

Migration and Refugees in South Asia

Quest for a New Legal Regime

*Migration and Refugees in South Asia:
Quest for a New Legal Regime*

 KONRAD
ADENAUER
STIFTUNG



ISBN 978-9937-2-8007-5



9 789937 280075 >

 KONRAD
ADENAUER
STIFTUNG



 KONRAD
ADENAUER
STIFTUNG



+

Migration and Refugees in South Asia: Quest for a New Legal Regime

Organized by

The Centre for South Asian Studies (CSAS)

and

The Rule of Law Programme of
Konrad Adenauer Stiftung (KAS)

Katmandu, 26 September 2018



+

+

Published by
Centre for South Asian Studies (CSAS)
Rule of Law Asia Programme of Konrad Adenauer Stiftung (KAS)

First Published, November, 2018

All rights reserved

The opinions expressed by individual authors are their own and do not necessarily represent that of the Centre for South Asian Studies (CSAS) and Rule of Law Asia Programme of Konrad Adenauer Stiftung (KAS).

Printed at:
Modern Printing Press
Kathmandu, Nepal.
Tel: 4253195, 4246452
Email: modprint@mail.com.np

+

+

Contents

Migration and Refugees in South Asia – Quest for a New Legal Regime: The Indian Perspective Dr Geeta Madhavan	7
The Pursuit of Achieving Sustainable Solutions in Protracted Afghan Refugee Crisis: Quest for a Legal Regime Dr. Mehwish Raza	15
Examining migration dynamics: Push and Pull factors in South Asia Paul I. Norton	25
Inclusive Justice for the Rohingya People: Leveraging on Legal Instruments and Community-Centric Strategies Manzoor Hasan and Dr. Caroline Brassard	31
Migrant Workers and Refugees in Malaysia: Dr. Rishi Adhikari	40

+

+

Foreword

Centre for South Asian Studies (CSAS) in cooperation with the Rule of Law Programme of the Konrad Adenauer Stiftung (KAS) organized a regional conference on 'Migration and Refugees in South Asia: Quest for a New Legal Regime' in Kathmandu on Sep. 26, 2018. Well known experts from the South Asian region along with more than 50 local experts participated in the conference. These included lawyers, academics and civil society representatives. What was noteworthy was that more than 30 law students from the Kathmandu University also participated.

Both migration and refugees are related topics. We see that there has been large refugee and migratory movements between India-Pakistan, India-Bangladesh, Afghanistan-Pakistan, Nepal-Bhutan, Myanmar-Bangladesh and also Nepal-India. South Asian nations are both refugee hosting and refugee receiving countries impacting the economy, polity, society and demography of the region. Scarce in resources with porous borders, this issue brings forth political debates to foray in all countries of South Asia. It also needs to be mentioned that youth migration has definitely brought remittance to the country. The contribution of remittance in the national GDP of Nepal for instance, is around 29 per cent. Sri Lanka, India, Bangladesh also get substantial remittance that helps their economy. However, large number of youth living and working abroad for a long period of time also has social costs which is being felt across South Asian countries. There are issues of physical and mental abuse, delay in payment, health hazards, etc. in places such as the Gulf that is now being highlighted by the international media as well. Most of time, the migrant worker is a South Asian. Despite of this problem, there is very little coordination among the member states of SAARC on migration and refugee issues. Conferences such

+

+

as this help in getting first-hand experience and knowledge of other countries and exploring possible solutions.

At the conference, Head of the Rule of Law Programme of the KAS Mrs. Gisela Elsner said that as we do not even have national level legislations on how to deal with refugees in South Asia, how are we to develop a regional mechanism? CSAS is thankful to Mrs. Elsner and her team at the Rule of Law Programme of the KAS for their support in organizing this event in Kathmandu.

I am indebted to the speakers and participants of the event for the enriching discussions on the subject as well as to the paper presenters for their well-researched papers. I am sure that this publication will be useful to researchers, academics, legal fraternity and the students who are interested on the themes of refugee and migration in the South Asian context. I would also like to acknowledge the assistance provided by Mr. Akshobhya Raj Pandey in editing the papers of this publication.

The conference was successful in reaching out to the wider SAARC experts group as well as the IOM office based in Kathmandu and law students. We very much hope that such programmes can be regularly held by the CSAS in cooperation with the rule of law programme of the KAS.

Dr. Nishchal N. Pandey
Director, CSAS
Kathmandu

+

+

Migration and Refugees in South Asia – Quest for a New Legal Regime The Indian Perspective

Dr GEETA MADHAVAN¹

In the context of India, migration falls into two broad categories: egress from the country and ingress into the country. As per the Ministry of External Affairs information, there are about 31.2 million Indians living and working abroad. Meanwhile, the United Nations Department of Economic and Social Affairs has concluded that the Indian diaspora is the largest diaspora in the world. The maximum number of Indians living and working abroad are in Mauritius, Guyana, Trinidad and Tobago, UAE, Kuwait and Oman, while others are dispersed in the Gulf countries of Iran, Iraq, North America and Europe. Although a minuscule proportion of the total population of India, the diaspora still contributes 3.4% to the GDP of India making it the world's largest receiver of remittances. According to the 2015 survey, they are responsible for 12% of the world's remittances amounting to US\$ 69 billion. The diaspora consists mainly of semi-skilled people that have migrated to the Asian countries and the Middle East; while those migrating to Europe, North America and other developed countries are professionally qualified and highly skilled personnel.

Migration into India in the form of refugee population has been occurring in waves throughout history and has been the result of religious, ethnic or ideological persecutions in the refugees' homeland. The most significant thing which deserves to be taken

¹ Advocate and President, International Law and Strategic Analysis Institute (ILSAI). This institution is based in Chennai.

+

note of is that there has not been a single occasion of any refugee originating from the Indian soil except the trans boundary movement of the people during the partition of the country in 1947. From the time when almost the entire Zoroastrian community took refuge in India fleeing from the persecution they were then subjected to on religious grounds in Iran, India has received refugees not only from some of its neighboring countries but several distant countries like Afghanistan, Iran, Iraq, Somalia, Sudan and Uganda. India has hosted approximately 420,400 refugees, including some 110,000 from Tibet who fled since China's 1951 annexation. There were about 36,000 Buddhist ethnic Chakmas and Hajongs from present-day Bangladesh who fled to Arunachal Pradesh after Muslim annexation of their land in 1964. Later in 1971, 10 million refugees arrived from erstwhile east Pakistan (Bangladesh) settling in West Bengal, Meghalaya, Tripura and Assam, and also reached the hinterlands of Madhya Pradesh, Bihar and Uttar Pradesh by the end of the year. The representative of the United Nations High Commissioner for Refugees (UNHCR) in India was the first to raise an alarm over an impending humanitarian crisis. India at that time was a nascent republic, 24 years old with a GDP that was just US\$ 65.9 billion. During the two decades of ethnic conflict in Sri Lanka, more than 102,300 Tamil Sri Lankans escaped fighting during the Eelam Wars between the Liberation Tigers of Tamil Eelam and the Sri Lankan armed forces by fleeing to India. Special camps were set up for them in Tamil Nadu and elsewhere to provide them with basic amenities, education and healthcare.

During World War II the displacement of more than 60 million people created the imminent need for a legal architecture for the international protection of refugees, securing various basic rights including that of life and liberty of the people granted asylum in several countries across the globe, as well as the duties and responsibilities of nations that had granted asylum. The Convention

Relating to the Status of Refugees, 1951 and its subsequent 1967 Protocol Relating to the Status of Refugees remain the main architecture for the protection of refugees globally and have so far been signed by 142 states making it one of the International instruments having large scale global acceptance.

India is not a party to the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol on Refugees. India is; however, party to several other international conventions that make it bound to the principles of human rights and the principle of non refoulement, adhering to the principle of customary international law prohibiting expulsion, deportation, extradition, or return to state of origin or another state if there is a risk that his life or freedom would be threatened for discriminatory reasons. The provisions of these international treaties have now acquired the status of customary international law and may be regarded as incorporated into the domestic law to the extent of their consistency with the existing municipal laws and also when there is a void in the municipal laws. An individual refugee is protected essentially under the Constitution of India since there has been no domestic legislation passed on the subject of refugees.

India has been observing a refugee regime that generally conforms to the international instruments to which it is party as well as those on similar subject despite not giving a formal shape to the practices by a separate statute dealing with the status of refugees. The decision as whether to treat a person or a group of persons as refugees or not is taken on the merits and circumstances of each case. The government of India, therefore, is often seen as following a policy of bilateralism in dealing with persons seeking to be refugees. In the case of the Afghan refugees of Indian origin and others, who entered India through Pakistan without any travel documents, were allowed entry through the Indo-Pakistan border till 1993. Most of the refugees had entered India through the Attari border near

Amritsar in Punjab. Subsequent to 1993, the government altered its policy of permitting Afghan refugees freely into India. In 1989, subsequent to the pro-democracy movement in Myanmar regarding those who fled to India, it was declared that in accordance with international law principles they would be accepted as refugees. Similarly, when Sri Lankan Tamil refugees crossed the sea to enter the southern Indian State of Tamil Nadu a specific refugee policy regarding them was formulated and entry was permitted, despite the fact that the refugees did not have travel or other documents.

The Indian Constitution guarantees certain fundamental freedoms to all persons within the territory of India and not just to Indian citizens. Therefore, persons who flee their country of origin and seek asylum in India have the protection of those fundamental rights, independent of the need for any recognition by the government of India or by any other international body like the UNHCR. The fundamental rights that all persons, including asylum-seekers and refugees enjoy under the Constitution include Right to Equality before Law (Article 14), Protection of Life and Liberty (Article 21), Right to Fair Trial (Article 21) and the Right to Practice and Propagate Own Religion (Article 25).

India has not yet passed a refugee specific legislation which regulates the entry and status of refugees within the territory of India. It has handled the matters pertaining to refugees and their status etc. on political and administrative levels. The result of the absence of a refugee specific legislation is that all refugees are treated under the law applicable to aliens in India, unless a special provision is made as in the case of Ugandan refugees (of Indian origin) when it passed the Foreigners from Uganda Order, 1972. Therefore, it is the Parliament that is vested with the right to deal with the subject of citizenship, naturalization and aliens. In the absence of a legal statutory framework for protection of refugees in India, the status of refugees has been characterized by wide ranging

mix of administrative ad hocism and the judicial assertion of constitutional rights. The Supreme Court of India has consistently held that the Fundamental Right enshrined under Article 21 of the Indian Constitution regarding the right to life and personal liberty, applies to all irrespective of the fact whether they are citizens of India or aliens. Various High Courts in India have also liberally adopted the rules of natural justice to refugee issues, along with recognition of the United Nations High Commissioner for Refugees (UNHCR) as playing an important role in the protection of refugees.

In the case *Gurunathan and others vs. Government of India and others* and in *A.C.Mohd.Siddique vs. Government of India and others* the High Court of Madras expressed its unwillingness to let any Sri Lankan refugee be forced to return to Sri Lanka against their will. In the case of *P.Nedumaran vs. Union Of India* before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not want to return to continue to stay in the camps in India. The High Court held that “since the UNHCR was involved in ascertaining the voluntariness of the refugees’ return to Sri Lanka, hence being a World Agency, it is not for the Court to consider whether the consent is voluntary or not.” The Bombay High Court, in the matter of *Syed Ata Mohammadi vs. Union of India*, directed that “there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR.” The Court also permitted the refugee to travel to whichever country he desired.

The Supreme Court of India has stayed deportation of refugees in numerous cases such as *Maiwand’s Trust of Afghan Human Freedom vs. State of Punjab & Others*, *N D Pancholi vs. State of Punjab & Others*. In the matter of *Malavika Karlekar vs. Union of India*, the Supreme Court stayed the deportation of the Andaman

Island Burmese refugees since “their claim for refugee status was pending determination and a prima facie case is made out for grant of refugee status.” The Supreme Court in the Chakma refugee case declared that no one shall be deprived of his or her life or liberty without the due process of law.

In recent times, India has received severe criticism from its neighbours and the international community for its policy in the matter of the Rohingyas fleeing from Myanmar into India. When the official statement was made about the deportation of the Rohingya Muslims, 40,000 of who are in India, it led to much debate inside and outside the country. The recent decision to deport Rohingyas also raised questions on the current BJP regime’s level of conviction in addressing refugee issues. A tinge of communal hue also ensued in that the Rohingyas are paying the price of being Muslim while many Hindu refugees from Pakistan enjoy full citizenship rights in India. The government’s policy has come under public scrutiny and has made it clear that there cannot be a better time for India to give some serious thought to drafting its own refugee policy, for the situation could only get worse. Internally displaced refugees fleeing conflict zones will soon be replaced by climate refugees (those fleeing the worst effects of climate change), which is a new class of refugees categorized as environmental. With new challenges at hand of mixed human migratory pattern, nations have to equip themselves with more empathetic refugee and migrant policies.

The lack of reliable data in terms of the exact number of illegal immigrants in India is also a problem area, and adequate and imminent measures need to be taken for better preparedness. India has treated a few refugee communities reasonably well but has not formulated a well-defined refugee law, and judicial interventions have only been case specific. The major cause for executive arbitrariness is the conspicuous absence of any defined statutory framework or policy on the status of refugees. There have been so

far no defined standards for implementing the judicial and constitutional directives on refugee protection and only ad hoc mechanisms exist to deal with their status and problems of refugees, as there is no separate law defining refugees and their entitlements. The legal status of the refugees is similar to those of aliens whose presence is regulated essentially by the Foreigners Act of 1946. Hence, refugees and asylum seekers and migrants and other aliens have all been brought under the Foreigners Act and treated similarly unless by specific Order of the Government. Indian law, therefore, fails to recognize refugees as a distinct category of persons and treats them at par with all other foreigners, thereby failing to appreciate the special circumstances under which a refugee leaves his or her country of origin and the consequent incongruity in applying the requirements of valid travel that the general Foreigners Act regime mandates.

The Indian refugee policy based on ad hoc executive orders and judicial pronouncements is quite inadequate in dealing with of large-scale migrations based on disasters. The question of who qualifies to be a refugee in India is ambiguous as there is no explicit mention of the term under any domestic law. The Supreme Court has stated *“the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion... the executive Government has unrestricted right to expel a foreigner”*. Thus, legally there is no impediment on the Government of India to expel Rohingya refugees if it wants to, although it should not be arbitrary or capricious. The Government of India should not treat the plight of Rohingya refugees as an unwanted trouble; rather it should be seen as an opportunity to pass a comprehensive legislation to take care of refugee rights.

The Asylum Bill, 2015 proposed by Dr Shashi Tharoor was seen as a big step in shaping an effective asylum regime. Unfortunately, it did not come up for debate in either Houses of the Parliament. The

refugee question in India is thus dictated by the manner in which the executive decides to address the questions based on various grounds: threat to national security, possible demographic changes that may affect the local population socially and economically, economic repercussions on the country as a whole (which is often seen as a weak argument by neighbouring countries and the international community in India's current economic growth and stature in the region), safety and working comfort of the Indian immigrants living in the Gulf, the continued threat of terrorism to the Indian subcontinent, and the issue of illegal immigration in the absence of a proper asylum management setup.

+

The Pursuit of Achieving Sustainable Solutions in Protracted Afghan Refugee Crisis: Quest for a Legal Regime

Dr. MEHWISH RAZA¹

It can be seen across the globe, that it is extremely important to achieve sustainable solutions to any protracted refugee crisis. The United Nations High Commission for Refugees (UNHCR) defines the term *protracted* as:

One in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and social, psychological and essential needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.²

The exodus of Afghan refugees into Pakistan is the longest run caseload of displaced persons and can be characterized as one of the major refugee crisis in the modern history. For the longest time in history, stretching over four decades, Pakistan has hosted unstoppable influx of Afghan refugees fleeing their homeland in five perpetual waves starting from late 1970s, through the porous border of the Durand Line³. Various democratic and military crisis compelled the citizens of Afghanistan to find refuge in neighboring countries, mainly to Iran in the west and Pakistan in the east and south. The first major Afghan migration was a consequence of the first military occupation in Afghanistan in 1978 by the Soviets. The

1 Assistant Professor, Department of Education - University of Lahore. Pakistan

2 Executive Committee of the High Commissioner's Programme, Standing Committee, 30th Meeting, *Protracted Refugee* (UNHCR, 2004)

3 The longest border of both Afghanistan and Pakistan stretching over approx. 1200 miles.

+

civil war that erupted in Afghanistan as a result of Soviet-backed government resulted in the exodus of a vast majority of Pushtuns⁴ who migrated from rural areas of Afghanistan. Afghan nationals' relocation and displacement from their homeland continued in a consequent second wave of asylum seekers when the mujahideen took over Kabul in 1992; and the third wave arrived, when the Taliban captured Kabul in 1996. Incessant war conditions in Afghanistan resulted in economic instability, poor living conditions and effects on the economic climate. From the mid-1990s onwards, because of the drought and famine, a fourth wave of refugees, in search of a secure life in Pakistan, migrated in large numbers to this country. The fifth and final wave of refugees comprised of a wide-spectrum of Afghan nationals, who eluded the post 9/11 U.S-led war on terror from October 2001 until March 2002.

In today's date, Pakistan, despite being a non-signatory to the UN Refugee Convention of 1951 is the home to the second largest refugee population in the world (Khan, Irum, & McNorton, 2018), with an estimated figure of 1.3 million registered and almost an equal number of undocumented Afghan citizens spread across all provinces of Pakistan (Table 1).

Table 1 Afghan Refugees per Province (UNHCR, 2108)

Location	Afghan Refugee Population
Khyber Pakhtunkhawa	801,136
Balochistan	318,368
Punjab	194,159
Sindh	63,064
Federally Administered Tribal Areas (FATA)	13,732
Azad Jammu and Kashmir	3,903
Gilgit Baltistan	5

⁴ The Pashtuns are a dominant ethnic group who mainly live in Pakistan and Afghanistan. They speak the Pashto language and adhere to Pashtunwali. Pashtuns became the major displaced population during Afghan war crisis (Ghufran, 2010).

Analysis of Refugee Situation in Pakistan

In 1978, the Zia regime adopted an open-door policy to welcome Afghan citizens with a great fervor. In early 1980s the administration and management of Afghan influx was directed to the Ministry of States and Frontier Regions (SAFRON). The ministry of SAFRON established an attached department, an office of the Chief Commissioner for Afghan Refugees (CCAR), primarily responsible for the administration of Afghan refugees and to ensure access provisions in coordination with the federal and provincial governments, UN agencies and international humanitarian organizations. However, as the refugee population increased there was a shift in the scope of operations. Initially, the influx of Afghan refugees was contained only in the refugee campsites⁵ commonly known as Refugee Villages (RVs) spread across the country. However, with the discontinuation of food supply from the World Food Program (WFP) in 1995, the refugee families seeped into the host society in search of opportunities to diversify their livelihoods. As asserted in Table 1, at the present time, the province of Khyber Pakhtunkhawa (KP) houses up to 57% of the documented refugee population currently, 68% of this population resides outside the RVs in urban slums alongside the host community. Peshawar, the provincial district of KP, remains the top refugee hosting urban location in the entire country (UNHCR, 2018).

Afghan Refugees Management: The legal status

Pakistan is not a signatory of the 1951 UN Refugee Convention⁵ and the additional protocol of 1967 therefore, to host the second largest population of Afghan refugees had never been viewed as a legal

5 The UN Convention Relating to the Status of Refugees, also known as the 1951 Refugee Convention, is a United Nations multilateral treaty that defines a refugee, sets out their rights and identifies the responsibilities of nations that grant asylum.

obligation, rather on humanitarian and religious grounds. Even after being applauded for hosting a large refugee population for the longest time in human history, Pakistan is still deficient in formulating a well-rounded refugee management policy framework to outline crucial aspects of the legal status of refugees or asylum-seekers in the country, their basic rights in the host society, and the legal indicators defining the future of refugees. The national focus is more on monitoring, managing and restricting the legitimate movement of Afghan citizens in Pakistan. In 2006, with the help of UNHCR, the first ever census for Afghan refugees was commenced with an objective of issuing a computerized identity document in the form of Proof of Registration (PoR)⁶ having a validity period of three years. The PoRs were subsequently issued in the years 2009, 2012, and 2015. The ministry of SAFRON extended the validity until December 31, 2017 of the PoR cards issued in the year 2015. The only legal entitlement that a PoR cardholder receives is a legitimate stay anywhere in Pakistan until the expiration of the document⁷, but the card does not serve as a travel document and does not allow the card bearer to cross international borders including the one between Afghanistan and Pakistan. The PoR does not grant a legitimate right to the bearer to work authorization in Pakistan.

In the current situation, despite the absence of a national refugee legal framework, the UNHCR plays a decisive role, assigning refugee status to asylum-seekers in Pakistan⁸. Despite issuing a PoR

6 UNHCR issued a fund of \$5.995 million dollars for this exercise which was carried out by the National Authority for Data and Registration (NADRA).

7 PoR cardholders have the right to reside in Pakistan and cannot be arrested under the 1946 Foreigners Act.

8 The Cooperation Agreement between the Government of Pakistan and UNHCR in 1993 awarded Prima facie status to refugees which is a response to mass influxes of refugees. It is recognized by the host state or the UNHCR on the basis of circumstances in the country of origin giving rise to exodus. Its purpose is to ensure admission to safety, protection from refoolment, and basic humanitarian treatment to those who are in need (Ahmed, 2017).

to Afghan refugees, nonexistence of a comprehensive national refugee law, constantly puts the Afghan refugees at a high risk of social injustice, discrimination from the mainstream society, and limited access to basic human rights⁹.

Sustainable Solutions: Repatriation of Afghan Refugees

UN General Assembly Resolution of 1950 ascribes the UNHCR to promote and facilitate the voluntary repatriation of refugees to the countries of their origin, where feasible, as a durable solution to displaced persons' plight in exile. In 2003, UNHCR, the Government of Pakistan and the Government of Afghanistan signed a tripartite agreement¹⁰ under which the UNHCR assured to continue voluntary repatriation of Afghan refugees, the world's largest UNHCR repatriation program (Ghufran, 2010). The UNHCR has assisted millions of Afghan refugees to return home through this program (UNHCR, 2018), but in recent years there has been a steady decline in voluntary repatriation (Table 2) that first started in 2002.

Table 2 Afghan Refugees Voluntary Repatriation (2002 - 2018)

Year	Families	Individuals
Repatriation in 2002	281,720	1,565,095
Repatriation in 2003	62,524	343,074
Repatriation in 2004	67,023	383,598
Repatriation in 2005	79,727	449,520
Repatriation in 2006	24,232	133,015
Repatriation in 2007	61,399	364,476
Repatriation in 2008	50,841	282,496
Repatriation in 2009	10,138	51,290
Repatriation in 2010	19,821	109,383

9 Education, health care facilities, occupational freedom, and freedom to move within a society.

10 An agreement signed between three parties as a sustainable solution to protracted Afghan refugee crisis in Pakistan. The agreement comprises of twenty-seven articles that details procedures from voluntary returns to post-return reintegration assurances.

Repatriation in 2011	9,976	52,096
Repatriation in 2012	15,348	83,423
Repatriation in 2013	6,318	31,224
Repatriation in 2014	2,684	12,991
Repatriation in 2015	9,100	58,211
Repatriation in 2016	61,407	381,275
Repatriation in 2017	12,214	59,020
Repatriation in 2018 (until August)	2,915	11,294

The step-by-step process repatriation process begins with a deregistration of PoR from NADRA and a receipt of Voluntary Repatriation Form (VRF) which serves as a proof for returnees to claim monetary assistance of USD 200¹¹ per person from the encashment centers in Afghanistan, upon their return. Despite the assistance, another reason that deepens the challenge of repatriation, is the lack of patriotic association of the second generation of Afghans that have been born in exile in Pakistan and do not imagine Afghanistan as a familiar homeland (Zieck, 1997). The probable shortage of livelihood opportunities, security threats, limited access to health care facilities and education, food and shelter insecurities are some of the reintegration challenges that daunt voluntary repatriation of Afghan families from Pakistan (Ministry of Refugees and Repatriation, 2018).

Afghan Refugee Management Policy: A Way Forward

It is challenging to propose sustainable solutions for protracted Afghan refugee crisis in Pakistan due to nonexistence of a comprehensive national legal refugee management framework. The volatile movement of refugees in and out of the country, side by side with the repatriation program and the ad-hoc nature of policies

11 Initially until 2011 this grant had been \$100, it was increased to \$150 in March 2011 and later to \$200 in January 2014. In June 2016, the reintegration grant was increased to \$350 along with a transportation allowance of \$30-70 per family member. In 2016 (September – November), UNHR spent over \$130 million in terms of reintegration cash grant (UNHCR, 2018).

implemented by local bodies, has added to the complexity of the situation. Through this study, some classified recommendations have been made for the current democratic government of Pakistan and UN agencies working on the refugee crisis.

Recommendations for the Government of Pakistan

- 1- The prime minister of Pakistan, Mr. Imran Khan, in September 2018, announced that all Afghan refugees born in Pakistan will be granted citizenship. Although this announcement has been received with much excitement, the policy-makers still await formal orders to officially culminate the initiative. Immediate measures should be taken to grant citizenship to Afghan refugees who have been born in Pakistan.
- 2- Government of Pakistan requires to pledge a legislation for mass inclusion in the national sphere of sixty-one percent Afghan refugees who are reported to be under-20. This youth can add value to Pakistan's socioeconomic system, if supported by a contextualized integration program. The policy makers should consider developing and implementing a *Refugee Youth Development Policy* with special focus on social and economic empowerment of Afghan youth.
- 3- Policy planners, refugee management organizations, UNHCR and the Ministry of SAFRON should expand their horizon from RV-based Afghan refugees to urbanized refugee families. Nonexistence of a policy framework to manage and outreach urban refugees result in social discrimination of this large percentage of Afghan refugees exposing them to an array of vulnerabilities.
- 4- There is an imperative need to collate up-to-date valid and reliable data on both documented and undocumented Afghan refugees. The Government of Pakistan, policy makers and

researchers face a lack of data, hence analyzing and decoding the current situation and formulating future decisions supported by statistical data is difficult.

- 5- Academia should play a role in the long-term integration of new generations of Afghan refugees residing in Pakistan by offering them financial assistance to seek higher education. Currently, the Government of Pakistan announces scholarships for Afghan students residing in Afghanistan, but there is insufficient assistance for the refugee students.
- 6- Well-defined border control procedures should be practiced and alternate stay arrangements for potential and eligible Afghans, such as Business Visa, Health Visa, student visa etc. may be considered.
- 7- The Government of Pakistan should legalize trade and commerce among Afghan refugees. Establishing *Afghan Chamber of Trade and Commerce* is a recommendation in this regard. Such a platform will not only register different trades and businesses being run by refugees, resulting in better monitoring, but at the same time it has the potential to enhance trade volume with Afghanistan.

Recommendations for the United Nations High Commission for Refugees (UNHCR) and other Humanitarian Agencies

- 1- Afghanistan should still be regarded as an economically unstable conflict affected state, which requires development initiatives from humanitarian agencies to build a harmonized society, provide secure livelihood opportunities to the returnees as well as the Afghan citizens. UNHCR and other humanitarian organizations should ensure returns to take place in safety and assure their dignity for the sustainability of the repatriation process.

- 2- Significant investments are required in education and health sectors to support Afghan nationals who migrate for health reasons to Pakistan.

Conclusion

The Afghan refugee population in forced exile has been growing for the longest period of time in the history of the world, and one out of every five refugees across the globe is reported to be an Afghan refugee (UNHCR, 2018). Pakistan has proudly hosted the second largest refugee population for a long time; however, there is a need to find a sustainable strategy for this protracted refugee crisis in the region. More than four decades have passed since the arrival of Afghan refugees and even today their return is uncertain. In the contemporary scenario, it is imperative to establish a comprehensive legal framework for better management of Afghan refugees in the country. Until there is peace and safety in their homeland, it is important to provide them access to education and decent opportunities for earning livelihoods. Until Afghan refugees reside on the land of Pakistan, the government should utilize their presence for adding value to Pakistan's economic progress. Pakistan plays a vital role in promoting peace to the new generation of Afghan refugees and one way to do that is to assure security and access to basic human rights to the new generation of Afghans. Around the world, lives of millions of displaced people matter. Both domestic and international parties are calling for local governments and humanitarian agencies to find sustainable solutions to reduce causes for violence and conflict, which impels citizens of a geographic region and forces them to go into exile giving up their fundamental human rights.

Bibliography

Ahmed, W. (2017). The Odyssey of Afghan Refugees in Pakistan. *Seattle Journal for Social Justice*, 15 (3), 591-661.

- Ghufran, N. (2010). *Politics of Afghan Refugee Repatriation from Pakistan: Complications and Challenges*. Verlag Dr. Mueller.
- Khan, F. A., Irum, U., & McNorton, D. (2018). *Fact Sheet: Islamic Republic of Pakistan*. Islamabad: UNHCR.
- Ministry of Refugees and Repatriation. (2018). *High Commission for Migration: Return and Reintegration Response Plan - 2018*. Kabul: Ministry of Refugees and Repatriation, Islamic Republic of Afghanistan.
- UNHCR. (2018). *Country Profile: Pakistan*. Islamabad: UNHCR.
- UNHCR. (2018). *Pakistan: Voluntary Repatriation of Afghan Refugees from Pakistan*. Islamabad: UNHCR.
- UNHCR. (2004). *PROTRACTED REFUGEE SITUATIONS - Standing Committee 30th Meeting*. UNHCR.
- Zieck, M. (1997). *Unhcr and Voluntary Repatriation of Refugees: A Legal Analysis*. The Hague: Martinus Nijhoff Publishers.

Author Notes

This research paper has been composed for the Consortium of South Asian Think Tank (COSATT). The author would like to express her gratitude for the following colleagues from various institutes for providing their valuable insight and outstanding expert opinion on the subject of Afghan refugees in Pakistan.

Dr. Tughral Yamin – Associate Dean of the Centre for International Peace & Stability (CIPS), National University of Science & Technology, Islamabad.

Mr. Muhammad Abbas Khan – Ex-Commissioner Afghan Refugees, Government of Pakistan, Peshawar.

Mr. Rahimullah Yusufzai – Journalist and War Correspondent

The recommendations made through this manuscript are heavily influenced by the observations made by Mr. Muhammad Abbas Khan during his active years in the role mentioned above. The author is also immensely grateful to Mr. Khan for his comments on the first draft of this manuscript.

The author takes full ownership of any errors noted in the manuscript and any such errors should not tarnish the reputations of esteemed individuals interviewed for this study.

+

Examining Migration Dynamics: Push and Pull Factors in South Asia

PAUL I. NORTON¹

- 1) In discussing the push and pull factors in South – it is also imperative to focus on “migration as a choice” and how to ensure safe, regular & orderly migration to ensure protection for migrants, and promotion of better standards for migrants within the region.
 - The Secretary General of the United Nations – quote *“managing migration is one of the most urgent and profound tests of international cooperation in our time”*.
- 2) With the advent of the Global Compact for Safe, Orderly and Regular (GCM) migration and the Global Compact on Refugees – it is a historic moment in time as all Member States have agreed on principles and objectives to manage migration in ways that are more safe, and further protect the rights of not only migrants and refugees, but enhance benefits for host States as well.
 - Managing international migration is a shared responsibility of all countries, not just those countries to which people are migrating.
 - The Global Compact provides a blueprint for how states can best manage migration and cooperate more effectively with one another. It also gives states the space and

1 Chief of Mission, International Organization for Migration (IOM) Kathmandu

+

flexibility to do so on the basis of their own migration realities and capacities.

- The Global Compact's 23 objectives and their associated commitments and actions provide a 360-degree approach to help achieve safe, orderly and regular migration – to work towards a world where migration becomes a genuine choice, not a necessity.
- 3) Importance of intra-regional solutions, and intra-regional cooperation
- With reference to the over-arching theme of this conference that notes “the quest for a legal regime”, it is important to note that there are existing regional and international instruments, and processes that can be strengthened, without the need for new legal regimes. I wish to highlight some of these:
 - With global challenges, such as migrant smuggling and trafficking, bodies such as SAARC have a vital role. SAARC Member States have already ratified the regional convention against Trafficking in Persons, especially women and children – and regionally there could be better mutual legal assistance, better protection, and strengthening of law enforcement cooperation across states to curb this transnational organized crime.
 - In 2014, SAARC Member States for the first time, also agreed as an outcome of the “Kathmandu Declaration” to facilitate safe, orderly and regular migration in order to protect and promote the many labour migrants from this region. Whilst this is not a legal instrument, it still serves as an important document where the political will of regional countries has been

exemplified, and now countries need to work together in order to translate the principles behind it, into tangible reality.

- There are also successful regional consultative processes in this region, namely The Colombo Process which comprises of 12 major labour sending countries in the Asia region, of which Nepal has been the Chair since March 2017.
 - The Colombo Process aims for all 12 countries in this region to cooperate and to foster dialogue and solutions on thematic areas including: remittances, labour market analysis, ethical recruitment, pre-departure orientation and empowerment, skills and qualification recognition under the overarching goal of improving regional labour migration governance.
 - Regional consultative processes such as the Colombo Process, ensures greater intra-regional cooperation. This helps to bolster government-led efforts to improve migration governance, with a goal of fostering mutually beneficial outcomes for the region, rather than as competitors in international labour markets.
 - Member States work together to find regional solutions, to challenges that require cross state cooperation such as ethical recruitment across jurisdictions. Most of the Colombo Process countries' migrants go to countries of the GCC and Malaysia.
- 4) South Asian Labour Migration in the Gulf: is inter country coordination possible?

- Inter country coordination between South Asia and GCC countries is very important especially considering the numbers:
- GCC countries rely on foreign labour migrants between 80% - to up to 93%
- Annually (2016 statistics) India has approx. 750,000 migrant workers, Pakistan 623,000 migrant workers, and Nepal 454,000 migrant workers who migrate to the gulf as labour migrants.
 - We already witness that inter regional cooperation is possible through platforms such as the Abu Dhabi Dialogue and the Colombo Process. The Abu Dhabi Dialogue comprises of countries of destination in the Gulf, as well as major labour sending countries of origin in Asia.
- An example of this effective collaboration to enhance empowerment and ethical recruitment of migrants is the Pre-Employment Orientation and Post Arrival Orientation programmes currently underway in the following pairing migration corridors: UAE and Sri Lanka; UAE and Philippines; and Kingdom of Saudi Arabia and Bangladesh.
- Another pilot project between the UAE and the Philippines specifically focuses on ethical recruitment processes of migrant workers –enables joint government oversight and monitoring of the recruitment process between the two countries.
- There are also currently discussions to pilot a skills harmonization programme between countries of South Asia and GCC. This would be bilateral cooperation for greater skills harmonization matching skills of migrants, to what is required. It would also support

- However there are still many challenges that exist for collaboration in the region:
 - The UNODC report 2018, highlights that migrant smuggling from South Asia is still a huge challenge for this region. The numbers from South Asia to the GCC, still remain unknown, and there is a need to strengthen data on this.
 - However, we know that the cost is incredibly high, not just the dangers of migrant smuggling but also take for example a migrant being smuggled between Nepal to the United States (via air) has to pay between \$27,000-\$40,000 USD. Migrant smuggling is a crime, that no country should tolerate, and something that no migrant should ever have to resort to.
 - We know that the most vulnerable demographic in this region, to migrant smuggling and irregular migration are women. In the context of Nepal, because of provisional restrictions on women and other social factors (e.g stigma) many women migrate irregularly to the Gulf, going through India. Cooperation between India and Nepal to strengthen border management, and protect women who fall prey to smuggling, and curb irregular migration is an area both countries can work towards.
 - Migrants in the Gulf, especially women in the domestic sector also fall victim to dangerous circumstances, whether being trapped in labour exploitation, debt bondage and even trafficking in persons. Countries like Nepal who have a significant number of women who work in the domestic sector

in countries not just in the Gulf, but around the world can work to strengthen bilateral consular ties in order to afford protection, and greater access to justice for migrants in these circumstances.

- a. IOM as an intergovernmental agency, has presence in many countries and we support migrants through our global Migrant Protection Assistance programme.

One of the most recent work of IOM Nepal's is with rescue and assisted return of around 300 stranded migrants back home, with the funding support from Qatar. Countries like Nepal and Qatar through development funding partnerships can also support migrants.

In conclusion I want to once again, reflect that this is a historic time that we are witnessing. Even with so many negative attitudes and discussions about migration around the world, Member States have come together with the political will and commitment, to adopt the Global Compact for Safe, Regular and Orderly Migration in December in Marrakesh.

However, it is only the beginning, and IOM looks forward to continuing to support Member States and migrants in Nepal and in the region.

+

Inclusive Justice for the Rohingya People: Leveraging on Legal Instruments and Community-Centric Strategies

**MANZOOR HASAN, *OBE*¹
Dr. CAROLINE BRASSARD, *PhD*²**

Abstract

The Rohingya refugee crisis in Bangladesh will be protracted due to the historical precedents, the political complexity, and the lack of support for international legal frameworks. The centrality of the meaning of 'identity' *vis-à-vis* the depriving of the citizenship rights and human dignity of the Rohingya people, are among the many root causes of the crisis. The two key arguments in this paper are that, the weak support of South Asia regarding international legal frameworks will elongate the resolution of the crisis; and second, that the Humanitarian sector must approach this crisis differently from other waves of Rohingya refugees. It must invest in inclusive justice involving community-centric strategies conducive to peace. The paper concludes on an agenda for research and advocacy that can generate knowledge, awareness, and inclusive justice for the Rohingya people.

Key words: Inclusive Justice, Rohingya Refugee Crisis, Protracted Crisis, Legal Frameworks

1. The Protracted Rohingya Refugee Crisis

-
- 1 Executive Director, The Centre for Peace and Justice (CPJ)
BRAC University, Dhaka, Bangladesh
 - 2 Academic Adviser, The Centre for Peace and Justice (CPJ)
BRAC University, Dhaka, Bangladesh

+

According to the UNHCR (2017), globally there are 68.5 million forcibly displaced people. About 40 million of them are internally displaced, 25.4 million are refugees, and 3.1 million are asylum-seekers. Furthermore, there are 3.3 million persons of concern in ASEAN and Bangladesh, of which 2.2 million are stateless. This paper focuses on the nearly one million Rohingyas that have perilously crossed the border between Myanmar and Bangladesh since August 2017, forming the world's largest refugee camp in Cox's Bazar.

Since Myanmar's independence in 1948, the Rohingyas have been gradually marginalized (World Bank 2018: 165). The deprivation of citizenship rights and the general human dignity of the Rohingya people are some of the root causes of the crisis, since they are not recognized as one of the 135 'national races' in Myanmar. The Rohingya refugee situation in Bangladesh will be protracted due to deep-rooted factors including the historical precedents, the political complexity and the lack of support to international legal frameworks (Ahmed, 2010; Ibrahim, 2018). Such a complex problem requires tackling the many fundamental issues through a combination of legal, political, and social approaches.

The 1951 Refugee Convention (UN, 1951) builds on the principle of burden-sharing reflected in relieving countries of asylum of disproportionate burdens of granting sanctuary and protection. Pursuing resettlement in third countries and facilitating conditions in those countries of origin which are conducive to repatriation with safety and dignity. South Asia hosts a historically unprecedented number of refugees without legitimate rights. However, out of 24 countries in Asia, only 3 (Cambodia, the Philippines and Timor Leste) have ratified the 1951 Refugee Convention.

Bangladesh is a nation among other non-signatories and has no legal framework protection. Despite this legal uncertainty, Bangladesh opened its doors to the Rohingyas in October 2017,

when the latest round of displaced citizens started entering from the Rakhine State of Myanmar. The Rohingyas do not have the legal status of refugees and are considered as illegal migrants.

The influx included a disproportionately high number of women and children. The Government of Bangladesh responded swiftly to the needs and mobilized both the civil and military administration to cope with the situation. Furthermore, non-governmental organizations (national and international) stepped in to deal with this unprecedented situation. The focus of these agencies was to address the immediate humanitarian needs of the Rohingyas, and to stabilize the situation.

2. South Asia's Weak Support to International Legal Frameworks:

South Asia's weak support towards international legal frameworks will deepen and prolong the crisis further, unless concerted and sustained effort is given to promote and reinforce the importance of signing up to the existing international legal frameworks. Most Asian countries are not signatory of the Refugee Convention of 1951 and the subsequent protocols, nor the Rome Statute of 2002, which created the International Criminal Court. However, Bangladesh is one of the few countries in Asia that has ratified the Rome Statute.

In Dhaka, on the second and third of April 2018, the first international conference on "The Rohingya Refugee Crisis: Towards Sustainable Solutions" was convened by the Centre for Peace and Justice Studies of BRAC University, the Department of Genocide Studies of Dhaka University, and ActionAid Bangladesh. As an outcome of the conference the "Dhaka Declaration" was adopted, building upon previous conventions and declarations, namely:

- The Refugee Convention of 1951 and the 1967 Protocol I: "the principle of *non-refoulement*";

- The 1989 International Conference on Indo-Chinese Refugees Declaration and Comprehensive Plan of Action for an internationally monitored and concerted political, humanitarian and legal response to refugee crises;
- The Global Summit of 2005 promising to take timely and decisive action in accordance with the United Nations Charter in situations of mass killings and mass evictions;
- The Responsibility to Protect (R2P) principle obliging the international community to protect refugees;
- The 2016 New York Declaration and Comprehensive Refugee Response Framework adopted at the United Nations General Assembly building on the notion of burden-sharing;
- The 2017 United Nations Special Rapporteur on Myanmar's recommendation 'to establish a documentation structure to collect, map and preserve evidence of human rights violations and abuses, and testimony from refugees in Cox's Bazar'.

The International Criminal Court recently took up the Rohingya matter and has ruled that the crime of deportation is within its jurisdiction, given the fact that the act was completed in Bangladesh. The question that was raised by the Prosecutor of the ICC was 'whether the Court may exercise jurisdiction under article 12(2)(a) over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.' Bangladesh and others were invited to submit their submission, which Bangladesh did on 11th June 2018. On 21st June 2018, Myanmar was also invited to submit its observation, which it refused to provide. Some international organizations, including Bangladeshi Non-Governmental Representatives, also submitted their written observations.

The ICC delivered its decision on the 6th of September 2018, which essentially granted leave to the Prosecutor to pursue the

matter. The Pre-Trial Chamber stated that the ICC could rule on the issue of jurisdiction regardless of the Article 19 procedure, as this a matter of dispute under Article 119 (1). It also reaffirmed the standing of the victims and their observations may be included at any stage of the proceedings (para. 21). The Pre-Trial Chamber rejected the arguments of the Myanmar government, which stated that the ICC operates on behalf of and with the consent of the state (paras. 35-46).

Identifying the crimes of deportation and forcible transfer, the Pre-Trial Chamber affirmed the distinct nature of the two crimes in Article 7(1)(d) with the crossing of a border for deportation (para. 55-58). It also held that deportation is an 'open conduct' crime. In other words, different types of conduct can amount to 'expulsion' or 'other coercive acts', including deprivation of fundamental rights, killings, torture, sexual violence, enforced disappearances) (para. 61). Another important observation was that, if elements of another crime were to have been committed within the jurisdiction of a state party, then the court may assert jurisdiction (paras. 75-77).

Finally, the Pre-Trial Chamber stated that it is not a 'pre'-preliminary examination, which would have given the prosecutor more time to decide. Instead, it squarely stated that this stage would be considered as a preliminary examination. The Pre-Trial Chamber urged the prosecutor to initiate investigation without delay (para. 86 - 88).

This decision of the ICC is a significant ray of hope for the Rohingyas in the context of international justice and accountability. It also provides huge moral and legal support for Bangladesh, given its regional isolation due to geo-political considerations. The South Asian Association of Regional Cooperation (SAARC) has become dysfunctional due to bilateral disputes in South Asia, mainly between India and Pakistan. ASEAN leadership has failed to restrain Myanmar

given its own policy of 'non-interference' and decision-making process on the basis of consensus. At the global level, the UN has taken a pro-active role despite the fact that the UN Security Council has not come together on the issue of ICC referral on the grounds of possible VETO by certain permanent members.

In March 2017, the United Nations Human Rights Council established a Fact-Finding Mission on Myanmar to establish the facts and circumstances of the alleged recent human rights violations by military and security forces in Myanmar (UN, 2018). Finally, on the 18th of September 2018, the UN Mission released its 444-page report, and the Chairperson of the report, Mr. Marzuki Darusman, started his statement at the Security Council by articulating the following:

Our report characterizes the recent events in Rakhine State as a human rights catastrophe that was foreseeable and planned. One that will have severe impact for many generations to come – if not forever.

3. Towards Inclusive Justice for the Rohingya People: A Research and Advocacy Agenda

The humanitarian and development actors must approach this crisis in a radically different manner from other waves of Rohingya refugees. It must invest in inclusive justice involving community-centric strategies conducive to peace, alongside the aforementioned longer-term legal process. It must build on the resourcefulness and growth potential of the Rohingya refugees to leverage on legal instruments for a sustainable solution.

This is an integral part of the 16th Sustainable Development Goal, as agreed by the international community in 2015. This involves strengthening the international community's commitment to ensure peace, justice, and to build strong institutions. However, as of yet, priority has been given to build 'formal' institutions while neglecting the crucial role of grass root ones. The important role of

youth and women groups in refugee camps is essential to complement humanitarian support (UNHCR, 2017: 14). However, in the context of the Rohingya refugee crisis, the involvement of community-based organisations in refugee camps has been minimal or neglected.

Community-centric inclusive justice faces many constraints due to traditional methods and practices of international development. Institutional mechanisms and cultural perspectives may be misaligned or misunderstood. Therefore, we propose an agenda for research and advocacy, which can generate knowledge and awareness towards inclusive justice for the Rohingya people. The long-term research agenda can build on three interrelated aspects: comparative political-economy analysis, policy research and sociological research.

Firstly, comparative political-economy research on South Asia's complex emergencies in the context of protracted crisis can look into the legal frameworks supporting access to employment and education, and the broader impact on local integration into the host communities. Secondly, policy research towards effective coordination and cooperation in the development-humanitarian-disaster management nexus can generate knowledge on ensuring an effective transition between the different actors engaged in the short-term emergency care and the longer-term assistance (UNOCHA, 2017:25). Finally, sociological research on mobilization and engagement, as well as discussion regarding statelessness, refugees and forced displacements can use innovative research methods. For example, through the co-creation of evidence in the form of collections of narratives and visual art representing voices from various demographics within the communities.

On the advocacy front, there has been a global trend of civil society shrinking in space (CIVICUS, 2018). Therefore, there is an

unprecedented need for community-based, grass root organisations to strengthen their network and build their capacity to work with the government as well as with the private philanthropy sector, in order to collectively build sustainable solutions to the Rohingya crisis. This requires a shift in the current modes of operations within the humanitarian and the development actors and their organisations.

The international community needs to move beyond the framework of 'beneficiaries' which tend to view the Rohingya people through the sole lens of vulnerability. Humanitarian and development actors need to better understand the resourcefulness and strengths of the Rohingya people, particularly women and youths, in order to engage them as leaders in the design of sustainable development solutions. This will involve the establishment of mechanisms supporting the collection, documentation, mapping, and preservation of evidence proving the occurrences of human rights violations. Once we recognize the role of community-based and grass root organisations in the investigation of mass atrocities and crimes against humanity, we need to build their capacity to participate in this process and ensure inclusive justice for the Rohingya people.

In conclusion, in combination with advocacy work, the principle of inclusivity in three proposed research strands can provide significant evidence to support to legislative, political approaches towards upholding the socio-cultural, political and economic rights of the Rohingya people. Advocacy for South Asian countries to sign on to the Refugee Convention and Protocol would go some ways in ensuring the voluntary, dignified, informed, and protected return of the Rohingya people in Myanmar. It is the world's responsibility to ensure that any child born to this earth, including future generations of Rohingya, are recognized as an individual, part of a community, a culture and society, and as equal to any other human being.

References

- Ahmed, Imtiaz (Ed) (2010) "The Plight of the Stateless Rohingyas: Responses of the State, Society and the International Community" University Press Limited, Dhaka.
- CIVICUS (2018) State of Civil Society Report 2018, Johannesburg. Available at: <https://www.civicus.org/index.php/state-of-civil-society-report-2018>
- Ibrahim, Azeem (2018) "The Rohingyas: Inside Myanmar's Genocide", Revised and Updated Edition, Hurst Publishers, London.
- UN (1951) "Convention and Protocol Relating to the Status of Refugees", United Nations New York. Available at: <http://www.unhcr.org/3b66c2aa10>
- UN (2018) UN Fact-Finding Mission on Myanmar (18 September 2018) Available at: <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>
- UNHCR (2017) "The Global Report 2017", United National High Commissioner for Refugees, Geneva. Available at: <http://www.unhcr.org/the-global-report.html>
- UNOCHA (2017) "Annual Report 2017", United Nations Office for the Coordination of Humanitarian Affairs, Geneva. Available at: <https://www.unocha.org/publication/ocha-annual-report/ocha-annual-report-2017>
- World Bank (2018) "Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict", Washington D.C. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/28337/211162mm.pdf>

+

Migrant Workers and Refugees in Malaysia

Dr RISHI RAJ ADHILARI¹

Experience at the international front has proven that migrant workers have been important contributors to the development of nations. In Malaysia, all of us are aware that the gleaming new buildings and highways would not have been constructed without the sweat and labour of the foreign workers. In addition, none of that would have been completed in that time frame. And we know that foreign workers are going to be needed for a very long time. They perform tasks that local manpower reject, or step in when the local numbers are insufficient.

Judicial System in Malaysia

- Malaysia's superior courts include the High Courts, the Court of Appeal and the Federal Court.

There are two High Courts in Malaysia, the High Court in peninsula Malaysia and the High Court of Sabah and Sarawak in Borneo.

- Malaysia has a National Human Rights Commission's findings and recommendations, however, are not binding.
- Criticism has been levied, however, at the government's control over judicial appointments and the impact this has on the judiciary's independence.

¹ Dr. Adhikari is former Nepalese Ambassador to Malaysia and foreign affairs advisor to the then PM Pushpa Kamal Dahal 'Prachanda'.

+

Party to Conventions

- Malaysia has ratified several international human rights treaties, including CEDAW; CRC and its two Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography and the Involvement of Children in Armed Conflict.
- Malaysia maintains reservations against treaty provisions seen to conflict with Islamic and national law. The majority of the CRC provisions have been incorporated into domestic law via the 2001 Child Act.
- In 2010, Malaysia ratified the Convention on the Rights of Persons with Disabilities but declared that it would not be bound by Articles 15 and 18; “Freedom from torture or cruel, inhuman or degrading treatment or punishment”, and “Liberty of movement and nationality for persons with disabilities”.
- Malaysia has also ratified six of the eight International Labour Organization Core Conventions. In 1990, it denounced C.105 on the Abolition of Forced Labour.
- Despite Constitutional Guarantee of Human Rights (Article 5-12), various human rights violations were reported and highlighted during the Universal Periodic Review (UPR) session on 11 February 2009.
- These violations included: those arising from the dual Shariah-civil law systems; continued discrimination against racial and religious minorities; lesbian, gay, bisexual, and transgender (LGBT) communities, disabled persons and women; and, Acts and Emergency Ordinances that allow for arrest and prolonged detention in the absence of judicial review.
- The UPR Working Group Report made multiple recommendations regarding improving the situation of refugees and migrant workers in Malaysia, the majority of which were

rejected. Malaysia also rejected recommendations to abolish death penalty.

- The UPR called on Malaysia to ratify the other main international human rights conventions and relevant Optional Protocols, and to revoke its reservations to CEDAW and CRC. Malaysia, however, rejected these recommendations.
- Malaysia has not issued a standing invitation to the UN Special Procedures and has not responded to country visit requests from ten special procedures.

Migrant Workers in Malaysia

- Malaysia is a major destination country for migrant labor in Asia. The number of migrant workers in Malaysia with regular status is nearly 2 million, and there are a significant number of workers with irregular status.
- As with most destination countries in the region, labor migration in Malaysia is managed through temporary programs, and primarily for "low-skilled" work, sometimes characterized as '3D' - dirty, dangerous and degrading.
- There have been many abuses faced by migrant workers, committed by recruitment agencies and employers, ranging from excessive recruitment fees, to serious violations of the terms and conditions of employment, among others.
- The sorrowful plight of foreign employees is not due to a lack of laws. It is due to a lack of the proper attitude and perception towards these people.
- These highlight the gaps between existing labor laws and policies and their implementation, and, likewise, differential treatment of nationals and migrant workers.

- Although the government has made efforts, and representations of additional steps in the future, to address the problems faced by foreign migrant workers, the gaps in the law and its application noted above continue to make it difficult for workers to claim their legal rights.

Refugees

- With today's movements of asylum seekers, refugees, and migrants presenting significant challenges in many countries and regions, reinforced international cooperation and responsibility-sharing is urgently needed among states regarding international law, and in international refugee law in particular.
- Recent dynamics create not only strong imperatives, but also potentially important opportunities, to take forward action in this area.

Refugees' New hope in Malaysia

- One of the great failures of the former Barisan National (BN) regime when it came to human rights was its dismal record in honoring its moral and legal obligations towards those fleeing political, religious or ethnic persecution in their homelands. For BN, it was all about political expediency instead of respect for sacrosanct principles.
- Many genuine refugees and asylum seekers were hastily handed back into the hands of their tormentors, never to be heard of again. For quite a few, it resulted in long years of incarceration, torture, persecution and great anguish. That the nation was party to such terrible acts will forever be a matter of shame.
- The Bar Council, together with other human rights groups, consistently appealed to the government to honor its asylum obligations but to no avail.

- A more compassionate refugee policy is expected from the new Pakatan Harapan (PH) government now at the helm in Malaysia as a number of current ministers and members of Parliament suffered political persecution and incarceration in the past.
- A new approach is expected that will be more welcoming of refugees irrespective of their religious, ethnic or political background.
- Perhaps the PH government, born out of its own struggle for freedom, will finally resolve to act on the issue.

Migration to Malaysia

Push factors

- Domestic political situation,
- Slow industrialization process.
- Pervasive poverty,
- High degree of unemployment.
- Enhanced awareness on growing tendency to seek foreign employment among the youth. etc.

Pull Factors

- Multi ethnic, multi religious society, very tolerant and provides better feeling to the migrant workers to live and work.
- Nepalese remember “Malaya” where their forefathers came and fought heroic wars and sacrificed their lives.
- The weather condition is favorable as there is no extreme cold or hot climate.
- There is direct air connection between Nepal and Malaysia by three airlines at present.
- Due to intense plea and lobbying, Malaysian government has revoked monthly levy charges that workers were paying thus increasing their savings substantially.

- Recent increases in minimum wages

Issues of Nepalese Migrant labor

At destinations

- Illegal Status
- Different work, salary and company
- No work permit
- Expired dates of Insurance and Welfare fund
- Labour and sexual exploitation
- Passports confiscated
- Salary withheld by company
- Injured and sick with no treatment
- Critically ill and being treated at hospitals
- Jailed and in detention centers on various charges
- Over charged by Man Power Companies
- Many recruitment agencies bringing the same work permits
- Lack of shelters
- No immediate support while at custody
- Domestic workers not recognized as workers
- No timely management of dead body,
- Insurance not paid in time and sometimes not paid

Way out

- Mobile camps for solving the above problems (renewal or issue of work permits, insurance, passport/travel document management, legalize the illegals).
- Diplomatic move for amnesty, reducing sentences, or serve jail terms at home
- Demand attestation only at the embassy

- Regular interactions with ambassadors of destination countries
- Arrange for renewal of documents by family or at destinations
- Management of shelters for women and men
- Enhance resources (finance and human) at embassies
- Monitor staff activity and work performance
- Arrange for keeping passports by the workers

Before Flying out

- Forced to pay excess with no receipt
- No understanding of nature of work demand
- Different work and salary at departure
- Attract workers with false information
- Encourage to take illegal routes
- Certificate provided without trainings, medical check ups
- Withheld passport for long time
- Forced to pay before arrival of visa
- Signing of agreement at haste at the airport
- Signing of two kinds of agreements
- Ill treatment and man handling

Way Out

- Visa processing by the government itself
- Establishment of Free Demand Information and bio-data collection centers with such information in the sticker with passports
- Make toll-free arrangement
- Pre-departure training at form filling or before handing over passports

- Training by government before work permits
- Arrange for 24 hour support cells with adequate authority
- Extensive use of media for awareness raising
- Take mobile number of passport seekers and make aware about safety of passports

Additional Measures

- Provide Bank loan to be paid back through deductions from remittances
- Visa processing by the government
- Training centers to meet international standards
- Training before processing documents
- Demand attestations by the embassy
- Effective monitoring, charging and cancellations of man power companies
- Encourage registration of capable man power companies and discourage and cancel others
- Focus on Bilateral agreement/ MoUs
- Determine to go for G to G
- Establish Hearing Centers to solution of disputes
- Establish temporary shelters in sending countries

Diplomacy

- Facilitate MOUs/agreements
- Facilitate high level meetings/visits
- Lobby for permission of workers to take part in Trade Unions
- Lobby for legal recognition of workers, especially domestic workers

- Lobby for bi - or multi - lateral cooperation for promotion of international labour standards
- Equip missions with adequate trained, motivated human and financial resources
- Dialogue at Regional (SAARC) level for united coordinated approach for enhanced strength

Way Out

- Request for Clemency from PM/President
- Payment by government
- Mobilize Friends of sending countries, NR individuals and others for reducing sentences and financial support

Foreign Workers and their plight

- It is time to understand the extent to which the conspiracy between the local employer, his/her local middleman and his/her foreign agent has shattered the dreams of the foreign workers.
- The foreign workers are exploited to the fullest. The reason is that the foreign workers have very little capacity to enforce their rights in the contract. The major problems are the language barrier, the cost of lawyers, inability to remain in the country to fight the case or work as the employer will inevitably instruct the Immigration Department to cancel their work passes by citing some fabrication such as strike, assault, etc.
- It is also hard for them to even know about or scout around for a volunteer lawyer. They are culturally disoriented and simply just ignorant of whom to turn to.

Local and Foreign Workers Differentiated Treatment

- Covered under**
 - **Local Workers:** Labor Laws (Employment Act, Employees Social Security Act 1969, Employees Provident Fund Act 1991)
 - **Foreign Workers:** Workman's Compensation Act 1952
- Employees Provident Fund**
- Local Workers:** Employee contributes 11 % of the monthly salary; Employer contributes 13 %
- Foreign Workers:** Employer contributes RM 5 per foreign worker
- Social Security Organization (SOCSO)**
- Local Workers:** Paid RM 250,000 in case of accident
- Foreign Workers:** Maximum of RM 25,000 under Workman's Compensation Act 1952
- Basic Necessities**
- Local Workers:** Not applicable
- Foreign Workers:** Sub-standard living conditions and lack of workplace protection against industrial
- Medical Benefits**
- Local Workers:** Yes
- Foreign Workers:** Not entitled especially for out sourced workers
- Cost**
- Local Workers:** Higher over time payment; double/triple on holidays.
- Foreign Workers:** Work 6 days a week, 12 hours a day; usually no overtime but a lump sum payment

Detention Condition of Migrants and refugees

- Failing to meet international Standards and lack of effective redress
- Overcrowded facilities in the detention depots
- Breaches of basic standards of hygiene, water, sanitary pads
- Diet and health care
- Treatment and Punishment of detained migrants
- Punishment
- Improving conditions of detention centers

Recommendations

- To urgently reconsider its current position on the ratification of the Refugee Convention
- Meanwhile, amend the Immigration Act or enact separate legislation to legalise the status of refugees and asylum seekers in Malaysia.
- To establish additional screening mechanisms so that refugees or asylum seekers are quickly identified and protected from arrest.
- To cooperate with and provide access by NGOs to immigrants and refugees detained in immigration depots or elsewhere.
- To ensure that it does not breach the customary international law principle of non-refoulement.
- To publish a clearly stated written immigration policy, including annual quotas for different categories of migrants, and to elaborate detailed plans for population growth and the requirements of the labour market.
- To review, rationalise and co-ordinate the various activities of government departments relating to immigration law and

enforcement, employment law and human resources, criminal law and enforcement, and detention and prisons.

- To amend the Immigration Act to correspond to international standards
- To withdraw its reservations to the Convention on the Rights of the Child,
- To urgently consider the ratification of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment the Optional Protocol to the Convention on the Elimination of Discrimination against Women for the benefit of both Malaysia citizens and other persons within its jurisdiction.
- To address a standing invitation to the UN Special procedures on human rights.
- To conclude appropriate MOU with other relevant countries providing migrant workers to ensure minimum rates of pay and conditions, and also bind private employers to maintain those conditions in their contracting and employment of migrant workers.
- To improve co-ordination between the Department of Human Resources and the Immigration Department
- To ensure the prosecution of employers under paragraph 12(1)(f) of the Passports Act who retain the passports or other travel documents of migrant workers where the worker has requested the return of the documents.
- To provide adequate legal aid to individual migrant workers

who wish to claim unpaid salaries or improper deductions or otherwise enforce their rights under employment law.

- To ensure the prosecution of those who recruit or employ migrants without adequate work authorizations
- To provide temporary status without a visa charge to migrants who have been improperly dismissed and are currently taking their case to the Labour Court
- To allow migrant workers to associate freely, in conformity with international human rights standards on freedom of association.
- To immediately cease the use of RELA officers in the enforcement of immigration law
- To improve conditions of detention in police lock-ups, prisons and, in particular, immigration depots
- To ensure that the relevant embassy is informed of the detention of its nationals and can access them
- To ensure the safe passage of removed persons out of Malaysia, taking all possible precautions and measures to prevent access by agents to detainees and the consequent process of extortion, trafficking and smuggling.