

THE STATUS OF REFUGEES IN ASIA: THE WAY FORWARD*

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ABSTRACT

Asia has in recent decades, been a generous host to millions of refugees. Yet, the status of the human condition of this region has been regressive. The camps in which the refugees are housed lack basic facilities, the right to education and employment are available only to some refugee groups, the special concerns of women and children have literally received no attention and local integration as a solution is frowned upon. Conclusively, refugees in the region are devoid of the opportunity to live and reconstruct their lives with dignity.

Asia is a region of vast proportions and marked contrasts. It is the largest continent on the globe, with around two-thirds of the world's population. Its multitude of races and cultures indicate the difficulties of attempting generalizations. Its heterogeneity militates against the search for a comprehensive approach towards the refugee issue within the region.

The researcher will look through the lens, analyse the issue and provide for ways to improve this condition.

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1) INTRODUCTION

The governing paradigm of inter-state relations in the region is known worldwide by the name of political realism. There are four features which have direct relevance to the status and welfare of refugees.

First, it sees international politics as a struggle of power, indeed, power doubles as both means and end. Morality has, in this scheme of things, only a marginal bearing on the conduct of foreign policy. Instead, refugees are most often seen as a resource, or a bargaining chip, to secure national interests. Therefore, the final determinant of the fate of refugees is not their concerns and problems but the role that they can play in enhancing the power of the host state.

Second, it examines all issues in the matrix of an omnibus concept of national security. This causes state policy to be particularly suspicious of all alien groups present on its territory.

Third, the overwhelming concern with enhancing power makes states wary of accession to international instruments on human rights for fear of accountability at the international level¹. When states do sign these instruments, human rights considerations are secondary to political expediency². It follows that membership of humanitarian organizations is often used to pursue the power agenda.

¹ Muntarhorn, n. 2, at p. 13.

² Ibid.

Fourth, the paranoia the realist approach engenders makes states limit the interaction of civil society with refugees. Thus, states often deny non-governmental organizations access to refugee camps, as they are worried about the impact of any negative reporting on its international image.

2) THE CONCERNS OF POST-COLONIAL STATES.

In addition to the problems arising from the language of political realism are the particular concerns of countries in the region. First, there is the impoverishment of a large majority of people living in these states, legitimizing the absence of concern with the condition of refugees. Second, there is the 'cartographic anxiety' of post-colonial states flowing from a bid to create a national identity³.

The post colonial state often sees as its primary function, the separation of its people from inhabiting neighbouring territories. Therefore, borders are manned by individuals whose job training is to push back rather than to express solidarity with the condition of those fleeing persecution or conflict. The national identity which the post-colonial state endeavours to create is often in tension with establishing a plural polity and with respect for minority rights. This makes it doubly hesitant to allow groups from neighbouring countries to reside in its territory even if they are fleeing from danger to their life or freedom, that is, unless there is an ethnic link between the incoming refugees and the receiving state⁴. The cartographic anxiety has been accentuated in South Asia by porous borders and the fact that states have been carved out of people inhabiting a common space for long periods in the past.

³ Ibid.

⁴ Muntarbhorn, n.2, p. 16.

Thus, the argument has often been heard that the influx of refugees increases pressure on land and employment.

3) THE NEED FOR NATIONAL REFUGEE REGIMES.

A striking feature of the Asian region is the complete absence of national legal regimes dealing with the status of refugees. The status of refugees in these countries is precarious. More often than not, it is subject to executive discretion, bolstered by claims of national security and foreign policy considerations. Law for the protection of refugees is an exception rather than the rule in the majority of Asian countries⁵. Thus, despite Asia having been host to hundreds and thousands of refugees, there is the absence of any formal legal regime. Refugee issues are dealt with at the political and administrative levels. The absence of national legal regimes poses a major obstacle to improving the human condition of refugees. As Muntarbhorn notes, 'A perennial problem facing all asylum – seekers in the region has been the uncertainty of their rights upon arrival, pending the search for long term solutions'⁶

To take one such example, is to refer to what the Human rights watch of Thailand writes:

'Thailand has no domestic legislation covering the treatment of refugees. The 1979 Immigration act is the only relevant piece of legislation and under this law all undocumented asylum-seekers are considered 'illegal immigrants' and liable to summary deportation. Appeals by asylum seekers against deportation are rare since, although such appeals can generally be made to the ministry of Interior, they are not allowed in the case of those without

⁵ Muntarbhorn, n. 2, p. 5.

⁶ Muntarbhorn, *ibid*, p. 154. With reference to South – East Asia, he writes: 'Even for those screened in as refugees under the 1951 convention, there was no complete recognition of rights enumerated in that convention. They had limited freedom of movement and selective access to employment, and there was a tendency to keep them in semi-closed camps, pending resettlement. Often they need passes to leave the camps on a daily basis for activities outside the camps'. *Ibid*, p. 155

passports or visas. Even in cases of appeals against deportation made by asylum-seekers, the courts have rejected to invoke the Refugee convention⁷.

While a legal regime does not necessarily ensure that refugees secure the conditions in which they can reconstruct their lives with dignity, and is not a precondition for the expression of solidarity, its lack can become a serious hurdle in the pursuit of a favourable environment.

4) ISSUES TO BE ADDRESSED IN FRAMING NATIONAL POLICIES WITH REGARD TO REFUGEES.

- Non-rejection at the frontiers and ratification of CAT

One of the major concerns is that the guards and officials are trained essentially to turn people back rather than accept their explanation for presenting themselves without proper papers. It is therefore important that any domestic legislation on the subject ensures that the principle of non-refoulement include non-rejection at the frontiers. There is a precedent in this regard in the Bangkok principles adopted by the Asian African Legal Consultative (AALCC) in 1996.

There is also the need for the countries in the region to ratify the Convention Against Torture (CAT) for it offers a wider legal basis for respecting the principle of non-refoulement. Article 3 of CAT says:

⁷ Human rights watch 1998. It recommends, 'Thailand should establish refugee status determination procedures by which asylum seekers can seek recognition as refugees in order to distinguish them from other migrants, thereby enabling Thailand to act in accordance with its obligations under International Law to provide refugees with International protection'.

1) No state 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.

2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violation of human rights.

- PREVENTING UNLAWFUL DETENTION

Despite the widespread consensus that detention should be viewed as an exceptional measure, a problem which confronts the asylum-seeker in the region is detention without justification.

In 1986, the executive committee of the UNHCR adopted conclusion no 44 that clarifies the situations in which detention may be deemed appropriate:

If necessary, detention may be resorted to only on grounds prescribed by law to verify identity, to determine the elements on which the claim to refugee status or asylum is based, to deal with cases where refugees or asylum-seekers have destroyed their travel or identity documents, or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum or to protect national security, or public order. This understanding should be the basis of any national law framed for the refugees.

In the case of mass influx of refugees, a key question is whether keeping refugees in closed or restricted camp conditions amounts to detention. While much would appear to depend upon the circumstances of the particular case and the nature of the restrictions which have been

imposed on the freedom of movement of refugees, the keeping of refugees in camps should in general be avoided, other than for reasons of national security⁸.

- **MINIMUM STANDARDS OF MATERIAL ASSISTANCE**

One of the problems encountered in giving meaning to the rights of the refugees in this region is the arbitrary determination of what constitutes material assistance which should be provided to refugees. Consequently, the fate of refugees can differ even within the same country with one refugee group getting better treatment than another group. Without being entirely insensitive to the general standing of living of the local population, there needs to be some effort at the government level to define the material assistance given to all refugee groups.

The issue, which needs to be addressed, is the extent to which certain assistance and facilities made available to refugees could also be accessed by the local populace. It is usual in a poor country to hear the complaint that refugees are using the resources meant for the nationals of the country. For example, the instance of Rohingya refugees in Bangladesh, the local people have expressed their dissatisfaction over the refugee day labourers whose presence and involvement almost halved labourers salaries in the region and called for their repatriation⁹

- **SPECIAL PROBLEMS OF REFUGEE WOMEN**

⁸ R. Black, 'Putting refugees in camps', *Forced migration review*, 1998, no. 2. Pp, 4-7 and 'Refugee camps not really reconsidered: A reply to crisp and Jacobsen', *ibid*, n. 3. P. 31. J. Crisp and K. Jacobsen, 'Refugee camps reconsidered', *ibid*, no. 3, pp. 27-30.

⁹ Local residents under the banner of Rohingya refugee repatriation action committee set up a six hour road block at Ukhia on the Cox bazaar Teknaf highway on 4 august 1992 demanding an early repatriation of more than a quarter million rohingya refugees. Masud Siddique, 'The state of Rohingyas in refugee camps: A critical assessment; South Asian refugee watch, Vol 1, no 1, July 1999, p. 40.

No state in the region has addressed the concerns of women and children refugees. The result is often a complete insensitivity towards their special concerns. For example, as has been found out in the case of Afghan refugees in Pakistan, 'women have suffered much more than any other group due to their identity as women, both at the hands of the state and donor agencies policies and of their own men at the family level. Ranging from the right to make decisions about their own lives to personal security, to the right of education and employment have all eroded in the case of Afghan women'¹⁰

The organizational structure of camps, the conservative ideologies of those who dominate the politics of Afghan refugees, and the overall environment in which cold war politics dictated refugee politics, have all contributed to the oppression of Afghan refugee women¹¹. This situation prevails despite the fact that a range of international human rights instruments prohibit discrimination against women and the UNHCR has issued guidelines which focus on how to protect and assist refugee women. These provisions need to be integrated into the official refugee policy and in some form, the proposed national law dealing with the status and rights of refugees.

- CONCERNS OF REFUGEE CHILDREN

Refugee children are confronted with a range of distinct problems, especially in relation to the registration of their birth, the security of their person and education. Nearly all countries

¹⁰ Saba Gul Khattack, 'Refugee policy politics: Afghans in Pakistan', in study pack on sources of conflict in south asia: Ethnicity, refugees, environment for winter workshop held in Lalitpur, Nepal, 6-16 March 1999, RCSS, Colombo, Sri Lanka.

¹¹ Ibid.

in the region are parties to the convention on the rights of the child, 1989, which contains a special provision on the refugee child. To take the instance of Aghan refugee children in Pakistan, 'their special needs and rights have not received much attention from Pakistani policy makers'¹²

There are a number of measures which states need to take in order to deal with the special problems of children. Above all, the principle of the best interest of the child and the role of the family as the fundamental group of society concerned with the protection and the well being of children needs to be respected. It should be mandatory for states to register the birth of refugee children and provide parents with legally validated birth certificates. It is also crucial to remove threats to the security of the person of the child and guarantee the right of children to education, adequate food, and the highest attainable standard of health.

- ENSURING VOLUNTARY REPATRIATION

The increasing emphasis of the UNHCR in the last decade on voluntary repatriation as a solution has meant that refugees are often returned against their will. For instance, the repatriation of Rohingya refugees from Bangladesh is a raging example.

In 1992, beating and other forms of abuse were used to 'encourage' the refugees to change their intransigent attitude towards repatriation.

¹² Nasreen Ghufraan, 'Afghan refugee children in Pakistan', paper presented at the conference of scholars and other professionals working on refugees and displaced persons in south asia, Bangladesh, 9-11 February 1998.

The allegations of coerced repatriation have been confirmed by independent observers¹³. The national laws should, therefore provide that no refugee would be returned against his or her will.

Where return has been voluntary, there needs to be thought given to devising effective mechanisms to ensure that the state of origin lives up to the promises which it had made in order to persuade refugees to return. Thus, the Chakma refugees who returned from India to the Chittagong hills tracts in Bangladesh found that the government did little to give them back their lands, or to provide them with enough resources to guarantee a minimum standard of life¹⁴.

- ALLOWING LOCAL INTEGRATION.

The solution of local integration is unpopular in this region. According to Muntarhorn, this was out of the question in most of the countries of the Asian region unless there were specific ethnic and religious links. This was also hampered by the local population, who were affected by mass influxes and who took offence at the material assistance accorded to asylum seekers which was at times of a higher standard than that received by the local population. The solution needs greater attention of researchers, the UNHCR and the international community of states in order to identify situations in which local integration is an appropriate solution and in defining the conditions in which meaning of 'local integration' may be said to have been realized.

- THE COMPLEX ISSUE OF STATELESSNESS

¹³ The World Refugee Survey 1997, p. 126.

¹⁴ Jatindralal Chakma and Upendralal Chakma, 'A life of fear and trauma; The uncertain fate of the Chakma refugees; Refugee Watch, no 8, December 1999, p. 14.

From the perspective of solutions, an important question which needs to be addressed, concerns the problem of stateless people in the region.

For, among other things, the problem of disputed nationality is a major obstacle in the process of repatriation. For example, there are four large groups of stateless persons in South Asian region: The Rohingyas from Myanmar, Bihari refugees in Bangladesh, Lhotsampa refugees from Bhutan and Chakma refugees in India.

A stateless person has been defined in the International law as one 'who is not considered as a national by any state under the operation of its law' (Article I of 1954 convention relating to the convention on statelessness). But this definition is confined to what are termed de jure stateless persons. There are in addition de facto stateless persons 'who are unable to establish their nationality or whose citizenship is disputed by one or more countries', that is, those who lack 'effective nationality'. In this context, the accession to the 1954 and 1961 conventions on statelessness, as well as the expansion of their ambit through amendment, need to be explored.

No country of Asia is a member of these conventions. They should be persuaded to become parties, as the Universal declaration of human rights puts it, everyone has a right to a nationality and that no one shall be arbitrarily deprived of his nationality. In addition, states in the region need to respond to the call of the executive committee of the UNHCR which in 1995 adopted conclusion no. 78 (XLVI) requesting states to adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality, and by eliminating provisions which permit the renunciation of a nationality without the prior possession or acquisition or another nationality.

In 1998, the commission on human rights adopted resolution, 1998/48 which, among other things, called upon states to refrain from taking measures and from enacting legislation that discriminates against persons or groups of persons on grounds of race, colour, sex, gender, religion or ethnic origin by nullifying or impairing the exercise, on an equal footing, of their right to a nationality, especially if it renders a person stateless, and to appeal to repeal such legislation if it already exists¹⁵

- NEED FOR COLLECTIVE EFFORT AT THE INTERNATIONAL LEVEL

The human condition of refugees in any part of the third world cannot be seen in isolation from developments in the first world. While the rights of the refugees to live in dignity in any state is not in any way linked to how they are treated elsewhere, the fact of the matter is that in absence of global regimes of solidarity third world states are going to be hard pressed to offer conditions in which refugees can live in dignity. In the worlds of Muntarbhorn: If international solidarity in the form of burden sharing is not forthcoming to shoulder the load of countries of first asylum, it is likely that the laws and practises of these countries will be stringent towards asylum seekers.

Restrictive application of immigration and refugee related laws in resettlement countries vis-a-vis refugees may set a precedent for countries of first asylum to adopt a similar attitude¹⁶.

The need for burden sharing has sought to be given legal expression in the asian region by the Asian-African legal consultative committee (AALCC) through adopting, in 1987, an addendum to its 1996 Bangkok principles calling for greater international burden sharing. It

¹⁵ Ibid.

¹⁶ Muntarbhorn, n. 2, p. 53.

expresses the belief of countries of the region that the principle of sharing should be given a global and not a regional interpretation. The additional principles adopted are :

1. The refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and as such the principle of burden sharing should be viewed in this context.

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

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

4. International solidarity and cooperation in burden sharing should be manifested whenever necessary, through effective concrete measures in support of states requiring assistance, whether through financial, or material aid, or through resettlement opportunities.

- MAKING UNHCR ACCOUNTABLE IN LAW : CONCLUSION

There have been charges, both in the region and elsewhere that the UNHCR has often acted in a manner which has led to the violation of the rights of refugees in the region. For example, it has been accused of promoting the involuntary repatriation of Rohingya refugees from Bangladesh to Myanmar. It also has been charged with reducing the assistance given to refugees under its charge.

Thus, for example it is said to have reduced assistance to afghan urban refugees in new delhi who now face difficult times¹⁷.

Where such charges are found to be well-founded however, the UNHCR needs be made responsible for its acts of omission and commission. So far, it 'still remains largely unaccountable' for the violation of its mandate.¹⁸

A correlative of international institutions possessing legal personality and rights (to offer humanitarian assistance, to advance claims, etc) is responsibility in international law¹⁹.

Thus, the UNHCR should be held responsible if it 'incorrectly declares that a source state is safe is safe for return, closes a camp and permits or facilitates the repatriation of the refugee population who suffer persecution on return'²⁰

Of course, any law, which is adopted on the subject, will have global application.

¹⁷ South Asian Human rights documentation centre, *Abandoned and betrayed: Afghan refugees under UNHCR protection in New Delhi*, New Delhi, November, 1999.

¹⁸ G. Gilbert, 'Rights, legitimate expectations, needs and responsibilities: UNHCR and the new world order', *International journal of refugee law*, vol. 10, 1998, pp. 349-88, at pp. 377ff.

¹⁹ Ian Brownlie, *Principles of public international law*, oxford: Oxford university press, 4th edition, 1990, at p. 701.

²⁰ Gilbert, n 35, p.382