CHAPTER V

REFUGEE REGIME IN SOUTH ASIA

The main objective of this chapter is to explore and study the refugee regime in South Asia. An attempt has been made to critically review the status and development of refugee regimes in South Asia, while simultaneously describing and discussing the refugee problem in the region. To what extent the absence of national refugee law and non-accession to international refugee law has affected the management of the refugee problem in South Asia, and the feasibility of a common refugee framework in South Asia, whether that will help in better management of the refugee problem in South Asia, have also been explored. The endeavour is to see if a refugee regime has been emerging, and, if yes, what should be a model refugee regime for South Asia?

South Asian states have a common cultural mosaic, sharing ethnicity, languages, religion, culture and traditions. Despite sharing long and porous borders, they have been unable to create a legal framework to deal with the problem of mass migration across borders. The reality of South Asia is that millions of ‘illegal aliens’ reside in most countries of the region. This presents a threat to the social and political stability of the region. It also seriously undermines the fundamental principles of democracy, transparency, rule of law and respect for human rights. “The absence of a legal framework not only harms refugees and asylum seekers, it also adversely affects the society of the host country” (Lloyd 2004: 10).

Even though none of the South Asian countries have acceded to the 1951 Convention and its 1967 Protocol, which has so far been ratified by 140 nations, South Asian countries have been relatively generous toward asylum seekers compared to many developed countries. They have given shelter and humanitarian relief to victims of forced migration, ethnic strife and natural disasters. There have been very few instances when asylum seekers have been blocked or refused entry into a South Asian State. International refugee instruments, in addition to defining who is a refugee, contain provisions dealing with protection from refoulement or forced return; unlawful expulsions and detention; the right to employment and education; access to
courts; and freedom of movement etc. Furthermore, with regard to many of these issues, refugees are to receive same treatment as national in their country of residence.

In the context of South Asia, although the rich cluster of international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination, the two International Covenants relating to socio-politico-economic rights, the Convention on the Reduction of Statelessness, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1984 Convention against Torture, and the 1989 Convention on the Rights of the Child, taken together have significantly strengthened the international regime of human rights and refugee protection, curiously none of the countries in the region has acceded to the international refugee instruments and none has a domestic legal framework in the form of a refugee asylum law or determination procedure.

In the light of the existing human rights standards in South Asia, both through accession to international instruments and domestic provisions, many argue that it is unnecessary to adopt a law that provides specific recognition and protection to refugees. It is felt that such an exercise is too burdensome and would only create another set of legal obligations, which the State will have difficulty fulfilling. How far such an assumption is right and justified is requires further exploration.

Praxis in South Asia: An Analysis

The historical background of asylum in South Asia reveals that, in the past, refuge was granted, at times, in the sense of permanent asylum, as in the case of the Hindus from West Pakistan in India, and Muslims from India in Pakistan. Besides these movements, which were a result of historical and political developments, even Tibetans have been granted almost a kind of permanent asylum in India. However, this trend, attitude and approach towards migratory and refugee movements have changed considerably and with only temporary asylum being granted in practice.

In general, after granted temporary asylum, fundamental protection is granted, there is usually no risk of massive refoulement, though ‘integration based’ rights are not accorded. However, acceptance of the principle of non-refoulement, without an
express acceptance of the ‘right to asylum’, renders the former principle a meaningless concept of law. Thousands of refugees cramped into camps, awaiting repatriation, without the privilege of certain basic rights, make their life traumatic and frustrating. Nonetheless, de facto situations vary from one country to another in the sub-continent. Where the ethnicity of the refugee population is the same as the local population or, at least not too dissimilar, a greater potential for local integration exists, for example, Nepali Bhutanese in Nepal and the Pashtoons in Pakistan.

Since granting of asylum to large groups within the sub-continent has never been dictated by whether such groups fall within the refugee criteria, the promotion of standards of treatment would not depend on whether the groups are recognised as refugees, but on factors such as ethnicity and geo-political considerations, as perceived by the concerned host governments. Furthermore, promoting lesser standards of treatment for non-criteria refugees in the sub-continent, where potential for local integration exists, will seriously jeopardize standards set in the Convention.

Pia Oberoi argues that refugee policy in South Asia is often tempered by the exigencies of nation building, developmental issues, and political unrest, which may, at times, even explain South Asia’s minimal adherence to the norms of the international refugee regime (Oberoi 1998: 277-286). In the absence of a formal legal framework governing the treatment of refugees, several South Asian countries have chosen to manage refugee influxes through administrative decisions rather than specific legislative enactments. This allows for flexibility in the granting of asylum. India, for example, generously accepts large groups of refugees, who are fleeing, not just persecution but, also generalised violence, like Sri Lankan Tamils. However, this does not hold good for all groups, refugees like Afghans, Myanmarese, Iranians, Iraqis, Somalis, and Sudanese are not recognised by the Government of India. In such cases, the UNHCR intervenes by determining and granting refugee status under its mandate. This differential treatment of refugees is a fundamental problem because it negates the provision of legal rights and assistance, which would normally be granted by an asylum country. Moreover, the legal status or the rights accrued to a person, as a result of registration by the government as a refugee, and the relationship between ‘refugee’ status granted by the government and corresponding national laws, governing the entry and stay of foreigners, remain unclear.
Discussing extant national policies in South Asia

INDIA

India, like other countries of South Asia, is not a signatory to the 1951 Convention or its 1967 Protocol, and has not enacted any refugee specific legislation (Saxena 1986: 501) to regulate the entry of refugees, or to spell out their status, rights and duties while in the host country. As a result, refugees are treated under the law applicable to foreigners or aliens in general. The juridical basis of the international obligations to protect refugees, namely, non-refoulement, including non-rejection at the frontier, non-return, non-expulsion or non-extradition and the minimum standard of treatment, are traced in international conventions and customary law. Since India has not yet ratified or acceded to the international refugee regime, its legal obligation to protect refugees is traced mainly to customary international law.

India’s refusal to join the Refugee Convention of 1951 does not absolve it from the basic commitment of humanitarian protection of refugees. The right of refugees to non-refoulement has been recognised, even if with some reservations, as a part of this customary international law. Thus, respect for this right is incumbent on the Government of India. The Constitution of India mentions, in one of the Directive Principles [Article 51(c)] of State Policy, that “the state (India) shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another” (Bakshi 2000: 95).

However, India has acceded to the two 1966 Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, which contain provisions relevant to the rights of refugees. However, the said Covenants have not been enacted within the Municipal Law and are, therefore, not enforceable in a Court of Law, though, that does not absolve or relieve India of its international obligations under the Covenant. Also, India has acceded to the 1989 Convention on the Rights of the Child, whose Article 22 deals with refugee children. Further, most refugee rights find place in the category of human rights, and the concept of Human Rights has been accepted, in

19 They include the Passport (Entry into India) Act, 1920, the Registration Act, 1939, the Foreigners Act, 1949 and the Passport Act, 1967.
principle, and is reflected in the establishment of the NHRC in India. The emphasis on the ‘right to remain’, advocated by the UNHCR, has its basis in the general human rights law. Another important right of refugees, the ‘right to return’, most clearly enshrined in the 1966 Covenant on Civil and Political Rights, under the provisions on the right to freedom of movement (Article 12.4), says that “no one shall be arbitrarily deprived of the right to enter his own country” (Banerjee and Samaddar 2006).

Article 3 of the 1984 International Convention against Torture states that “no state party shall expel, return (refoule) 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”. These provisions indicate that India is obligated to secure the refugees a right to status determination, a due process for such determination, and a right against return to the country of origin. As India has no refugee-specific legislation, refugees are not classified and treated differently from other aliens. The principal Indian laws relevant to refugees include the Foreigners Act, 1946 (section 3, 3A, 7, 14); the Registration of Foreigners Act, 1939 (section 3, 6); the Passport (Entry into India) Act, 1920; the Passport Act, 1967; and the Extradition Act, 1962 (Talwar 1996: 254). Jurisdiction over issues of citizenship, naturalisation and aliens rests with the union legislature20.

However, influxes of refugees have been handled by administrative decisions, rather than through legislative requirement. This administrative discretion is exercised within the framework of the 1946 Foreigners Act; refugee policy in the country has essentially evolved from a series of administrative orders passed under the authority of Section 3 of the said Act21. Paragraph 3 (1) of the 1948 Foreigners Order lays down the power to grant or refuse permission to a foreigner to enter India. It stipulates a general obligation that no foreigner should enter India without the authorisation of an authority having jurisdiction over such entry points. It is mainly intended to deal with illegal entrants and infiltrators. In case of persons who do not fulfil certain conditions of entry, sub-para 2 of the para 3 of the Order authorises the civil authority to refuse

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20 Item 17 of the Union List (Schedule Seven appended to Article 246).
21 Section 3 provides the power to make orders and is drafted very broadly - “The Central Government may by order make provision, either generally or with respect to all foreigners, or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating, or restricting the entry of foreigners into India or their departure therefrom of their presence or continued presence therein”.

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the leave to enter India. The main condition being, unless exempted, every foreigner should be in possession of a valid passport or visa to enter India. If refugees contravene any of these provisions, they are liable to prosecution and thereby to deportation proceedings, just like any other foreigner or illegal alien (Bhattacharjee 2008: 74). The impact of administrative policy on judicial decisions is minimal and developments in one area occur quite independently of developments in the other.

In addition to the laws regulating citizenship and foreigners, statutes have been enacted that deal with legitimate entry and exit into India and movement within India, largely governed by the Passports Act, 1967, and the Passport (Entry into India) Act, 1920. These laws lay down special procedural safeguards legitimizing entry, and therefore, by definition, anyone not in compliance with them is an illegal entrant. Under section 3 of the Passport (Entry into India) Act, the government is empowered to make rules for the requirement of the production of passports by any person entering India. Rules 3 and 5 of the Passport (Entry into India) Rules, 1950, require a validly issued passport by the country of origin as a prerequisite for a person entering India. Under section 4 of the same Act, if a person has contravened any of the Rules made under section 3, he/she would be liable to be arrested (Dhavan 2005: 49).

Positive rights accruing to refugees in India, therefore, are those applicable to all aliens under the Indian Constitution. They include the right to equality before the law (Article 14) (Bakshi 2000: 17), free access to courts for protection of life and personal liberty, which may not be deprived, except according to procedure established by law (Article 21) (Bakshi 2000: 34) and freedom to practice and propagate one’s own religion (Article 25) (Bakshi 2000: 64). Indeed, any law or administrative action in violation of these rights is null and void and can be so declared by the courts (Article 13 read with Articles 32 and 226) (Talwar 1996: 254).

But, the question remains why India is not a signatory to the international refugee regime. Analysis of Indian experience with refugees clearly shows that refugee determination cannot be done on an individual basis. The Indian experience is one of mass inflow of refugees, whether from Pakistan before and after partition, Tibet after 1959, Bengalis from East Pakistan before and during the liberation of Bangladesh, or Sri Lankan Tamils after the communal flare-up in 1983. Other
historical realities have also dissuaded India from signing the 1951 Convention, which is said to be Euro-centric, based on the refugee policies of the US and West European countries, framed against the backdrop of Cold War politics. Equally relevant is the fact that, as B.S. Chimni has forcefully argued, the Convention is being “dismantled by the very states which framed the Convention”. Any talk of accession “should be linked to the withdrawal of measures that constitute non-entry and temporary protection regimes”. Instead of ‘burden-sharing’, the Western countries are resorting to ‘burden shifting’ (Suryanarayan 2001: 254-262).

During the discussion on the adoption of the Convention, Indian representatives averred that India was not convinced about the need to set up an elaborate international organisation with the sole responsibility to give refugees legal protection (SAHRDC 1997: 8143). After the adoption of the Convention, there has been no official response from the Government of India on its refusal to ratify it, except for a statement by the External Affairs Minister in Parliament, which indicated that the government was studying the implications of ratifying it22.

The question of signing the 1951 UN Convention has engaged the attention of the Government of India on several occasions; in 1967, in 1992-94 and just before India became a member of the Executive Committee of the UNHCR. The Ministry of External Affairs rightly considers the Convention and the Protocol as “a partial regime for refugee protection drafted in a Euro-centric context”. Several observers have argued that India refused to sign the Convention because it was very Euro-centric and India viewed it and the UNHCR as instruments of the Cold War. Interestingly, India’s Cold War-influenced opposition to the UNHCR has not prevented it from seeking its assistance from time to time. As a backgrounder, the Ministry points out,

“They do not address adequately situations faced by developing countries, as it is designed primarily to deal with individual cases and not with situations of mass influx, they also do not deal adequately with situations of mixed flows, that is, they do not distinguish between political refugees and economic migrants…the Convention does not provide for a proper balance between the rights and obligations of receiving and source states. The concept of international burden-sharing has not been developed adequately in the Convention. The idea of minimum responsibility for states not to create

22 Lok Sabha Debates in India, Vol XVII, Col 32, 7 May 1986 (SAHRDC 1997: 8143.)
refugee outflows and cooperating with other states in the resolution of refugee problems should be developed. The credibility of the institution of asylum, which has been steadily whittled down by the developed countries, must be restored” (Ministry of External Affairs 1999: 78).

It is argued in India that adopting a model national legislation would be the first step toward a greater capacity to protect refugees. India has restrictive laws governing the entry and stay of foreigners. Due to this legislation and the extensive discretion afforded to the authorities who implement it, a refugee may uncertainty about life, unable to work or travel and protected only according to the whims of the government. According to Christina Harrison,

“A national refugee determination system and government-recognised refugee status would carry the attendant privileges of government-issued travel and identity documents as well as greater freedom of movement within and outside India. This status, in turn, would afford refugees greater protection from refoulement (involuntary return to their country) and make their stay in India less precarious” (Harrison 1998).

An eminent group of persons in South Asia drafted a Model National Law on Refugees that was later finalised at the 4th the Regional Consultation on Refugees and Migratory Movements in South Asia. The Consultation, an initiative of the UNHRC, comprised of a group of eminent jurists, former government officials and academics. The Indian Eminent Persons Group was headed by the former Chief Justice, P. N. Bhagwati, who in consultation with the Indian civil society, comprising eminent legal luminaries etc., re-drafted the Model National Law in the Indian context, which was handed over to the Ministry of Law and Justice in mid-2000 (UNHCR 1997a: 4). Justice P. N. Bhagwati feels that,

“The adoption of a national law on refugees would not only serve to codify India’s international legal obligations for refugees, but it would help establish transparency, fairness and predictability in the law and procedures governing refugees. It would also serve to de-politicise the refugee issue so as to ensure that the corner-stone human rights principles of ‘non-discrimination’ and ‘equality before the law’ are maintained for all refugees, regardless of their country of origin” (Bhagwati 1999: 23-24).

The advantages of having a national legislation relating to refugees are many. Firstly, a law in force would greatly help to ensure the protection of human rights of the refugees in a better manner. The linking of human rights standards with that of the rights of refugees has become the order of the day and has been reiterated by many.
leaders in the UN as well as the UN Human Rights Committee. Secondly, such a law would certainly protect the constitutional mandate provided to persons, under various provisions of Part III of the Indian Constitution, and uphold the principles of the rule of law. Thirdly, such a law would effectively avoid any form of discrimination from the policy makers in relation to any particular group or category of refugees. The concept of equality, as enshrined in the Indian Constitution, can be better implemented with the help of a refugee legislation. Further, such a law would certainly work towards preventing arbitrary and ad hoc decisions taken by various administrative authorities from time to time. Finally, a national legislation would also enable the courts in India to better protect the rights of the refugees, whenever they are violated by the administrative authorities or by any other decision making bodies.

On 7 May 2003, Rajya Sabha, the Upper House of the Parliament, considered changes to the 1946 Foreigners Act for strengthening punishments for ‘illegal immigrants’. Fali Nariman, Member of Parliament, made a plea for a comprehensive new legislation on foreigners, and Eduardo Faleiro made a specific suggestion that Model Bill for refugees be incorporated in India. The proposed amendment was passed by the Rajya Sabha on 7 May 2003 itself, incorporating official amendments that strengthened the punitive regime of the Act. Lok Sabha, the House of People, passed the amendment on 30 January 2004, paving the way for its enactment (Dhavan 2005: 52-53). The amendment enables a court to sentence a person staying in the country with a forged passport to up to eight years of imprisonment and a fine of Rs. 50,000, as against two years, which was previously the case. Bail can now be granted only by a Sessions Judge, instead of a First Class Magistrate. A new Section 14 was inserted into the 1946 Foreigners Act, relating to a person who is overstaying in the country. Such a person could be punished with imprisonment of up to five years and a fine of Rs. 50,000 (Dhavan 2005: 52-53).

The Parliamentary Standing Committee on Home Affairs tabled its report on the Citizenship Act on 12 December 2003. It suggested the extension of ‘all humanitarian assistance’ to refugees, who had fled to India because of civil unrest or religious persecution, while putting pressure on the governments of those countries to create conducive atmosphere for their return. However, the Citizenship (Amendment)
Act, actually passed by the Parliament in 2004, did not have any mention of ‘refugees’. Instead, it defined ‘illegal immigrant’ in section 2 (1) (b) to mean,

“A foreigner who has entered into India

i. without a valid passport or other travel document and such other document or authority as may be prescribed by or under any law in that behalf; or

ii. with a valid passport or other travel documents and such other documents or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time” (Dhavan 2005: 53-54).

Even though the general law on foreigners in India is silent on treating refugees as a distinct class of foreigners needing protection, there have been special legislative measures reflecting India’s crisis-driven refugee policy to address particular problems. Therese measures were meant to regulate the properties left behind by the evacuees, and included Administration of Evacuee Property Act, 1950; Evacuee Interest (Separation) Act, 1951; Transfer of Evacuee Deposits Act, 1954; East Punjab Evacuees (Administration of Property) Act, 1947; and Mysore Administration of Evacuee Property (Emergency) Act, 1949 (Dhavan 2005: 58).

They also aimed at providing a compensatory and rehabilitative regime, using the properties of the evacuees for the incoming refugees and included Refugees (Registration of Land Claims) Act, 1948; Displaced Persons (Claims) Act, 1950; Displaced Persons (Compensation and Rehabilitation) Act, 1954; Displaced Persons (Claims) Supplementary Act, 1954; Patiala Refugees (Registration of Land Claims) Ordinance, 1948; UP Land Acquisition (Rehabilitation of Refugees) Act, 1948; and East Punjab Refugees (Registration of Land Claims) Act, 1948 (Dhavan 2005: 59).

There were other provisions that made exemptions for particular refugee communities from the excessively harsh regime governing foreigners. The Registration of Foreigners (Exemption) Order, 1957, made several exemptions for certain foreigners from the stringent registration requirements generally applicable to all. Children under the age of 16 years were entirely exempted. Rule 3 of the said Order also relaxed certain regulations, inter alia, ‘indigenous inhabitants of Tibet region of China’; ‘any person who is a subject of Bhutan’; and ‘any person who is a

The Order Regulating Entry of Tibetan National into India, 1950, stipulates that a Tibetan national ‘at the time of his entry into India obtain from the officer-in-charge of the police post at the Indo-Tibetan frontier, a permit in the form specified’. The permit allows such a person to stay and travel in India for the prescribed period, extendable on application. Similarly, during the problem of Bangladeshi refugees in 1971, the Refugee Relief Taxes Act, 1971, was passed, which was later abolished in 1973 (Dhavan 2005: 59). The measure indicates the political acceptability of specifically and expressly burdening the national population with fiscal measures to cater to ‘outsiders’. Only the political context of the Bangladesh war and the military defeat of Pakistan made this possible. These special measures, however, remained few and far between. Parliament needs to take a comprehensive view of the refugee law policy. At present, a refugee is trapped by a harsh legislative framework and subjected to ameliorative interventions by the judiciary and national human rights authority.

**NHRC, Supreme Court of India and Refugee Protection**

The democratic constitution and practices of the Republic of India are clearly embedded in human rights principles, the judicial system being the high moral legal authority of human rights. The establishment of the NHRC, by an Act of Parliament in 1993, has further demonstrated India’s commitment to uphold the international human rights regime. “The Constitution, the Judicial System, the Commissions, the dedicated organisations and individuals in the field of human rights have all contributed in the promotion and strengthening of the human rights regime in India” (Mahiga 1998: 222).

The NHRC has been considerably active in protecting the human rights of refugees. Specific interventions made by it have resulted in wide-ranging consequences relating to the protection of Chakma refugees, who have sought refuge in the North-Eastern states of India, particularly the states of Arunachal Pradesh and Tripura. It has also effectively intervened in cases of illegal detention of Sri Lankan Tamil refugees in the state of Tamil Nadu. In 1994, the PUCL, an Indian NGO,
spearheaded the complaints made for the redressal of their grievances, which related to the non-grant of citizenship and attempts at their forcible expulsion from India. Intimidatory tactics, like looting, threats, and physical violence, were employed against the Chakma and Hajong refugees in Arunachal Pradesh. In order to verify the authenticity of the grievances, the NHRC wrote to the Central and concerned state government, and upon not obtaining a favourable response, it sent an inspection team comprising of senior officials from the NHRC and the PUCL in 1996 to investigate allegations concerning the poor camp conditions that, according to the PUCL, had the effect of pressuring the refugees to repatriate.

The team reported on the woefully inadequate accommodation, health and food facilities in the refugee camps. Due to lack of cooperation from the state of Arunachal Pradesh, the NHRC took the initiative to file a writ petition before the Supreme Court of India. This 1996 Supreme Court case of NHRC vs. State of Arunachal Pradesh involved the issue of preventing hostile treatment of the Chakma refugees settled in Arunachal Pradesh. At issue was whether these people could be forcibly expelled from India. The All Arunachal Pradesh Students’ Union (AAPSU) had issued ‘quit India’ notices to all alleged foreigners, including the Chakmas living in the state, with the threat of the use of force if its demands were not met.

The Supreme Court granted interim orders for non-expulsion of the refugees till the final disposal of the case. Thereafter, in January 1996, the Supreme Court issued final orders, which, inter alia, recognised the existence of a clear and present danger to the lives and personal liberty of the refugees. Justice Ahmadi held that since the rights under Articles 14 and 21 of the Constitution of India are available even to non-citizens, “the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it can not permit anybody or group of persons, e.g. the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so” (Bhattacharjee 2008: 73). The Court further decided that the ‘quit India’ notices amounted to a threat to life and liberty as understood by Article 21 and that the Chakmas could not be evicted from their homes except in accordance with the law. The Supreme Court, thus, ordered that the refugees can not be deprived of their life or personal liberty except in accordance with the procedure established by law.
Specific directions were issued to the State Government to the effect that:

"...the State shall ensure that the life and personal liberty of each and every Chakma residing within-the State shall be protected and any attempt to forcibly evict or drive them out of the State... shall be repelled, if necessary by requisitioning para-military or police force..." (Gorlick and Khan 1997: 351).

As a result of these interventions, the conditions in the Chakma refugee camps improved and their quality of life enhanced. Orders were also passed for ensuring that applications for Indian citizenship made by the Chakma refugees would be duly recorded and forwarded to the Central Government for consideration. The decision of the Indian Supreme Court has been hailed as a landmark judgement in safeguarding fundamental constitutional rights of foreigners, in this case a group of refugees. Although, the judgement is rather limited in its discussion on the scope of the ‘rights’ applicable to refugees in India, it is the most helpful pronouncement that has since been referred to repeatedly in the respective high courts and lower-level courts in India that ‘refugees’, however defined, should be granted certain legal protection in India. More broadly, the decision is a successful example of the NHRC following up a refugee case and creating a favourable precedent.

The NHRC has also successfully intervened in many cases of Sri Lankan Tamil refugees, detained in so-called ‘special camps’ in Tamil Nadu on suspicion of being LTTE militants. A number of them had been issued Refugee Permits by the State Government, recognising their refugee status and, thereby, authorising their stay in India. Despite the permits, many refugees were detained for illegal entry and unauthorised stay in India under the Foreigners Act. The NHRC took up these cases with the State Government and obtained the release of many refugees. In Gurunathan and others vs. Government of India, and A. C. Mohd. Siddique vs. Government of India, the High Court of Madras expressed unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will. Another decision from the Madras High Court in 1992 has favourably acknowledged other fundamental principles of refugee law, including the need to respect the voluntary nature of repatriation (Gorlick 1996: 249).
In the 1992 Supreme Court case, Malavika Karlekar vs. Union of India, concerned twenty-one Myanmarese refugees facing deportation from the Andaman Islands to Myanmar. Their writ petition raised the argument regarding the violation of Article 21 rights. The Court directed against the execution of the deportation, until the question of their refugee status was determined. They were, therefore, allowed to approach the UNHCR to apply for refugee status (Gorlick 1996: 249). The Bombay High Court in Syed Ata Mohammadi vs. Union of India directed that there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR (Gorlick 1996: 249).

These cases, along with several others, indicate that the Indian courts have recognised the obligation of states not to return refugees contrary to the principle of non-refoulement. The decisions are especially heartening because they acknowledge the right of persons to have their claims to refugee status fully determined before a government authority. The High Courts of various states in India have liberally adopted the rules of natural justice to refugee issues, along with recognition of the UNHCR as playing an important role in the refugee protection. In Digvijay Mote vs. Government of India case of 1994, the Karnataka High Court, considering the rights of 150 Sri Lankan refugee children, ordered the state to make necessary arrangements to provide basic amenities to the refugee children in the camp on humanitarian ground. In Khadija vs. Union of India, the Delhi High Court ruled that international law and conventions cannot be applied to refugees indulging in criminal activities. They can be repatriated or deported. However, since the petitioner had approached the UNHCR for third country settlement, he was given four weeks time to seek asylum in a third country (Bose 2000: 35).

The Guwahati High Court has, in various judgements, recognised the refugee issue and permitted refugees to approach the UNHCR for determination of their refugee status, while staying the deportation orders issued by the lower court or the administration, in cases where the refugee has been arrested for violations of the Foreigners Act, for instance in the cases of Zothansangpuli vs. State of Manipur; Bogyi vs. Union of India; and Khy-Htoon and others vs. State of Manipur (Khan 1997: 75). In Bogyi vs. Union of India, the Guwahati High Court not only ordered the temporary release of a Burmese man from detention, but also approved his stay for
two months enabling him to apply to the UNHCR for refugee status. The case of U. Myat Kayew and Nayzan vs. State of Manipur involved eight Burmese, aged 12 to 58, detained in the Manipur Central Jail in Imphal for illegal entry. These pro-democracy activists in Burma had voluntarily surrendered to the Indian authorities and were taken into custody. They were charged under Section 14 of the Foreigners Act for illegal entry into India. They filed a petition for their release to seek refugee status with the UNHCR in New Delhi. In a landmark ruling, the Guwahati High Court, under Article 21, held that asylum seekers, who enter India, even if illegally, should be permitted to approach the UNHCR to seek refugee status (Bhattacharjee 2000: 73).

Though some of the decisions by the courts in India are positive in their recognition and adoption of refugee principles, but the refugee regime in India is not wholly satisfactory, with gaps in the law and the protection of refugees. By not defining or differentiating refugees from other aliens, a situation is created whereby persons in need of international protection are not receiving it. For example, thousands of Afghans and Iranians have individually arrived in India seeking asylum. However, there exists no system in India for protecting such asylum seekers, and if it was not for the intervention of a third party, these people would have run serious risk of being refouled at the expiry of their initial stay permits. A legislative framework would certainly be beneficial in filling the gaps in refugee protection in India, providing additional predictability and accountability.

The NHRC can play a powerful role in protecting the rights of refugees. However, the resources of the Commission simply can not keep pace with the number of complaints it receives. It is estimated that the NHRC receives over 2,000 communications monthly and has a backlog in excess of 25,000. In such circumstances, the delivery of justice will never be satisfactory. Nevertheless, the efforts of the NHRC stand out as positive examples of accessibility and functioning. The NHRC, through its various annual reports, has been increasingly pressurizing the government to accede to the international refugee protection regime as well as pass domestic legislation ensuring the same (Dhavan 2005: 143).

If and when the Government of India accedes to the 1951 Convention and the Protocol, it would be within the constitutional parameters to enact the appropriate
national legislation to translate those international obligations into action. For this purpose, Article 253 of the Constitution of India provides the competence to the Parliament to legislate on matters that may fall within the jurisdiction of the states (Bakshi 2000: 229). Once such a course of action is taken, it would also be possible for the Union Parliament to provide machineries and procedures for implementing the same in the federal structure. This becomes essential as the Union Government has to rely upon the states for the proper and effective implementation of the national legislation. This is achieved on an ad hoc basis with the Centre’s financial assistance to the states that have refugee population. A national legislation would certainly bring uniformity, certainty and clarity that are essential in the treatment of refugees. Such legislation would treat all refugees alike without any discrimination based on religion, language, race and the like.

With the broadened definition of refugees, the countries in the SAARC region must look at the issue afresh and take positive decisions. India should take the lead role in doing so, because 140 nations have already ratified the Convention and the Protocol (Vijayakumar 1997: 334). Being a refugee receiving state, India should be proud of its actions and the decisions taken in that regard. The international community and the related organisations have commended the role played by India in receiving mass exodus at different points of time and treating them well. India should try to translate this appreciation to its advantage, firstly, by becoming a party to the Convention and the Protocol, and, thereafter, by trying to modify the disadvantageous provisions. Further, in the light of the claim made by India for the permanent membership of the UN Security Council, ably and widely supported by many of the developed and developing countries alike, “India should shoulder more international obligations to justify such a claim” (Vijayakumar 1997: 335).

B. S. Chimni, however, believes otherwise. He argues that India should not accede to the Convention because the North is violating it, both in letter and in spirit. Instead, along with other South Asian countries, India should argue that their accession is conditional on the rolling back of non-entree regime by the Western States (Chimni 2003: 447-448). The non-entree regime is constituted by a range of legal and administrative measures, including visa restrictions, carrier sanctions, interdictions, third safe-country rule, restrictive interpretations of the definition of
"refugee", withdrawal of social welfare benefits to asylum seekers, and widespread practices of detention. Dismantling the non-entree regime will be in keeping with the principle of burden-sharing that has evolved as a principle of customary international law and requires that the responsibility of providing asylum be shared by all states.

**Benefits of Enacting a National Legislation in India**

Due to the absence of a national legislation on refugee protection and the presence of refugees in India, ad hoc and differential administrative measures have occasionally been applied to some refugee groups, in particular, the Tibetans and the Sri Lankans. These measures vary for each refugee group, with regard to their determination and treatment. There are no policy guidelines for individual refugees, who have no alternative but to approach the UNHCR. Existing policies have been dictated by the sectarian political interests of the receiving regional state. A national legislation for refugee protection would enable provision of standardised and acknowledged principles for refugee determination and treatment.

The powers to grant refugee status for a specific group of refugees are vested in the administrators at the district and sub-district levels. These administrators are not guided by any defined mechanisms of determination, leading to administrative discretion and lack of consistency. The problem is further confounded in case of individual asylum seekers due to the absence of a governmental/judicial forum for the specific purpose of receiving asylum claims and determination thereof. Enactment of refugee protection legislation will enable the creation of a framework for determining refugee status based on agreed standards of determination, protection and treatment. The entry, stay and exit of individual refugees in India are governed under the general laws relating to Foreigners. These provisions could be harmonised under a single legislation for refugee protection to enable meaningful implementation guided by humanitarian principles. Given the prevalence of rule of law in the Indian legal system, and as enunciated in the Constitution of India, refugee determination and treatment should receive similar attention as other human rights protection issues. This will be in keeping with India's active participation in the EXCOM, her leadership role in the region and among developing nations.
In bridging the gap between ad hoc refugee policies and establishment of a standardised mechanism for refugee status determination and treatment, the state will have immense administrative gains. A database providing detailed information about asylum seekers, including their backgrounds in country of origin, precise cause of departure/flight from country of origin, would be established. Also on record would be information about their present whereabouts, family profile and activities, enabling the government to distinguish between bona fide asylum seekers, migrants, terrorists, criminal elements etc. Asylum seekers who may not be deemed as deserving refugee status, in accordance with the accepted principles and standards, may be dealt with under the immigration procedures. While those conferred with refugee status can be treated in accordance with the accepted standards, they may be required to keep regular contact with concerned administrative authorities for location of residence, work, movement to other parts of India, and any other issues that may arise.

In view of the dictum 'a refugee is not a refugee for ever', the presence of a domestic legislation shall provide a planned and structured approach to the search for durable solutions for particular groups of refugees and individual refugees. Enacting a national legislation, dealing with the roles of governmental, judicial, the UN and other agencies in the determination, protection and treatment of refugees, shall clarify the roles to be played these agencies and provide for appropriate coordination among them. However, Ram Jethmalani, former Minister of Law, Justice and Company Affairs, Government of India, believes that Article 51 of the Constitution of India clearly exhorts the Government of India to observe international law. He further adds that "Our Supreme Court has ruled that wherever domestic law is silent, international law must be considered to be a part of the domestic law" (UNHCR 1999a: 17-18).

Since one of the aims of a national legislation would be to ensure uniformity of practice, and the phenomenon of refugees and their problems may be encountered in any part of India, it may be desirable to establish a ‘nodal agency’ for the purpose. Such an agency would ensure consistency by establishing liaison between the security agency concerned, the refugee(s), and the legal aid mechanisms, including the the UNHCR (Ananthachari 2003: 107). Enactment of a legislation for refugee protection will help to avoid friction between the host country and the country of origin. The act of granting asylum being governed by law rather than an ad hoc policy will then be
understood by other states as a peaceful, humanitarian and legal act, under a judicial system, rather than as a hostile political gesture. The institutionalisation of the longstanding Indian tradition of compassion, hospitality and protection to refugees shall be achieved by the enactment of a model law on refugee protection. This may be read as India’s humanitarian leadership in the comity of nations.

SRI LANKA

Although, Sri Lanka has a relatively satisfactory ratification record with regard to international human rights instruments, it has ratified neither the 1951 Convention nor the 1967 Protocol, relating to the status of refugees. As a member of the UN, however, Sri Lanka is obliged to respect the protections guaranteed by the UDHR, 1948. However, Article 14 of the UDHR merely recognises the right of individuals to seek and enjoy, in other countries, asylum from persecution. It does not delineate the obligation on the part of the states to provide protection to refugees.

The Ceylon Citizenship Act provides for two types of citizenship, by descent and by registration. The provisions relating to citizenship by descent applies mainly to indigenous Sri Lankans and, hence, very few residents of Indian descent could claim citizenship by registration, with its rigid residence prerequisites (Tilakaratna 1996: 80), thereby turning many of them into refugees. A careful perusal of the statute book of Sri Lanka reveals the total absence of provisions pertaining to refugee protection. The laws governing immigration and emigration are silent on this subject. Neither the Controller of the Immigration and Emigration, nor any other official, possesses guidelines or authority to determine refugee status, provide protection to asylum applicants and refugees or enforce the principle of non-refoulement. Only the Extradition Law of 1977 (Section 8) marginally provides for this latter aspect by prohibiting the extradition of persons, who may be persecuted on the basis of race, religion, nationality or political opinion, the final determination, however, being made by courts (Udagama 1996: 86).

In the absence of a national asylum policy or any legal framework of refugee protection, the UNHCR carries out Refugee Status Determination, on the basis of an informal arrangement with the Government of Sri Lanka (UNHCR 2006a). There
appears to be an ad hoc understanding between the Controller and the UNHCR to provide provisional protection to asylum seekers and those stranded. The UNHCR has been formally permitted to take care of such persons exclusively at its expense and to make efforts towards their repatriation from Sri Lanka. However, those who seek asylum cannot regularise their stay in Sri Lanka unless they can fulfil other legally recognised conditions for doing so. In the absence of grounds enabling them to do so, their stay in Sri Lanka, although protected by UNHCR, is technically illegal.

Under the Immigrants and Emigrants Ordinance of 1948, an alien (other than those aliens who are exempted by the law), aside from possessing a valid passport, has to either obtain a visa or an endorsement by an authorised officer at the port of entry (Article 10, 13 and 14). Where an airliner is obliged under ICA/IATA rules to take back passengers, who are not admitted into the country (for lack of documents/visa), then such persons are sent back, usually to the port of origin, without affording them an interview with the UNHCR at the airport. If, on the other hand, an airline is not obliged to take passengers, who are not admitted to Sri Lanka, the Controller permits the UNHCR to interview persons so stranded, if they request protection (Udagama 1996: 87).

Eminent Persons Group (EPG) Sri Lanka has also been lobbying with the local government for a national legislation on refugees and trying to create awareness for the better appreciation of the issue. However, they have received negative reaction from the government officials on the issue. They feel that ‘the government of Sri Lanka does not see a need for a refugee law [which] believes that having such a law would only allow a large inflow of individuals into Sri Lanka’. EPG thinks that the government would have no difficulty with a regional instrument, which would set non-binding guidelines for the treatment of Sri Lankan refugees abroad (Wijeratne 1998: 23). Sri Lanka EPG has been coordinating and collaborating with all concerned agencies to create necessary awareness on the issue. They have argued in favour of broadening the refugee discourse by discussing issues relating to involuntary movements of peoples, in particular, internally displaced people.

Sri Lanka’s priority problem is that of IDPs and not spill-over of non-national refugees. Considering the history of illicit immigration from South India and presence
of Tamils of Indian origin, the EPG believes that the introduction of the model law would cause public misapprehension that the government was ‘inviting’ South Indian migratory movements at a time when it should be most circumspect. Politicians and bureaucrats both believe that the time is not appropriate to move in the matter (Wijeratne 1998: 48). Sri Lanka EPG also believes that the model national law would remain on the back-burner for sometime, though Sri Lanka would not mind moving forward with respect to a regional arrangement.

The protection accorded though the informal and ad hoc arrangement between the Controller and the UNHCR, where the latter has to bear the entire responsibility, is extremely tenuous. From a legal point of view those who receive protection from the UNHCR, have no legal status in Sri Lanka. The operations of the UNHCR in Sri Lanka are based on the 1993 agreement with the Government of Sri Lanka and on a letter of the UN Secretary General of 15 August 1997, which confirmed UNHCR’s coordinative role with regard to humanitarian and relief assistance for internally displaced persons in Sri Lanka (UNHCR 1999c: 19).

The irony is that India and Pakistan have received and continue to provide protection to thousands of asylum seekers, without having legal provisions or process in place to determine status and to provide for protection. Given this situation, Sri Lanka should ideally ratify the international instruments for the protection of refugees, adopt a legal framework to authorise and provide guidelines to a competent authority (like the Controller) to process asylum applications and to make determination of refugee status in accordance with international standards. The same would provide for a comprehensive protection framework, including health care and schooling for young children. It would also entrench the principle of non-refoulement in the legal system, providing necessary administrative infrastructure and facilitating coordination among various departments and ministries. It shall also create ground for training relevant officials to equip them refugee protection.

NEPAL

The Constitution of Nepal accepts the basic rights of individuals that are accepted universally, the most fundamental being that no person shall be deprived of his/her
personal liberty, save in accordance with law. Right to equality is provided to each person, subject to the equal protection of law, which cover both citizens and aliens. The right to criminal justice, right against preventive detention and right to religion for all individuals are stipulated in the Constitution. In the case of violation of these rights by any law or administrative rules, constitutional remedy is available.

Nepali citizens and foreigners/aliens enjoy some fundamental rights under the Constitution, which include the Right to Freedom (Article 12), Right to Criminal Justice (Article 14), Right against Preventive Detention (Article 15), Right to Education and Culture (Article 18), Right to Religion (Article 19), Right against Exploitation (Article 20), Right to Privacy (Article 22) and Right to Constitutional Remedy (Article 23) (Bose 2000: 38-39). The Citizenship Act, 1963, permits naturalisation of refugees (Section 3). The Immigration Act, 1992, vide Section 14 (2), retains the power to expel aliens on grounds of national interest (Bose 2000: 39). The Extradition Act, 1992, incorporates in Section 12 (1) the principle that political offenders should not be extradited. This clause supports the philosophy of refugee law (Phuyal 1997: 49).

Despite these legal provisions, the Foreigners Act empowers the government to regulate the entry of aliens into Nepal, and also their presence and departure therefrom. The Passport Act empowers the government to impose conditions of possession of a passport for entry into Nepal, and the issuance of passport and travel documents and trekking permission. However, with no particular legislation to regulate the movement of refugees in Nepal, the matter is tackled through administrative measures. The government policy, permitting entry into Nepal and stay thereafter, is quite liberal towards aliens including refugees.

Nepal EPG, established at the Regional Consultation on Refugee and Migratory Movements in South Asia at Geneva, in 1994, believes that the concept and draft of the model law is in line with various international conventions and practices towards creating an enduring and institutionalised framework to deal with the situation of asylum seekers and refugees in this country. Such a framework can go a long way in facilitating the task of those who deal with the issue at ground level.
These will also “allow the authorities to dispense with ad hocism and discretionary approaches” (Silwal 1998: 7).

According to the EPG Nepal, the Model National Law, as proposed, has to be disseminated widely among the public for greater awareness towards fulfilling the need for a legal regime. However, the adoption a model refugee law should be accompanied by the preparation of a regional instrument, convention or declaration. Mr. Yadav Kant Silwal, member EPG Nepal, said “A regional instrument galvanises the entire countries of the region into the mainstream of international legal norms and practices. It ensures accountability on the part of all countries demanding sufficient political will to address the causes which are at the origin of refugee movements” (Silwal 1998: 7). The EPG Nepal felt that the adoption of a model national law and developing a regional instrument are complementary exercises, prone to wider acceptability by the governments of the region. It has already taken up the issue of model national law with the national Government and feel that “it would be difficult to have a refugee law before Parliament as it is the general feeling among official that a refugee law would open the gate to flood of refugees” (UNHCR 1998d: 22). Nevertheless, the EPG Nepal believed that there is a need for greater concerted efforts by all EPGs to promote such a law and suggested that the UNHCR should directly write to the governments in the region on the issue.

By accepting and sheltering refugees, Nepal has fulfilled its international commitment as enshrined in sub-article 15 of Article 26 of the Constitution, dealing with the State’s policies, which reads, “The foreign policy of Nepal shall be guided by the principles of the United Nations Charter, non-alignment, the Panchsheel, international law and the value of world peace” (UNHCR 1996a: 59). However, in the absence of any specific provision or legislation related to asylum, the international human rights instruments and domestic legislation applicable, in general, to foreigners are also applicable to refugees in Nepal. Apart from having incorporated several provisions of the UDHR, the Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment into the Constitution, Nepal is party to 14 other Human Rights instruments, which, by virtue of Article 9 of the 1990 Treaty Act, take precedence over conflicting domestic provisions. However, Article
14 of the UDHR, providing for the right to seek and enjoy in other countries asylum from persecution, is not included.

The domestic legislations that are applicable include the Nepali Citizenship Act, 1964, the Immigration Act, 1992, and its implementing instrument, the Immigration Rules, 1994. The Immigration Act prescribes that all foreigners wishing to enter Nepal must hold a valid travel document and visa (Article 3). Entry without the prescribed documentation and/or overstay are punishable by fine and imprisonment (Article 10), followed by deportation (Article 9). Application of these provisions to refugees might result in refoulement, in breach of international law standards, such as the non-refoulement principle under customary law and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as signed by Nepal. Therefore, unless confronted with unmanageable political or economic problems, the Nepalese Government is not expected to mete cruel and inhuman treatment with refugees by punishing or deporting them.

Article 14 of the Immigration Act empowers the Nepalese Government to forbid the entry, stay or departure of any foreigner in/from Nepal, whose entry, presence or departure may be against the best interest of the country. Article 44 (1) of the Immigration Rules specifies that foreigners, against whom deportation orders have been issued under the Act or these rules, must stay at the place specified by the Department of Immigration until they depart from Nepal. They must bear the expenses required for their departure from Nepal (UNHCR 2002a: 53).

The Government of Nepal has dealt with various refugee groups and individual cases in different ways. From a legal point of view, even though Nepal has not acceded to the 1951 Refugee Convention, it is bound by the relevant provisions of the Covenant on Civil and Political Rights and of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Immigration Act itself allows for Government discretion in exempting certain groups from its provisions, for instance, Indian nationals are exempted under the terms of Article 7 of the 1950 Treaty between India and Nepal. A declaration that refugees are exempted from certain provisions of the Immigration Act would probably suffice to clarify the issue. However, individual asylum-seekers, recognised under UNHCR’s Mandate, are
permitted temporary stay in Nepal, though they have no right to work and have, therefore, virtually no possibility of local integration (UNHCR 2002a: 66).

In Nepal, the Ministry of Foreign Affairs, through its Department of Border Administration, is entrusted with the responsibility of handling refugee issues. Each of the 19 districts of Nepal has a Division of Border Administration to deal with the issue at the local level. At the Central level, a National Unit for Coordination of Refugee Affairs has been set up to plan, monitor and coordinate refugee affairs. The Ministry of Foreign Affairs handles bilateral talks with the countries of origin and is also entrusted with the responsibility of monitoring and supervising the issue at the international level (Kumar 2001: 50-60).

Nepal’s preparedness towards the legal protection of refugees is well reflected in its commitment to international human rights and in practice. These are strong bases for the future framework of refugee legislation in Nepal. Although, refugees in Nepal do enjoy asylum, in practice, and as basic rights, formalisation of this practice through establishment of specific refugee legislation or through accession to the 1951 Convention or its 1967 Protocol, is desirable and should be promoted in order to provide for a legal basis for dealing with individual asylum seekers.

BANGLADESH

Mr. Abul Hasan Chowdhury, Minister of State for Foreign Affairs, while speaking at a Conference on Temporary Migrant Workers of Bangladesh Towards Developing a National Plan of Action, 26-27 April 1999, in Dhaka, organised by the RMMRU and Bangladesh National Women Lawyers’ Association (BNWLA), in collaboration with the Solidarity Centre and International Organisation for Migration (IOM), said that ‘a national plan of action necessitates national consensus.’ He stated that contribution of temporary migrant workers (TMWs) to the host country’s economy should also be recognised and studies should be conducted at the practical level to highlight their contribution both in the host as well as in the home country. He also underscored the need for an appropriate national legislation to safeguard the rights and interests of TMWs (RMMRU 1999: 1).
The EPG Bangladesh has been undertaking various promotional activities to advance the model national law in their country. The Bangladesh Association for UNHCR brought the issue to the notice of the Government of Bangladesh and organised a press session. In fact, the then Law and Foreign Ministers of Bangladesh had promised to examine the issue closely (Wijeratne 1998: 35). The EPG Bangladesh has worked closely with the RMMRU, University of Dhaka, on its promotion. The Bangladesh Bar Council has also joined the EPG in promoting the model national law in Bangladesh through organisation of workshops and seminars. Bangladesh has signed a number of international human rights instruments and has also declared its intention to form a National Human Rights Commission as well as an Office of the Ombudsman. The EPG intends to lobby with the Government of Bangladesh to accede to the 1951 Convention (UNHCR 1998d: 21).

PAKISTAN

Pakistan has ratified a number of international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Political Rights of Women, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women among others. Pakistan, however, is not a party to the 1951 Convention, the Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNHCR 1998a: 13).

All refugees groups in Pakistan have been dealt with under administrative measures and domestic law; Pakistan has, in general, accorded to refugees, in its territory, rights as under the 1951 Convention. Under the Registration of Claims (Displaced Persons) Act, 1956, a detailed procedure for the registration and verification of claims by displaced persons was established. The Displaced Persons (Compensation and Rehabilitation) Act, 1958, laid down procedures for the allotment and transfer of evacuee property in favour of refugees who had abandoned properties in India (Bose 2000: 43). Justice Dr. Nasim Hasan Shah observed that,
“Pakistan, to help the Afghan refugees in all possible ways, waived all restrictions, permitting them to work outside their camps and move freely throughout the country. Indeed, the rights and privileges granted to Afghan refugees exceeded those provided under the 1951 Refugee Convention and 1967 Protocol. In this state of affairs, the need of a formal legal framework to deal with refugees seeking asylum in the country has been deemed unnecessary” (Bose 2000: 45).

EPG Pakistan has also taken up the issue of a national refugee law with the national government. However, they noticed that “there was a general apprehension that the adoption of a refugee law would leave Pakistan alone in shouldering the burden of Afghan refugees at a time when international burden-sharing was dissipating”. Pakistan, thus, complains that the principles of ‘burden-sharing’ and ‘international solidarity’ have disappeared from the international scene, evident from their conduct of drastically reducing assistance for the Afghan refugees.

Apprehension has also been expressed that they may be burdened further if they adopted formal legal instruments obliging them to comply with rights and privileges conferred to the refugees stipulated in these instruments. Notwithstanding this, the EPG Pakistan has expressed its determination to continue with its efforts to place the matter in the proper perspective and to explain the importance of having a legal regime to deal with refugees. For the moment, the EPG Pakistan favours the adoption of a Regional Declaration, which could also be an important step towards adoption of a national legislation.

UNHCR’s Role in South Asia

There are no refugee status determination structures administered by governments within the South Asian sub-continent. “Large groups of asylum seekers are granted refuge under policy/administrative procedures. Those granted refuge have normally originated from countries within the sub-continent or having the same ethnic/religious background as the host country’s population and also geopolitical factors have played a vital role in the grant of refuge” (Lim 1993: 7) In the case of asylum seekers of other nationalities, usual immigration laws apply and, in this regard, the UNHCR’s role is essential in promoting asylum, for instance, in the case of Iranians, Somalians, Iraqis and Afghans.
The UNHCR is mandated to find durable solutions for refugees world-wide and the same applies to South Asia as well. These are:

- **Voluntary Repatriation:** This is the most preferred solution. The UNHCR helps refugees who wish to return (repatriate) to their country, often arranging and paying for their passage.

- **Local Integration:** In the host country, refugees are helped to become self-reliant, either through vocational training or other initiatives. In cases where refugees are interested in becoming citizens of the host country, UNHCR facilitates this process through cooperation with the concerned authorities of the host country.

- **Resettlement:** The third and last option, if the first two are not possible. In limited situations, refugees are helped to resettle in a third country. From India, refugees mostly find resettlement in Canada, the USA and Scandinavia (UNHCR 2000: 1).

The UNHCR in India has taken the admirable initiative to sensitisise the intelligentsia about the problems of refugees in South Asian countries (Suryanarayan 2001: 261). A number of seminars and workshops have been organised in collaboration with Universities and organisations like the SAARCLA W and the ICHLR. Informal consultations have taken place and a Model Law on Refugees has been drafted by an Indian Group of Concerned Eminent Persons, under the chairmanship of Justice P.N. Bhagwati, former Chief Justice of India. He has succinctly posed the problem as follows, “Would the setting up of an appropriate legal structure or framework not help to provide a measure of certainty in the States dealing with the problem of refugees, and provide greater protection for the refugees? India and other South Asian countries must seriously ponder this question” (SAARCLA W and UNHCR 1997: 23).

The UNHCR works throughout the South Asian region to increase public awareness on refugee issues and to encourage governments to address both the root causes and the consequences of refugee migration. It has been organising a series of regional consultations on the problem of refugees; the consultations, held in Dhaka in November 1997, focussed on developing and adopting a Model National Law on
Refugees. The participants, including eminent jurists and former politicians from Bangladesh, India, Nepal, Pakistan and Sri Lanka, raised some interesting rationales for their respective countries’ failure to sign the 1951 Refugee Convention, which reflected the South Asian perceptions. They, inter alia, argued that, ‘Western’ signatories only meet their obligations when it suits them to do so; the Convention is tailored to post-WWII era refugees and has become outmoded, impotent to deal with the mass migrations of recent years; the 1951 Convention is a Cold War instrument, tilted in favour of ‘political refugees’ and, therefore, inappropriate for the South Asian situation where the mass exodus of refugees is caused mainly by generalised conflict; signing the Convention will mean taking on financial burdens which they can not bear; and each of them has been generous and responsive to the needs of refugee populations on a crisis-by-crisis basis (Weerakoon 1997: 48-54).

Bureaucratic wariness of the perceived ‘interventionist’ activities of the UN and other international agencies, the possibility of economic migrants benefiting from the Convention principles, the derogation by developed countries of international refugee protection principles, the apprehension of policy makers that the consequences of signing the Convention might entail obligations that they may not be able or prepared to meet in terms of resource mobilisation and, the perception that the Convention is being abused by refugee groups in the developed countries who are collecting funds for terrorist activities in their countries of origin, have been advanced as further explanations for non-signing of the 1951 Convention (Abrar 2001).

While acknowledging the validity of some of these arguments, the group urged their respective nations to adopt national legislation that would give the countries flexibility to meet their own concerns, while giving legal force to the humanitarian ideals of the 1951 Refugee Convention. The participants also suggested that the natural extension of the Consultation would be to arrive at a regional consensus similar to that of the OAU.

Initiatives towards Development of a Regional Instrument

The majority of states in Asia are neither party to the 1951 Refugee Convention nor do they have any national refugee legislation. There is also no regional organisation
on the pattern of OAU or OAS. There are only some small sub-regional organisations like the Arab League, the ASEAN, and the SAARC etc. The most important document relating to refugees in Asia is the ‘principles concerning treatment of refugees’, adopted in 1996 by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok, commonly known as the ‘Bangkok Principles’. They are just guiding principles and the member states are not bound by them.

Article VI of the Bangkok Principles states the minimum standards of treatment and like the 1951 Refugee Convention stresses that, (i) a State shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances; (ii) a refugee shall not be denied any rights on the ground that he does not fulfil requirements which by their nature a refugee is incapable of fulfilling; and (iii) a refugee shall not be denied any rights on the ground that there is no reciprocity in regard to the grant of such right between the receiving state and the country of nationality of the refugee (Saxena 1998: 240).

A Round Table Conference of Asian Experts on the ‘Current Problems in the International Protection of Refugees and Displaced Persons’ was held at Manila, 14-18 April 1980, under the auspices of the UNHCR. A Working Group was established at the Round Table, with the task of following up the recommendations and conclusions of the Conference. The Report of the Working Group was prepared at the International Institute of Humanitarian Law, San Remo (Italy), 19-22 January 1981. The Working Group, however, concerned itself mainly with large-scale influx of refugees and not individual refugees, and laid down the basic minimum standards for the protection and well-being of the former only.

The question of asylum-seekers of other national groups, who are supposed to be determined as refugees under the mandate of UNHCR, still persists. In South Asia, differential treatment exists in the way the host government treats individual refugees recognised under the UNHCR mandate and those of mass influxes from neighbouring states. With respect to the former, their non-recognition before the law and uncertain status renders them open to risk of penalisation for illegal entry and expulsion, whilst there is a greater measure of fundamental protection with respect to the latter. Hence, any regional instrument, under which countries of the sub-continent may set common
minimal standards of treatment for refugees, should highlight the plight of mandate refugees, whose status are governed by immigration laws.

There has been a rise in the regional processes of consultation, many of which have been initiated by the UNHCR, in partnership with NGOs and eminent personalities. Such initiatives have included annual sessions of the Asian-African Legal Consultative Committee (AALCC), the Fourth Informal Consultation on Refugee and Migratory Movements in South Asia (also known as the EPG), and the Third Meeting of the Asia-Pacific Consultations (APC). In addition, local NGOs have begun to take initiative to convene discussion on refugee issues in South Asia. This is exemplified by the Regional Consultation on 'Refugee and Forced Migration – Need for National Laws and Regional Cooperation', held in New Delhi, India in 1998. The Consultation, organised by regionally-based human rights NGOs, is an important step on the path towards evolving a regional consensus on standards of refugee protection. Such meetings are a valuable part of the ongoing efforts, both formal and informal, to promote attention to refugee issues in South Asia.

The AALCC, an inter-governmental consultation group, comprising of forty-four members, meets annually to discuss issues of concern to the region. The status and treatment of refugees has been on its agenda since its 6th Session, held in Cairo in 1964. At its 8th Session, held in Bangkok in 1966, the AALCC adopted the 'Bangkok Principles' (Oberoi 1998a: 279). These aimed to provide a common normative framework of refugee protection for the Afro-Asian region. While the principles do not amount to treaty obligations, they have served as guidelines for refugee treatment and protection. A resolution passed during the 35th Annual Session of the AALCC, held in Manila in 1996, was an important part of a series of AALCC initiatives to update the 1966 Bangkok Principles.

The Manila Seminar, held in December 1996, was attended by delegates from twenty-three AALCC member-states, including five South Asian countries. The

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23 The list of member states is as follows: Bangladesh, Bahrain, Botswana, china, Cyprus, Egypt, the Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Kuwait, Korea, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Pakistan, Philippines, Qatar, Republic of South Africa, Saudi Arabia, Senegal, sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Sultanate of Oman, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, Yemen.
Seminar resulted in a series of recommendations aimed at updating the Bangkok Principles, in the light of the legal developments and state practice in the Asian-African region during the previous thirty years. It was further recommended that the conclusions of this Session be submitted to the 36th Annual Session, to be held in Tehran. In May 1997, the AALCC’s 36th Annual Session meeting took note of the Manila recommendations and requested the AALCC Secretary General to convene a Meeting of Experts to further debate the issue. This Meeting, it was hoped, would be able to compile a detailed study and possibly achieve reasonable consensus on the major issues affecting refugee protection and solutions in the Asian-African region.

At the Tehran Meeting of Experts, held from 11-12 March 1998, the four themes debated at the 1996 Manila Seminar were discussed, along with other related issues. The Meeting of Experts requested the AALCC Secretariat, based in New Delhi, to prepare a draft text of proposed revisions to the Bangkok Principles. They emphasized that these should aim to take into consideration issues discussed during the Meeting, as well as the recommendations of the Manila Seminar. This request was subsequently passed on to the UNHCR by the Secretariat: The Meeting of Experts, in common with most AALCC sessions, was attended by senior officials from the Foreign Affairs and Law ministries of Asian and African countries, clearly indicating the importance attached to such deliberations by the region’s governments. The draft text, prepared with assistance from the UNHCR, was finalised and submitted by the AALCC Secretariat to the 37th Annual Session, held in New Delhi from 13-18 April 1998, and furthered significantly the process of revision (Oberoi 1998a: 281).

Contained within the AALCC process are a number of potentially favourable implications for refugee protection standards in the region. In the first place, there is considerable value in updating and reviewing the Bangkok Principles, in the light of developments in refugee situations within the region. Given that these Principles are the only codified and comprehensive standards of protection in Asia, it is important to ensure that they are kept relevant to the refugee experience of Asian States. This is necessary if there is to be any chance, in the future, of evolving common regional standards and mechanisms of protection. Achieving predictability, consistency and uniformity in the treatment of refugees within the region should, therefore, be seen as a desirable development. In addition, such initiatives are an important method of
increasing understanding among states and non-state actors of the role and importance of international, regional and domestic law in refugee protection.

In a region where refugee flows are dealt with, primarily, as issues of state security and political process, initiatives that emphasise the importance of a legal framework to construct refugee policy must be welcomed. On a more general level, the AALCC Sessions are able to foster dialogue on the legal principles, affecting refugees among states, with diverse experiences of refugee movements. Eventually, it is hoped, that the AALCC initiative will prompt states in the region to move forward in respect of accession to the international refugee instruments and/or adoption of appropriate regional or national procedures.

The First Informal Consultations on ‘Refugee and Migratory Movements in South Asia’ were held in November 1994 in Geneva. These Consultations were established by Ms Sadako Ogata, former UNHCR, in order to garner the views and support of eminent personnel and former governmental officials of the region. By confining their discussions to issues of forced displacement within the region, it was hoped that they could achieve a South Asian perspective on the pathways that would lead to a lasting solution. One of the main purposes of these consultations was to find ways of reconciling the narrow power-political interests of states with their international humanitarian responsibilities. By virtue of the prominence in public life of the participants, the EPG Consultations also raised public awareness of refugee issues in the region. In addition, such initiatives attempt to identify mechanisms to influence political decision-making and create linkages between the various refugee protection constituencies in the region. In this way, efforts are made to change the information environment in which state actors work.

Since the first meeting in Geneva in 1994, EPG Consultations have been held in Colombo, Sri Lanka in September 1995, and New Delhi, India in November 1996. These consultations concluded that the need for development of a ‘regional normative framework which would cover refugees, stateless persons and the internally

24 The five original members of the EPG were: Justice P.N. Bhagwati (former Chief Justice of India), Dr. Kamal Hossain (former Minister for Foreign Affairs of Bangladesh), Mr. Bradman Weerakoon (former advisor to the President of Sri Lanka), Justice Dorab Patel from Pakistan and Mr. Risikesh Shah from Nepal.
displaced’ (UNHCR 1996b: 13) should be a priority. In addition, the New Delhi Consultation agreed that efforts should be made within the EPG forum to adopt a standard model national refugee law for the countries of the region. The EPG Consultation held in Dhaka, Bangladesh from 10-11 November 1997, included participants from India, Pakistan, Bangladesh, Nepal and Sri Lanka. Reports on each of these states were submitted by the country delegations. Along with detailing the current plight of refugees in these South Asian countries, the reports focussed on efforts within countries to promote refugee law and refugee issues. The reports also noted the links that were being established between local NGOs and regional inter-governmental consultations.

A regional consultation entitled, ‘Refugees and Forced Migration – Need for National Laws and Regional Cooperation’, was held in New Delhi, India from 5-7 September 1998, under the auspices of two local NGOs, the Other Media and the South Asia Forum for Human Rights (SAFHR). This meeting was the second in a series of consultations on refugee movements in South Asia organised by SAFHR. The first meeting, held in Kathmandu in 1997, had concentrated on the political context of forced displacement and the need to accede to international refugee protection instruments. The primary aim of the New Delhi initiative was to ‘evolve a common instrument’ to address refugee movements in South Asia. Participants drawn from the South Asian human rights NGO community included delegates from Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka. It was an unprecedented effort to bring together non-governmental human rights practitioners to formulate a common framework for refugee protection in South Asian. The Consultation was further distinguished by the fact that it included delegates from the Afghan, Iraqi, Bhutanese, Myanmarese and Sri Lankan Tamil refugee communities in South Asia.

The themes discussed included the definition of refugee in South Asia, protection of refugees and need for national laws, the international refugee regime and participation of South Asian states, and regional cooperation. Participants endorsed, with minor alterations, the Model National Law on Refugees, adopted at the Dhaka EPG Meeting. They further recommended that the media, a powerful force in most countries of South Asia, be used to inform and influence civil society on important issues of the refugee regime. While recognising the inadequacies in the international
protection instruments, the participants affirmed the need for regional mechanisms of protection, and greater national and regional debate on the 1951 Convention.

The meeting also focussed on the definition of refugees in the South Asian context, stressing that categories, such as 'threatened peoples', 'uprooted peoples', 'forced migration' and 'unwanted peoples', did not tend to lend themselves easily to concrete definitions. The meeting did, however, affirm the need to accede to the 1951 Refugee Convention and its 1967 Protocol, determine regional mechanisms of protection and draft national laws, based on wider frames of reference evolved in the OAU Convention and the Cartagena Declaration. In bringing together influential figures from the NGO community of South Asia, this Consultation significantly advanced the debate on issues of refugee protection in the region. By including the refugee community in the processes of discussion, these initiatives have the ability to identify and communicate relevant solutions to issues of protection and refugee treatment in the South Asian region.

These initiatives regard a Model National Refugee Law as the ideal starting point for discussions on refugee protection. This is largely due to the emphasis on bilaterally negotiated solutions within dispute settlement mechanisms (centred largely on the SAARC) in the South Asian region. In this context, a coordinated, though nationally based, legal framework of refugee protection is a necessary first step. Despite not making any binding obligations on participating states, such initiatives are both an important influence on publicly held opinion, as well as being indicative of prevalent or changing views. The very fact that governments feel compelled to participate, or to be seen as participating, is itself recognition on their part of the value of the process. What is of considerable significance is the willingness of governments in the region to participate, admittedly to varying degrees of involvement, in processes of consultation that address issues of refugee protection.

The Consultation held in New Delhi agreed that a Model National Refugee Law would be the main item on the agenda of the Dhaka EPG meeting. Discussions on this draft legislation, prepared under the chairmanship of Justice P. N. Bhagwati, were wide-ranging and thorough. The group debated issues, such as the scope of the refugee definition, the rights and duties of refugees, and states in situations of mass
influx among others. The model law itself had been formulated, taking into account the particular features of South Asian refugee flows. Hence, it includes provisions on mass influx, on special consideration for women and child refugees, and strengthens the provision on voluntary repatriation and non-refoulement. This Model Law was adopted by the members of the Consultation by consensus. It was recognised, however, that the law might have to be adapted to take into account the particular legal context and political imperatives of individual countries.

The legislation relating to refugee rights was laid down in the form of a 'Model Legislation on the Status and Treatment of Refugees', submitted to the 34th Session by the AALCC Secretariat in 1995 and the Model National Law on Refugees, adopted at the 4th Regional Consultation on Refugees and Migratory Movements in South Asia, held in Dhaka on 10-11 November 1997. Article 14 of the later document lays down the rights of refugees, that they be generally accorded the same treatment as received by aliens; their basic human entitlements sympathetically considered; refugee women and children be given special consideration; and be issued identity and travel documents. Article 10 of the former document ('Rights of Refugees') lays down two options, option A\textsuperscript{25} and option B\textsuperscript{26}.

The Model National Law establishes, not only the rights of the refugees, but also includes their duties, and provide for group determination of refugee status in the

\textsuperscript{25} The rights of refugee stipulated by the International Convention to which this State is a party and that customarily recognized by states will be respected and guaranteed as far as practicable.

\textsuperscript{26} Every refugee, till the time he stays within this country, shall have the right –

- (a) to a fair and due treatment, without discrimination as to race, religion, sex or political, opinion, or country of origin;
- (b) to receive the same treatment as is generally accorded to aliens relating to...
  - movable and immovable property, other similar rights pertaining thereto, and also to leases and other contracts relating to movable and immovable property;
  - education, other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges, provided, however, he is accorded the same treatment as is accorded to nationals with respect to elementary education;
  - the right to transfer assets held and declared by a refugee at the time of his admittance into the country, subject to the laws and regulations;
  - the right to engage in agriculture, industry, handicrafts and commerce and establish commercial and industrial companies in accordance with applicable laws and regulations;
- (c) have the same right as nationals of this country with respect to practicing their religion and the religious education of their children;
- (d) to have free access to courts of law, including legal assistance and exemption from cautio judicatum solvi.
context of the modern phenomenon of mass refugee exodus, where individual
determination is impractical. The provision regarding the cardinal principle of non­
refoulement includes not only refugees, but also the asylum seekers. The most
appropriate solution to the problem of refugees, the principle of voluntary
repatriation, has also been fully refined in the Model Law. It has eighteen paragraphs
and covers nine substantive areas broadly.

Firstly, it makes an attempt to define ‘refugees’ in a much broader context
than the 1951 Convention. The definition, by and large, includes positive
developments in the field of international refugee law, including those at various
regional organisations. The human rights perspectives, as well as the implications of
the judicial decisions, have also been reflected in this definition. Secondly, the
exclusion clause has been developed, based on the existing legal framework, as
reflected in subsequent developments. The ‘cessation clause’ continues to find a place
in the draft as well. Thirdly, the Model Law reiterates the customary as well as
conventional principle of ‘non-refoulement’, which is the central theme in refugee
law. Fourthly, the Model Law provides for procedures relating to refugee status
determination, which is not present in the Refugee Convention. These procedures
incorporate practices followed by nations, in general, in the determination of refugee
status as well as the minimum procedural safeguards as enunciated by the EXCOM.

The Model Law provides for constitution of authorities, like the
Commissioners for Refugees and a Refugee Committee to hear the appeals from the
Commissioners. Under the proposed legislation, the order of the Refugee Committee
is made final. However, judicial review of such decisions can not be denied to the
person seeking protection and review of such orders before the judiciary. The Model
Law also proposes a series of measures to be adopted, from the date of application to
seek refugee status to the final determination, which has to be made by the authorities
so constituted. The Model Law has incorporated only four out of the five grounds of
the cessation clause provided under the 1951 Refugee Convention.

The rights and duties of refugees, with an emphasis on non-discrimination,
treatment on par with aliens, ensuring basic human entitlements, special protection to
be extended to refugee women and children etc., have been provided for in the Model
Law. The provisions relating to mass influx, refugees unlawfully present in the country of asylum and voluntary repatriation are also incorporated. The Model Law empowers the government to frame rules and regulations to give effect to the provisions of the law as and when it is enacted. It has a provision that seeks to override all other legislations, including the Foreigners Act. The Model Law incorporates ‘ethnic identity’ in its categorisation of people qualified to gain refugee status and establishes that membership of a particular social group will also include gender-based persecution, thereby, providing a comprehensive definition suiting the needs of the region. The model law reaffirms the principle of non-refoulement (Article 6) and lays down rules for application of refugee status (Article 7).

The Model Law provides for setting up an implementing agency (the Refugee Commissioner), an appellate body (the Refugee Committee – Article 8), and rules for determination of refugee status (Article 12). It explicitly sets out the rights and duties of refugees (Article 14) and provides for appropriate procedures in case of mass influx (Article 15) and an important safeguard for those who enter illegally (Article 16). In order to ensure the voluntary nature of repatriation, it is necessary that refugees express their wishes in writing or through other appropriate means (Article 17). The Model Law provides a basic framework by embodying procedures for determination of refugee status, including legal assistance and interpreters’ services.

While the end goal of such initiatives must surely be a comprehensive approach within the legal framework, the fact that governments have sent officials to represent them in such fora and have often taken active part in the debate, is undeniably important. This is part of the important process whereby states are influenced by norms in the international system and, consequently, adopt appropriate policies and mechanisms of action. Thus, through the definition of what is an acceptable policy, such initiatives are able, eventually, to channel state behaviour in accordance with international norms of refugee protection.

In fact, before the countries of South Asia arrive at a consensus on Regional Convention on Refugees, each state should enact national legislation. This legislation should not only spell out the rights of the refugees, but should also safeguard the territorial integrity and security of the state. The problems of the refugees have been
dealt with on an ad hoc basis. However, there are issues that cannot be addressed in this way. For example, do the refugees have the right to work? Do they have the freedom of association? Refugee Law, as Justice P. N. Bhagwati has pointed out, would "help to provide a measure of certainty in the states, dealing with the problem of refugees. It would also provide greater protection to them" (Bhagwati 1999: 19-23. The legislation would enable all concerned to make a distinction between economic migrants and refugees. And, above all, it would incorporate the principle of non-refoulement, the basic tenet of International Refugee Law.

The UNHCR and NGOs: A Complimentary Relationship

The domestic NGOs and the UNHCR are complementary to each other. In a situation, where Government of India denies access to the UNHCR and other foreign humanitarian agencies, domestic NGOs play the most crucial role in providing 'protection' to the refugees. The Oslo Declaration on Partnership-in-Action (PARinAC), between the NGOs and the UNHCR, provides the basis for their cooperation. However, reports of the Medicins Sans Frontier (Holland) and Human Rights Watch (Asia), detailing the involuntary repatriation of Rohingya refugees, the report of the Human Rights Watch (Asia) on the involuntary repatriation of the Sri Lankan Tamil Refugees, the report of the South Asia Human Rights Documentation Centre (SAHRDC, India) on the treatment of the urban refugees the UNHCR looks after, make it evident that the role of the UNHCR in South Asia has been far from satisfactory and it has failed to respond to many of these concerns (Oral statement of the representative of the Asian Cultural Forum on Development, under Agenda Item 9 of the 53rd Session of the United Nations Commission on Human Rights, 10 March-18 April 1997) (SAHRDC 1997).

The UNHCR report to the 47th Session of its Executive Committee is oblivious to the plight of the refugees looked after by the Government of India. The objective of the UNHCR in South Asia is to create public awareness of refugee situations and issues in India and promote a legal framework for their protection. Consequently, UNHCR's implementing partners neither have any track record of working with the refugees nor anything to do with protection of refugees. Refugees do face numerous difficulties, from denial of food to the restriction on their freedom of
movement. The creation of awareness and promotion of a legal framework as envisaged by the UNHCR is important to create an institutional framework to protect the rights of the refugee. However, it should not be an excuse for the UNHCR to shirk its responsibilities to provide protection to the refugees. Neither can the denial of access by the governments be an excuse when the governments in South Asia have usually allowed the UNHCR to work with its various partners.

The fundamental issue is when the government gradually repatriates all the refugees under duress and the UNHCR makes living conditions untenable for the urban refugees, it looks after in the name of 'rationalisation of the care and maintenance', a legal framework will have little meaning. The UNHCR has failed to respond to these concerns, and attempts to follow up and put the PARinAC process into practice have failed due to the non-cooperation of the UNHCR to protect and promote the rights of the refugees.

Among the international human rights treaties, many South Asian governments are a party to the two international Covenants, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the Convention on the Prevention and Punishment of the Crime of Genocide. India has also acceded to the 1984 Convention against Torture (Gorlick and Khan 1997: 343).

The plight of the refugees, irrespective of whether they are looked after either by the UNHCR or the countries of asylum, is abominable, to say the least. The condition of the refugees who are not recognised either by the UNHCR or the government is the worst. The lack of legal mechanisms and policies on refugees is one of the fundamental flaws of refugee protection in South Asia. But the courts have awarded excellent judgements to abide by international principles on refugee protection, including non-refoulement. An expert, while talking about India, said that "international refugee law stands fully integrated into Indian law via Article 21 of the
Constitution irrespective of the Government’s decision to accede or not to accede to the Convention and Protocol” (Gonsalves 1998: 254).

However, the cardinal problem arises when both the UNHCR and the government violate their own standards and principles. While it is possible to bring the government under the scrutiny of quasi-judicial bodies, like the National Human Rights Commission and judiciary, there is no such mechanism to scrutinise the UNHCR. Official rules and procedures have become an excuse to raise the veil of secrecy and resort to arbitrariness at the expense of the refugees. This has come to the point where the UNHCR Office requires security fearing attacks from the refugees, rather than the UNHCR providing protection to them.

The ratification of 1951 Convention remains just a statement of intent, unless it is enforceable in domestic courts. Since the governments of South Asia are not even considering ratification, enforcement of the 1951 Convention in domestic legislation or development of a refugee regime is a far cry. A consistent legal framework is vital to prevent political ad-hocism, which often translates into forcible repatriation of refugees. The issue is not only development of domestic legislation, but how to ensure that both the UNHCR and the Government of India strictly abide by their own standards and principles. For the refugees, the latter remains the immediate concern and the UNHCR has manifestly failed to address the issue of protection.

Although the host of international human rights instruments that have been ratified by the South Asian countries may significantly strengthen the human rights protection regime, it remains a fact that none of the South Asian countries has acceded to the international refugee instruments. They have neither enacted a domestic legal framework in the form of a refugee or asylum law, or determination procedure. In the absence of a domestic legal framework and procedure, national human rights institutions and courts have come forward to fill in the vacuum.

Why are the South Asian countries reluctant to accede to the 1951 Refugee Convention? Besides, the issue of porous borders and the lack of administrative, military and political capacity to enforce rules of entry, any refugee influx or population movement in South Asia is regarded as having a negative impact on the
internal security, political stability and socio-economic balance of the country. Further, it is feared that a large population flow may alter the linguistic or religious composition of the host country, with the indigenous population becoming a minority in their own land. Hence, governments in South Asia seem to consider these issues as matters of bilateral, and not multi-lateral, relations. They justify their reluctant to accede to the Convention by stating that they have been accepting and are willing to host refugees. Further, many have permitted the UNHCR to open an office in their territory. Some of the developing nations perceive the rights incorporated in the 1951 Convention as being unrealistic. Nevertheless, India, Bangladesh and Pakistan have become a member of the Executive Committee of the UNHCR.

The South Asian countries have to reconsider the issue of accession to the 1951 Convention in order to promote humanitarian standards vis-à-vis refugee problems. Further, the South Asian countries could independently or jointly consider the enactment of refugee-specific regional instruments.

The involvement NGOs, working on refugee protection, would help diffuse international norms of refugee protection among official policy-makers. This is largely due to their access to local channels of communication between civil society and the government. Such NGOs can actually serve a more important long-range function by increasing public awareness and sparking public debate over refugee policy. Besides, they can also attempt to focus public attention on states’ interventionist foreign policy initiatives and the creation of refugee flows (Nanda 1989: 206-207). It is undoubtedly interesting, in any event, to continue to chart the progress of and developments within such fora, which tend to be little known, even in the areas where they are conducted. South Asia, as a region, is sorely in need of coordinated negotiation mechanisms on refugee flows, as on other humanitarian issues. It is perhaps, not unrealistic to hope that the initiatives detailed above will provide the first steps on the path towards the achievement of such mechanisms.

The absence of a national law on the status of refugees in South Asia has also meant that refugees are dependent on the benevolence of the state, rather than on a rights regime, to reconstruct their lives with dignity. Thus, the refugees are left at the mercy of the state, without any recourse available against systemic violations by the
state of its legal obligations. Therefore, a just, fair and humane response to the question of refugees, in conformity with international and constitutional obligations, require, as an immediate imperative, adoption of a definite statutory regime that clearly defines refugees as a distinct class of persons, spells out a fair procedure for determination of their status and outlines a due process for refugee protection, in consonance with the right to non-refoulement and the right to a dignified life.

However, philosophically one may ask, as Plato has done, "Is it more advantageous to be subject to the best men or the best laws?". Plato himself answered it by saying that, "laws are by definition general rules and generality falters because of specifics of life". Laws, generality and rigidity are, at best, a makeshift and far inferior to the discretion of the philosopher king whose pure wisdom would render real justice by giving each man his dues. Aristotle was, however, in favour of the rule of law. He said, "He who bids the law rule, bids God and reason rule. But, he who bids man rule adds an element to the beast for desire is a wild beast and passion perverts the minds of rulers, even though they be the best men" (Bhagwati 1999a: 127). Yet, Aristotle knew that law can not anticipate the endless combinations and permutations of circumstances and situations. There is bound to be a gap between the generalities of law and the specifics of life. It is here that ingenuity and leadership are called upon to fill the vacuum.