CHAPTER VI

CONCLUSION

The present study began with an attempt to understand the international order and international cooperation through an interpretation of international regime-formation by way of rational-choice analysis. It is found that over the years regimes have proliferated in the international system, by conscious interventions of various actors, to facilitate cooperation in an anarchic world. Regimes are tailored to suit the specific interest of the concerned states.

While the existence of specific regimes facilitates cooperation, the vice versa is also true. Often, existence of cooperation among states leads to creation of regimes by formalising the same. These attempts at regime formation, conscious and unconscious, are often reflection of complex balance of power obtaining in the international system and, thus, all the regimes are impacted, tempered or modified, in the light of national interests of various factors involved. The role of a hegemon is a critical influence in regime formation. The question, as to why self-interested actors in world politics seek to establish international regimes through mutual agreement under certain circumstances, is, thus, adequately answered.

The working of various regimes in international relations has been critically reviewed and analyzed, while simultaneously discussing different theories of regime. It was found that the effectiveness of regimes in influencing the behaviour of state and non-state actors, in a specific issue-area, depended on their robustness and resilience, as well as the willingness of the states to conform or comply with it, depending on the suitability to their national interest. Regime effectiveness is directly proportional to the desire of the party states to conform and comply with the particular regime.

Issues relating to the importance and efficacy of regimes in promoting international cooperation, their role in reducing the transaction costs of cooperation by way of reduced uncertainty, in promoting balanced agreements, and in facilitating further international cooperation through issue-linkages and incremental learning, and
evolution of an international refugee regime have also been discussed and analysed. Even though existence of a refugee regime has been found to be critical to refugee care and protection, over the years it is felt that self-interested actors in a self-help system have often tampered and interfered with the effective functioning of the same. They have done so by way of convenient interpretation and selective implementation of the refugee regime, as found suitable to their perceived national interests. Regimes do, actually, promote international cooperation by reducing the transaction costs of cooperation by reducing uncertainty. Further, they have been found useful in promoting functional cooperation in other issue areas through an incremental learning facilitated by regime-induced iterated cooperation. Such cooperation often has the tendency to spill over in other identified issue areas of interests to the parties.

A critical review of the various refugee problems across the world has been undertaken in Chapter III, while analysing their implications for international relations and international politics. The varied responses to sundry refugee problems have been shaped by various structural realist factors of the international politics, often reflecting the political reality of reigning power equations. Even the response to refugee problems have been shaped and modified in the light of specific national interest of the concerned states, rather than being a reflection of their commitment to the international refugee regime or international humanitarian law.

The many triggers of the complex refugee crises the world over has been explored, discussing in details the reasons and politics behind them and the role played by the UNHCR in managing them. While the role of the UNHCR has been quite appreciable, yet the same has been found wanting on many scores, including financial incapacity and frequent penchant to foist a solution on a particular refugee problem, as directed by the principal donors, namely the developed countries. The UNHCR requires some restructuring to be able to handle its tasks better. Though often the need for a specialised agency with supervisory power over UNHCR has been recommended, it is felt that the same role can be adequately played by the UN General Assembly, with some institutionalised arrangements. The UNHCR, however, needs to continue to build consensus among the concerned actors towards a better care and protection system for the refugees, including the IDPs.
The asylum and migration policies of different countries have been reviewed, focussing on the development of an international refugee system, the issue of burden-sharing, internal displacement and specific problems of women refugees, along with various alternative approaches to resolve the refugee problem. The reluctance of the developed countries to share the burden or responsibility for international refugee care and their penchant to shut their doors to refugees are causes of concern. The developed countries' response has triggered a domino effect in the system, goading the developing countries to have a selective approach towards refugee care and protection. Such attitudes threaten the continued robustness of the international refugee regime, which is already showing considerable signs of weakness. Creative intervention is required for survival of the extant refugee regime, in the better interest of the refugees, whose dignified survival has been put to stake.

The existing refugee problem in South Asia has been analysed in Chapter IV. The related dimensions of the problem and their implications for the intra-regional and international politics have been explored and discussed. An attempt has been made to delineate the varied responses of the different South Asian countries to the refugee crises in the region, notwithstanding their non-accession to the 1951 Refugee Convention and the 1967 Protocol. The status and development of refugee regimes in South Asia have been critically reviewed, while simultaneously describing and discussing the refugee problem in the region. The feasibility of a common refugee framework in South Asia has been explored. It has also been attempted to find out how the absence of a national refugee law and non-accession to international refugee law affect the management of refugee problem in South Asia. Chapter V sought to see whether a common refugee regime for South Asia could help better management of the refugee problem in the region. The endeavour was to find out if a refugee regime has been emerging and, if yes, what should be a model refugee regime for South Asia? While discussing all these issues, one has actually argued for a common refugee framework for better management of refugee problem in the region.

The South Asian region has a very complex refugee situation due to, inter alia, ethnic, religious and territorial conflicts. There are, at least, two ways of addressing the refugee problem in this region. First, by going to the very causes of tensions and strife that trigger refugee crises; and second, by having a South Asian regional refugee
law and/or a national law, respectively, to provide effective management to refugee issues. The first approach is obviously difficult because complex issues, clubbed with social and economic problems, already prevail in the region. The second approach is easier since it involves only political will to constitute committees to frame laws in tune with international standards. The SAARC, committed to promote economic and social cooperation for the welfare of the people in South Asia and to improve their quality of life, is an ideal regional forum for creating such a regional mechanism.

The entire problem of asylum in South Asia is rooted in the lack of a legal framework for refugee protection. Not a single country in the sub-continent is a signatory to either the 1951 Convention or its 1967 Protocol. Further, there is no regional instrument relating to refugees, specific to the South Asian refugee situation, or, a specific refugee rights regime, to govern the situation. Nevertheless, the principles concerning the treatment of refugees have been adopted by the Asian-African Legal Consultative Committee (Verghese 1996: 141). Probably, regional instruments along these lines, or modified if necessary, could be attempted.

A positive picture for refugee protection is not visible. States, it appears, are either increasingly unwilling or increasingly unable to apply international refugee, and associated human rights instruments, to guarantee protection to the forcibly displaced, whether within their countries or across international borders. This unwillingness or incapacity is connected with the erosion of state authority under the pressures of economic globalization. The erosion of an international commitment to the refugee regime is accelerated, of course, by downward standard-setting, led by the migrant and refugee receiving countries of the North. With globalisation processes likely to exacerbate global inequity of all kinds, the Northern states hardly have any moral authority to press governments of the South to respect and apply international human rights instruments, which is all but disappearing, more so in the light of their own negative action in respecting the international refugee regime.

The need to ratify the Refugee Convention, in order to put the issues relating to refugees on the international political agenda, has been reiterated time and again by the UN General Assembly. Starting from the General Assembly Resolution No. 428, passed at its 5th Session, there have been more than 12 such resolutions passed by it
The effect of passing these resolutions by the General Assembly, over a period of time, assume a binding force as it graduates from a merely persuasive influence to a compulsive or obligatory mandate.

Every state that is not a party to the Refugee Convention and the Protocol has an obligation to ratify the same as member of the UN. The decision of the International Court of Justice in the Barcelona Traction, Light and Power Co. Ltd. Case appropriates this (Vijayakumar 1997: 338). The court propounded the concept of an obligation *erga omnes*, in relation to human rights, which means that in view of their importance, all states have legal interest in their protection, without any impediment of locus standi. This means that a state can not escape performance of its obligations in international human rights law, by stating that it is not answerable on this score to any other state.

Equally significant is the fact that the Barcelona dictum specifically refers to the fact that a state must extend to aliens, that are admitted to its territory, protection of the law and proper treatment, which is a matter that can be vindicated by any state; without having to demonstrate a bond of nationality or other form of substantial connection between it and the persons whose cause is ventilated. In the words of the UN High Commissioner for Refugees, “The Convention has proven its resilience by providing protection from persecution and violence to millions of refugees over five decades. It is the hub upon which the international protection regime turns and we would tamper with it at our peril” (Lloydd 2004: 1).

The South Asian states by ratifying the 1951 Refugee Convention and its 1967 Protocol, would commit to respect international norms/standards, particularly the principle of non-refoulement. It would also provide the NGOs and other institutions of civil society a basis to campaign against any violations of these conventions, nationally, regionally and internationally. By acceding, the South Asian member states would attain a platform within the UN to pressurise western countries to adhere to these international instruments, which are being undermined by their ‘non-entrée’ procedure to keep out asylum seekers. Further, for countries like India such initiatives to bring national legislation or regional legislation could bring more leverage vis-à-vis a proactive role in world politics, facilitate legitimate space for claim to the UN
Security Council and to effectively solve many of the regional issues including refugee crisis which has become perennial now.

B. S. Chimni, however, argues that the South Asian states should refrain from acceding to the 1951 Convention since it is being dismantled by the very states which framed it, and any talk of accession should also be linked to the withdrawal of measures that constitute non-entrée\(^\text{27}\) and temporary protection regimes (Abrar 2001). Chimni's formulation merits serious consideration given the fact that asylum as an institution has come under severe threat from the Western countries. It is time for a serious moral challenge to be posed by the developing world and South Asia may very well take the lead in this regard. However, linking the accession issue to making demands for changes in the Convention may lead to the further erosion of the already weakened international refugee principles. Accession to the Convention can provide the civil society institutions with a legitimate basis to campaign against any violations of the conventions (Bose 2000), and the South Asian states to exert pressure on Western countries to dismantle the non-entrée regime.

After a careful analysis of the legal as well as political reasons, it can be concluded that the concept of 'national interest' stands between political sovereignty and international treaty obligation. What would constitute national interest is a matter purely left to the domestic governments. However, for a limited purpose, it can be stated that such national interest would still be protected even after a state ratifies the Refugee Convention and the Protocol.

SAFHR organised a regional consultation on 'Refugees and Forced Migration: Need for National Law and Regional Cooperation' in New Delhi, from 5-7 September 1998, in partnership with The Other Media, New Delhi, and with the support of the South Asia regional office of Friedrich-Naumann-Stiftung. About 30 delegates from human rights organisations, legal profession, media and academic institutions of Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka participated. Representatives of diplomatic missions of Bhutan, Pakistan and the UNHCR's mission in India attended the open sessions as observers. It was noted that the existing

\(^{27}\) Various legal and administrative measures have been drawn up by the US and European countries to restrict the entry of asylum seekers from other countries.
international regime for the protection of refugees was inadequate for South Asia and the Western states themselves have initiated measures that jeopardised the core protection provisions of this regime. While recognising the urgent need for reformulation of the definition of the refugee and strengthening the core provisions of the international refugee regime, the consultation unanimously endorsed the view that refusal of the South Asian states to ratify and accede to the 1951 Convention and its 1967 Protocol presented serious problems for the refugees in the region.

It was noted that the insistence by some of the states to resolve all issues through a bilateral process has proved to be an impediment for the growth of a humane refugee policy in the region. In the bilateral process, national security considerations reign supreme and refugees are often perceived as threats to national security. Consequently, the states often fail to approach the refugee issue on humanitarian grounds, independent of security considerations. The consultation noted with serious concern that, for the first time, the refugee issue was linked to terrorism during the 9th SAARC summit in 1997 at Male. The difficulty in getting the states of South Asia to accept a regional convention or a protocol for the protection of refugees and displaced persons was recognised. However, it was felt that since the entire region was affected by a continuing process of trans-border population flux, a problem that the South Asian region shares with Africa and Latin America, the states could be persuaded to develop regional standards and instruments for cooperation on the lines of the OAU Convention and the Cartagena Declaration on refugees.

The draft for an instrument for regional cooperation on refugees, prepared by the ‘Group of Eminent Persons’, brought together by the UNHCR in 1997, under the chairmanship of the late Justice Dorab Patel of Pakistan, and the recommendations of SAFHR’s 1996 Kathmandu seminar on refugees, presented the scope for developing a comprehensive document, which could be presented to the states as a model for a regional mechanism for cooperation on refugee issues. The consultation suggested that though the document should ideally be addressed to the states, it could also be used by civil society organisations of the South Asian countries to build a non-governmental regional network of cooperation. It was pointed out that as the states have often adopted the agenda of the civil society organisations, this effort of the non-governmental bodies might also similarly influence the states.
The Draft Regional Declaration on Refugees in South Asia, prepared under the stewardship of Justice Dorab Patel, is a very useful first step. The challenge in drafting a regional declaration is that it takes cognizance of two imperatives: the need to provide adequate, encompassing protection to asylum seekers and refugees; and the simultaneous need to allow governments some measure of administrative discretion in their management of refugees. The Draft Regional Declaration incorporates both, a definition of refugee that is already in consonance with the definition being used by the regional governments in relation to asylum seekers from neighbouring countries, and a reaffirmation of the sovereign right of a state to grant or refuse asylum to a refugee in its territory.

Those arguing in favour of a regional instrument point out that, in spite of accession to quite a few international human rights instruments and constitution guarantees, and generous asylum practices and lenient judiciaries in many South Asian countries, protection for refugees has been jeopardised by the absence of legal principles. It is further suggested that foreign policy and domestic political considerations have often prevailed over general protection principles, putting refugees in vulnerable situations. The proponents of the regional approach, inter alia, argue that: the complexity and size of population movements in South Asia defy ad hoc responses; there is sufficient commonality of problems, policies and practice among the South Asian states to develop a regional approach; and a regional approach would allow South Asia to address its specific concerns on refugee issues, help improve cooperation and solidarity among countries, improve prospects for solution and help define a clear and useful role for the UNHCR.

The authorities, dealing regularly with the refugees, face a continued dilemma. On the one hand they have the duty to uphold and apply the existing laws, covering the immigration to the country, entry and exit, legal or illegal. On the other hand, they genuinely share sympathy and concern regarding how best they can protect and take into account the needs of the people, whose situation does not fit into the existing rules. Sometimes they can meet the needs of the refugees and asylum seekers in most commendable manner, within the provisions of existing laws, sometimes they can not. Erkki Heinonen, UNHCR Representative to the fifth consultation on refugee and migratory movements at Kathmandu, 1998, observed that,
"It is, therefore, important that a legal regime exists to deal with this well defined issue. Not only would it provide a great relief to refugees and asylum seekers whose situation and rights and obligations in the asylum country would be more clear and secure, but also to the authorities of the asylum country and to all those whose work is to apply, to the best of their ability, the principle, we all agree with, but are too often unable to enforce" (Wijeratne 1998: 9).

Every refugee situation tends to raise political issues and problems in the country of asylum, or in relation to other countries, particularly with respect to the country of origin. Having a legal regime to deal with refugee situations enables the government and administration to address the issues on the basis of legal requirements, thereby, defusing any arguments of a political nature at home or with the neighbours. However, some argue in favour of a national legislation, as opposed to a regional declaration or convention. Firstly, they argue that a premature attempt at a regional solution could mean the “scuttling of national legislation as the process of negotiation will raise politically sensitive issues which may be used by ruling elites to turn the ordinary citizen hostile to even a national regime for refugees” (Chimni 1998: 12). Secondly, a non-binding regional instrument may have little impact but, may provide enough justification for thwarting any national legislation. Thirdly, the scope of a regional instrument will be confined to general issues affecting the region, while a national legislation can go into much detail and, therefore, be more comprehensive.

Fourthly, any attempt at arriving at a regional agreement is likely to result in a minimalist regime. And finally, issues surrounding IDPs, which have no place in a regional instrument, can be effectively addressed in a national legislation. Chimni further states that,

“The passage of national legislations would allow states in the region to identify and debate their individual concerns, both at the level of security and resources, and, thereby, bring to the fore the divergent perceptions to the problem. They would also accumulate critical experience in their implementation. It is at this point that a fruitful dialogue for a regional solution could be initiated with greater confidence among the participants” (Chimni 1998: 12).

In the view of mass migration becoming increasingly perennial, Nepal’s Law and Justice Minister, Sita Nandan Ray, is of the opinion that “only an interlinked and
integrated national, regional and international humanitarian order will be a mechanism to yield durable solution" (Wijeratne 1998: 13). He further believes that,

"it is high time for the South Asian countries to sincerely consider developing [a] regional framework in (sic) regard to refugee problem as well. It is the regional mechanism that could supplement to domestic and international regime, facilitate the exchange of information and expertise, improve and promote both regional and inter-regional cooperation to have viable and durable solution to this complex and intricate problem" (Wijeratne 1998: 13).

Another member of EPG Nepal, Daman Nath Dhungana, while referring to the accession of international refugee law, held that,

"Only a regional approach and appropriate mechanism will help each country to expedite the process in this regard. Although every matter concerned with refugee’s right is a matter of urgent concern, it is prudent to wait for a working law than simply go for an adopted law for the sake of adoption" (Wijeratne 1998: 31).

Sri Lanka also favour a regional convention, which would set guidelines, is non-binding and would provide the rationale that its own refugees abroad would be entitled to some of the privileges of asylum and protection. Of course, it concedes that a regional convention would impose certain obligations but, it would be easier to explain to Parliament and the public because it also provide for reciprocity in the treatment of the refugees abroad (Wijeratne 1998: 49).

A SAARC Refugee Convention/Declaration would also mean a great step forward in developing a humanitarian regime in the region. The immediate beneficiaries would, of course, be the refugees themselves in different SAARC countries, over 70 per cent of whom are women and children. In the absence of normative refugee standards, refugees in South Asia live in fear of capricious actions by refugee officials. Since all refugees are technically considered aliens, they have no institutional protection of the principles of the Rule of Law. In developing a regional convention/declaration on refugees, SAARC countries would not only be recognising and refining the existing traditional humanitarian policies but, will also be developing a set of non-contentious humanitarian principles that will enhance the organisational solidarity and its commitment to respect human rights. It will strengthen SAARC position in the international fora. Such a convention/declaration would not be document borrowed from outside, unsuitable for specific needs of the problem of refugees in the region but, a SAARC developed piece of international law.
Ergo, a SAARC level system is needed for regional cooperation, along the lines of the UNHCR. If there is an Asian concept of human rights, there should also be an Asian mechanism, particularly in South Asia, to handle the problem of refugees, which is a multi-state problem, believes Anand Kumar. According to him the South Asian countries can not solely depend on Western nations for their conception of the refugee problem (Lama 2000a: 120). Refugee issue is yet to enter the main domestic political debate in the SAARC countries. Refugee policy had been left to the bureaucratic decision makers, who typically prefer to maintain status quo where they retain authority on the subject. Another reason preventing political leadership in South Asia from discussing the issue of refugees at regional level is related to the leverage that certain countries receive by hosting refugees. Granting asylum and facilitating repatriation are seen as political acts rather than a humanitarian one. Decisions pertaining to refugees, if limited by regional or international norms, would affect manoeuvrability of the policy makers.

The South Asian countries are yet to de-link refugee issues from their national security concerns. They do not share the broad worldview of perceiving them as humanitarian and human rights concerns. In this context, a regional instrument, either in the form of a declaration or a convention, is most unlikely to emerge. Even if it does, in the absence of national regimes, such an instrument is likely to be constrained by a number of factors, and the rights of refugees are likely to be compromised. This leaves only the option of national legislation. Goodwin-Gill says that “an effective international refugee system needs to reach persecuted people wherever they are – where possible bring protection and acceptance to them; where this is not possible, bringing their plight to the public attention” (Goodwin-Gill 1989: 546).

It is, therefore, evident that there are differing opinions on the advisability of having a regional or a national instrument but, there is definitely unanimity on the fact that there should be a specific legal instrument on refugees in the region to guide the governments in their policy towards refugees. Whether the South Asian governments would like to accede to the existing international refugee regime, or they would like to have a legislation of their own, is something that they need to take a decision about. However, there are certain issues that can be better dealt with within the multi-lateral regional framework. All countries of the region are susceptible to these problems and,
in some cases, more than two countries are affected by the same problem. R. K. Nair believes regional policy to be beneficial under such circumstances. Harmonisation of the regional with the national approach is generally advocated. Nair also feels that the countries of South Asia should displace the language of realism and adopt a more humanitarian attitude (Nair 2003: 204).

Almost all the South Asian countries have been liberally hosting refugees in their territories, even though they are not party to the international refugee regime, or have a legislation of their own. It is high time that they take a stand on the issue, rather than dealing with it through administrative measures, infused with ad hocism, in light of their so-called 'national interest'. Hence, South Asian countries should have a specific refugee legislation of their own. Since they have already been accepting and hosting refugees, dealing with them according to their own national legislation, and ensuing commitments under different international human rights conventions as acceded to by them, by having a specialised legislation, they would only formalise and give a concrete shape to the existing practice.

This legislation can be specially designed to factor the respective national interests, making it more in sync with the sub-continental reality than the international refugee regime that was drafted in a Cold War context and appears to be out of touch with the ground level realities in South Asia. By doing away with the element of discretion and putting in place an organised structure and infrastructure, as may be required, for dealing with refugees, the new system can be custom-made to regional and national interests. Such a system would make the regional reaction to refugee problem more consistent, coordinated and predictable. It would also help the countries of the region in meeting their international obligation required under the UN system. Drafting of a ‘Model National Law’ and ‘Draft Regional Declaration’ on refugees are positive developments in this regard. It is hoped that by taking a positive/affirmative decision to have a specialised legislation on refugees, the countries of the South Asia would live up to their reputation of being a liberal host to the refugees on their shores.