Asylum in South Asia: The Indian Experience in a South Asian Context: Laws of Asylum and Protection

Module F: CRG Winter Workshop 2019

Theme Paper

Introduction: Asylum in South Asia and in International Law

At present, the 1951 Refugee Convention and its sister 1967 Protocol Relating to the Status of Refugees, the cornerstones of international refugee law, have been ratified by 148 states. There are additional regional instruments relating to refugees in Latin America (the 1984 Cartagena Declaration) and Africa (the 1969 OAU Refugee Convention) and Europe (2004 Qualification Directive). South Asia is one of two major regions that exists outside of this regime (the other being the Middle East). And yet, at least three South Asian states (India, Pakistan and Bangladesh) were founded upon the basis of some of the largest forced displacements in human history; the 14 million who crossed the borders in 1947 with the creation of India and Pakistan is far and away the largest ever recorded. Bangladesh too was created in the midst of its own refugee crisis as some 9 million crossed into India during the struggle for independence with Pakistan in 1971. Sri Lanka and Nepal too have witnessed large refugee movements, in the former between itself and the southern Indian state of Tamil Nadu, and with the latter, refugees from Tibet and Bhutan. Today Pakistan and Bangladesh are amongst the top ten hosting nations for refugees globally, with the former currently accommodating around 1.4 million people mainly from Afghanistan, and the latter around 900,000 mainly from Myanmar. These numbers far outstrip those taken in by most parties to the 1951 Refugee Convention and the 1967 Protocol. Indeed, of the top 10 hosting nations for refugees in 2018, only five were parties to the 1951 Convention. And one of those, Turkey, only formally recognizes refugees coming from Europe, in other words almost none at all today. Yet, in spite of that, Turkey is currently hosting the largest number of refugees in the world.

This situation presents a paradox that has largely gone unexplored in academic literature. Why have states that are not bound to observe the rights accorded by those treaties the most generous in granting asylum than the ones that are? If the objective is to facilitate access to asylum for refugees, then it appears that international refugee law is a hindrance rather than a

help to refugees. While the states of South Asia are far more open when it comes to numbers, it is often the case that refugees do not possess the same level of rights in the region as compared with those who find sanctuary in states that are parties to the refugee law treaties. Is there perhaps a trade-off between the numbers of refugees that states are willing to take in and the standard of rights that are accorded to them? Moreover, what characterizes refugee reception in 1951 Convention states is individual status determination; every asylum-seeker having to prove their own bona fides as refugees, according to the legal definition. By contrast, South Asian asylum has been largely based on mass inflows and collective status. What are some of the problems and challenges of each approach?

South Asia stands apart from the international refugee law regime in at least two ways. First, as already mentioned, by not acceding to the international refugee treaties, and indeed with an absence of any domestic refugee laws either. As such, there is no fixed definition of a refugee. In a piece of post-colonial irony, India, Pakistan and Bangladesh all share the same Foreigners Act, passed in 1946 under British rule of the as yet undivided territory. Under the terms of this legislation refugees are lumped together with all non-citizens in matters of entry, residency and deportation. But critically, this is not in the form of a ban. Article 3(1) of these common pieces of legislation places absolute discretion in the hands of the central government of each state as to decisions on entry, stay or deportation. Thus, in South Asia the refugee question is solely and absolutely a political question. In contrast, in states that operate under refugee law asylum has become an administrative matter, albeit coloured by political prejudices and pressures. One of the implications for refugees in refugee law countries is that they must each individually negotiate a complex legal procedure, and then shoehorn themselves into fitting the parameters of the legal definition of refugee. In many instances, when including all the various avenues of appeal, this process can take many years, during which asylum-seekers are usually denied access to most benefits and to the right to work. For refugees in South Asia some groups face similar purgatory such as the Chakmas whose status in India has been largely precarious for many decades, whereas other groups have been welcomed, settled and granted citizenship fairly quickly, as with the Tibetans. As we shall see further below, the vagaries of refugee reception in South Asia largely depend on the backgrounds of the refugees and the historical moment of their flight.

The second major difference between asylum in South Asia and in refugee law countries is that in the former it tends to be granted on a group basis rather than through individual status

determination, as is standard elsewhere. This avoids the burdensome process of applying for asylum that faces most refugees in countries with refugee law. It also avoids the kind of border bottlenecks that we see in Greek and Italian islands, at Calais, at the US/Mexican border or in certain Pacific islands. The group approach can also have the effect of maintaining a certain collective identity based in exile, whereas under the legal framework refugees become both atomized but also lumped together in the amorphous mass of 'refugees' that ignores that specific cultures, their political identities etc.

Refugee identity has been a problem that lies at the crux of refugee law and the refugee experience even before the 1951 Convention. The first line of Hannah Arendt's classic text 'We Refugees', written when she was herself a newly arrived refugee in the US,expresses the resistance to being reduced to a label: 'In the first place, we do not like to be called "refugees".'[1] One of the significant effects of refugee law, as it evolved in the years after Arendt wrote that piece, has been to trap refugees within a very peculiar identity. This is done first by creating a legal definition that determines who does or does not qualify for protection; those fleeing political persecution qualify, those fleeing the general effects of war do not; those who cross international borders are refugees, while those who do not are merely internally displaced persons. More than three decades after the 1951 Convention came into effect, Andrew Shacknove, sometime lawyer for the UNHCR, was moved to interrogate the meaning of the term 'refugee'.[2] He argued that its meaning had become unnecessarily reduced to its legal cypher, and that the scope of its meaning should be widened to include all those for whom normal social bonds have been lost.As such, this can include people fleeing the effects of severe economic deprivation and natural disasters as well as those escaping persecution. Indeed, much of the jurisprudence around the 1951 Convention has revolved around determining the parameters of the 'refugee'. For the asylum-seekers themselves, their struggle from the moment they enter the putative country of asylum is to convince officials, lawyers and judges that their experiences enable them to reach the high bar of refugee status. That, for forced migrants, is the price of protection, at least in countries that adhere to international refugee law.

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1 Hannah Arendt, 'We Refugees' in H. Lambert (ed.) *International Refugee Law* (Routledge 2016) 3.

2Andrew E. Shacknove [1985] 'Who is a Refugee?' *Ethics* 95.2: 274-284.

Finally, one also cannot speak of asylum in South Asia without discussing the question of resources. The region has suffered from a relative lack of resources while also accommodating the largest numbers of refugees. It is a matter of record that India, Pakistan and Bangladesh have struggled to ensure basic provisions, most acutely in 1947 and 1971. In many cases, though, refugees were provided with at least the bare necessity of rations and rehabilitated with gifts of land, as with the Chakmas in Arunachal Pradesh, or the Tibetans in Kerala. The emphasis on care and rehabilitation is one that is notably absent in many other parts of the world including the richest countries which also happen to be integrated into the international refugee law regime.

Thus, what marks out asylum in India and throughout the region is a flexibility of approach, with politics to the fore when it comes to determining the right of access and the standard of care accorded to each group of forced migrants. This has benefited some groups and disadvantaged others. It makes the initial entry into the country of asylum relatively straightforward, but makes the conditions of stay often highly precarious. Legal processes are avoided in the moment of flight, but can end up dragging on for many years when it comes to maintaininga right to stay or the protection of basic rights.

Asylum as a State-Building/Reinforcing Tool

Of course, refugees have been welcomed in many instances on the basis of solidarity with co-religionists, with people who share a common language or ethnic heritage. In the case of Partition this meant that often the people who crossed over from one side to the other were not considered ‘refugees’ as they were simply coming ‘home’ to build the nation. In 1971 despite the enormous pressures on resources represented by the arrival of millions of people in just a few months, the people of West Bengal were largely welcoming to people who were, until the carving up of the state by the British in 1905 and then again into different nations in 1947, had been one. With the victory of the liberation movement and the establishment of Bangladesh, most of the estimated 9 million refugees returned to build the new nation.

But nation-building is a doubled edged sword for refugees as it can just as easily be used to exclude and to include. As NavineMurshid has written, one of the major characteristics of asylum in South Asia since independence has been its deployment as a tool of regional

politics.[3] The rivalry between India and Pakistan has governed the reception of the largest refugee arrivals in 1947 and 1971. Pakistan's generous hosting of Afghan refugees has been since 1979 to its largely pro-US stance. Equally, India's relatively generous reception of Tibetan refugees has been a means to temper the geo-political rival, China. While this has benefitted these groups of refugees, it has also placed them and others in the vulnerable position of being dispensable when their presence unsettles the state's political outlook. The Biharis, mostly Urdu-speaking Muslims who had moved from Bihar and West Bengal into what was then Pakistan during Partition, following the establishment of Bangladesh found themselves as a non-Bengali minority suspected of loyalty to their fellow Urdu-speakers in Pakistan. Almost half a century later some 300,000 Biharis find themselves still trapped between a Bengali nation that does not want them, and a Pakistan that no longer needs to take in more Muslims to build their nation. The Rohingyas present an even more acute example of this problem, as a people whose identity and history disrupts the post-colonial division of the sub-continent. Excluded from citizenship in Myanmar, the lands that they have called home for the past two centuries, but who due to the changing policies of British colonialism, the division of the region into separate nations, and a series of persecutions, have found themselves as linguistic, ethnic and/or religious outcasts in Myanmar, Bangladesh and India.

In short, the nation has included and excluded refugees in South Asia. However, this is far from being a phenomenon specific to the region. Europe experienced its own 'unmixing of peoples' following the collapse of the great multi-ethnic empires – Austro-Hungary, Ottoman, Russian – following World War I. The solution for the minorities stranded in the new ethnically-based nation states was conceived of within a legal framework, from the Nansen Passport through to various refugee treaties leading up to World War II. Is this what South Asia has been missing? Would regionally-based treaties solve the problem of statelessness and protection? We should be wary of any rose-tinted view of the historical development of refugee law. James Hathaway has argued that the interwar period in Europe was one in which 'refugees were defined in largely *juridical* terms', so as to remedythe fact that a mass of stateless persons in Europe was creating 'a malfunction in the international legal system',[4] while ClaudenaSkran suggests that, as well as assisting some refugees to travel, the Nansen Passport 'would help governments to count and monitor their refugee

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3NavineMurshid, *The Politics of Refugees in South Asia: Identity, Resistance, Manipulation* (Routledge 2015).

4James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33 *International and Comparative Law Quarterly* 348, 349, 358.

populations'.[5]Noiriel argues that the relative ease with which the Nansen Passport was instituted in the years after the First World War was possible only because European states believed that it would facilitate the mass repatriation of refugees caused by the war and the revolutionary upheavals in Russia.[6] In short, the Nansen Passport system, and its successors, were primarily about stabilising, monitoring and controlling the movement of refugees. Insofar as it had a humanitarian effect in facilitating greater ease of movement to refugees who would otherwise have been without travel documents, this was a secondary aim. Moreover, such a scheme was only necessary because of the plethora of border controls that had become the norm across Europe over the preceding decades. Yet South Asia has maintained relatively open borders that has allowed the mass movement of refugees. One of the primary rationales for international refugee law is to facilitate the entry of refugees to states of asylum. But so long as the borders of South Asian states remain open, such a framework seems unnecessary? Access to asylum, certainly via land borders, is arguably not the key issue facing refugees in South Asia. Rather the issue is protection, care and access to basic rights once in the country of asylum. Before interrogating this question further, it is necessary to first address the issue of why South Asia is not part of the international refugee law regime, and why it does not solve the weaknesses of asylum as practiced in the region.

The Euro-centric origins of international refugee law

There is little mystery about why the newly independent South Asian's nations did not sign up to the 1951 Refugee Convention at its inception.Stephanie Schmahl, citing the French and Italian delegates to the Conference of Plenipotentiaries that drafted the 1951 Convention, describes the concern of European states as being to create a legal regime 'primarily designed to create secure conditions such as would facilitate the sharing of the refugee burden.'[7] There appears to have been a trade-off in the negotiations over Article 1, the 'key' to the system of rights for refugees under international law, which delineates who does or

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5 ClaudenaSkran, 'Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 7.

6GèrardNoiriel,*Réfugiés et sans-papiers: La République face au droit d'asile XIXe-XXe siècles*(Hachette 1998)106.

7Stephanie Schmahl, 'Article 1B 1951 Convention' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 469.

does not fall within the definition of a 'refugee'.[8] In return for a settled universal definition the temporal and geographical limitations (relating to events in Europe prior to 1951) had to be put in place.[9] The French delegation, following concerns expressed within the French government that they would have to receive too many refugees, successfully insisted on these restrictions being included in the final draft.[10] The US delegation, among others, objected to a universal definition as it would force states to sign a 'blank check'. The US delegate, Henkin, pointed to the numbers of Palestinian refugees and of those who had fled as a result of Indian Partition as examples of why a more specific definition was necessary. The Italian delegate, Del Drago, expressed horror at the idea that European nations would have to accept refugees as a result of national movements in the East.[11] The Israeli delegate, Robinson, made the curious argument that people fleeing natural disasters could not be included because 'fires, floods, earthquakes or volcanic eruptions' did not differentiate 'between their victims on the grounds of race, religion or political opinion'. Robinson also made it explicit that 'persecution' meant that anyone merely fleeing a war situation would also be excluded.[12] It was left to the Pakistani delegate, Brohi, to express his government's opposition to a refugee convention that excluded all non-Europeans from protection, such as the millions who had so recently suffered as a result of Partition.[13] It is therefore clear that the Convention refugee has its origins not in concern for refugees *per se*, but rather as part of a compromise intended to assuage the concerns of states that they would be inundated with masses of unwanted asylum-seekers. In particular, the Western bias of the Convention is obvious in statements such as the following made in 1966 by UNHCR:

> The limitation did not give rise to any particular problem when the 1951 Convention was first adopted, since at that time the 1951 Convention extended in practice to all known groups of refugees.[14]

8Einarsen T, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011)40.

9ibid 55.

10Noiriel (n 6) 144.

11Einarsen (n 8) 60.

12ibid 61-62.

13ibid 57.

14 UNHCR, UN Doc A/AC.96/346 (1966), para.2.

This claim is highly disingenuous, as the Convention excluded non-European refugee situations, thus ignoring at least three other major refugee crises of the time: in addition to Partition there were the 800,000 Palestinians forced from their homes by the Zionists in the following year; and the refugees created by the outbreak of war on the Korean peninsula in 1950, with estimates of their number reaching a million or more.[15] For geopolitical reasons to do with the Cold War, the UN, at the behest of Western states, was prepared to set up specific agencies to assist the Palestinians and Koreans, but those in South Asia were denied aid, in spite of repeated requests from India and Pakistan.[16]

Thus, the specific restrictions on recognizing refugees from outside of Europe, plus the focus on political persecution, was intended to exclude any recognition or responsibility to the millions of forced migrants outside of the continent, and specifically ignored the mass event of Partition. In addition, the criteria strongly implied that the refugee definition had to be evidentially supported on an individual rather than a group basis. Whilst this was feasible in the post-conflict situation of Europe, with most refugees arriving from the Soviet Bloc coming in relatively small numbers or already *in situ*, this obviously did not fit the mass character of forced migration in South Asia at the time. Indeed, the individualized basis of refugee status determination under the 1951 Convention has increasingly proved unworkable or worse, an effective barrier, to asylum for people from the Global South, who are usually fleeing armed conflict and other forms of social breakdown, rather than individualized political persecution.

Attempts at Refugee Law in South Asia

For a number of years there were efforts to promote accession to the 1951 Convention or to develop national refugee laws in India and other countries in the region. The most sustained effort was begun under the auspices of the South Asian Association for Regional Co-operation in Law (SAARCLAW)in 1996,when the former Chief Justice of India P.N. Bhagwati led a commission that drafted a Model National Law on Refugees.[17] The idea was that this draft could then form the basis for legislation in each country in the region. In fact,

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15 The Convention allowed states voluntarily to accept non-European refugees, but this was not a binding commitment as it was with European refugees.

16Loescher G, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (OUP 1993)62.

17 'Model National Law on Refugees', [2001] *ISIL Yearbook of International Humanitarian and Refugee Law*19

the Model Law attempted to incorporate the basic elements of the 1951 Convention, in large part verbatim. There were two distinctions. The first was the inclusion of the broader definition of a refugee included in the regional refugee agreements of Africa and Latin America that includes people fleeing general conditions of social breakdown as well as those in fear of persecution. The second difference is that the Model Law provides a much thinner version of the rights accorded to refugees in the Convention in terms of the right to work, access to education or welfare. For example, whereas Article 23 of the Convention grants equality of welfare provision with nationals of the state, the Model Law makes no such commitment.

In India there were a number of attempts to pass the Model Law through the Lok Sabha, most recently in 2015. That process appears largely dormant today, and indeed given the current government in India, appears to have little chance of progress for the foreseeable future. Indeed, at the time of writing, the omission of some 2 million people from the register of citizens in Assam suggests the direction of travel for any policy involving immigrants and refugees. Yet, the question remains, would such legal developments compromise or enhance asylum provision in the region? Would a specific tradition of asylum that has, all things considered, largely been successful under the strain of events such as those that occurred in 1947 and 1971, be compromised by shoehorning itself into the international refugee law regime? If political, ethnic and religious solidarity have been the driving forces of asylum in South Asia rather than a purely legalistic approach, to what extent could that be seen as having had a positive or negative effect on refugees themselves? These are some of the questions we seek to explore in assessing the history and present of asylum policies and practices in South Asia.

Human Rights as the Way Forward?

In South Asia where there are no legal definitions of a refugee at play, forced migrants do not face the rigors of individualized refugee status determination on arrival. Further, the question of who may qualify for protection is left open. The crises facing refugees seeking asylum in Convention countries have been mostly about the attempts at surmounting the rigid legal barriers erected under refugee law, whether it be in the Mediterranean, in the Pacific archipelago of Australian holding camps, or at the US/Mexico border, in which asylum-seekers struggle to mark themselves out from the immigrant mass as ‘deserving’ of entry and

protection. By contrast this has not been a feature of the South Asian experience. Much larger numbers of forced migrants, from Partition through to the Tibetans in the 1950s and 60s, East Pakistanis in 1971, Afghans from the late 70s onwards, Tamils and Bhutanese in the 1980s and more recently the Rohingyas, have negotiated borders with far greater ease. The focus instead has been on the level of care and rehabilitation once they have reached their countries of refuge, of their human rights in exile.

Some 16 years ago RanabirSamaddar posed the question as to whether there can be 'a policy for hospitality, a policy to be kind'?[18] Moreover, when we consider that refugee law is normally framed as a means by which the state decides who gets protection or not, then the question naturally arises of 'how are we to look at the form of the power of a State to rule and to care, which though connected as they are with each other, appear as separate and distinct activities, but actually build on each other?'[19] The standard answer to the conundrum is to advocate for an extension of basic human rights. Case law involving the Chakmas residing in Arunachal Pradesh demonstrate the potential in this approach.

The Chakmas are in many ways symptomatic of both the positive and negative aspects of asylum as practiced in South Asia. On the one hand from the 1960s onwards they were able to find easy access to India, having suffered discrimination and worse in Bangladesh, and many were granted land on which to settle in what was then the North EastFrontier Agency (NEFA), now known as the state of Arunachal Pradesh. The top-down rehabilitation of Chakmas in Arunachal Pradesh, however, represented an incursion upon protected tribal lands in the province from which others are normally not allowed to settle or acquire land. The result has been long-standing tensions between the tribal communities and the Chakmas which culminated in orders to quit by the state government and violence directed against the Chakmas beginning in the 1980s. Although citizenship had originally been denied to the Chakmas following the Supreme Court's decision in *State of Arunachal Pradesh v Khudiram Chakma*,[20] things changed with the establishment of the National Human Rights Commission in 1993 under the legal mandate of the Protection of Human Rights Act of the same year. Following the 1994 Supreme Court decision and renewed pressure on the Chakmas to move

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18RanabirSamaddar, 'Power and Care: Building the New Indian State' in R. Samaddar (ed.) *Refugees and the State: Practices of Asylum and Care in India, 1947-2000* (Sage 2003) 23.

19Ibid.

20AIR 1994 SC 1461

from their homes, the NHRC took up their case which culminated in the landmark case of *National Human Rights Commission v State of Arunachal Pradesh*.[21] On a technical point the Supreme Court clarified that many of the Chakmas were in fact entitled to Indian citizenship. The much broader issue decided, however, was that Article 21 of the Indian Constitution, which guarantees the protection of life and liberty, was applicable to all persons residing in India, not just citizens. In practical terms, this meant that the state government was bound to provide security against the xenophobic vigilante attacks that had plagued them for years, and the Chakmas could not be evicted from their lands without due process, which included the period while citizenship applications were pending. In addition, the state government was ordered to provide all the necessary paperwork for the central government to consider citizenship applications for the Chakmas. While violence towards the Chakmas has become less acute, it took a further Supreme Court decision[22] for the process of citizenship to finally be granted in 2017.

Despite the long drawn out legal process with the Chakmas, it is possible to conceive of effective protection for refugees by applying and enforcing human rights norms. However, it must be noted that the Chakmas benefitted from being found eligible for citizenship under the 1955 Citizenship Act, which would not be applicable to many other groups of refugees such as the Biharis, Sri Lankan Tamils or the Rohingyas. Also, application of Article 21 of the Constitution only guarantees the basic rights of life and liberty, but does not cover many other rights that are critical for a viable and dignified life, such as access to healthcare, education and the right to work. Agitation for a human rights act that does grant these things to citizen and non-citizens alike might therefore be the aim, but given the hardnationalist turn witnessed with the advent of the Modi government since 2014, we must consider this aim in the context of political strategy as much, if not more than a legal one.

Hospitality or solidarity?

When we pose the question of refugee protection in India and elsewhere in South Asia, we must reckon with the endpoint of a process that began with colonial divisions between and manipulation of ethnic, religious and linguistic groups in the sub-continent, the establishment

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211996 1 SCC 742

22Supreme Court of India, WP (Civil) No. 510 of 2007, Decided on 17 September 2015.

of nation-states based on these divisions, which in turn has led to an ethno-nationalist polity in which minority groups face an increasingly unmediated assault on their basic human rights. In this context, we must engage with traditions of asylum based on hospitality and solidarity that do not remain beholden to state policy. These two groundings have important distinctions and they each lead to different roads to protection, even if the end result may be the same.

Hospitality is grounded in a universalist aspiration in which we must always be open to the Other, welcoming them as fellow human beings with as much right to be there as ourselves. How does this approach translate into law? Is such a framing even possible when law itself is based on a contest between various individual and group rights? More concretely, in South Asia how would such unconditional openness cope with the desire of vulnerable tribal groups to maintain their identities and cultures together with the arrival of large numbers of refugees as was the case with the Chakmas in Arunachal Pradesh? How would a willingness to accept Muslims, Hindus, Buddhists etc. be squared with a desire to maintain states created with the express aim of creating homelands for one or the other? In short, is it realistic to imagine a cosmopolitan hospitality mapped onto a nationalist division of the sub-continent? That was the Nehruist dream for India, but why has it failed? Was such a failure inevitable with Partition? There may be a great irony that the mass refugee flows of 1947 created the demographic conditions for the eventual closing of asylum in the region that we are perhaps witnessing today.

Asylum as solidarity is another way to advance the cause of refugee protection. In contrast to hospitality, there is no claim to universality, rather it is about the extension of support and identification with others who we share a language, culture, religion or political aims. This has certainly been the basis for asylum in South Asia since independence. It also characterized support for refugees globally during the Cold War, and as far back as the Protestants who fled France to the Netherlands and England in the 17th Century, and even to the movements of populations during the internecine wars in Ancient Greece. While potentially exclusionary, it also keeps open the prospect of protection as a political matter. And if we understand the political as a form of discourse that can never be closed, as in Jacques Rancière's formulation as form of permanent 'dissensus', then a space always remains open in which the cause of protection for any group can be agitated for and

advanced.[23]Solidarity can be deployed by states for their own purposes, as with Partition itself, Pakistan's hosting of Afghan refugees following the Soviet invasion in 1979, or with India's welcome to the Tibetans. Perhaps one of the reasons why the position of certain groups of refugees, whether they be the Chakmas, the Biharisor the Rohingyas have found themselves devoid of such support is because of a lack of grassroots solidarity. In other words, asylum-as-solidarity in South Asia has remained largely a function of state policy, as a means for state-building and a tool of regional politics. As such, just as with refugee law, the humanitarian aspect of asylum is but a secondary aspect, the primary one in this case being state formation and regional hegemony. The question therefore is, given that neither law nor state-centred solidarity places the refugee at its heart, can we conceive of asylum in a way that does? It could be argued that a form of grassroots asylum in which refugees themselves agitate for their own rights, with support from civil society, is the way forward.The campaign of the Chakmas together with the human rights sectorcould be one such instance. Are there others in South Asia that can be drawn upon as a harbinger of what asylum could mean in the region?

Conclusion

Asylum in South Asia since 1947 has been characterised by nation-building, geo-political rivalries, expressions of solidarity for people of the same ethnic, religious or linguistic background, along with impulses towards care and protection when faced with large numbers of people fleeing acute danger. Throughout this period borders have been relatively porous, thus avoiding the kind of crisis-inducing obstacles to movement seen in many other parts of the world, especially those at the centre of the international refugee law regime in Europe, North America and Australia. When considering the role of law in terms of refugee protection, its absence in South Asia has not hindered access to asylum. However, this legal gap has often left refugees vulnerable to changes in the political weather, and to long-term precarity in the countries of asylum. Yet, international refugee law is not the panacea that is often supposed. The great benefits of rights bestowed under the various treaties are difficult to access as the barrier to entry is so narrowly circumscribed. As is clear from the negotiations that led to the 1951 Refugee Convention, there was a trade-off between agreeing

23 Jacques Rancière, *Disagreement: Politics and Philosophy* (University of Minnesota, 1999).

to these rights with a restrictive definition of a refugee. Moreover, it is left to the state to decide on the legal process by which refugee status determination is granted. Given the crises created for refugees who tried to traverse the closed borders of Europe in the 1920s and 30s right through to the violence imposed on forced migrants trying to enter the EU, Australia and the US today as they are faced with evermore arduous processes to reach the bar of refugee status, advocates for refugees in South Asia must ask themselves what the price of refugee law, either at national or international level would be. The common criticism levelled at refugee policy in South Asia is that it is largely dictated by political factors. But looking at how asylum is being practiced under the Trump administration, with the Fortress Europe policy of the EU or the Pacific Solution deployed by Australia, it is not necessarily the case that international refugee law provides quite the shield for refugees that many assume. Therefore, the problem of asylum in South Asia may not be too little law and too much politics, but rather a need to thinkmore creatively about the interaction between the two. In particular, there is a need to avoid asylum being reduced just to state-centred or state-directed priorities, especially at a time when ethno-nationalism is increasingly becoming the driving force in regional and global politics.