CHAPTER 1

INTRODUCTION

History shapes today's understanding and attitudes and therefore it is wise to be aware of what happened earlier. Since ancient times South Asia was not one entity but an amalgam of fragmented territories. The population movements in the region have been legion and they have brought with them people from a wide variety of backgrounds, beliefs, cultures etc. A closer look at how at certain points in time the population and powers that be reacted to this influx would provide a number of clues as to how the tradition of receiving migrants, including refugees, was shaped. The values which form the foundation for this hospitality may be traced back to sources such as religion or philosophy.

The recent history of refugee management in South Asia starts with one of the world's largest movements of populations in a limited time frame: Partition in 1947-48. A number of developments which still exert their influence on today's consideration of refugee issues took place in that period and deserve more than just a cursory treatment. Another of the world's largest mass exoduses in modern times took place from East-Pakistan to India in 1971 when up to ten million refugees needed assistance and protection.

Heralding the end of the Cold War with a considerable impact on the situation of refugees in South Asia was the retreat of the Soviet army from Afghanistan in 1989 and the subsequent repatriation of more than one and a half million refugees from Pakistan. However, they came back with a vengeance: up to three million Afghans had to be hosted again in South Asia. At the beginning of the 21st century there are still a number of fairly intractable refugee situations in South Asia the largest of which is still the Afghan population in Pakistan but other refugee groups such as the Rohingyas are waiting as well for a durable solution to their plight.

In South Asia management of refugees takes place without attributes such as a clear definition of what a refugee is, without a determination of the status of most refugees and without any specific global, regional or municipal legal instruments on refugees. The virtues of generous/compassionate "humanitarianism" and "universal brotherhood" are two of the recurring references in every discussion on refugees in South Asia, however, are these virtues manifested in all cases or only in some? Does
this mean that refugees are better or worse off in this region than in countries that do
have some of the above mentioned attributes? Are the refugees more or less protected
here, is there more or less respect for concepts such as asylum and non-refoulement?
These are some of the interesting questions which the thesis will attempt to answer
taking into account that the situation in South Asian states is not very different from
many other states in Asia: law for the protection of refugees is the exception rather
than the rule and the status of refugees is precarious as it is subjected to executive
discretion, national security and foreign policy considerations.

Discussions nowadays on International Refugee Law (IRL) and the related
bodies of International Human Rights (IHRL) and Humanitarian Law (IHL) are held
in an atmosphere of questioning the underlying definitions and/or motives and this for
the very first time since their inception and promulgation as a legal framework in the
aftermath of the First and Second World War. These discussions take place both in
the North and in the South. It is an interesting exercise to look into whether this
diverging understanding has an impact on the policies and practice of the refugee
management in South Asia.

Why a study and which study on the refugee regime in South Asia?

In this thesis we would like to contribute by highlighting specifically the
international legal framework applicable to South Asian states and, from a state
perspective, the institutional aspects of refugee issues in South Asia.

Refugees are being managed in South Asia where none of the states is a
signatory to the 1951 United Nations (UN) Convention Relating to the Status of
Status of Refugees (hereinafter: ‘1967 Protocol’). In the absence of any specific
regional or municipal instrument on refugees, could it be that there is, as Harrell-Bond
(1998) asked, an idiosyncratic way of managing refugees in this region and could,
hence, a South Asian perspective to the overall body of knowledge in the field of
refugee studies be identified?

The thesis will also attempt to formulate answers to crucial questions such as:
why are South Asian states not acceding to the 1951 Convention and/or the 1967
Protocol? Is there a legal basis for the South Asian states to remain outside the United
Nations Office of the High Commissioner for Refugees (UNHCR) mandate? What
are the steps that are being taken towards a regional and/or national legal framework
on refugees?
The study will consist of a three-pronged approach: the first part encompasses the international framework as far as IRL, IHRL and IHL is concerned and a series of sources and definitions in order to precisely point out what the content is of the concepts we are using in these branches of Public International Law. The second part of the thesis will be a comprehensive study of the ground reality for refugees in South Asia as far as institutions, policy and practice is concerned. The two parts lead us to the third: an assessment of the South Asian refugee regime and of the (potential) issues - hence, on occasion a de lege ferenda approach - regarding the introduction of national refugee law.

In order to clearly delineate the subject matter of the thesis it is necessary to state from the outset that it is not an exhaustive study of all refugee situations in South Asia. This would by far surpass the scope of the underlying research as many more resources would be required. Nevertheless, parsimonious reference to actual refugee situations will be made where appropriate to illustrate our discourse.

Another caveat as far as the scope of the study is concerned is that we will maintain the criterion that our ‘persons of concern’ are dealt with solely if and when they have crossed the international boundaries of states, in other words, Internally Displaced Persons (IDPs) will not be part of this study.\(^1\)

Lastly, in order to keep the format of this thesis manageable it is not feasible to go back and describe all the movements of populations in each South Asian country in earlier times: we will focus on the management of refugees in the space of South Asia - which for the purpose of this work consists of Bangladesh, India, Nepal, and Pakistan – and this during the decade that straddled the millennium shift, i.e. 2005 being the last year of the developments that are discussed. However, wherever appropriate, short historical perspectives will be provided, to understand the background of the how and why of the management of refugees in South Asia.

**Migration: as old as humanity**

The word ‘refugee’\(^2\) was coined in the mid-16th century to designate the two hundred thousand Huguenots who, for reasons of religious persecution - after the Edict de Nantes (1598) granting them freedom of religion, was revoked by Louis XIV

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1 The reason why Sri Lanka and Afghanistan will not be covered in this study is that the overall majority of people in a refugee-like situation are IDPs, although they also harbour a small caseload of refugees outside their country of origin.

in 1685 - fled from France. This is just one illustration that refugees are of olden times, however, they will also remain with us in times to come, and so are humanitarian initiatives to protect them and to alleviate their suffering. More importantly, refugees are survivors and, mustering up their strength, they make the best use of all the resources they can get. These inherent capabilities make that they are geared to pick up their lives again wherever they go. The initiatives devised for their benefit do not always give full recognition to this agency of refugees and more often than not do not involve refugees in the planning and/or implementation of their programmes.

The question of refugees raises important questions about, inter alia, the relationship between the individual and the state, sovereignty, asylum, non-entrée regime, etc., each of which is too complex an issue to discuss comprehensively within the scope of this thesis, however, they will be succinctly explained.

However, let us start at the beginning: migration and refugees have been around perhaps as long as mankind, nevertheless an international refugee regime (IRR) has only emerged in the previous century. Africa is the origin of mankind from where man set out to populate the rest of the planet. Major migration movements have been known to take place since ancient civilisations (for instance, Egypt, Mesopotamia, Rome, Inca empire). Demography, trade and economic survival or opportunities were major determining factors for migration throughout the ages. In many cases conquest combined with religion led to enslavement and/or persecution or conversion.

Prominent examples of migration are diasporas, for instance, of the Jews from 586 BC (destruction of the Salomon Temple in Al-Quds and subsequent persecution by Babylonians) to 1948 (establishment of the state of Israel) leading to emigration to, for instance, Kochin, Kerala. Elahi (1998) identifies the first major population shift of

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3 Until today their offspring finds itself in as far apart places as Canada and South Africa.
4 The term 'humanitarian' is often confusing because it is also used outside the context of strictly Humanitarian Law, e.g. in words such as 'humanitarian' organisations, 'humanitarian' intervention etc.
5 Positive aspects of refugees such as their contribution to the host society are seldom highlighted as it is usually the negative ones that draw the attention.
6 From Latin: 'migrare', 'migratio': to move out, to go to another land.
7 The mass migration of populations in Europe (3rd - 6th century AD) furthering the end of the western Roman empire was proportionally probably the greatest migration in the history of the continent. Partly because since then no major flows of immigration to or mixing of populations in Europe have taken place - even those during the World Wars were very temporary - the mentality in the Occident vis-à-vis foreigners/immigrants/asylum-seekers has evolved very differently from that in other parts of the world which are still subject to major population movements.
8 From Latin: persequor, persecutus sum: to follow incessantly, to go after someone, to pursue, to search; persecutio: pursuit, prosecution, persecution; persecutor: persecutor.
the CE in South Asia as the Buddhists who were persecuted by the Hindu Sena kings around the 12th century AD, however, it is difficult to determine who the first refugees in the region have been since, for instance, the flight of the Parsees to the Subcontinent had preceded the 12th century AD.

Refugees are part of the much larger group of migrants,9 hence, a more holistic picture of the field of refugees places it firmly in the overall framework of migration. However, there is increasing debate on the distinction between the two categories. The narrow (1951 Convention) definition of a refugee is no longer feasible as, for instance, refugee movements should not be seen as completely independent of the state of the global economy. Hence, a distinction between economic and political migrants/refugees loses its meaning. A number of theories exist about the motives of flight which deal with complex questions of sovereignty, perceived interests, international relations and ideological considerations (Migration, 1996: 809-12). Other theories state that refugee movements are not a collection of random events but display a distinct pattern that is related to political and economic transformations (Migration, 1996: 809-12). Most migration theories are ill-suited to be applied to refugee movements - which are much less predictable - except on a micro level where refugees may be studied like any other migrants (Richmond, 1994).

Refugee theories may be divided into two levels of analysis: macro and micro. The first one focusses on refugee streams and identifies the conditions under which large scale population movements occur with a description of the demographic, economic and social characteristics of the refugees in aggregate terms. This may include theories regarding the economic and social adaptation/assimilation/integration processes when interpreted from a structural or cultural angle. The micro level concentrates on socio-psychological factors that distinguish refugees from non-migrants. Theories on motivation, decision-making, satisfaction and identification have also been developed, but as of yet, there is no agreement on a comprehensive theory regarding refugees.

Since independence India and its South Asian neighbouring countries have approached refugee situations with a bilateral policy, by negotiating with the state of origin and with little or no interference of the UNHCR. South Asian governments prefer to resolve refugee problems in a politico-administrative manner in accordance with domestic political, bilateral and humanitarian considerations. As far as a bilateral approach is concerned, the consideration of good relations with other states is often an overruling factor in the decision making by states as to how a particular group of asylum seekers should be treated.

9 In 2005 (IOM, 2005) the total number of migrants is estimated at over 200 million.
However, even those states not parties to international refugee conventions are obliged under IL to provide minimum standards of treatment such as stipulated under IHRL, IHL, and the UNHCR Executive Committee (EXCOM) resolutions (e.g. EXCOM, 1981: Art. I B. (2) (a) -(p)) or (customary) IL, and respect fundamental rights under their Constitution and under Municipal Law. One example of the current *ad hoc* situation is that different groups of refugees enjoy a different treatment in the same country of asylum, for instance, in India the Tibetan refugees as compared to the Myanmarese/Burmese refugees.

In international politics migration and related issues have shifted from ‘low’ to ‘high’ politics and, concomitantly, have come to stay for many years ahead a priority item on the international agenda. The importance of refugees as an issue and their impact on a world wide scale - for instance, a marked increase in the total number of UNHCR caseload in two decades: 2.4 million in 1975 to 26.1 million in 1995 (and 21 million in 2005) (UNHCR, 1995; 2005a) - as well as in South Asia, without forgetting their very personal experiences, forms the background of this thesis.

The thesis is divided into three main parts: the international legal framework, refugees in South Asia and a study of a potential regional regime including national law on refugees. After a general introduction (Chapter 1), the first part (Chapter 2) deals with refugees in international law which includes public international law, human rights, humanitarian and refugee law.

The second part deals with refugees in the South Asian practice. In this third chapter we give an overview of the institutions involved in refugee matters: the Executive, the Legislature and the Judiciary as well as the Human Rights Commissions' followed by highlighting the role of UNHCR and other international institutions. International human rights law constitutes an important influence on the treatment of refugees as the major conventions have been signed and/or ratified by the South Asian states. As a reality check, we mention the concluding observations of each of the treaty-monitoring bodies regarding the situation of refugees in South Asia. As far as international humanitarian law is concerned, we take a closer look at the status of the Geneva Conventions and Protocols Additional and discuss the provisions applicable to refugees in South Asia. Before touching upon the municipal law (Constitution, legislation and case law) and the transformation of international into municipal law, we highlight some obstacles for South Asian states to accede to the 1951 Convention and/or 1967 Protocol.

The third part is called: "A Regional Refugee Regime and/or National Refugee Legislation in South Asia?" and (Chapter 4) starts with a discussion of what a regime is and of
the existing regional human rights and refugee regimes. The issues discussed are the (lack of) international co-operation, the role of human rights from root causes to implementation, the definition of a refugee and a (potential) supervisory body. The penultimate (fifth) chapter deals with a (potential) national law in South Asia concerning refugees. Major issues why the situation is called *ad hoc* and why legislation has not yet materialised are sovereignty, security, government decisions made on the basis of foreign policy, and the difficulty of uniform (i.e. non-discriminatory) standards of treatment of the refugees. This chapter ends with a discussion of the rights regime applicable to refugees (as aliens) and is followed by a summary of the findings of the thesis in the sixth, concluding chapter.