Refugees in South Asia: Political and Security Dimensiors,* (Shillong, 2001), p. 6

[52] Myron Weiner, n. 26, 1993, p. 1742

[53] Ranabir Samadar, *The Marginal Nation: Trans-border Migration from Bangladesh to West Bengal* (New Delhi, 1999), p.17

borders.[54] Taking advantage of the porous border there has been a constant flow of Muslims from the Indian States of Bihar and Uttar Pradesh to Pakistan.

Another virtually open border situation exists between India and Myanmar. Eastern Mizoram adjoins Myanmar. Burmese nationals come as a matter of routine to Chhimtuipui district in southern Mizoram as daily wage labourers or for shopping and medical treatment.[55]

These kinds of cross border population movements are becoming a major cause of concern especially in the context of increasing incidences of cross border terrorism, drug trafficking and smuggling.

(v) *Developmental and Environmental Refugees*:

In recent times a large number of people in South Asia have been forced to move out because their place of habitation has become unfit for living. These are results of both man made and natural factors. Environmental refugees have been defined by Ehsaan El Hinnawi in his report prepared for UNEP as "those people who have been forced to leave their traditional habitant temporarily or permanently because of a marked environmental disruption, natural and/or triggered by people that jeopardise the existence and/or seriously affect their quality of life".[56]

South Asian region is one of the poorest and highly and densely populated regions of the world. This creates enormous stress on the natural environment. A large section of the population is land less, agricultural productivity is low and poverty is endemic. The increasing demand for land leads to de-forestation which in turn results in soil erosion, siltation of rivers, etc. Increasing population also puts pressure on water resources thereby depleting them. This rapid deterioration of environment results in massive exodus of environmental refugees either to urban areas or neighbouring countries. Besides these cyclones, storms, droughts, earth

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[54]   Partha S. Ghosh, n.51, p. 10

[55]   ibid, p. 12

[56]   Quoted in Narottam Gaan, *Environmental and National Security: Case of South Asia*, (New Delhi, 2000), p.5

quakes and land slides which affects South Asia also displace a large section of population.

Bangladesh with an area of 145,000 square kilometers and a population of 120 million lies in the flood plains of three great rivers - Jamuna, the Ganges and Meghana. Riverbank erosion, which is a persistent problem in the country, causes displacement of hundreds of thousands of people annually. Approximately 50% of all rural households are functionally landless, owning less than 0.2 hectares each. According to one survey about half the people who are landless today have lost their land during the last two decades which indicates the severe frequency of natural disasters.[57] Further, sea level rise as a result of global warming poses as a potential reason for intensification of population displacement in Bangladesh. According to a Asian Development Bank study, a 45 to 50 cm rise in sea level will submerge around 11 % of the countries land area by 2070. As a result 38 upazilas of the districts of Satkhira, Khulna, Bagerhat, Jhalakathi, Barguna, Patuakhali, Barisal, Bhola, Lakhipur, Naokhali, Chittagong and Cox's Bazar will be affected by this rise of sea level. Consequently, approximately 5 to 7 million people will be displaced.[58]

Maldives, coastal regions of India and Pakistan and parts of Sri Lanka are also prone to submergence in the event of sea level rise. It is estimated that in the event of sea level rise, large parts of Maldives will be submerged. The environmental refugees resulting from this would migrate to the Indian sub-continent for refuge.[59]

In large parts of South Asia population has been displaced due to developmental intervention where large parts of their lands have been taken up for developmental purposes or has been destroyed due to them. In Bangladesh, the construction of

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[57] Shashanka Saadi "1998 flood induced displacement: A Case Study of Jamalpur" in C.R. Abrar and M.P. Lama (ed.), *Displaced Within Homelands: The IDPs of Bangladesh and the Region*, (Dhaka, 2003), pp. 33-34.

[58] K.B. Sajjadur Rashid, "Climate Change and Sea Level Rise: Implication for population Displacement from the Coastal Regions of Bangladesh", in C.R. Abrar and M.P. Lama (ed.), *Displaced Within Homelands: The IDPs of Bangladesh and the Region*, (Dhaka, 2003), p. 72

[59] Narottam Gaan, n.56, p. 57.

Kaptai hydroelectric project in 1962 submerged 54000 acres of settled and cultivable land affecting about 100,000 people majority of whom were Chakmas.[60]

In India, massive land acquisition for construction of industrial projects, dams, roads, mines, power plants and new townships in the post independence period resulted in huge displacement of population. Over 21,000 families were uprooted and ousted during the construction of Pong dam in Himachal Pradesh. Even after 25 years, these people have not been properly rehabilitated. The Sardar Sarovar project is likely to displace 200,000 people mostly adivasis, flood thousands of hectares of land because of backwater effect and cause high seismic tensions.[61]

The most disturbing feature in these kinds of displacement is the fact that their status as refugees is not recognised. The states in South Asia lack the capability to assist and rehabilitate these disasters and development induced displaced persons. Under these circumstances their fate remains undecided.

(vi) *Stateless Persons in South Asia*:

There is also a category of persons who having lost the citizenship of their erstwhile state have become "stateless". The Sri Lankan Indians and Tamils in Sri Lanka, Chakma and Hajong tribals and the Biharis of Bangladesh fall under this category. Around 900,000 Tamil plantation workers from South India were taken to Sri Lanka by the British colonial powers in the 19th century to work in the tea plantations in the Kandyan highlands. The Sri Lankan Sinhalese regarded these Indians as unwelcome migrants who should return home.

After independence Sri Lanka adopted a new Citizenship Act which defined a Sri Lankan citizen as a person whose father or grand father was born in Sri Lanka. This disenfranchised 95% of the estate workers.[62] The government of Sri Lanka wanted the Indian government to take them back. In 1954 India and Sri Lanka

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[60] Partha S. Ghosh, n.51, p. 14

[61] Mahendra P. Lama, "IDPs in India: Causes, Protection and Management Dilemma, in C.R. Abrar and Mahendra P. Lama (ed.), *Displaced Within Homelands: The IDPs of Bangladesh and the Region*, (Dhaka, 2003), pp. 157-60

[62] Myron Weiner, n. 26, p. 1738.

signed an agreement (The Nehru - Kotelawala pact) which provided that the Indian government would accept the Indian Tamils who wished to become citizens of India, the Indian government rejected the Sri Lankan government position that those who did not qualify for Sri Lankan citizenship should automatically be given Indian citizenship. This agreement read in conjunction with the Ceylon Citizenship Act of 1949 created a category of stateless people. Subsequently under the Indo-Ceylon Agreement of 1964 India agreed to take 525,000 Sri Lankan Indians while Sri Lanka in turn agreed to grant citizenship to 300,000. The government of Sri Lanka was eager to see the repatriation of the estate workers for two political reasons. Firstly, they were anxious that the Sri Lankan Indians might form a political alliance with the Sri Lankan Tamils, thereby threatening the political supremacy of the Sinhalese. Secondly, the Sri Lankan government was apprehensive that if it retained such a large number of Indians, it would pave way for the intervention of the Indian Government in the Internal affairs of Sri Lanka.[63]

In India, the Chakma and Hajong tribals who were settled in mid sixties by the government of India in the former North East Frontier Agency (NEFA) and present day Arunachal Pradesh are yet to be granted Indian citizenship.[64] The Chakmas who are the one of the 13 indigenous tribal communities of CHT differ from the Bengalis in three ways. Firstly, they are of Sino-Tibetan descent. Secondly, their language is more akin to those spoken by their neighbours in North-East India and Burma. Thirdly, they are predominantly Buddhists. Under the British administration, CHT was considered an excluded area status which was ended in 1964 by the Pakistan Government. During the 1971 civil war some Chakmas were recruited by the Pakistan army and were regarded as Pakistani collaborators by the Bangladesh authorities. Gradually the Bangladesh government started allocating funds to thousands of Bangali families to settle in the tracts. The Bengali population of CHT which was only 2.5% of the total population of the region in 1947, rose to 10% in 1951 and to 35% by 1981.[65] The Chakmas formed the CHT Peoples' Solidarity Association (PCJSS) which called for regional autonomy and

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[63] Ibid, p.1739

[64] Refugees in South Asia: A Brief History, *www.mnet.fr/aiiindex/ Refugee-watch/ref.html*

[65] Raja Debasish Roy, Mehgana Guhathakurta, Ameena Mohasin, Prashanta Tripura and Phillip Gain, *The CHT: Life and Nature at Risk* (Dhaka, 2000), p. 5.

ban on further Bengali immigration. When the government rejected their demand, they launched an armed insurgency through their armed wing, Shanti Bahini. As the Bangladeshi troops retaliated, many Chakmas fled across the Indian border to Tripura and Mizoram.

The liberation of Bangladesh in 1971 left 300,000 "stranded Pakistanis" in Dhaka. They were primarily Bihari Muslims who migrated to the erstwhile East Pakistan in 1947 from the Indian State of Bihar. During the 1971 civil war these Biharis supported Pakistan. At the time of liberation many crossed over to Pakistan but the rest were stranded in Bangladesh. Since these people supported the Pakistani authorities they were looked at with contempt in liberated Bangladesh. Most of them expressed the desire to move to Pakistan. In 1974 under a tripartite agreement between India, Pakistan and Bangladesh, Bangladesh repatriated 170,000 Biharis to Pakistan. The rest are still in Bangladesh. Further repatriation was not allowed by the Sindhi community in Pakistan, they feared that these Biharis would eventually migrate to Karachi and join the Muhajirs community there.

(vii) *External Refugees*:

Another category of refugees in South Asia relates to the developments outside the region. Such refugees have come to south Asia from Tibet, Afghanistan and Burma. Tibetan refugees started arriving in India in 1950 due to Peoples Republic of China asserting its sovereignty over Tibet. These refugees fled due to fear of persecution, physical torture, forced sterilisation, destruction of families, etc. by the Chinese authorities.[66] Over 98000 Tibetans have been successfully settled in India. Nepal also hosts around 30,000 Tibetans.

Soviet intervention in Afghanistan in December 1979 resulted in the huge inflow of Afghan refugees into Pakistan. Between April 1978 and December 1979, an estimated 193,000 had come to Pakistan to seek asylum. [67] As per UNHCR estimates, Pakistan hosts 1,673,323 Afghan refugees while 11,972 Afghan refugees are hosted by India.[68]

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[66] Mahendra P. Lama, n.19, p. 9

[67] Lok Raj Baral and S.D. Muni, n.20, p. 21

[68] *Quarterly Refugee Trends*, January -September 2002, UNHCR Geneva, 24 December 2002

Burma has been the third extra regional source of refugees in South Asia. Massive flows of Rohingya Muslim refugees to Bangladesh took place in 1978 and in early 1990s. At present there are 22,097 Myanmarese refugees in Bangladesh and 876 in India.[69]

DETERMINANTS OF GEOGRAPHICAL DESTINATIONS

Most of the refugees generated in South Asia are absorbed within the region itself. Three factors determine this. These are:

(i) easy accessibility of borders to be crossed.

For example the Rohingyas of Myanmar crossing over to the nearest border of Bangladesh, or Afghans in the North-West Frontier Province.[70] The map below shows the geographical contiguity of the region.
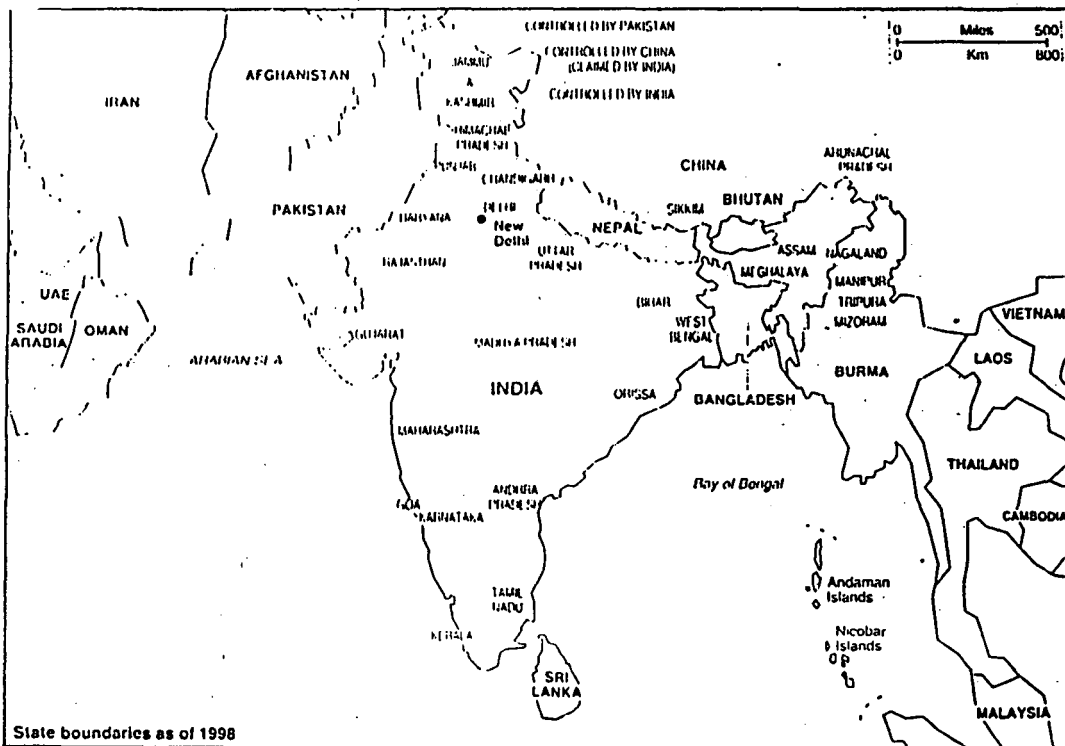
Source : Shrinking Space: Minority Rights in South Asia, South Asia Forum for Human Rights, New Delhi, 1999, p.4

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[69] ibid

[70] Mahendra P. Lama, n.19, p. 14

(ii) cultural and linguistic affinity which can be easily discerned in the exodus of Nepali speaking Lhotshampas from Southern Bhutan to Nepal or Sri Lankan Tamils to Tamil Nadu.[71] A large number of Sri Lankan Tamils, the descendents of ethnic Tamils who had migrated to Sri Lanka in the 10th century, sought refuge in India in the wake of the civil war in their country. These Tamils were easily integrated into the society of Tamil Nadu due to their ethnic and cultural similarities.

(iii) political support of the host government also have a bearing on the refugees destination of asylum. This is evidenced in the inflow of Bangladeshi refugees to India during the liberation struggle. The Afghan refugees in Pakistan, Bangaladeshi and Sri Lankan Tamil refugees in India had the active support of the host. They obtained arms from their hosts and found local allies among the members of their own ethnic group. Afghan warrior refugees have become involved in Pakistan politics, working with military intelligence and the Pathans in the North-West Frontier Province. In 1971 Bangladeshi insurgents established closed ties with West Bengal government and similarly Sri Lankan Tamils received support from the government of Tamil Nadu.[72]

CATEGORIES OF REFUGEES IN SOUTH ASIA

Categories of refugees in South Asia can be classified into three on the basis of their place of origin.

(a) South Asian countries host a large number of refugees from countries outside the region. The majority of these are from Afghanistan, Burma and Tibet. A large number of Afghan refugees, who fled their country after the Soviet intervention in 1979, are settled in Pakistan and India. Nepal and India host a large number of Tibetan refugees who fled Tibet in 1959 after the Chinese occupation of that country. Presently there are 92,300 Tibetans in India and 20,300 in Nepal.[73] The Burmese refugees can be found in Bangladesh, India and Nepal. They are also a result of atrocities on the minorities by the majority

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[71]   V.T. Patil and P.R. Trivedi, *Refugees and Human Rights,* (New Delhi, 2000), p.259

[72]   Myron Weiner, n. 26, p. 1744.

[73]   *Quarterly Refugee Trends,* January -September 2002, UNHCR Geneva, 24 December 2002

regime. Besides there are refugees from other parts of the world like Somalia, Iranians, Vietnamese, Iraqis, etc. Most of the are assisted by UNHCR.

(b) Almost all the South Asian countries are multi-ethnic, multi-cultural and multi-linguistic. All these countries are ridden with the problem of conflicts on the basis of religion, ethnicity, region, language, culture, etc. Undoubtedly, these conflicts have generated massive number of refugees. Most of the refugee movements from the South Asian countries have either been internal or regional in nature. Apart from the Sri Lankan Tamils, only a few Indians, Bangladeshis and Pakistanis have sought refuge beyond the region.[74] The Sri Lankan Tamils moved to India, Nepalese speaking southern Bhutanese moved to Nepal and Bengali speaking Bihari Hindus sought refuge in the eastern states of India. Cultural and linguistic similarities within the countries of the region, geographical contiguity, porous borders, easy accessibility and sympathies of the governments in the neighbouring countries have been the crucial factors that motivated refugees to move within the region.

(c) There are also a number of refugees in South Asia who due to their inability to cross the international borders remains displaced within the territory of their own countries. The problem of IDPs in South Asian region is rampant but the problem is hardly acknowledged. Various causes are attributed to internal displacement of population. Around 30 million people in South Asia are displaced because the land that they inhabited had been taken away for installation of such projects as mines, dams and industries, wild life sanctuaries, etc.[75] Added to this are those ethnic minorities who have been deported by the majority ethnic community. Border skirmishes especially those between India and Pakistan have also created a large number of IDPs in the sub-continent. Increased population pressure, rising unemployment and environmental degradation have also created a substantial number of IDPs in South Asia.

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[74] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n. 1, p. 127.

[75] Samir Das, Sabya Sachi Basu Roychaudhary and Tapan K. Bose, "Forced Migration in South Asia: A Critical Review" *Refugee Survey Quarterly*, Vol.19, No. 2, 2000.

COUNTRYWISE PROFILE OF REFUGEES

1) Bangladesh

Bangladesh is a frontier region of South Asia. History and geopolitics have combined to make Bangladesh a land of shifting frontiers and fluid population movements.[76] Bangladesh is both a refugee receiving and refugee producing country. According to the US Committee for Refugees' World Refugee Survey, 2002, in 2001 Bangladesh hosted approximately 122,000 refugees. Of these 22,061 were recognised as Rohingya from Burma and 112 persons from Somalia, Seirra Leone, Iran and other countries by the UNHCR. An estimated 60,000 Chakmas and Jummas were internally displaced in Bangladesh. An unknown number of Hindus and other minorities were displaced at the year's end as a result of post election violence that began in October.[77]

In the twentieth century the political frontier of East Bengal moved twice in three decades, once to become a part of Pakistan and again to become the independent state of Bangladesh. Both these events led to massive displacement of population. The partition of India was based on religious lines. The existence of Pakistan on either side of India, divided by its large territory, had caused administrative, political and integrational problems right from its inception. After independence, the religious similarity that had formed the foundation of the new state of Pakistan was replaced by linguistic animosity. In the initial years itself the tussle between the Punjabi and Bengali nationalism emerged. West Pakistan gradually started dominating eastern wing in all aspects. Eastern part, which had 53% of the population, demanded its share in administration. Considering the rising Bengali nationalism, the Pakistani government started taking coercive measures to control them. Awami League and Hindus were regarded as agents of Indian government.[78] The denial of West Pakistani Authorities to let the Awami League form the government after winning the 1970 general elections in Pakistan led to violent protests. The Bengali guerrillas were trained, armed and logistically supported by

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[76] Meghana Guhathakurta, "Bangladesh: A Land Of Shifting Population", in Tapan K. Bose and Rita Manchanda(ed.), *State, Citizens and Outsiders,*(Kathmandu,1997), pp.111-37

[77] *World Refugee Survey,* 2002, US Committee For Refugees, www.unhcr.ch

[78] Meghana Guhathakurta, n. 76, pp.111-137

the Indian government. [79] Around 10 million Bengalis took refuge in India during the liberation struggle. Most of them moved to the neighbouring Indian states of Assam and West Bengal.[80]After independence of Bangladesh, most of these refugees were able to return to their homes mainly due to the international help.[81]

The emergence of Bangladesh created a category of refugees called the Bihari Muslims, who neither supported the liberation struggle nor consider themselves as citizens of Bangladesh. Biharis are the people of Indian State of Bihar. In 1947, the population of Bihar numbered around 30,000,000 of whom about 4,000,000 were Muslims.[82] Following the anti Muslim riots of 1946, 1.3 million moved to Pakistan out of which 700,000 chose to settle in East Pakistan.[83] However, these Urdu-speaking Biharis could never completely integrate in the Bengali Socio-political milieu of East Pakistan.

With the breaking up of Pakistan and the creation of the new state of Bangladesh, these Biharis were displaced for the second time, giving rise to their international status as refugees.[84] Their role in favour of the Pakistani army during the liberation movement precipitated retaliation against them, both during and after the liberation. Many Biharis left for Pakistan during 1971. Many more wanted repatriation to Pakistan. During 1972-73, 170,000 non-Bengalis were repatriated to Pakistan under the aegis of the International Committee of Red Cross. However, between 250,000-300,000 Biharis were stranded in camps in Bangladesh. The issue of legal status of these Biharis revolves around their stated desire to migrate to Pakistan on the one hand, and the reluctance of both Pakistan and Bangladesh to grant them citizenship on the other.[85] According to the World Refuge Survey, 2002 Of US Committee on Refugees, an estimated 240,000-300,000 Biharis are residing in Bangladesh.[86]

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[79] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n.1, p. 143

[80] Satish Kanitkar, , *Refugee Problems in South Asia,*(New Delhi, 2000), p. 48

[81] ibid, p.49

[82] Satish Kanitkar, n.80, p.53

[83] Meghana Guhathakurta, n. 76, pp.111-137

[84] Sumit Sen, "Stateless in South Asia", *Seminar* Vol. 463, March 1998, pp.49-55

[85] Satish Kanitkar, n.80, p.53

[86] *World Refugee Survey,* 2002, US Committee For Refugees, *www.uhhcr.ch*

Apart from these a large number of Bangladeshi minority groups, mainly Hindus migrated to India in the post liberation period. Bangladesh's population is approximately 88% Muslims, 11% Hindus and 1% others.[87] Though the post liberation government of Bangladesh talked of secularism, with the change in regime in 1975, this provision was scrapped altogether. The Eighth Constitutional Amendment of 1988 proclaimed Bangladesh as an Islamic State. Besides this, the various acts initiated by the government, like the Enemy Property Act of 1965, further alienated the minorities. A surge of fundamentalist parties from the early 1990's aggravated the communal situation. After the coming to power of the Right Wing Bangladesh National Party in 2001, an estimated 5000-20,000 Bangladeshi Hindus and other minorities fled to India to escape post election violence against the minorities.[88]

The plight of the tribals and indigenous people of the Chittagong Hill Tracts (CHT) has been and continues to remain the darkest episode in national integration process of Bangladesh. The CHT cover 10% of the total area of Bangladesh and lie to the south east of the country bordering the Indian states of Tripura and Mizoram and the Arakan state of Myanmar. It is home to 13 different ethnic peoples of which the Chakmas, Marmas and Tripuras constitute upto 90%. They are Buddhists, Christians and animists in a predominantly Muslim country.[89] Despite the predominant non-Muslim population of the region, it became a part of Pakistan after the partition of 1947. Since this time the Chakmas and other non-Muslim tribal groups of CHT have faced extensive and well documented oppression at the hands of the various Islamic governments. In 1964, communal violence and the Construction of the Kaptai Hydro electric dam displaced nearly 100,000 Chakmas most of whom sought refuge in India.[90]

From 1960's onwards the government began to encourage the settling of non indigenous people in the CHT region in order to counter the demands of autonomy by the indigenous people. As a part of this policy, land-less Bengalis from the

[87] ibid, p.57

[88] ibid, p.58

[89] Meghana Guhathakurta, n.76, pp.111-137

[90] Nathan A. Limpert, "People Without a Country", Seminar, Vol. 463, March 1998, pp.41-48

plains were settled in CHT. A 25-year-old civil war ensued between government forces and Shanti Bahini, the armed insurgency group formed to fight for the rights of the indigenous people of CHT. During the period of conflict, the demography of CHT has been changed dramatically. The population of non-indigenous people, which was negligent in the earlier periods, increased to almost 50% of the total population of CHT region.[91]

Bangladesh has an even greater number of IDPs. The number of conflict induced population displacement ranges between 50,000-100,000, whereas those displaced due to natural disaster or developmental projects number around 750,000-100,000.[92] Depleting water resources have threatened the livelihood of farmers and fishermen. The poorest either leaves for urban areas or hilly slopes or even migrate to the neighbouring state of India. Added to this is the problem of floods and cyclones that annually visit Bangladesh. In the 1988-89 floods, 3million housing structures, 2 million hectares of crop and 80% of industrial assets were destroyed. The cyclones of 1970 and 1991 were the most severe. The 1970 cyclone killed 5 lakh people and destroyed 4 lakh houses.[93] Sea level rise due to global warming may also inundate large parts of Bangladesh and might displace 10% of its population. Developmental projects have also displaced large segments of its population. As a result of the Kaptai hydro electric project of the 1960's, about 100,000 indigenous inhabitants of that place were displaced.[94]

Bangladesh has also been host to thousands of refugees from the neighbouring state of Burma. These refugees were the result of the failure of nation building and imposition of majority rule in Myanmar. 69% of the Burmese population consists of Burmans or Bhamas, 8.5% are Shans, 6.2% are Karens, 4.5% Arakanese or Rohingyas and 11.8% others.[95] Among these a sizeable number of Rohingyas are Muslims. At the time of independence and even subsequently, they were not consulted or even considered in the administrative processes. Since 1942, 1.2

[91] *Internally Displaced People: A Global Survey*, Second Edition, (London, 2002), p.110

[92] Janie Hampton(ed.), *Internally Displaced People: A Global Survey*, (London, 1998), p. 138

[93] Narottam Gaan, n. 56, p. 72

[94] Satish Kanitkar, n. 80, p. 25

[95] Imtiaz Ahmad, "Refugees and Security: The Experience of Bangladesh", in Lok Raj Baral and S.D. Muni (ed.) *Refugees and Regional Security in South Asia*, (New Delhi, 1996), p.136

million Rohingyas were either expelled or had to flee the country to escape persecution.[96] During Army General Ne Win's rule from 1962-1988, thousands of Rohingyas were expelled. By June 1978 total of 167,000 Muslim Rohingyas were pushed into Bangladesh.[97] However under a bilateral agreement between the two governments, most of them were repatriated. But around 15000 stayed back in Bangladesh.[98] Again after the reprisals from the State Law and Order Restoration Council (SLORC) regime, some 250,000 Rohingyas fled to Bangladesh.[99] Attempts at bilateral negotiations were made again. The presence of Rohingyas in Bangladesh was creating domestic problems. Between mid-1992 and 1999 more than 250,000 Rohingyas were repatriated. These repatriations were stopped after complaints that these repatriations were forced and not voluntary. As per the UNHCR estimates, there are 22,097 Myanmarese in Bangladesh.[100]

2) Bhutan

The small land-locked Himalayan kingdom of Bhutan is a major refugee generating country of South Asia. An estimated 126,000 persons from Bhutan were living as refugees in neighbouring countries at the end of 2001, including nearly 111,000 in Nepal and more than 15,000 in India.[101] The population of Bhutan consists of four major cultural groups, who had settled in Bhutan in course of a series of migrations through centuries and each distinguished by distinctive socio-religious, linguistic and cultural characteristics.[102] According to informal sources the ruling Drukpa comprises only 16% of the population, the Sharchops 31% and the rest is constituted by the Lhotshampas, who are the Nepali speaking Southern Bhutanese.[103] The present refugee crisis of Bhutan is the result of the policy of the government to impose Drukpa values and culture. The Buddhist Drukpas have

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[96] Abdul Razzaq and Mahfuz- ul Haq, *A Tale of Refugees: Rohingyas in Bangladesh*, (Dhaka,1995), p. 3

[97] Imtiaz Ahmad, n.95, p. 139

[98] Abdul Razzaq and Mahfuz- ul Haq, n. 96, p. 5

[99] *World Refugee Survey*,2002, US Committee on Refugees, www.unhcr.ch

[100] *Quarterly Refugee Trends*, January- September 2002, *UNHCR*, 24 December, 2002

[101] *World Refugee Survey*,2002, US Committee on Refugees, www.unhcr.ch

[102] Krishna P.Khanal, "Human Rights and Refugee Problems in South Asia: The Case of Bhutanese Refugees", Nancy Jetly (ed.), *Regional Security in South Asia*, (New Delhi, 1999), p. 456

[103] Lok Raj Baral, "Bhutanese Refugees in Nepal: Insecurity for Whom?",in Lok Raj Baral and S.D. Muni (ed.) *Refugees and Regional Security in South Asia*,(New Delhi, 1996), p. 154

historically excluded the Lhotshampas from the country's political and economic mainstream.

The Citizenship Act of 1985, which was implemented in 1988, declared tens of thousands of people who were recognised as Bhutanese citizen, illegal. The 1985 Act revoked the citizenship of Southern Bhutanese who had been recognised as bona fide Bhutanese under the 1958 Nationality Act and the 1977 Citizenship Act of Bhutan.[104] The 1985 Act required them to produce land tax receipt of 1958, knowing very well that nobody would retain those receipts for such a long time. The 1988 Population Census declared at least 100,000 Lhotshampas as illegal immigrants.[105] Besides this Driglam Namza, the Druk code of social etiquette was made obligatory for all communities. Dzongkha language was adopted as the national language and Nepali was dropped from the school curriculum. Further the Marriage Act of 1988 also targeted the Southern Bhutanese who were married to non-Bhutanese. They were also discriminated against in administrative services. All this was justified in the name of one nation, one people policy. But, these measures were taken to curb the influence of the Lhotshampas who were fast outnumbering the other communities.

Apart from the internal dynamics, the developments in the neighbouring state of Nepal conditioned these policies of the Bhutanese government. They feared that considering the majority of people of Nepali origin in Southern Bhutan, that region might also become a part of the Greater Nepal movement. Also after the wave of democracy and human rights in Nepal, the Bhutanese monarchy feared that such movements would begin in Bhutan as well.[106]

The Lhotshampa refugees first fled to India, but were chased away to Nepal by the local authorities in adjoining districts of Darjeeling and Jalpaiguri.[107] UNHCR

[104] Tapan Bose, , *Protection of Refugees in South Asia: Need for a Legal Framework*,(Kathmandu, 2000), p. 44

[105] Mahendra P. Lama, n.19, p. 11

[106] Lok Raj Baral, "Bhutanese Refugees in Nepal: Quest for Confidence Building Measures" *BIIS Journal*, Vol. 20, No. 4, 1999, p. 410

[107] Mahendra P. Lama, n.19, p. 13

estimates point out that there are 111,812 Bhutanese refuges in Nepal.[108] Since 1993, Bhutan and Nepal have been in an impasse over these refugees.

As far as IDPs in Bhutan are concerned, due to the restrictions imposed on the access to international organisations, it is difficult to ascertain the actual number. But studies point out to the existence of a significant number of IDPs in Bhutan.[109] In Bhutan, population displacements due to environmental degradation are potential, not actual. The threat to environment is imminent from increasing population and diminishing forest cover.

3) Nepal

Nepal is primarily a refugee hosting country in South Asia. Nepal hosted nearly 131,000 refugees at the end of 2001. These included 110,780 Bhutanese and 20,000 Tibetans.[110] In addition, Nepal also hosts an unspecified number of refugees from Kashmir, Myanmar, Sri Lanka, China, Iraq, Afghanistan and Somalia.[111]

The policy of forced assimilation by the Bhutanese monarch vis-à-vis the Southern Bhutanese of Nepali origin alienated the latter leading to refugee influx into Nepal. The Bhutanese government adopted a number of legislation and policies to push the Southern Bhutanese out of their country. These were the Marriage Act of 1988, Bhutanisation policy, Citizenship Laws, Compulsory National work, Language policy, Religious policy, Census of 1988 etc.[112] Ethnic Nepali asylum seekers started leaving their country since 1991 and out of an estimated 100,000 refugees, about 85,000 took refuge in the Jhapa and Morang Districts of Eastern Nepal.[113] Since then refugees from Bhutan have been settled in camps in Jhapa, Morang,

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[108] *Quarterly Refugee Trends*, January- September 2002, *UNHCR*, 24 December, 2002

[109] Sumit Sen "Regional Profile: South Asia", Janie Hampton (ed.), *Internally Displaced People: A Global Survey*, (London,1998), p. 138

[110] *World Refugee Survey*, 2002, US Committee on Refugees, www.unhcr.ch

[111] Tapan Bose, n.104, p. 36

[112] Hari Phuyal, "Nepal's Refugee Burden", in Tapan K. Bose and Rita Manchanda (ed.), *State, Citizens and Outsiders*, (Kathmandu, 1997), p. 241

[113] Lok Raj Baral, n. 103, p. 160

Beldnangi and Khudunabari. Due to the inability of Nepal to host such a large number of refugees, it invited international assistance.[114]

The UNHCR along with the Refugee Coordination Unit have taken charge of verification, registration and documentation of refugees seeking asylum. Most of the refugees live in the seven UNHCR assisted camps in Jhapa and Morang districts. Bhutanese and Nepali authorities have entered, into several rounds of negotiations to solve the refugee issue. In December 2000, Nepalese and Bhutanese governments entered into their tenth round of talks on repatriation of Bhutanese refugees. The two governments agreed to establish a Joint Verification Team to identify potential candidates for repatriation.[115]

The government of Bhutan has been worried over the political and economic fallout of the large number of refugees in the camps. Apart from the Bhutanese refugees Nepal has given shelter to more than 18,000 Tibetan refugees since 1959. The establishment of direct Chinese control over Tibet in 1959 resulted in the massive flight of Tibetans to India and Nepal. Initially they entered via the Kodari Highway. Most of the Tibetans live in the 16 refugee settlements across Nepal.[116] The Tibetan community has been culturally and economically integrated in the Kathmandu Valley. Approximately 80% of the refugees are involved in Carpet trade. Since 1960's the ICRC, Swiss Red Cross and UNHCR have assisted the Tibetan refugees in Nepal.[117] The Nepal government does not recognise the new arrivals of Tibetan refugees and does not allow them to remain in Nepal. According to the UNHCR figures there are 20,102 Tibetan refugees in Nepal.[118]

Besides these refugees there are a number of other refugees who have crossed over to Nepal mainly due to the open borders of Nepal. They are mainly Kashmiris, Sikhs, Tamils, Burmese, and Indian migrants. Most of them are residing in and around Kathmandu.[119] There are also a number of Indian seasonal migrants who

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[114] Satish Kanitkar, n. 80, p. 38

[115] *World Refugee Survey*, 2002, US Committee on Refugees,*www.unhcr.ch*

[116] Hari Phuyal, n 112, p. 238

[117] ibid, p. 238

[118] *Quarterly Refugee Trends*, January- September 2002, *UNHCR,* 24 December, 2002

[119] Hari Phuyal, n. 112, pp. 243-46

cross over to the Terai region of Nepal. The 1991 Nepal puts the figure of people of Indian origin in Nepal to be 418,982 and of Indian citizens in Nepal to be 68,489.[120]

In Nepal there is a considerable movement of people from the hilly regions to the plains and from the urban to rural areas. The causes of internal migrations are overpopulation, deforestation, soil erosion, water depletion etc. Developmental projects like hydro electricity projects, dam construction, establishment of wildlife conservation parks and expansion of electric lines have also displaced many people. The foreign funded Kulekhani hydroelectric project of 1963 internally displaced many persons who are still waiting for compensation.[121] Similarly the construction of Chitwan National Park displaced 22,000 people. The Bardia National Park and other wild life parks have displaced 1500 families.

4) Pakistan

Pakistan also has its share of refugees. It hosts the largest number of external refugees (Afghans) in south Asia. At the end of 2001 Pakistan hosted more than 2.2 million Afghan refugees, including some 200,000 who arrived during 2001 and about 18,000 refugees of other nationalities.[122]

At the time of independence about 7 million Muslims migrated from India to Pakistan and about 8 million Hindus and Sikhs migrated from Pakistan to India. Now they were re-settled by either country on the property left behind by those moving out. In spite of this in Pakistan it caused problems in the Sindh province of South West Pakistan. There emerged a tussle between the Sindhis and the urdu speaking settlers. The ethnic riots that followed displaced many.[123] Till 1971, there were large numbers of displacements from East Pakistan to the neighbouring state of India. The repression and persecutions at the hands of Pakistani authority forced many East Pakistanis to leave for India.

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[120] ibid, pp.243-46

[121] Regional Profiles, *Internally Displaced Persons: A Global Survey*, 2nd Edition (London, 2000), p. 146

[122] *World Refugee Survey*, 2002, US Committee for Refugees,*www.unhcr.ch*

[123] Satish Kanitkar, n. 80, p. 46

The struggle for Baluchisthan also uprooted many from their natural habitat. The Baluchis who are a community of tribes who enjoyed autonomous rule under the British had from the very beginning resisted Pakistani administration. The guerrilla warfare between Baluchi and Pakistani troops displaced 300,000 Baluchis.[124] Religious violence between the Shias and the Sunnis has also forced many to move to newer places. During the period of military rule many Pakistanis left the country to Western Europe for safety. The UNHCR reported that 10,751 Pakistanis sought asylum in other countries during 2001. Most fled due to increasing repression in Pakistan. According to Human Rights Watch Pakistan authorities have been suppressing opposition led demonstration, strikes and prosecuting independence NGOs and journalists.[125]

Pakistan regards all refugees, including those recognised by the UNHCR, as illegal aliens. It allows the UNHCR recognised refugees to remain in Pakistan pending repatriation or third country resettlement. But it does not permit them to work or receive free healthcare or education.[126] UNHCR provides the refugees with financial assistance, medical care and scholarship.

The civil war in Afghanistan following the 1979 Soviet intervention led to an exodus of refugees to Pakistan, Iran, India and former Soviet Union. By the 1980s around 3 million Afghan refugees arrived in Pakistan. The military government of Pakistan initially gave a big welcome to these refugees. Reportedly, American intelligence and Government of Saudi Arabia provided material and monitory assistance to Pakistan for training and arming the Afghan mujahideens.[127] As the problem of feeding and housing these refugees emerged, the government sought the assistance of UNHCR, UNICEF, WHO, FAO, etc. Afghan refugees caused many problems in Pakistan. These included terrorism and large scale smuggling of narcotics and arms. Fresh Afghan refugee influx began in June 2000 and accelerated rapidly in October of that year. Pakistan officially closed its borders to new Afghan refugees on November 9, 2000.[128] According to UNHCR, after the

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[124] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n.1, p. 142

[125] *World Refugee Survey*, 2002, US Committee for Refugees, www.unhcr.ch

[126] Tapan Bose, n. 104, p. 40.

[127] Ibid, p.40

[128] *World Refugee Survey*, 2002, US Committee for Refugees, www.unhcr.ch

repatriation of 1,688,143 Afghans during January - September 2002, now there are 1,673,323 Afghans in Pakistan.[129]

Besides this, conflict in Kashmir dating back to the partition of India in 1947 has displaced thousands of people. It is reported that during the 1965 Indo-Pakistan war nearly 500,000 people from Indian Kashmir border districts of Rajouri and Poonch crossed over to Pakistan due to hostile attitude of Indian army. More than 15,000 refugees from Kashmir who have fled to Pakistan since 1991 are living in about 10 camps in Pakistan occupied Kashmir known as Azad and Jammu Kashmir. The Azad and Jammu Kashmir authorities are responsible for their welfare.[130]

5) Sri Lanka

Since its independence in 1948, Sri Lanka has created a large number of refugees. As many as 800,000 Sri Lankans were internally displaced at the end of 2001. Another 144,000 Sri Lankans were refugees in India. Most of the refugees and displaced persons were Hindu Tamils, although thousands of Muslims and some Buddhist Sinhalese were also displaced.[131]

The roots of conflict in Sri Lanka lies in the failure of the post independence governments to accommodate and assimilate the ethnic, linguistic, social and cultural differences in the country. The 18 million population of Sri Lanka is constituted of 74% Sinhalese, 13% Sri Lankan Tamils, 8% Muslims and 6% Tamils of Indian origin. The majority of the Sinhalese are Buddhists and they occupy the south, west and the central parts of the country. The Sri Lankan Tamils who are predominantly Hindu reside in the northeastern part of the country. The Muslims also live in the eastern part while the Tamils of Indian origin inhabit the central hills.[132] The post independence Constitution of the Sri Lankan state proclaimed it as a unitary state with parliamentary democracy on the Westminster model. Under the colonial rule the Tamils had prospered more. Even in post-

[129] *Quarterly Refugee Trends*, January- September 2002, *UNHCR*, 24 December, 2002

[130] Tapan Bose, n. 104 , p. 42.

[131] *World Refugee Survey*, 2002, US Committee for Refugees, www.unhcr.ch

[132] Tapan Bose, n.104, p. 46

colonial period they began to occupy professional and administrative positions much beyond their proportion of population. Therefore, the core of the post independence conflict has been the Sinhalese majority to downgrade the Tamils' socioeconomic status.[133]

The first act of the new state was to disenfranchise the entire Indian Tamil population.[134] These people had been brought by the British colonial powers as plantation workers from parts of South India. Most of these workers who had their families in India used to visit them occasionally and send regular remittances to their dependents back home. The crux of the early controversy was whether the Indian estate workers could be considered as permanent settlers or were they just transient labour who retained their connections with South India.[135] The Citizenship Acts of 1948 and 1949 deprived these Estate workers of their voting rights. As a result a new category of refugees emerged in Sri Lanka, whom neither Sri Lanka nor India wanted to own.

The status and economic power of the Sri Lankan Tamils were eroded by the discriminatory policies regarding education and language. In 1970's the government introduced a number of "affirmative actions" to help the Sinhalese. [136] These reforms eroded the security of the Tamil minorities. From 1976 a more radical demand for the establishment of a separate Tamil State began. These ethnic tensions led to violent riots during 1971, 1977 and 1981. However the 1983 riots were the turning point and from this period onwards, the conflict took the shape of a civil war. The movement for a separate Tamil Elam received support from the Indian Tamil community as well as the Indian authorities.

The first Elam war ended in 1987 when the Indian government intervened and the Indo-Sri Lankan Peace Accord was signed. In spite of this accord, no breakthrough could be achieved because the LTTE rejected it. The LTTE initiated the second war with the government forces in 1990's. By the end of this confrontation in 1993

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[133] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n. 1, p. 145

[134] Ajith Rupasinghe, "Politics of the Refugee Crisis in Sri Lanka", in Tapan K. Bose and Rita Manchanda(ed.), State, Citizens and Outsiders,(Kathmandu, 1997), p. 332

[135] Satish Kanitkar, n. 80 , p. 70

[136] Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, n. 1, p. 146

LTTE had extended its territorial control over most of Northern Sri Lanka. After the coming to power of the new Peoples Alliance government in 1994, peace talks were initiated between the government and LTTE. These talks failed and the conflict and accompanying population displacements continued. During the two decades of violence in this small island state thousands of people were displaced. Most of them have been displaced more than once. While most sought refuge in Tamil Nadu, a large number of people remain displaced internally.[137]

The UNHCR and Refugees International, both estimated that 800,000 Sri Lankans remained displaced internally at the end of 2001.[138]The Sri Lankan government said that it was providing food assistance to nearly 705,000 IDP including those in areas controlled by the LTTE. Of the displaced persons assisted by the government in 2001, some 528,000 were staying with family and friends and the remaining 176,000 were living in the 348 government run camps, known as Welfare Centers, in the north and the east of the country. [139] However estimates of March 2002 point out that approximately 185,000 of the 800,000 displaced are still residing outside the 348 welfare camps.[140]

In February 2002, the Sri Lankan government and the LTTE signed formal bilateral cease-fire. In the context of these continuing efforts towards peace, there is hope that a long lasting solution to this problem may evolve.

6) India

India has been a host nation to refugees originating from various neighbouring countries which include Lhotshampas from Bhutan, Tamils from Sri Lanka, Chakmas from Bangladesh, Afghans from Afghanistan, Tibetans from China, Burmese from Myanmar etc. At the end of 2001, some 345,000 refugees were living in India. This included 144,000 from Sri Lanka, 110,000 from China, 52,000 from Burma, 15,000 from Bhutan, 12,000 from Afghanistan, an estimated 5000-20,000 from Bangladesh and nearly 300 from other countries. An estimated 40,000

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[137] Koenraad Van Brabant, "Regional Profiles: Sri Lanka", *Internally Displaced Persons: A Global Survey*,(London, 2000), pp.148-153

[138] *World Refugee Survey*, 2002, US Committee for Refugees, www.unhcr.ch

[139] ibid

[140] *Internally Displaced Persons: A Global Survey*,(London, 2002), Second Edition

Afghans were living in India in refugee like situations. More than 500,000 people were internally displaced in India because of political violence including about 350,000 Kashmiris and 157,000 others in Northeast India. About 17,000 Kashmiris from the Indian controlled area of Kashmir remained in Pakistan.[141]

After the partition of the sub-continent into two sovereign states of India and Pakistan in 1947, 15 million people crossed the newly defined borders in what became the greatest mass migration ever recorded.[142] During the 1950s another 4 million Hindus migrated to India. The frequent communal strifes in East Pakistan during the 1960s lead to a further exodus of Hindus particularly into the Indian States of Assam, Tripura and West Bengal. From partition to 1964 the number of such refugees was estimated to be 5.5 million.[143] In 1971 India saw massive influx of population from East Pakistan. The liberation movement of Bangladesh as a result of massive repression by the Pakistani military caused the mass exodus of an estimated 10 million East Pakistanis.

In the early 1986, 51,000 refugees belonging to ethnic and religious minority groups, mostly Buddhists, Chakmas fled the CHT region of Bangladesh. Right from the time of Bangladesh independence the Chakmas had resisted the imposition of Bengali culture in CHT. The conscious attempts by the Bangladeshi government to make the Chakmas a minority in CHT by massive human settlement of Samtalbashees led to violent conflict between the military and Shanti Bahini, the armed insurgent group of Chakmas.[144] The number of Chakma refugees in India in 1989 was 70,000. Most of them were sheltered in 6 camps of North-Eastern state of Tripura. During the 80s and the 90s the Bangladesh government accused the Indian agencies of providing arms and military training to the Shanti Bahini. Following the talks of March 1997 between the governments of India and Bangladesh 43,000 refugees sheltered in Tripura were repatriated. In December

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[141] *World Refugee Survey*, 2002, US Committee for Refugees, www.unhcr.ch

[142] Ishtiyaq Ahmad, "Refugee Problems in India", *Third concept, April-May 1996.*

[143] Tapan K. Bose and Rita Manchanda(ed.), *State, Citizens and Outsiders,*(Kathmandu,1997), p. 158

[144] Mahendra P. Lama, n. 19, p. 10

1997, following a peace agreement between Bangladesh and Shanti Bahini another 13,500 Chakmas returned home.[145]

Besides this there are also around 65,000 stateless persons belonging to Chakma and Hajong tribes living in India's North Eastern State of Arunachal Pradesh. The construction of Kaptai hydro-electric project of 1964 submerged 54,000 acres of settled and cultivable land affecting about 100,000 people 90% of whom were Chakmas.[146] The Indian government gave them shelter and settled them in Arunachal Pradesh.

Many Bangladeshis have also crossed over to India taking advantage of the open borders between the two countries. According to estimates provided by the Indian census report, the number of people who have migrated illegally from Bangladesh to India totaled 1,729,310 from 1961 to 1971 and 559,006 from 1971 to 1981.[147] Between October and December 2001 between 5000 to 20000 Bangladeshi Hindus and other minorities fled to India to escape violence following Bangladesh national election, which brought a right wing party to power.[148]

The violent ethnic conflict in Sri Lanka between the Sri Lankan Tamils and the government forces which have continued unabated for the last two decades have created large number of Sri Lankan Tamil refugees in India. The anti-Tamil riots of July 1983 in Colombo lead to the influx of about 30,000 Tamils to India. By 1985 this figure reached 100,000. Following the signing of the India-Sri Lanka accord of 1987 approximately 25,000 Sri Lankan refugees were repatriated. However, the second Elam war triggred the next wave of refugees in August 1989 to 90 when 122,000 crossed over to India. From 1992 to 95 some 54,188 refugees were repatriated to Sri Lanka. These refugees were settled in 122 refugee camps in the southern state of Tamil Nadu for whose maintenance the Government incurred an annual expenditure of Rs. 150 million.[149] However, the attitude of Indian authorities towards the Tamil refugees changed after the assassination of former

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[145] Tapan Bose, n. 104, p. 27

[146] Tapan K. Bose and Rita Manchanda(ed.), *State, Citizens and Outsiders*, (Kathmandu, 1997), pp. 163-64

[147] ibid, pp.163-64

[148] *World Refugee Survey*, 2002, US Committee for Refugees,*www.unhcr.ch*

[149] Tapan Bose, n. 104, p. 24

Indian Prime Minister Rajiv Gandhi by LTTE. Besides this India has also received 525,000 Indian Tamils who were repatriated under an agreement between the Indian and Sri Lankan Government in 1964.[150]

More than a hundred thousand ethnic Nepalese inhabitants of Bhutan fled to India in the beginning of 1991. They were fleeing the repression by the Druk dominated regime. This large influx of population was not allowed to settle in India and was send to Nepal. However, about 30,000 of these refugees settled down close to India's border with south Bhutan, in the states of West Bengal and Assam. Under the terms of the Indo-Bhutanese Friendship Treaty of 1949, India allows Bhutanese citizens to live and work freely in India. But, lately there are around 7000 refugees in the Bomdila region of Arunachal Pradesh who have been threatened with deportation by the All Arunachal Pradesh Students Union as a part of their anti-foreigner's campaign. [151]

Tibetan refugees first fled to India in 1959 when they refused to accept Chinese sovereignty over Tibet. The reports of the International Commission of Jurists, published in 1959 and 1966, documented several cases of religious persecution, torture, forced sterilisation and destruction of families, perpetrated by the Chinese authority.[152] By 1966, it was estimated that about 80,000 to 90,000 Tibetans had taken refuge in India. Initially the government allowed the UNHCR to assist the Tibetan refugees in India. However after the entry of main land China into the United Nation, the UNHCR, unilaterally withdrew its support to the Tibetan refugees. The Indian government has been generous to the Tibetan refugees. It has given them residential and work permits as well as identity documents to travel in and out of the country.[153]

The Soviet intervention in Afghanistan in December 1979 resulted in a huge inflow of Afghan refugee into South Asia via Pakistan. Some of these refugees

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[150] Tapan K. Bose and Rita Manchanda (ed.), *State, Citizens and Outsiders*, (Kathmandu, 1997), p.164

[151] ibid, p.166

[152] ibid, p.169

[153] Tapan K. Bose and Rita Manchanda (ed.), *State, Citizens and Outsiders*,(Kathmandu,1997), p.23

moved on to India. There are around 16,000 Afghan refugees in India. Majority of them resides in Delhi. They are provided monetary assistance by the UNHCR.

Following the 1988 coup in Burma, a number of pro democracy student's activists took refuge in the Indian States of Mizoram and Manipur. They were not welcomed by the Indian authorities and many of them were deported. By late 1988 some camps were opened in Mizoram and Manipur for those student activists who had entered India. Besides this at least 50,000 Chin Burmese are living in India mostly in the states of northeast. The Chin who are mostly Christians are among the ethnic minorities who have suffered discrimination and persecution at the hands of present Burmese regime. Similarly during August 1999, more than 1000 ethnic Nagas fled from the Sagaing division due to persecution by the Burmese authority.[154]

India has always been a host to refugees coming from various parts of the world. India has had and continues to reel under variety of violent movements like Naxalites in West Bengal, Bihar and Telengana region of Andhra Pradesh, caste and communal conflicts, Punjab agitation, Movements in the northeast and violent conflicts in Jammu and Kashmir. However, in spite of being one of the most violence prone states of South Asia it has not produced any noticeable number of refugees. [155] The reason is that the population displaced due to these reasons does not cross the international boundary of India. Rather, it remains displaced within the country itself.

In Jammu and Kashmir as many as 350,00 Kashmiri Pandits have been displaced since 1990 as a result of the long-standing conflict in Kashmir. Some 250,000 displaced are living in or around Jammu while about 100,000 are living in other parts of the country, especially Delhi.[156] These people have not been able to return due to the frequent eruption of violence in this part.

The ethnic conflicts between the Santhals and the Bodos in Assam since 1978 have killed many and displaced many more. Of the displaced about 45,000 remain in

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[154] *World Refugee Survey*, 2002, US Committee for Refugees,*www.unhcr.ch*

[155] Mahendra P. Lama, n.19, p. 15

[156] *World Refugee Survey*, 2002, US Committee for Refugees,*www.unhcr.ch*

rehabilitation camps and the rest are still in the relief camps.[157] In Tripura the tribal militants National Liberation Front of Tripura and All Tripura Tiger Force have consistently adopted strategies towards displacing the non-tribals mostly Bengalis. Recent violence forced out about 30,000 non-tribals from the Khowai subdivision.[158] Similarly the ethnic conflicts between Tanghul Nagas and Kukis resulted in the large-scale displacement of both the population groups. In Mizoram, 31,000 Reangs were displaced following the attacks by the majority Mizos. They settled in three camps in Tripura. The attacks and counter attacks between the naxalites representing the land-less peasants and the private armies of the landlords in Bihar have also forced a large number of people to move out of their houses. Recently in Gujarat more than 90,000 people were displaced due to the communal riots following the Godhra carnage.

Besides this natural disasters and planned eviction due to developmental projects have created more than 21.3 million IDPs. According to the Indian Social Institute figures 16.4 million people are displaced by dams, 2.55 million by mines, 1.25 million due to construction of industrial establishments and 0.6 million due to setting up sanctuaries and national parks. In the Eastern state of Orissa 110,000 people were displaced due the construction of Hirakud dam between 1949 to 1958. Floods, droughts, cyclones and earthquakes strike various states of India affecting an average of 63 million people every year.[159]

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[157] Om Prakash Mishra, P V Unnikrishnan and Maxmillan Martin, "Regional Profiles: India", *Internally Displaced Persons: A Global Survey,* (London, 2000), pp.163-65

[158] ibid, pp.163-65

[159] ibid

CHAPTER 4

POLICIES TOWARDS REFUGEES IN SOUTH ASIA:

National Legislation and Regional Approach

South Asia is home to one of the largest refugee populations in the world. Since 1947 approximately 35 to 40 million people have moved across national boundaries of India, Pakistan, Bangladesh, Sri Lanka and Nepal[1]. The table depicts the position: -

Table 2: Refugees in South Asia

Host Country	Country of origin	Number	Total
Bangladesh	Ethnic Rohingyas	50,000	
	Chinese	3,000	
	Somalia	62	
	Iranian	27	
	Biharis	238,000	291,089
India	Afghans	16,000	
	Chakma	65,000	
	Bhutanese	30,000	
	China/Myanmar	50,000	
	Burmese (student activists)	300	
	Tibetans	111,000	
	Sri Lanka	110,000	381,300
Nepal	Bhutanese(in refugee camps)	96,500	
	Bhutanese(out-side camp)	10,000	
	Tibetans	18,000	124,500

[1] Rose Varghese, "The Contemporary Refugee Problem and the Concept of Asylum in South Asia", *Regional Consultation on Refugee and Migratory Movements*, Colombo, Sri Lanka 25-27 September 1995, p 18.

Pakistan	Afghans	1,200,000	
	Kashmir	15,000	
	Somalia	900	
	Iraq	900	
	Iran	500	3,813,000

Source: UNHCR, 1999; Report of the US Committee on Refugees 1998 and South Asia Forum for Human Rights.[2]

However, in spite of such high incidences of refugee influx, none of the South Asian countriès is signatory to the 1951 Convention and its 1967 Protocol. Nor do the countries have any specific national legislation to deal with refugees in their respective countries.

The reasons for this derive from the history of the region. The demarcatiop of boundaries of newly independent states emerging from colonial rule was often arbitrary. Besides the ethnic, linguistic or religious affinity of communities on both sides of national borders and the existence of extremely porous borders between states had led to habitual and persistent cross border movements.[3]

Under these circumstances the states have been extremely generous with regard to refugees (as evident from the table given above). The approach to refugees and migrants by the host countries in South Asia has been one of passive acceptance and receptiveness, with high degree of tolerance. The reason for this is that most of the refugees come from countries within the region. These refugees share ethnic, cultural and linguistic ties with the country of asylum. For example, the Southern Bhutanese in Nepal, Sri Lankan Tamils and Indian Tamils from Sri Lanka in India, Afghans in Pakistan, etc. Moreover, the region has a culture of hospitality.

Nations in South Asia have traditionally preferred to deal with refugee problems as a matter of administrative decisions based upon bilateral relations between states than as legal requirement. The governments in these states have concluded that

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[2] Tapan K. Bose, *Refugee Protection in South Asia: Need for a Legal Frame Work,* (Kathmandu, 2000), p. 2

[3] These factors have been explained in the third Chapter

unwanted migrations including refugees are a matter of bilateral and not multi-lateral relation and that international agreement could constrict their freedom of action. There have been a number of bilateral agreements intended to enable refugee flows in an orderly manner. A tripartite agreement between India, Pakistan and Bangladesh facilitated the return of refugees from India and the movement of some stranded Pakistanis from Bangladesh to Pakistan. A treaty between India and Sri Lanka established the legal status of estate labourers and facilitated the repatriation of large numbers to India. An agreement between Burma and Bangladesh facilitated by the UNHCR, enabled refugees from the Arakan region of Burma to return home.[4] This approach has, however, led to disparities in treatment of refugee groups by states depending upon the particular local circumstances.

As a result some refugee groups are recognised and secured with refugee rights while others are treated as foreign nationals or aliens and treated likewise. For example in Pakistan the Afghan refugees are treated favourably and are allowed to move freely and engage in wage employment, other refugees are not entitled to such facilities.

In recent times the circumstances in the South Asian region has changed. The rate of population growth in the region is alarming. In 1990 the population of this region was 1.1 billion which has now increased to 1.3 billion. Most countries register a population growth rate of around 2%. At present South Asia is the second most populated region of the world after East Asia.[5] This high level of population growth has put tremendous pressure on the resources in this region. This rapid growth of population coupled with greater competition for local resources and opportunities will lead to greater population movements. The countries of the region are already hard pressed to meet the basic requirement of their own population. This scarcity of resources and opportunities would lead to conflicts which might in turn result in displacement of population. At the same time the receiving states would be further constraint to accommodate these refugees.

[4]   Myron Weiner, "Rejected Peoples and Unwanted Migrants in South Asia", *Economic and Political Weekly*, August 21, 1993, p.1745

[5]   *Human Development Report, 2002*, UNDP (New York, 2003), p.19

Further the politicisation of ethnic, religious, regional and ascriptive identities has further complicated the refugee issue as refugees in South Asia carry with them their own ethnic, regional or religious identities. There is a possibility of a refugee flow changing the linguistic or religious composition of the receiving area within the country. Local anxieties are acute when there is a perceived treat of being culturally and/or economically swamped. For instance, in 1971, given the already substantial Bengali presence, some of the states in North-East India were concerned that the influx from Bangladesh would result in the indigenous population becoming a minority.[6] All these necessitate legal framework to deal with the refugee issue in this region.

The Position of Refugees in South Asian States

BANGLADESH

Just like the other countries of South Asia even Bangladeshis not a signatory to either 1951 UN Convention on status of refugees or its 1967 protocol. The refugee issues are generally handled in terms of the Foreigner's Act, 1946. This Act was amended in 1974 as the law of citizenship and passport Act of Bangladesh. Article 2 gives the definition of the term foreigner. It describes foreigner as a person who is not a citizen of Bangladesh. Article 3 of the same Act says "the government may by order make provisions, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into Bangladesh or their departure therefrom or their presence or continued presence therein".[7]

Moreover, the Bangladesh Constitution under Articles 31, 32, 33 and 44 has given a large number of justifiable human rights to non-citizens.[8] Article 31 titled 'Right to protection of law' says "to enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of

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[6] Myron Weiner, n. 4, p. 1742

[7] Foreigner's Act, 1946, "Country of origin and Legal Information: Bangladesh", *www.unhcr.ch*

[8] C.R. Abrar, "State, Refugees and the Need for a Legal Procedure", in C.R. Abrar and Shahdeen Malik, (ed.) *Towards National Refugee Laws in South Asia,* (RMMRU, 2000), p.47

every citizen wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life and liberty, body, reputation or property of any person shall be taken except in accordance with law".[9] Further Article 32 of the same Act says "no person shall be deprived of life and liberty, save in accordance with law".[10]

At this stage it would be worthwhile to remember that one of the directive principles of state policy of Bangladesh is respect for international law and the principles enunciated in the UN Charter. It should also be noted that Article 14 (1) of the Universal Declaration of Human Rights says "every one has the right to seek and to enjoy in other countries asylum from persecution".[11]

Although Bangladesh's track record in dealing with refugees has been satisfactory, it has not been consistent. One of the major issue in this regard is the question of legal status of Biharis. They are those people who were the erstwhile residents of the Indian State of Bihar. These Bihari Muslims had fled to East Pakistan in 1946 to escape reprisals by Bihar Hindus. However, the Urdu speaking Biharis could not integrate with the Bengali speaking Muslims who were in a majority in East Pakistan. During the liberation war of 1971 many Biharis left for West Pakistan. After the liberation war, 462,000 Biharis were stranded in Bangladesh. They demanded to be repatriated to Pakistan. The Pakistani government initially agreed to take 83,000 Biharis. By 1974, 108,000 Biharis have been transferred to Pakistan. But around 300,000 Biharis are still left in Bangladesh.[12]

Under Article 3(d) of Bangladesh Citizenship Act, 1951 Biharis can claim citizenship. This Article reads "who before the commencement of this Act migrated to the territory now included in Bangladesh from any territory in the Indo-Pakistan sub-continent outside those territories with the intention of residing

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[9] Article 31, Constitution of Bangladesh, "Country of origin and Legal Information: Bangladesh", www.unhcr.ch

[10] Article 32, Constitution of Bangladesh, "Country of origin and Legal Information: Bangladesh", *www.unhcr.ch*

[11] C.R. Abrar, n. 8, p.46

[12] Shahdeen Malik, "Overview of the Situation of Refugees, Stateless Persons and Internally Displaced Persons in Bangladesh", *Regional Consultation on Refugee and Migratory Movements in South Asia*, 14-15 November 1996, p.33

permanently in those territories are eligible to become citizens". Furthermore Article 2 of the Bangladesh Citizenship (Temporary provisions) Order, 1972 provides that children and grandchildren of those born in the territories now comprising Bangladesh or those who were permanent residents of territories now comprising Bangladesh on 25 March 1971 can claim Bangladesh citizenship.[13] According to the above criteria Biharis are entitled to Bangladesh citizenship. However, Article 2(b)(1) of the Bangladesh Citizenship (Temporary Provisions) Amendment Ordinance 1978 added that a person shall not qualify to be a citizen of Bangladesh if he owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state. This rule clearly strips Biharis of eligibility for Bangladeshi citizenship. Under these circumstances, the issue of legal status of Biharis remains ambiguous.

Bangladesh have faced mass influx of Rohingya refugees from Myanmar in 1978 and 1991. The Bangladesh government has provided relief and shelter to the Rohingya refugees ever since their arrival. In spite of the humanitarian assistance rendered to the refugees, a major policy consideration of the Bangladesh authorities has been that "quick and safe return to Myanmar.[14] In 1978 Bangladesh government claimed that more than 250,000 Rohingyas had sought refuge while the Burmese authorities put the figure at less than 150,000.[15] In order to deal with the arrival of so many refugees Bangladesh government appealed to the UN for assistance. As a result a UN relief programme was launched and coordinated by UNHCR from May 1978. In all 13 camps were established. In order to find out a permanent solution to the refugee problems bilateral agreement was signed between Burma and Bangladesh providing for repatriation of Rohingyas. By end of 1979 more than 180,000 had returned to Burma.[16]

New influx of Myanmarese refugees began in 1991. The Bangladesh government allowed the refugees to enter its territory and provided them with shelter and relief

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[13] ibid, p.33

[14] C.R. Abrar, "Repatriation of Rohingyas Refugees", *Regional Consultation on Refugees and Migratory Movements in South Asia*, 25-27 September 1995, p. 46

[15] UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, (New York, 2000) p.75

[16] ibid, p.75

considering them to be a short-term problem. In 1992, both the governments signed a memorandum of understanding under which Myanmar agreed to take back those refugees who could establish their bona fide residency in Myanmar prior to their departure to Bangladesh. UNHCR was not a party to these agreements.[17] During 1992 and 1993 human rights groups and UNHCR raised concerns over coerced and forceful repatriation of refugees by the Bangladesh authorities. One of the reasons for the changed attitude of the Bangladesh government and the people was the increasing economic burden and the social and environmental problems. Most of the cost of hosting the Myanmarese refugees who were sheltered in 14 refugee camps located in the districts of Cox's Bazaar and Bandarban of Bangladesh was met by the UNHCR and several other international organisations. But Bangladesh was also spending a good amount from its meager resources for strengthening of local administration, the maintenance of law and order in and around the refugee camps, the development and maintenance of the local infrastructure, transport and communications as well as a number of miscellaneous expenses not covered by the UNHCR's assistance programme.[18]

Though Bangladesh felt that the solution to the problem could be worked out through bilateral diplomatic channels as done in 1978, it was misguided. It failed to notice that most of the Rohingya refugees were stripped of their Myanmar documents prior to their crossing to Bangladesh. After the accusation of forced repatriation, authorities of Bangladesh reached an agreement with UNHCR which allowed the latter to verify the voluntary nature of repatriation. As the repatriation took place in October 1992, UNHCR said that it was not involved in at least 84% of these repatriations.[19] These repatriations were also criticised by the US Department of State which viewed it as forced repatriation. The terms of understanding between Bangladesh and UNHCR were re-negotiated. The new memorandum allowed UNHCR officials to independent interview of refugees in

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[17] C.R. Abrar, n. 14, p.40

[18] Mohammed Humayun Kabir, "Rohingya Refugees in Bangladesh: Some Issues and Security Implications" in Om Prakash Mishra and Anindyoj Majumdar (ed.) *The Elsewhere people: Cross Border Migration, Refugee Protection and State Response*, (New Delhi 2003), p.143

[19] C.R. Abrar, n. 14, p.40

transit camps. UNHCR's assessment was that in most cases the refugees were better off in their homes in Myanmar than in Bangladesh refugee camps.

BHUTAN AND MALDIVES

The laws and policies of Bhutan and Maldives are similar to other South Asian countries. Neither do they have any domestic law nor have they ratified any international convention regarding refugees. Laws like Citizenship Act, Foreigners Act, Passports Act, etc. and other Constitutional obligations guide the state's policy towards refugees.

In the aftermath of the Chinese aggression in Tibet some Tibetans fled to Bhutan as well. Due to the geographical proximity, common cultural ethnic affinity and shared values of Buddhism, the Tibetans were welcomed into Bhutan. These Tibetan refugees who sought refuge in Bhutan were settled in 7 settlements. The land for these settlements were donated by the Royal Government of Bhutan and the finances for them were granted by the Government of India. However, problems started in 1963 Jigme Dorje, Bhutanese Prime Minister was assassinated. The Dorje family who had fled to Nepal, developed close ties with the Chinese authority and had Chinese sympathies. In 1974 Royal Government announced the arrest of 28 Tibetans for assassination of the Bhutanese king and burning the Bhutanese secretariat. Simultaneously the Bhutanese started pursuing a policy of isolating Tibetans.[20]

INDIA

In the case of refugees the Indian Constitution guarantees certain Fundamental Rights, which are applicable to all non-citizens. Broadly, these rights are Right to Equality (Article 14), Right to Life and Personal Liberty (Article 21) and the Freedom to Practice and Propagate one's own religion (Article 25).[21] Any violation of these rights can be remedied through the Courts. In this regard the Indian

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[20] The information Office of His Holiness The Dalai Lama, *Tibetans in Exile* (1959 to 1980), (Dharamasala, 1981), pp. 189-91.

[21] Tapan K Bose, n. 2, p. 31

obligation to observe the principle of *non-refoulement* is further strengthened by the fact that India is a signatory to the 1984 Convention against torture. (CAT). Article 3 of CAT says "no party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.[30] Further Article 51 (C) under the directive principles of state policies provides that the state shall endeavour to foster respect for international law and treaty obligations. Though the Constitution of India under Article 21 provides that no person shall be deprived of his life or liberty except by process established by law, Articles 19(1)(d) and (e) restrict the right of a foreigner to move freely or reside in any part of the country.[31]

National Human Rights Commission (NHRC)'s role in the protection of refugees should also be considered here. In 1995 the NHRC filed a public interest litigation on behalf of 65,000 Chakma refugees settled in Arunachal Pradesh in India since 1965 and successfully sought the intervention of the Supreme Court of India in order to safeguard their life and freedom. The Court in its judgement noted that it was inhuman and impracticable to approve these Chakmas as they had bee residing in Arunachal Pradesh for more than 3 decades.[32]

In India, the UNHCR is given a very limited mandate, which looks after the cases of hardly 9.3% of the refugees in India. The UNHCR has been essentially permitted by the Government to concern itself with the status and welfare of refugees coming from outside the South Asian region. Afghan refugees constitute a predominant majority of those whom UNHCR has recognised as refugees. The UNCHR assists almost all of the 11,420 Afghan refugees in India.[33]

The policy decisions with regard to refugees in India have always been political and the different categories of refugees have been treated differently, depending on the political expediencies of the time. India has been very receptive towards the

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[30] B.S. Chmni, "Status of Refugees in India" in Ranabir Samaddar (ed.), *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*, (New Delhi and London, 2003), p.448

[31] ibid, p.454

[32] ibid, p.456

[33] UNHCR, *Quarterly Refugee Trends, December 2002*, Population Data Unit, www.unhcr.ch

Article 3(1) of the Registration of Foreigner's Act, 1939 says "the Central Government may appoint registration officers for the purpose of these rules for such areas as it thinks fit".[25] Further, Article 6(1)(a) of the same Act reads "The Registration report shall be presented in case of a foreigner who enters India on a visa valid for a stay in India for a period of 90 days to the Registration Officer having jurisdiction in the place where the said foreigner is present".[26]

Passports (Entry into India) Act, 1920 is also relevant with regard to foreigner's in India. Article 3 of the Act says "the Central government may make rules requiring that persons entering India shall be in possession of Passport and for all matters ancillary and incidental to that matter".[27] Article 3(2)(a) of the same Act says that the entry of any person who is not in possession of a passport can be restricted. Article 3(2)(c) provides" the exemption either absolutely or on any condition, of any person or class of person from any provisions of such rules".[28]

Passports Act of 1967 under Article 3 says "No person shall depart from, or attempt to depart from India unless he holds in his behalf a valid passport or travel document".

The Citizenship Act of 1955 in its Article 6 contains the provisions for citizenship by naturalisation. Article 6(1) says "where an application is made in the prescribed manner by any person of full age and capacity.............., the Central Government may, if satisfied that the applicant is qualified for naturalisation under the provisions of the third schedule, grant him a certificate of naturalisation".[29]

While India is not party to the 1951 Convention, it is still obliged to observe the principle of *non-refoulement* as this is a part of customary international law. The

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[25] Registration of foreigner's Act, 1939, "Country of Origin and Legal Information: India" www.unhcr.ch

[26] ibid

[27] Passports (Entry Into India) Act, 1920, "Country of Origin and Legal Information: India" *www.unhcr.ch*

[28] ibid

[29] Citizenship Act, 1955, "Country of Origin and Legal Information: India" *www.unhcr.ch*

Tibetan refugees who came to India in 1959 in the aftermath of the Chinese aggression. They were treated very sympathetically by the Indian Government who set up transit camps at Misamari in Assam and Buxa in West Bengal.[34] By 1962 the Government started adopting plans for their resettlement in various sectors. These were primarily in agriculture, handicrafts and small scale industries.[35]

However, the Indian Government's attitude has not been the same in case of Southern Bhutanese fleeing the Bhutanese repression. These Lhotshampa refugees first fled to India into the districts of Jalpaiguri and Darjeeling. But they were chased away by the local authorities to Nepal. The role of India in this case is far more pronounced. According to article 2 of the Indo-Bhutanese Friendship Treaty of 1950, "the Government of Bhutan agrees to be guided by the advice of the Government of India in regard to its external relations".[36]

However even when there was such massive movement of people, India did not react. One of the major reasons for this could be the short-term economic interest of India. India provides substantial economic assistance to Bhutan and plays a large part in financing the 5-year plans of Bhutan. Since 1961, bulk of Bhutanese trade is with India. Also India is interested in purchasing power generated by Chukha Hydel Power Project. Besides this India's aloofness in this issue has been guided by its strategic interests. After the Sino-Indian war of 1962, India realised the strategic importance of having a friendly relation with Bhutan. By criticising Bhutan, India did not want to loose an important strategic and economic ally.[37] If refugees were able to involve India in putting forward their views to Bhutanese and Nepalese governments, their present dilemma would have never reached such a farcical level. Since Bhutan and Nepal do not have a common border, the first country of asylum was India. The refugees did come and tried to reside in bordering Indian districts. More than India's national interest in keeping its relation

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[34] B.S. Chimni, "The Legal Condition of Refugees in India", *Journal of Refugee Studies*, Vol.7, No.4, 1994, pp.378-81

[35] For details see, Rajesh Kharat, "Gainers of a Stalemate: The Tibetans in India", in Ranabir Samaddar (ed.), *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*, (New Delhi and London, 2003), pp. 289-92

[36] The South Asian Human Rights Documentation Center, *The Bhutanese Political Crisis and Refugee Problem*, (SAHRD, 1998), p.109

[37] ibid, p.110

with Bhutan in good pedestal, the narrow interest of Bengal's ruling elite came into foreplay. Bengal, which was just coming out of five years of violent bouts of Gorkhaland Movement, was keen on deescalating the past tensions and might have thought that the refugees if given shelter would invite fresh rounds of controversies.[38]

The Indian policy towards Sri Lankan Tamil refugees has not been a consistent one. India had recognised Tamils' need for asylum and admitted them with a good deal of sympathy. In fact, in many respects the government treated them as if they were convention refugees, and in general did not subject them to arbitrary detention or restriction on movement. The Sri Lankan Tamils received the same elementary education in Tamil Nadu schools as Indian nationals. The students were also issued a certificate of refugee status describing them as persons affected by ethnic violence in Sri Lanka.[39] However, things changed in the aftermath of Rajiv Gandhi's assassination. Sri Lankan Tamils living in Tamil Nadu started facing unprecedented hostilities. Government started decreasing the number of camps and by 1993 the number of camps was reduced from 237 to 132.[40] Infact in the case of Sri Lankan refugees the Indian Calculations misfired. The first batch of refugees had lot of militant elements whom India had really cultivated. This was made possible by the competitive electoral politics in Tamil Nadu. However, when these militant groups started turning against India, they were termed as security threat.[41]

NEPAL

Although Nepal does not have any specific provisions to safeguard refugees, it has generously housed a large number of refugees since 1959. Nepal is neither a party

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[38] Mahendra P. Lama, 'Political Economy of Lhotsampa Refugees: State Behaviour, Aid, Intervention and Repatriation", *Conference of Scholars and Other Professionals Working on Refugees and Displaced Persons in South Asia,* (RMMRU, Dhaka, 1998), pp.19-20

[39] Nirmala Chandra Hasan, "A Precarious Refuge: A Study of the Reception of Tamil Asylum Seekers into Europe, North America and India", *Harward Human Rights Year Book,* Vol. II, 1989, pp. 92-94

[40] Asha Hans, "Repatriation of the Sri Lankan Refugees From India", *The Bulletin on IHL and Refugee Law,* Vol.2, No.1, January-June, 1997, pp. 96-108

[41] P. Sahadevan in Mahendra P. Lama (ed.), *India as a Refugee Host Country: Management, Practices and Policy Options,* 2000, p.98

to the 1951 Convention nor to the 1967 Protocol relating to the status of refugees. In the absence of any specific legal provisions related to asylum, general International Human Rights Instruments and domestic legislation, applicable to foreigners are applicable to refugees.[42]

The constitution of Nepal does not make any distinction between citizens and foreigners in regard to certain basic rights. These rights are Right to Freedom (Article 12), Right to Criminal Justice (Article 14), Right Against Preventive Detention (Article 15), Right to Education and Culture (Article 18), Right to Religion (Article 19), Right Against Exploitation (Article 20), Right to Privacy (Article 22) and Right to Constitutional Remedy (Article 23).[43]

The Immigration Act of 1992 and its implementing instrument, the Immigration Rules of 1994 also have a bearing on refugee movement in the country. Article 3(1) of the Immigration Act states "no foreigner shall be allowed to enter into Nepal and stay in the Kingdom of Nepal without obtaining a passport and visa".[44] Article 7 of the same Act titled "Functions, Duties and Powers of the Director General" empowers the Director General: -

(a) to regulate, systemize and control the entry, presence and departure of foreigners from the Kingdom of Nepal and make arrangements to do so;

(b) to issue trekking permits to foreigners;

(c) to issue visa as prescribed and extent the term of such visas;

(d) to systemize the arrival and departure of Nepali nationals; and

(e) to discharge other functions according to directives given by His Majesty's Government (HMG) from time to time.[45]

This Act further states that the Director General has the power to expel a foreigner who has committed immigration offences. Article 9(1) says "the Director General (Chief of the Department of Immigration) shall expel the foreigner who has

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[42] UNHCR Nepal, "Asylum, Internally Displaced Persons and Statelessness in Nepal", *Regional Consultations on Refugees and Migratory Movement in South Asia*, New Delhi, 14-15 November 1996, p.54

[43] Tapan K Bose, n. 2, p.38

[44] Article 3(1) The Immigration Act of Nepal, 1992

[45] Article 7, The Immigration Act of Nepal, 1992

committed immigration offences, with or without limits, upon receiving report from the Immigration Office. The Director General must seek permission from the HMG to execute such expulsions".[46] Article 10 of the same Act says in case a person commits any offence or instigates others to do so he shall be punished with a fine of not more than Rs. 50,000 or with imprisonment for a term not exceeding 5 years, or with both.[47] Article 14 of the Immigration Act says that

(i) HMG is empowered not to make effective this Act or Rules made under this Act or any part of it, to the foreigners of certain nationality or the persons of certain ethnic group or tribes or castes or can make them effective only under the prescribed terms.

(ii) HMG has power to forbid the arrival, stay or departure of any foreigner in or from the Kingdom of Nepal whose presence or absence may be against the best interests of the Kingdom.[48]

This provision empowers HMG to permit foreigners, including refugees to stay in Nepal until such time as may be deemed desirable by HMG. Article 44(i) of the Immigration Rules says "Foreigners against whom deportation orders have been issued under the Act or these Rules must stay at the place specified by the Department of Immigration until they depart from the Kingdom of Nepal. They must themselves bear the expenses required for their departure from Nepal".

It is evident from these provisions of the Immigration Act and Rules that this legislation is inadequate to deal with individual asylum seeker or with larger refugee movements. It is also evident from Article 14 of the Immigration Act that the HMG has the discretion to allow certain groups of people. Therefore, granting of asylum or refuge would become a political decision. The provisions of Article 3 which mentions the necessity of valid travel documents and visa and Article 10 which mentions the punishments for violating Immigration Rules might result in *refoulement*. The principle of *non-refoulement* is a principle under the customary inter-national law.[49]

[46] Article 9(1), Immigration Act 1992, Royal Kingdom of Nepal
[47] Article 10, Immigration Act 1992, Royal Kingdom of Nepal
[48] UNHCR Nepal, n. 42, p. 59
[49] ibid, p.60

The Foreigners Act empowers the government to regulate the entry of aliens into Nepal as also their presence and departure. The Passport Act empowers the government to impose conditions of possession of a passport for entry into Nepal, and the issuance of passport and travel documents and trekking permission.[50] Article 3 of the Act says "the Government may issue an order, restricting, prohibiting or regularising the entry, presence and departure of foreigners in general or of any particular foreigner or class of foreigners or of foreigners of any descriptions". Article 3(2)(h) of the same Act provides for arresting, detaining or keeping in custody any foreigner, and making arrangements about any emergency or incidental situations in order to carry out the purpose of this Act.

Employment of refugees is not permitted in Nepal. Self-employment is permitted under existing Nepali law; however, foreigners have to deposit a certain amount of money to run a business. Religious freedom is respected. Refugees have access to courts and enjoy *de facto* right of association.[51]

In Nepal, the Ministry of Home Affairs, through its Department of Border Administration is entrusted with the responsibility of handling refugee issues. Eac 1 of the 19 Districts of Nepal has a Division of Border Administration to deal with the issue at local level. At the Central level, a National Unit for Coordination of Refugee Affairs has been set up to plan, monitor and coordinate refugee affairs. The Ministry of Foreign Affairs is handling the Bilateral talks with the Country of origin and is entrusted with the responsibility of handling the issue at the international level.[52]

Nepal is signatory to 14 Human Rights Instruments, which by virtue of Article 9 of the 1990 Treaty Act, take precedence over conflicting domestic provisions.[53] Article 9(1) of the 1990 Treaty Act says "in case of the provision of a treaty to

[50] Hari Phuyal, "Refugee Policies and Laws: Nepal", *Refugees in the SAARC Region: Building a Legal Framework*, 2-3 May, New Delhi, p. 49

[51] Tapan K Bose, n. 2, p. 38

[52] Manoj Kumar, "Status of Refugees in The South Asian Region" *Journal of Peace Studies*, Vol. 8, Issue 2 March-April 2001, pp. 50-60

[53] UNHCR Nepal, n.. 42, p. 58

which the Kingdom of Nepal or HMG has become a party following its ratification, accession, acceptance or approval by the Parliament, conflict with the provisions of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provisions of that treaty shall be applicable in that connection as Nepal laws". Further Article 26(15) of the Constitution dealing with the state policies reads "the foreign policy of Nepal shall be guided by the principles of the United Nations Chapter, non-alignment, the *Panchsheel*, international law and the value of world peace".[54]

HMG has so far dealt with different refugee group and individual cases in different ways. The influx of Tibetans started in 1959. While majority of the Tibetan refugees settled in India, thousands remained in Nepal. The Tibetan refugees who desired to stay in Nepal were allowed to do so, initially in settlements built on lands purchased with international community funds in the Nepali Red Cross's name. They were initially kept in camps in Jawalakhel. Later the Nepali government set up camps in various parts of the country for Tibetan refugees.[55] The Tibetan refugees, many of whom brought with themselves considerable wealth were allowed to undertake economic activities which eventually resulted in the introduction of carpet manufacture. In the early 70s, about 20,000 Tibetans were registered and documented in a one-time exercise. The refugees were issued identity cards certifying them as Tibetan refugees. In 1994 HMG decided to resume and complete the documentation exercise extending it to all those who had arrived in Nepal before 31st December 1989. This issuance of cards were interrupted in 1995 and since then not resumed.[56]

Although travel documents are issued to those Tibetans who have identity cards, most countries do not recognise this and are unwilling to issue a visa to them. Article 6 of the Citizenship Act of 1964 says "in case of any foreign national who has fulfilled the following conditions and requirements, he may submit an application in the prescribed form to the prescribed authority for obtaining a certificate of Nepali citizenship: -

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[54] ibid, p.59

[55] Tapan K. Bose, n.2, p.38

[56] UNHCR Nepal, n.42, p.62.

(a) he can speak and write in the national language of Nepal,

(b) he is engaged in any occupation in Nepal,

(c) he has relinquished his citizenship in any other state and

(d) he has resided in Nepal for at least 16 years".

In spite of the fact that most Tibetan refugees in the country fulfil the criteria set by the law for acquisition of Nepali citizenship, they seem to have been excluded from it as a matter of policy. The Nepal government does not recognise new arrivals from Tibet as refugees and does not allow them to remain in Nepal. They are kept in undisclosed transit camps. Apparently there is an unofficial arrangement between the Nepalese government and the office of the Dalai Lama in India that they will take the new arrivals away from Nepal.[57]

In 1995 the Nepalese government forcibly repatriated 300 Tibetan refugees fleeing Chinese rule. Although Nepal has denied the accusation, its action has been condemned by governments and human right organisations around the world. The May 31, 2003 decision of the Nepali Government to expel 18 Tibetans including 8 minors to China has resulted in world wide condemnation of Nepal. UNHCR officials described the act as blatant violation of Nepal's obligation under international law. Until now Nepalese authorities have allowed UNHCR to screen Tibetan asylum seekers and re-settle them in third countries.[58] However, the foreign Minister of Nepal, Narendra Vikram Shah told the Kathmandu Post that the government had not deviated from its policy on Tibetan Asylum seekers. He said "the standard practice is that every time we nab Tibetans fleeing from Tibetan Autonomous Region of China, we launch a thorough investigation into their allegations of torture and persecution in Tibet and either deport them or hand them over to UNHCR".[59] However in this case all pleas of UNHCR to hand over this asylum seekers were ignored. In its defence the Chinese authorities have said that the 18 deportees were by no means refugees, but illegal immigrants who had

[57] Tapan. K. Bose, n.2, p.38

[58] "UNHCR gravely concerned about the deported Tibetans" 30 May 2003, www.unhcr.ch.

[59] "Nepal Denies Change in Policy on Tibetan Asylum Seekers", BBC International News Service, 2 June 2003, Kathmandu.

violated laws and regulations of immigration of both the countries.[60] However this act on the part of Nepalese government is a clear political act. Considering Nepal's fluid political state it does not want to offend a non-interfering neighbour, i.e, China.

The influx of ethnic Nepalese from Bhutan started in 1990. This was the result of the policy of forced assimilation practiced by the Bhutanese monarch with regard to southern Bhutanese of Nepali origin. The subsequent alienation of the latter led them to seek refuge in Nepal. Initially these refugees moved to the Indian State of West Bengal from where they were literally forced out.[61] Nepal received these refugees whole-heartedly. Gradually it realised that it could not carry the economic burden of hosting such a large number of refugees. In October 1990, the Bhutanese People's Human Rights Forum, the Bhutanese People's Party and the Students Union of Bhutan requested humanitarian assistance to Bhutanese asylum seekers in Jhapa in eastern Nepal. In February 1991 emergency assistance was requested by the above organisations for some 24,000 Bhutanese asylum seekers.[62] Since mid-1992, UNHCR alongwith the Refugee Coordination Unit are incharge of verification, registration and documentation of refugees seeking political asylum in the camps.[63] Most of the Bhutanese refugees are settled in various camps in Timai, Sanischare, Goldhape, Beldangi I & II and Khudanabari North and South.[64]

The ground for bilateral talks between Nepal and Bhutan were set up during the meeting between the King of Bhutan and G.P. Koirala the then Prime Minister of Nepal during the 7th SAARC Summit in Dhaka. Subsequently both the leaders agreed for setting up a joint committee to work out the modalities to solve the refugee crisis.[65] The first meeting of the Home Ministers of both countries held on 17 July 1993 decided to set up a Joint Ministerial Committee (JMC) to be entrusted

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[60] "America, EU and Germany Criticise Nepalese Action", 3 June 2003, www.nepalnews.com

[61] Smruti Patnaik, "Nepal-Bhutan Bilateral Talks and Repatriation of Bhutanese Refugees", Strategic Analysis, January 1999, p. 1611.

[62] UNHCR Nepal, n.42, p.63

[63] Smruti Patnaik, n.61, p.1611

[64] ibid, p.1612

[65] Lok Rj Baral, "Bhutanese Refugees in Nepal: Quest for Confidence Building Measures", BIIS Journal, Vol. 20, No.4, 1999, p.408

with the task of (a) determination of different categories of people claiming to have come from Bhutan in the refugee camps of eastern Nepal, (b) to specify the position of the two governments on each of these two categories, (c) to arrive at mutually acceptable agreement on each of these categories.[66] In the first JMC meeting held in 1993 the refugees were categorised as follows (i) bona fide Bhutanese citizens forcefully evicted, (ii) Bhutanese who had emigrated, (iii) Non-Bhutanese people and (iv) Bhutanese who have committed criminal acts. This categorisation has been held as a fundamental cardinal principle to solve the crisis. Categories (ii) and (iv) comprise Bhutanese citizens. If they are de-nationalised, by Bhutan, they would be stateless. Till 1996 no mechanism for verification of refugee population according to the above criteria was agreed upon. In the meeting of the foreign Ministers of Nepal and Bhutan held in April 2003 both the countries agreed to set up a Joint Verification Team within one week. Five officials from each side will visit the camps. The two sides have agreed to verify the refugees on the basis of family lineage and not as individuals.[67]

PAKISTAN

Like the other countries of the region, Pakistan is not a party to any international convention in relation to refugees and has no domestic laws to deal with them. The issues are taken up at the local level within the Islamic tradition of sympathetic treatment to the rehabilitation of refugees. The Islamic tradition ordains sympathetic treatment to the rehabilitation of refugees who are forced to abandon their homes and hearts on account of persecution. Indeed, leaving one's homeland, including one's kith and kin is a recommended course of action for Muslims to escape persecution for protecting their religious beliefs or social traditions. Islamic traditions not only recognise the right of asylum but in dire need encourage people to avail of it.[68]

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[66] UNHCR Nepal, n.42, p.64

[67] "Nepal, Bhutan Agree on Verification of Refugees", World News, 9 April 2003, www.unhcr.ch

[68] Justice Dr. Nasim Hasan Shah, "Pakistan: Policies and Laws with Reference to Refugees", *Refugees in the SAARC Region: Building a Legal Framework*, 2-3 May 1997, New Delhi, p. 35

Besides the Constitutional recognition of the inalienable rights of the human being, which are applicable to both citizens and foreigners, the state has some other laws to deal with the issue of refugees indirectly.[69]

Immediately after Pakistan's independence, all asylum seekers were dealt with under the Foreigner's Act of 1946 enacted by the British Indian government. Under this Act the federal government was empowered to regulate or restrain the entry of foreigners. According to the provisions of this act, no foreigner could enter Pakistan without a passport or a valid visa.[70] Article 3(1) of the Foreigner's Act states "the Federal government may by orders make provisions either generally or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, restricting, regulating or restructuring the entry of foreigners into Pakistan or their departure therefrom or their presence or continued stay therein".

Article 3 of the Foreigner's Order 1951 titled "Power to grant or refuse permission" says "no foreigner shall enter Pakistan otherwise than at a port or such place of entry on the borders of Pakistan otherwise than at a port or such place of entry on the borders of Pakistan as the Registration Officer having jurisdiction at such port or place may appoint or without the leave of the civil authority having jurisdiction over such port or place". Article 3(2) of the same Order says "leave to enter shall be refused if the civil authority is satisfied that a foreigner is not in possession of a passport or valid visa for Pakistan or has not been exempted from passport or visa. Further Article 10 says that no foreigner shall without the general or special permission in writing of the civil authority enter any premises or be employed in any undertaking for the supply of power, petroleum or water without special permission in writing of the civil authority. Article 11 of the Foreigner's Order, 1951 gives the government the power to enforce restrictions on movements of foreigners. The Article says "the civil authority may, by order in writing, direct that any foreigner shall comply with such conditions as may be specified in the order in respect of (a) his place of residence, (b) his movements, (c) his association with

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[69] Manoj Kumar, n. 52, pp. 50-60
[70] Tapan K Bose, n. 2, p. 43

persons of a description specified in the order and (d) his possession of such articles as may be specified in the order". Under Article 51 of the same Order the civil authority may detain any foreigner without warrant if in his opinion it is necessary in the interest of the security of Pakistan. As is evident from these provisions regarding foreigners there is no mention of safeguarding interests of the asylum seekers. These laws are in fact made to secure the State of Pakistan from foreigners and to limit their freedoms as far as possible.

In order to deal with 7 million Muslims who had migrated from India on the eve of independence, laws were made. Rules and procedures were devised and steps taken for rehabilitating the refugees and for administration of evacuee property abandoned by the non-Muslims who had left for India. Under the Registration of Claims (Displaced Persons) Act, 1956, a detailed procedure for the registration and verification of claims by displaced persons was established. The Displaced Persons (Compensation and Rehabilitation) Act, 1958, laid down procedure for the allotment and transfer of evacuee property in favour of refugees who had abandoned properties in India.[71] This refugee problem of unprecedented proportions was settled without any outside help or assistance.

In Pakistan the treatment given to partition refugees and Afghans is different from that given to others like Biharis, Iraqis and Somalians. While Pakistan allows UNHCR recognised refugees to remain in Pakistan pending repatriation or third country re-settlement it does not permit them to work or to receive free health case or education. But the Afghans are treated differently. The government of Pakistan gave a warm welcome to the Afghans fleeing the civil war in Afghanistan following the 1979 Soviet intervention. By 1980s there were around 3 million Afghan refugees in Pakistan. They were ostensibly accepted under the Islamic tradition of granting asylum. But reportedly, Americas Central Intelligence Agency and the Government of Saudi Arabia provided cash and material assistance accounting to about US $ 18 billion to Pakistan's military authorities for training and arming the Afghan Mujahideens who are fighting the Soviet supported regime in Kabul.[72]

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[71] Justice Dr. Nasim Hasan Shah, n. 68, p. 34

[72] Tapan K Bose, n. 2, p. 40

Its military regime welcomed the refugees because it expected the Western governments to extend military support in view of the Russian military presence in Afghanistan. Thus not only did Pakistanis military rulers ensure their own legitimacy in national and international fora by taking an anti communist stance in 1979, they also look forward to economic aid and weapons supplies.[73] It was also an attempt to keep India away from the region considering its proximity with Soviet Union at that time. As the burden of Afghan refugees grew, the government sought the assistance of UNHCR, UNICEF, FAO, WHO and ICRC. In the management of Afghan refugees, the UNHCR alone has spent over one billion dollar on its Pakistan programme. The repatriation/re-integration budget for 1998 was estimated to be US $ 16.9 million.[74] The government of Pakistan does not put any restriction on the movement of Afghan refuges and also respects their right to work or set up business in any part of the country. However, Afghan refugees caused many problems in Pakistan. These included terrorism and large scale smuggling of narcotics and arms. It was also feared that they may make a claim on North West Frontier Province areas which were earlier a part of Afghanistan.[75]

Also sharp differences arose among the political parties of Pakistan on the issue of Afghan refugees and their eventual return. Many Pakistani leaders and Afghan Mujahideens blamed the Soviet supported Kabul regime for acts of terrorism in Pakistan.[76] Though Pakistan has adopted a very generous attitude towards refugees, the absence of laws and national policy for rehabilitation has led to inhuman treatment meted out to refugees and asylum seekers by other agencies of the state.[77] Though there were fresh refugee influx in June 2000, with the restoration of normalcy in Afghanistan, most of the refugees are returning to their homes in Jalalabad, Namgarhar and Kunar in east Afghanistan. Pakistan,

[73] Arpita Basu Roy, "The Uprooted Afghans: Consequences of an Unsettled Political Agenda" in Om Prakash Mishra and Anindyo J. Majumdar (ed.), *The Elsewhere People: Cross Border Migration, Refugee Protection and State Response*, (New Delhi, 2003) , p. 96

[74] Mahendra P. Lama, *Managing Refugees in South Asia: Protection, Aid, State Behaviour and Regional Approach*, (Dhaka, 2000), p 22

[75] Kalim Bahadur, in Mahendra P. Lama (ed.), *India as a Refugee Host Country: Management, Practices and Policy Options*, 2000, p.67

[76] Tapan K Bose, n. 2, p. 41

[77] Tapan K Bose, n.2, p. 44

Afghanistan and UNHCR signed an agreement in March 2003 under which some 1.8 million Afghan refugees are to return home over the next 3 years on a voluntary basis.[78]

SRI LANKA

Sri Lanka is neither a party to the 1951 UN Refugee Convention nor to its 1967 Protocol. Further the statute book of Sri Lanka reveals the total absence of provisions with regard to refugee protection.[79] As a member of the United Nations, Sri Lanka is obliged to respect the protections guaranteed by the Universal Declaration of Human Rights (1948). Under Article 14 of this declaration individuals have the right to seek and enjoy in other countries asylum from persecution. However it does not result in any obligation on the part of the state to provide protection to the refugee. Similarly the Article 3 of the Convention against torture (1984) which was ratified by Sri Lanka in 1994 provides for *non-refoulement* of persons to a country where the person would be in danger of being subjected to torture. But the laws in Sri Lanka do not contain the provisions to enforce this article.[80]

In the absence of legal framework for refugee protection, there appears to be an informal and ad-hoc understanding between the controller of immigration and emigration and the UNHCR to provide provisional protection to asylum seekers.[81]

Sri Lankan law dealing with aliens is the Immigrants and Emigrants Ordinance of 1948. Article 10 of this Ordinance is titled "documents required at the time of entry". It reads "a person to whom this part applies shall not enter Sri Lanka unless he has in his possession (a) a valid passport which bears an endorsement in the prescribed form granted to him by an authorised officer (b) if so required under regulations made under this Act, a visa granted to him under such regulations." Article 14(1) of the same document says "a visa may be granted by the prescribed

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[78] "Afghans Head Home from Eastern Pakistan", AFP, 2 June 2003, www.unhcr.ch

[79] Deepika Udagama, "Protection of Refugees in Sri Lanka, *Regional Consultation on Refugees and Migratory Movements in South Asia*, 14-15 November 1996, p.86

[80] ibid, p.87

[81] ibid, p.87

authority for such period not exceeding two years, as may be specified in the visa". Article 14(2) provides "a visa may, with the approval of the minister, be granted by the prescribed authority for such period exceeding two years but not exceeding five years as may be specified in the visa".[82]

Neither the controller of immigration and emigration nor any other officer possesses guideline and authority to determine refugee status or to provide protection to asylum applicants or to enforce the principle of *non-refoulement*. Only the extradition law No. 8 of 1977 marginally provides for this latter aspect by prohibiting the extradition of persons who may be persecuted on the basis of race, religion, nationality and political opinion. However, in this case the final determination relating to non-extradition is to be made by the court.[83]

Whenever an airliner or ship brings in passengers who do not possess valid documents of visa, the controller of immigration and emigration permits the UNHCR to interview persons so stranded if they request protection. When the UNHCR takes over the persons seeking protection, certificates are issued which operate as visas. The UNHCR has to bear the expenses of those under its protection. Nationalities who often avail of these provisions are Iranians, Somalians, Iraqis, Pakistanis, Ugandans, etc. The number of such refugees in Sri Lanka is almost nominal. In December 2002 there were only 19 such refugees of which 18 were assisted by the UNHCR.[84]

A more severe problem in Sri Lanka is that of internal displacement. This internal displacement in Sri Lanka is linked to the ethnic conflict that has been going on for decades in this country. This conflict is the result of ethnic assertion of the Sinhalese people who constitute approximately 74% of the population over the Indian Tamils who constitute 12.5% of the population.[85] The ethnic tensions

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[82] *Immigrants and Emigrants Ordinance*, Government of Sri Lanka, 1948

[83] Deepika Udgama, n. 79, p.86

[84] UNHCR, *Quarterly Refugee Trends: Populations, New Arrivals, Repatriation and Resettlement in 86 Asylum Countries*, Population Data Unit, 24 December 2002, www.unhcr.ch

[85] Ahilan Arulanathan and Elizbeth Ban Schaak, "Having lost our Homeland", *Seminar* 463, March 1998, p.29

escalated into violent riots in 1956, 1958, 1971, 1977, 1981 and 1983.[86] As a result of these conflicts in southern parts of Sri Lanka Tamil people were forced to leave their homes in the Sinhla dominated parts of the country and move to the north and the east. In the aftermath of the attack against Tamil people in the plantation areas in the late 1970s, many of these people from the central islands of Sri Lanka settled in the Vavuniya and Killinochi districts of the northern province.[87] The UNHCR and Refugees International both estimated that 800,000 Sri Lankans remained displaced internally at the end of 2001.[88] Most have been displaced more than once, some for several years at a time. Some of them have returned only to be caught up in a civil war.[89]

Internally displaced persons at present lack protection under international law. At the same time human rights guarantees crucial for the displaced and enshrined in state constitutions are legitimately derogated or restricted in the interest of public order or security. Lack of legal protection may also exist where armed groups exert control over territory where the government writ does not run.[90]

Throughout the years of violence the government has maintained a skeleton administration in LTTE controlled areas which has been effective in registering IDPs and managing humanitarian assistance provided by the government. In areas under its control IDPs and resettled families have also been able to get some government assistance for shelter. In principle returnees from abroad and resettling or relocating IDPs can benefit from government grants and loans to help make them self-sufficient. In practice, poor management has reduced the schemes' effectiveness.[91] On several occasions the government has set up rehabilitation and

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[86] Koenraad Ban Brabant, "Regional Profiles: Sri Lanka, Internally Displaced Persons: A Global Survey, (London 2000), p.148

[87] Nimalka Fernando, "Civil War and Refugees in Sri Lanka" Summer 2000, www.imadr.org /project/srilanka/news.html.

[88] World Refugee Survey, 2002, US Committee for Refugees, www.unhcr.ch

[89] Ajith Rupasinghe,"Politics of the Refugee Crisis in Srilanka", in Tapan Bose and Rita Manchanda, States, Citizens and Outsiders, (SAFHR, 1997), p.335

[90] Bradman Weerakoon, Bernard Tilakaratna and Deepika Udagama, "Internal Displacement", Regional Consultation on Refugee and Migratory Movements, 25-27 September 1995,pp.37-45

[91] Koenraad Ban Brabant, n. 86, p.150

reconstruction programmes to which the international community has given financial and other support.

Following the Indo-Sri Lankan peace accord of 1987, a Ministry of Reconstruction and Rehabilitation was created to provide an institutional focus and extra capacity.[92] However, staff shortages, strict control of supplies and inadequate infrastructure have severely limited the functioning of local services including health, education, roads and agriculture.[93] One of the major criticisms of the first 7-year (1987 to 1994) emergency rehabilitation and reconstruction plan (ERRP1) was its lack of participatory involve-ment of the target groups and intended beneficiaries. Participatory approaches were one of the strong recommendations of the comprehensive exercise that should have resulted in an ERRP2.[94] The institutional framework for the government's decision making with regard to the areas of the north now back in its control, is the Rehabilitation and Resettlement Authority for the North (RRAN).

There are 10 international NGOs working with IDPs most of which also have development programmes in the south. The ICRC has been operating in Sri Lanka since 1989. Its large scale operations involve visiting detention centres, tracing missing people, dissemination and relief, mostly in health and emergency shelter. In 1993 UNHCR adopted criteria for its involvement with the internally displaced in Sri Lanka. It provides that it will assume 'primary responsibility' in situations where there is a direct link with its basic activities for refugees, in particular where returning refugees are mingled with IDPs. It further said that it would involve itself in situations where there is a significant risk that the internally displaced will become a refugee problem.[95] UNHCR has provided assistance to IDPs, for example, through its 'open relief centre', safe heavens, micro projects, etc. during the third Elam war the UNHCR became a major player in emergency relief and

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[92] ibid, p.151

[93] Regional Profiles: Sri Lanka, *Internally Displaced Persons: A Global Survey* (London, 2002)

[94] Koenraad Ban Brabant, n. 86, p.151

[95] Bradman Weerakoon, Bernard Tilakaratna and Deepika Udagama, n 90, p.63

logistics for IDPs and returning refugees.[96] In January 2002 there were 683,300 IDPs of concern to UNHCR in Sri Lanka.[97]

The complicating situation of the region and increasing and varied nature of refugee movement in the region has necessitated a legal framework to deal with them. Since all refugees are technically considered illegal aliens they have no institutional or legal protection. They are largely dependent on the generosity and humanitarian gestures of the host government. These standards may differ from time to time from one country to another based on the whims and fancies of refugee officials.[98] The South Asian states can follow 3 paths in evolving a legal framework: (i) accession to the 1951 Convention and/or its 1967 protocol, (ii) a domestic legislation to be enacted keeping in mind the specific problems faced by the individual countries, and (iii) regional convention based on the experiences and culture of the region.

Reasons for Non-accession to 1951 Convention

Most of the South Asian countries have acceded to the major humanitarian instruments like International Covenant on Economic, Social and Cultural Rights (India, Nepal and Sri Lanka), International Covenant on Civil and Political Rights (India, Nepal and Sri Lanka), International Covenant on the Elimination of All Forms of Racial Discrimination (Pakistan, Bangladesh, India, Maldives, Nepal, Sri Lanka), Convention on Prevention and Punishment of the Crime of Genocide (Pakistan, India, Maldives, Nepal, Sri Lanka), Convention on the Rights of the Child(Pakistan, Bangladesh, India, Maldives, Nepal, Sri Lanka and Bhutan), Convention on the Elimination of All Forms of Discrimination Against Women (Pakistan, Bangladesh, India, Maldives, Nepal, Sri Lanka and Bhutan) and Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (India, Nepal and Sri Lanka).[99]

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[96] Koenraad Ban Brabant, n.86, p.152

[97] UNHCR, "Refugees by Numbers 2002 Edition", www.unhcr.ch

[98] S.S. Wijeratne, "Importance of Regional Co-operation and Need for Formulation/Adoption of Regional Refugee Instruments" *Fifth Informal Regional Consultation on Refugee and Migratory Movements in South Asia*, 9-10 November, 1998, Kathmandu, pp. 53-59

[99] Bradman Weerakoon, "Regional Initiatives to Promote Awareness of and Accession to the 1951 Refugee Convention and Other Relevant Human Rights Instruments", *Fourth Informal*

None of these Countries have ratified the 1951 Convention and the 1967 protocol. There are several reasons which are cited:

(a) the Euro-centric character of the 1951 Convention[100]- It is pointed out that the definition is confined to the violation of civil and political rights, and does not extend to social, economic and cultural rights. Further, the definition also excludes protection to individuals or groups fleeing internal wars or situations of generalised violence.[101]

(b) historical peculiarity of the region- Almost all the countries of the region were under the British colonial rule. Under the British rule the whole region was administered as a sub-continental region. The boundaries created by the colonial powers at the time of their withdrawal were arbitrary and often cut across cultural and ethnic identities. Under these circumstances, the states in this region find it increasingly difficult to stop people of the region from entering into their country.

Further, the countries of South Asia have a tradition of hospitality and reception of asylum seekers, as was evidenced in the case of Tibetan refuges in India, Sri Lankan refugees etc. The region also faces the peculiar problem of statelessness. The Indian Tamils in Sri Lanka, the Chakma and Hajong tribals and the Biharis of Bangladesh fall under this category.

(c) the lack of control over borders - most of the boundaries in South Asia are forests. In fact these boundaries are superimposed over cultural boundaries and, therefore, often flouted. There are few natural boundaries that separate one countries from another. Moreover it is impossible for any government to patrol its border effectively. Since vital registration is not compulsory, they do not have means of identifying their citizens.[102] Under these circumstances the countries of South Asia would not be able to distinguish between their own citizens and people from the same region.

Regional Consultation on Refugee and Migratory Movements in South Asia,, 10-11 November, 1997, p.48

[100] Rajeev Dhawan, "The Refugee in India", *The Hindu*, 28 June,2003

[101] B.S. Chmni, n. 30, p.444

[102] Prem R. Upreti, "Stateless persons in South Asia: The Nepali Experience", *Regional Consultation on Refugees and Migratory Movements*, 25-27 September 1995, p.59.

(d) ethnic ties cutting across borders- since ethnic, cultural and linguistic identity of the people of South Asia cut across national boundaries, it is difficult to prohibit them from entering into the countries. For example, Nepali speaking Lhotshampas from Southern Bhutan having ethnic affinity with Nepalis could easily move into Nepal.

(e) lack of sufficient resources - in economic terms the countries of South Asia are among the least developed category. The problem of poverty is chronic in these regions. Most of these countries are still not in a position to fulfil the basic necessities of food, clothing and shelter of their own population. Under these circumstances they would not be able to bear the burden that the refugees would impose on their economy. Moreover, they would also not be able to provide the rights of refugees that are entailed in the 1951 Convention.

(f) the dismantling of the convention by the Western states - the Western countries are increasingly implementing non-entry regime with regard to refugees. A host of restrictive practices have been institutionalised in the western world to prevent refugees fleeing underdeveloped countries from arriving at its doorsteps.[103] Some of these often used practices are visa requirements and carrier sanctions, creation of international zones, narrow interpretation of the concept of *non-refoulement*, etc.

India's inhibition can be traced to the perception that these instruments were the products of the cold war and therefore, not in tune with the present refugee crisis. India further argues that the narrow definition of refugees as expounded by the 1951 convention is not sufficient to deal with the country's history, size and complexity of the problem. The definition of the term refugee in the 1951 Convention places emphasis on fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. This definition was drawn up in the context of the post war years and does not apply to the current refugee situation.[104] Moreover, India is against the unilateral restrictive asylum practices of the western industrialised world and wants the affluent world to share the increasing refugee burdens.

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[103] B.S. Chimni, "In International Law", *Seminar*, Volume 463, March 1998, pp. 18-22

[104] P.N. Bhagawati, "Presidential Address", *Refugees in the SAARC Region: Building a Legal Frame-work*, New Delhi, 1997, p. 21.

Chimni[105] points out some of the reasons often advanced for India not becoming a party to the 1951 Convention. First, reference is made to the Euro-centric definition of refugee contained in the 1951 Convention. Second, it is noted that the rights regime contained in the 1951 Convention is too burdensome for third world countries like India to implement as it can barely meet the needs of its own citizens. Third, it is said that once India becomes a party to the 1951 Convention, it would allow under Article 35, intrusive supervision by the UNHCR of the national refugee regime. Fourth, apprehension is expressed that international NGOs could, citing India's membership of the 1951 Convention embarrass the government in front of the international community through negative reports which do not take into account the problems faced by a poor country in addressing the concerns of refugees. Fifth, it is pointed out that the 1951 Convention does not allow an effective protection of India's national security interests. Terrorists and other criminal elements could abuse its provisions to get refuge in the country. Sixth, it is argued that India's record in giving assistance and protection to refugees is satisfactory and, therefore, there is no particular reason for it to accede to the 1951 Convention.

Pakistan, in its defence says that even without ratifying these international instruments it has been able to host and manage a large number of refugees. It further says that another reason for non-accession is that the rights provided in the international refugee regime would create unbearable economic liability for the state. Pakistan can ill afford to guarantee such rights as the right to wage earning employment (Article 17 of the 1951 Convention), right to elementary education (Article 22), right to social security (Article 24), etc. as enshrined in the 1951 convention.[106] These Articles stipulate that the contracting states should accord the most favourable treatment to refugee, who is residing lawfully in their territory, with regard to wage earning employment, self-employment, rationing, housing, public education and social security.

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[105]   B.S. Chmni, n.30, p.444

[106]   Justice Dr. Nasim Hassan Shah, n. 68, p.37

Other countries of the region also cite various reasons for non- accession to the 1951 convention. They are one or the other of the following.[107]:

(i)   The perception that the 1951 refugee convention, as it was devised at a time when the cold war was at its height and was used by the western states as instrument of cold war. The definition of refugee enshrined in the convention was intended to assist refugees seeking political refuge. This definition is inadequate to deal with the refugees of the South Asian region who are mainly the result of civil war. During the cold war, the western countries used the 1951 refugee convention selectively. While they readily accepted political asylum seekers, detractors and oustees from the eastern European countries, they consistently rejected genuine refugees from the African and Asian continent.

(ii) Official practice of dealing with refugee issues on a bilateral basis. This is reflected in the negotiation between Nepali and Bhutanis governments with regard to southern Bhutanis in Nepal, the agreements between Bangladesh and Myanmar with regard to Rohingyas in Bangladesh, the Indo-Sri Lankan agreement regarding the Sri Lankan Tamils in the Indian State of Tamil Nadu and the agreement between Bangladesh and Pakistan with regard to Biharis in Bangladesh.

(iii) Bureaucratic sensitivities against perceived 'interventionist' activities of United Nation agencies when international protection is afforded to refugees under the terms of the refugee convention. Article 35 of the 1951 convention stipulate the provision of cooperation of the contracting state with the UNHCR with regard to refugee information. This Article further says that the contracting states should provide UNHCR with information and statistical data regarding condition of refugees, the implementation of the convention and laws and regulations regarding refugees. The South Asian states fear that the UNHCR may act as the agents of western donor countries and will not understand the predicaments of underdeveloped South Asian countries.

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[107] Bradman Weerakoon, n. 99, p. 49

(iv) The perception that refugee conventions being dismantled by those very states which had created it. Most of the western countries have started adopting non-entrée regimes and principle of temporary protection.[108]

(v) The apprehension that the obligations that would be needed to be undertaken by these countries on accession to the convention would result in needless problems for the states of South Asia who have not as yet been able to ensure basic social and economic right for their own population. These Articles stipulate that the contracting states should accord the most favourable treatment to refugee, who is residing lawfully in their territory, with regard to wage earning employment, self-employment, rationing, housing, public education and social security. For example, a country like Bangladesh cannot clothe, house and feed their own population. In that country 120 million people live in 55,000 sq. mile area.[109]

(vi) The possibility that the convention may be used by the economic migrants who seek illegal means of entry. It is the perception that once the convention is acceded to, the states would not be able to push back anybody. There is an apprehension that the signing of the Convention would make entry for economic migrants easy.

(vii) The belief that accession to the convention is not going to change the nature of refugee protection in these countries as they are already following a liberal tradition of hosting refugees.[110]

Those who favour accession to the international convention argue that by doing so the South Asian states would attain a platform within the UN to pressurise western countries to adhere to these principles. Chimni says that most of the arguments advanced by the South Asian countries for not acceding to the 1951 Convention do not withstand close scrutiny. First, a state that becomes party to the convention is not prevented from including a broader definition of refugee in its national law. Second, it is not true that India is to implement in totality the rights regime contained in the 1951 convention. The convention under Article 42 provides for

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[108] Explained in detail in Chapter 2

[109] Ziaur Rahman Khan, "Proceedings of the Consultation on Need for National Law on Refugees", in C.R.Abrar and Shahdeen Malik (ed.), *Towards National Refugee Laws in South Asia*, (Dhaka, 2000), p.65

[110] As evident from the country profiles mentioned in the previous section

reservation to be made to the rights regime. Further, while these countries have a genuine concern regarding its national security interest, it is taken care of in the 1951 convention. Article 33 of the convention categorically states that the provision of non-refoulement does not apply to a person who is convicted of serious crimes or constitutes a danger to the community of that country. Moreover, the 1951 convention facilitates and legitimises the distinction between a refugee and other categories of migrants. Therefore the states of South Asia will in fact benefit by adopting this convention.[111]

Besides some scholars are of the view that in the absence of a legal framework for the protection of refugees in the South Asian countries, the 1951 convention can be used as a management tool.[112]

Regional Approach to Refugee Problems in South Asia

The proponents of a regional approach to refugee problem base their view on the notion that

(i) the causes of refugee flows lie within the region- reasons attributed to the incidences of refugees in the region are colonial policies, ethno-religious discontents and struggle, open borders, etc.. The refugee movement in this part of the world is not a result of foreign aggression, or domination or any other external reasons. Refugees in the region are created by factors within the countries of the region.

(ii) most refugee flows take place within the region and cultural similarities necessarily facilitate regional solutions- the states of India and Pakistan and later Bangladesh got defined from massive refugee movements. After 1947 partition, 7.5 million Hindu and Sikh refugees from Pakistan crossed over to India and 7.2 million Muslims from India crossed to Pakistan. It was the largest recorded refugee movement in history. There was no or little international assistance in this massive and painful humanitarian crisis.[113] Flight of Burmese Muslims to Bangladesh, flight of Chakmas from

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[111] B.S. Chmni, n. 30, pp.445-447

[112] Bradman Weerakoon, n.99, p. 53

[113] "SAARC Region", *Fifth Informal Regional Consultation of Refugees and Migratory Movements*, 9-10 November 1998, p. 54

Bangladesh to India, flight of Bangladeshis to India, flight of Afghans to Pakistan, Tibetans to India have been successfully handled by the countries in this region.

The countries in South Asia have during the past fifty years dealt with an estimated 35-40 million refugees relying on traditional principles of asylum founded in their historical, religious and cultural practices. The principles underlying the traditional practices have by and large confirmed to the standards found in international refugee law. This is evident from the absence of severe international criticism of South Asia asylum practices.[114]

(iii) refugee flows threaten the stability in the region - In recent times international migratory flows within South Asia have become largely unacceptable, uncontrollable and a source of conflict among the countries of the region and often within the receiving country. For example, Pakistan rejected many stranded Pakistanis for the fear that their migration would exacerbate conflicts between Sindhis and Muhajirs. The Assemese were concerned that the influx from Bangladesh would result in loss of land, employment, cultural hegemony and political power to foreigners.[115] By evolving a regional convention for refugees providing for clear cut methods of refugee management would help in displacing the language of realism and bring in the humanitarian aspect.

(iv) since most countries in the region face similar refugee problems, all countries would benefit from a regional refugee policy. Almost all the South Asian States are afflicted by the refugee problem and in some cases the refugee issues affect more than two countries. The Bhutanese refugees, for instance, are an issue both in India and Nepal. The Bangladeshi economic and illegal immigrants are present in India, Nepal and also Pakistan.[116]

The causes for refugee movements in the South Asian region are generally the same for all countries of the region. They have their roots in imperial policies, problems of state formation and nation building, ethnic conflicts and regional wars.

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[114] S.S. Vijeratne, n. 98, p. 62

[115] Myron Weiner, n. 4, p. 1744.

[116] Lok Raj Baral and S.D. Muni, "Conclusions: Refugees, Prospects and Security Solutions" in Lok Raj Baral and S.D. Muni (ed.), *Refugees and Regional Security in South Asia*, Colombo, 1996), p. 236

Cross border cultural, linguistic and ethnic affinities between the populations of the South Asian states and the porous borders of these states make it very difficult for the individual states to control population entry.[117]. None of the countries of South Asia have devised any constitutional provisions or legal frameworks to deal with the issue of refugees. In the absence of such legislation, refugees have been treated in an *adhoc* manner and they have often used as pawns in regional geopolitics.

In this case even SAARC has not been of much aid as it does not, as a matter of policy, deal with contentious issues. SAARC Charter under its General Provisions II says that bilateral and contentious issues are excluded from its deliberations. Since most refugee issues are bilateral and contentious in nature, SAARC cannot address them. Notwithstanding this provision, on the non-consideration of bilateral and contentious issues, the fact remains that the SAARC forum and frequency of meetings at various senior, bureaucratic and political levels have exercised a benign influence on the resolution of bilateral conflictual issues, including those related with refugees.[118] Talks between the Nepali Prime Minister Koirala and the Bhutanese King on the question of the Bhutanese refugees in Nepal, during the Dhaka SAARC summit in 1994, paved the way for bilateral negotiations between the two countries.[119]

Countries of the South Asian region are, one and all, afflicted with the refuge problem. Pakistan is facing the problem of Afghan refugees; just as Nepal has the problem of refugees from Bhutan. Bangladesh is battling with problems of refugees from Myanmar; and Sri Lanka has her own problems arising from internal displacement. India has the problem of Chakma refugees from Bangladesh, Tamil Refugees from Sri Lanka, Tibetan Refugees, Bhutanese refugees, Arakanese refugees from Myanmar and refugees from some other countries as well.[120] It is also argued that the liberal principles adopted by the states of South Asia towards refugees can be assimilated as a regional policy.

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[117] All these reasons have been dealt with in detail in the previous chapter.

[118] S.D. Muni and Lok Raj Baral, n. 116, p. 235

[119] ibid, p. 236

[120] P.N. Bhagavati, n. 104, p. 19

A regional approach to refugee problem can take cues from the regional conventions adopted in other regions like the OAU Convention and the Cartagena Declaration. These regional organisations have adopted an expanded refugee definition, criteria and redressal mechanism to suit the specific needs of their region.

Furthermore, the South Asian region itself has adopted a number of regional conventions to evolve a common approach to issues of common concern. These are the convention establishing SAARC Food Security Reserve adopted in 1988, SAARC Regional Convention on Suppression of Terrorism signed in 1987, SAARC Convention on Narcotic Drugs and Psychotropic Substances, SAARC Agreement on SAPTA and the Convention Against Trafficking of Women and Children signed in 2002. All these conventions have sought to find solutions to common problems faced by the countries of the region.

The preamble of the Convention on SAARC Food Security Reserve recognises the importance of regional and sub regional collective self reliance with respect to food security as a means of combating the adverse effect of natural and man made calamity and refers to the spirit of solidarity and mutual cooperation in which agreement has been signed.

By the agreement on SAARC regional convention on suppression of terrorism the countries have agreed to help one another in suppression of terrorist activities in the region in accordance with the Hague Convention of 1970, the Montreal Convention of 1971 and the New York Convention of 1973 dealing with unlawful seizure of aircraft, acts against safety of civil aviation and crimes against internationally protected persons respectively. In addition, offences like murder, manslaughter, bodily harm, assaults, kidnapping, hostage taking, etc. including aiding and abetting of such offences were brought under the purview of this Convention.[121]

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[121] Dipankar Banerjee, *SAARC in the 21st Century: Towards a Cooperative Future* (New Delhi, 2002), pp. 73-74.

At the Islamabad summit in 1988, SAARC expressed great concern over the growing magnitude and the serious effect of drug abuse and trafficking and recognised the need for urgent and effective measures to eradicate this problem, including the possibility of a regional convention on drug control. Article 2 of the Convention calls upon the member states to cooperate among themselves to address various aspects of prevention and control of drug abuse and suppression of illegal trade.

However, the two conventions on suppression of terrorism and narcotic drugs and psychotropic substances had no impact on controlling terrorism or drug trafficking through regional cooperation in South Asia. Some of the countries have still not even enacted the enabling national legislation to give effect to these conventions.[122]

In case of the Convention on Terrorism, the agreement was the result of considerable debate and compromises. It is, therefore, vague and full of lacunae in many respects. It does not even define clearly the terms 'terrorists' and 'terrorism'. Almost every provision in this convention mentions that it would be subject to the law of the concerned state. Therefore, the operation of the convention depends on the will of the state. The shortcomings of the convention are evident from the fact that in spite of the convention, terrorism is assuming endemic proportions in South Asia.[123]

In spite of the limited successes of these conventions, it emits a visible sign on the willingness on the part of the SAARC members to tackle political issues at the regional level. Dr. Partha S.Ghosh points out that if not anything else the process has begun where the states get used to each others sensitivity and susceptibility which by itself is a positive development. Further this is an indication that despite its self imposed restraint of precluding bilateral and contentious issues from formal

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[122] Report of the SAARC Group of Eminent Persons, *SAARC Vision beyond the year 2000*, (New Delhi, 2001), pp. 36-37.

[123] Dipankar Banerjee, n.121, p. 74

discussion, SAARC is being hard put in avoiding consideration of vital regional, political and strategic questions.[124]

As far as the refugee issue is concerned, initiatives have been undertaken in the South Asian Countries. Representatives of India, Pakistan and Sri Lanka participated in the Asian-African legal consultative committee of principles concerning treatment of refugees held at Bangkok in 1966. The Bangkok principles do not amount to any treaty obligations but have served as guidelines on issues affecting refugees such as the definition of refugees, loss of status, asylum, right of return, minimum standards of treatment, obligations, etc. At the inter-governmental Asia-Pacific consultation in Canberra on regional approaches to refugees and displaced persons in Asia held in November 1996, India, Bangladesh, Nepal, Pakistan and Sri Lanka participated.

At the South Asian regional level, efforts at dealing with the refugee issue have been initiated since 1994. An informal meeting was held in 1994 between the United Nations High Commissioner for Refugees (UNHCR), and one eminent person each from Bangladesh, India, Nepal, Pakistan and Sri Lanka in an effort to identify common ground on migratory and refugee issues, with the ultimate goal of establishing an adequate national and/or regional regime of protection.[125] Since then, five more such informal consultations have taken place. In these consultations the representatives of each state has put across his/ her nation's views, problems, apprehensions and inadequacies regarding the refugee issue. Representatives of these countries have also presented working papers on issues relating to refugees like statelessness, internally displaced persons, refugee situations in their respective countries, etc. In each of these consultations the states have come up with a report on the progress their states have made in dealing with the refugee issue.

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[124] Ross Masoodi Hussain, "SAARC 1985 to 1995: A Review and Analysis of Progess, in Eric Gonsalves and Nancy Jetly (ed.), *The Dynamics of South Asia: Regional cooperation and SAARC*, New Delhi, 1999), pp. 21-40

[125] Bradman Weerakoon, "Introduction", *Sixth Informal Consultation on Refugee and Migratory Movements*, 23-24 September 2001, Colombo, p. 1

Besides this, SAARCLAW, a body officially recognised by SAARC which brings together eminent legal personalities, looked at the refugee issue in a seminar held at New Delhi in 1996. This seminar examined the prevailing situation of refugees in the region and how matters relating to them can be best addressed. Among other issues discussed were the need for proper laws to define and identify refugees, the principle of non-refoulement, and the question of durable solutions.[126]

The seminar also discussed the relative merits of a regional convention vis-à-vis a national one. At the seminar K.K. Venugopal, President of SAARCLAW stressed the importance of uniform standards of law and practice governing refugees in the region. At the seminar, Ramakant Khalap of India focussed on the close relationship between the violation of human rights and the refugee situation. There was an opinion that persons fleeing their homes because of manmade disasters, ecological disasters, conflict situations and poverty should also be classifies as refugees. P.N. Bhagavati opined that the principle of non-refoulement and adequate quasi-judicial mechanisms for refugee status determination were essential components of any refugee legislation.[127] Almost all the participants of the seminar favoured a refugee legislation in order to overcome the *ad-hocism* in the practice of granting asylum in South Asia.

Type of Regional Approach

V. Vijayakumar[128] says that there are three kinds of approaches that South Asian countries can take in the formulation of a regional refugee policy. These are:

(i) Legally binding instruments like the OAU Convention Governing the Specific Aspects of Refugee Policy in Africa, 1969, and in Europe, the Schengen and Dublin Convention of 1985 and 1990,[129] respectively.

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[126] Summary, Seminar Report, *Refugees in the SAARC region: Building a Legal Framework*, 2-3 May, 1997, New Delhi, p. 1

[127] P.N. Bhagavati, n. 104, p. 21

[128] V. Vijayakumar, "Developing a Regional Approach to a Regional Problems in South Asia", *Fourth Regional Consultation on Refugee and Migratory Movements in South Asia*, 10-11 November 1997, Dhaka, pp.55-59

[129] These Conventions have been explained in detail in the second chapter.

(ii) Non binding declarations like those adopted by the Organisation Of American States and the Bangkok Principles Concerning the Treatment of Refugees adopted by the Asian African Legal Consultative Committee.

(iii) A third approach can be to develop regional arrangement related to specific refugee problem, like the Comprehensive Plan of Action for Indo-Chinese refugees in South East Asia (CPA) and the international Conference on Central American Refugees (CIREFCA).

The International Conference on Central American Refugees (CIREFCA), was convened in 1989. It followed the signing of the Esquipulas II Peace Agreement in 1987, in which signatory states formally declared that a solution to the refugee problem had to be an integral part of the peace initiative in the region. CIREFCA's plan of action is characterised by wide ranging commitments on the part of countries concerned. In the search for durable solutions for the over 2 million refugees and displaced in the region, signatory states committed themselves to abandon a purely assistance oriented approach by closing refugee camps, integrate the uprooted within wider development programmes, respect basic principles of humanitarian treatment for all categories of uprooted and engage in dialogue at country level, especially with NGOs, with aim of achieving national conciliation.[130]

Forced displacement was to be addressed without distinction among categories, assistance to the displaced was to be linked to national development plans. The conference set up specific follow-up mechanisms at the international, regional and national levels with the aim of involving all key actors and in building consensus. UNHCR and UNDP were entrusted with the technical support and follow-up to the plan of action which, in addition to their respective programmes in the countries, was expressed mainly through the CIREFCA Joint Support Unit.[131]

Until 1989, the international response to the problem of Indo-Chinese refugees had been the combination of temporary asylum in countries in the region, and

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[130] "Comprehensive and Regional approaches to Refugee Problems", www.unhcr.ch/cgi-bin/texis/ vtx/home/+swwBmeoYZ69wwwww.../opendoc.ht, p.8

[131] ibid, p.9

international resettlement. By 1987, first asylum countries faced sharply increased influxes, while resettlement possibilities dwindled. The UNHCR sponsored conference on Indo-Chinese refugees (June 1989) sought to define a new framework which would safeguard the protection of refugers, enable the repatriation of non-refugee migrants, taking into account the concerns of the country of origin, first asylum, and resettlement.

The conference adopted the Comprehensive Plan of Action (CPA), which included the development measures, including a mass media campaign within the country of origin, to deter clandestine departures for non-refugee reasons. It also called for the acceleration and expansion of immigration through orderly departure procedures and other migration programmes. It provided for grant of temporary refuge to arrivals in the region and unimpeded UNHCR access to these arrivals. It called for establishment of refugee status determination procedures in countries of first asylum for those persons arriving after a certain "cut-off date", the continuation and expansion of resettlement for those Vietnamese who arrived before refugee determination procedures were established, and for those determined to be refugees. Material assistance was provided to returning Vietnamese as well as to communities on their return.[132]

Any regional regime on refugees should adopt a definition of the term refugee, procedure of determination of refugee status, outline the rights and duties of asylum seekers, address the problem of statelessness, include the principle cf voluntary repatriation and examine the mechanisms to be adopted to implement the regional instrument.

Problems in Evolving a Regional Approach to Refugees in South Asia

The attempt to evolve a regional refugee policy for South Asia is ridden with problems. Firstly, the environment of suspicion that engulfs this region is not conducive for a common approach to refugee problem. This region is engulfed with bilateral problems relating to boundary demarcation, river water sharing, etc.

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[132] ibid, ,pp. 9-10

the power asymmetries between the countries of the region make them vary of one another. They fear that a refugee regime may be used by their neighbour in the region to interfere in their domestic politics.

Secondly, bilateral mode of resolving contentious issues has been for long the dominant mode of dispute resolution in the region and it is unlikely that the ruling elite would break from this tradition with reference to refugee problem. The absence of any specific refugee legislations gives the country a scope for political maneuvering. In some cases the refugees are also used as pawns in intra-state politics.

Thirdly, the power asymmetry, geographical proximity, and the divergence in the nation and state building processes that characterise this region reduce the possibility of arriving at a common solution.

Countries of this region are differently positioned in terms of receiving refugees from within the region. For example the island states of Sri Lanka and Maldives are excluded from being a host to asylum seekers.[133] Sri Lanka hosts only a handful of external refugees. On the other hand, India is prone to greater refugee flows as it has land or sea borders with all the countries in the region. There is also a possibility that a regional convention on refugees may become a redundant document like some other conventions that have been adopted by SAARC. The successes of SAARC regional convention like that on narcotics and psychotropic substances and on terrorism have not been implemented properly because adequate measures to implement them have not been taken at the national level. In the absence of domestic legislation, even the refugee convention may become a document only on paper.

Furthermore, some scholars like Chimni[134] oppose the very concept of regional solution to refugee problem. He says that propagating a regional approach is, in the

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[133] B.S. Chimni, *The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia* (Colombo 1998), p. 8

[134] ibid, p.8

post cold war era, an exclusionary device which is advocated to help reduce the burden of the global refugee problem on the affluent regions of the world.

Rationale for National Legislation on Refugees

Many scholars, administrators and legal experts are of the opinion that there is a need to draft domestic legislation to deal with the refugee problem in individual states.

Abrar[135] is of the opinion that a National Law, embodying the basic principles of international humanitarian law would equip the state with the proper procedures to distinguish between a genuine asylum seeker and those who have crossed the border for other reasons. He further says that a formal refugee law would help bring about administrative efficiency. Absence of such law leads to confusion, *ad hocism* and bureaucratic red-tapism. A set of rules with clear delineation of authority would establish proper status determination procedure. It will also lay out rights and obligation of refugees. A national law on refugees would also help in conducting foreign relations of receiving states with other states. As granting of refugee status to a national of other country would constitute a legal obligation, based on international humanitarian law, such an act would absolve the asylum country from the charges of unfriendly act by the state whose national is accorded the status.

Most participants of the Fifth Informal Regional Consultation on Refugee and Migratory Movements also voiced similar views. One Participant suggested that such a law, apart from ensuring transparency in official dealings with refugees, serves to constrain government officials in the exercise of their discretion in handling refugee matters and would compel them to act in responsible manner. Without a legal framework, the standards of treatment of refugees is dependent on the officials incharge based on adhoc approaches, thus resulting in lack of uniformity and coherence.[136]

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[135] C.R. Abrar, n. 8, pp. 45-48

[136] "Summary of Discussion Sessions", *Fifth Informal Regional Consultation on Refugee and Migratory Movements,* 9-10 November,1998, Kathmandu, pp. 24-25

The legalist view on National Legislation, as endorsed by legal experts like Vijaykumar, propounds the notion that having a legal framework on refugees is not only a sign of a positive attitude of a civil society to refugee issues, but would also lay down specific provisions. According to them it can provide appropriate institutions, appeal procedures, guidelines, define the groups or the categories of persons to be assisted, the rights and duties of both states and the refugees and a host of other things.[137] In the same tone, Justice P.N. Bhagwati says that in the absence of legislations in the South Asian countries, refugees are treated on a purely *adhoc* basis. He says that under these circumstances, there is a great need for a legal framework in each country of South Asia.[138]

Chimni[139] also enunciates a number of reasons for adopting a national legislation. In his opinion, such a law would replace a charity based approach that governs grant of asylum in South Asia, by a rights based approach. A national legislation would spell out the rights and duties of refugees. A national law dealing with the status of refugees will allow the government to clearly distinguish between an illegal migrant and a refugee. It will facilitate the identification of illegal migrants posing as refugees. Further a law on the status of refugees will help the countries avoid certain diplomatic problems and difficulties. For example, when India gave refuge to the Karmapa Lama in the year 2000, it was alleged that it amounted to interference in the internal affairs of China. Similarly, the recent expulsions of Tibetans from Nepal led to widespread international criticism of that country.

He further says that a national legislation on refugees would help in providing uniform treatment to different refugee groups and thereby reduce the allegation of discrimination by different refugee groups. For example, in the case of India, Tibetans have received much better treatment than the Sri Lankan or Chakma refugees.

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[137] V. Vijaykumar, " The Need for a National Legislation on Refugees", *Round:able Workshop on Refugees in the SAARC Region: National Legislation on Refugees,* 30 April, 1999, New Delhi, p. 30

[138] ibid, p.32

[139] B.S. Chmni, n.30, pp.442-445

The SAARCLAW version considers refugee law as a part of the broader international human rights regime. They term refugee problem as a humanitarian problem. Most of the causes for mass exodus today fall under the rubric of human rights violation, and migrations due to this reason give rise to human rights problems.[140] Singhvi says that the interface between refugees and human rights must start from the very concept of human rights as a baseline of equal concern for the interest of everyone. Human rights is itself reflective of a deep-rooted moral sentiment that all human beings, great or small, virtuous or vicious, should be respected and cared for simply by virtue of being a human being and this must necessarily include refugees.[141]

However, various reasons are cited for the absence of national legislation. Vijaykumar traces this to the failure on the part of the legislature and bureaucracy to recognise the developments in the field of international refugee law, humanitarian law and human rights. The reluctance on the part of the policy makers to recognise the existence of the problem and make necessary legislation is also a reason for the absence of refugee law. Matters are further complicated due to the fear of the policy makers, legislators and the bureaucrats that if the law is enacted then it would lead to fresh refugee flow into the country.[142]

Deepika Udagama[143] traces the absence of refugee legislations in Sri Lanka to the lack of political will. Chimni[144] puts forth various reasons for the absence of national refugee legislations in India. First, the government is apprehensive about passing a national legislation as it is not clear about the consequences of doing so. It is particularly concerned about porous borders and the fact that the national legislation could be used by terrorist and criminal elements to legally stay on in this country. Second, a law on refugees is not a priority in view of the range of

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[140] "Seminar Report", *Refugees in the SAARC region: Building a Legal Framework,* 2-3 May, 1997, New Delhi, pp.1-8

[141] A.M. Singhvi, "Key Note Address", in Mahendra P. Lama (ed.), *India as a Refugee Host Country: Management, Practices and Policy Options,*2000, p.11

[142] V. Vijaykumar, " E- interviews" in C.R. Abrar and Shahdeen Malik(ed.), *Towards National Refugee Laws in South Asia,* (Dhaka,2000), p. 32

[143] ibid, p.32

[144] B.S. Chmni, n. 30, pp.461-63

crucial problems that the parliament has to address in a vast and poor country such as India. Third, there is the cynical fact that the passage of national legislation will allow the court to intervene regularly to protect the interests of refugees, thereby depriving the state of a foreign policy tool. Fourth, there is the absence of knowledge about the legal points involved. Therefore, many of the apprehensions concerning accession to the 1951 Convention also play themselves out in regard to the passage of national legislation. Fifth, there is the worry about the financial cost involved in hosting refugees.

Specific national legislation will take care of details regarding infrastructure, procedural matters, appointment of officials to deal with refugees, criteria for acceptance or rejection of refugee status, provisions with regard to providing asylum, defining special measures in relation to national security concerns and incorporation of bilateral agreements.[145]

According to Arvind Gupta[146] specific national legislation can include the following provisions:

(i)   Delineate the principle of non-refoulement and non-expulsion of refugees. The law would protect refugees and asylum seekers from return, in any manner whatsoever, to the frontiers of territories where their lives or freedom would be threatened because of their race, religion, nationality, membership of a particular social group, or political opinion;

(ii)   Provide for the provision of non-discrimination. The law would contain a general guarantee that the legislation would be applied without discrimination as to race, nationality, etc. to all persons recognised as refugees.

(iii)   Outline the refugee criteria. The definitional and inclusional clause of the Law should contain a definition of a refugee as internationally recognised. It can also include the exclusion clauses as well as the provision for termination of refugee status.

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[145]   Arvind Gupta, "Promotion of National Refugee Laws: Its Time to Strategise", *Sixth Informal Regional Consultation on Refugee and Migratory Movement*, 23-24 September 2001, Colombo. pp.54-63

[146]   Ibid, pp. 56-58

(iv) Mention the need and type of identity and travel documents. Legislation should provide for the issuance of identity documents to recognised refugees and travel documents to those staying lawfully in the country.

(v) Provide for reception facilities and assistance. Subject to the resources available in the country, assistance may be provided to asylum seekers who are considered to be in need, pending the final outcome of their asylum application.

(vi) Stipulate the infrastructure such as body or person who would deal with the subject matter, what committee, commission, court or tribunal would be constituted for the purpose.

(vii) Formulate the rules for the appointment of members, their terms of office and terms of reference.

(viii) Cover the procedural issues for reception of asylum seekers, accomodation and care till their status is determined. It may also outline the rights and duties of refugees.

(ix) Define special measures to be taken by state authorities in relation to national security concerns and with regard to bilateral agreements among states.

Model National Legislation for South Asia

At the invitation of UNHCR, a group of eminent jurists, academics and senior statesmen of South Asia have been working on a draft national law for refugees. They held several rounds of consultation with government leaders, human right activists and refugees in different countries of the region to assess the needs of the governments and the refugees. At the end of a nearly 3 year long exercise, this group of eminent persons finalised the text of a draft model law on refugees. This national model law incorporates the fundamental elements of the 1951 Refugee Convention and its 1967 Protocol as well as the 1969 OAU Convention and the 1984 Cartagena Declaration.[147]

The draft legislation covers a number of aspects on refugees like the definition of the term 'refugee', exclusion from refugee status, principle of *non-refoulement*, application of asylum, constitution of authorities on refugees, determination of

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[147] Tapan K Bose, n. 2, p. 53

refugee status, rights and duties of refugees, situation of mass influx, principle of voluntary repatriation and other rules and regulations.[148]

The main provisions of the Draft National Law on Refugees are:

(i) Definition of a Refugee- Article 4 of the Model Legislation says

  (a) a refugee is any person who is outside his or her country of origin, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of a well-founded fear of persecution oñ account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion, or

  (b) a refugee is any person who owing to external aggression, occupation, foreign domination, serious violation of human rights or other events seriously disrupting public order in either part or whole of his or her country of origin, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin.[149]

Model National Law refugee definition has expanded the definition of refugee beyond the 1951 Convention definition by including 'ethnic identity and sex based persecution'. Moreover, the Model National Law refugee definition expands the scope of refugee status of generalised violence and gross violation of human rights. This provision has been inspired by the expanded refugee definition in OAU Convention and the 1984 Cartagena Declaration.[150]

(ii) Exclusion Clauses- Article 5 of the Model Legislation reads, "a person shall be excluded from refugee status if

  (a) he/she has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

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[148] Arvind Gupta, n. 145.

[149] Model National Law on Refugees, Annex III, *Fourth Informal Regional Consultation on Refugee and Migratory Movement in South Asia*, 10-11 November, 1997, pp.67-72

[150] S.S.Wijeratne, "International Refugee Law and The Proposed Model National Law on Refugees for Countries in South Asia", in C.R. Abrar and Shahdeen Malik,(ed.), *Towards National Refugee Laws in South Asia,* (Bangladesh,2000), pp. 5-6

(b) he/she has committed a serious non-political crime outside the country of asylum prior to his or her admission into this country as refugee."[151]

The Model National Law in the footnote to the exclusion clauses clarifies that commission of political crimes does not *ipso facto* qualify a person to become a refugee, but on the contrary a politically motivated violation of criminal law can disqualify a person from refugee status.

(iii) Principle of *non-refoulement* - Article 6 says that

(a) no refugee or asylum seeker shall be expelled or returned in any manner whatsoever to a place where there are reasons to believe his or her life or freedom would be threatened on account of any of the reasons set out in sub-section (a) or (b) Section 4.

(b) the benefit of the present provision may not, however, be claimed by a refugee or asylum seeker where there are reasonable grounds for regarding him or her as a danger to the security of the country or who has been convicted by a final judgement of serious crime and constitutes a danger to the community.[152]

The provisions of the Model National Law are consistent with similar provision in international, regional refugee instruments and judicial interpretation of the scope of application of the principle in different countries who are signatories to the 1951 Convention.[153]

(iv) Voluntary Repatriation-Article 17 says:

"the repatriation of refugees shall take place at their free volition expressed in writing or other appropriate means, which must be clearly expressed. The voluntary and individual character of repatriation refugees and the need for it to be carried out under conditions of safety to the country of origin shall be respected".

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[151] Model National Law on Refugees, Annex III, *Fourth Informal Regional Consultation on Refugee and Migratory Movement in South Asia*, 10-11 November, 1997, pp.67-72

[152] ibid, pp.67-72

[153] S.S.Wijeratne, n. 98, p. 65

The 1951 Refugee Convention and its 1967 Protocol provides for international protection and sets out obligations of contracting states towards refugees but, had failed to provide except for naturalisation, other possible solutions to the problem of refugees.

(v)   Standards of Treatment of Refugees - Article 14 says, "Every refugee so long as he or she remains within this country, shall have the right to :

   (A)

      (a)   fair and due treatment, without discrimination on grounds of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.

      (b)   receive the same treatment as is generally accorded to aliens under the constitution or any other laws and privileges as may be granted by the Central or State Governments.

      (c)   receive sympathetic consideration by the country of asylum with a view to ensuring basic human entitlements.

      (d)   be given special consideration to their protection and material well-being in the case of refugee women and children

      (e)   choose his or her place of residence and move freely within the territory of the country of asylum.

      (f)   To be issued identity documents.

      (g)   To be issued travel documents for the purpose of travel outside and back to the territory of the country of asylum.

   (B)   every refugee shall be bound by the laws and regulations of the country of asylum."[154]

Provisions in paragraph 14(d) of Model National Law for special consideration of women and children is a unique feature not found in any other refugee instrument.

(vi) Determination of Refugee Status and Role of UNHCR- Article 12 says,

      (a)   " an asylum seeker who wishes to claim refugee status under the terms of this Act shall be heard by a Commissioner for Refugees before the determination of his or her status.

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[154] Model National Law on Refugees, Annex III, *Fourth Informal Regional Consultation on Refugee and Migratory Movement in South Asia,* 10-11 November, 1997, pp.67-72

(b)   During the Refugee determination interview, the asylum seeker shall be given necessary facilities including to services of the competent interpreter where required.

(c)   The asylum seeker, if he or she wishes, shall be given an opportunity, of which he or she could be duly informed, to contact a representative of UNHCR.

(d)   Where an application by the asylum seeker is rejected, the commissioner for Refugees shall give reasons for the order in writing and furnish a copy of it to the asylum seeker"[155]

The provision of engaging an interpreter is comparable with the rights of due process available to a citizen of a country. The obligation cast on the Commissioner of Refugees to give reasons in writing when rejecting a refugee status application would ensure transparency, accountability and provide an opportunity for the rejected asylum seeker to appeal to the Refugee Committee.

(vii) Provisions regarding situations of mass influx- Article 15 says "the government may, in appropriate cases where there is large scale influx of asylum seekers, issue an order permitting them to reside in the country without requiring their individual status to be determined under Section 12 of this Act, until such time as the reasons for departure from the country of origin have ceased to exist, or the government decides that their status should be determined on an individual basis under this Act".[156]

Taking into account the provisions enshrined in the Model National Law, one can conclude that it is an advanced piece of refugee legislation incorporating refugee related legal development since the adoption of 1951 UN Refugee Convention. The Model Law has benefited from the legal developments in Africa, Latin America as well as the Resolutions and deliberations in the inter-governmental Executive Committee of the High Commissioner's programme.[157]

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[155] ibid, pp. 67-72

[156] ibid, pp.67-72

[157] S.S.Wijeratne, n. 150, p. 13

At the Fifth informal consultation on refugee and migratory movement held in November 1998 in Kathmandu, a comparative review of the Model National Law with the 1951 Convention and the OAU Convention on Refugees. It concluded that

(i) The definition in the model law was much wider than that found in 1951 Convention and OAU Convention. Article 4(a) of the Model National Law also includes sex and ethnic identity as grounds for persecution. Secondly, like the OAU convention the Model Law definition under Article 4(b) includes as refugees those persons who are compelled to leave their country owing to external aggression, foreign domination and events disturbing public order. The Model Law definition has also borrowed from the Cartagena Declaration on refugees the concept of serious human rights violation as a reason for mass exodus of population.

(ii) The exclusion provisions in the model law are more restrictive than those contained in the 1951 convention or the OAU convention. The Model Law in Article 5 (a) and (b) puts emphasis on the requirement of proof to hold a person guilty of categories of crime incorporated in the legislation.

(iii) The Model Law also endorses a wider scope of the principle of non-refoulement by stating that the provision of non-rejection at the frontier is applicable to asylum seekers as well as refugees (Article 6(a)). The 1951 convention provision on non-refoulement on the other hand refers to refugees only and this has been interpreted by states to exclude the principle of non-rejection at the frontier.

(iv) The Model Law sets out the procedure for refugee status determination and provides that the request of asylum seekers should be referred to the commissioner of Refugees, whether such request be received at the border point or inside the territory of the country. None of the other instruments contain provisions relating to the treatment of asylum seekers or to procedures for refugee status determination.

(v) In regard to the cessation clauses, while the 1951 convention and OAU convention contain essentially 5 grounds for cessation, Article 13 of the Model Law sets out 4 grounds, omitting the reference to refugees "who

having lost their nationality voluntarily reacquire it" as a ground for cessation.

(vi) As far as the rights and duties of refugees are concerned, the model legislation in line with the 1951 Convention and OAU Convention enumerates the provisions for identity papers, travel documents, freedom of choice of residence and movement and the duties of refugees. The Model Law also incorporates such rights like ensuring basic human entitlements and special consideration for the protection and well being of refugee women and children, (Article 14), which are not mentioned in any other instrument.

(vii) Further the Model National Law also contains the unique provision of mass influx which is not found in any other international instruments.

(viii) The model national law also incorporates the voluntary repatriation provision which is not found in the 1951 convention.

National Legislation vis-à-vis a Regional Regime

Many scholars are of the opinion that adoption of a harmonised national law on refugees by all the countries of the region is a first step towards seeking a regional solution to this problem. Chimni[158] is of the view that regional solution may assume the form of a non-binding declaration with little impact on the behaviour of the states. Also the scope of a regional declaration or convention will be confined to refugees from the region whereas national legislation can be more comprehensive in their coverage. A national convention can take measures to take care of refugees from outside the region. Moreover national legislation could also address the problem of internally displaced persons which would be entirely ruled out in the regional context. In view of the inter-state relations in the region, a regional instrument will only result in a minimalist regime. Also any regional instrument will eventually have to be implemented at the national level. Further, a premature attempt to arrive at a regional solution could mean the scuttling of

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[158] B.S. Chimni, n. 133, p 12.

national legislation as the process of negotiation will raise politically sensitive issues which may turn the citizen hostile to even a national regime for refugees.

Passage of national legislation would enable the South Asian states to identify and debate their individual concerns and bring to the fore divergent perceptions to the refugee problem. For example, all the countries of the region are concerned that a legislation would disadvantage them on the issue of illegal economic immigrants. It will also result in gauging impediments at the level of implementation. With the experience of a national convention, the states in the region would be in a better position to negotiate on a regional refugee regime.

The proponents of a regional refugee regime for South Asia base their views on the argument that since refugee movement in South Asian region is intra-regional, and most countries face similar problems, a regional approach would be more appropriate.

Weerakoon [159] says that at one time the number of Sri Lankan refugees in South India was around 200,000. An international or regional arrangement, providing protection to refugees in which India and Sri Lanka both participated, would have ensured that Sri Lankan nationals in South India would have received minimum standards of protection and care.

A regional legal framework based on "Regional Specificities" has been advocated.[160] This is perceived as having three distinct advantages. Firstly, this will Pave way for the member states in designing their own national law. Secondly, it will also facilitate the process of ratifying the 1951 Convention and the 1967 Protocol by the South Asian nations and help in easing the burden of large numbers of refugees. This will also generate a regular exchange of information and expertise to deal with refugee related problems. And thirdly, regional approach

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[159] Bradman Weerakoon, " E-Interviews", in C.R. Abrar and Shahdeen Malik (ed.), *Towards National Refugee Laws in South Asia,*, (RMMRU, Dhaka, 2000), pp. 28-29

[160] Mahendra P. Lama, "E- Interviews", in C.R. Abrar and Shahdeen Malik (ed.), *Towards National Refugee Laws in South Asia,*, (RMMRU, Dhaka, 20000, pp. 35-36

may persuade the other nations in the UNHCR to make the definition more comprehensive.[161]

Anand Kumar[162] says a SAARC-level system is needed for regional cooperation along the lines of UNHCR. If there is an Asian concept of human rights, there should also be an Asian mechanism, particularly in South Asia, to handle the problem of refugees, which is a multi-state problem. The South Asian countries cannot solely depend on western philantrophy.

However, many scholars have proposed a harmonisation of both the national and regional approaches. At a Seminar on Refugees in the SAARC region, the former Foreign Secretary of Nepal Mr. Yadav Kanth Silwal[163], put forth the view that that in a world which is increasingly seeking regional solutions to problems like economic, drug related or terrorism, a two pronged approach to building a legal framework for refugees would be the right approach.

In this regard, the South Asian countries can take cues from a similar practice in some other regions of the world, notably, Africa, Central America and West Europe. The OAU Regional Refugee Convention was adopted to deal with the specific refugee problems within that region. Some states like Zimbabwe have adopted domestic legislations for implementation of the provision of the Convention. In Central America, countries like Bolivia and Ecuador have included the broader regional refugee declaration in their national legislations.[164]In some cases , for example, in Argentina, the authorities have granted refugee status, within the ambit of Cartagena Declaration, to grant refuge to persons from outside the region.[165]

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[161] ibdi, p.36

[162] Anand Kumar, in Mahendra P. Lama (ed.), *India as a Refugee Host Country: Management, Practices and Policy Options,* April 2000

[163] In 'Summary", *Refugees in the SAARC Region: Building a Legal Framework,*(New Delhi, May, 1997), p. 6

[164] Ivor C. Jackson, *The concept of Refugees in Group Situations,*(London and Boston, 1999), pp. 414-415

[165] Alberto D'Alotto and Roberto Garrenton, " Developments in Latin America: Some Further Thoughts", *International Journal of Refugee Law,* Vol. 3, No.3, 1991, p.500

The European Union has been occupied by questions of visa regimes and treatment of migrants, asylum seekers and refugees. The inter-governmental Schengen Agreement calls for the abolition of internal borders between member states. The Maastritch treaty defined a common European visa policy. The Amsterdam treaty included the Schgengen agreement into the EU's formal political fabric.[166]

However, in the South Asian region the institutional framework under which such a approach can be evolved is ambiguous. Institutionally, SAARC is yet to develop the capacity to innovate regional approaches to international law questions. The provision in SAARC Charter to avoid contentious issues have inhibited initiatives except in technological and economic fields.[167]

Therefore, a comprehensive regional approach calls for the strengthening of a regional forum for consultation on the subject, the regular and continuous sharing of information including statistical data, the harmonisation of laws and practices concerning illegal migrants, traffickers and people smugglers, as well as a pro-active approach to addressing root causes of population such as economic development, encouraging democratisation and rule of law, and addressing human rights issues through institutional capacity building.[168]

Clearly, South Asia has to go beyond other regional standards, and seek its own model while learning from these in terms of coping with mass displacement and influx. The civilian character of protection will be enhanced when the human rights based approach will be given priority, justice to the victims will become the prime value, and roles and responsibilities would democratised.[169]

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[166] Arvind Gupta, "Migratory Flows and Refugee Protection", *Sixth Informal Consultation on Refugee And Migratory Movements*, (Colombo, September 2001), p.47

[167] S.S. Wijeratne, "Importance of Regional Cooperation and Need for Formulation /Adoption of Regional Refugee Instruments", *Fifth Informal Consultation on Refuge and Migratory Movements,*(Nepal, 1998), p.56

[168] W. M. Lim-Kaaba, " Mixed Migration and Refugee Protection in South Asia", *Sixth Informal Consultation on Refugee And Migratory Movements*, (Colombo, September 2001), p.83

[169] Ranabir Sammadar, " Brief Note on Institutional Requirements on Protection and Care of the Victims of Forced Migration in South Asia", *Sixth Informal Consultation on Refugee And Migratory Movements*, (Colombo, September 2001), p. 75

CHAPTER 5

CONCLUSION

The foregoing chapters have covered a wide spectrum of issues ranging from regional organisation to refugee movement and the approaches of different regional organisations to the refugee problems.

Chapter 1 titled "Regionalism and Forced Migration" essentially points out the movement of regional organisation from being an economic entity, towards its newer roles which covers in its ambit issues of non-military threats to security like environmental degradation, terrorism, refugee movements, etc.

Regionalism, as a means of consolidating relations with countries of a particular geographical region or like-minded ones to enhance their economic interest and to preserve and promote politico-strategic interest, emerged in the post second world war period. Since then intra-regional cooperation has become an important ingredient of post war world order. As a concept it lies somewhere between nationalism and universalism.

A region is defined as a homogenous area with physical and cultural characteristics distinct from those of neghbouring areas, which thereby possess a sense of identity different from the rest. Integration refers to a process or series of action which results in the joining together of previously independent units for purpose of creating a new entity or a whole. Integration can be characterised as regional when it takes place among sovereign states that share a widely recognised geographical identity, such as occupation of common body of land or water.

International experience points out that a number of criteria can be outlined to assess the potential for regional integration. Broadly, these conditions are geographical propinquity, cultural and political homogeneity or at least like mindedness, economic and infrastructural advantage through cooperation. This also incorporates in it common and related security concerns, common political values, the absence of major political and security disagreements and conflict and effective regional leadership.

Regionalism or regional integration may be characterized as responses to international and domestic challenges. In the post war world two underlying sets of causes have led nations to become more closely inter linked. Firstly, the technical, social and cultural changes which have sharply reduced the effective economic distances among nations. Secondly, many of the government policies that traditionally inhibited cross border transactions have been relaxed or even dismantled.

Theoretical explanations to the phenomenon of regionalising have been sparse and scattered. The principal approach that economists have taken in their efforts to explain regional integration or free trade areas arise from new institutionalism and the new political economy approach.

Political scientists have emphasised institutional solutions to the problems of war and international political instability and have focussed on the idea of federalism and political integration of the world. From the early post war period the thinking of those interested in integration has been influenced by federalism, neo-functionalism, neo-institutionalism, inter-governmentalism and realism.

These above mentioned approaches to a theoretical understanding of the phenomenon of regional integration fail to cover all the varied dimensions of this phenomenon. A universal theory or explanation of such a diverse and wide ranging phenomenon is undoubtedly impossible to formulate. However, any theorising on regionalism in future should take note of the changing concerns within a region. Issues of trade liberalisation, economy etc. though important, would not be the only issues of concern in the future. Any theorising of the phenomenon of regionalism should take note of issues of gender, ecology, sustainability, human security etc. Problems arising due to spill over effects of ethnic strifes, environmental degradation, population movement, drug trafficking, terrorism, arms trade etc which are now affecting large parts of the world must now be recognised and addressed.

Cooperation on a regional basis can extend to various dimensions. One of the most important and beneficial aspects of regionalism has been recognised as the economic aspect.

In the decolonised world regional grouping was seen as an agency for development. Regional cooperation became imperative for those micro states which either had the option to cooperate within themselves to solve their common problems or to become client states of the developed countries. Regionalism is also perceived by the developing countries as means to reinforce societal viability, solve environmental problems and resolve regional conflicts.

In the political sphere, regional organisations are seen as a platform to bring together countries of a particular geopolitical region as well as to stand together as a single bloc in the international forum, thereby increasing their negotiating and bargaining power. Moreover, evidence proves that most regional economic integration efforts have underlying political aims. The movement for the European community was dominated by the fear of yet another brutal war in Germany. During the period of East-West rivalry many regional groupings sprang up which were supported by either of the ideological blocs and were seen as instruments for maximising the politico-strategic concerns of these power blocs. Also, regional integration is not possible without the support of key elite (businessmen, politicians, academicians, bureaucrats, etc.) Regional integration is often conducted as an intergovernmental business and therefore political undercurrents are difficult to suppress.

Security parameter also has a bearing on the functioning of regional organisations since each regional group shares a common geopolitical space and as a result has common security concerns, both internal and external. Within the context of the security dimension of a region falls the 'Security Complex Theory' proposed by Barry Buzan. The traditional definition of a security complex is a set of states whose major security perceptions and concerns are so inter linked, that their national security problems cannot be reasonably analysed or resolved apart from one another. This concept of regionalism is reflected in the emergence of regionalised military blocks in the cold war period. The setting up of the European Community was an effort to bind the European competitors in the Second World

War into a mutually beneficial net work of politico economic relations and institutions. In the American case cross border flows of goods, investments, undocumented migrants, drugs, oil etc. aroused US attention and stability of Mexico became a security concern for the US.

The end of the cold war has altered the perceptions of security in a major way. The realist paradigm of international order and national and international security does not hold good in the times of changing global order. The threat of super power rivalry has receded, but new notions of security are emerging on the basis of demography, resources and territory. The end of the cold war has seen a more defused and regionalised international order. Two factors explain this tendency. Firstly is the diffusion of power and secondly the introversion of the great powers. The nature of conflict in the post cold war period would change dramatically. The large scale inter state conflicts that were common during the first half of the last century will have little relevance in the future. Most conflicts in the post cold war period tend to be internal, intra-state and inter-regional in nature. Internal and intra-state conflicts are invariably motivated by ethno-political, communal, religious or socio-economic factors.

Another aspect of security in the post cold war period is the increasing importance of non-military threats to national security. Over the years the definition of security has broadened from simple exclusive concern with the strategic relationship between super powers and logic of deterrence, towards the dynamics of understanding social and economic processes as essentials of security. They derive from both international and regional phenomenon like global warming areas or drugs, smuggling, money laundering and cross border migration. Apart from these there are purely intra-state non-military threats arising from phenomenon like internal migration, environmental degradation, unplanned urbanisation, growing nexus between organised crime and corrupt elements in administration and so on.

In recent times there has been a shift in the security perspective of regional organisations. Many regions of the world have been subjected to different forms of anarchy, mainly due to the breaking away of the state in these parts. In these circumstances the international agencies like UN have not been able to play a

significant role. Regional organisations are, under these circumstances, being increasingly seen as an agent for reduction of political violence, attainment of economic well being, promotion of human rights and benevolent governance, protection of ecological diversity, safeguarding of health and renewable resources in those areas. Further, in the post cold war years, the focus of security has shifted from military to non-military issues like refugees, human rights, environment, state sponsored violence, ethnicity, welfare provisions etc. and in these spheres, regional organisations are to play a more important role in the future.

International migration with its international, regional and national repercussions is increasingly becoming a matter of security concern in all regions of the world. Migration is a spatial phenomenon and by definition a migrant is someone who leaves one community and becomes part of another community at least for some minimum period of time. Movement of population from one place to another has been an age-old phenomenon but it is only in recent times that it has assumed greater significance in terms of threat to local, national, regional and international security.

However, within migrant a distinction is made between refugees, migrants and internally displaced persons. Refugees refer to those people who are outside their country due to well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Migrants refer to those people who cross inter national borders attracted by the pull of better economic opportunities. Migration therefore is seen as a voluntary action. However, studies have shown that these distinctions are blurred. In most third world countries majority of those who are classified as migrants by host governments and inter national agencies actually belong to the minorities and backward sections of society. Another category of migrants are the internally displaced persons (IDP) who though forced to leave their homes, remain within the borders of their own country and are not officially recognised as refugees. The major causes of internal displacements are identified as development related displacement, movement due to environmental degradation, ethnicity related displacement, border related displacement and externally induced displacement.

Refugee movements already figure prominently on the post cold war political and security agenda. Increasing attention is being paid to ethnic conflicts that generate movements of refugees and internally displaced people which subsequently cause foreign policy problems for neighbouring states. It is also being increasingly acknowledged that refugee movements not only create but also exacerbate conflict between and within states. Refugees are perceived as a challenge and threat to the integrity and security of both the sending and receiving states. In case of sending countries it not only leads to international embarrassment but sometimes these emigrants may re-organise themselves out side their home country and harm the home country militarily through overt and covert (proxy war, guerilla warfare) means. At the same time the sending states may take it as a chance to indulge in espionage and other kinds of convert activities in the host-state.

The host countries have inherent advantage of not only embarrassing these sending state but also using a section of immigrants militarily against the senders to achieve certain foreign policy goals. However the negative impact of refugee influx is more pronounced than the positive outcomes. Mass refugee influxes act as a serious threat to both security and stability of the host nations. Illegal immigrants may pose a political threat to regime in the host country. This is more so in the case of democratic countries where the refugees align with the opposition parties to wrest certain benefits from the government. In some democracies they are also used as vote banks. Refugees are seen as a threat to cultural and ethnic identities by the native population, which creates and aggravates animosity between the two sections. Furthermore, mass influxes place heavy economic burdens on the country of asylum. In the developing countries refugee inflows alter the socio-cultural and economic patterns and lay claim on the already limited resources leading to tensions and conflicts. Refugees also indulge in terrorist attacks, illegal smuggling of arms, drug trafficking, etc. making governments even more suspicious and reluctant to allow not only refugees but also economic migrants into their territory. These increasing concerns are becoming evident in the practice and policy of states and regional organisations towards refugees. They are becoming increasingly restrictive in allowing refugees into their region.

The geographical destinations of the migrants are determined by various factors. The most important criterion is physical accessibility. The most common option is to cross over the nearest international boundary into the neighbouring country. Cultural and linguistic affinity are also factors in a refugee's determination of the destination. In the post colonial states cultural and linguistic borders go beyond the territorial borders and therefore chances of crossing over to neighbouring countries within the region increase. Political support of host country is also criteria in determining the destination. All these bring forth the regional aspect of migration flows.

The second chapter titled, "International and Regional Responses to Forced Migration", looks at the issue of refugee movements and international and regional responses towards them. The phenomenon of movement of people from one place to another is as old as humanity itself. However, the practice of forcing people out of their known habitat began with the birth of territorial nation state. In an attempt to create homogenous national identity in terms of language, religion and culture, the ruling elite persecuted, exploited and forced out those who didn't conform to the so called "national identity". This became a cause for mass movements between the 15th and 17th century. Religious wars of the 16th and 17th century displaced half a million people in Europe. During the period of colonial expansion, between late 17th century to early 19th century millions of Europeans migrated to settle down in new areas like United States of America and Australia. In these countries the European settlers uprooted the indigenous people. Many more were forcibly moved to other areas as slaves or indentured labours. Military conscription also uprooted many. The two world wars led to massive devastation, mass killings and widespread population movements.

The process of decolonisation in the 1960s and 70s led to the creation of a number of new nation states. These decades of liberation struggles, revolutions, coups and counter coups caused large scale movements of population within and across the borders of these newly independent countries. Readjustments of old colonial boundaries rekindled old rivalries, unleashed ethnic and religious conflicts. Entire communities of people were disenfranchised and forced out of these territories. The beginning of cold war generated movement of refugee from East to West.

These kinds of refugees were however encouraged by the western nation states. During the last two decades masses of people have been displaced by made environmental disasters, natural calamities and by the highly elitist and capital intensive models of development adopted by governments of third world countries. International migration in some cases is also a result of globalisation process, which has led to the widening, deepening and speeding up of world wide interconnectedness. The recent years have seen major exodus of population from the southern hemisphere to northern hemisphere. They are classified as migrants or economic migrants by governments and international agencies.

International community has taken steps to address the issue of refugees in the form of international covenants protocols, regional mechanisms, laws and organisations. The attention of the international community was first directed towards the problem of refugees in the post first world war period. In order to deal with the millions of stateless persons in Europe at that time, League of Nation came up with a new document called the Nansen Passport. This document sufficed as identity certificate for refugees for purposes of travel and resettlement. A number of international treaties were entered between 1922 and 1938 which recognised the issue of refugees. These treaties created a legal definition of refugees as those who are outside their country and without the protection of the government of that state. As the number of refugees from Germany increased, States became selective in accepting refugees. They started distinguishing between 'voluntary' and 'involuntary' refugee, with only the latter being entitled to international support. The Second World War left some 30 million uprooted. The UN Relief and Rehabilitation Agency (UNRRA) was created to oversee the immediate relief and repatriation operation in post war Europe. However UNRRA became embroiled in Cold War conflicts and was replaced by IRO.

In 1946 UN created the International Refugee Organisation (IRO). The primary objective of this organisation was to devise a quick solution to the refugee problem. But this organisation was primarily concerned with the refugees in Europe. Though a temporary refugee organisation, it tried to find solution to the 1.5 million displaced on the Continent. It failed due to cold war politics where it could not do anything about the Soviet side of German refugees.

The 1951 UN Convention on the Status of Refugees and its 1967 Protocol are the main international instruments that regulate the conduct of states relating to the treatment of refugees. Notwithstanding the differences among the big powers on the issue of definition and mandate of the new organisation, it made the first attempt to codify refugee law. Article 1 of the convention defines a refugee as "Any person who as a result of events occurring before January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable or owing such fear, is unwilling to avail himself of the protection of the country, or who, not having a nationality and being outside the country of formal habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it."

The Convention further mentions the principle of *non-refoulement*. Its various articles enumerate the rights for the refugees like non discrimination in regard to race, religion or country of origin, freedom to practice their own religion, right of association, right to work, freedom of movement, right to access courts, etc. However the definition of refugees under the 1951 Convention had spatial and temporal restrictions. The 1951 Convention stipulated that refugees concerned those people who were displaced due to events occurring before 1st January 1951 and were result of such events. In order to overcome this, a Protocol was introduced in 1967 to remove these restrictions and to universalise the protection offered to the refugees. Even so, the 1951 Convention with the protocol had a European bias. One of the major lacunae of this Convention was that it did not take into account changing sources of instability and dislocation like civil wars, environmental disasters, natural and man made calamities, etc.

Besides the international convention on status of refugees there are instances of regional refugee conventions or attempts to it. These regional conventions have broadened the definition of refugee. Notable among these is the 1969 Organisation of African Unity's (OAU) Refugee Convention. After the decolonisation process, in 1965 there were 850,000 refugees in Africa. By the end of the decade, due to new conflicts in the post-colonial period, the number of refugees rose to around to one million. Also, the character and needs of these refugee flows in Africa were

very different from those in Europe. Problems in documenting these refugees became a major handicap in the functioning of UNHCR. African governments also had their apprehensions as they feared that these refugees might use their countries as bases from where to overthrow the regime from which they had fled. Beside, the refugees in Africa were not a result of persecution. Rather they were outcome of various other factors which were not under the purview of the 1951 Convention. Main reasons for African refugee flows was colonial rule, liberation struggles, underdevelopment and ethnic conflicts, economic recession and deprivation and internal wars in newly independent states. Therefore, after 5 years of consistent efforts, starting from 1964, the OAU and the African states devised and adopted the OAU Convention in 1969.

The OAU convention recognises the 1951 convention as the basic and universal instrument regarding status of refugees. The OAU convention goes a step further and includes those who have fled as a result of external aggression, foreign occupation or domination or events disturbing public order in their country of origin. The OAU convention expands on the guarantee of *non-refoulement* by making an absolute and unqualified requirement that no refugee shall be subjected to measures such as rejection at the frontier, return or expulsion. Further it defines the duties of the countries of asylum and origin and also stipulates the system of "burden sharing". Another pioneering step undertaken by OAU convention is the inclusion of the provision that grant of asylum by a state shall not be regarded as unfriendly act by any other state. It also obligates the refugees to avoid indulgence in subversive activities against other member states. By December 1999, 45 out of 53 states in Africa were party to the convention. Although the OAU convention is an exemplary text, it must be remembered that it was arrived at in the context of anti colonial struggle. It has been noticed that the commitment of African states towards this convention is waning away. The main reason for this is the lack of western world's commitment to burden sharing also African convention had come up at a time when refugees were welcomed within the western world. Also, most countries have been reluctant to replace their domestic legislations governing immigration, aliens, national security and the like with that of the Convention. Lack of competent personnel to handle asylum requests and political overtones

with regard to asylum issues have negated the humanitarian aspect of granting asylum.

The Cartagena declaration on refugees adopted by the central American governments in 1984 has also adopted an expanded definition of refugees to include those persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other disturbances which have seriously disturbed public order. Though Central America had precedents of regional refugee conventions in the form of Montevideo, Havana, Caracas and Costa Rica Convention, they were not comprehensive enough to cover the changing nature of Central American refugee problem of 1960's and 70's. The efforts at a new regional refugee policy which started with the 1981 colloquium held at Mexico, finally culminated in the 1984 Cartagena Declaration.

This declaration expands the refugee definition further. It makes explicit reference to the reasons deemed to be valid justifications for persons to flee their countries of origin. Apart from the categories included in the 1951 Convention and its 1967 Protocol, it includes in its ambit persons fleeing generalised violence, foreign aggression, internal conflicts, massive violation of human rights and other circumstances leading to a serious disturbance to public order.

In the European continent the history of the refugee regime has been chequered. Although it is difficult to genaralise about different policies and countries, it can be argued that in the 1950s and 60s immigrants were primarily an extra work force in most western European countries. The economic situation and labour market required a cheap and flexible work force that did not exist in domestic markets. The legal status of immediate post-war immigrants was not politically sensitive. But, by the 1970s immigration became a subject of public concern in most of the European Union countries. There was a shift from a permissive immigration policy to a control oriented and restrictive immigration policy.

Many states have gradually erected a non-entrée regime by means of visa restrictions, carrier sanctions, demarcation of international and safety zones, narrow interpretation of concept of refoulement, citing safe third country option,

etc. The countries of the western hemisphere are continuously trying to reduce their commitments to sharing the refugee burden.

A significant Europeanisation of migration policy took of in 1980s. Policy coordination was instituted in the European inter-state co-operation, the European Union and trans-national cooperation between functional organisations such as the police. Migration became an important issue in the inter-governmental fora in Europe, Trevi, the ad-hoc group on immigration and the Schengen group. These pre-structured the development of a migration policy within European Union. The 1990 Dublin convention established common criteria for EU member states to determine the state responsible for examining asylum requests. This was intended to prevent asylum seekers from applying for asylum in more than one state. The 1990 Schengen convention included provisions for reinforced police and judicial cooperation, common visa policies and the strengthening of carrier sanctions. The treaty of European Union introduced a third pillar on justice and home affairs in which migration was an explicit subject of inter-governmental regulation. In the Third Pillar, asylum policy is identified as a matter of common interest. The process of harmonising asylum policies in Europe continues.

Therefore the second chapter tries to highlight how regional organisations have handled the refugee problem within the regional framework. The need for the evolution of a regional refugee policy, its implementation and problems in doing so are analysed. The purpose of this discussion has been to see whether and how this experience can be translated in the South Asian context.

The Third chapter of this research work takes the focus of the study to the South Asian region. This chapter titled "Forced Migration in South Asia" first looks at the geographical, historical, economic and political setting of the region. In the next section the major causes of forced population displacement in this region are discussed. The chapter also looks at the extent of refugee problems faced by the countries of the region.

The South Asian countries face a severe problem of migration, both internal and cross border. Ever since the partition of Indian sub-continent in 1947, about 35 million people have been involved in cross border movements in search of security

of life, honour and property or to avoid persecution on grounds of race, religion, ethnicity, civil strife or for work, food or ethnic or ideological homogenization. The problem of refugees has been further compounded by the problem of international terrorism, drug trafficking and illegal arms trade. Many reasons can be attributed to the mass refugee movement within the region. There was massive exodus of population across the Indo-Pak border in 1947. About 13 million people were involved in this process. The matters were further complicated with the failure of the nation building process in these countries. In an attempt to cultural homogenization these countries indulge in imposing majority culture, thereby alienating the minorities and forcing them to move out. Around tens of thousands refugees from Bangladesh arrived in India. Again in 1975, many Hindus illegally migrated to India. Similar is the case of Lhotshampas in Nepal, Bhutanese refugees, Indian repatriates from Myanmmar, Arkanese refugees in India, Chin Burmese in India, etc.

In some countries inter ethnic conflicts has led to refugee flows to other countries. For example Sinhala-Tamil conflict has resulted in mass exodus of population to India. The accessible and open borders between the countries of South Asia make matters worse. India shares porous land borders with Nepal, Bangladesh, Pakistan and Bhutan. The wars witnessed by the subcontinent have also to some extent created refugees in the region. A new genre of refugees in South Asia today are those who have to leave their homes because their erstwhile places of habitation have been rendered uninhabitable due to environmental degradation and developmental projects. In some cases these people do not cross international boundaries and remain displaced in their countries. In South Asia there is also the incidence of stateless people such as Indian Tamils in Srilanka, Biharis in Bangladesh, etc. Besides the intra-regional migration, there are also extra regional refugee flows like Tibetans in India and Nepal, Afghan refugees in Pakistan. The matters of migration are further complicated because in many cases a link has been established between cross border movements and increased incidence of terrorism, drug trafficking and illegal arms trade within the region.

Within the region the easy accessibility of the borders to be crossed, cultural and linguistic affinity between the people of the region and the political support of the

host governments in some instances have had a bearing on the intra-regional refugee flows in South Asia.

Bangladesh is both a refugee receiving and refugee producing country. In 2001 Bangladesh hosted 122,000 refugees. In the same period, Nepal was host to nearly 131,000 refugees. At the end of 2001, Pakistan hosted more than 2.2 Million Afghan refugees, including some 200,000 who arrived during 2001 and about 18,000 refugees of other nationalities. Bhutan and Sri Lanka are the main refugee producing countries of the region. At the end of 2001, 144,000 Sri Lankans were refugees in India. Similarly in the case of Bhutan, an estimated 126,000 were living as refugees in the neighbouring states of India and Nepal.

Having outlined the intensity of the refugee problem in South Asia, the Fourth chapter titled, "Policies Towards Refugees in South Asia: National Legislations and Regional Approach", looks at the legal approach to the issue of refugees in South Asia. This chapter brings forth the fact that inspite of having such large incidences of refugee problem in the region, none of the countries have a well documented, legal approach to this problem.

Refugee population in South Asia roughly constitutes fourteen percent of world's total refugee population. None of the South Asian countries are signatories to 1951 UN convention and the 1967 protocol. The approach to refugees and migrants adopted by the host countries has been one of passive acceptance and receptiveness, based on a high degree of tolerance. The reasons for this derive from the culture of hospitality of the region and the fact that most refugees are from countries within the region. These refugees share ethnic, cultural and linguistic ties with the country of asylum.

So far the countries of the region have treated refugees within the framework of Foreigner's Act, Passports Act or Citizenship Laws. These do not distinguish between refugees and those who move out due to economic, social and cultural reasons. Nations in South Asia have traditionally preferred to deal with refugee problems as a matter of administrative decisions based upon bilateral relations between states than as a legal requirement. The governments in these states have concluded that unwanted migrations, including refugees are a matter of bilateral

negotiations rather than international agreement. The latter measure in their opinion can constrict their freedom. A tripartite agreement between India, Pakistan and Bangladesh facilitated the return of refugees from India and the movement of some stranded Pakistanis from Bangladesh to Pakistan. Though the South Asian countries have generally adopted a soft attitude towards refugees, the policy towards them has been differentiated on the basis of political calculus. This aspect has brought forth the need to devise a legal framework to handle the refugee issues.

In evolving a legal approach to refugee problem the states of South Asia can adopt three approaches. Firstly, it can accede to the 1951 UN Convention and/or its 1967 Protocol. Second option is to devise domestic legislations keeping in mind the specific problems faced by the individual countries. Thirdly, the South Asian states can adopt a regional Convention based on the experience and culture of the region.

South Asian countries cite various reasons for not signing the UN Convention on refugees. Broadly these are the Euro-centric character of the convention, historical peculiarity of the region, lack of control over borders, ethnic ties cutting across borders, lack of sufficient resources and the dismantling of the Convention by the Western states themselves. Official practices of dealing with refugee issues on a bilateral basis, bureaucratic sensitivities against the perceived 'interventionist' activities of UN agencies, the possibility that the Convention may be used by the economic migrants who seek illegal means of entry and the belief that accession to the Convention is not going to change the nature of refugee protection in these countries as they are already following a liberal tradition of hosting refugees are other reasons that prevent the South Asian nations from acceding to the Convention.

However, those who advocate the signing of the Convention argue that by doing so the South Asian countries would attain a platform within the UN to pressurise western countries to adhere to these principles. Also as far as the issues of legal and economic burden are concerned, the Convention itself has provisions for reservation in this regard. On the other hand, the proponents of a regional approach base their arguments on the notions that the causes of refugee flows lie within the region, most refugee flows take place within the region and cultural similarities necessarily facilitate regional solutions. They further say that since most countries

of the region face similar refugee problems, all countries would benefit from a regional refugee policy. However, the difficulty in framing regional policies on migration in South Asia arises mainly due to the general environment of suspicion and distrust within the area. Also, most of these issues have been dealt with within the bilateral framework. Moreover the countries of the region are differently placed in terms of refugee reception. For example, the island states of Maldives and Sri Lanka are excluded from being a host to asylum seekers. Further the power asymmetry and divergence in nation building process within the region reduce the possibility of arriving at a common approach.

Apart from these two approaches to refugee problem in the region, many scholars, administrators and legal experts are of the opinion that there is a need to draft domestic legislation to deal with the refugee problem in individual states. Their opinion is that domestic legislation would help overcome the problem of adhocism and bureaucratic red tapism. It will also help in providing treatment to different groups of refugees and thereby reduce the allegations of discrimination by different refugee groups. Specific national legislation would also take care of details regarding infrastructure, procedural matters, appointment of officials to deal with refugees, criteria for acceptance or rejection of refugee status, provision with regard to providing asylum, defining special measures in relation to national security concerns and incorporation of bilateral agreements.

However, there are certain issues which can be dealt with within the multilateral regional framework. All countries in the region are susceptible to this problem and in some cases more than two countries are affected by the same problem. Under these circumstances regional policy would be beneficial. In recent times, harmonisation of the regional with the national approach is advocated. As far as this problem is concerned, the countries of South Asia should displace the language of realism and adopt a more humanitarian attitude.

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