The summary of our findings will follow the same structure as the thesis: first the international legal framework (IHRL, IHL, and IRL) and then the situation of refugee protection in South Asia.

A sovereign state ultimately determines who enters - including externally displaced persons such as refugees - and exits its territory. And on its territory it is the sole protector of its citizens. But states must also protect the rights of refugees and asylum seekers. In other words, for as long as the nation-state system will last, it will have to be the states that take up their responsibility for protecting their citizens, and failing that, other states will have to co-operate in alleviating the refugees' plight. Despite the existence of an international legal framework, now as in the foreseeable future, the rights of individuals including refugees can most effectively be guaranteed in the domestic sphere by sovereign states. This is no different in South Asia, especially since there is neither a (strong) regional organisation nor a regional regime on refugees or Human Rights for that matter.

Nevertheless, there is an indirect impact of the global Human Rights regime in South Asia. One of the most debated but fundamental issues in the theory of IL is the question of how IL relates to Municipal Law. IL enjoys a high formal status in most states, but in South Asia treaties and customary IL do not override domestic statutes. As part of IL, Human Rights Law provides a useful illustration of the extent to which, in widely varying state practice, its provisions have found their implementation in the national plane.

Refugee rights are Human Rights: the UN and the *International Bill of Human Rights* are the foundations for the international protection of Human Rights. The Covenants are legally binding texts on Human Rights protection which not only create obligations for the South Asian state parties, but also contain provisions for domestic implementation. Human Rights have increasingly become a matter of international concern, hence, the international Human Rights machinery and its impact are vast and still expanding.

Municipal Law is in many instances modified i.e. brought into conformity with IL, after the ratification of international Human Rights treaties, or through jurisprudence (further) revision may take place. Even if it is not possible or
successful to invoke international Human Rights law directly before the courts in South Asia, in the long run the laws may be amended through the legislative way or, when no such revision takes place, administrative notices concerning the change, taking into consideration the international Human Rights provisions, may be circulated to the state organs concerned.

There exists as of now no universal court of Human Rights. The consideration of Human Rights by courts in South Asia varies greatly: they may either try to ignore arguments purely based on international Human Rights or, the courts may be wary to establish a violation by the state. In the practice of the courts, international Human Rights law has come to be considered not only a relevant but a necessary source of law which sets standards about how to interpret the Municipal Law. Indeed, arguments based on international Human Rights provisions may be used as an aid to constitutional interpretation; in South Asia the domestic ('Bill of Rights' in the) Constitution of each state provides stronger tools than conventions to protect the rights of the refugee, especially the right to life and to equality before the law.

International Human Rights adjudication is more effective indirectly as a means of putting pressure on a particular state – 'name to shame' - to change domestic laws than as a direct factor which influences court cases. The publicising of decisions and reports of treaty-monitoring bodies and special rapporteurs may exert pressure on states by shaming the violators into compliance and also create an increased awareness among the population. Especially the proposals for change floated during discussions at the UN may be effective as it may in some cases be the only place a government is more or less held accountable for non-compliance with international Human Rights provisions.

Here it may not be out of place to mention that there is no direct link between the statements or an active involvement by a state when developing international Human Rights norms in international fora\(^1\) on the one hand, and its record of implementation through legislation (or other means) of these norms at the national level on the other hand. On the contrary, certain states seek representation in those fora precisely for defensive purposes. A general conclusion with regard to IL is that despite the absence of solid enforcement measures, IL may have a profound impact on shaping domestic law: IHRL is a good example.

\(^1\) For instance, in the CHR India was very active in the preparation of the ICCPR, only to be slow to ratify it, without Optional Protocol and with an implementation that leaves something to be desired judging by the HRC Concluding Observations.
In the specific case of armed conflict, the provisions of IHL protect refugees. A detaining power may not treat refugees as enemy aliens merely on the basis of their nationality (Art. 44 1949 IV Geneva Convention). The refugee status does not mean in and by itself that a refugee is exempted from any legitimate special measures that a party to the conflict may take in order to protect its safety. Therefore certain types of refugees may be subjected to various security measures, for instance, because they are deemed to constitute a threat to the state due to their political activities. Art. 44 1949 IV Geneva Convention, however, pleads for a consideration of exemption for refugees of these control measures so that they would not be applied across the board to all “enemy aliens” on the sole basis of their being nationals of the enemy state.


Persons who fled to a territory that later becomes occupied by the authorities of their country of origin cannot be arrested, prosecuted, convicted or deported (Art. 70 (2) 1949 IV Geneva Convention). This constitutes an exception to the definition of “protected persons”. Art. 70 1949 IV Geneva Convention, apart from safeguarding the security of the occupying power, limits the jurisdictional powers of the latter and is also meant to preserve the right of asylum.

The status of refugees in armed conflict between their country of origin and their country of asylum/residence is regulated by Art. 73 1977 I Protocol Additional. Refugees are considered “protected persons” in situations of international armed conflicts if they were recognised as refugees before the start of the hostilities. As mentioned in Article 73 in fine this provision enlarges the application of the relevant articles of 1949 IV Geneva Convention without effect on the articles contained in 1977 I Protocol Additional.

The 1949 IV Geneva Convention is applicable without any discrimination to refugees in their capacity as civilians in the territory of the parties to the conflict. The ‘additional value’ of 1977 I Protocol Additional as far as refugees is concerned may thus be summed up as enlarging the scope of the 1949 IV Geneva Convention to include refugees in the category of “protected persons” and in the process making the impressive list of relevant 1949 IV Geneva Convention Articles applicable to them. Technically speaking, this result is arrived at by reading Art. 73 1977 I Protocol Additional into Art. 4 1949 IV Geneva Convention whereby refugees enjoy a double protection, firstly, as refugees per se and, secondly, as civilians who are not nationals.
of a party to the conflict or an occupying power in whose hands they find themselves.

Art. 73 1977 I Protocol Additional - and thus the whole of the 1949 IV Geneva Convention - covers the previously not covered refugees\(^2\) who are nationals of a non-party to the 1949 IV Geneva Convention (Art. 4(2)). It now also covers refugees who have the nationality of a neutral or of a co-belligerent state that has a diplomatic representation in the state in whose territory they are. This was a serious deficiency in 1949 IV Geneva Convention as refugees by definition no longer benefit from any protection by the state whose nationality they possess.

In occupied territory refugees who are nationals of the occupying power are now covered by the whole of the 1949 IV Geneva Convention (before they were only covered under Art. 70(2) 1949 IV Geneva Convention).

Many of the enumerated provisions of IHL have become part of customary IL, however, they are reaffirmed in Part IV 1977 I-II Protocols Additional. Part II 1949 IV Geneva Convention provides protection to refugees as civilian victims of the effects of hostilities. These rules are relevant in the case of, for instance, attacks on refugee camps. On numerous occasions it has been clear that problems have arisen due to the location of these camps in combat zones and/or the presence of combatants mixed with the civilian refugees.

Art. 73 1977 I Protocol Additional confirms Arts. 44 and 45 (4) 1949 IV Geneva Convention, but changes the law in that section III becomes entirely applicable to refugees if the occupying state is their country of origin. The list of Articles which apply to refugees as civilians is extensive, for instance, Articles 47 1949 IV Geneva Convention (the occupying authorities may not change the law under which refugees are recognised, or once given asylum, the occupying power must respect it) and 48 1949 IV Geneva Convention (Special Cases of Repatriation) apply to refugees as well as Arts. 49 1949 IV Geneva Convention (Deportations, Transfers, Evacuations) and Art. 70 (1).

The role of ICRC as far as refugees are concerned is twofold: under IHL and under its statutory right of initiative. The role of the National RC/RC Societies consists of helping their own authorities, co-ordinated by the International RC Federation, under the direction of ICRC and/or as implementing partner of the UNHCR.

\(^2\) If they had been recognised as refugees as defined by the relevant international instruments or the national legislation of their state of asylum/residence before the outbreak of the hostilities.
The two main concepts in international refugee protection are the definition of a refugee and the principle of *non-refoulement*. The definition of a refugee in general IL has been extended throughout the existence of the post-1950 IRR. The protected and assisted within the UNHCR mandate include persons who have a well-founded fear of persecution on the enumerated grounds, as well as those categories without any protection by their state of origin who fled from there due to violent Human Rights or IHL violations, conflicts or serious harm the root cause of which could be the political, social or economic situation. Of vital importance remains that they are in another state - although the UNHCR also has in country activities\(^3\) - and that they did not migrate for purely personal, economic\(^4\) or criminal reasons.

State parties claim they fully respect the *1951 Convention/1967 Protocol* but it is being applied to an ever smaller proportion of asylum seekers. Myron Weiner (1993) noted that the existence of international norms regarding refugees raises two crucial issues: how they are to be implemented, and how they are to be enforced? International institutions are created to implement norms. Under its mandate the UNHCR is charged with propagating and implementing norms for the protection of refugees. The enforcement of norms against governments that violate them is more difficult. Violators may be threatened by shame and ostracism, but the international community is often reluctant to impose sanctions or intervene militarily because the political and economic costs may be high.\(^5\) And who's the keeper's keeper? The UN High Commissioner for Human Rights may share part of this process to pressurise governments into respecting refugee rights.

As soon as - even before formal determination - a person fulfils the stipulated criteria, she or he is a refugee and, hence, s/he is recognised because s/he is a refugee and s/he does not become a refugee because s/he is recognised as such. The refugee definition is not hard and fast or static and neither is the global refugee regime a complete legal regime. There are gaps, for instance, between the legal obligations of the states and the responsibilities of the UNHCR - the latter can be imposed by the GA, but not the former. Depending on whether a state has other international and/or

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\(^3\) On request UNHCR may deploy within the country of origin with its permission for IDP and/or returnees' assistance.

\(^4\) "Economic reasons or motivation alone will not entitle a person to refugee status; but a government's 'economic measures' may well be the cloak for action calculated to destroy the economic livelihood of specific groups; in such cases, a fear of persecution can be well founded." (Goodwin-Gill and McAdam, 2007: 129).
regional obligations - for instance, ratified the 1951 Convention/1967 Protocol or agreed to a regional instrument or arrangement (e.g. CPA) - the responsibilities of UNHCR will expand accordingly.

The principle of non-refoulement (found in IHRL, IHL and IRL) comes into play for a wide range of persons once they are at the border of a country of asylum and they have valid grounds (e.g. Human Rights violations where they originate from) for their flight. No state has made the claim that it possesses the unqualified right to send a refugee to a place where she or he faces persecution but the exact status of non-refoulement in customary IL awaits a court verdict.

States in South Asia are the main ‘donors’ to refugees. Indeed, the list of institutions dealing with them is witness to this, although it should not make us forget the indispensable role that intergovernmental and non-governmental organisations play in this respect. The international Human Rights scrutiny of the situation in the region shows that there still remains a lot to be done, both regarding refugee protection and assistance.

In the context of the discussion regarding accession to the 1951 Convention/1967 Protocol, the post-World War II IRR has displayed a number of features: (1) the 1951 Convention has an incomplete and a politically partisan Human Rights rationale; (2) the definition is focussed on the individual refugee rather than on a mass-influx which is much more common in the South Asian region; (3) there was no indication of burden-sharing by Europe for South Asian refugees - it took 16 years before the 1967 Protocol would do away with the double limitations of time and space constraints; (4) the real extent of the Cold War impact on the UNHCR is only recently being studied, scrutinising its “non-political character” (e.g. Loescher, 2001) and (5) regardless of the fact that some 50 million refugees have been repatriated, resettled or integrated by the UNHCR in the past half century, the UNHCR is still a temporary UN organ whose mandate is extended every five years. This is proof that refugees (around eighty percent of whom are “a problem of poor countries”) are still not given the appropriate attention and resources by the western countries that they deserve. Instead of acceding to the 1951 Convention, B.S. Chimni makes the constructive proposal of establishing a new comprehensive global refugee instrument to deal with refugees, but adds that

"there is an element of naiveté in this proposal. And this is the

5 But see the humanitarian intervention by India in East Pakistan in 1971.
tragedy. Rational solutions often appear naive in a world in which self-interest alone defines goals, and power and resources are unequally distributed, rather than because they do not aspire to be practical.” (Chimni, 1991: 546)

Although the Subcontinent has frequently been experiencing refugee influxes, dealing with them only very rarely involved the adoption of specific laws. "No law" does not mean "no policy". If there is no law, than it must be that this is the policy that these states have opted for. Basically, as and when a refugee (group) presents itself, the political and administrative levels take up the matter. This means that unless the governments want to treat (certain) refugees in a different way, they will all be dealt with under the laws relating to foreigners in general. Domestic case law has, on individual occasions, been able to provide relief for refugees from the rigorous application of the Aliens legislation which does not distinguish refugees.

With each refugee influx South Asian leaders have stated that only temporary refuge could be granted and that other solutions than local integration would have to be found. In practice and given the porous borders in South Asia, there has always been a leakage of refugees who have been overstaying in the country of asylum.

South Asia has probably held the world record in the 'category' of hosting refugees in the latter half of the previous century. Yet it is simply amazing how rare the references are to refugees in publications on current affairs in South Asia by the media or by South Asian scholars: it is almost a non-issue. Hence, a primary future objective of those involved in the protection and assistance of the "scum of the earth" (Arendt, 1986: 269) should be to keep the issue on the political agenda in the 21st century.

Geography is forever and, as in the past, it may be said with a high degree of certainty that in the 21st century people in different capacities will keep coming from various parts to South Asia including from neighbouring countries of origin. As far as forced migration is concerned, two seemingly unavoidable developments with disastrous effects will have a considerable impact on South Asia in the 21st century: the Maldives and the densely populated littoral areas of Bangladesh will disappear under the Indian Ocean level as a consequence of global warming. And where will all these teeming crores of people go?

As if this doomsday scenario were not enough, at the beginning of the 21st century it does not look like the conflicts in extra-regional states are anywhere near being resolved – if it is at all possible to resolve conflicts. That means: more refugees. Now a trickle, now a
flood: from places such as Afghanistan, Burma and Tibet they (will) come. And what about the intra-regional situation? Any worsening of the conditions in Bangladesh, Bhutan, Nepal, Pakistan, and Sri Lanka, whether in the political, economic or socio-cultural sense, will lead to lakhs more people heading for the porous borders of, predominantly, the world's largest democracy and the region's economic power house.

As far as South Asia is concerned, nothing could be further from the truth than the submission that refugees are an issue that could be dealt with in a non-political way because the political stakes have proved time and again to be much higher than the rational for more regional integration or even humanitarian considerations: refugees are a national and international political matter par excellence. At a national political level, socio-economic and ideological factors are predominant, while at an international political level, diplomatic but also ideological factors play a dominant role e.g. while during the Cold War refugees were at the mercy of East-West rivalry, in the post-Cold War they continue to be a top issue in the North-South relationship. All of these considerations have to be taken into account when analysing the refugee situation in South Asia as a region.

Would it be useful if a regional organisation such as SAARC could formally be involved in the process of or even taking charge of concluding a regional instrument on refugees? States should refrain from paying lip service to principles such as non-refoulement - there are other such examples of Conventions in the SAARC framework and observe them in the act.

Immediate humanitarian needs including protection (temporary asylum) and assistance, as well as post-return (long term) assistance including reconciliation and conflict resolution have to be taken into consideration. An ounce of prevention of refugee-generating conditions would be worth many pounds of alleviating of suffering and of arduously searching for (inter)national solutions for refugees without and within the region, including the adoption of a regional refugee instrument. But the humanitarian actions should not become the fig leave for a lack of relevant political initiatives as is mostly the case, including in South Asia.

At the regional level there are emerging refugee 'regimes' in Africa, the

6 The flight of H.H. Karmapa heralded the 21st century of arrival of refugees to South Asia with a bang (Kumar, 2000: 45-46; Singh, 2000: 47-49).

7 SAARC has hitherto always avoided the consideration of contentious bilateral issues.

8 Compare, for instance, with the SAARC 1987 Convention on Suppression of Terrorism or the 2002 Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, and the reasons why they have been ineffective for many years. For the time being a SAARC Convention on the Status of Refugees would therefore also most probably remain a dead letter regime.
Americas and Europe, and although there are differences, basically these regimes are (still) more part of the global regime than that they could be considered separate regimes standing entirely on their own. With a lot of efforts and to a large extent due to the already existing high degree of regional integration, the furthest move towards a harmonised regime has been made in Europe, where the building blocks are being put into place to form a comprehensive distinct regime encompassing own qualification criteria, processing and appeal procedures, burden-sharing arrangements, lists of safe countries, and return modalities. In 1997 the EU basically introduced the territorial exception\(^9\) to the application of the 1951 Convention. The South Asian region could attempt to declare a similar territorial exclusion if and when the states have a regional agreement in place.

But for that the regional integration has not evolved far enough. Far from \textit{"the end of geography"} (O’Brien, 1992) we observe that in South Asia geography is a paramount factor in international politics. Contrary to the evolution in most parts of the world, globalisation in South Asia does not show the - at first sight - paradoxical,\(^10\) but increasing global move towards regionalisation.\(^11\) Even geographic proximity is not a guarantee for economic and/or political interaction: East and West Europe or British and French Africa are counter examples as are the intensive diplomatic relations between non-Arabic Islamic states such as Bangladesh and Pakistan and the Arab world. Hence, powerful cultural, religious, historical, political or economical motives can keep even close states worlds apart - like in South Asia.

Moreover, the existential fear of nation-states to give up part of their sovereignty and the differences in national interests are perhaps even more important obstacles to South Asian co-operation and integration than in other regions. Due to the asymmetry in South Asia, the basic model for regional co-operation is bound to be that of states whose relations are directed to one state rather than an even spread of

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\(^9\) This was a demand of Spain which had seen other EU states grant asylum to ETA Euskadi members.  
\(^10\) Globalising the production increases the competition, and because of the advantages of economies of scale states and corporations try to increase their domestic markets to regional markets to counter the competition. Additionally, regional arrangements are used as a protectionist measure and to increase the negotiation position against other trade blocks, for instance in the framework of the WTO. GATT had made an exception rule for blocks of states. The EU has as a block in effect become an exception to the 1951 Convention/1967 Protocol regime by exempting their citizens to enjoy asylum in other EU states. South Asia could consider doing the same.  
\(^11\) Inspired by the EEC, other, predominantly economic, communities were established, such as the East African Community, West African Economic Community (1959), ECOWAS (1975), Central American Common Market (1960), MERCOSUR, ASEAN (1967), Customs and Economic Union of Central Africa (1964), CARICOM (1968), LAFTA (1960), Andean Group (1969).
mutual relations.

The South Asian people in their adjacent countries have commonalities which act as powerful pull factors for seeking refuge: common social behaviour, ethnicity and religion.\textsuperscript{12} The international community has on various occasions recognised the exemplary behaviour of South Asian states in hosting refugees (Ray, 2002)\textsuperscript{13}

As far as convergence of expectations is concerned, all the states in South Asia claim to respect asylum and \textit{non-refoulement}, although this does not take place through the adoption of national, regional or international refugee legislation. We can therefore in South Asia not speak of a refugee regime \textit{per se}, but of a tacit (or implicit) refugee protection regime: \textit{de facto} protection but limited \textit{de jure} protection (by the Judiciary).

Whether they will ever come under the enhanced protection of a regional instrument is for the future to tell. For the time being we cannot conclude in South Asia that a full-blown refugee regime has materialised and the chances in the foreseeable future of a South Asian convention on refugees also look slim, at the most a regional declaration or guiding principles could be aimed at.

The current degree of international co-operation/burden-sharing equally has to be enhanced manifold in South Asia. As far as the global refugee regime is concerned, we have seen in Part I that increasingly there is a disconnect between what states want at the international level and what responsibilities they actually assume at the national level: in the UN they have consistently voted for enlarged institutional (UNHCR) responsibilities protecting \textit{persons of concern}, but at the same time their own sovereign discretion has increased and their interpretation of the refugee definition has shrunk. There has until now not been a consensus to revise the 1951 \textit{Convention/1967 Protocol}, however, the need to devise complementary forms of protection has been recognised (EXCOM, 2005). We have also established that the global refugee regime is not a complete legal regime: this is specifically the case where persons are concerned who do not have a well-founded fear of persecution.

When refugee definitions become separated from local political and social events - which cause the flight of refugees in the first place - it is inevitable that more gaps in the refugee protection will occur. In case of individuals, when dealing with a

\textsuperscript{12} For instance, in 1984 the Ahmadiyya community in Pakistan was prohibited by presidential decree to practice and propagate the Islamic faith. Many Ahmadis were persecuted, detained or killed without sufficient protection by the authorities. Many of them fled to neighbouring countries including India. Their plight and the risk of a refugee flow was brought to the attention of the UN Commission on Human Rights.

\textsuperscript{13} High Commissioner Sadako Ogata visited the region in April 2000 and Ruud Lubbers in May 2002. This was no doubt in recognition of the efforts made in South Asia on behalf of refugees.
regional instrument for South Asia, we have already pointed to the required 'complement' to the 1951 Convention/1967 Protocol definition - with reference to the 1969 OAU Convention and the 1984 Cartagena Declaration - through the addition of a regional component to define the refugee concept. In case of a mass influx, one may, without prejudice to the status of the individuals concerned, resort to a prima facie or group determination founded on the establishment that the persons under consideration enjoy no protection.

From the description of the prevailing refugee rights regime it is clear that different categories of aliens/refugees are treated differently, for instance, in India especially the ‘most favoured’ Nepalese and Bhutanese citizens, and PIOs. They have a physical resemblance with Indian citizens and merge relatively easily without being traced at once. That constitutes a considerable advantage vis-à-vis refugees who are not of Indian descent.

But also the Tibetan refugees stand out because of their treatment vis-à-vis other refugee groups. They were allotted land in different parts of their country of asylum, they are employed gainfully, they receive identity cards for the purpose of economic activities, eligibility certificates so as to be able to get a job as state employees, and travel documents to leave India and come back, and, hence, although they have not all acquired Indian citizenship, the privileges they enjoy come very close to the ones Indian citizens enjoy. They were also accepted when they had already settled in other countries such as Nepal or Bhutan but the authorities there forced them to leave.

Another observation is that the legal position of aliens/refugees does not improve over time: as far as their rights regime is concerned, the length of stay in the country of asylum does not affect (the level of) their entitlements.

However, refugees may apply for an identity card for purposes of economic activities and/or to be able to travel abroad, but this is, firstly, not a right but a privilege and, secondly, it takes a period of many years (exceptions notwithstanding), and, thirdly, it is a long bureaucratic struggle. Moreover, in case of violation of the conditions imposed for the return, re-entry may be refused. Applying for naturalisation according to the applicable citizenship law is also possible but this takes much more time and depends entirely on the authorities since it is also not a right but a privilege.

Apart from UNHCR, nowhere in South Asia an individual refugee status
determination has been done by the authorities. An asylum-seeker gets a similar protection as any other foreigner. This means no minimum standard can be guaranteed - this is also the case for citizens in the countries of asylum. After rejection of the recognition as an asylum-seeker or refugee status, the alien may be required to leave the territory or may be deported to his/her country of origin. The legal remedies at the disposal of ‘ordinary’ aliens are also at the disposal of refugees and, in case an error of justice, lack of jurisdiction or violation of fundamental rights took place, the courts may issue a stay against deportation with suspensive effect.

After recognition of asylum/refugee status, the foreigner may be granted a long-term residence permit very much like any other alien and with the same restrictions - which means that in case of violation of any of these, s/he may be deported willy-nilly. Family members are usually treated in the same way as the refugee, but this is mostly a privilege and not a right. Once they are allowed in the members of the family of a refugee have the same entitlements as the refugee regarding residence, employment, social benefits, financial transactions etc. Since the granting and withdrawing of refugee status are not laid down in any law, but are purely a political or policy decision, no legal remedy may be available against such cancellation.

The jury is still out on whether the likelihood of a national refugee Act in some South Asian countries looks greater than of acceding to the 1951 Convention/1967 Protocol and/or a regional instrument. Chimni (1998) contends that there should first be a national legislation in place before a regional instrument is created.

Does the availability in South Asian states of a national Refugee Act by definition protect the rights of refugees more than in the absence of a national Refugee Act? Conventional wisdom has it that law has to introduce rules that are more certain, stable and predictable. However, the history of Aliens and Refugee Acts in the West contains valuable lessons: one reiterating feature is that although in general a law has to do away with arbitrariness - it should even preclude any possibility of arbitrariness, even when there is a conviction that no use will be made of such a possibility (De Wilde, 1971-72: 1099) - a very large margin of discretion remains at the disposal of the Executive, leaving open the possibility of administrative

14 Certain refugee groups such as the Rohingyas, the Bhutanese and the Biharis have been screened for the purpose of repatriation.
arbitrariness. There is a clear evolution in Western Europe in the legislation until the 1960s towards increasing repression for violations of the Aliens Act, especially for asylum seekers: administrative measures were gradually complemented with or changed into penal provisions increasing the options and duration of administrative detention or restriction of the freedom of movement, restricting the social assistance, rendering removals more effective, and tightening of the overall control including on carriers, preferably before unwanted aliens reach the territory.

The approach in Western Europe towards aliens in general changed from the 1960s to the mid-1970s and was characterised by simultaneously reinforcing the rights of the aliens and their remedies against the state, thereby increasing their legal security. In the mid-1970s a general immigration stop was proclaimed in all Western European states, leaving only three options to aliens for immigration: illegal immigration or asylum applications or family reunification. Soon after the procedures for the latter two options were considerable tightened.

In short, chances are that South Asia will follow the global trend: after the introduction of a refugee Act, subsequent amendments will increasingly restrict the rights of asylum-seekers and refugees. With the adoption in India of the 2001 Carrier Liability Act the writing is on the wall...

15 Prime examples are the legal provisions introduced in the 1990s to refuse aliens access to the territory in case they are found in an airport transit zone without the proper papers or they cannot show documents in support of the aim and conditions of the stay or when it is deemed that they may harm (earlier legal provisions demanded that they had actually harmed) the public peace, ordre public or national security and fingerprints are to be taken of aliens when there are indications that they have already submitted a claim.

16 The detention of aliens is not related to the individual execution of a punishment, but is part of increased control measures. The evolution in subsequent Alien Acts is from a very limited number of options to detain asylum seekers in case of extraordinary circumstances pending their status determination to the present situation where any aliens not in possession of the required documents while claiming asylum at the border, or those ordered to leave the territory, or those no longer having a valid residence permit or whose claim had been found inadmissible, are detained.

17 The evolution in subsequent Alien Acts is from an option to assign a place of residence pending the status determination procedure to the detention of those asylum seekers already on the territory but whose residence permit had expired or their claim had been found inadmissible.

18 A measure to restrict the unwanted stay of certain aliens are the amendments in the legislation on social services to the needy who are not registered with the national registry-office: the state would no longer refund those services from the date that the aliens concerned were ordered to leave the territory, after which they could only claim urgent medical assistance and food rations. This hit asylum seekers whose claim was rejected but who had appealed again against the decision in case their order to leave the territory was not suspended; they are not allowed to work. It was expected that they would return to their country of origin or elsewhere before their appeal was decided, making this appeal no longer effective. Some higher courts have rejected this as unreasonable, e.g. Belgian Cour d'arbitrage, Arrest of 22 April 1998, after which the practice was amended, but uncertainty made many social service providers refuse to grant social assistance. If the rejected asylum seeker signs up for voluntary repatriation by IOM, the social services will continue until her or his departure.

19 The regional EU Schengen agreement was used to impose a number of legal amendments in the EU
In any case, if and when a national law is adopted a refugee’s situation will no longer be governed by the current relevant Aliens legislation. This means that a refugee will no longer be considered as an (illegal) alien, but will get a distinct status. The limitations of the absence of a specific refugee Act and the fact that revision of the present situation is needed has come to be recognised by, among others, the most eminent members of the Judiciary. In India, Chief Justice Verma, for instance, stated that there was a need for refugee legislation in order to avoid ad hoc decision making.20 A draft MNL has been developed in 1997 which could form the basis for a legal framework and provide certainty, accountability, consistency, transparency and predictability.

Is it possible that India and each of the neighbouring states pass their own Refugee Act so that they have their own system to deal with refugees, which at the same time will grant refugees their rights and leave enough leeway for the discretionary decisions of the governments? Let us assume that in the foreseeable future a national Refugee Act would be adopted, what would be some of the implications? Now an asylum seeker presenting himself or herself at the border will have to produce a valid passport or visa to enter the territory. If he or she is not capable to do so, he or she is liable to prosecution and imprisonment or deportation states’ legislation.

20 Adhocracy and non-policy elsewhere have led to arbitrariness and restrictionism. For instance, after having taken in one million Belgian refugees during World War I, the Netherlands (then population: 13 million) adopted a restrictive foreigners’ legislation in the 1920s and 1930s, in an attempt to keep out as many Jewish/German refugees as possible resulting in an eventual closing of the borders by the end of the 1930s. The implementation was assured because it was the task of especially established agencies such as the passport office and the foreigners’ registration offices (Leenders and van Meurs, 1996: 118-119). Furthermore, in an administrative circular of 30 May 1934, refugees were declared no longer to be governed by the Foreigners Act, but to be at the mercy of the police and the border guards. Four years later, another administrative circular declared refugees as ‘undesirable aliens’ and they were no longer admitted. If a few thousands of refugees annually did manage to enter this could have been due to the ad hoc policy which caused uncertainty among the police and border officials as to which rules were applicable, leaving the door open to their own judgement. The ad hoc policy was the result of several factors: a cutting up of the competence of the various Ministries of Justice (admission, sojourn), Colonies (emigration), Economic and Social Affairs (labour market), and MEA (international relations), a lack of co-operation between decision-making and implementing bodies (border security and Foreigners’ Registration Office were under the jurisdiction of the Ministry of Justice and Defence). Rather than an ad hoc, there was a non policy on refugee matters: the traditional granting of asylum was no longer an issue although the government was well aware of the precarious situation of the Jews in Germany. The government wished to retain full decision-making and implementing powers regarding aliens and not allow any international encroachment of its sovereignty: the Nansen passports were seen by the Ministry of Justice and the MEA Legal section as a mere means to resolve the bureaucratic problem of statelessness, not for the refugees’ sake, but to induce them to leave the territory. The Dutch MEA indulged in sheer image-building during discussions about the Nansen arrangements in order to uphold the international prestige of a hospitable state with a heart for refugees. Humanitarian considerations were never part of the discussion. The upshot was a position of first ratifying one arrangement, but not implementing it, and later no more signing of any instruments, but instead an ever increasingly restricting entry policy (Berghuis, 1990: 9; Moore, 1986: 10; 82; Lucassen, 1986: 125).
under the Foreigners Act which gives the Executive wide powers, generally free from judicial review – a fact upheld by the respective Supreme Courts. When an asylum procedure would be established to consider the asylum claim, the asylum seeker who enters or stays illegally will no longer be liable to be punished on this account.

Another inequality would be done away with if in the future the status of asylum-seekers would be determined along more or less the same rules by the government as by the UNHCR. Now those determined by the UNHCR have an uncertain status before the law entailing the risk of punishment for illegal entry as opposed to those recognised by the state who are much better protected.

One more instance of discriminatory treatment which may vanish in the future upon enactment of a national law is the issuance of travel documents. Only the Tibetan refugees in India have relatively automatically received travel documents which allow them to travel to foreign countries and return to India.

When there is refugee legislation the asylum seeker will be in a much better position to claim his rights before the municipal authorities and courts. But does that mean that until then a refugee has no locus standi in the domestic legal system? No, but he or she would have to claim a remedy under the Constitution or the domestic/international laws when applicable.

Last but not least, a national law would call for establishing a status determination mechanism: an assessment based on subjective and objective factors as well as the consideration of the inclusion, cessation and exclusion clauses - the latter two coming only into play after the inclusion provisions have been considered. In the examination of a refugee claim the facts are judged against the definition in the domestic (and, where applicable, in international) law texts. An appeal is possible with an independent institution. The story of the asylum seeker is judged on the basis of the authenticity of the pieces of evidence whereby the onus is completely on the claimant. In the absence of evidence and if the story is deemed consistent, it is up to the personal judgement of the person(s) in charge to decide whether to use legal or moral standards. Enter politics: the higher authorities do not discourage a legal approach resulting in as small a number of recognised refugees as possible and in practice the decision on the situation in a given country is more based on the reports of the MEA than on, for instance, reports of AI. The authority in charge of refugees may issue a permit to stay on humanitarian grounds which has to be extended on a regular basis. When all appeal options have been exhausted, the asylum seeker has been staying for many years in the country of asylum. If a person is not recognised as
refugee, his expulsion may be suspended if the situation in the country of origin is not deemed sufficiently safe. The stay of that person will then be tolerated but with a minimum standard of (Human) Rights.

As far as the determination system is concerned, there are numerous problems with the interpretation of the provisions in the 1951 Convention/1967 Protocol, but even in the case of a national Act this may create problems. Some examples of recurring problematic issues\(^{21}\) are imperfect interview techniques, credibility issues, standard of proof for the prediction of harm in the future, application of inclusion, cessation and/or exclusion clauses, country of origin information, etc. The procedure of status determination is such that the current system is extremely expensive, with most of the money going not to refugees but to the bureaucrats and lawyers who operate the system.\(^{22}\) Other drawbacks of the system are that the procedure is too complicated and completely technical, a judicialised procedure with different instances, impossible without legal assistance ("a lawyers' paradise"), very legalistic and formalistic, timebound, contradictory verdicts by appeals mechanisms/courts at all levels in different places, a negative first or second decision may still be turned around, encouraged by the assistance personnel, the lawyers, who make people hope for a positive decision. A lack of cultural awareness may lead to the misinterpretation of an asylum-seeker's story, e.g. in some cultures emotions are not shown to strangers. There may be a lack of knowledge of the ground reality of the life of asylum seekers by the top of the hierarchy who make decisions on asylum policy. There may be difficulties in finding quality status determination officers resulting from insufficient recruitment criteria: the office bearers may have insufficient knowledge and understanding of other cultures, of countries of origin, of other languages, other habits, etc. which leads to asking the wrong questions and getting the wrong answers or misinterpreting them. A lack of co-ordination between the various institutions dealing with asylum seekers, on occasion passing 'the buck' to one another, may create a picture in the mind of the public and the asylum seeker alike that the procedure is in a mess. Asylum seekers are not aware of their rights or risks,

\(^{21}\) Whole libraries have been written about interpretation difficulties of the 1951 Convention/1967 Protocol, see, for instance, every issue of the International Journal of Refugee Law since 1989.

\(^{22}\) From 1990 to 1998, the European states spent 40-45 bn US dollars managing their asylum systems. In 2001 it was some 10 billion US dollars (Migration: Benefiting Australia, s.d.). Other possible measures could be envisaged such as determining an annual figure and allocation of refugees of special humanitarian concern who will be admitted, regardless of any conventional definition, cf. in the United States where the executive establishes annually the quota for categories of refugees.
for instance, they hand over all papers without keeping the originals. There is also a risk of potential incompetence of the status determination personnel who do not give the benefit of the doubt but are suspicious of asylum-seekers. Asylum-seekers distrust interpreters, interviewers, lawyers (not paid by refugees themselves, but through legal aid) or they have problems with bad lawyers. Difficulties may also arise in establishing the identity of the asylum-seekers which leads to delays in the status determination and/or removal from the territory, and if the country of origin refuses re-admission, the country of asylum has to find a solution.

If and when a national Refugee Law will be adopted in one or more South Asian states, decisions will have to be made on the division of ‘labour’ between the role of the UNHCR and the role of the state: will all the functions being performed by the UNHCR before also remain after the adoption of a refugee Act or, if that were not the case, to what extent will these functions be taken over by the state?

In South Asia the role of the UNHCR23 is not without controversy, although, according to Singh (1984: 74), it may be said that “Its future is undoubtedly linked to the future of the human race.” However, if the UNHCR wants to continue to remain effective its non-political character will have to be enhanced.24 This is certainly a sine qua non if the UNHCR would like to play a prominent role in the Subcontinent in the years to come where currently it is restricted in its protection functions.

It has to be said that a legal regime should not be an end per se, but a means to an end, hence, a few considerations before we end this section. In South Asia the numbers of refugees who actually claim refugee status is small compared to those who come to improve their economic conditions. A legal refugee regime would not be an answer to illegal immigration. The Judiciary already has a considerable backlog without an additional caseload of potential refugees who could be going for litigation under a refugee Act. Meanwhile, a few – some would say too few –

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23 If it will continue to exist (under the same name).
24 Was it simply coincidence that, just as UNHCR began to examine and criticise new restrictionist asylum regimes in western countries, it was awarded new funding to expand its operations into interventionist and preventative arenas, while other UN organisations which are charged with the protection of Human Rights were starved of funding? Barutciski (1996) argues that the non-political character of the UNHCR is increasingly undermined by its expanding of the original mandate. The Open Relief Centres in Sri Lanka – the first place since the Second World War where this approach was established - represent an example of a UNHCR operation in a zone of internal armed conflict. These ‘safe havens’ exist since the end of 1990 to assist returnees with a “temporary place where displaced persons on the move can freely enter or leave and obtain essential relief assistance in a relatively safe environment”. Another example is the UNHCR’s acquiescing to Pakistan’s closing of the border in 1996 – the year in which the Taliban captured Kabul - so that a wave of Afghani refugees could not reach the Peshawar camps. Instead, the UNHCR had set up in-country camps to reduce pressure on Pakistan to accept the refugees. Barutciski concludes that the new norm in refugee policy
violation of human rights cases have been picked up by the Judiciary. The geopolitical situation of a South Asia with porous borders being what it is, acceding to the 1951 Convention or adopting a national law will not cause a great deal of change since the influx is already happening. Laws to protect the rights of domestic workers or children have been adopted, but their implementation is very much lacking; these groups are not a constituency because they are invisible or minors, hence, what can then be expected from (the implementation of) a law for refugees – people who are not even citizens?

Until we reach a situation with a national refugee Act, a refugee in South Asia will remain just another alien entitled to the same treatment and rights.

is non-admission combined with a new role of interventionism for the refugee regime.