PART II
The Regional Framework

CHAPTER 3

REFUGEES IN THE SOUTH ASIAN PRACTICE

This second part deals with refugees in the South Asian practice. In this chapter we give an overview of the (inter)national institutions involved in refugee matters: the role of the Executive, the Legislature and the Judiciary are discussed followed by the main international player, the UNHCR which recognises refugees, provides assistance, has access to some camps, and is involved in the resettlement in third countries of some refugee groups or in the repatriation of others.

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: the 1965 Convention on the Elimination of Racial Discrimination, the 1966 International Covenant of the Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of Discrimination against Women, the 1984 Convention against Torture, and the 1989 Convention on the Rights of the Child. As it would take much more resources, we do not go into each and every right which is applicable to refugees in South Asia, however, we mention the concluding observations of each of the treaty-monitoring bodies regarding the situation of refugees in South Asia. How the international community has scrutinised the South Asian treatment of refugees provides an idea of how the states in this region will be held accountable against a future regional instrument, adherence to the 1951 Convention/1967 Protocol, and/or national refugee laws.

As far as international humanitarian law is concerned, we take a closer look at the status of the Conventions and Protocols Additional and discuss the provisions applicable to refugees in South Asia from the First and Second Protocol Additional as well as the Fourth Geneva Convention.

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.
There is till date no national refugee law anywhere in South Asia, but there were a few Acts related to Partition and, naturally, there are Aliens, Immigration, Extradition, Carrier Liability and Citizenship Acts which deal with refugees in their capacity as foreigners.

No law does not mean no policy– as a matter of fact, no law is the very policy: the decisions states make are purely administrative through policy; general as well as specific (potential) policy issues are included as are the effects on the ground for refugees of policy changes with respect to them.

The state practice is looked into from the moment an asylum-seeker reaches the border in South Asia: what are the procedures for asylum-seekers/refugees (as foreigners) regarding their entry and exit of the territory, their stay and residence and their voluntary departure? Do they have legal remedies in case of termination and cancellation of permission to stay and reside and what is their situation as far as deportation is concerned?

Different categories of asylum-seekers/refugees, illegal immigrants and stateless persons are discussed as well as situations of temporary refuge and large-scale influx. We also focus on whether there is respect for non-refoulement and what the durable solutions could be for refugees in South Asia: local integration, third country resettlement or repatriation.

3.1. Introduction

Refugee Management

"Successful progress in a refugee operation is measured in terms of x houses built, y tons of food provided, z patients treated. There is little consideration of social factors or refugee values because the focus of refugee relief is on objects, not people. Basic needs may be met but whose basic needs? The donors, the assisting agencies or those of the recipients?" (Needham, 1994)

Each country in South Asia has been a refugee receiving or producing country since its independence. In this Part we will look from a state perspective at how the refugees under their jurisdiction have been managed by the host states - the biggest ‘donors’ of refugee management in South Asia. We start with a discussion of the major institutions involved before we come to the applicable international legal provisions and the state policy and practice.

Refugee law may be found at different levels: Municipal Law, or instruments at the regional and at the global level. In South Asia there is no regional convention
and the 1951 Convention and its 1967 Protocol have not been acceded to. Refugees in all the states under consideration fall under the Aliens legislation and partly under the Constitution in the sense that ‘citizen only’ constitutional provisions are not applicable to them. At a national level the implementation of these laws and the refugee policy must be assessed. In practice law implementation and policy are closely intertwined in South Asia. The discussion of some refugee populations shows that the attitude of the government varies according to the time of arrival and the ethnic links of the asylum seekers.

There may not be any specific national laws on refugees, however, standards of treatment are also included in the body of Human Rights Law, IHL and customary IL. In the process we will adduce some reasons why they have not acceded to the 1951 Convention and its 1967 Protocol. We will also look into which procedures are applicable to arriving refugees in the South Asian states.

Do we have examples in South Asia of successful refugee management? Many observers consider the case of the Tibetan refugees who fled to India and of the East Pakistani refugees in 1971 as a paragon of refugee management.1

Since no national refugee Act or convention is applicable, in all South Asian states asylum is purely an administrative issue. There exist two procedures for recognition as a refugee in South Asia: on the one hand, there are those refugees recognised by the governments - like Tamilians and Tibetans are recognised by the government of India - and, on the other hand, those refugees whose status has been determined by the UNHCR, Afghans, Burmese, Iranians, Iraqis, Somalis, Sudanese et al. The latter ones are the so called ‘mandate refugees’.2 Some of these mandate refugees have also been recognised by the government as mandate refugees, while others have not been recognised as such.3 Some asylum seekers have not been recognised by the government and their status has not been determined by the UNHCR, however, they are allowed to stay only if for a valid reason, for instance, studies, marriage, etc.

The situation of many new arrivals is uncertain as far as material assistance and legal protection are concerned. Sometimes the government in question has established a cut off date for certain groups after which the new comers do not get the

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1 Wherever the matters under discussion differ markedly in other South Asian states this will be indicated, otherwise, and especially in the legal domain, the Indian example will be discussed as it is the most elaborated one so as to avoid multiple duplication.

same treatment – or do not have the same rights – as those who had arrived prior to the cut off date. This is for instance the case with the newly arriving Rohingyas in Bangladesh who have no longer access to the camps - and the housing and rations - that the older refugee population had.

The existence of those new comers who do belong to a category recognised by the government under whose jurisdiction they fall and who do not present themselves to the UNHCR branch offices (BO) of the country of asylum is indeed very precarious. Many migrants are in a refugee-like situation, but do not have the same rights as accorded to the government recognised or mandate refugees. Some are allowed to stay by the local authorities, most are harassed on a daily basis by the police and there is the ever looming risk of *refoulement*. Only after a period of many years it is possible that they manage to integrate locally, and if they are fortunate they will receive some assistance by NGOs for their material well-being or to help them with legal aid in their pursuit of administrative papers.

Let us now see which state institutions play a role in dealing with refugees in South Asia. But first, who are the main groups of refugees in South Asia?

*Main categories of refugees in South Asian countries of asylum*

The main groups of refugees in South Asia are: Afghans, Bangladeshis, Bhutanese, Biharis, Burmese, Iranians, Iraqis, Nepalis, Pakistanis, Somalis, Sri Lankans, Sudanese, Tibetans, and in the past: Partition refugees (1947), East Pakistanis (Chakmas 1964), East Pakistanis (1971), Ugandan expulsees (1972), and Chakmas (returned end 1990s).

3.2. **Institutions**

What are the functions as far as refugees are concerned of the institutions in South Asia at the international/national/ministerial, regional/district and local level? What is the role of the UNHCR and National Human Rights Commissions with respect to refugees? Which authority is in charge of implementing/enforcing the rules and regulations including the powers to deport, detain or jail refugees (and other aliens) considered to be a threat? Is appeal against such a decision possible and, if so, where?

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3 *In casu*, Burmese and Afghans in India.
3.2.1. National Institutions

3.2.1. The Executive

3.2.1.1. The Central Government

3.2.1.1.1. The Ministry of Home Affairs

The Ministry of Home Affairs is the nodal point in the South Asian countries as far as refugee policy is concerned. It is in charge of the refugee policy and any changes in this policy.

The orders for the issuing or extension of the Refugee Certificates originate from this Ministry. It is also the place where, when they are requesting naturalisation, aliens, including refugees, have to send their citizenship applications - citizenship is a privilege extended by the state, and is not a right that may be claimed by a foreigner, not even after s/he can prove a genuine bond with the state in question, for instance, many years of continuous legal stay, knowledge of the official language, employment, the payment of taxes, etc.

Moreover, the Ministries of Home Affairs decide on, issue and deliver the Leave Notices which are, in effect, deportation orders from the territory of the state. At the end of their studies the student visas also end and in the case of overstay the refugees concerned are served a Leave Notice unless they have a valid and by the government recognised reason - such as marriage to a citizen - to stay on the territory.

3.2.1.1.1.1. The Foreigners' Registration Office

The functioning of these Foreigners' Registration Offices (FROs) - or their regional branch offices outside the capital - is entirely directed by the Ministry of Home Affairs of which they are dependent. Refugees who are recognised by the UNHCR will have to renew their temporary residence permits with the Foreigners' Regional Registration Office which has jurisdiction over the place where the refugees

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5. The name of this Ministry varies in different countries and at different times: Ministry of Interior Affairs, Home Ministry, Ministry of the Interior...

6. See infra, Policy.

7. Citizenship is bound by certain rules, constitutional provisions and/or Citizenship Acts, see infra, Municipal Law, Citizenship Acts.

8. See infra, Part III, Chapter 5, Standards of Treatment, Deportation.

9. For instance, in India this is the case for many Afghan and Burmese refugees.
have been domiciled or confined to.\textsuperscript{10} In most FROs with a great number of refugees under its jurisdiction, special counters are installed per refugee group and interpreters are available for the handling of the interviews.

The FRO is also the authority where refugees have to present themselves for the issuance or extension of the \textit{Refugee Certificates} the decisions on which are forwarded by the Ministry of Home Affairs as heretofore mentioned.

An important permit which refugees, in possession of a permission for a long duration stay, have to obtain from FRO if they want to leave (temporarily) the country is the exit visa/non-objection certificate to leave the territory. The normal procedure is that at the border crossing the Residence Permit is handed over for later forwarding to the Ministry of Home Affairs, which may re-issue it upon the re-entry to the person in question. In order to be able to re-enter the territory, the refugee will have had to obtain a re-entry permit from FRO before leaving since otherwise he or she will not be allowed entry.

When a refugee’s visa expires and the status determination by the UNHCR is pending, the UNHCR sends a request to FRO to extend the leave to stay. In case a \textit{Refugee Certificate} has expired and we have in effect a situation of illegal overstay, the FRO informs the UNHCR so that action may be taken to speed up resettlement.\textsuperscript{11}

Long time staying refugees may be in a more comfortable position as far as obtaining the above documents are concerned since over time the bureaucratic procedures for certain groups have become more fluent.\textsuperscript{12} Many other refugees face constant harassment by the authorities at the time of applying for these documents or upon checking them at entry/exit points.\textsuperscript{13}

3.2.1.1.1.1.2. The Police

In all (South Asian) states the police are in charge of law and order in public places – as when refugees are demonstrating - and are authorised to perform checks of any person on the territory of the state. In many ways the police are the ‘executive’ arm of the Ministry of Home Affairs in that their task is to control individuals and to check their identities. It is also the police which serve the Leave Notices issued by the

\textsuperscript{10} See \textit{infra}, Part III, Chapter 5, Standards of Treatment, Freedom of Movement.
\textsuperscript{11} See \textit{infra}, Part III, Chapter 5, Durable Solutions.
\textsuperscript{12} For instance, Tibetans who arrived during the first decades after the XIV Dalai Lama left Tibet, have obtained travel documents allowing them to leave and re-enter Indian territory.
\textsuperscript{13} In these cases usually bribes are requested to resolve the matter.
Home Ministry to the person in question.

Another function of the police consists of detaining persons or the investigation of private matters such as complaints issued against refugees by institutions or citizens. In all South Asian countries there are complaints about the harassment by police officers when dealing with refugees, including for simple checks. Problems with the police could be that they are distrusting and demand bribes or who use ruses to arrest the asylum-seekers when they are requested to present themselves at the police office or when they receive their benefits, sometimes by law enforcement agents in civilian who later deport them.

There have been proposals for (a) 'de-governmentalising governmental power' i.e. empowering civil society to de-police refugee-related activities both on the macro and micro level; and (b) "democratising the senses" by inducing a culture that is tolerant and pro-ahimsa, particularly through democratic education (Ahmed, 1999: 8-16).

3.2.1.1.2. Ministry of Defence
3.2.1.1.2.1. The Armed Forces

Border forces may include the armed forces which comprise the coast guard/navy, the army, the air force and medical services. They may all in the course of their duties come into contact with asylum-seekers/refugees. The border forces of each South Asian country, for instance, the Bangladeshi Rifles, the Indian Border Security Force or Indo-Tibetan Police Force, the Pakistani Rangers, are usually the first authorities that have to deal with refugees crossing the (land) borders, especially in cases of mass influx. At sea the interception of potential refugees usually takes place by the coast guard/navy of the state in question.

In order to deal properly with the applications for asylum, it is imperative that these forces get training sessions regarding the rights and duties of refugees and what this entails in the practice of daily border patrols. In the curriculum of the education of the officer corps of all of these branches there is also a component on IHL which, as we have seen, includes a reference to the definition and protection of

14 See supra, Ministry of Home Affairs.
15 It is interesting that his micro level proposal of February 1998 to publish a SARWATCH has been implemented within one and a half years.
16 See infra, Part III, Chapter 5, United Nations Office of the High Commissioner for Refugees.
refugees. In all South Asian countries cases have been reported of pushing people back across the border, individuals as well as groups. Since in many instances the status of the migrants concerned have not been examined it is not possible to verify whether there are refugees among them, and if so, how many. What is known to a certain extent is the number of cases where people trying to cross the border have been killed by the border forces.

The physical sealing of the border through fencing, which is another task of the border forces, has not proved to be effective in attempting to keep people from crossing borders.

3.2.1.1.1.3. The Ministry of External Affairs

This Ministry is - by definition - in charge of the bilateral relations with the countries of origin of the refugees. Since a decision to grant asylum may mean an (implicit) recognition of the reasons of flight - especially in the case of a mass influx of refugees - it is of the utmost importance that the Ministry deals in a cautious way with the issue so as not to jeopardise the friendly relations with (neighbouring) states.

The Ministry of External Affairs has a voice in the decision-making on the individual applications of persons seeking asylum. Because the relations with other states are concerned, this involvement is especially the case where well-known personalities are concerned, for instance, in India artists from Pakistan, the Karmapa from Tibet or Taslima Nasreen from Bangladesh, or in Pakistan.

The decisions are being made in co-ordination with the Ministry of Home Affairs and regard also the validity of cases of asylum-seekers/refugees who are applying for (an extension of) their stay for reasons such as studies or marriage to a

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17 See infra, Part III, Chapter 5, International Committee of the Red Cross.
18 For instance, by its own admission the government of Bangladesh has pushed back thousands of Rohingyas over the years and numerous firings by the Bangladesh Rifles have killed these refugees through injuries or drowning in the Naf river which forms the border in the south with Myanmar/Burma.
19 This has been proved time and again not only in South Asia (where, for example, on the Indian side of the border with Bangladesh hundreds of kilometres have been fenced), but also in Berlin during the Cold War (concrete wall with minefields), the US border with Mexico or the Moroccan border with the Western Sahara (both electronic fences).
20 The name of this Ministry varies in different countries and at different times: Ministry of Foreign Affairs, Ministry of External Affairs, Ministry of External Relations.
21 Pakistan on 5 January 2002 refused political asylum to the former Taliban Ambassador to Pakistan, Abdul Salaam Sayiph and he was expelled to Afghanistan where he was taken prisoner by the US troops.
national of the country of asylum.

The Treaty Division of the Ministry of External Affairs is in charge of the negotiations and, in case of agreement, signing of conventions and bilateral treaties. This Division works in close cooperation with the Ministry of Home Affairs and the Law Ministry as regards the potential consequences for the domestic legal system of signing a treaty, for instance, the 1951 Convention and/or its 1967 Protocol. The effect of a treaty depends on the legal system of the state concerned. There exist treaties that have been signed by diplomats of the Ministry of External Affairs, but that have never been ratified or incorporated into the domestic legal system. A potential South Asian Declaration or Convention on refugees will also have to be vetted and approved of by the Treaty Division before it may be discussed with other interested states.

This Ministry is also in charge for vetting the admission of foreigners into education institutions.

Last but not least, the Ministries of External Affairs of Bangladesh, India and Pakistan are also present in the EXCOM where the policy of the UNHCR is discussed and adopted. Every year in October the diplomatic representatives of these states state their views on refugee matters the world over in an official statement, thereby putting their own accents on the policy regarding planning of and expenditure for the next year's protection and assistance programmes. Also in the Third Committee of the GA, where UNHCR, humanitarian (including refugee) issues are discussed, all South Asian Ministries of External Affairs send diplomatic representatives.

3.2.1.1.2. The State Government

In the case of state governments having jurisdiction under a central state for refugees, a layer of administration and politics is added to many refugee issues. To give one example, if and when refugees would like to apply for citizenship, the state governments have to forward these applications to the central level for consideration by the Ministry of Home Affairs.

22 For instance, between India and Pakistan on the Partition refugees, see infra, Municipal Law.
24 In the case of India, one example is the 1984 Convention against Torture which has been signed in 1997.
25 See infra, Standards of Treatment.
26 See supra, Part I, International Refugee Law, Sources.
As far as politics are concerned, the state governments may influence or have different views on the policy of treatment of certain refugee groups. For instance, in the case of Afghan refugees in Pakistan, the NWFP government was instrumental in influencing the refugee policies as they were the beneficiaries of many of the resources that were poured from abroad into the care for the refugee camps.

The co-operation of the state government is also required for the processing of asylum applications and/or the maintenance of refugee population statistics which determine the level of assistance required – whereby the state authorities have a vested interest in blowing up the figures since they get it refunded from the central state.

In India the influence of the state government of, for instance, Tamil Nadu has been vital in steering the policies at federal level vis-à-vis the Tamilian refugees: the predilections of AIADMK and DMK as far as the LTTE are concerned are well known, hence, with a change of power at the state level, the policy with respect to a refugee category may change.

If such a change of policy takes place, the financial and material assistance to refugees which is also delivered by the state administration for which statistics are also used – may vary according to the wishes of the power that be.27

3.2.1.1.3. The District Authorities

Under the state administration a further division exists in that the district authorities are involved in implementing the policies of the higher levels in respect of refugees. This may be the case if there are refugee camps that need to be administered or given material assistance such as food, clothing or shelter.

On a more individual note, the application for recognition and for citizenship by a refugee has to be made at the level of the District Collector who considers and forwards it to the state government.28 The power to grant refugee status (for a specific category of refugees) is vested in the administrators at (sub)district levels. They are not following any consistent mechanisms of determination. This leads to administrative discretion and inter-district inconsistencies. If the National Model Law becomes an Act, the refugee commissioners will be appointed at district

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27 The material and financial assistance to Tibetan refugees in India is also delivered through the state administration.
28 See supra, State Government and Administration.
3.2.1.1.4. The Municipal Corporation and Panchayats

In larger cities, the Municipal Corporation also has a role to play concerning refugees. The Corporation hospitals/disispensaries treat refugees for a nominal fee or free of cost.

When children are born to refugees, the Municipal Corporation issues the birth certificates. Depending on the panchayat or town and the level of administration involved, refugees are also issued ration cards by the panchayat or town administration.

3.2.1.1.5. The Health Authorities

When refugees experience health problems, all depends on where they are located. In camps there are in most cases dispensaries for first aid, but for more serious cases there is usually a provision for transport by an ambulance to the nearest state hospital. In Delhi a special refugee counter is provided with interpreters in AIIMS.30

3.2.1.2. The Legislature

The function of the Parliament in Bangladesh, India, Nepal and Pakistan is to perform checks and balances on the policies and actions of the Executive, i.e. the government of the day. This takes place at the central level and at the state level where applicable. Parliament has the exclusive power to make laws and rules regarding aliens and related matters such as citizenship, extradition, admission, emigration, expulsion, passports and visas.31

If the Parliament approves of the government's or opposition's Bills, it may adopt Acts such as a Refugee Act and/or ratify treaties signed by the Executive.32

Parliament has neither the right to initiate nor to amend a treaty which is put before the legislator by the Executive. Parliament does not negotiate directly on

29 See infra, Part III, Chapter 5, National Model Law.
30 See also infra, Part III, Chapter 5, Medical Assistance.
31 E.g. entries 17 to 19, List I, Schedule 7 read with Art. 246 Constitution of India. For the situation of refugees regarding these matters, see infra, Part III, Chapter 5, Standards of Treatment.
32 Parliament may also decide not to ratify an already signed treaty. In that case there are still some international legal obligations for the state party that has signed but not ratified a treaty, see Part I, Public International Law.
behalf of the state and cannot bind the state vis-à-vis other states. The Minister of External Affairs can accept an obligation in an international forum without say of the Parliament. Moreover, in case of a federal state, the central government does not always call all the shots as a state government may also weigh heavily in the decision-making. All the above makes that it is difficult for MPs or MLAs to get a comprehensive overview of local and/or national refugee issues before voting on them. The sources of information also play a considerable role: MEA receives on a daily basis data and reports from its diplomats in embassies or conferences giving their officials and decision-makers of the Executive an edge.

The Bills are usually first cleared by the Law Commission of the Parliament where a preliminary vote is taken as to whether it should proceed to the plenary house. The Law Ministry is the highest stage where a proposal for a Refugee Bill has reached in India.

The dominance of the Executive in the realisation of laws detracts from the belief that the Parliamentary procedures are a sufficient warranty for the respect of the rule of law, which increases the need of checks and balances by the Judiciary, especially in the realm of Human Rights.

Another important role of the Parliament is the control of the ‘purse strings’: every year a vote has to be taken for approving or rejecting the budget which includes financial aid and other assistance packages for refugees. In this way the Legislature is also a crucial chain in the treatment of refugees. The debate about the budget of External Affairs does not give the full Parliament insight into the foreign policy while some discussions in the Parliamentary Committees are usually confidential.

The Parliament is also the place where changes in the Constitution (within boundaries) and a review of other legislation are decided which may mean more or less rights for refugees.

3.2.1.3. The Judiciary

The Judiciary, from the lowest to the highest level, performs many functions with respect to refugees. The function which brings the Judiciary the closest to the individual refugee or group of refugees is, for obvious reasons, the court system. This is vital in cases of detention of refugees, their ‘disappearance’ – for which a writ of

33 See infra, Part III, Chapter 5.
34 See infra, Part III, Chapter 5, Model National Law.
Habeas corpus may be issued to produce the refugee in front of the court – or degrading treatment. The courts at the lowest level deal also with criminal cases in which refugees may be involved, but appeals move up the ladder of the (court) system: High Court or Supreme Court.

Under the Constitution refugees – or anyone on their behalf - may claim their rights directly from the highest court in the country. Public Interest Litigation (PIL) is a means to achieve justice through the highest court.

It is clear that in case an Executive and/or Legislature are unwilling or unable to take action on behalf of the (mal)treatment of refugees, the Judiciary may step in so as to warrant that justice is not denied to them. ‘Judicial activism’ is a term frequently mentioned in this context.

The Supreme Court has, after all, the authority of being a ‘guardian’ of the Constitution where the Judiciary has to interpret and apply the provisions on the fundamental/Bill of rights applicable to all persons including refugees within the jurisdiction of the state.

In each state over time there is an evolution in the (adoption and) interpretation of these provisions which may entail a more activist or restrictive treatment of refugees.

A short overview of the evolution in India of the Supreme Court’s interpretation of fundamental rights shows the meandering path it covered towards a pro-Human Rights activist role:

1. In the 1950s the Supreme Court followed the Federal Court: the judges were educated abroad, they did not doubt the good intentions of the stalwarts in politics, the freedom fighters, and it was conservative in its interpretation of the law.
2. In the 1960s-1970s, due to the influence of socialism, the question was asked: should the Judiciary be committed to an ideology? The Supreme Court was not clear, it supported all executive actions like in the United States of America with the New Deal policy when the government filled the court with committed judges.
3. Emergency (1975-1977): the Supreme Court supported the Executive, even denied

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35 See infra.
37 See infra, Municipal Law, Domestic Case Law.
38 See infra, Part III, Chapter 5, Standards of Treatment, Access to Courts.
39 See, for instance, the Chakma and Tamil Cases in India, infra, Domestic Case Law.
constitutional article 21 and declared that it could be justified in case of emergency. Thousands of victims suffered as a consequence because of the denial of their rights.

4. Post-Emergency: the Supreme Court realised what it had done under the Emergency and that it should not reoccur. In the 1977 Maneka Gandhi Passport Case the Supreme Court expanded on Article 21 and the jurisprudence followed. This would be of great benefit in subsequent refugee cases.

5. The Supreme Court developed through applying the naturalist thought: each human being is endowed with Human Rights and nowadays the Supreme Court is committed to a pro Human Rights interpretation and it has therefore contributed to the respect of refugees’ rights by and large.

In the next section we will elaborate on examples of actual court cases where the impact of the Judiciary on the treatment of refugees may be demonstrated, for instance, where some courts have ruled on the status of refugees recognised only by the UNHCR.

3.2.1.4. The National and State Human Rights Commissions

National/state Human Rights commissions, Human Rights defenders etc. the name differs in various countries; their authority comes from the Constitution, from special legislation; where there is no National Human Rights Commission this function is also performed by courts.

In the 1990s in South Asia the first Human Rights Commissions were established, first at the national level, later at the state level. Strictly legally speaking these Human Rights Commissions are not on par with courts/the Judiciary, but they could be said to have a quasi-judicial role to play. In India The Protection of Human Rights Act (1993) established the first National Human Rights Commission (NHRC) of South Asia.

The functions of the Human Rights Commissions as far as refugees are concerned are three-fold: they have a monitoring role, a reporting function and they

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40 Right to life and personal liberty.
41 See infra, Domestic Case Law.
42 Ibid.
43 See supra, Public International Law, Genesis and Development.
may be directly involved in litigation. In India the National Human Rights Commission\(^4\) has monitored the situation of predominantly refugee camps: Tamilians from Sri Lanka in Tamil Nadu and Chakmas from Bangladesh in Arunachal Pradesh.

The NHRC's second function is to make confidential reports on the (Human Rights) treatment of refugees which it sends to the authorities concerned in order to make the necessary adjustments to improve the situation of the refugees. The third function is litigation. However, not a lot of cases are brought before the NHRC due to, firstly, a general lack of knowledge about this forum to claim rights and get justice done and, secondly, insufficient legal aid which is available to the victims for the duration and successful completion of a case.

Hitherto the most well known NHRC refugee case was *National Human Rights Commission v. State of Arunachal Pradesh*. This was a case in 1996 in respect of the treatment in Arunachal Pradesh of the Chakma refugees from Bangladesh. In this case the NHRC has been active in protecting the Human Rights of the Chakmas by referring to the Supreme Court. However, the backlog of the NHRC is due to a lack of resources which may impede the powerful role that this independent Human Rights institution may play to protect refugees (Gorlick and Khan, 1997: 39-44).

### 3.2.2. International Institutions

#### 3.2.2.1. United Nations Office of the High Commissioner for Refugees

Do the South Asian states remain outside the UNHCR framework? The *1950 Statute* is a GA resolution which thus applies to all UN member states. This implies that the UNHCR has a mandate in all states including those which have not yet acceded to the international instruments such as the *1951 Convention* and/or *1967 Protocol*. In South Asia too, the UNHCR protects refugees, assists them and searches for their permanent solutions. In practice this means that the UNHCR, among other things, recognises refugees, issues *Refugee Certificates*, assists in repatriating or resettling them, funds projects to rehabilitate returnees, supports education/training, provides medical and legal assistance, intervenes with the governments in South Asia on behalf of refugees or gives pecuniary aid to refugees.

Among the general population the UNHCR also tries to spread awareness and

\(^4\) In its annual reports (e.g. NHRC, 2003-4) the NHRC has repeatedly admonished the government to accede to the *1951 Convention* and to adopt a national law on refugees. In response to a request by the MOH on the MNL, the NHRC set up an Expert Committee on
create interest for refugees and the necessity of legislation through the media, seminars, Refugee Law courses and it offers to university students working on refugee related issues special scholarships and funding for field trips.

As we have seen, Bangladesh, India and Pakistan are members of the EXCOM\(^{45}\) and co-operate in determining the policy issues because the EXCOM, *inter alia*, approves and supervises the material assistance programme of the UNHCR and gives advice on the exercise of the functions under the Statute.

### 3.2.2.1.1. Establishment in South Asia

It was due to the Tibetan refugees that the UNHCR, upon request of India on occasion of a visit of the High Commissioner in 1963, established an office in New Delhi in 1969. In 1971 U Thant\(^{46}\) requested the UNHCR to become the focal point 'United Nations East Pakistan Relief Operation' (UNEPRO) for the co-ordination of UN assistance to the millions of East-Pakistanis who had crossed the border with India. Some 25 crore dollars' worth of cash and assistance were distributed among the refugees. The latter were also assisted in their return by the UNHCR. Many Bangladeshis and Pakistanis who had ended up in Pakistan or Bangladesh respectively were airlifted back.

### 3.2.2.1.2. General role

The UNHCR is often the leading agency in cases of mass influx and co-ordinates the NGOs activities as well as liaising with the governments. On the logistical side the UNHCR provides funding and material assistance. The UNHCR also has a monitoring function.\(^{47}\)

In India the government has never formally recognised the status of the UNHCR representation as autonomous and, hence, its mission functions under the auspices of the United Nations Development Programme (UNDP). In all South Asian countries under consideration the UNHCR has opened subsidiary offices, for instance,

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45 See *supra*, Part I, International Refugee Law, Sources.
46 UN secretary-general from 1961 to 1971. In the process of replacing UN secretary-general Hammarskjöld, the developing world insisted on a non-European. U Thant was recommended; however, due to opposition from the French (Thant had chaired a committee on Algerian independence) and the Arabs (Burma supported Israel), he was only appointed for the remainder of Hammarskjöld's term. The following year, Thant was unanimously re-elected to a full five year term. He was similarly re-elected in 1966. Thant did not seek a third term.
Peshawar in West Pakistan, Cox’s Bazar in South Bangladesh, or Jhapa in East Nepal.

The UNHCR Liaison Office in Chennai has both social and legal functions: the office has the competence for status determination of the Tamil refugees, but also checks the situation and well-being of repatriates back to Sri Lanka. In order to be able to proceed with a repatriation, the office grants assistance to obtain exit visas and pays for the fares.

In the last decade of the 20th century alone the UNHCR has provided in South Asia assistance in the form of food, water, shelter, and health care to Afghans, Rohingyas, Bhutanese, Tibetans, and Tamilians as major refugee populations. Where refugees are willing to return, the UNHCR offers an assistance package including cash, food and domestic utensils: lakhs of Afghans and Rohingyas have been assisted in this way for their repatriation (Zieck, 1997; Van Wonterghem, 1997).

The scope of the UNHCR mandate in South Asia has come under fire on various occasions, for instance, at the time of the Soviet invasion of Afghanistan, that state stated its objections to the UNHCR protection and assistance which was being offered to the refugees in Pakistan. As there have been controversial repatriations in which the issue was the voluntariness of the repatriates, the UNHCR has also intervened to make a survey of this vital aspect and has pulled out on occasions where it did no longer wish to be involved.

As no South Asian state has instituted refugee determination procedures, a determination by UNHCR is needed to protect the refugee (e.g. against deportation), to give material refugee assistance to a requesting government, or usually for resettlement purposes. However, as we have earlier seen, the refugees whose status has been determined as such by the UNHCR are not automatically recognised as refugees by the South Asian governments.

From the perspective of the refugees, as soon as asylum-seekers cross the border of a South Asian state, they may contact the offices of the UNHCR for a determination of their status, although this usually entails a long and expensive trip to the capital. From the perspective of the UNHCR, legal officers may be called by the state authorities to pay a visit, for instance, to vessels which carry asylum-seekers or

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48 See supra, Chapter 3, Institutions, Ministry of Home Affairs.
49 Afghanistan claimed in various UN meetings that the people concerned in Pakistan (and Iran) did not deserve UNHCR protection and assistance as they were not refugees but ‘fugitive insurgents’ or ‘nomads’ and seasonal ‘migrant workers’.
50 For instance, the Tamil and Rohingya refugees being forced back by India and Bangladesh respectively to their countries of asylum.
detention centres where refugees have been detained.

Furthermore, with permission of the government of the host country, the UNHCR may have access to the various groups of refugees inside or outside camps. In the North East of India, the UNHCR has never obtained this permission, but it did get access to the Tamil refugee camps in Tamil Nadu, the Rohingya camps south of Cox’s Bazar, the Afghan settlements in NWFP and Baluchistan and the Bhutanese camps in Jhapa, Nepal.

In South Asia the UNHCR has not been requested to be in charge of the IDP caseload, although on occasion, there may be a mixed group of repatriates given assistance by the UNHCR which is mixed with IDPs who stayed within the borders of their country of nationality.

3.2.2.1.3. Specific role

It would lead us too far to give a detailed description of all the functions which the UNHCR performs in South Asia.51 Some specific functions will, however, be shortly highlighted without order of importance:

The UNHCR has over the years been working with and delegating (especially assistance) tasks to local implementing partners.52 Whenever and wherever there is an issue involving refugees the UNHCR may take up the matter with the appropriate responsible level of the government in question.

Locally the UNHCR has to be able to count on the support of refugee leaders for its policies and practice, hence, it is important that good relations are being maintained with what is living in the refugee communities. That this is quite important may be illustrated by the fact that there have been - at times quite violent - demonstrations53 in all South Asian capitals in front of the UNHCR offices because of (non)action taken by the UNHCR legal section, the community services or the resettlement department.

In order to be able to handle the dealings with the administration and Judiciary, the UNHCR also offers legal advice to individual asylum-seekers and assists refugees in filing complaints with the police. The UNHCR is also a major employer as international organisation with a total staff and interns in South Asia

51 Also cf. supra, Part 1, United Nations Office of the High Commissioner for Refugees.
52 See infra, Non-Governmental Organisations.
53 In the mid-1990s there was the case of a self-immolation by an Afghan refugee in front of the Lodi Road office in New Delhi.
running into the hundreds of both locally and internationally recruited employees.

As far as resettlement is concerned – a ‘holy cow’ many refugees are looking forward to for many years - the UNHCR section in charge deals directly with the resettlement countries for which it prepares short lists of screened candidates from which embassy officials make their choice.54

Monitoring the state behaviour as far as the determination procedures of the asylum applications are concerned, is also a task for the UNHCR as the only place the international community can turn to.

3.2.2.1.3.1. Status Determination Procedure

The core business of the UNHCR in South Asia is status determination and the issuance of Refugee Certificates after which it looks for durable solutions. In order to be able to perform its tasks, the UNHCR has to negotiate and intervene with the authorities in the countries of asylum, of origin and of resettlement.

UNHCR alone determines the status of all who come to its offices according to the enlarged 1950 Statute definition criteria55 in case the 1951 Convention/1967 Protocol definition is not applicable like in the South Asian region. This status determination is according to guidelines issued by the Geneva headquarters of the UNHCR. Different guidelines have been used for the determination of the status of some categories.

After arrival at the office an asylum-seeker’s first step is registration: a general questionnaire or Eligibility Determination Form has to be filled in by the asylum-seeker or his or her representative to start the procedure. For practical purposes, interpreters and translators are provided by the UNHCR so as to ascertain that there are no communication obstacles.

The next step is an interview by a UNHCR legal officer, which after some time in case of a request for further detailed information, may require a follow-up interview. The decision on the refugee’s status is subsequently taken at the BO level although complicated cases are referred to headquarters in Geneva. If the decision on refugee status is positive, a Refugee Certificate or ‘RC’ will be issued to the refugee and his or her dependants as the case may be. If, however, the decision is a negative one, an appeal is possible and has to be directed in written form within one month after the notification of the first decision. In that case a new interview will take place

54 See infra for the role of embassies.
with a different legal officer.

In case of a negative appeal, the role of the UNHCR is over and it is not in a position to assist the asylum-seeker any longer. This is because the appeal procedure has been exhausted and the decision is definitive. The case may only be reopened if relevant information which had previously not been included may be brought to the attention of the UNHCR.

As we have earlier seen, the refugees whose status has been determined as such by the UNHCR are not automatically or entirely recognised as refugees by the South Asian governments.

Refugee Certificate

The Refugee Certificate or ‘RC’ is issued if and when the refugee status is granted. This certificate allows the refugee to identify herself or himself and thus it serves as an identity card for those who have no other identity documents. It is also required for the application with FRO for the extension of the residence permit. The Refugee Certificate is not automatically issued and must be applied for by the refugee in question. The certificate is only valid for one year and has to be extended annually on the date that corresponds with the caseload file. Upon departure/re-entry the certificate will be checked together with the other required travel documents.

3.2.2.1.3.2. Intervention with the Government

The UNHCR BOs throughout South Asia negotiate with the governments of the countries of asylum, origin and resettlement. The contact between the UNHCR and the authorities takes place at various levels at various places and is both formal and informal. In the country of asylum the contacts are most frequent by the Ministry of Home Affairs\(^{56}\) and the FRO\(^{57}\) in order to obtain exit visa, to apply for citizenship\(^{58}\) for the local integration of returnees or refugees etc.

At the level of the headquarters in Geneva there is also contact between the UNHCR and governments involved in refugee issues, most notably in the framework of the annual EXCOM meetings in October; Bangladesh, India and Pakistan are EXCOM members. The High Commissioner on occasion visits the countries affected

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55 See supra, Part I, International Refugee Law, Sources.
56 See supra, Part II, Institutions, Ministry of Home Affairs.
57 See supra, Part II, Institutions, Foreigners' Registration Office.
58 See supra, Part I, Public International Law, Concepts.
by the presence of refugees, this was the case for example in 2000 when Mrs Ogata Sadako visited some of her BOs in South Asia and held talks with the authorities.

Lastly, the UNHCR sends provisional and updated reports to MEA about the safety of the situation in the country of origin which may be used as a guideline for (not) sending people back there.

3.2.2.1.3.3. Promoting Refugee Law

Extensive programmes are being run at the instigation of the UNHCR for the promotion of Refugee Law world-wide. In 2005 UNHCR gave input for the development of national refugee legislation in 26 countries which were in the process of drafting/amending their legislation, in 21 countries UNHCR provided comments on draft legislation and 17 countries were in the process of adopting/amending legislation with previous UNHCR input (UNHCR, 2005a).

Concomitantly, law enforcement agencies (police,\textsuperscript{59} border forces,\textsuperscript{60} armed forces,\textsuperscript{61} and other relevant institutions) are informed of the rights of refugees. Media campaigns may also be organised to galvanise support for the refugee cause. Lastly, the UNHCR has extended invitations to the Judiciary for sessions regarding Refugee Law, for instance, the \textit{Judicial Symposium on Refugee Protection} held in New Delhi (13-14 November 1999).

The reason is that UNHCR has a vested interest in co-operation with institutions such as government agencies, Judiciary, universities, think tanks and NGOs so as to enlarge the range of (future) decision-makers with knowledge of refugee issues. For this purpose there is a budget to encourage publications and to make donations of books and other information material to institutions of interest to the UNHCR.

It is also at the instigation of the UNHCR that in South Asia the EPG has been brought together to discuss the accession of the South Asian states to the \textit{1951 Convention} and/or the \textit{1967 Protocol} as well as considering a regional instrument and/or conceiving a MNL.\textsuperscript{62}

\textsuperscript{59} See \textit{supra}, Part II, Institutions, Police.
\textsuperscript{60} See \textit{supra}, Part II, Institutions, Border Forces.
\textsuperscript{61} See \textit{supra}, Part II, Institutions, Armed Forces.
\textsuperscript{62} See \textit{supra}, Chapter 4, Model National Law.
3.2.2.2. The International Committee of the Red Cross

We have discussed in Part I the 'lex specialis' which is applicable in times of armed conflict. The institution which has the right of initiative in these circumstances is the ICRC.

The assistance activities of ICRC including to refugees are based on the following international instruments: the 1949 I-IV Geneva Conventions; the 1977 I-II Protocols Additional; the ICRC Statutes (ICRC, 2003); the International Red Cross and Red Crescent (RC/RC) Movement Statutes (RC/RC, 2006); and the Resolutions of the International Conferences of the RC/RC.

The right of ICRC initiative to assist refugees as victims of international armed conflict is based on Art. 10 1949 IV Geneva Convention, however,

"[t]he provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief" (Minear and Weiss, 1993: 99)

and Art. 81(1) 1977 I Protocol Additional:

"1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."

The actions of the Federation of RC/RC and National Societies on behalf of

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63 See supra, Parts I and II, International Humanitarian Law.
64 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, adopted by the Diplomatic Conference held at Geneva from April 21 to August 12, 1949.
65 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in armed Conflicts.
66 The International Conferences of the Red Cross/Red Crescent take place every two to three years.
67 Bangladesh, India, Nepal and Pakistan have each their National Societies of RC/RC.
refugees as victims of the conflict are also dealt with under Art. 81(2)(3) 1977 I Protocol Additional:

"2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conference of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Red Cross as formulated by the International Conferences of the Red Cross."

The ICRC role to ensure respect for IHL may be implemented by assisting third states to fulfil their IHL obligations: assistance if the warring parties are not capable of it, offer good offices, finding protective power(s), making diplomatic efforts to enter an area, and/or providing information to third states to prod them into action. Or the ICRC could publicise breaches of IHL if (a) they are consistent and serious breaches; (b) confidential efforts have no results; (c) publicising is in the interest of the victims; or (d) the facts are established by ICRC or reliable sources (Action, 1981: 79-86).

A discussion about the difference in the field of action between the mandate of the ICRC, the RC/RC Movement68 and the UNHCR falls outside the scope of this thesis; it suffices to point out that the primary competence of the ICRC is assistance to IDPs, whereas the UNHCR predominantly provides international protection to refugees in their country of first asylum and residence. In the latter case ICRC acts only in a subsidiary capacity if no other organisation has been requested to assist the refugees, and hands over the caseload to the UNHCR as soon as the latter are present. A concurrent competence exists in border areas, for instance, when refugees’ security is at stake and they become the victims of armed attacks (Kosimnik, 1984). The ICRC Central Tracing Agency, however, may operate at any time on behalf of refugees (Arts. 140 1949 IV Geneva Convention; 33 1977 I Protocol Additional).

68 "[...] it is apparent that the Movement has preferred to base its actions on the “right of initiative” under its own Statutes and subject to the consent of the parties concerned rather than having recourse to the Geneva Conventions and Protocol I as the basis for providing protection and assistance to refugees.” (Muntharbhorn, 1986: 28-48).
In South Asia the ICRC became prominent in, for instance, the 1971 Bangladesh liberation war. However, in South Asia the ICRC also plays a role for refugees outside situations of armed conflict. In case of resettlement of refugees from the South Asian region to overseas host countries, the ICRC provides travel documents because most refugees do not possess valid travel documents or even a passport. With this internationally recognised ‘laisser passer’ the border authorities will allow a refugee to leave the country and the resettlement state will admit to its territory the person carrying the document (and his/her minor descendants as the case may be).

The ICRC also disseminates IHL by organising workshops, seminars, conferences and teaching sessions for government officials, media, medical personnel and the armed forces. Since 1982 the permanent regional delegation for South Asia is located in India where the ICRC supports an IHL course in ISIL since 1999 and setting up a pilot project of Exploring Humanitarian Law in Jammu and Kashmir.

3.2.2.3. The International Organisation for Migration

The International Organisation for Migration is the latest avatar of the Intergovernmental Committee for European Migration (ICEM) which was originally established to deal with the organisation of the emigration of migrants after the Second World War in Europe. In 1980 it became the Intergovernmental Committee for Migration (ICM) and its name changed again in 1989 into the International Organization for Migration (IOM).

The ICEM assisted the UNHCR in 1971 in the resettlement of 130,000 refugees from Bangladesh and Nepal to Pakistan, and in 1972 the ICEM assisted in the evacuation and resettlement of Asians from Uganda, most of whom were resettled in the UK, but some came to South Asia. The IOM provides for the logistics and fares to transport refugees and other migrants.

3.2.2.4. Non-Governmental Organisations

(International) non-governmental organisations should not be ignored in IL, not only in IHRL. IL is based on the consent of states and formally it is the states that make the law, however, informally many forces play on the states: Human Rights

69 The 1953 Constitution of the Intergovernmental Committee for European Migration entered into force on 30 November 1954.
70 The 1987 Constitution of the International Organization for Migration entered into force on 14
NGOs, for instance, such as AI or Human Rights Watch. International and domestic NGOs push IHRL and IRL, for instance, in the domestic area for problems that are related to vulnerable sections of society, for example, refugees, women's rights, and rights of the child (Rashid, 2000: 1-5). NGOs work in these special areas, they have their own agenda of what the law should become, they push this agenda through the media, demonstrations, by lobbying lawmakers (MPs) and if the latter are convinced they may adopt or amend the law. Also on the implementation side NGOs are active after having lobbied to accede to IHRL Conventions, for instance, the 1984 Convention against Torture, CRC, or the 1997 Anti-personnel Mines Protocol.

Refugees may count on the assistance of numerous NGOs throughout South Asia – it is impossible to state how many NGOs in total may be involved. Some NGOs specialise in a particular kind of assistance, others cover a variety of services offered to the displaced, from legal aid to material assistance or advocacy at a local, state, national or international level. The origin of these NGOs varies greatly, from local (e.g. refugee) volunteers to regional or international NGOs.71

Assistance to Urban Refugees

The limited space does not permit to cover the details as far as all the activities of the NGOs which are involved in assisting refugees are concerned,72 hence, we will discuss the example of the situation of refugee assistance in the city with the biggest caseload of urban refugees in the world, Delhi.73 As we have mentioned, UNHCR has been working with and delegating a number of tasks to NGOs which are called 'implementing partners'. The NGOs are in charge of well-defined tasks which they facilitate or offer directly in name of and usually funded by the UNHCR. The names of the NGOs involved are the following: for medical assistance this comprises The Charitable Medical Clinics, the Centres of the Voluntary Health Association of Delhi and a medically equipped mobile van which comes with an interpreter and special assistance to disabled refugees. The government medical bills reimbursement

November 1989.

71 Some prominent examples in South Asia regarding advocacy for Refugee Law are PILSARC (legal aid for complaints to the police, court cases, citizenship applications, PIL) and SAARCLAW which participates in the development of and lobbying for the NML.

72 For a discussion of all NGOs involved in the assistance of Rohingya refugees in Bangladesh see Van Wonerghem (1997).

73 The UNHCR has always proclaimed that in Delhi they were dealing with the biggest urban caseload of (Afghan) refugees in the world. The presence of millions of Afghani refugees, mostly in Pakistani cities, raises the question as to whether this distinction would not rather go to a city like Karachi, Peshawar or Islamabad, only to stay within South Asia.
takes place by the *Voluntary Health Association of Delhi*, while vocational training and placement happens in the *Young Men’s Christian Association*. Self-employment grants or a grant to start a small business are also given by the *Young Men’s Christian Association*. There is an agreement with a bank for financial transactions which has a special refugee counter, the *Syndicate Bank* branch.

**Financial Aid**

As implementing partners, the NGOs are also in charge of the distribution of UNHCR financial aid packages allotted to the needy refugees. They are threefold:

- **A subsistence allowance:**
  - INR. 1,200 per month
  - plus INR. 500 each for the first three dependents
  - plus INR. 400 each for the next three
  - plus INR. 200 each for the rest

- **A primary and lower secondary educational allowance:**
  - INR. 1,500 per annum for children in government schools
  - for classes V to VIII in private schools:
    - INR. 1,000 per annum for the admission fee
    - INR. 1,000 per annum for purchasing school material
    - INR. 175 per month for tuition fees
  - for classes IX and X in private schools:
    - INR. 1,000 per annum for the admission fee
    - INR. 1,000 per annum for purchasing school material
    - INR. 225 per month for tuition fees.\(^{74}\)

- **Self-employment grants:**
  - equal to one year’s subsistence allowance or
  - a grant to start a small business\(^{75}\)

Chimni (1993) stresses the need for a strictly humanitarian role of intergovernmental (and non-governmental) organisations consistent with the fundamental principles of IL: sovereignty and non-intervention.\(^{76}\) One of the re-occurring issues with the above organisations is their financial dependence on donors and aid tied to their own agendas - or lack of funds if these organisations did not toe

\(^{74}\) These figures are for the financial aid packages which the UNHCR distributed to the urban refugees in India in 2000.

\(^{75}\) The implementing partner in charge is *Young Men’s Christian Association*.

\(^{76}\) See *supra*, Part I, Public International Law, Concepts.
3.2.2.5. The Embassies

Often the role of embassies in Dhaka, Islamabad, New Delhi, or Kathmandu is neglected in discussions about refugees. Nevertheless, their function is vital for the state practice vis-à-vis refugees in the country of asylum, for instance, in the case of the deportation of a refugee, the country of origin of the deportee has to give its approval. The extradition of a refugee may take place according to the provisions of a treaty, and usually the embassy is also involved for the necessary paper work. Some states refuse re-admission of their citizens who claimed but were refused asylum abroad.

The embassy of the country of origin of refugees is usually not very co-operative to deliver papers or renew documents such as expired passports. The hefty fees which are charged by the embassy make it sometimes prohibitive for many refugees to obtain the necessary documents. However, if there is a regime change in the country of origin, the situation may become quite different.

The embassies of immigration countries such as Australia, New Zealand, the US, offer possibilities for refugees to directly apply for immigration, usually through a point system which allows the person concerned to have already a realistic idea about her/his chances of being successful, at least administratively speaking, when applying. In the case of resettlement, the embassy of these countries of destination is involved for screening purposes and to process the applications, either directly or through the UNHCR.

Last but not least, the embassies of Bangladesh, India, Nepal and Pakistan as countries of asylum provide crucial information regarding the situation in the refugees' countries of origin. This country information is the main basis for decisions on individual asylum or prima facie determination in case of mass influx.

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77 For instance, in 1992 the US presidential campaign indicated pursuing a new avenue of the American foreign policy: 'assertive multilateralism'. In the case of refugees this has meant that multilateral institutions such as the Red Cross, the IOM and the UNHCR were given greater responsibility but not always accompanied with an increase in the financial resources. "Support for the UNHCR is a vital U.S. concern; it can grow if the public sees evidence of successful efforts and the benefits of effective co-operation with other countries." ("Final Report of the Eighty-Sixth American Assembly", 1995: 308).

78 This was for instance the case for the (south) Sudanese refugees in India who on several occasions held protest marches in Delhi to complain about this fact.

79 See supra, United Nations Office of the High Commissioner for Refugees, Specific Role.

80 See infra, Chapter 5, Status Determination Procedure.
3.3. International Law

3.3.1. International Human Rights Law

Status of International Human Rights Law Instruments and Treaty-Bodies’
Conclusions on Refugee Issues in South Asia

In Part I we have provided an overview of the Human Rights treaties in which there are a number of international Human Rights provisions applicable to refugees both per se and qualitate qua persons. In this section we will provide an overview of which Human Rights treaties are applicable to the South Asian states under consideration as well as the concluding observations of the respective treaty bodies regarding refugee issues in the region. For each Human Rights treaty the dates of accession by the respective South Asian states are mentioned, followed by the comments of the treaty body concerned on the ground reality for the refugees.

3.3.1.1. 1965 CERD: Committee on the Elimination of Racial Discrimination

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As far as refugees are concerned, the periodic report of Bangladesh received the following comments in the CERD Committee’s Concluding Observations in 2001:

"Concern is expressed about the poor living conditions in the refugee camps for Rohingyas. It is recommended that the State party suitably address the situation pertaining to refugees." (Bangladesh, 2001: para. 74)

The CERD Committee’s Concluding Observations in 1998 regarding refugees in Nepal stated:

"The State party should fully observe the Human Rights of refugees and displaced persons of Bhutan and should negotiate with the Government of Bhutan towards a peaceful solution of this important issue." (Nepal, 1998: para. 441)

In 2000 the CERD Committee’s Concluding Observations added:

"The large number of refugees from neighbouring countries in Nepal is

\(^{81}\) The first line is the date of the ratification, accession or succession. The status of the respective treaties is mentioned on the UNTS website mentioned in the References.

\(^{82}\) The second line contains the date of the entry into force.
of concern. Furthermore, concern is expressed at the absence of legislative protection for refugees and asylum-seekers. The State party is reminded of the importance the Committee attaches to international instruments relating to the protection of refugees and to the adoption of national legislation that ensures that refugees enjoy the rights contained in the Convention.” (Nepal, 2000: para. 301)

Four years later (2004) the CERD Committee’s Concluding Observations on Nepal were:

"The Committee is concerned by information that only the Tibetans who arrived in Nepal before 1990 and the Bhutanese are recognized as refugees by the authorities, and by recent information on forced expulsion of Tibetan refugees. It further expresses concern over the serious restriction of rights for the Bhutanese refugees and the lack of specific measures for unaccompanied refugee children. The Committee reiterates its concern at the absence of legislative protection for refugees and asylum-seekers, and urges the State party to enact relevant legislation, and to ratify international instruments relating to the protection of refugees. It also encourages greater interaction with the Office of the United Nations High Commissioner for Refugees in this regard...” (Nepal, 2004: para. 134)

3.3.1.2. 1966 ICCPR: Human Rights Committee

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The HRC’s Concluding Observations in 1997 commented on the situation of refugees in India83:

"Concern is expressed over the forcible repatriation of asylum seekers, including those from Myanmar (Chins), the Chittagong Hills and the Chakmas. In the process of repatriation of asylum seekers or refugees, due attention should be paid to the provisions of the Covenant and other applicable international norms.” (India, 1997: para. 445)

1966 Optional Protocol to the ICCPR84

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83 In 1966 the ICCPR came about after long negotiations in the Commission on Human Rights. India was actively participating in the negotiations; but it was slow to ratify; there is a provision on the right to a family where some religious objections were raised.

84 The state recognises the competence of the HRC to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of any of the rights in the Convention by that state.
1989 Second Optional Protocol to ICCPR aiming at the abolition of the death penalty

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3.3.1.3. 1966 ICESCR: Committee on Economic, Social and Cultural Rights

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The ICESCR Committee's Concluding Observations in 2001 discussed the periodic report of Nepal:

"It is noted with concern that only Tibetans who arrived in Nepal before 1990 and the Bhutanese are recognised as refugees by the authorities. It is further noted that while the Tibetan refugees benefit from appropriate treatment, Bhutanese refugees are not allowed to work, are not allowed freedom of movement outside their refugee camps, and do not have access to the same health and educational facilities as Nepalese citizens." (Nepal, 2001: para. 545)

"The State party should acknowledge people other than those from Tibet and Bhutan as refugees and provide the same kind of treatment to all refugees. The State party is invited to consider acceding to the Convention relating to the Status of Refugees and its Protocol, the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness." (Nepal, 2001: para. 570)

3.3.1.4. CEDAW (1969): Committee on the Elimination of Discrimination against Women

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85 "s" means that the state is a signatory only.
Interesting for Nepal are the CEDAW Committee's Concluding Observations to Bhutan's periodic report in 2004:

"The Committee is concerned about the situation of ethnic Nepalese women who lost their Bhutanese citizenship following the enactment of the 1985 Citizenship Act and now live in refugee camps in Nepal. It is also concerned about the situation of girls born of Bhutanese parents in refugee camps who can obtain naturalisation only after the age of 15 years." (Bhutan, 2004: para. 127)

"The Committee urges the State party to step up its efforts to conduct negotiations with the Government of Nepal, and to collaborate with the Office of the United Nations High Commissioner for Refugees, in order to find a prompt, just and durable solution to the situation of Bhutanese women and girls living in refugee camps in Nepal, including the possibility of return to Bhutan for those Bhutanese women who wish to do so." (Bhutan, 2004: para. 128)

Provisions specifically applicable to refugees:

Article 3

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that..."
he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of Human Rights.”

With respect to non-refoulement specialists have noted that

"[t]he Committee against Torture’s practice in reviewing State action in matters of refusal of admission and removal of those whose return may lead them to face the risk of torture contributes significantly to the consolidation of ‘human rights-based protection’ (Goodwin-Gill and McAdam, 2007: 90).

3.3.1.6. 1989 CRC: Committee on the Rights of the Child

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**CRC - amendment re: Article 43(2)**

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**2000 Optional Protocol to CRC on the Involvement of Children in Armed Conflict**

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Provisions specifically applicable to refugees

**Article 9**

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities

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90 The Committee shall consist of eighteen instead of ten experts.
subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”

Article 22\(^1\)

"1. States Parties shall take appropriate measures to ensure that or a child who is seeking refugee status who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other International Human Rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

The CRC Committee's Concluding Observations on Pakistan in 1994 contained the following remarks as far as refugees are concerned:
"It is hoped that the Federal Government will continue to grant refugee status to children - and their families - as such needs arise in the future, and ensure at the same time a comprehensive system of registration." (Pakistan, 1994: para. 58)

Bangladesh’s periodic report of 1997 received the following comments by the CRC Committee’s Concluding Observations:

"The weak legal protection and lack of adequate procedures for refugee children remain of concern. The difficulties children encounter in securing access to educational and health facilities and the difficulties in ensuring family reunification are also of concern." (Bangladesh, 1997: para. 146)

"Refugee children should be ensured adequate protection, including in the fields of physical safety, health and education. Procedures should be established to facilitate family reunification. Assistance from the Office of the United Nations High Commissioner for Refugees (UNHCR) may be considered in this regard." (Bangladesh, 1997: para. 168)

The CRC Committee’s Concluding Observations directed to Bhutan in 2001 also concerned the refugees in Nepal:

"It is of concern that as a result of events following the census in the late 1980s, there may be children in southern Bhutan who are separated from their parents, or whose parents are residing abroad as refugees." (Bhutan, 2001: para. 460)

"The State party should ensure that family reunification is dealt with in a positive, humane and expeditious manner, in accordance with article 10 of the Convention." (Bhutan, 2001: para. 461)

"Noting that the verification process of refugees in camps in Nepal has commenced, concern is expressed about the slow rate of this process and the serious and negative impact this has on the rights of children residing in these camps, particularly given that repatriation will begin only once all refugees have been verified." (Bhutan, 2001: para. 474)

"In accordance with the principles of the best interests of the child, the right to a nationality and to the preservation of identity (articles 3, 7 and 8 of the Convention), and with a view to reaching a just and durable solution to the situation of refugees in camps in Nepal, the State party should:
(a) Make greater efforts to expedite the verification process and consider the possibility of repatriating individuals within a reasonable time following individual verification;
(b) Consider a mechanism to allow individuals to appeal against decisions;
(c) Ensure that returnees are repatriated and resettled, in safety and dignity, to their place of origin or choice;
(d) Consider acceding to the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, and the conventions on statelessness; and

91 Emphasis by the author.
(e) In the best interests of the children, consider seeking assistance from UNHCR.” (Bhutan, 2001: para. 475)

The CRC Committee’s Concluding Observations in 2003 as far as refugees in Bangladesh were concerned stated:

"The Committee is very concerned about the difficult conditions under which some refugee children, especially children belonging to the Rohingya population from Myanmar, are living, and that many of these children and their families do not have access to legal procedures that could grant them legal status. Furthermore, the Committee is concerned at the lack of a national refugee policy and that refugee children are not registered at birth.” (Bangladesh, 2003: para. 499)

"The Committee recommends that the State party:
(a) Adopt a national refugee legislation and accede to the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967;
(b) Grant all refugee children and their families immediate access to relevant procedures determining refugee status;
(c) In collaboration with and with support from international agencies, undertake effective measures to improve the living conditions of refugee families and children, particularly with regard to educational and health-care services;
(d) Provide unaccompanied refugee children with adequate care, education and protection;
(e) Register all refugee children born in Bangladesh.” (Bangladesh, 2003: para. 500)

Pakistan received the following CRC Committee’s Concluding Observations in 2003 regarding its treatment of refugees:

"While noting some progress in this field, for instance, the introduction of birth registration in the refugee camps in May 2002, the Committee remains concerned at the very harsh living conditions in Afghan refugee camps, the scarcity of food and water and the lack of shelter and medical care, which have serious implications for the situation of children living in these camps. The Committee is also concerned at reports of ill-treatment of refugees by the police.” (Pakistan, 2003: para. 231)

"The Committee recommends that the State party:
(a) Make all appropriate efforts to improve the living conditions of refugee families and children in refugee camps and elsewhere within the country;
(b) Give special attention to unaccompanied refugee children;
(c) Ensure that refugee children have access to health care and education and are not discriminated against;
(d) Ensure that refugee children receive appropriate protection and in this regard, seek co-operation with relevant United Nations specialised agencies, including the Office of the United Nations High Commissioner for Refugees and UNICEF, as well as with NGOs;
(e) Consider ratifying international instruments, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.”
The CRC Committee's Concluding Observations in 2004 touched upon the situation of refugees/stateless persons in India:

"The Committee is concerned that Pakistani refugee and Mohajir children residing in India (Rajasthan and Andhra Pradesh, respectively) are stateless." (India, 2004: para. 418)

"The Committee recommends that the State party take measures to provide these children with a nationality, in accordance with article 7 of the Convention." (India, 2004: para. 419)

"The Committee welcomes the generous policy of the State party in hosting refugees and asylum-seekers, but remains concerned at the absence of legislation regarding these groups." (India, 2004: para. 448)

"In light of article 22 of the Convention, the Committee recommends that the State party consider acceding to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and adopt comprehensive legislation to ensure adequate protection of refugee and asylum-seeking children, including in the fields of physical safety, health, education and social welfare, and to facilitate family reunification." (India, 2004: para. 449)

The CRC Committee's Concluding Observations to Burma (Myanmar) in 2004 also contained some comments on stateless refugees/returnees:

"The Committee notes that a large number of returnees from Bangladesh to northern Rakhine State have gone back to their villages of origin, but is concerned that some 850,000 Muslim residents in northern Rakhine State and large numbers of persons of Chinese or Indian descent throughout the country remain stateless, making it impossible for children of these families to benefit from the provisions and principles of the Convention. The Committee is further concerned at the very high number of children and their families who were internally displaced in Myanmar and that many were forced to seek asylum in neighbouring countries owing to the armed insurgencies taking place in various parts of Myanmar." (Myanmar, 2004: para. 438)

"In light of articles 7, 22 and other relevant provisions of the Convention, the Committee recommends that the State party:
(a) Take the necessary measures to allow children and their families who have returned to Myanmar and who are stateless to acquire Myanmar citizenship by way of naturalization;[...]
(c) Prevent situations which force children and their families to leave Myanmar;
(d) Ratify the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and the 1954 Convention relating to the Status of Stateless Persons; and
(e) Work closely in this regard with UNHCR and UNICEF." (Myanmar, 2004: para. 439)
Nepal’s periodic report of 2005 was discussed in the CRC Committee’s Concluding Observations which commented on the abuse of refugees in the camps:

"The Committee welcomes the adoption in August 2004 of an official policy that is grounded on the principle of non-refoulement, but it regrets that the State party has not yet ratified the Convention relating to the Status of Refugees, Convention relating to the Status of Stateless Persons or the Convention on the Reduction of Statelessness, and that there is no domestic legislation that covers the rights of refugees and asylum-seeking persons. In this regard, and given the fact that a large population of these persons are children the Committee is concerned about:

(a) The reports of discrimination and ill-treatment, including high incidence of sexual abuse of women and children in Bhutanese camps in Nepal;
(b) The reports of deportation of Tibetan asylum-seekers to China by Nepal, including unaccompanied minors and the closure of the Tibetan Refugee Welfare Office in January 2005;
(c) The rule that refugee status can only be sought by certain categories of asylum-seekers, specifically, the Tibetans who arrived in Nepal before 1990 and the Bhutanese;
(d) The restrictions on Bhutanese refugees on their freedom of movement, as well as their enjoyment of the right to health and education.[...]
(Nepal, 2005: para. 359)

"The Committee recommends that the State party:
(a) Ratify, as a matter of priority, the Convention relating to the Status of Refugees, the Convention on the Status of Stateless Persons and the Convention on the Reduction of Statelessness;
(b) Seek to ensure, as a matter of priority, that all internally displaced, refugee and asylum-seeking children and their families have access to health and education services, and that all their rights contained in the Convention are protected, including the right to be registered at birth;
(c) Take immediate measures to ensure that all internally displaced, refugee women and children under its jurisdiction are protected from all forms of sexual exploitation and that perpetrators are duly prosecuted; [...]" (Nepal, 2005: para. 361)

"The Committee expresses concern about children who were separated due to the conflict, including children who have fled to India, and that little efforts have been taken by the State party to reunite these families [...]
"(Nepal, 2005: para. 362)

"The Committee recommends that the State party develop a comprehensive policy and programme for implementing the rights of children who have been affected by conflict, and allocate human and financial resources accordingly. In particular, the Committee recommends that the State party: [...]"
(d) Develop, in collaboration with NGOs and international organisations, a comprehensive system of psychosocial support and assistance for children affected by conflict, in particular child combatants, unaccompanied internally displaced persons and refugees, returnees;" (Nepal, 2005: para. 363)
3.3.1.7. 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

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Provisions specifically *not* applicable to refugees

Article 3(d)

*The present Convention shall not apply to: [...]*

(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

From the above 'reality check' by the IHRL treaty-monitoring bodies, it is clear that if and when any South Asian state would accede to the 1951 Convention/1967 Protocol and/or to a regional instrument, even in the absence of any treaty-monitoring body, it would be held accountable under its international legal obligations in much the same way as already is being the case.

3.3.2. International Humanitarian Law

3.3.2.1. Status of International Humanitarian Law Instruments

In IHL there are no general observations by treaty bodies. The reports by the ICRC on the (lack of) respect for the IHL provisions are only directed at the government concerned and are confidential. 92

In South Asia the four 1949 Geneva Conventions 93 have been ratified/signed by (ICRC, 2005):

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<td>04 Apr. 1972</td>
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The 1977 I Protocol Additional 94 has been ratified/signed by (ICRC, 2005):

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92 There have been very few exceptions to this rule, for instance, the ICRC report on the genocide in Rwanda had been made public.

93 See *supra,* Part I, International Humanitarian Law, Sources.

94 See ibid.
The 1977 II Protocol Additional\textsuperscript{95} is ratified/signed by (ICRC, 2005):

Bangladesh  India  Nepal  Pakistan
1977

The 2005 III Protocol Additional is ratified/signed by (ICRC, 2005):

Bangladesh  India  Nepal  Pakistan

Now that we have established the status of IHL in South Asia, let us examine what its importance is for refugees during armed conflict.

### 3.3.2.2. Provisions applicable to refugees in South Asia

There have been a number of armed conflicts in South Asia\textsuperscript{96} - and perhaps new ones may break out in the future. It is in the context of armed conflict that IHL provisions are important. The underlying section is divided into three parts: the 1977 I Protocol Additional, the 1977 II Protocol Additional and 1949 IV Geneva Convention. Under 1977 I Protocol Additional and 1949 IV Geneva Convention both the specific provisions applicable to refugees \textit{per se} and the general provisions applicable to refugees as civilians will be discussed. The specific provisions which may be applicable to refugees are to be found in Art. 73 (1977 I Protocol Additional) and Arts. 44; 45; and 70 (2) (1949 IV Geneva Convention). The applicable non-specific articles are mentioned with their headings wherever necessary for informative purposes only.\textsuperscript{97}

The conceptual framework has already been dealt with in Part I to make it clear what the definition is of civilians and who protected persons are, what the field of application is, and when the beginning and end of application are.\textsuperscript{98}

#### 3.3.2.2.1. First Protocol Additional

In the 1977 I Protocol Additional refugees are provided protection (a) \textit{per se}

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\textsuperscript{95} See ibid.

\textsuperscript{96} The major armed conflicts in the South Asian countries under consideration since 1950 have been the war of liberation in Goa (1961), the Indo-China war (1962), and the Indo-Pakistan wars (1965 and 1971). Furthermore there have been major internal conflicts in Kashmir, the North-East of India, the West of Pakistan, insurgency by the Maoists in Nepal and the Naxalites in India.

\textsuperscript{97} The 1949 Diplomatic Conference did not adopt the Conventions' headings, they were included later by the Secretariat of the Conference and, hence, they do not constitute a formal part of the Conventions.

\textsuperscript{98} See \textit{supra}, Part I, International Humanitarian Law, Concepts.
(i.e. as refugees) as well as (β) in their capacity as civilians. An analysis of this double layer of protection (a & β) shows the extent to which a comprehensive list of IHL provisions is applicable in the case of refugees.

a) Which 1977 I Protocol Additional provisions offer a specific protection to refugees per se?

PART IV
CIVILIAN POPULATION

SECTION III – TREATMENT OF PERSONS IN THE POWER OF A PARTY TO THE CONFLICT
CHAPTER I – FIELD OF APPLICATION AND PROTECTION OF PERSONS AND OBJECTS

Article 73 Refugees and stateless persons

"Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction."

Analysis of Article 73

"[...] before the beginning of hostilities [...]": ratione temporis

The indication that only refugees considered as such "before the [...] hostilities" shall be protected persons means that refugees caused by the hostilities themselves fall outside the purview of "protected persons". In other words, those who were refugees – having fled for reasons of (fear of) persecution – before the outbreak of hostilities, are included in the category of protected persons.

Then what about the 'new' (i.e. post-outbreak of hostilities) refugees – does it mean that they do not enjoy any protection? In this respect it is useful to remember the general principle incorporated in the 1949 I-IV Geneva Conventions:

"Every person in enemy hands must have some status under International Law.[...] There is no intermediate status; nobody in enemy hands can be outside the law." (Pictet, 1958: 51).

Hence, those 'new' refugees will come under the provisions for civilians in 1949 IV Geneva Convention and enjoy relief and protection provided to them, as we

will discuss under □100 while they also benefit from Art. 75 1977 I Protocol Additional.101

"Persons [...] shall be protected persons [...]": ratione personae

Who shall be protected persons? The 1949 Geneva Conventions do not contain any definition of exactly who is a refugee. There is only a mention of "those who no longer enjoy the protection of the state" of which they are nationals. Hence, the term refugee is to be understood in its widest sense. Art. 73 1977 I Protocol Additional, however, states clearly who is to be considered a refugee by referring to the

"relevant international instruments accepted by the Parties [...] or [...] the national legislation of the State of refuge or State of residence [...] ."

Consequently, states have to respect the other states' decisions that a person is recognised as a refugee, whether this was on the basis of international instruments or Municipal Law (ICRC, 1999: 168; 171).102

"[...] considered as [...] refugees under the relevant international instruments [...]"

The major international instruments which contain a refugee definition are (1) the 1950 Statute of the UNHCR, (2) the 1951 Convention, (3) the 1967 Protocol, (4) the 2001 Bangkok Principles, (5) the 1969 OAU Convention, (6) the 1984 Cartagena Declaration, and (7) a number of UN resolutions.

We have mentioned these definitions of a refugee earlier in this thesis,103 but with respect to Art. 73 1977 I Protocol Additional it may be added that, if, before the hostilities began, the state had recognised the UNHCR competence, the UNHCR caseload will be considered "protected persons" as mentioned under Art. 73.

"[...] considered as [...] refugees under the national legislation of the State [...]"

The national legislation of the state of refuge or the state of residence may

100 Which 1949 IV Geneva Convention provisions offer a general protection to refugees qualitate qua civilians?, see infra.
101 They are also covered by the relevant provisions in IRL, see infra.
102 See also Art. 38 1949 IV Geneva Convention: "[...] the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace.[...]" and Art. 47 1949 IV Geneva Convention.
103 See supra, Part I, International Refugee Law, Sources.
incorporate a definition of a refugee which matches the definition(s) in the international instruments or it may be a different definition. If the scope of the domestic definition is wider than that of the treaty which the state has ratified, the former will take precedence. In South Asia this had hitherto no application since no state has adopted a national refugee Act.

"[...] protected persons within the meaning of Parts I and III of the Fourth Convention [...]"

At the start of our analysis we referred to the definition of "protected persons" as mentioned in Art. 4 1949 IV Geneva Convention. Its third paragraph reads as follows:

"The provisions of Part II are, however, wider in application, as defined in Article 13."

Art. 13 1949 IV Geneva Convention states on the field of application of Part II that it

"cover[s] the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war."

These grounds of discrimination mentioned here in the 1949 Geneva Convention – religion, race, nationality, political opinion – would return as grounds for ‘well-founded fear of being persecuted” in the definition of a refugee in the 1950 Statute and the 1951 Convention. For refugees this implies that of the 1949 IV Geneva Convention not only Part I and III apply, but also Part II General Protection of Populations against certain Consequences of War – in effect, the whole 1949 IV Geneva Convention.

"[...] in all circumstances and without any adverse distinction."

This formulation is used for (a) all situations in which IHL applies and (b)

104 See infra, Part III, Chapter 5, Towards National Refugee Law.
105 See supra, Part I, International Refugee Law, Sources.
106 See the list of applicable articles infra.
to make it clear that protection shall be without any discrimination whatsoever. Indeed, the protected refugees shall be given equal treatment, however, the word "adverse" allows more favourable treatment (e.g. for pregnant women and children under fifteen years).

β) Which major 1977 I Protocol Additional provisions offer a general protection to refugees qualitate qua civilians?

The following enumeration includes the name of the part, section and chapter of 1977 I Protocol Additional provisions which may be applicable to refugees in their capacity as civilians:

PART II
WOUNDED, SICK AND SHIPWRECKED
SECTION I – GENERAL PROTECTION

Art. 11 – Protection of persons
"The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described [...] to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards [...]"

The purpose of Art. 11 is to provide protection against harmful medical procedures and experiments. The persons covered include not only the nationals of the adverse party, but also other people who may be present on the territory under control by a party to the conflict - inter alia, those persons who have fled after the start of the hostilities - if they have been deprived of liberty as a result of an Art. 1 situation.

SECTION II: MEDICAL TRANSPORTATION

108 Compare the anti-discrimination provisions in the international refugee instruments, for instance, Art. 3, 1951 Convention; Art. IV 1969 OAU Convention.
109 Though the grounds of discrimination are not listed, they are in other provisions of the 1949 I-IV Geneva Conventions and 1977 I-II Protocols Additional: see use of the phrase "without adverse distinction" in common Art. 3 1949 I-IV Geneva Conventions; Art. 13 1949 IV Geneva Convention; Art. 75 (1) 1977 I Protocol Additional and Art. 2 1977 II Protocol Additional.
110 See, for instance, Arts. 14; 17; 23; 24; 38 (5); 50; 89; and 132 1949 IV Geneva Convention.
111 The description which follows the article number is more comprehensive than and does not correspond to the heading given in the text of 1977 I Protocol Additional.
Art. 22 – Hospital Ships and coastal Rescue Craft
"1. The provisions of the Conventions [...] shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. [...]"

Art. 13 1949 II Geneva Convention (Protected Persons) applies to the wounded, sick and shipwrecked who form part of the military and a few categories of civilians.

1977 I Protocol Additional enlarges the scope of application to civilians not falling within Art. 13 1949 II Geneva Convention. As far as wounded, sick and shipwrecked refugees are concerned, by lack of a provision to the contrary, they may be required to surrender to a party to the conflict whose nationality they possess even if it goes against the wishes of the refugees to go back to their country. In any case, Art. 75 1977 I Protocol Additional (Fundamental Guarantees) is applicable to them.

Art. 23 – Other medical ships and craft
"1. Medical ships and craft other than those referred to in Article 22 [...] and Article 38 [1949 II Geneva Convention] shall [...] be respected and protected in the same way as mobile medical units under the [1949 I-IV Geneva Conventions and 1977 I Protocol Additional]. [...]"

6. [...] Wounded, sick and shipwrecked civilians who do not belong to any of the categories mentioned in Article 13 [1949 II Geneva Convention] shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; [...]"

Paragraph 6 of Art. 23 refers to the situation of the wounded, sick and shipwrecked civilians not falling under Art. 13 1949 II Geneva Convention aboard ships and craft not covered by Arts. 22 1977 I Protocol Additional and 38 1949 II Geneva Convention when boarded by an adverse party. Wounded, sick or shipwrecked refugees are not subject to surrender to another party which is not their own, nor to be removed, in the latter case even if it were to be a removal to a ship of the state whose nationality the refugee possesses.

Art. 30 – Landing and Inspection of medical Aircraft
"1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order. [...]"

112 Art. 73 covers persons who, before the beginning of the hostilities, were considered as refugees.
3. If the inspection discloses that the aircraft:
   (a) is a medical aircraft within the meaning of Article 8, subparagraph (j),
   (b) is not in violation of the conditions prescribed in Article 28, and
   (c) has not flown without or in breach of a prior agreement where such agreement is required, the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorised to continue the flight without delay.[…]

The adverse party has the right to order an aircraft to land in an area under its control for the purpose of an inspection. The treatment of the crew and passengers depends on all the three conditions under paragraph 3: if they have been fulfilled, the plane may continue. What about the occupants? If they are nationals of the adverse or neutral party or of a non-party to the conflict, they may continue the flight as well, but they are not obliged to and they may apply for asylum in the inspecting state. However, if there are nationals of the inspecting party aboard, including asylum seekers, they may be taken off the plane, even if it is against their will.

SECTION III – MISSING AND DEAD PERSONS

Art. 32: Right of families to know the fate of their relatives

Art. 33 – Missing Persons
"1. As soon as circumstances permit […] each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. […] […]"

Art. 33 does not mention the categories of persons which are covered, only that they should be reported missing by the adverse party. The people concerned are required to have a link with the adverse party, for instance, through nationality, or they are included because of Art. 32 (General Principle). Refugees may also come into the picture when they had been recognised by or allowed on the territory of the adverse party and the latter reports them as missing.

PART IV
CIVILIAN POPULATION
SECTION I – GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

113 See supra, Part I, Public International Law, Concepts.
114 The 1899 and 1907 Hague Conferences (see supra, Part I, International Humanitarian Law, Genesis and Development) lie at the basis of the international legal rules to limit the conduct of hostilities. Some of them have become part of customary IL and are mentioned in Part IV 1977 I-II
CHAPTER I - BASIC RULE AND FIELD OF APPLICATION

Art. 48: Distinction between civilian Population / objects and combatants / military objectives;
Art. 51 - Protection of the civilian Population

"1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules [...] shall be observed in all circumstances. [...]"

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians [...]"

This article includes a general protection of the civilian population and prohibition of indiscriminate attacks, reprisals, and prohibition to use protected persons to make points or areas immune from military operations. It is one of the foundation stones of 1977 I Protocol Additional as it provides general protection to the civilian population and civilians against the effects of the hostilities the danger of which should be minimal to them. Paragraph 5 (a) refers to what is popularly known as 'carpet bombing'. In an area with a similar concentration of civilians as in cities or villages, military targets which are separated and distinct must be attacked separately. Refugee camps - however temporary they may be - also constitute concentrations of civilians and therefore attacks in those areas must be carried out separately with minimal casualties among the civilians.

CHAPTER II - CIVILIANS AND CIVILIAN POPULATION

Art. 54: Protection of objects indispensable to the survival of the Civilian population;

These objects may include water purification plants, sanitary installations and other types of infrastructure constructed for refugees.

CHAPTER IV - PRECAUTIONARY MEASURES

Art. 57: Sparing civilians, considerations in the planning and choice of

Protocols Additional. Part II 1949 IV Geneva Convention equally provides protection of refugees against the effects of hostilities (see infra, 1949 IV Geneva Convention).

115 This article, para. 6, is relevant in the case of problems due to the location of refugee camps in combat zones (see also Art. 58 1977 I Protocol Additional). This article also applies in cases where combatants are mixed with refugees, for instance, in refugee camps.
attacks, and avoiding civilian losses;\textsuperscript{116}  
Art. 58: Removal of civilians from military objectives and their protection against military danger;\textsuperscript{117}

CHAPTER V – LOCALITIES AND ZONES UNDER SPECIAL PROTECTION

Art. 59 – Non-defended Localities
"1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:
   (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
   (b) no hostile use shall be made of fixed military installations or establishments;
   (c) no acts of hostility shall be committed by the authorities or by the population; and
   (d) no activities in support of military operations shall be undertaken.[…]"

Art. 59 deals with a prohibition to attack non-defended localities and their definition, limits, establishment, and marking; it lays down the conditions which have to be met. Condition (b) does not allow for hostile use of fixed military establishments, but if these are put to another use, such as the housing of refugees in army barracks, this would not detract from its character as a non-defended area and, hence, it may not be attacked.

Art. 60: Prohibition of military operations in demilitarized zones and their definition and marking;

CHAPTER VI – CIVIL DEFENCE

Art. 61: Definition and scope
Art. 62: General protection;
Art. 63: Civil defence in occupied territories;
Art. 64: Civilian civil defence organizations of neutral or other states not parties to the conflict and international co-ordinating organizations;
Art. 65: Cessation of protection;
Art. 66: Identification;
Art. 67: Members of the armed forces and military units assigned to

\textsuperscript{116} This article is relevant in the case of combatants who are present among civilian refugees, for example, in refugee camps. See also the so-called ‘warrior refugees’.

\textsuperscript{117} This article is relevant in the case of problems due to the location of refugee camps in combat zones (see also Art. 51(6) 1977 Additional Protocol).
civil defence organizations;

SECTION II – RELIEF IN FAVOUR OF THE CIVILIAN POPULATION

Art. 69: Provision of basic needs to the civilian population of the occupied territory;
Art. 70: Relief actions and passage, protection and distribution of relief.

UNHCR faces many difficulties in providing food and water to refugee populations during armed conflict. During the 1971 campaign there were also major problems in bringing relief to the refugees. UNHCR at the time was the UN Focal Point for relief.

SECTION III – TREATMENT OF PERSONS IN THE POWER OF A PARTY TO THE CONFLICT

CHAPTER I – FIELD OF APPLICATION AND PROTECTION OF PERSONS AND OBJECTS

Art. 74: Facilitation of family reunion;

In IRL, family reunification has also become a moot point, especially in the non-entrée regime of western states which make it difficult for relatives, including children, to be joined with the refugee.

Art. 75 – Fundamental Guarantees

"1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction [...]. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

a) violence to the life, health, or physical or mental well-being of persons, in particular:

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118 During the armed conflict in former Yugoslavia, for instance, the UNHCR convoys were not allowed free passage and/or had to offload (a part of) the cargo to pay off the warring faction that stopped the convoy.
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;
b) outrages upon personal dignity, in particular humiliating and
degrading treatment, enforced prostitution and any form of indecent
assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.[…]
6. Persons who are arrested, detained or interned for reasons related
to the armed conflict shall enjoy the protection provided by this Article
until their final release, repatriation or re-establishment, even after the
end of the armed conflict.”

Art. 75 deals with the minimum standard of humane non-discriminatory
treatment, prohibition of certain acts, principles of judicial procedure and prosecution
of persons accused of war crimes or crimes against humanity.

It is a reflection of the concern that to persons who do not possess a specific
status under the 1949 Geneva Conventions or 1977 I Protocol Additional, a minimum
protection should be extended; these minimum rules apply thus to all such persons
who find themselves in the hands of a party to the conflict during times of armed
conflict or occupation.121 The exact categories of persons who may benefit from this
article are not mentioned. By virtue of Art. 73 (Refugees and stateless Persons),122
refugees are considered as “protected persons” in 1949 IV Geneva Convention and,
hence, they benefit from a more favourable treatment. However, those who have been
recognised as refugees post-outbreak of hostilities, enjoy the protection of Art. 75.123

Paragraph six is similar to Art. 3(b) 1977 I Protocol Additional and Art. 6
1949 IV Geneva Convention where we discuss the relevance of these provisions for
refugees who cannot be released or repatriated.

CHAPTER II – MEASURES IN FAVOUR
OF WOMEN AND CHILDREN

Art. 76: Respect and protection of women and mothers;
Art. 77: Respect, protection, care and aid for children, refraining from
recruitment and separate detention of children; and
Art. 78 – Evacuation of Children

121 See “field of application – derogations”.
122 Important here is that Art. 73 only covers refugees who had been recognised as such “before the
beginning of hostilities”.
123 See also Art. 11 1977 I Protocol Additional.
"1. No party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment or the children or, except in occupied territory, their safety, so require. [...] Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take feasible precautions to avoid endangering the evacuation. [...]"

Art. 78 provides for the evacuation of children, their education and identification during evacuation. In order to avoid the pernicious effects of hostilities on children, evacuations frequently take place and that is why this article has been included in 1977 I Protocol Additional. It does not include a definition of a child nor does it cover children who are nationals of the state that arranges for the evacuation, but children of refugees are covered. If the latter became recognised as refugees before the beginning of hostilities, they are considered "protected persons" and enjoy the appropriate protection under the 1949 IV Geneva Convention and 1977 I Protocol Additional, however, if this were the case after the hostilities started, they do not come under this category and then other rules apply.124

The protecting power which has to supervise the evacuation is the power which takes care of the interests of the refugee receiving state. If there is no such power, the services of the UNHCR125 or ICRC (RC/RC)126 may be called upon.

PART V
EXECUTION OF THE CONVENTIONS AND OF THIS PROTOCOL

SECTION II – REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THIS PROTOCOL

Art. 85 – Repression of Breaches of this Protocol

"1. The provisions of the Conventions relating to the repression of [...] grave breaches, supplemented by this Section, shall apply to the repression of [...] grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Article[ ] 73 of this Protocol [...]"

124 See Art. 75 (Fundamental guarantees) 1977 I Protocol Additional.
125 See supra, Part I, International Refugee Law, Sources.
1977 I Protocol Additional introduces the persons under Art. 73 as a new category against whom grave breaches - subject to universal jurisdiction - may be committed. Art. 73 (Refugees and stateless Persons) deals with refugees and considers them as "protected persons" under the 1949 IV Geneva Convention.

Art. 88 – Mutual Assistance in criminal Matters

"1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol. 2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred."

The 1949 I-IV Geneva Conventions have common articles on penal sanctions and grave breaches (Arts. 49 and 50 1949 I Geneva Convention; Arts. 50 and 51 1949 II Geneva Convention; Arts. 129 and 130 1949 III Geneva Convention; and Arts. 146 and 147 1949 IV Geneva Convention) in which mutual assistance in these matters is implied. It may be observed that, according to the relevant international instruments, persons accused of crimes against peace and against humanity and of war crimes, may neither claim the right to enjoy asylum nor refugee status.

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127 A national court is usually not competent for crimes committed by non-nationals outside the national territory, hence, for situations where there is no prosecution by the territorial nor by the state of the nationality of the perpetrator, the concept of universal jurisdiction authorises the prosecution of international crimes committed by whomever wherever. Nowadays states may or must exercise criminal jurisdiction concerning serious breaches of IHL; if a state is party to the 1949 Geneva Conventions and the perpetrator of such acts is present in its territory, it is obliged to apply this principle. Examples outside grave breaches of the 1949 Geneva Conventions are piracy or torture (Arts. 4-8, 1984 Convention against Torture, see supra, Part I, International Refugee Law, Concepts). The introduction of universal jurisdiction is usually combined with an application of aut dedere aut judicare (from Latin: "To extradite or to try").

128 See also the subsequent discussion on Art. 88 1977 I Protocol Additional.

129 This article has to be read in conjunction with Art. 85 1977 I Protocol Additional, see the discussion there.

130 Art. 14 1948 UDHR; Preamble and Art. 1 1967 DTA; Arts. 1; 7 (d) 1950 Statute "7. Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person: [...] (d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights." Also see supra, Part I, International Human Rights Law, Concepts.

131 Art. 1 F 1951 Convention “F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up
Before we make an in-depth study of the Fourth Geneva Convention, we discuss briefly the applicable provisions in the Second Protocol Additional of 1977.

3.3.2.2.2. Second Protocol Additional

The protection enjoyed by civilians who flee from an internal armed conflict is similar to the protection provided in times of international armed conflict, but the provisions are not so specific.

If refugees flee from a state involved in armed conflict to another state not involved in international conflict, they cannot benefit from the protection of IHL. If, however, the state they have fled to harbours an internal armed conflict, refugees as victims of the conflict are protected by common Art. 3 1949 I-IV Geneva Conventions and by 1977 II Protocol Additional.

As stated in Art. 1 the material field of application of 1977 II Protocol Additional is constituted by all armed conflicts which are not covered by Art. 1 1977 I Protocol Additional (except internal disturbances and tensions) and which take place in the territory of a state party between its armed forces and organised armed groups which under command control part of the territory and implement IHL. It supplements common Art. 3 1949 I-IV Geneva Conventions which, however, applies in all situations of non-international armed conflict.

PART I

SCOPE OF THIS PROTOCOL

Article 2 – Personal Field of Application

"1. The Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflict as defined in Article 1. [...]"

Art. 2 indicates the application ratione personae of 1977 II Protocol Additional to make provision in respect of such crimes; [...]" Apart from the 1949 I-IV Geneva Convention articles and Art. 85 1977 I Protocol Additional (Grave Breaches), other international instruments which are relevant to the aforementioned Art. 1 F (a) are: The London Agreement of 8 August 1945 and Charter of the International Military Tribunal; Law No. 10 of the Control Council for Germany of 20 December 1945 for the Punishment of Persons guilty of War Crimes, Crimes against Peace and Crimes against Humanity; GA Res. 3 (1) of 13 February 1946 and 95 (1) of 11 December 1946 confirming war crimes and crimes against humanity as defined in the Charter of the International Military Tribunal of 8 August 1945; Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Art. III). The exclusion clause in Art. 1 F (a) does not only apply to persons who commit these crimes in an official capacity, but also as members of non-state entities, whether
Additional: it applies to all persons without any discrimination affected by an armed conflict. As there exists no discrimination on grounds of nationality, refugees as residents of a party to the conflict are also included. What then should be the minimum standards of treatment of refugees under 1977 II Protocol Additional?

PART II
HUMANE TREATMENT

Art. 4 – Fundamental Guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
   a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
   b) collective punishments;
   c) taking of hostages; acts of terrorism;
   d) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
   e) slavery and the slave trade in all their forms;
   f) pillage
   g) threats to commit any of the foregoing acts. [...]"

These norms cover all persons, including refugees, affected by armed conflict under Art. 2 (see supra), if they do no(t longer) take part in hostilities. The norms have earlier been stipulated in common Art. 3 1949 I-IV Geneva Conventions and are based on the ICCPR provisions; almost all non-derogable rights132 under Art. 4(2) ICCPR have been included.133

Of the other provisions which may be applicable to refugees we can mention Arts. 5; 6; 7-12; 14; and 18 which, inter alia, apply to persons with restricted liberty, include penal prosecutions, care for the wounded, sick and shipwrecked, prohibit starvation as a method of war, and require governments to accept assistance from

recognised or not. See supra, International Refugee Law, Sources.


133 See supra, Part I, International Human Rights Law, Sources; supra, International Human Rights Law; and see Art. 75 1977 I Protocol Additional.
international relief agencies. 134

Special mention should be made of the provision which prohibits forced movements of the civilian population:

PART IV
CIVILIAN POPULATION

Art. 17 – Prohibition of forced Movement of civilians
"1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

In ‘modern’ terms this Article prohibits ‘ethnic cleansing’ to which both the SC135 and the ICTY136 have made reference in connection with the concept of ‘persecution’. In Art. 49 1949 IV Geneva Convention protection is provided against deportations, transfers and evacuations in occupied territories.137 The “satisfactory conditions” have to apply to refugee camps as well and include a reference to their security, for instance, that they should not be located near military objectives.138 The “territory” in the second paragraph means the national territory which the civilians are forced to leave due to the armed conflict.

After the Protocols Additional we now take a closer look at the Fourth Convention.

3.3.2.2.3. Fourth Geneva Convention

Introduction

There is no definition of exactly who constitutes a refugee in the 1949 Geneva

135 (The Security Council) “Reaffirms that any taking or acquisition of territory by threat or use of force, including through the practice of 'ethnic cleansing', is unlawful and unacceptable”; para. 7: “Reaffirms its condemnation of all violations of International Humanitarian Law, in particular the practice of 'ethnic cleansing' and reaffirms that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts” (SC Res., 1993: para. 5)
136 The ICTY and ICTR have been established under Chapter VII, 1945 UN Charter, and therefore all UN member states are obliged to co-operate with these tribunals by putting suspects at the tribunals’ disposal. If a state where a suspect resides does not co-operate it violates IL. For the execution of the prison sentences the tribunals also rely on member states. Also see supra, Part I, Introduction.
137 See infra.
Conventions or 1977 Protocols Additional; the only description provided is that refugees "do not, in fact, enjoy the protection of any government." In IRL the lack of state protection, although a necessary element, only constitutes one element of the definition.\(^{140}\)

In the 1949 IV Geneva Convention refugees are provided protection (a) \textit{per se} (i.e. as refugees) as well as (b) in their capacity as civilians.\(^{141}\) An analysis of this double layer of protection (a & b) shows the extent to which a comprehensive list of IHL provisions is applicable in the case of refugees.

(a) Which 1949 IV Geneva Convention provisions offer a specific protection to refugees \textit{per se}?

\textit{Beginning and end of application}

Art. 6 1949 IV Geneva Convention indicates the beginning and end of application of 1949 IV Geneva Convention:

"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations."

Article 2 states:

"[...]
the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them.
The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

Paragraphs 3 and 4 of Article 6 are of particular interest to refugees:

"[...] In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military

\(^{138}\) See Art. 52(2) 1977 I Protocol Additional.

\(^{139}\) Art. 44 in \textit{fine} 1949 IV Geneva Convention.

\(^{140}\) See infr\(a\), Definitions.

\(^{141}\) Armed forces are excluded from the category of protected persons under 1949 IV Geneva Convention by virtue of their falling under 1949 I-III Geneva Conventions, see Art. 4 (4) 1949 IV Geneva Convention.
operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.”

The 1949 IV Geneva Convention continues to apply in occupied territory beyond one year if the occupying power exercises governmental functions; the enumerated articles remain in force as long as the occupation lasts. The fundamental rules for humane treatment are mentioned (Arts. 27; 29-34) as well as the applicable penal legislation including Art. 70.

The fourth paragraph refers to the continued application of 1949 IV Geneva Convention for certain categories of persons. This complements paragraphs two and three in that the 1949 IV Geneva Convention continues to apply to protected persons such as internees and refugees who have not returned to a normalised situation. They will continue to enjoy the rights under the said 1949 Geneva Convention. Refugees are not to be repatriated, but have to be able to re-establish/resettle themselves if they are not allowed to settle in the country of asylum/residence. This means that they will have to be accepted by a third state.143

PART III
STATUS AND TREATMENT OF PROTECTED PERSONS
SECTION II – ALIENS IN THE TERRITORY OF A PARTY TO THE CONFLICT

Before the First World War treaties were concluded stipulating that all who possessed the nationality of the other state parties, including refugees, could leave freely upon the outbreak of a war.144 During and after the Great War, however, things would never be the same: enemy nationals were prevented from leaving if not

142 See infra for the other provisions applicable in cases of repatriation.
143 See also Art. 3 (b) 1977 I Protocol Additional.
144 Repatriations still happened sporadically later, for instance, in 1943, during the Second World War, when 1,500 American and Canadian civilians were exchanged in Goa for an equal number of Japanese. Revue internationale de la Croix-Rouge, 1944, 239-40. In the 1949 IV Geneva Convention the right (not the obligation) to leave the territory is included (though qualified) in Art. 35, however, it does not include the word “repatriation” as, in the case of refugees, some protected persons do not wish to go back to their home country. In short, a belligerent is bound to let protected persons go to any country, prohibited to indulge in their forcible repatriation, and free to expel/deport them to another
downright interned. The ICRC’s draft on the treatment of interned aliens within the territory of a belligerent was ready in 1934,145 but could not come into force due to the outbreak of the Second World War during which the ICRC managed to convince various belligerent states to treat some 160,000 interned civilians analogous to the treatment of POWs.146 After the war, the 1949 IV Geneva Convention was adopted and it includes a number of provisions that attempt “to fill the gap” (Pictet, 1958: 233).

The title of Part III refers to the status and treatment of protected persons whereas Section II provides a protective legal status for civilians of enemy nationality living in the belligerent state territory.147 We have earlier referred to the definition of who protected persons are.

Two articles in Section II govern the specific situation of refugees in the territory of a party to the conflict: Art. 44 and 45.

Analysis of Article 44

Article 44 – VII. Refugees

"In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.”

"In applying the measures of control mentioned in the present Convention, […]

Art. 44 has not an absolute character: it is exhortatory in nature in that it merely urges belligerents to consider exempting refugees from the application of exceptional measures instituted for the safety of the state. It also does not state that all refugees should be exempted from these control measures. In this respect, the 1951 Convention148 is elucidating:

"Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.” (Art. 9)
We shall now discuss which rules govern the situation in which a refugee present on the territory of a belligerent is (a) not exempted from the special measures authorised by 1949 IV Geneva Convention; and (b) exempted from the special measures authorised by 1949 IV Geneva Convention.

Special measures authorised by 1949 IV Geneva Convention

SECTION I – PROVISIONS COMMON TO THE TERRITORIES OF THE PARTIES TO THE CONFLICT AND TO OCCUPIED TERRITORIES

Art. 27 - Treatment I General Observations

"(4) [...] the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

Art. 27 is the basis of 1949 IV Geneva Convention. It states the basic principles of humane treatment and of inalienable rights. This last paragraph is, however, a reference to the military necessity. Measures of supervision/control as meant (but not specified) by the 1949 IV Geneva Convention are manifold: from registration to restriction of movement including internment. These may thus be taken vis-à-vis refugees as well, and their fundamental rights must be respected at all times.

The most severe measure of control allowed is assigned residence or internment:

Art. 41(1) - Assigned Residence. Internment

"Should the Power in whose hands protected persons may be consider the measures of control [in 1949 IV Geneva Convention] to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43. [...]"

"Internment" is a more serious restrictive measure than "assigned residence". The decision to go for internment or assigned residence may be taken

149 See infra, Part III, Chapter 5, Standards of Treatment.
150 "Internment is [...] a form of assigned residence, since internees are detained in a place other than their normal place of residence. Internment is the more severe, however, as it generally implies an obligation to live in a camp with other internees." (Pictet, 1958: 256).
151 "The object of assigned residence is to move certain people from their domicile and force them to live, as long as the circumstances motivating such action continue to exist, in a locality which is generally out of the way and where supervision is more easily exercised. In that respect it differs from 'being placed under surveillance' which [...] is a form of supervision which allows the person
on a collective scale whereby whole groups of refugees may be affected. The reference to the two subsequent articles is a qualifying clause: they indicate (Art. 42) the grounds for which protected persons in casu refugees may be interned/assigned a residence, and (Art. 43) the procedure applicable:

Art. 42 – Grounds for internment or assigned residence. Voluntary internment.
"The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be."

When we read this article in Art. 44 it is clear that a refugee, by merely possessing the nationality of an enemy state, may not be treated as if he or she constitutes a threat to the security of the state of asylum/residence. By implication, he or she may not be interned/confined to an assigned place of residence without valid reasons; these legitimate reasons may include subversive activities in the territory of the belligerent, actions or knowledge directly assisting the enemy (e.g. espionage or sabotage), or membership of organisations representing a security threat. In this respect, the 1949 IV Geneva Convention includes a provision that excludes a protected person from claiming the rights contained in it:

Art. 5 - Derogations
"Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.[...]
In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

Without going into the details of this article, it is important to observe that under Art. 5 collective measures are not allowed (i.e. affecting a whole category of
people or refugees) as "such individual (protected) person" must be suspected. There is no definition of what exactly "activities hostile to the security of the State" consist of. Scholars have pointed to the exceptional character of this Article. 154

The second paragraph of Art. 42 sets out the conditions for voluntary internment. Protected persons request internment usually for reasons of urgent material needs. However, in case of, for instance, refugees there is also the possibility that they ask to be interned in order to protect their security if they feel threatened by dangerous actions taken against them by the host community. If their official request is warranted by the situation and forthcoming through the protecting powers, the state of asylum/residence shall intern them. 155

Art. 43 (Procedure) stipulates that an interned refugee's case shall be decided upon by an appropriate court or administrative board as soon as feasible. If the decision is that (s)he remain interned, at least twice annually his (or her) case shall be reviewed.

During their confinement protected persons shall be treated according to the regulations indicating the standards of welfare for internees. 156 If the methods of control applied to the refugee result in his (her) inability to support himself (herself) the party to the conflict applying the measures must ensure his (her) support and that of his (her) dependants. This is especially the case if the said person, due to security reasons, is prevented from getting a job. 157

The cancellation of the restrictive measures taken concerning refugees as protected persons shall take place as soon as possible after the end of the hostilities 158 and each detained person shall be released as soon as the reasons which

154 "What is most to be feared is that widespread application of the Article may eventually lead to the existence of a category of civilian internees who do not receive the normal treatment laid down by the Convention but are detained under conditions which are almost impossible to check. It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion." (Pictet, 1958: 58).

155 Arts. 79 through 135 1949 IV Geneva Convention become thus applicable as far as their treatment is concerned.

156 Part III, Section IV (Arts. 79-135) contains chapters on: (II) the places of internment, (III) food and clothing, (IV) hygiene and medical attention, (V) religious, intellectual and physical activities, (VI) personal property and financial resources, (VII) camp administration and discipline, (VIII) relations with the outside world, (IX) penal and disciplinary sanctions, (X) transfer of internees, (XI) deaths, and (XII) release, repatriation and accommodation in neutral countries.

157 Art. 39 1949 IV Geneva Convention; also cf. infra, Part III, Chapter 5, Standards of Treatment.

158 Arts. 46 and 133 1949 IV Geneva Convention.
necessitated the internment cease to exist. 159

Exemption of the special measures mentioned in IV 1949 Geneva Convention

In the absence of any measures of control mentioned in 1949 IV Geneva Convention being taken regarding refugees, Art. 38 1949 IV Geneva Convention governs their situation as aliens in the territory of a party to the conflict. It states that the situation of protected persons is regulated

"[... ] in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

1. They shall be enabled to receive the individual or collective relief that may be sent to them.
2. They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
3. They shall be allowed to practice their religion and to receive spiritual assistance from ministers of their faith.
4. If they reside in an area particularly exposed to the dangers of war, they shall be authorised to move from that area to the same extent as the nationals of the State concerned.
5. Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned."

As a general rule, the treatment of aliens, including refugees, who are in the territory of a belligerent should, according to Art. 38, be the same as in times of peace. That means that the status quo ante of the refugees under the prevailing provisions of the national legislation of the country of asylum/residence (and IL where applicable) should be continued. Even when supervisory or security measures are taken vis-à-vis protected persons,160 the rights enumerated in clauses 38 (1)-(5) shall be granted. Clause (4) provides protection in case dangers of war move towards the place where refugees reside: they have the same rights to leave as the nationals and a ban on an exodus may not be issued in a discriminatory way.

"[... ] the Detaining Power shall not treat [refugees] as enemy aliens [... ]"

Refugees are a category of aliens which is singled out in the 1949 IV Geneva Convention for special mentioning as they have fled the country the nationals of which they continue to be, due to (fear of) persecution or because of certain events. The moment hostilities break out between their country of origin and the country of

159 Art. 132 1949 IV Geneva Convention.
160 Art. 27(4) 1949 IV Geneva Convention.
asylum/residence, their nationality will lead them to be considered as “enemy aliens”.

During the Second World War a number of belligerents passed legislation to exempt refugees from exceptional measures taken against enemy aliens, for instance, by setting up tribunals that distinguished between ‘real’ and ‘friendly’ (i.e. refugee) enemies.161

The 1951 Convention162 contains a similar provision as Art. 44 1949 IV Geneva Convention:

Art. 8 – Exemption from exceptional Measures

"With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign state, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this Article, shall, in appropriate cases, grant exemptions in favour of such refugees.”

"[...] exclusively on the basis of their nationality de jure of an enemy State [...]”

Jean Pictet (1958: 264) wrote in his Commentaire:

"The purely formal criterion of nationality must [...] be adjusted, for it rests on an essentially legal and technical conception, and the strict application of such a criterion would be in contradiction to human reality and contrary to justice and morality. When the [1949 IV Geneva Convention] stipulates that the position of an enemy alien must not be considered solely in the light of his legal nationality, it in fact invites belligerents to take into consideration a whole set of circumstances which may reveal what might be called the ‘spiritual affinity’ or ‘ideological allegiance’ of a protected person. A State must decide whether the application of security measures is justified or not on the basis of these data and not by applying the superficial criterion of nationality.”

"[...] refugees who do not, in fact, enjoy the protection of any government.”

At the time of the adoption of the Geneva Conventions in 1949 neither the 1950 Statute163 nor the 1951 Convention164 existed. There was, however, the

161 During the Diplomatic Conference the IRO provided an important input for including this Article in 1949 IV Geneva Convention; for a brief history of the treatment of refugees during the Second World War in certain Anglo-Saxon countries, see Pictet, 1958: 263.
162 See supra, Part I, International Refugee Law, Sources.
163 See supra, Part I, International Refugee Law, Sources.
164 Ibid.
Constitution of the IRO\textsuperscript{165} which included a definition of who was a refugee. The Diplomatic Conference decided not to include a definition - other than stating that a refugee is a person without state protection - as it was considered too technical and limited in scope for the purpose of the 1949 Geneva Convention (Pictet, 1958: 264).

The result is a need for a broad interpretation in the spirit of the 1949 Geneva Convention to the benefit of those "who do not, in fact, enjoy the protection of any government" (Art. 44).

Interestingly, Pakistan made a reservation regarding Art. 44:

"Reservation concerning Article 44 to the Convention: Every protected person who is a national de jure of an enemy State, against whom action is taken or sought to be taken under Article 41 by assignment of residence or internment, or in accordance with any law, on the ground of his being an enemy alien, shall be entitled to submit proofs to the Detaining Power, or as the case may be, to any appropriate Court or administrative board which may review his case, that he does not enjoy the protection of any enemy State, and full weight shall be given to this circumstance, if it is established whether with or without further enquiry by the Detaining Power, in deciding appropriate action, by way of an initial order or, as the case may be, by amendment thereof."

(ICRC, 2005)

Analysis of Article 45

Article 45 – VIII. Transfer to another power

"(4) Protected persons shall not be transferred to a Power which is not a party to the Convention.[…]

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.[…]"

"Protected persons shall not be transferred"

"Protected persons" have been defined earlier. A transfer is an individual or collective movement by the detaining power of protected persons to another state. It includes repatriation\textsuperscript{166} and the return of protected persons to their country of residence.

"[...] a Power which is not a party to the Convention."

Parties which are not party to the 1949 Geneva Convention are states which have not ratified/adhered to the 1949 Geneva Convention or which refuse to apply it. In South Asia, all the states under consideration are party to the 1949 IV Geneva

\textsuperscript{165} See supra, Part I, International Refugee Law, Genesis and Development.

\textsuperscript{166} See supra, Part I., International Refugee Law, Concepts.
"In no circumstances shall a protected person be transferred [...]"

The prohibition is absolute: it applies to all categories of protected persons and all countries at all times. Unlawful transfer of a protected person is a grave breach of the 1949 Geneva Convention and is subject to universal jurisdiction.167

"[...] to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."

This paragraph is a reference to the IL principle of non-refoulement, also known as 'the foundation stone of international protection'.168 In the previous paragraph it has been established that:

"(3) Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention."

Contracting parties have to respect and ensure respect for the 1949 Geneva Convention in all circumstances (Art. 1) and the detaining power has to make sure that the receiving power is willing and capable of applying 1949 IV Geneva Convention.

A contrario, if fundamental Human Rights are violated (Art. 27) and, for instance, the detaining power has serious indications that the receiving state is not treating certain groups of protected people (including refugees) in a non-discriminatory way, these people may not be transferred.169 Furthermore, if it were the case that they have already been transferred after which they were discriminated against or persecuted, the transferee power would have to return them at the request of the transferring party.170

SECTION III – OCCUPIED TERRITORIES

Occupation of territory during times of war is in essence a de facto situation

167 Arts. 146 and 147 1949 IV Geneva Convention, see note 429
169 The XVIth International Red Cross Conference requested the inclusion of this paragraph.
170 This would constitute the ultimate step for the transferring party to resume its conventional obligations; in practice other steps will have been taken beforehand such as oral complaints via diplomatic channels and the offer of assistance in case the transferee party is not capable of applying the 1949 Geneva Conventions (Pictet, 1958: 269).
with a temporary character, in other words, the occupied power cannot exercise its rights pro tempore – but it loses neither its sovereignty nor its statehood.\footnote{\textit{India, Rev. Mons. Monteiro v. State of Goa} (1969).} As far as occupied territories are concerned, we will limit ourselves to mentioning the first and a discussion of the second of two articles that specifically govern the situation of refugees.\footnote{Arts. 27 through 34 \textit{IV Geneva Convention} apply to both territories of the parties to the conflict and to the occupied territories and, hence, also protect refugees in the hands of the authorities of their state of origin when the latter has occupied their country of asylum. They stipulate, \textit{inter alia}, that refugees shall be treated humanely.} The first article is

\textbf{Art. 49 - Deportations, Transfers, Evacuations}

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuation may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated. […]

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

If the occupying power is the country of origin, refugees will be protected from forcible transfer in addition to the prohibition of arrest, prosecution, conviction and deportation, as mentioned below in Art. 70. The second article is a special clause that comes under the provisions for penal legislation to protect refugees (ICRC, 1983: 49-50).

\textit{Analysis of Article 70}

**Article 70 – VII. Offences committed before Occupation**

"Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with
the exception of breaches of the laws and customs of war. Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.”

The acts and opinions of refugees mentioned in the first paragraph include those contrary to the interests of the occupying party if they were committed and expressed prior to the occupation of their country of asylum/residence. However, were the Hague law, the 1949 Geneva Conventions and customary IL to be breached, arrest, prosecution and punishment at all times is not only allowed but mandatory.173

"Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State [...]"

The second paragraph of Art. 70 deals only with the situation of the nationals of the occupying power who had fled before the conflict to their country of asylum/residence now occupied. A contrario, it does not apply to other protected persons. Art. 70 (2) constitutes an exception in the sense that the 1949 Geneva Convention as a general rule does not interfere in the relationship between the state and its own nationals.174 In this case nationals “who have sought refuge” shall be protected i.e. those who, before the hostilities, had fled to the occupied territory, but were not recognised as refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or of residence.175 In the case of South Asia, there is no national legislation nor any international convention on refugees applicable.

"[...] shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities [...]"

The jurisdiction in penal matters of the occupying powers may only cover offences by refugees (a) which took place after the conflict started; and (b) which took place before the conflict and which would have justified extradition under the

173 Principle of universal jurisdiction in the case of war crimes, see note 429.
174 Apart from Part II (General Protection of Populations against certain consequences of war) 1949 IV Geneva Convention. Also cf. supra, Part I, Public International Law, Concepts.
175 See Art. 73 1977 I Protocol Additional.
Municipal Law of the occupied state in peace time.176

(a) Refugees may be subjected to arrest, prosecution, conviction and deportation if they indulge in offences going against the interests of the occupying state after the hostilities have broken out.177

"[...] or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace."178

(b) If in peace time extradition would have been warranted by the Municipal Law of the occupied state, ordinary criminal offences, committed before the hostilities began by persons in their country of origin who subsequently become refugees in the occupied territory, are a legitimate cause for arrest, deportation, prosecution and conviction by the occupying party as these common criminals would otherwise escape their punishment. This excludes politico-military offences by refugees as extradition legislation usually does not authorise extradition for these categories.178

The reference to “peace time” pre-empts a potential change by the occupying authorities of the municipal legislation of the occupied state subsequent to the occupation; in this respect, Art. 47 becomes relevant:

Art. 47 - Inviolability of Rights.
"Protected persons who are in occupied territory shall not be deprived, in any case or in any matter whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

The protection which the Municipal Law offered should not be denied after occupation.179 Under IL intervention and changes in the Constitution and legislation of an occupied territory are prohibited: the traditional role of the occupier in this respect was to be a “de facto administrator”.180 In any case, the outcome of such

176 See infra, Municipal Law.
177 Cf. Art. 2 1951 Convention: "Every refugee has duties towards the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."
178 See Articles on Exclusion from refugee status in 1950 Statute and 1951 Convention/1967 Protocol; Also cf. infra, Part III, Chapter 5, Standards of Treatment.
179 See also Art. 38 1949 IV Geneva Convention.
180 Art. 43 1907 Hague Regulations: “[The occupying authority shall respect], unless absolutely
changes should not entail a lower level of protection for the persons concerned and that is why the 1949 Geneva Convention must continue to be applied. 181

β) Which major 1949 IV Geneva Convention provisions offer a general protection to refugees qualitate qua civilians?

As mentioned above, there are two kinds of IHL provisions applicable: those rules applicable to refugees as civilians who fall under “protected persons” and those applicable to other refugees as civilians including nationals of the parties to the conflict.

A. Major 1949 IV Geneva Convention Articles applicable to refugees qualitate qua “protected persons”.

The following provisions under Part III apply to refugees as civilians and protected persons: 182

PART III

STATUS AND TREATMENT OF PROTECTED PERSONS

SECTION I – PROVISIONS COMMON TO THE TERRITORIES OF THE PARTIES TO THE CONFLICT AND TO OCCUPIED TERRITORIES

Art. 27: Respect for the rights of the person and non-discrimination in their protection and treatment which should be humane;
Art. 28: Prohibition to use protected persons to make points or areas immune from military operations;
Art. 30: Option to apply to protecting powers or relief organisations including to ICRC and the National RC/RC Society; 183
Art. 31: Prohibition of physical or moral coercion;
Art. 32: Prohibition to cause physical suffering;
Art. 33: Prohibition of collective punishment, intimidation, pillage and reprisals;
Art. 34: Prohibition of hostage taking.

The above Articles are applicable to refugees regardless of whether they find themselves in the hands of the state of residence or of refuge, or whether they are in the hands of the state of which they carry the nationality.

181 See Art. 7 (Special Agreements) 1949 IV Geneva Convention.
182 The description which follows the article number is more comprehensive than and does not correspond to the heading given in the 1949 IV Geneva Convention.
183 Refugees, as protected persons, may apply to the protecting power of the state of refuge. Alternatively, they may appeal to UNHCR. If that fails an application to any relief organisation would do in order to get assistance.

prevented, the laws in force in the country.”
SECTION II – ALIENS IN THE TERRITORY OF A PARTY TO THE CONFLICT

Art. 35: Right to leave the territory with personal luggage and review of the refused permission to leave;

Art. 38: Protected persons’ situation continues to be governed by provisions regarding aliens in peace time and they have the right to receive relief, health care, practice religion, move from dangerous areas, preferential treatment for mothers and young children;

Art. 39: Right to work or receive support and allowances;

Art. 41: Assigned residence or internment

It is clear that these rules apply as refugees may also be aliens within the territory of a party to the conflict. We elaborate elsewhere on Arts. 44 (Refugees) and 45 (Transfer to another Power).

SECTION III – OCCUPIED TERRITORIES

Art. 48: Right to leave;

Art. 49: Prohibition of mass transfers and deportations; 184

Art. 70: Offences committed before occupation 185

Section III has become entirely applicable in the case of refugees.

B. Major 1949 IV Geneva Convention provisions applicable to refugees qualitate qua civilians

PART II

GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR 186

Art. 14: Institution and recognition of hospital, safety zones and localities;

Art. 15: Establishment, position, administration, food supply and supervision of neutralised shelter zones;

Art. 16: Protection and respect for the wounded, sick and infirm and expectant mothers, and search for the killed and wounded;

Art. 17: Removal of wounded, sick, infirm, elderly, children and

184 Art. 49 in extenso, see supra.
185 For an analysis of Art. 70, see supra.
186 The 1899/1907 Hague Conferences lie at the basis of the international legal rules to limit the conduct of hostilities. Some of them have become part of customary IL and are mentioned in Part IV 1977 I-II Protocols Additional (see 1977 I Protocol Additional). Part II 1949 IV Geneva Convention equally provides protection of refugees against the effects of hostilities. The description which follows the article number is more comprehensive than and does not correspond to the heading given in the 1949 IV Geneva Convention.
maternity cases, and passage of religious ministers, medical personnel and equipment;
Art. 23: Free passage of medical supplies, religious objects, food, clothing and tonics for children and mothers;
Art. 24: Maintenance, religious exercise and education of orphaned and separated children under fifteen, and identification of children under twelve;
Art. 25: Correspondence of personal news to/from the family;
Art. 26: Contact with separated family members;

PART III
STATUS AND TREATMENT OF PROTECTED PERSONS
SECTION III – OCCUPIED TERRITORIES

Art. 55: Duty to supply food and medical stores;
Art. 59: Facilitation, passage and protection of relief Articles such as food, medical supplies and clothing;
Art. 60: Responsibility of the occupying power;
Art. 61: Distribution and free transit of the relief consignments;
Art. 62: Reception of individual relief consignments;

SECTION IV – REGULATIONS FOR THE TREATMENT OF INTERNEES
CHAPTER VIII – RELATIONS WITH THE EXTERIOR

Art. 108: Reception of individual and collective relief shipments;
Art. 109: Regulations concerning collective relief;
Art. 110: Exemption from import, custom and postal charges for relief shipments;
Art. 111: Transport of mail and relief Shipments and safe-conducts;

In the 1949 IV Geneva Convention there are extensive provisions related to repatriation. Details as far as the method of repatriation is concerned are mentioned in Art. 36:

SECTION II – ALIENS IN THE TERRITORY OF A PARTY TO THE CONFLICT

"Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connections therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.
The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and

187 See also supra, Art. 6 (4).
The transfer to another Power is stipulated in the following provisions:

Article 45(1)(2):
"Protected persons shall not be transferred to a Power which is not a party to the Convention."

"This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities."

There exists a detailed regulation as far as the valuables and personal effects of repatriates are concerned:

CHAPTER VI – PERSONAL PROPERTY
AND FINANCIAL RESOURCES

Article 97(5):
"On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt."

The conditions in which protected persons including refugees are repatriated should not compound their already difficult situation:

CHAPTER X – TRANSFERS OF INTERNEES

Article 127(5):
"When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes."

During the course of the armed conflict or occupation repatriation may take place with special care for, among other protected persons, women and children:

CHAPTER XII – RELEASE,
REPatriation AND
ACCOMMODATION IN NEUTRAL COUNTRIES

Article 132(2):
"The parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in
a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.”

The repatriation and return of all internees is provided for after the armed conflict is over:

Article 134:
"The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation."

The expense for the repatriation shall be born by the Detaining Power unless the internee opts for spontaneous repatriation:

Article 135(2)(4):
"Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the costs of repatriation of an internee who was interned at his own request."

"The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands."

SECTIO N V – INFORMATION
BUREAUX AND CENTRAL AGENCY

At the start of the hostilities and occupation an office to receive and transmit information with respect to protected persons shall be established:

Article 136(2):
"Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths."

The personal valuables of the repatriates must be forwarded:

Article 139:
"Each national Information Bureau shall, furthermore, be responsible
for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency.[...]

Art. 140: Creation, function and funding of a Central Information Agency

There is an important final provision in the 1949 IV Geneva Convention on the right of the contracting Parties to denounce this Convention and the relation with repatriation:

Article 158(3):
"The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated."

PART IV
EXECUTION OF THE CONVENTION

SECTION I – GENERAL PROVISIONS

Art. 142: Constitution of relief societies and organisations;
Art. 143 - Supervision
"Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work." [...
"The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. [...]"

This article is the legal basis on which the ICRC has the right to visit protected persons including assisting refugees.

Art. 147 - Grave Breaches
"Grave breaches [...] shall be those involving any of the following acts, if committed against persons [...] protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages [...]

Breaches of Arts. 45 (Transfer to another Power) and 49 (Deportations,
Transfers, Evacuations)\textsuperscript{188} \textit{1949 IV Geneva Convention} come under the crime of "[u]nlawful deportation or transfer". The ICTY\textsuperscript{189} considered Art. 49 \textit{1949 IV Geneva Convention}, Art. 85 Additional Protocol I and Art. 17 Additional Protocol II and established that they

"prohibit forced movement within the context of both internal and international armed conflicts" (Prosecutor v. Milorad Krnojelac, 2003: Paras. 220-222)

After this overview of the applicability of IHL in South Asia, we will turn to IRL and its implications for the region, starting with some arguments why the states under consideration may see obstacles in acceding to the \textit{1951 Convention/1967 Protocol}.

3.3.3. International Refugee Law

3.3.3.1. Obstacles to accede to the \textit{1951 Convention and/or 1967 Protocol}

Why did South Asian states not accede to the \textit{1951 Convention} and/or the \textit{1967 Protocol}? And why is acceding to these treaties so important, is it an end or a means to an end?

In 2005 in Asia-Pacific only one third of the states (20/58) are parties to the \textit{1951 Convention} as compared to 52/53 in Africa, 45/46 in Europe, and 24/36 in the Americas. Of the total of 146 state parties only 102 had national asylum procedures. Jordan, Lebanon and Thailand are other Asian states who are members of the Excom without having acceded to the \textit{1951 Convention}. Acceding to the \textit{1951 Convention} is not a prerequisite for a national law and vice versa.

Apart from several general reasons such as ignorance on behalf of the decision makers and legislators or reluctance by bureaucrats, the specific motives indicated by the South Asian governments for not acceding to these international instruments are manifold: some point to the Eurocentric definition of who constitutes a refugee\textsuperscript{190} or to the lack of international burden-sharing,\textsuperscript{191} others claim that the rights regime for the refugees as stipulated in these instruments is inappropriate for South Asian

\textsuperscript{188} See supra.
\textsuperscript{189} See supra, Part I, Public International Law, Introduction.
\textsuperscript{190} See supra, Part I, International Refugee Law, Sources.
\textsuperscript{191} See infra, Part III, Chapter 4, International Co-operation.
conditions,\textsuperscript{192} or that the socio-economic situations of the own population is not yet satisfactory\textsuperscript{193} and therefore it is not yet appropriate to submit to an international obligation of having to offer refugees a certain minimum treatment. Finally there is the argument that if India does not accede, other states would not either. It is clear, however, that the powers that be would like to have as much liberty of action as possible in refugee related issues predicated upon political and security considerations.

As we mentioned in Part I, the period 1948-50 is vital to be able to understand the attitude of the newly independent South Asian states vis-à-vis the IRR which was being conceived at the time. The mandate of the International Refugee Organisation (IRO) was about to wind up and the international community was in the process of negotiating the post-World War II refugee regime.

Several states pleaded for an international protection framework, including the establishment of a new organisation, based on a narrow definition of a refugee. Other states wanted to cast the net wider. Since India and Pakistan were still reeling under the Partition influx, the category of population transfer refugees was also being discussed. However, for the US Mrs Roosevelt stated that these refugees could claim rights from their countries of residence and were, as a consequence, not in need of international protection. The UK proposed a refugee definition that would cover persons in need of assistance but without protection, but the US rebutted by saying that refugees in India and Pakistan were able to enjoy the rights of the nationals of those countries and that any forms of assistance had to be discussed directly with the governments concerned instead of becoming part of the competence of the future High Commissioner for Refugees (GAOR,1950: Paras. 34-6).

In short, the representatives of states such as Germany,\textsuperscript{194} Greece,\textsuperscript{195} India, Pakistan, and Turkey\textsuperscript{196} which at the time had to care for large groups of refugees caused by population transfers, were given short shrift by the remainder of the international community who claimed that theirs was not considered to be an international problem.

The 'Travaux Préparatoires' of the 1951 Convention give a rare insight in the

\textsuperscript{192} See infra, Part III, Chapter 5, Standards of Treatment.
\textsuperscript{193} See infra, Part III, Chapter 4, Obstacles to a Regional Regime.
\textsuperscript{194} See supra, Part I, International Refugee Law, Genesis and Development.
\textsuperscript{195} Ibid.
\textsuperscript{196} Ibid.
background discussions at the time of the drafting of that Convention. Of special interest are the comments of the Delegations of India and of Pakistan - no other states from South Asia were involved in the discussions - on the Study of the Ad hoc Committee on Statelessness and Related Problems which was doing the preparatory work for the 1951 Convention.

At the beginning of the series of discussions about the new refugee convention, M. Desai (India) stated that India accepted during the war 6,000 European refugees and 4,000 were permitted to stay indefinitely while four lakhs Asians were granted asylum. He added that India was

"fully prepared to co-operate in the drafting of conventions for the legal protection of refugees, provided they were consistent with its own national citizenship laws [...]" (ECOSOC, 1949: Vol. I, 99)

By the end of the discussions, M. Brahi (Pakistan) declared that Pakistan could not accept the definition of the term 'refugee' in the draft Convention as it covered only European refugees and

"completely ignored refugees from other parts of the world" (ECOSOC, 1950: Vol. II, 6)

This was the end of the involvement of South Asia in the preparation and adoption of the 1951 Convention and the main historical reason why no state of the region became a party to the Convention from its inception.

We have already referred to the main features of the emergence of the IRR, two of which were of particular importance as obstacles for South Asian states to join.

Cold War influence and post-Cold War shifts in the IRR

The core of the IRR to recognise refugees was biased pro persons with pro western convictions who, by their fleeing to the West, served as propaganda to expose communism. The 1967 Protocol lifting the temporal and/or geographical limitations did not change anything about its restrictive refugee definition which remained identical to the 1951 Convention.

The 1951 Convention/1967 Protocol definition of a refugee points to a fear of persecution the grounds for which focus on political and civil Human Rights. The

197 It contains all the UN meetings, GA Resolutions, Resolutions of the Commission on Human Rights, the Summary Records of the ECOSOC prior to the adoption of the 1951 Convention.
purpose of focussing on these rather than on economic, social and cultural rights was the weakness of communist states in granting the former rights, whereas the socio-economic rights were the weakness of the western states.

Chimni (1993) posits that after the Cold War the developed countries have a vested interest in keeping the increasing number of refugees out of and away from their territories as they do not serve any geopolitical or ideological purpose anymore. These countries, however, are not inclined to share the burden of the developing host states, some of which like in South Asia belong to the poorest of the world. The ‘solution’ of assistance in the region is also bound to re-emerge as the advantages for the developed states are legion: official arguments claim that refugees themselves prefer to remain as closely as possible to their homes, that refugees must be able to return as soon as possible, that allowing refugees to flee is actually helping ethnic cleansing, that UNHCR does not want the refugees to leave the region etc. Other arguments include that a regional ‘solution’ is cheaper than reception, assistance and asylum claims processing in the developed world, there is no need of issuing temporary or permanent residence permits, there is no legal aid and scrutiny by western Human Rights organisations or activists, and the problem of removal is non-extant. Instead, poorer countries and a number of international organisations become - often for a protracted period of time - responsible for the refugee problems and costs. The region is subsequently surrounded by a cordon sanitaire consisting of international peacekeeping or police forces which contain the flow. The option of claiming asylum is fast fading, instead temporary protection is granted in reception camps also known as ‘internationally protected areas’ which simultaneously serve the double purpose of deterrence and that ‘spontaneous’ asylum seekers who do reach the developed territories may be sent back to these areas. A long-term consequence of this ‘solution’ may very well be the creation of what a critic termed ‘permanent refugee states’ (Intergovernmental Consultations: 1994; 1995).

In the post-Cold War period, the UNHCR has also shifted its focus towards more preventive protection (“containment”) inside the country of origin and to repatriation of those who have left. This constitutes a threat to the fundamental principles of refugee protection: the right to flee, to seek asylum and not to be subjected to refoulement.

Eurocentric

The definition of a refugee according to the 1951 Convention was limited in
space: events occurring only in Europe. At the same time it was limited in time: pre 1 January 1951 events. In the opinion of some observers, the purpose of this double limitation was burden-shifting off European shoulders: all UN member states were called upon to help to resettle war/political refugees. This was a way to encourage refugees to go beyond Europe.

At the time of the 1951 Convention negotiations the insistence of India and Pakistan in the GA to delete the geographical limitation was rebuffed when it was remarked by a western representative at the Conference of Plenipotentiaries that:

"although more than eighty invitations had been sent out, the Conference [where the 1951 Convention would be adopted] gave the appearance of nothing more than a 'slightly enlarged' meeting of the Council of Europe. [The French representative] observed that only a small fraction of the forty-one governments that had voted for art. 1 in the General Assembly had been willing to come to Geneva to sign the Convention and nearly all were European. In his view, those who argued for deletion of the geographical limitation, 'had done so without any feeling of definite responsibility'. The system of generalised protection had failed; because the non-European countries were absent and because of the attitudes of the immigration countries (they claimed to have no protection problems), there was no practical possibility of 'giving refugees in general, and European refugees in particular, a truly international status'.

Another obstacle for South Asian states to accede to the 1951 Convention/1967 Protocol is the non-discrimination provision in both instruments:

"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." (Art. 3)

It will become clear from our examination of the refugee situation in South Asian countries of asylum that they do not treat all refugees equally, hence, this provision may prove to be problematic.

Another potential obstacle is the supervisory provision of the 1951 Convention/1967 Protocol:

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199 Art. B (b) 1951 Convention gives the option to state parties to make a declaration at the time of signature, ratification or accession that they understand "events occurring before 1 January 1951" as "events occurring in Europe or elsewhere before 1 January 1951" but very few state parties did this.

200 Participants in the Conference were: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, the Federal Republic of Germany, Greece, the Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, the Netherlands, Norway, Sweden, Switzerland (also representing Liechtenstein), Turkey, the United Kingdom, the United States of America, Venezuela and Yugoslavia. The observers were: Cuba, Iran. UN doc. A/CONF.2/SR.3, para. 12, cited in Goodwin-Gill and McAdam, 2007: 36.
"The Contracting States undertake to co-operate with the [UNHCR] and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” (Art. 35(1) 1951 Convention and Art. II(1) 1967 Protocol)\textsuperscript{201}

Although there is no mention in these instruments about the refugee status determination procedure to be established by the state parties, if and when a South Asian state decides to accede to the \textit{1951 Convention} and/or the \textit{1967 Protocol} it will be admonished to institute such a procedure and the UNHCR (or any other UN organisation that may succeed it) will have to be involved directly or indirectly in the refugee status determination by that state (UNHCR, 1992: III).\textsuperscript{202} The fact that in

\textsuperscript{201} See also Art. 8(a) \textit{1950 Statute}.

\textsuperscript{202} For the potential impact of this provision in the case of the adoption of a national law, see \textit{infra}, Part III, Chapter 5, Status Determination Procedure. The world’s first status determination procedure set up under the \textit{1951 Convention} took place in Belgium. Interestingly, the UNHCR lobbied heavily to be the only authority to determine the status of refugees. The Belgian Ministry of Justice was eager to have the full say in the recognition procedure of refugees, however, in 1952 Parliament decided first that this would be done in the same way as refugees were recognised in the 1930s: by a commission chosen by the Minister of Justice but consisting of a magistrate, a barrister and a representative of the Red Cross. The refugee could choose his or her counsel. The government agreed to the commission set up, but degraded its decisions to advisory, thereby laying the autonomous power to decide the recognition in the hands of the Minister of Justice. As soon as the UNHCR was established it was not only seeking a seat in the Advisory Commission for Aliens, but even exercised strong international pressure to get the exclusive competence of refugee recognition for Belgium was about to create a precedent as the first country that instituted a status determination procedure. High Commissioner Van Heuven Goedhart insisted with the Belgian delegation that the UNHCR should not have to share this competence with the Ministry of Justice as “\textsc{une pareille situation est de nature à compromettre gravement son crédit auprès des gouvernments étrangers.}” (“Such a situation is of a character to heavily compromise his credit with foreign governments.”, PVW’s translation). (9\textsuperscript{th} session of the General Council and 2\textsuperscript{nd} session of the EXCOM) The Ministry of External Affairs agreed to hand over this sovereign competence to an international organisation, but the Ministry of Justice opposed this. Due to the importance of the Minister of External Affairs in the Belgian government, the 1952 Act gave both the UNHCR and the Minister of Justice the competence to recognise, but with a priority to the former - if, however, refugees wanted a purely Belgian decision, their claim would be decided only by the Minister of Justice. The acceptance of this transfer of sovereignty was voted with a great majority in both the Lower and the Higher Houses of Parliament, in both cases only the Communist Party voted against. At that time if a refugee constituted a threat to national security, the \textit{ordre public} or the economy, s/he was expelled. The UNHCR as well as the communist and socialist parties protested against a bad economic situation as a ground to expel refugees. In 1964 an Act removed in effect for Belgium the temporary limit of the \textit{1951 Convention}. Now the 1952 rivalry about the competence of recognition re-emerged between the Ministry of Justice and UNHCR. The Ministry of External Affairs, once again, supported the UNHCR, because a recognition procedure run by the UNHCR would exempt the Belgian government from judging other governments and, moreover, this would avoid a situation with two kinds of refugees, one recognised by UNHCR and one by Belgium. The Ministry of Justice’s main argument to have a pure Belgian procedure was to be able to expel potentially risky individuals posing a threat to the \textit{ordre public}. The government decided that recognising claims falling outside the scope of the \textit{1951 Convention} would be a competence of the Minister of Justice. In 1967 the Protocol was adopted in the UN and on grounds of security the Ministry of Justice made its objections against the ratification and against a UNHCR-run determination procedure known. However, in 1969, when the \textit{1967 Protocol} was ratified, the UNHCR, once again, determined all the claims. In the 1980s new Acts were adopted significantly weakening the possibilities of aliens to get legal access to and stay on the territory in general and the position of asylum seekers in particular. In 1987 the UNHCR requested to be relieved of the competence to determine the refugee status and it was handed over to the Commissioner of Refugees and Stateless under the Ministry of
such case there will be different procedures of determination may lead to a difference in outcome between the status of a person determined by the state and the status of the same person as determined by UNHCR.203

If the settlement of disputes between state parties to the 1951 Convention turns out to be an obstacle because it has to be settled through the ICIJ, accession to the 1967 Protocol instead with the appropriate reservation could be considered.

The 1951 Convention/1967 Protocol refugee status criteria for the definition of a refugee are strongly focussed on the individual. The refugee experiences of South Asia, like Africa and Latin-America, have been predominantly with great numbers of asylum-seekers crossing the borders. In such a case, making the necessary arrangements for a person by person examination of a well-founded fear of persecution is nigh impossible.

A further obstacle is that the 1951 Convention/1967 Protocol, or for that matter any treaty, is not self-applying and, hence, the significance of the terminology used, unless specifically defined in the treaty concerned, is not straight forward and terms such as ‘persecution’204 or ‘refouler’205 need to be interpreted.

Furthermore, the interpretation of a number of concepts such as the grounds for persecution have become increasingly loose or are in the process of being developed progressively. Even though the 1969 CVLT offers some guidelines for interpretation,206 this will inevitably lead to different results from refugee case to case and from state to state. The 1951 Convention/1967 Protocol concepts will also inevitably be interpreted in the light of the social mores of a particular country, leading to even bigger differences between states, for instance, in the West the characteristics of the group under the “Membership of a particular social group” (Art. 1A(2) 1951 Convention) persecution ground may include women,207 gays208 and

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203 See infra, Chapter 5, Status Determination Procedure.
206 Art. 31(1): “[...] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Art. 31(2) elucidates that ’context’ “for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”
207 Some Pakistani women had faced domestic violence after being accused of adultery and claimed and got asylum in the United Kingdom for reasons of being left by their husbands, being without male protection and being ostracised by the community. It was judged that the danger they would be
Moreover, in the process of interpretation, it is important that newly acceding state parties are aware that all subsequent agreements and/or practice between the parties have to be taken into consideration.\textsuperscript{209} These may be derived from diplomatic actions by states inclusive of

"the adoption or promulgation of unilateral interpretative declarations; and at the national level, in the promulgation of laws and the implementation of policies and practices." (Goodwin-Gill and McAdam, 2007: 8).

A major function of a treaty like the 1951 Convention is a warranty against arbitrary changes of national legislation. However, the 1951 Convention itself may become an element of arbitrariness in that states which have acceded to it may be declared "safe third countries" by other states, whereby refugees could be rejected on that very basis in the latter and be sent back to the former, eventually leading to chain deportations.

Of course, any state deciding to accede to the 1951 Convention/1967 Protocol is free to make declarations and reservations for those provisions in the instruments that the state objects to, provided that reservation is permitted.\textsuperscript{210}

3.3.4. Transformation of International into Municipal Law

As we have seen, several branches of IL deal with the treatment of persons such as aliens including refugees. We have also touched upon the role regarding refugees of the Executive, the Legislature and Judiciary: implementing, conceiving and reviewing laws and regulations. Let us now take a look at where IL and domestic law converge.

The situation in South Asian states as far as the incorporation of international legal provisions into municipal law is concerned (Rao, 1993) allows for the existence of a duality: on the one hand a state may decide to sign and ratify a treaty, on the other hand, the same state does this in the full knowledge that the provisions of this treaty are not (all) directly enforceable by its courts at the domestic level.

exposed to when returned, was tolerated or even sanctioned by Pakistan as a state (Islam v. Secretary of State for the Home Department, 1999).

\textsuperscript{208} Gays from South Asia have been granted asylum in the West on grounds of discrimination.

\textsuperscript{209} And Art. 31(3) 1969 CVLT adds "any relevant rules of International Law applicable in the relations between the parties" which have to be taken into account.

\textsuperscript{210} Arts. 1; 3; 4; 16(1); 33; 36-46 1951 Convention are immune from reservations.
As we have mentioned earlier, it is the Executive that is in charge of the signing of treaties, however, the follow-up of this act for legal effect within the jurisdiction of the state does no longer pertain to the Executive. The 1949 Geneva Conventions, for instance, have only become directly enforceable at the domestic level after they were incorporated into the municipal legislation. This took place through the adoption by Parliament of special legislation. 211

However, forces within the state may decide - for a number of reasons, including public relations at the international level - that some treaties would be signed without any follow-up to give their provisions legal effect. The Legislature may also decide, for whatever political reason, not to heed the Executive’s initiative of signing a treaty by postponing or rejecting the enabling of a treaty through the adoption of a Parliamentary Act.

The role of the Judiciary is double: it is part of the checks and balances vis-à-vis the Executive and the Legislature, but in legal cases it may take initiative regarding the interpretation of existing international legal provisions. In case the Executive has signed a treaty, but this treaty or its provisions have not been duly incorporated into the domestic legal system - no enabling Act having been adopted by the Legislature - the Judiciary is not in a position to play its full role of checks and balances as far as the state's international obligations are concerned.

The Judiciary may take the initiative to refer to international legal provisions and ‘read in’ these provisions in a particular case if and when this is not contradictory or inconsistent with domestic legal provisions and there exists no legal remedy in municipal legislation. 212

In India, the Constitution admonishes the state to

"foster respect for International Law and treaty obligations" (Art. 51(c)) 213

The Supreme Court has ruled that

"rules of International Law may be accommodated in the municipal

212 See also Part III, Chapter 4, Implementation of International Human Rights Norms.
law even without express legislative sanction” (Gramophone Co. Of India Ltd. v. Birendra Bahadur Pandey, 1984: 671)

But in case of a conflict between Municipal and International Law, the former overrides the latter (Gramophone Co. Of India Ltd. v. Birendra Bahadur Pandey, 1984: 671). Nevertheless,

"the courts are under an obligation within legitimate limits, to interpret the municipal statute so as to avoid confrontation with the community of nations, or well-established principles of International Law” (Gramophone Co. Of India Ltd. v. Birendra Bahadur Pandey, 1984: 671)

Unless a specific enabling Act has been adopted, this is the position in South Asia regarding all the IL instruments discussed earlier.

3.4. Municipal Law

Under which laws are refugees considered? For instance, immigration legislation: what is de jure stipulated about the discretion over who is admitted?; are there different categories of ‘illegal immigrants’?; is extradition law relevant in case of political refugees?; what are the measures provided for by the legislation in case of illegal entries (deportation, punishments,…); permanent resident status is granted after how many years?; is it depending upon the target group?; are work or dependants’ passes issued? What does the case law teach us?

3.4.1. Constitution

In all the South Asian states considered the Constitution contains a number of fundamental rights which are not only applicable to the citizens, but to all persons within the jurisdiction of that state, which therefore includes asylum-seekers and refugees. The fundamental rights provision that has most often been invoked before courts by litigants is that on the right to life and liberty of the person.214 The scope of these articles may be expanded when the Judiciary decides to read international legal provisions into the Constitutional provisions.

3.4.2. Legislation

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214 See, for instance, infra, Part III, Chapter 5, Standards of Treatment.
3.4.2.1. Partition related Acts

With a view to rehabilitating the uprooted people, a number of Acts had
been adopted since 1948 regarding the legacy of Partition:

The 1948 Rehabilitation Finance Administration Act

In this Act a “displaced person” was defined as:

"(i) a person who, being displaced from any area (now forming part of
Pakistan) on account of civil disturbances or fear of such disturbances,
has settled and is engaged or intends to engage in any business or
industry in India, or
(ii) a person in India who, having had his business, industry or
property, wholly or partially (in any area now forming part of
Pakistan) has lost wholly or partially, such business, industry, or
property on account of civil disturbances or the fear of such
disturbances, and who is engaged, or intends to engage in any
business or industry in India."

Interestingly, this individualised definition casts a very wide net as regards the
recognised reasons for the displacement, which may include fear of the actions of
private people as well as officials; there is no mention of persecution and/or lack of
protection by the authorities of the place of origin.

This Act established a Rehabilitation Finance Administration for the purpose
of financial assistance to displace persons so as to facilitate their settling in business
or industry.

The 1950 Displaced Persons (Claims) Act

This Act came into being for the registration and verification of claims of
displaced persons with respect to their immovable property in Pakistan.

The 1949 Abducted Persons (Recovery and Restoration) Act

The recovery and rehabilitation of abducted family members to their own
families was provided for by this Act.

215 The rehabilitation effort after Partition was needed on a massive scale. Relatively little officially
published material is available on that episode right after Partition. One book treating this subject is
Saksena (1961). It describes what the conditions in the camps in the east were (the largest camp
contained 70,000 refugees from East Pakistan), what the rehabilitation policy of the government
consisted of, the role of the United Central Refugee Council, how the administration of the
rehabilitation was tackled, the patterns of expenditure on relief for East and West Pakistan refugees and
the arrangements made for housing, employment, education of refugees.
The 1950 Administration of Evacuee Property Act and the 1951 Evacuee Interest (Separation) Act

The property of millions of uprooted people had to be administered on both sides, hence, the adoption of these two Acts.

The 1951 Displaced Persons (Debts Adjustment) Act

The adjustment and settlement of debts accumulated and due by the displaced persons was taken care of by this Act.

The 1954 Transfer of Evacuee Deposits Act

This Act was meant for the transfer of deposits by the displaced persons.

The 1954 Displaced Persons (Compensations and Rehabilitation) Act

Seven years after Partition, compensation and rehabilitation grants were paid to displaced persons under this Act. This was the last year that a piece of legislation was adopted, others being: the 1948 Displaced Persons (Institutions of Suits) Act; the 1949 Displaced Persons (Legal Proceedings) Act; the 1949 Influx from Pakistan (Control) Act; the 1952 Influx from Pakistan (Control) Repealing Act; and the 1954 Displaced Persons (Claims) Supplementary Act.

In the framework of the above legislation, administrative measures were taken for the short and long term needs of the refugees. Furthermore, a central Ministry was heading the implementation of these Refugee Laws. The uprooted who resettled on the other side of the border were eventually given citizenship and integrated themselves in their new communities.216

3.4.2.2. Aliens and Immigration Acts

Since there is currently no specific Act on refugees in any of the South Asian states,217 other Acts are applicable to refugees qualitate qua aliens. The Acts specifically applicable to refugees as foreigners may be divided into, on the one hand, Aliens and Immigration laws, and, on the other, citizenship laws. Before we will discuss these Acts, it is also important to refer to some other Acts which are indirectly

216 Elahi (1998) estimates the number of Muslim refugees who fled from India due to communal and anti-Bengali tensions into Bangladesh after Partition until the 1980s at between eight and fifteen thousand.
relevant to refugees.

In India the 1993 Protection of Human Rights Act, was the foundation for the establishment of the National Human Rights Commission, which was later followed by the decision in various states to establish their own state Human Rights commissions.\textsuperscript{218}

The first Immigration and Aliens laws in the Subcontinent are more than one and a half century old.\textsuperscript{219} The legislation currently applicable may be grouped as follows:

The 1920 Passport (Entry into India) Act

This Act empowers the government to oblige foreigners to carry a passport for entry.

The 1939 Registration of Foreigners Act\textsuperscript{220}

This Act contains the provisions for the registration of aliens who enter, are present and leave the territory.

The 1946 Foreigners Act\textsuperscript{221}

This Act empowers the government concerning the entry, presence and departure of aliens. For instance, in India the Ministry of Home Affairs' issuing Refugee Certificates\textsuperscript{222} takes place under the provisions of Section 3 The 1946 Foreigners Act.

The Acts of 1939 and 1946 are skeleton laws, which means that a very extensive margin of appreciation is granted to the government to make Orders or

\textsuperscript{217} See infra, Part III, Chapter 5, National Law.
\textsuperscript{218} For a discussion of the Statute, functions, and powers as well as refugee cases before NHRC or state Human Rights commissions, see supra, Institutions.
\textsuperscript{219} The first legislation dealing with the legal treatment of aliens in India dates back to the 1864 Foreigners Act.
\textsuperscript{220} Adopted together with the 1939 Registration of Foreigners Rules. During World War II, the 1939 Foreigners Ordinance, the Foreigners Order and the Enemy Foreigners Order were adopted. The first became the 1940 Foreigners Act the validity of which was extended up to 25 March 1947. Under this Act the definition of an alien was changed so as to exclude from the definition (i) "any ruler or subject of any Indian State" (ii) "any native of tribal area". These two provisions would be maintained in the 1946 Foreigners Act.
\textsuperscript{221} After consultation with the provincial governments, this act was passed on 23 November along the lines of the 1940 Foreigners Act. Together with the 1948 Foreigners Order this constitutes the law for the treatment of aliens. The 1957 Foreigners Laws (Amendment) Act introduced the definition of a foreigner in the 1946 Foreigners Act and the 1939 Registration of Foreigners Act.
\textsuperscript{222} See supra, Institutions, Ministry of Home Affairs.
Rules under these Acts. These Orders or Rules themselves leave very wide powers to the executive/administrative authorities. The framework for this wide ranging legislation and wide discretion of the administration are the standards and policy laid down for guiding the administration.

The 1967 Passports Act

This Act deals predominantly with the issuance of passports and travel documents for the departure of Indian citizens, but where necessary also applied to non-citizens.

The term ‘alien’ is mentioned both in the Constitution (Arts. 22(3), entry 17, List I, Schedule 7) and in various Acts (Sec. 83 Civil Procedure Code; Sec. 3(2)(b) 1955 Citizen Act; 1918 Bengal (Aliens) Disqualification Act; 1918 Bombay Disqualification of Aliens Act).

However, there is no definition in the legislation. This may be because under international and common law it is clear that an alien is a person who is not a citizen/national of a particular state: the term ‘foreigner’ is used interchangeably with ‘alien’ and means “a person who is not a citizen of India” (Sec. 2(a) 1946 Foreigners Act; 1948 Foreigners Order; 1957 Foreigners (Exemption) Order; 1939 Registration of Foreigners Act; 1939 Registration of Foreigners Rules; and 1957 Registration of Foreigners (Exemption) Order). Whether a person is a citizen or not is determined by the Constitution (Arts. 5 to 11 and entry 17 of List I, Schedule 7 read with Art. 246) and the Citizenship Act 1955.

The legislation relating to foreigners did and does not apply to all aliens in a uniform way. Until the 1980s refugees who were citizens of any Commonwealth state were exempt from the provisions of the 1948 Foreigners Act and the 1948 Foreigners Order as well as the 1939 Registration of Foreigners Rules. The rules for Pakistanis and Chinese nationals are also different from other foreigners and when crossing the border with India, citizens from Nepal and Bhutan have a privileged ‘most favoured nation’ status. Certain categories of non-citizens including

223 See infra, Policy.
224 This Act is accompanied by the 1956 Citizenship Rules, see infra.
225 Until 18 June 1984, see Gazette of India, Extraordinary, Part II sec. 3 subsec. (ii), 16 June 1984.
226 See 1957 Foreigners (Exemption) Order and the 1957 Registration of Foreigners (Exemption) Order.
227 This is due to the provisions of the India-Nepal Peace and Friendship Treaty (1950) and India-Bhutan Friendship Treaty (1949).
refugees enjoy a number of privileges not attributed to others, for instance aliens of Indian origin are eligible for certain public services not available to others.\textsuperscript{228}

The 1972 \textit{Foreigners from Uganda Order}

In the beginning of the 1970s President Idi Amin Dada expelled all persons of South Asian descent from Uganda, some of whom came to their countries of origin in the Subcontinent. Thousands arrived in India and settled in different parts. However, later many of them left for England or returned to Uganda after the humanitarian intervention by Tanzania in 1979 that overthrew Idi Amin.

A number of other laws also touch upon foreigners' matters: The 1961 \textit{Foreign Award (Recognition and Enforcement) Act}; the 1976 \textit{Foreign Contribution (Regulation) Act}; the 1973 \textit{Foreign Exchange Regulation Act}; and the 1947 \textit{Foreign Jurisdiction Act}. Earlier Migrant Acts had been adopted in which 'illegal migrants' had been defined.\textsuperscript{229}

\textbf{3.4.2.3. Extradition and Carrier Liability Acts}

India has also concluded a number of agreements with other states regarding extradition:

The 1946 \textit{Foreigners Act}

The third chapter of this Act contains extradition agreements with Papua New Guinea, Russia, Singapore, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Uganda, the United Arab Emirates, the United Kingdom, and the United States of America.

\textit{The 1962 Extradition Act}

This act contains extradition agreements with Australia, Belgium, Bhutan, Canada, Fiji, and Nepal.\textsuperscript{230}

The 2001 \textit{Carrier Liability Act}

Some national Aliens Acts additionally demand that carriers check whether aliens dispose of sufficient means of existence, whether they can show documents in support of the aim and conditions of their stay, and whether they may not threaten the \textit{ordre public}, and carriers are also sanctioned in case of illegal aliens who do not try to

\textsuperscript{228} See \textit{infra}, Part III, Chapter 5, Standards of Treatment.

\textsuperscript{229} See \textit{infra}, Practice, Illegal Immigrants.
stay, but transit the territory. Carrier liability means, in effect, a privatisation of the border control function of the state authorities: carriers are obliged to check whether every alien possesses the required travel documents (several airlines ‘borrow’ immigration officials from the country of destination to assist during check in) and those who do not must be repatriated or brought to a country for which valid travel documents are available. Moreover, carrier sanctions are slapped on carriers bringing in persons without the required travel documents. There has been strong criticism because henceforth many asylum seekers may no longer migrate since they may not be able to obtain official travel documents and carrier checks may thus imply an infringement of the principle that refugees fleeing their country of origin have to get access to the asylum procedure (Cruz, 1994).

What all the above Acts have in common is that they do not make a distinction whatsoever between aliens on the one hand and asylum-seekers or refugees on the other. The Acts govern the entry, stay and departure of all foreigners including refugees. In order to have access to the territory of a state, the required valid travel documents, including passports, also come under these Acts.

3.4.2.4. Citizenship Acts

The Citizenship provisions in India are contained in the following texts:

The 1955 Citizenship Act and the 1956 Citizenship Rules

Citizenship may be obtained through naturalisation or through registration. Naturalisation is governed by Section 6(1) of the 1955 Citizenship Act. Registration is regulated by Section 5(1) of the 1955 Citizenship Act. The system used for citizenship is not according to the principle of *jus soli*, but on the contrary, *jus sanguinis*, which means that refugee children born in India do not get citizenship, but if one of the parents has Indian citizenship, the child is eligible for citizenship. 231

Anyone, whether an alien or a stateless person, may become a citizen if s/he is eighteen years old, with a sound mind and a good character and after a minimum period of stay. However, special consideration is given to PIOs for granting naturalisation. The requirements in order to be eligible to apply for citizenship (without, however, adding up to a right to citizenship) are those stipulated in the Third

230 See *infra*, Part III, Chapter 5, Termination of permission to stay.
Schedule 1955 Citizenship Act: five years of legal residence if married to an Indian or a proven legal residence of ten years. All or some of the requirements may be waived for persons who have rendered special services to science, philosophy, art, literature, world peace or human progress.

The procedure for the citizenship applications has to reach three levels: 1. The district level; 2. The state level; and 3. The central level, which is the Ministry of Home Affairs. It takes between four months and two years to fully process an application. The citizenship applications are screened by the Ministry of Home Affairs which may take into consideration other factors such as moral turpitude and the holding of a job. Each person has to apply separately for naturalisation, but when naturalised, her or his spouse and minor children will also be naturalised.

3.4.3. Domestic Case Law

It would lead us to far to discuss all the jurisprudence in the South Asian states, but it is clear that refugees (and other foreigners), like other persons, have sued and have been sued. This may be for common reasons which do not differ from those of citizens, however, refugees are confronted with a number of problems which are unique to them, for instance, the non-issuance or non-renewal of Refugee Certificates, which means that they become illegal residents on the territory of the state. In such cases, the access to courts becomes even more difficult. In general the case law reflects the partial de jure refugee protection by the Judiciary despite a lack of a refugee law.

3.5. Policy

The status of refugees subject to the discretion of the authorities is guided by policy guidelines in the absence of a legal framework.

In South Asia refugees have been considered a humanitarian problem for which a humanitarian solution is to be found: how does that consideration translate into policy options? Security considerations are always referred to by governments in case of refugees: how does the realist approach interfere with a more

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232 See supra, Institutions, District Authorities.
233 See supra, Institutions, State Government and Administration.
235 See infra, Part III, Chapter 5, Standards of Treatment.
236 But see Guterres (2008): "There is never a humanitarian solution for a humanitarian problem, it's..."
humanitarian approach of the refugee problematic in South Asia? Are refugees kept apart from the local population? Is there a different policy for extra-regional arrivals or an ad hoc treatment for some groups? Is non-refoulement respected? Is there a change in policy if a person is under the UNHCR mandate? Are the 'illegal immigrants' detained? Is there a change of policy with a change of government? Are there different responses at different levels within one state? Are cross-border flows tolerated by the authorities? Is residence and citizenship liberally granted to some groups as opposed to others? Is there a policy of status determination?

No treaty on refugees has been ratified by South Asian states, neither at the global nor at the regional level. National legislation applicable only to refugees is also absent from the South Asian statute books. The Acts that do apply to refugees are the same as for other foreigners and the rules and regulations involved are of an administrative nature.

This lack of legal framework allows for the utmost political flexibility which implies, among other things, that with each influx of refugees the policy may be adapted to the nature of the influx or of the individuals concerned or of the situation in and bilateral relations with the country of origin in question. In each South-Asian country a realist approach and national security considerations play a role of paramount importance in the decision-making regarding refugees, especially if they originate from within the region or neighbouring states.

The character of each situation determines the attitude of the government(s) concerned which leads to ad hoc administrative discretion and rules which are being devised according to the developments taking place with respect to each refugee population. Some individual refugees are under government protection because of their actions in their home country.237

Seen from the perspective of the refugees, problems ensue due to a distinct policy and treatment of the different groups of refugees under consideration. There may even be a different policy for different groups of refugees from the same country of origin, for instance, the Indian policy vis-à-vis so-called 'Indian' (Hindu and Sikh) Afghan refugees as compared to the Muslim and Christian Afghan refugees.238 Or a different policy for the same group of refugees from the same country of origin but

237 For instance, Taslima Nasreen or the Karmapa.
238 The population of Afghanistan of some 20 million is of a great ethnic and religious variety: Pashtoons, Tajiks, Uzbeks, Hazaras, Sikhs, Persians etc. of Sunnite, Shiite, Sufi, Sikh etc. beliefs.
arriving at different times.  

In each South Asian country the government has come up with different administrative rules for refugees who have been recognised as such by that government as compared to those who are not recognised as refugees by the government. Moreover, the refugees who have presented themselves to the UNHCR offices for the determination of their status and who have been recognised as refugees by the UNHCR are not formally recognised as refugees by the governments of the countries of asylum. As a corollary, the Refugee Certificates which the UNHCR issues to those refugees whose status they have determined and subsequently recognised, are not legally binding for the host governments. Nevertheless, in all South Asian host countries under review, the state authorities (Ministry of Home Affairs, 240 Foreigners Registration Offices 241 and the police 242) de facto recognise generally the UNHCR mandate refugees. 243

3.5.1. Policy Issues

It would be impossible to discuss all issues at hand regarding refugees, but below we touch upon some (potential) issues for the policy makers to consider regarding politico-administrative rules and regulations applicable to asylum-seekers/refugees in the potential future case of implementing a national Refugee Law: 244 some issues that today may seem remote could then very well become poignant.

3.5.1.1. General Issues

Tension is created due to the dilemmas for the policy makers when implementing the aliens/refugee legislation as general policy is held against the personal stories or situations of the individual asylum-seekers. Aliens/refugee policy is full of back-room politicking (horse-trading instead of rational decision-making) and emotions (instead of rationale) run high in the host society, in Parliament, and in

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239 For instance, the Tamil refugees before and after the Rajiv Gandhi assassination, or the Afghans in Pakistan who are regularly that after a certain cut off date no more new refugees would be allowed in.
240 See supra, Institutions.
241 Ibid.
242 Ibid.
243 Regardless of this de facto recognition by state authorities there are numerous cases of harassment and extortion of those recognised refugees.
244 See infra, Towards a National Refugee Law.
discussions with the various groups of asylum seekers.

There may be problems between the various institutions dealing with refugees: at the reception (customs/(para)military/border law enforcement/immigration), Foreigners’ Registration Office, defective provisions in the Aliens/Refugee Act, (vote banks) in the Parliament, public support or disapproval for asylum and/or removal policy, the dialogue between top civil servants and the politicians heading the various government departments, lack of co-operation between the different departments (Home, Foreign Affairs, possibly also Law/Justice Ministry and Defence), competence problems within and between departments, differences between Centre and states, loss of time with bureaucratic communication (including response to events in the field such as asylum seekers arriving on ships, well-known figures requesting asylum etc.).

Immigration/Home Ministry problems: understaffed, relation with the other institutions, differences in approach by personnel of asylum seekers (interviews become interrogations), backlog of claims, public/media criticism, politicians constantly interfering in individual files, frequent personnel changes, frequently changing legislation/policies lead to more backlogs and paralysis.

Debates to devise refugee policy: within the various political parties, the Parliament (government versus opposition), the coalition partners in the government, with the media, the public, the Judiciary, neighbouring/friendly countries/countries of origin, UNHCR.

Refugee politics: every measure is judged and as such interpreted as a favour to certain political parties, the (Law) Ministry is used to create bills after considerable consideration, but devising aliens/refugee policy is very different and requires much more (political) feedback from the outside world, something personnel in aliens/refugee departments are reluctant to adjust to. The latter are too busy with daily problem solving and have little time to take a step back to develop/adjust a consistent and realistic refugee policy.

Policy contacts with outside resource persons - the reaction of civil servants to inputs and brainstorming by outsiders is not always very positive - may include: jurists (may thwart the smooth implementation of an (amended) asylum procedure if it does not contain sufficient appeal options and file appeals with the courts instead), legal aid services, judges (may block the implementation of an Aliens/Refugee Act if they have a problem with certain of its provisions and who may reconsider or interfere
with certain decisions already taken by Parliament e.g. which countries are safe to send people back to), NGOs, reception (centre/camp) personnel, child protection workers, educationists, UNHCR.

The reaction of the host communities at large may be taken into account in order to explain the dilemmas of aliens/refugee policy: nowhere people rejoice when foreigners settle down in their backyard.246

The mass media as well as international pressure increasingly impact policy making: scoops on aliens/refugees (especially in the case of mass influx or well-known personalities) has an immediate impact on Parliamentary debates and on the policy makers.

3.5.1.2. Specific issues

If too many policy changes are made in a short time span regarding specific issues with respect to asylum seekers this may be detrimental to their cause due to the sensitivities of the system (including the status determination procedure, if any). Practical problems ensue for the institutions in the field when introducing amendments on specific issues to the Aliens/Refugee Act, hence, there should be a provision of enough preparation time to switch between procedures.

UNHCR may be requested to give positive or negative advice about national Refugee Bill/implementation. UNHCR also sends provisional and updated reports to MEA about the safety of the situation in the country of origin which may be used as a guideline for (not) sending people back there.

A Refugee Act generates delays, creating backlog generating new delays which may have an influence on other work which is consequently delayed. The Judiciary may have backlogs and delays in refugee cases, but it is independent of the Executive, however, the Ministry in charge may reorganise the Judiciary.

The department in charge of aliens/refugee policy has discretionary competence to regularise certain cases which do not fall under the existing regulations. One off decisions such as regularisation or general amnesty are also (temporary) solutions for intractable and sensitive problems of certain asylum seekers.

Creating coalitions with local politicians increases the chances of reaching a political agreement on solutions even if there is no parliamentary majority since the local (vote bank?) politicians may be from different political backgrounds but

245 See supra, Institutions.
wrestling with the same problems.

Asylum may come in the way of other policy matters such as security, economy, unemployment, sensitive relations with friendly or neighbourly countries etc.

The cost of a status determination system may start to weigh on a policy-making looking to cut corners because the cost becomes prohibitive: the total expenditure on the refugee status determination system in one country of asylum, the Netherlands, in fiscal year 1998 equalled the total annual budget of the UNHCR worldwide.247

3.5.2. Changes in Policy

The de facto policy by the MOH and the FRO to issue Refugee Certificates to UNHCR recognised refugees is based on an informal agreement. Another part of this agreement is that mandate refugees are allowed to stay on the state territory as long as it takes for a durable solution to be found for them.

Since 1997 the government of India has changed the policy by directing the MOH and the FRROs to require from a refugee a valid passport before issuing the Refugee Certificate.248

In major places (including cities) with refugee presence a declaration has been made by the local heads of police of a pro-active policy of no harassment by the law enforcement officers. This directive was a direct result of the numerous cases of untoward attitudes by the police which led to UNHCR interventions at the highest level of the Home Ministries in Bangladesh (e.g. Rohingyas), India (e.g. Myanmarese/Burmese), Nepal (Tibetans), and Pakistan (Afghanis).

This situation of the presence on the territory of states of mandate refugees going often without (valid) Refugee Certificates puts them as vulnerable non-citizens through a harrowing exile experience facing, among other things, frequent checks by the authorities, problems for finding jobs, suspicion from landlords and rejection by banks.249

246 This is the well-known NIMBY syndrome.
247 Three billion Guilders (1998 figures). The enumeration in this section has been based on the personal account of the Aug. 1998 - Dec. 2000 Dutch Secretary of State for Aliens' Policy (a member of the Labour Party and former Vice-Chancellor of the University of Maastricht) Job Cohen about his experience in office as described in Corduwener (2001).
248 See infra, Effects on the Ground of Policy Chances for Refugees.
249 Also cf. infra, Part III, Chapter 5, Standard of Treatment.
As we have seen, the policy for the various (groups of) refugees is not uniform. Furthermore, the policy is not uniform over time as various imperatives may influence the decision-making or a change of decision-makers may take place. One of the clearest examples of policy change may happen when there is a change in power (government and/or political parties, or individuals) at the helm of the decision-making institutions. 250

A dramatic shift in refugee policy may also be caused by events and/or the perceived role that refugees have played in those events: the assassination of Prime Minister Rajiv Gandhi in Tamil Nadu is a textbook example.

Moreover, a change in the bilateral relations between the country of asylum and the country of origin may also have an impact on the treatment of refugees, for better or for worse. 251 In the region of South Asia, there are numerous examples: it is a fact that China is putting pressure on Nepal as far as the reception and treatment of Tibetan refugees in concerned – the Nepalese government has even gone as far as handing over refugees to the Chinese authorities at the border and closing down reception centres; the Indian government entertains cordial relations with the Singhalese rulers in Sri Lanka, but the government of the state of Tamil Nadu is pro-Tamil; 252 the presence of Myanmarese/Burmese refugees is a continuing hurdle for both Bangladesh and India in their bilateral relations with Myanmar/Burma at a time that they want to improve relations; the government of India has good relations with the present regime in Iran, but there remain a number of (political) refugees in India the fate of whom is uncertain if they would be sent back; in India there was a lot of discussion at the time the Kairnapa fled from China. The government permits Tensing Gyatso’s government-in-exile, but at the same time wants to improve relations with the rulers in Beijing; during the conflict in Afghanistan between the Taliban and the Northern Alliance, India was on the side of president Rabbani but India hosts various mutually inimical factions of refugees since the end of the 1970s; the government of India has good relations with the government of Iraq despite an increasing recent presence of refugees from Iraq, some of whom (Palestinians) have staged public

250 For instance, in Tamil Nadu there is a difference in attitude of AIADMK and DMK vis-à-vis the Tamil refugees and LTTE.
251 Conversely, the better/worse treatment of refugees – or even the mere fact of recognising them as refugees - may also trigger a change in the relations with the country of origin, cf. the Algerian refugees and the reluctance to accuse France of persecutions, see supra, Part I, International Refugee Law, Sources, The 1950 Statute of the Office of the United Nations High Commissioner for Refugees.
252 See also supra on the difference between the refugee attitudes of political parties in the state of Tamil Nadu.
demonstrations in front of the UNHCR office in New Delhi; the government of India claims that the Lhotsampa refugees are a purely bilateral affair between the government of Nepal and Bhutan, although the refugees first crossed Indian territory and were removed from it by the Indian authorities. Nepal and the UNHCR had established a status determination screening at the border for the incoming asylum seekers. The many rounds of bilateral negotiations have not yielded any results and the position of India has repeatedly been questioned: applying the 'safe third country' rule, the refugees could have been returned by Nepal to India (Baral, 1996: 152-177); the last government ruling Somalia collapsed over a decade ago, effectively turning the country into a failed state. In Bangladesh, India and Pakistan there is a (small) number of Somali refugees waiting for resettlement overseas since there is no way back for them; for many years Sudanese refugees have been living in Bangladesh, India and Pakistan, and throughout there has been friction between the various groups from North and South Sudan including public demonstrations because of alleged discriminatory practices by the Sudanese embassies; the Indian government, however, wants to maintain good relations with the Sudan.253

Apart from the powers that be in the country of asylum, the prevailing atmosphere at the site(s) of the refugee concentration(s) may cause the host community to turn against refugees, entailing a potential shift in attitude and policy by the authorities. Resentment in the long run of the host communities has manifested itself with all refugee populations in South Asia.

3.5.3. Effects for Refugees of Policy Changes

The current state of ad hoc refugee policy making by the various South Asian governments may mean that unpredictably sudden and profound consequences can ensue for the individual refugees in case of a policy shift. Let us take a closer look at one particular case, the effects that hit the refugees in India due to the policy shift that took place in the course of 1997.254

The decision of a stricter application of the Foreigners Act had effects on the entry and stay of asylum-seekers, there was a stop in the issuing or the renewing of Refugee Certificates, or stricter conditions applied to the issuing of Refugee Certificates: apart from the Refugee Certificate which had been required earlier, henceforth also an identification document was needed. For the refugees this resulted

253 For instance, the Indian National Oil company is active in oil exploration in the Sudan.
in a situation where around ninety percent of the mandate refugees\textsuperscript{255} overnight became illegal aliens i.e. without proper documentation. Consequently, there were many more detentions, there were many more \textit{Leave India Notices} issued, many refugees lost their accommodation, numerous working refugees could not hold onto their jobs, their children were having problems to enroll in schools, and, as a corollary to all the above, there was a much higher level of anxiety, stress and depression for both the individuals and their families, kids were bullied at school, and the stigmatisation of refugees in the society at large increased with a concomitant decreased level of self-confidence.

Although it had been feared at the time, there was not a great increase in the number of deportations. For the UNHCR such a change in circumstances means more pressure to resettle refugees, especially those considered to be at risk.

All in all, the current situation of informal agreements by authorities, \textit{ad hoc} decision-making at a political level together with changing administrative rules and regulations according to the nature of each refugee (group) in question does not amount to a consistent refugee policy worth the name. Rather, in South Asia

"[a] concerted national or regional policy is lacking, unless we consider a non-policy also as a policy option." (Elahi: 1998)

3.6. Practice

Asylum-seekers/refugees are aliens/foreigners/migrants as far as the legislation in South Asia is concerned. However, they may be illegal or legal migrants. They may enter and stay lawfully or not. We will look into every situation in which asylum-seekers/refugees \textit{qualitate qua} aliens find themselves, what the applicable set of rules and regulations comprises and which rights and legal remedies they are entitled to.

3.6.1. Procedures for Asylum-Seekers/Refugees \textit{qualitate qua} Aliens

The state practice includes, among other things, the reception at the border: what happens to an arrival without visa or travel documents? But it also deals with matters such as the rules and regulations for lawful stay and the procedures followed in case of mass influx.

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\textsuperscript{254} Our sources preferred not to be named.

3.6.1.1. Situation at the Border: Entry and Exit

Let us start by examining what the practice is upon arrival: what happens to asylum-seekers/refugees who present themselves at the land, sea or air borders of South Asian states?

In South Asia there are no particular laws or regulations for asylum-seekers/refugees. Since the treatment of all non-citizens falls under the Aliens legislation, it is appropriate to take a closer look at the state practice as far as the treatment of asylum-seekers/refugees qua foreigners is concerned.256

A foreigner257 who wants to enter the territory must apply to a consulate abroad or at the border258 for permission to enter (Rules 5 (iv); 34 1950 Passport (Entry into India) Rules). In the interest of public safety the immigration authority may refuse entry at a particular entry point (Para. 3(4)(a) 1948 Foreigners Order).

The authority has to refuse leave to enter if it is satisfied that:

(i) the alien does not have a valid passport or visa and has not been exempted from that requirement;
(ii) he is a lunatic;
(iii) he is suffering from a loathsome or infectious disease which in the opinion of the medical expert is likely to prejudice public health;

(i) he has been convicted for an extradition offence; or
(ii) his entry is prohibited by the central government or any other competent authority (Para. 3(2) 1948 Foreigners Order).

There is no provision whatsoever in the law that the authorities have to grant leave to enter in any particular case even if the foreigner claims refugee status. If for reasons of public safety entry is refused, the authority has to report the matter to the central government which may cancel or modify the order (Para. 3(4)(b) 1948 Foreigners Order).

No remedy is available in the other cases and the courts cannot be approached

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256 For reasons of clarity since the terms “aliens” and “foreigners” are being used in the legislation which is also applicable to refugees, we have kept these terms rather than consistently replacing by “refugees”.

257 The treatment of all aliens is not uniform, see the Aliens legislation of each state (e.g. exceptions for the Bhutanese and Nepalese in India and Indians in Bhutan and Nepal).

258 For instance, Nepal. In India from 31 March 1981 until 5 November 1982 the requirement of applying abroad was waived and aliens could enter visa free after obtaining a temporary landing permit upon arrival. Each South Asian state also has a list of visa waivers for nationals from a number of countries or individuals arriving for specific purposes on compassionate grounds, but they have to carry their passports/identification where applicable.
unless and until the person has entered the territory.  

Upon arrival, all border authorities check the asylum-seekers for security reasons - national security being the dominant factor in the South Asian consideration of refugees.

Since no government in the region has a determination procedure in place, there is no formalised way of deciding the fate of the person crossing the border and, hence, a case by case decision is resorted to depending on the particulars of the person, the situation in his or her country of origin and the fact as to whether or not may be ascertained that he or she is in the possession of valid travel documents to enter the territory.

The country of origin is also a determining factor whether certain categories will be recognised by the government of the host country, for instance, in India Tamilians and Tibetans are a recognised category of 'refugees'. 'Refugees' are put between inverted commas since, on the one hand, the word 'refugees' does not appear in the legislation, and, on the other hand, there is no precise definition of who is a refugee in South Asian countries.

Other factors that form the basis of recognition are foreign policy - predominantly the bilateral relationship with the country of origin - and humanitarian considerations.

Once a government has recognised (a) refugee(s), he or she will be able to make use of the services offered in the protection and assistance framework that is instituted for that particular category of refugees by the host authorities.

The skeleton character of the statutory legislation regarding aliens leaves a very wide margin of appreciation for the administration to act through regulations, which in effect means that the rights of foreigners in certain respects, for instance, at the point of entry are all but non-existent because the state concerned may prefer to deal with the matter at the administrative level without the formal backing of a legislation.

In short, in no South Asian state there is a general standard procedure to receive asylum seekers, only for some predetermined categories there are

259 See supra, Part I, Public International Law, Concepts.
260 See infra, Part III, Chapter 5, Status Determination Procedure.
261 But see 'displaced persons' in the Partition related Acts, infra, Municipal Law.
262 See supra, Policy.
extraordinary security checks, a registration procedure and/or camps.\(^{263}\)

Generally a visa is required from all foreigners, even when they are applying for asylum\(^{264}\). The situation may even become hairy when asylum-seekers are trying to enter illegally. The border authorities in all South Asian countries practice a denial of entry at (air)ports – stowaways in particular are not allowed to leave the ship.

The standard situation when trying to leave illegally is that refugees are deported back which in some cases amounts to *refoulement*.\(^{265}\) If timely action is undertaken there may be a court injunction pending resettlement to a third country of asylum. However, in a situation where a refugee is leaving illegally, and he or she is refused asylum in a third country, he or she may be sent back to the first country of asylum where denial of re-entry may potentially lead to detention and/or *refoulement*.

### 3.6.1.2. Stay and Residence

A residence permit is required which could be granted based on the purpose of stay. This permit is granted by the registration office\(^{266}\) at the place of entry or where the alien presents a report to the office (Para. 7 1948 *Foreigners Order*). This report must be presented within a specified deadline (Rules 5 and 6 1939 *Registration of Foreigners Rules*). The permit includes the authorised period to stay and the place(s) of stay (if any) specified in the visa. If such places are indicated, the foreigner is not allowed to visit other places\(^{267}\) unless the permit has been extended. Certain restrictions on movement are possible (Para. 11 1948 *Foreigners Order*).

The alien has to report upon arrival and departure of that place within 24 hours. The foreigner must leave the territory before expiry of the period unless it is extended. At the point of exit s/he must surrender the permit (Para. 7 1948 *Foreigners Order*). If an alien has stayed illegally, an entry may be made in his/her travel document and permission to stay may be refused for that reason on a later occasion.

### 3.6.1.3. Voluntary departure

A foreigner may leave at any time under certain conditions. S/he can only

\(^{263}\) For instance, LTTE cadres in Tamil Nadu camps.


\(^{266}\) See *supra*, Institutions.

\(^{267}\) See *infra*, Part III, Chapter 5, *Standards of Treatment, Freedom of Movement*. 191
leave with permission from the immigration authority and only from a recognised point of exit (Para. 5(1) 1948 Foreigners Order). 268 This permission is refused if:

(i) the alien has failed to comply with the departure formalities under the 1939 Registration of Foreigners Rules; or
(ii) her/his presence is required to answer a criminal charge; or
(iii) her/his departure will prejudice the relations of the central government with a foreign power; or her/his departure has been prohibited by a competent authority's order (Para. 5(2) 1948 Foreigners Order).

Furthermore, if an immigration authority deems it not in the public interest, it may prohibit the departure (Para. 5(3) 1948 Foreigners Order), but then the central government must be immediately informed for the purpose of cancellation or modification of the order (Para. 5(3) 1948 Foreigners Order).

Upon departure an alien 269 must surrender his registration certificate (Rules 15(1-A) and 4 1939 Registration of Foreigners Rules). Another condition to be fulfilled in order to leave is tax clearance. Subject to certain exceptions, 270 all aliens have to obtain a certificate of no liabilities under the tax legislation (1961 Income Tax Act, 1940 Excess Profits Tax Act, 1922 Business Profit Tax Act, 1957 Wealth Tax Act, 1958 Gift Tax Act). 271

3.6.1.4. Termination and Cancellation of Permission to Stay and Reside

There is no distinction between termination of permission to stay without administrative decision and cancellation of permission to stay by administrative decision. The only legal provision is the power of the central government to order that an alien "shall not remain..." (Sec. 2(c) 1946 Foreigners Act).

In order words, the law leaves the matter completely to the Executive 272 since in the legislation there are no grounds enumerated on which permission to stay may be terminated. Moreover, the law does not even provide any clear-cut policy or

268 Also cf. para. 4 1962 Foreigners (Restriction on Chinese National) Order.
269 Other than a tourist.
270 E.g. tourists, diplomats and consuls.
271 Rule 44, 1962 Income Tax Rules: "Any person leaving India shall, at the request of any customs officer, produce to him for examination the clearance certificate, or exemption certificate as the case may be".
272 See supra, Institutions.
standards for the guidance of the power of the Executive in this matter. This huge margin of appreciation granted to the Executive by the Legislature has been upheld by the Judiciary in view of the nature of the government’s discretion in dealing with foreigners, the Legislature may not be more specific in laying down constraints (A.H. Magermans v. S.K. Ghosh & Others (1966); Hans Müller v. Supdt. Presidency Jail, Calcutta (1955).

In this light we have considered the termination of permission to stay; it is a purely discretionary administrative decision which may be taken on any ground: national security, adverse report against her/him, undesirability of the foreigner etc. There is no requirement for the administration to reveal any reason for its order and it may be passed at any time including after a prior permission to stay (Momin Khan v. Supdt Police, Kanpur (1963)) This discretion to cancel the residence permit of any foreigner and to deport him includes the extradition law which in certain circumstances (Sec. 31, 1962 Extradition Act) prohibits the return of a fugitive to the state requesting the extradition.

The sole exceptions which apply in this matter are related to marriage and family (residence permit not terminated for the duration of the marriage with an Indian spouse, potentially including other family members) or judgements of the courts. The courts may impose on the executive limitations on the basis of general principles of law e.g. "no person can be deprived of life or liberty without prescription of law". There is no fundamental right for aliens to stay and reside, but the denial of her/his stay may not be decided arbitrarily by the Executive (Maneka Gandhi v. Union of India (1978); Maharashtra v. Chandrabhan (1983); Patiram v. Mohd. Usman (1984)).

Challenging the administration’s order to terminate the permission to stay is often an uphill struggle as the authority comes under section 3(2)(c) of the 1946 Foreigners Act which allows for a very wide application making it almost impossible to prove arbitrariness. On grounds of principles of natural justice (such as lack of being given a hearing prior or subsequent to an order) a cancellation of residence

273 Ibid.
274 Ibid.
275 See infra.
276 See supra, Extradition Act.
277 See infra, Chapter 5, Marriage and family.
278 See supra, Domestic Case Law
permit could be challenged although residence is not a right, but a privilege for a foreigner. Procedural grounds such as lack of jurisdiction of the issuing authority may also invalidate the order (*State v. Abdul Rashid*, 1961) 280

3.6.1.4.1. Legal Remedies

*Refusal of Residence Permit*

If a residence permit is refused, an alien may apply to the central government. The legal remedy itself does not have a suspensive effect, but the authority refusing the permit may suspend the order until the government decides which, in effect, means a temporary permit is granted. The government decision is final, but a foreigner may approach the Supreme/High Court under the Constitution to claim that his Human Rights were infringed.281

*Termination of Residence Permit*

There are both (a) administrative and (b) judicial remedies.

(a) The alien may apply for revision to the central government if the order has been issued by an immigration authority and until the government has decided, no action can be taken against the foreigner by the immigration authority (*Andhra Pradesh v. Syed Mohammad Khan* (1962); *Mukhtar Ahmad v. State of UP* (1965)).

(b) For legal questions the foreigner may approach a civil court or a High Court (Art. 226 Constitution of India).

Any violation of an alien’s fundamental rights may be challenged before the Supreme Court (Art. 32 Constitution of India). If the foreigner is under arrest and detained, the validity of a deportation (incl. expulsion) order may be challenged in a *habeas corpus*282 case in the High/Supreme Court.

3.6.1.5. Deportation

Only non-citizens including refugees may be deported. The usual procedure is to inform the deportee of the notice which carries a deadline for leaving the territory. This may or may not be followed up by a detention by the law enforcement agencies and subsequent forced expulsion to the country of origin. The provisions of

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279 See *infra*, Chapter 5, Standards of Treatment, Freedom of Movement.
280 A deputy superintendent of police may not pass such an order.
281 See *supra*, Municipal Law.
deportation treaties constitute the legal framework since the country of origin has to agree to take back its national. The expenditure for the deportation may be (forcefully) recovered from the deportee her/himself. In each South Asian country there are cases of deportation in which the deportee has only been able to inform her/his relatives in the country from which s/he is deported after reaching the country to which s/he had been deported.

The procedure of deportation is governed by legal provisions (Section 3(1) 1946 Foreigners Act).

It is the Ministry of Home Affairs that issues a Leave Notice.283 The official reasons for deportation may vary widely: illegal entry is most common, or illegal stay or overstaying the permitted duration mentioned on the travel documents. In case of illegal exit without the necessary permit,284 deportation may also ensue. The real reasons behind the practice of deportation are usually ordre public (public order) in the case of criminal behaviour or national security.

The procedures involved in a deportation vary (Section 14 1946 Foreigners Act): there may be no delay in case of deportation and no charges may have been brought against the deportee and he or she may not have had contact with a lawyer.

A deportation involves the serving of the notice, detention, transportation from the detention camp to the airport or land border the fare of which is financed by the deportee in question. Time permitting a legal challenge against deportation is possible, in many cases, however, it is not successful. If, however, UNHCR has been timely informed, they may intervene and contact the MOH to cancel the deportation order or to extend the stay of the refugee pending his or her resettlement in a third country.

If a notice to leave has been served, it may be accompanied with a prohibition to return to that state for a number of years.285

3.6.2. Asylum-Seekers/Refugees

3.6.2.1. Illegal Immigrants

Illegal immigration also used to be dealt with at the administrative level. But due to severe law and order problems cropping up since the 1950s which were caused

283 See supra, Institutions, Ministry of Home Affairs.
284 Ibid.
285 In case of India the prohibition to return is usually for five years.
by the entry and presence of large numbers of illegal immigrants, certain Migrants Acts have been adopted. These acts authorise the central government to establish tribunals for the detention of migrants so as to be able to expel them. Whereas in some Acts there was not made a difference between legal and illegal migrants to be expelled, in others there was made a distinction. For instance, an 'illegal migrant' has been defined as a person who:

(i) has entered the territory on or after a specific date;
(ii) is a foreigner; and
(iii) has entered without being in the possession of a valid passport or travel document or any other lawful authority. (Sec. 3(c) 1983 Illegal Migrants (Determination of Tribunals) Act)

The territory covered by these Acts may be part or whole of the territory of the state concerned. As far as the procedural safeguards are concerned, the provisions in some Acts go further for the protection against the expulsion of illegal immigrants than those provided for the expulsion of legal immigrants. Some other Acts, however, did not contain comprehensive safeguards or the effect of the Act was not confined to immigrants after a specific date.

3.6.2.2. Stateless Persons

There are, however, lakhs of stateless people in the region. The (potential) categories may be: the Bangladeshi and Nepali migrants; the Bhutanese Persons of Indian Origin in India; the Burmese Nagas and other tribals in the North East of India; the Chakmas in Arunachal Pradesh; the children born to both refugee parents.

In India, the 1955 Citizenship Act does not specify anything on stateless children born in India, however, the Supreme Court judgement in National Human Rights Commission v. State of Arunachal Pradesh (1996) on the Chakmas contained a reference to statelessness.

3.6.2.3. Temporary Refuge

No alien has any right either to a temporary or unlimited stay, nor does such a

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286 In India this started in north(eastern) regions such as Assam.
287 For instance, 1950 Immigrants (Expulsion from Assam) Act; 1983 Illegal Migrants (Determination of Tribunals) Act.
288 For example, 1950 Immigrants (Expulsion from Assam) Act.
289 E.g. 1950 Immigrants (Expulsion from Assam) Act was very general in its application in that its reach comprised all those who had arrived prior or subsequent to the commencement date of the Act.
right arise from the length of residence. The governments of Bangladesh, India, Nepal and Pakistan permit refugees to be present on their territory only temporarily and therefore the asylum which they have extended is not open-ended.

That is why refugees are not at all encouraged to integrate locally. As a matter of fact, in refugee camps it is a host authority’s practice that the housing materials used may not be of such a nature which would give the refugees the impression that they are in for the long haul.

Despite the practice of discouraging the refugees with the lack of any long-term measures, and especially in cases of protracted refugee situations (e.g. Lhotsampas, Rohingyas), many refugees have managed to obtain ration cards and even voters’ cards.290 But although granted asylum, the situation of refugees during the temporary stay remains very difficult if the Refugee Certificates are not issued or renewed by the host authorities.

### 3.6.2.3.1. Large Scale Influx

In case of mass exodus, asylum is generally granted by South Asian states on a temporary basis (Varghese, 1996: 133-46). This is called a *prima facie* or group determination as opposed to the individual determination, which, for sheer practical reasons, would not be feasible in case of mass influx. The provisional granting of asylum is prompted by the immense pressure on resources such as on land and water, health services and employment. These are, however, also the usual reasons for *refoulement*, especially in the case of protracted refugee populations.

In the absence of an option for third country resettlement or local integration, the political leaders of the South Asian states have repeatedly made public statements stressing the *temporary* nature of the asylum291 granted, for instance, Khaleda Zia292 or Mrs. Gandhi when one crore of East Bengalis came over to India:

"Relief cannot be perpetual, or permanent, and we do not wish it to be so. Conditions must be created to stop any further influx of refugees and to ensure their early return under credible guarantees for their future safety and well-being." (Ministry of External Affairs, 1971: 674)

The Tamilians and Chakmas were granted similar temporary asylum in India.

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290 Thereby refugees become part of politics and form on occasion part of the vote banks of politicians.

3.6.2.4. Non-Refoulement

As we have demonstrated, non-refoulement is an emerging norm in customary International Law, and therefore it could be invoked in deportation cases by domestic courts in South Asia. However, as mentioned, national security considerations are of paramount importance for the states concerned, and that includes the Judiciary.

In some court cases the Judiciary has resorted to injunctions until the status of the person in question could be determined$^{293}$ or, for instance, citizenship could be granted.$^{294}$ In other cases a decision has been arrived at to grant exceptional leave to remain on the territory until the refugee could be resettled in a third country.

Nevertheless, it is clear that in each South Asian country there have been cases of refoulement$^{295}$ and deportation as, unfortunately, this basic principle or cornerstone of refugee protection of non-refoulement has not always been observed in the state practice. This is usually the case when individuals or groups of refugees have been perceived as incompatible with national interests. A hot potato in this respect is the issue of mixed migration, flows of both genuine asylum-seekers and other irregular migrants, which poses a serious challenge to the granting of asylum. The reason is usually simple: a clash of reconciliation of refugee protection with the state prerogative of immigration control. In South Asia these mixed movements are very clear: for instance, for many people in the neighbouring countries, India is the rich land of opportunities. But there is a vital difference: refugees flee forcibly because their government is not protecting them or is even persecuting them, whereas migrants also leave, but not in search of international protection. This is a clear distinction which should be made and advocates of national Refugee Laws$^{296}$ claim that this is one of the big advantages of a status determination system$^{297}$ to separate the genuine refugees from other types of migrants.

But is the distinction so straight forward? A great deal comes down to the definition of a refugee and the accepted grounds for screening them in. One example: if I flee famine it may be that it is caused by civil war or even caused directly as a way of persecution. Practice shows that there is a gap between International Law and the

\[\text{292 This was in the case of the Rohingyas.}\]
\[\text{294 See supra, Municipal Law, Citizenship Acts.}\]
\[\text{295 For instance, the Rohingyas from Bangladesh, the Tamils and Chakmas from India, the Tibetans from Nepal.}\]
\[\text{296 See infra, Part III, Chapter 5.}\]
\[\text{297 Ibid., Status Determination Procedure.}\]
ground reality as far as the distinction refugees - other migrants is concerned, but one thing is clear: everywhere those who are not genuine claimants usurp the provision of asylum, with as two major consequences: (i) refugee determination procedures and/or the search for (national and international) solutions are being clogged; and (ii) in the mind of the public at large and the policy makers confusion reigns as to who is a refugee (fleeing violence or persecution and therefore requiring to be extended protection and basic rights) and who is not a refugee (but an irregular or undocumented immigrant).

In some places in South Asia there is a deliberate policy to mix up the two for political aims: Assam is a good example, hence, the heretofore mentioned special Act applicable. This confusion leads to public calls for increasing restrictions on asylum and even deportation to the country of origin in potential violation of the principle of non-refoulement. Instances of non-refoulement practice in the region constitute a violation of human rights and must be stopped and universally condemned; in a later stage state responsibility and compensation may become issues.

3.6.3. Durable Solutions

Repatriation to the country of origin, resettlement in a third country or integration in the first country of asylum are the three solutions for refugees. Applying the three kinds of durable solutions in South Asia is somewhat problematic as there is a clear voluntary repatriation bias, see, for instance, the comment of India298 on the Bangkok Principles' article concerned (Art. VIII):

"1. Voluntary repatriation, local settlement or third country resettlement, that is, the traditional solutions, all remain viable and important responses to refugee situations, even while voluntary repatriation is the pre-eminent solution. To this effect, States may undertake, with the help of inter governmental and non-governmental organizations, development measures which would underpin and broaden the acceptance of the three traditional durable solutions.
2. States shall promote comprehensive approaches, including a mix of solutions involving all concerned States and relevant international organizations in the search for and implementation of durable solutions to refugee problems.
3. The issue of root causes is crucial for solutions and international efforts should also be directed to addressing the causes of refugee movements and the creation of the political, economic, social, humanitarian and environmental conditions conducive to voluntary repatriation."

298 These notes, comments and reservations are an integral part of the main document of the 2001 Revised Bangkok Principles.
"The Government of India expressed its reservation on including a separate Article VIII on "International co-operation and comprehensive solutions". It wants the emphasis to remain on 'voluntary repatriation'. The other solutions like 'local settlement' or 'third country resettlement', according to it, would have to be considered carefully in each case, given their political, economic or security implications, particularly in situations of mass-influx. In this connection, a distinction needs to be maintained between the 'individual refugees' and 'situations of mass-influx' as well as between 'convention refugees' and 'economic migrants'. Further, the implementation of these solutions and treatment of refugees is linked to the available resources and capacity of each State." (AALCO, 2001)

(emphasis in the original)

3.6.3.1. Local integration

In all refugee situations there is a 'leakage' of a certain number of refugees that will (attempt to) remain in the first country of asylum, even when refugees are forced to stay in guarded camps.\textsuperscript{299} All the issues discussed in the next Part regarding the standards of treatment enter the picture in case of local integration.

There may be difficulties to stay because of government policies such as the non-issuance or non-renewal of Refugee Certificates which would lead to illegal stay. The economic conditions to be(some) self-sufficient are not always present or the economic situation may worsen, victimising refugees twice as potential scapegoats. The host community atmosphere may be welcoming at first, but after some time resentment may start, especially if the refugees are doing better than the local population or they get (inter)national assistance which the locals do not receive.

Other crucial issues are the risk for the personal safety and security of some categories of refugees due to reasons such as politico-ideological background or gender which makes them refugees specifically at risk and which, hence, creates special protection problems for both the government of the country of asylum and the UNHCR.\textsuperscript{300} Last but not least, in the case of local integration sooner or later the issue of naturalisation kicks in.\textsuperscript{301}

Let us finish with the description of two examples of local integration in the South Asian context. In the case of the Afghani presence in Pakistan the effects, both

\textsuperscript{299} For instance, the number of Rohingyas that has moved on from the camps into the Bangladeshi society is unknown, but runs into the thousands.

\textsuperscript{300} The author met a personal acquaintance and bodyguard of President Najibullah in India who was targeted by other Afghan refugees.

\textsuperscript{301} See supra, Citizenship.
political and socio-economic, on the host country, Pakistan, have been studied. What stands out from these studies concerning the Afghani is that, contrary to general expectations and occasional resistance from the host community, a positive assessment may be concluded of the consequences of accommodating such a huge refugee population. Farr adds that although Pakistan is not a signatory to the 1951 Convention or the 1967 Protocol, it has taken into account the UN mandate (Farr, 1993: 111-126). The success story *par excellence* is, of course, the Tibetan integration. Tanka B. Subba made a study based on a survey of eighty refugee households. The mainstay of the work deals with the successful social and economic integration and adaptation that took place

"*the manner in which a social system [...] fits into the physical or social environment*" (Subba, 1990: 4).

In case of integration in the country of asylum, after some time the naturalisation of an alien entitles him or her to all the concomitant rights and benefits of citizens.302

### 3.6.3.2. Third Country Resettlement

In Europe after the Second World War resettlement was the preferred option for the millions of refugees. Nowadays is has become a most problematic option, but for some refugees they have no other option left due to the problematic nature of local integration in the country of first asylum or the impossibility of repatriation.

As we have seen, the resettlement countries, often via their diplomatic representation,303 decide on the final selection of the resettlers after a short list has been constituted by the UNHCR which screens and selects cases for submission. These resettlement places are highly coveted and therefore very difficult to manage.304 Refugees may approach directly the embassy of resettling countries, but in the case of special refugee categories at risk the pressure on the UNHCR to find resettlement places increases, for instance, when a recognised refugee is being detained and/or there is a pending deportation.305 Of specific importance in case of resettlement are family reunification cases where one or more members of a family

303 See *infra*, Chapter 5, Embassies.
304 All UNHCR offices in South Asia have experienced cases of bribes being offered or asked in order to obtain a place on the repatriation shortlist. The order of magnitude of the bribes has increased over the years from around $5,000 in the 1990s to over $10,000 in the new millennium.
are already present abroad.

Practically speaking, the refugees who have been cleared for resettlement after they were screened in and they passed the rigorous medical examinations, receive from the ICRC the necessary travel documents for their departure. The major resettlement countries for refugees in South Asia are Australia, Canada, Denmark, Finland, France, the Netherlands, New Zealand, Norway, Sweden, or the United States of America. It may take up to a decade for refugees to be resettled after they first made their application. In South Asia no country officially resettles refugees from other countries. There are therefore no quota arrangements for special groups of refugees such as women at risk, elderly, ill refugees etc.

3.6.3.3. Repatriation

Arthur C. Helton (1992) offers ten principles to guide the refugee repatriation policy. On occasion of the repatriation of the Rohingya refugees to Myanmar/Burma he urged that those ten requirements be fulfilled before any repatriation to any country of origin should be promoted. The enumeration is fairly comprehensive and stresses the general respect for Human Rights by all states concerned and—in particular the protection of refugees through non-refoulement. Repatriation must be voluntary and take place in safety and in dignity. The UNHCR should be involved and NGOs should also have unimpeded access. Risks such as conflict or landmines should be eliminated or dealt with and there should no longer be a recurrence of the abuses which precipitated the flight. Women and children need special care. All the above principles may apply to unassisted or spontaneous repatriations as well.

B.S. Chimni also discussed the repatriations from Pakistan (Afghans) and Bangladesh (Rohingyas) and states that

"the ostensibly voluntary repatriation of refugees from Bangladesh to Burma in 1978-79 actually involved coercion, in the form of cutting rations in the camps" (Sorenson, 1992: 280).

Because we have personally witnessed in the mid-1990s the forcible repatriation in the case of the Rohingyas and the denial of both the government of Bangladesh and the UNHCR that this was, indeed, a forced repatriation, it is important to define term 'forced' (which does not always have to involve physical force):

"it may also include 'the threat of force or coercion, such as that

305 Especially when a Leave Notice has already been served, see supra.
caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment'. The essential element is that the displacement be involuntary in nature, that 'the relevant persons had no real choice'. In other words, a civilian is involuntary displaced if he is 'not faced with a genuine choice as to whether to leave or to remain in the area' [...] 'what matters is the personal consent or wish of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons' [...]'.(Prosecutor v. Simic et al., 2003: paras. 125; 128)

It is evident that the prospects for repatriation to the different countries of origin vary greatly depending on, for instance, the political situation or vital questions such as whether there exists state protection against gender discrimination.

In practice repatriation movements in South Asia take place through different modes of transport, often depending on whether there is a direct connection available for repatriation. From India Iranian, Iraqi, Somali, Sudanese and Tamil refugees are repatriated by ship. Afghans are sent back by plane and Bhutanese as well as Myanmarese/Burmese refugees repatriate via the land borders.

Among all refugee populations individual and spontaneous voluntary returns have taken place to the countries of origin. The role of the UNHCR in a textbook repatriation should be to provide objective country of origin information to the would-be repatriates and, with permission of the host government, to check the voluntariness of the repatriation through personal interviews. The UNHCR policy is that no assistance is offered at all if one family member refuses to repatriate, but the practice may differ to a large extent from the textbook policy.

Repatriees are returnees within the country of origin and they are sometimes taken care of by UNHCR, including in situation of mixed groups of IDPs and returnees. Information about returnees may reach the UNHCR protection officers in the country of origin.

UNHCR's creating 'conducive' conditions for repatriation by posting a few

306 There was a break in repatriation of Afghan refugees in 1999 due to the end of the flights of the national carrier of Afghanistan, Ariana.
307 For many years after 1995 no more mass repatriation movements of Tamils took place.
308 Repatriating Tamils had to sign and hand to the Indian authorities a declaration that they would not return.
309 The author witnessed repatriation movements where in the presence of UNHCR protection officers family members who refuse to repatriate are forced on the spot to join their returning family members. The explanation given by UNHCR was that these recalcitrant refugees by protesting at the time of the repatriation only wanted to extort more repatriation rations of food and other items...
officers in the country of origin is no guarantee for stopping the return of refugees to the country of asylum if the conditions were not fundamentally changed. 310

Chimni (1991) focusses on the growing concern in the refugee literature with the root causes of flight and the promotion of repatriation as the preferred option instead of resettlement in the first or another country of asylum. This concern, says Chimni, is prompted by the increasing mass exoduses of refugees in developing countries. 311

Let us now turn to the implications of the situation we have examined in this chapter for the genesis and development of a regional refugee regime in South Asia.

310 See, for instance, Van Wonterghem (1997).
311 His survey of the western refugee literature as far as repatriation is concerned leads him to sum up three perspectives: a statist, a liberal and a critical-pragmatic.