

NATION STATE BOUNDARIES AND HUMAN RIGHTS OF PEOPLE IN SOUTH ASIA



Shomona Khanna



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List of Abbreviations

AIHRC	Afghanistan Independent Human Rights Commission
AIOS	Anti Infiltration Operating System
AACPR	Actions (in Aid of Civil Power) Regulations 2011
AAPSU	All Arunachal Pradesh Students Union
AFSPA	Armed Forces Special Powers Act
AHRD	ASEAN Human Rights Declaration
ASEAN	Association of South East Asian Nations
BSF	Border Security Force
BGB	Border Guard Bangladesh
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHT	Chittagong Hill Tracts
CO	Commanding Officer
CrPC	Code of Criminal Procedure
EEZ	Exclusive Economic Zone
EEVFAM	Extra Judicial Execution Victim Families Association
FATA	Federally Administered Tribal Areas
FCR	Frontier Crimes Regulation 1901

HRC	Human Rights Council (United Nations)
HRCP	Human Rights Commission of Pakistan
IBSF	Indian Border Security Force
ICC	International Coordinating Committee (of National Institutions)
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Person/People
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICSPA	International Convention on the Suppression and Punishment of the Crime of Apartheid
IIDH	Inter-American Institute of Human Rights
IMDT	Illegal Migrants (Determination by Tribunals) Act, 1983
J&K	Jammu and Kashmir
LTTE	Liberation Tigers of Tamil Eelam
MSA	Maritime Security Agency
NADRA	National Database and Registration Authority (Pakistan)
NFF	National Fishworkers' Forum
NHRC	National Human Rights Commission
NHRI	National Human Rights Institution
NHRAP	National Human Rights Action Plan
NPMHR	Naga Peoples Movement for Human Rights
NWFP	North Western Frontier Provinces (Pakistan)
NEFA	North Eastern Frontier Agency
OAU	Organisation of African Unity

OHCHR	Office of the High Commissioner of Human Rights
PATA	Provincially Administered Tribal Areas
PCJSS	Parbatya Chattagram Jana Sanghati Samiti (Bangladesh)
PIL	Public Interest Litigation
PoR	Proof of Registration
PPF	Pakistan Fisherfolk Forum
PSA	Public Safety Act, 1978 of Jammu and Kashmir
PSO	Public Security Ordinance, 1947 (Sri Lanka)
PTA	Prevention of Terrorism Act (Sri Lanka)
PUCL	People's Union for Civil Liberties
RSD	Refugee Status Determination
RAB	Rapid Action Battalion (Bangladesh)
SAARC	South Asian Association for Regional Cooperation
SIT	Special Investigation Team
SLA	Sri Lankan Army
SSB	Sashastra Seema Bal (Indian Armed Border Force)
UDHR	Universal Declaration of Human Rights
ULFA	United Liberation Front of Assam
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review

Preface

South Asians for Human Rights (SAHR) is pleased to publish “Nation State Boundaries and Human Rights of People in South Asia”. SAHR as a regional organization that advocates on issues that are common to countries in the region. SAHR, concerned about the plight of people living in border areas of states that constitute the South Asian Association for Regional Cooperation (SAARC) region, decided to undertake a study on the issue. The aim is to highlight problems faced by people living in border areas and its implications for the protection of their human rights.

The SAHR study on border issues completed in June 2016, focuses mainly on human rights violations faced by the people living in the border areas and highlights some of the causes. The study delineates the various human rights violations carried out by security forces in the name of national security in the border territories. It looks at the stateless people and refugees and recommends measures that could be taken by states to mitigate problems faced by people living in border areas. However, the study avoids examining issues related to disputes between states regarding their borders.

SAHR intends to use the study as an advocacy tool for encouraging the SAARC states to find durable solutions for the problems faced by people living in border areas. SAHR also hopes that the SAARC, as an inter-governmental organization, would engage with member states and find preventive measures to protect the human rights of people living in border areas in the region.

SAHR is grateful to Ms. Shomona Khanna who is an experienced researcher and lawyer from India for producing the study despite the challenges involved in embarking on a study of this nature. SAHR hopes that this unique study, first of its kind to be produced in the region, would contribute to the protection of human rights of millions of people living in the border areas of countries that constitute the SAARC region.

Hina Jilani

South Asians for Human Rights
Chairperson

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Content

I	Introduction	I
II	Weaponisation of Border Areas, Combined with Drug Trade and Trafficking	II
III	Human Rights Violations by Security Forces Against Local Populations in the Border Areas	19
IV	Refugees and the Impact of National Boundaries	47
v	Law and Practice of Immunity to Security Forces at Border Areas	105
VI	Mechanisms for Protection of Human Rights at the International and Regional Level	137
VII	Preliminary Recommendations and Conclusion	171
	Annexure A: A Brief Note on the Inter-American Mechanisms for Protection of Human Rights	177
	Annexure B: Short Note on ASEAN Mechanisms with Reference to Human Rights	185
	Annexure C: Model National Law on Refugees	191
	Annexure D: Recommendations of the Seminar on Refugees, Migrants, Internally Displaced and Stateless Persons in South Asia: Need for a Regional Protocol	201

“One day there will be no borders,
no boundaries, no flags,
and no countries
and the only passport
will be the heart.”

Carlos Santana

I

Introduction

The present study¹ seeks to examine the issue of human rights violations in the border areas of countries in the South Asian Association for Regional Cooperation (SAARC) region. It is in an effort to map both the nature and extent of these violations, and the mechanisms for accountability of those that perpetrate them. At the outset, it must be stated that the study does not set out to enter into contentious issues between countries regarding demarcation of their boundaries or territories. Furthermore, in its refusal to enter into such contentions, it seeks to shift the focus to the people who inhabit these areas, and their human suffering. The study approaches the issue from a human rights perspective, and therefore its focus is on how the boundaries between countries impact the lives and livelihood of people living on both sides of the borders.

The main objectives of this study are to map the different forms of human rights violations which take place, gather authentic data from the human rights perspective, and ultimately to prepare the ground for taking up these issues in the form of a regional campaign towards protecting and promoting rights of the affected people.

¹ The writer would like to acknowledge the research assistance and support provided by Ms. Tusharika Mattoo and Ms. Megha Bahl to this study, and their active contribution to its development.

Remembering Felani Khatun

A vivid example which puts the present study within the context of human rights relates to the gruesome killing of a young girl, Felani Khatun, at the hands of the Border Security Force (BSF) in India. A fourteen year old girl, Felani Khatun, who had been illegally living in New Delhi, India was attempting to cross the border to Bangladesh with her father and maternal uncle for her marriage, when she was killed by the BSF. The two men had successfully crossed the barbed-wire fence at the border. However, the young girl's clothes got entangled, and as she struggled to free herself, she was shot by the Border Forces. Witnesses claimed that she was alive for at least the next hour, even as she continued to hang on the fence. After she died, her body continued to hang on the fence for four hours. A photograph of the ghastly sight was published across the world. As per news-reports,² when the BSF personnel finally took her body down, they tied her hands and arms to a pole, much like an animal, and carried her off, handing her over to the Border Guard Bangladesh (BGB) personnel the following day.

At the time, this incident caught the attention of the global media. As a result, the BSF found Constable Amiya Ghosh of the 181 Battalion responsible, and he was charged under Section 304 of the

² North Bengal Times BD "BSF to revise Felani trial", September 13, 2013; see also Chowdhury, Syed Tashfin "Acquittal of India border guard in Bangladeshi girl's killing rekindles human rights concerns" Asia Times, News & Features, South Asia, July 10, 2015, <http://www.atimes.com/article/acquittal-of-india-border-guard-in-bangladeshi-girls-killing-rekindles-human-rights-concerns/> (accessed on 16 August 2016).

Indian Penal Code,³ as well as Section 46 of the BSF Act.⁴ The trial commenced two years later on August 13, 2013, and a few months later the constable was cleared of the charges. Due to public outcry, on July 2, 2015 a revision trial was held in a special West Bengal Court of the BSF. But despite the backlash and condemnation, the previous verdict was upheld.

Subsequently, Amnesty India declared that it would file a Public Interest Litigation (PIL) in the Indian Supreme Court to challenge the verdict of the West Bengal Court. Information regarding the fate of this petition is not available.

This tragic story encapsulates the challenges and human tragedies which inhabit border zones in the SAARC region. The cultural and historical kinship ties between the peoples of these countries, though fragmented by the drawing of borders, remain vibrant. As a result people are drawn from one side of the border to the other through human relationships, in this case for the purpose of marriage, even as the methods of travel are “illegal”. The very “illegality” of their actions places them in a position of suspicion, and therefore vulnerable to violent reprisals from the heavily armed security forces patrolling these borders. Even when the forces cross the boundary of what is morally right, which they so clearly did in this case, holding them accountable in the courts of law is difficult because of the special

³ Section 304 of the Indian Penal Code relates to punishment for culpable homicide not amounting to murder. According to this provision, a person found guilty of this crime where the intention was to cause death, can be sentenced to imprisonment for life, or imprisonment up to ten years, and a fine. The presence of intention, or *mens rea*, determines the quantum of punishment. Thus, absence of *mens rea* would attract the lesser sentence of imprisonment up to ten years.

⁴ Section 46 of the Border Security Force Act, 1968 relates to “civil offences” which means, in short, offences committed against civilians or under civilian law by the security forces.

security legislations which protect their actions, and the general mindset within the law enforcement agencies that national borders need to be protected at all costs, and if necessary through the use of force. A combination of these factors results in a denouement where a young woman travelling to the happy destination of her marriage meets a sub-human death and the perpetrators are never brought to book.

In the present study, the author attempts to untangle each of these threads and scrutinize them in the hope that future occurrences of such tragic proportions can be prevented.

It is also important to clarify that the study focuses only on the SAARC countries, namely, India, Bangladesh, Sri Lanka, Nepal, Maldives, Bhutan, Pakistan and Afghanistan. Other countries in the region, even if they do have contiguous borders, do not form the subject matter of the present study.

A brief outline of the different borders shared by the SAARC countries

As stated earlier, the present study does not enter into an examination of the many disputes relating to borders between the countries in the region. However, the fact that these disputes exist has important implications for the intensity of human rights violations.

The border of Afghanistan with Pakistan, for instance, which is described as the “Durand Line”⁵ remains disputed till today, and has major security repercussions for both countries and also for India. The

⁵ The Durand Line was established in 1893 by a British Diplomat and civil servant in India, Sir Mortimer Durand. It was modified by the Anglo-American Treaty of 1919 and eventually inherited by Pakistan.

Durand Line measures about 2,640 kilometers from Baluchistan to the northern mountain peaks of the North-West Frontier Province (NWFP) (now known as Khyber Pakhtunkhwa) to the Federally Administered Tribal Areas (FATA).⁶

The relationship between India and Pakistan has remained tense and complex from the time of the Partition in 1947, and this tension has manifested in disputed borders and in particular the disputed territory of Kashmir. The border itself is disputed by the two countries in some areas. India claims a 3,323 km border (including the Line of Control in the Jammu and Kashmir Sector) but Pakistan claims the border runs 2,900 km (which does not include the Jammu and Kashmir sector). The Indian claim is recognised as the International Border. On the Indian side, the border runs along the four Indian States of Jammu & Kashmir, Punjab, Gujarat and Rajasthan, and along the Pakistan side it runs along the Pakistani provinces of Sindh and Punjab.

The border between India and Pakistan has been called “the most dangerous border in the world”.⁷ Apart from the Kashmir conflict, the war of 1965, the war of 1971, and the Kargil war, border skirmishes occur on a regular basis, with presence of military personnel on high alert on both sides. While the intensity of the troubles faced by civilian populations definitely peaks during times of war or attrition, life for people living along this particular border is remarkably hard even in the ordinary course.

⁶ Rahi, Arwin. “Why the Durand Line Matters” *The Diplomat*, February 21, 2014, <http://thediplomat.com/2014/02/why-the-durand-line-matters/> (accessed on 16 August 2016).

⁷ “The world’s most dangerous border”. *The Economist*. May 19, 2011. Print Edition.

Bangladesh shares a 4,096.7 km long border with India. On the Indian side, seven States⁸ fall along this border. On the Bangladesh side six “divisions” of the country fall along the border. These include Dhaka, Khulna, Rajshahi, Rangpur, Sylhet, and Chittagong. People have been crossing over this border for a variety of reasons for decades. Some of these reasons include natural calamities, the 1971 war, livelihood, and so on. While the dispute regarding this border is less acrimonious than that described above, the border remains a hostile one due to the influx of Bangladeshi migrants into India.

Between other countries where there is no history of antagonism or border dispute, the borders are relatively more peaceful and life for ordinary people on both sides less stressful. Thus, comparatively, relations between India and Nepal have been less hostile, with the foundation being laid in the India–Nepal Treaty of Peace and Friendship of 1950. Additionally, in 2014 an agreement to “review, adjust, and update” the treaty was made. The treaty was last revised in 2006.⁹ There have also been talks as recently as January 2016, to address the perception of Nepal of India’s presumptuous attitude towards it. Nepal being landlocked by India from three sides, the border is porous by design, facilitating a free flow of people for livelihood and social reasons, and goods for trade.

Cordial relations also exist between India and the Kingdom of Bhutan, which share a 699 km long border traversing four States on the Indian side,¹⁰ and various “dzongkhas” or districts of Bhutan

⁸ The Indian states that share a border with Bangladesh are West Bengal, Sikkim, Assam, Arunachal Pradesh, Meghalaya, Tripura and Mizoram.

⁹ Ghimre, Yubaraj and Sinha, Rakesh. “2014 and beyond: India, Nepal agree to refresh 1950 treaty” *The Indian Express* August 5, 2014, <http://indianexpress.com/article/world/neighbours/india-nepal-agree-to-review-adjust-update-1950-treaty/>

¹⁰ The Bhutan border falls along the States of Assam, West Bengal, Arunachal Pradesh, and Sikkim in India.

including Zhemgang, Sarpang, Samdrup, Jongkhar, Chukkha and Samste. In 1949 a treaty of friendship was signed between India and Bhutan where the countries, while establishing free trade, agreed to a non-interference policy on internal matters. This treaty also provided that both countries would consult each other on foreign affairs and defence matters, indicating India's effective involvement in shaping the foreign policies of Bhutan. This treaty continued to be in place till 2007, when the provision of Indian "guidance" on foreign matters was removed.

The two countries share a unique relationship between their armed forces. The Indian Army is responsible for training the officer cadres of the armed forces of Bhutan, as well as providing them with arms supplies. Since 1949, the officers the Royal Army of Bhutan and the Royal Body Guards have all been sent for training to the National Defence Academy at Pune (Maharashtra) and Dehradun (Uttarakhand) in India. Even more interestingly, the Indian Air Force, through the Eastern Air Command, takes care of Bhutan's air defence needs. Additionally, the Indian Armed forces have recently set up a training mission in Bhutan, called the India Military Training Team.¹¹ India has also assisted Bhutan in its strategic planning viz. Operation All Clear.¹²

¹¹ Lee, Robert Victor "Bhutan: The Indian Army's Front Line". *The Diplomat*. November 6, 2014. <http://thediplomat.com/2014/11/bhutan-the-indian-armys-front-line/>. See also: Stobdan, P. "India and Bhutan: The Strategic Imperative" *Institute for Defence Studies and Analyses (IDSA)*. Occasional Paper No. 36, September 2014, http://www.idsa.in/occasionalpapers/OP_IndiaandBhutan_pstobdan_260914 ; Gokhale, Nitin A. personal interview on 31.03.2015.

¹² Banerjee, D & Laishram, B S. "Bhutan's 'Operation All Clear': Implications for insurgency and security cooperation, IPCS Issue Brief, No.18, January 2004, http://www.ipcs.org/pdf_file/issue/IB18-OperationAllClear.pdf.

Maldives and Sri Lanka both have no land borders with any other country, being completely water bound in the Indian Ocean. The republic of Maldives is comprised of a group of 26 atolls.¹³ Its economy is primarily dependent on tourism, with fishing being the next most important sector of the economy. The strategic location of Maldives, especially with respect to the important sea lane transit route for trade and oil, has meant that it receives considerable attention from some of the larger countries in the region. There are no major conflicts which have been reported resulting from border disputes between these countries and Maldives.

Similarly, the sea-bound country of Sri Lanka has no border dispute with any country in the region. Maldives and Sri Lanka have amicably decided their maritime boundaries and control over their Exclusive Economic Zones (EEZs). In 2012 India, Sri Lanka, and Maldives entered into a trilateral agreement wherein they have pooled resources to address security concerns.¹⁴ Illegal fishing (bottom trawling, etc.) by South Indian fisherfolk in the Sri Lankan waters, however, remains a major issue which has not been resolved.¹⁵

¹³ An 'atoll' is a ring-shaped coral reef including a coral rim that encircles a lagoon partially or completely.

¹⁴ Radhakrishnan, R.K. "India, Sri Lanka, Maldives to sign agreement on maritime cooperation" [Colombo] *The Hindu*. 16 Dec, 2013, <http://www.thehindu.com/news/international/india-sri-lanka-maldives-to-sign-agreement-on-maritime-cooperation/article4203041.ece> . See also Barbara Crosette "Coup Attempt in Maldives Laid to Tamil Force." *The New York Times* 18 Dec. 1988, <http://www.nytimes.com/1988/12/18/world/coup-attempt-in-maldives-laid-to-tamil-force.html>

¹⁵ Camelia Nathaniel. "Fishing invasion causing 60 million Dollar loss", *The Sunday Leader*, January 12, 2014, <http://www.thesundayleader.lk/2014/01/12/fishing-invasion-causing-60-million-dollar-loss/> ; Gautam Sen, "Problem of Fishermen in India Sri Lanka Relations", Institute of Defence Studies and Analyses, http://www.idsa.in/idsacomments/problem-of-fishermen-in-india-sri-lanka-relations_gsen_200516

The social and political history of the region has been tumultuous, with many countries having become independent from colonization by European powers only in the last century, and others still at a nascent stage in their nationhood. Constitutional democracies also have not developed uniformly and some nations in the region have struggled with military rule in the recent past.¹⁶ These upheavals have had enormous consequences upon the people who populate these countries, and the bordering regions in particular. One consequence of the colonial past has been that many of the countries in the region struggle with severe underdevelopment. Despite recent economic advances, the fulfillment of basic human needs remains a challenge.

Migrations from one country to another in this region of vast populations - in times of war, attrition, or political transformation - are among the highest in the world, leading to a very high proportion of political and economic refugees. Yet one of the key methods through which an emerging nation defines its identity is through stringent citizenship laws and the drawing of lines between those who rightfully constitute the nation and its citizens, and the 'other', the 'alien' or the 'foreigner'. Those who constitute the latter, often due to circumstances beyond their control, are extremely vulnerable to all manner of exploitation and human rights abuse. This study will also examine how the basic rights of these populations are protected under international law, and how these protections translate into reality in this region.

Given the acrimonious nature of relationships and the nascent character of the states in the region, it is not surprising that the border areas are heavily guarded with a high presence of armed forces and paramilitary forces to supplement, even supplant, the local

¹⁶ At the time of writing this report, none of the SAARC countries were under military rule.

police forces. Without exception, we find that such security forces are cocooned from accountability within myriad protective laws and practices, some of which can even be traced to the respective Constitutions. This has led to a distinctly worrying atmosphere of impunity, where the security forces perceive themselves, and are perceived by others, as being immune from the ordinary operation of the rule of law. There is increasing evidence to demonstrate that there are widespread human rights abuses being committed by these security forces at the border areas under the guise of protecting the borders, and under the protection of special laws. Such abuses range from use of force, torture and wrongful detention, to enforced disappearances, extra judicial executions and sexual violence. Yet there are no viable remedies available within the domestic law for holding such security forces accountable and bringing them to book, or even obtaining reparations for victims of such abuse. Even where protections in terms of domestic laws exist, their implementation seems to be lacking.

It is not surprising that such abuses are intense in border areas between countries which have volatile relationships. But even in border areas where relations between the countries are comparatively non hostile, there are concerns regarding smuggling of arms, narcotic drugs, and other illicit and licit goods, and also trafficking of persons for exploitative uses such as bonded labour and prostitution. This has led to a general atmosphere of criminalisation of these areas, even as it has resulted in pervasive corruption and its attendant problems, which has impacted the daily lives of the civilians living there.

It becomes, therefore, important to see whether any remedy is available at the international or regional level, and the present study seeks to examine at some length the international and regional mechanisms for redress of human rights violations.

II

Weaponisation of Border Areas, Combined with Drug Trade and Trafficking

In the present section we will be examining the nature of weapons build-up along border areas, which is purportedly in response to the need to protect the integrity of such borders, prevent infiltration of 'aliens' and in particular to control illegal activities. Conversely, there has also been an increase in the weaponisation of those that undertake such illegal activities themselves, such as those involved in the drug trade and human trafficking. The high concentration of weapons in these areas has a considerable impact on the human rights of populations inhabiting these areas. These direct and indirect consequences are explored below.

The borders shared by **Pakistan and Afghanistan**, with their close clan and tribe linkages on both sides, have a significant presence of insurgent groups. This has led to a large scale weaponisation of the areas. Moreover, Afghanistan lies in the "Golden Crescent"¹ of the drug trade. An intertwined relationship between the drug trade, weapons production and money laundering has been witnessed in these areas. The combination of large-scale drug production and

¹ The Golden Crescent is the name given to the areas of Afghanistan, Pakistan, and Iran which are the principal areas of illicit opium production. It accounts for a majority of opium production worldwide.

the small-weapons trade in Afghanistan has been labelled the “Kalashnikov Culture”.

Being a highly inaccessible and mountainous area, the border has remained porous and provided ample opportunity for terrorist militant groups to find safe havens in Pakistan whenever the situation in Afghanistan becomes inimical. The porous border has also facilitated large-scale smuggling of both licit and illicit goods, in particular narcotics. The special status of these regions under the Pakistan Constitution (under the nomenclature of PATA and FATA), the dominance of the tribal justice system, and the regular clashes between the Pakistan armed forces and the terrorist militant groups, have combined to form a set of circumstances that have caused the populations living in these areas enormous suffering.

The migration of refugees, narcotics and weapons trafficking, human smuggling and cross-border infiltration by militants in these areas all exert considerable pressure on the governments of the region to secure their borders.

Warlords in Afghanistan and Pakistan are responsible for the \$80 million revenue in drug trafficking which supports the Taliban. There are around 65,000 drug cultivators in Helmand province in Afghanistan supplying 1,500 traffickers. After the fall of the Taliban government, opium production and its trade have reached a record high, with over 90 per cent of the world’s opium supplied by Afghanistan.² In 2008, poppy production reached 7,700 metric tons cultivated over 157,000 hectares of land, while more than 70,000

² Neil, Alexander. *Towards Cross-Border Security*. Page 3: Royal United Services Institute (RUSI). 2010 https://rusi.org/sites/default/files/201002_op_towards_cross-border_security_o.pdf

hectares of land were used for the cultivation of cannabis.³ This has created a black market economy involving extremist organisations, and has led to the criminalization and corruption of a significant proportion of the regional economies in Pakistan and Afghanistan.⁴

The United Nations Office on Drugs and Crime (UNODC) has pointed out that the “war on drugs” resulting from the enormous drug trafficking in the region leads to an undermining of several human rights. Criminalization of drug use, production, and trade often affects the most vulnerable in the society, as do systems of drug trafficking. Stringent laws aimed at curbing drug trade and drug use, while giving an appearance of state pro-activeness, actually end up targeting the end users and the small time traffickers, rather than the powerful cartels which mastermind the operations. The UNODC observes:

*“In some countries, notably in India, East and Central Asia, drug users are routinely sent to drug detention facilities, without trial or due process – for example, on the word of a family member or police officer – for months, or even years.”*⁵

Between **India and Pakistan**, direct trade is minuscule, with trade relations having been practically cut-off during Partition; subsequent efforts to re-establish these links have been half-hearted at best.⁶ However, there has always been considerable unofficial trade

³ *Ibid* page 14

⁴ *Ibid*

⁵ “The War on Drugs: Undermining Human Rights” Count the Costs. Retrieved from <http://www.countthecosts.org/seven-costs/undermining-human-rights> Accessed on August 1, 2015.

⁶ Singh, Gagan Preet. “Industrial Growth in Two Border Cities of Punjab.” *Economic and Political Weekly* L.10 (2015) *Economic and Political Weekly*. 7 Mar. 2015.

through re-exporting from third countries, as well as illegal trade or smuggling. Arms and drug smuggling are a major issue along the borders of India and Pakistan, particularly in Kashmir and Punjab, with the Indian Government unequivocally blaming Pakistan for supplying separatists in these areas with weapons.⁷

The State of Punjab on the Indian side has been severely afflicted by the influx of narcotics through the border, with the level of drug addiction so alarming as to “affect an entire generation”.⁸ The State of Punjab accounts for one-half of the cases in 2013 under the Narcotic Drugs and Psychotropic Substances Act, 1985.⁹ Further, 41% of all opium seizures in the country in the same year, amounting to 964 kgs, were from the Indian State of Punjab.¹⁰ The decline in the agricultural economy and the resulting unemployment have been seen as contributing factors to the rampant drug abuse in the state.

Another serious problem is the smuggling of fake Indian currency.¹¹ The BSF in India has reported that farmers are drawn into such

⁷ “India: Arms and Abuses in Indian Punjab and Kashmir”. Human Rights Watch Arms Project. (1994) Vol 6 No. 10.

⁸ Choksi, Mansi. Heroin Trafficking from Pakistan is affecting an entire generation. Vice News.. (1994), Web, August 1, 2015. Retrieved from: <https://news.vice.com/article/heroin-trafficking-from-pakistan-into-india-is-crippling-an-entire-generation>.

⁹ Sethi, Abheet Singh. “Why Punjab is India’s narcotic haven.” *The Business Standard*. January 7, 2015, http://www.business-standard.com/article/current-affairs/why-punjab-is-india-s-narcotic-haven-115010700502_1.html

¹⁰ “2014: Drug menace reaches alarming proportions in Punjab”. *The DNA*. December 31, 2014. <http://www.dnaindia.com/india/report-2014-drug-menace-reaches-alarming-proportions-in-punjab-2048382>.

¹¹ Roy, Vijay C. “Spurt in Drug Smuggling from Pakistan via Punjab Border.” *The Business Standard*. October 2, 2014. http://www.business-standard.com/article/current-affairs/spurt-in-drugs-smuggling-from-pak-via-punjab-border-114100200955_1.html

smuggling due to the high returns, facilitated by the easy availability of Pakistani mobile phone cards, which are impossible to track.¹² Without a doubt, the security forces guarding these borders have their work cut out.

As stated earlier, as a result of various bilateral agreements between **India and Nepal**, the border between these two countries is largely porous, permitting free ingress and egress of people as well as goods. These borders have remained largely non-hostile, but in recent years a number of problems are emerging.

In October 2009, the Revised Agreement of Co-Operation between the Government of India and the Government of Nepal to Control Unauthorized Trade was signed, under which both countries have committed to prevent re-exports and imports through their mutual border. An unfortunate result of this agreement has been a spurt in cases of harassment of local people by the Sashastra Seema Bal (SSB)¹³ and customs officials. The SSB is a paramilitary force that guards the borders from the Indian side. It was established in 1963 after the defeat of India in the Indo-China war in 1962.¹⁴

At a meeting of the joint task force on Nepal-India Border Management held in February 2015 in Pokhara, Nepal, a number of criminal activities proliferating along this border were discussed. These included drug trafficking, arms smuggling and terrorism, human trafficking, illegal activities by armed groups operational in

¹² Singh, Gagan Preet. "Industrial Growth in Two Border Cities of Punjab." *Economic and Political Weekly* L.10 (2015) *Economic and Political Weekly*. 7 March, 2015.

¹³ Gaikwad, Rahi. "Locals suffer as India crack the whip on unauthorised cross-border trade". *The Hindu*. December 8, 2013 <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/locals-suffer-as-india-nepal-crack-the-whip-on-unauthorised-crossborder-trade/article5435155.ece>, August 1, 2015.

¹⁴ Read more about the SSB at: <http://www.ssb.nic.in/>

India, trading of counterfeit money, child abuse, use of illegal SIM cards, and religious extremism. Also discussed were the repeated instances of harassment of Nepali citizens by the SSB. Further, the unrestricted movement of people has been misused for trafficking of women and children. Large numbers of girls are trafficked from Nepal to India for prostitution, and also for onward trafficking to the Gulf countries and Europe.

Most unfortunately, the porous border between India and Nepal has been misused by other countries in the region for covert operations providing financial and arms support to separatist groups on Indian soil. This has naturally led to an increase in the policing of this border.¹⁵

The SSB also guards the borders between **India and Bhutan**. In this region, the security concerns have related mostly in the past to insurgent groups from the Indian state of Assam allegedly seeking safe haven in the mountainous and forested areas on the Bhutan side, and the highly porous border being used for facilitating espionage. However, the problem is not just one of security against “terror” forces. There has been a trend of trafficking of pharmaceutical drugs viz. pain-killers and anti-anxiety drugs, from India to Bhutan, as well as heroin (particularly for European markets).¹⁶

Insofar as the border between **India and Bangladesh** is concerned, smuggling of cattle, weapons, goods like rice, saris, and other items

¹⁵ Thapliyal, Sangeeta. “Movement of Population Between India and Nepal: Emerging Challenges.” Institute for Defence Studies and Analyses (IDSA). Page 8. <https://www.idsa-india.org/an-aug9-6.html>

¹⁶ “Annual Report 2004-2005”, India. *Ministry of Home Affairs, Departments of Internal Security, Jammu & Kashmir Affairs, Border Management, States And Home*. New Delhi.

is a major issue. One writer describes the nature of ‘illegal’ activities at the Bangladesh border thus:

“As against half a dozen legal entry points between the two countries on this stretch of the border, there are 17 illegal ones, called ghats. Like liquor vends, these ghats are auctioned and the ghatmaliks¹⁷ set their own rates of commission for permitting the illegal activity. There is also a loose network of line-men, agents and carriers who facilitate the smuggling of cattle, rice, shimmering nylon saris and Phensedyl (a cough syrup that serves as a narcotic drug) across the barrier.”¹⁸

The flourishing illegal trade in ‘Phensedyl’, a codeine-laced cough syrup made in India that is illegal in Bangladesh, is particularly serious. It is reported that between January 2009 and September 2010, nearly two million bottles of Phensedyl were seized.¹⁹

However, the biggest concern remains the influx of migrants from Bangladesh into India in search of livelihood, safe haven, or simply because of the close socio-cultural ties between the two countries. Large sections of the border between India and Bangladesh have been fenced, and much of it has also been electrified.²⁰ The Indian government’s anxiety about illegal immigration from Bangladesh is linked to concerns that insurgent groups demanding self-rule in

¹⁷ *Ghatmaliks* are port-owners controlling the trade.

¹⁸ Rai, Usha. “No-woman’s land”. *The Hindu*, 15 May 2011, <http://www.thehindu.com/todays-paper/tp-features/tp-sundaymagazine/nowomans-land/article2020264.ece>, 17 March 2015.

¹⁹ The War on Drugs: Undermining Human Rights” Count the Costs. Retrieved from http://www.countthecosts.org/sites/default/files/Human_rights_briefing.pdf. Accessed on August 1, 2015

²⁰ Gokhale, Nitin A. Personal Interview dt. 31.03.15

various North East States have sought sanctuary across the border, particularly around the State of Tripura, which is engulfed within Bangladesh.

Human trafficking across the India-Bangladesh border is rampant. Although information regarding incarceration of Bangladeshi nationals in Indian jails is difficult to confirm, there are reports that many end up incarcerated in jails with little recourse to justice.

It is important to recognise that once channels are established for drug trafficking across borders, these same channels are then opened up for other kinds of trafficking - arms, human trafficking, smuggling of licit and illicit goods, etc. As one writer observes:

“Drug trafficking facilitates other organised criminal enterprises such as human trafficking and gun running, all of which use the same networks and routes to smuggle people, arms and contraband.”²¹

Therefore, the need to crackdown on drug trafficking in the border areas, and thereby prevent the criminalization of these areas in their entirety, cannot be denied. At the same time, as we find in the examination subsequently, the vesting of special powers in the security forces in these areas has, unfortunately, resulted in widespread and ubiquitous human rights violations by these same forces.

²¹ Das, Pushpita. “Drug Trafficking in India: A Case for Border Security” *Institute for Defence Studies and Analysis*, http://www.idsa.in/system/files/OP_DrugTraffickinginIndia.pdf, May 2012.

III

Human Rights Violations by Security Forces Against Local Populations in the Border Areas

In this section we examine the different kinds of abuses of human rights which take place at border areas at the hands of security forces against the local populations, both in the home country, and in some cases across the border. The nature, extent and intensity of these violations depend upon the intensity of the hostility, if any, between the nations concerned, the physical characteristics of the border, and the nature of the security threat sought to be addressed. Thus, different problems arise in different areas and contexts.

However, without exception, we find that there is a marked tendency to overlook the excesses of security forces in the border areas, in light of the purported objective of securing the national boundaries. Thus we find an overarching fidelity to the 'national interest', rather than to ensuring that criminal acts are brought to justice. As a result, many of the actions of the security forces in these areas, which would have met with unambiguous approbation in other circumstances, are 'normalized' in the border areas in the larger interests of the nation in protecting its borders. Naturally, this has serious consequences on the quality and security of life of the people inhabiting these areas, and on the rule of law in particular.

Hyper Securitization at Borders, such as Fencing, Electrification, etc.

As stated earlier, where demarcation of borders between countries is disputed, or where infiltration is perceived as a high security threat, there is a significant concentration of security forces, including armed forces and paramilitary forces, at the border areas. This has important implications for the populations which live along and around such borders.

The border between **Pakistan and India** is highly contested, and according to some reports has been dubbed one of the most dangerous borders in the world. Not surprisingly, therefore, efforts to fence this border have been made intermittently over the years, with uneven success. India has installed about 0.15 million floodlights and fencing along its border with Pakistan. Almost the entire stretch is to be fenced (apart from a few areas which cannot be fenced due to topographical reasons), and also electrified. In fact, the entire fencing installed along the border in Kashmir has been electrified. The electrification is done in such a way that electrocution of people and animals who stray into the fence in “normal” circumstances would be difficult. There are two layers of fencing, with the inside fences being electrified, while the outer perimeter is not electrified. As part of what is known as the Anti Infiltration Operating System (AIOS), the fences are supplemented with a system for alerting through sirens, etc. in case the systems on the outer perimeter are tripped, which are a signal for the soldiers to start moving in. Despite these precautions, incidents of electrocutions have occurred in the past.¹

The Pakistan-India border also has a number of pre-existing landmines, remnants from previous wars, which have still not been

¹ Gokhale, Nitin A. Personal interview dt. 31.03.2015.

successfully defused despite several de-mining initiatives on both sides.²

The governments do not release information regarding the concentration of armed forces in the region. However, according to estimates there are at any given time 500,000 to 700,000 armed forces personnel in Kashmir on the Indian side alone, making it one of the highest densities of armed forces in the world.

This has tragic consequences for the people of the area, who have close familial and cultural links with the population on the other side of the border. To many, the border is an external and artificial imposition which obstructs the interaction between families and clans on either side, as well as traditional trade relations. The electrification of the borders supplemented by vigorous army patrolling has resulted in tremendous hardships for the people living in the area, even as no sustainable solution appears to be in sight in the near future.

It is reported that along the Rajasthan border, there are live landmines along areas as long as six to eight kilometers, on cultivated and uncultivated farmlands, and in close proximity to infrastructure in the villages, which have resulted in casualties. These landmines were laid prior to the establishment of the International Border, and de-mining operations were not entirely successful. As a result, landmines continue to be found and cause casualties even after all these years.³

The border between **India and Bangladesh** is perceived as being a significant security threat because of the large numbers of undocumented migrants crossing over into India from Bangladesh for a variety of reasons, and the numerous armed insurgent groups

² *Ibid*

³ *Ibid*

from India who seek haven on the Bangladesh side of the border. As a result, half of the border is already fenced, with most sections consisting of parallel barbed-wire fences, some of which are electrified.⁴

The security personnel along these borders are also on constant high-alert, with the situation escalating when the political relations between the countries become tense.

The move to fence the border between the two countries has led to a further escalation of problems for villagers living near the borders. According to a 2010 Human Rights Watch report:⁵

“The Indian government says it is seeking to contain the smuggling and mass economic migration from Bangladesh. In recent years, India has also alleged that separatist militants in its northeastern states find sanctuary in Bangladesh and cross into India to perpetrate terrorist attacks. However few of those killed by the BSF have ever been shown to have been involved in terrorism. In an effort to secure the border the Indian government is constructing a large 3,200 kilometer fence. But in densely populated areas of the border, where land is cultivated right up to the international boundary, the border fence is already exacerbating the problems faced by residents of the border areas.”

⁴ Lewis, Martin. “India’s Second Most Dangerous Border” *Geocurrents* May 26, 2011. Retrieved on 17 March 2015 from: <http://www.geocurrents.info/geopolitics/india%e2%80%99s-second-most-dangerous-border>

⁵ Human Rights Watch. “Trigger Happy: Excessive Use of Force by Indian Troops at the Bangladesh Border.” 2010, https://www.hrw.org/sites/default/files/reports/Bangladesh_1210_web.pdf.

Traditional social and economic associations among the local populations transcend these geopolitical borders. There are innumerable instances of people crossing over these borders intentionally, knowing full well the risks involved, because of economic pressures and because of traditional usufruct in the areas across the borders. Examples abound of people who find their lives and lands truncated by these border fences, with families, lands, and grazing areas becoming fragmented. In some areas, permission has to be sought from the border security forces to access agricultural fields on a daily basis, with curfew-like conditions being imposed. Sometimes the permission is refused for 'security' reasons, and this can be particularly crushing during sowing and harvesting seasons. Cattle often stray on to the other side of the border, with disastrous results. These are just a few examples of the myriad implications and unintended consequences of increased militarization across the India-Bangladesh border.

Abuse of Power by Security Forces at the Borders

Apart from the State of Jammu & Kashmir, the border between India and Pakistan also traverses the Indian States of Rajasthan, Gujarat and Punjab. Here the problems faced by local populations are different, but no less important. These borders are policed on the Indian side by the BSF. On both sides, people live under the constant threat of being attacked by the forces across the border. This is compounded by the omnipresent fear that the security forces on the same side of the border might evacuate inhabitants without warning, in response to an escalation in hostilities elsewhere. The villagers on the Indian side in Rajasthan have reported that the BSF often uses private farmlands for different kinds of operations, demanding that the local people "cooperate". Often, standing agricultural crops get stampeded on, while important infrastructure such as wells and

pumps are carelessly run over, and farm animals and cattle become collateral damage. Reparation and compensation are rare.⁶

The border between the two countries along the State of Punjab has seen several instances where lands have been taken away from farmers under the Border Area Development Programme. They have been waiting for the compensation promised by the Centre for over fifteen years. The farmers claim that “after receiving just one payment we were told that funds had been exhausted”.⁷ The construction of fences has escalated state acquisition of private lands, as large areas of land have been acquired for the areas between the fences. In many instances the fences actually pass through individual land-holdings, bisecting them into two parts on either side of the border. In order to access land on the other side of the fence the landowners have to obtain permits from the BSF on a daily basis, which must be deposited by 6:00 p.m. Failure to do so within the stipulated time results in a hefty fine.⁸ Given these circumstances, it is not surprising that there are so many restrictions on the buying and selling of land in border areas.

It is reported that security forces stationed in border areas also recruit locals as spies to be sent into the bordering districts. Usually these recruits belong to marginalised sections of the community who are particularly vulnerable, making it easier to strong-arm them into performing their “duty” towards their country. The recruitments are unofficial, leaving local recruits completely stranded in the event they are caught on the other side of the border. They can face long years

⁶ Gill, Bani. (2012) Border Dialogues. “Peace Prints: South Asian Journal of Peace building”. Vol. 4, No. 2

⁷ Bajwa, Harpreet. “Ryots at Punjab border suffer as government looks the other way.” *The New Indian Express*. May 6, 2013.

⁸ Gokhale, Nitin A. Personal interview at 31.03.15

of incarceration in foreign prisons where their status is precarious, while their recruiters refuse to take any responsibility, even breaking promises made to look after their families in their absence.⁹

It is well documented that at the border between **Bangladesh and India**, the Indian BSF commits serious human rights violations under the pretext of curbing ‘illegal activities’. People who cross over for livelihood reasons are harassed, assaulted, tortured and even killed by these forces. It has also been reported that BSF soldiers have been seeking sexual favours “from women in exchange for letting them cross over”.¹⁰

Killings along the 4096.7km long Bangladesh-India border by the Indian BSF are not uncommon. According to Odhikar, a Bangladeshi human rights organisation, in the fourteen years between 2000 to 2014, approximately 1,035 Bangladeshis were killed by the BSF, 919 were tortured and 1,274 were abducted. Additionally, in the first six months of 2015, a total of 23 Bangladeshis had reportedly died at the hands of the BSF, while 35 were injured and 17 abducted.¹¹

Unofficial reports have revealed a clandestine military campaign in the border region named “Operation Pushback”, under which people

⁹ “Indian SSB Men Rape Nepali Girl En Masse, Nation Stunned.” Review. *Telegraph Nepal* 2012: <http://sajha.com/mobile/info.cfm?threadid=97378&noofposts=2>

¹⁰ Rehman, Azeera. “On India-Bangladesh Border, Sex and Smuggling Are Intertwined.” *Yahoo News India*. IANS, 17 Apr. 2011, http://twocircles.net/2011apr17/indiabangladesh_border_sex_and_smuggling_are_intertwined.html#.WEkngLJ97IU

¹¹ Chowdhury, Syed Tashfin. “Acquittal of India border guard in Bangladeshi girl’s killing rekindles human rights concerns”. *Asia Times*. July 10, 2015, <https://www.google.lk/search?q=Acquittal+of+India+border+guard+in+Bangladeshi+girl%E2%80%99s+Killing+rekindles+human+rights+concerns&coq=Acquittal+of+India+border+guard+in+Bangladeshi+girl%E2%80%99s+Killing+rekindles+human+rights+concerns&caqs=chrome..69i57.1226joj7&sourceid=chrome&ie=UTF-8>

are abducted during the night, harassed, and left on the other side of the border, sometimes even killed.¹²

As will be examined in greater detail below, these security forces enjoy a high degree of immunity under special legislations, leading to an atmosphere of impunity. Instances where the security forces are held accountable for the overreach of their powers are rare, and in any case remain unreported, leading to a further reinforcement of the perception that they are immune from prosecution.

As stated above, the border between **India and Nepal**, guarded by the SSB, has resulted in harassment, gang rapes, kidnapping, and abductions of locals as their livelihood activities have been labeled as illegal trade.

BOX 1: CASE OF DANG VILLAGE

(article extracted from the Kathmandu Post GH)

Indian excesses trigger exodus

DURGALAL KC

DANG, June 2, 2009 - More than 2,000 people from 22 bordering villages of Dang district have already fled their homes fearing persecution and sexual harassment from Sashastra Seema Bal (SSB), the Indian border security force, and various other armed Indian groups.

The displaced continue to swarm a community forest of Satbariya VDC-2 in Deukhuri region. The victims say there was no option but to flee the continued harassment, abduction, rape and robbery.

¹² Gautam, Navlakha. *Bangladeshis in India' in States, Citizens and Outsiders: The Uprooted Peoples of South Asia*. Ed. Tapan Bose and Rita Manchanda. Kathmandu: South Asian Forum for Human Rights, 1997.

The latest abduction victim, 19-year-old Krishna Thapa of Khir village of Rajpur VDC-9, was reportedly abducted by an armed group on May 18. Villagers allege Thapa has been kept in a house across the border and is being sexually abused.

It has been over a year since Rana Bahadur B.K., 58, of Khangra village of Rajpur VDC-7 lost two of his daughters. B.K. said his daughters were visiting their elder sister at Satbariaya but never returned. "I now hear that both my daughters have been sold in India. I don't know when I will see them," he said.

Seventeen girls have disappeared from bordering Patauli, Sunpathri and Kalyani areas in the last three years. "They raid our homes and take away our women. When we try to protest they threaten to kill us," said Prakash Pun of Rajpur VDC-9. "We can't do anything."

Very few abducted women return. Most of them fall prey to SSB men and other Indian criminal outfits while collecting fodder and firewood in the forest. "We either have to submit or be shot dead," said Lila Gharti of Biruwa village at Bela VDC-2. Even going to bordering Indian villages to buy foodstuff and essentials has now become a horror.

"In the name of interrogation, SSB men keep our women captive for months and abuse them," said Krishna Gharti of bordering Gobardiha village. "Men are usually freed after some roughing up, but they keep the women." He said things have worsened in recent days. "With no one around to protect us we eventually decided to flee."

The Indian side has set up SSB units along the Nepal-India border at every 10 metres, but there are no such security provisions on the Nepali side. Instances of crime and encroachment of Nepali land in Dang district have gone unattended due to absence of any mechanism to keep a tab on border security.

Displaced villagers have demanded that the government set up border security camps in their villages immediately so that they can return home.

Chief District Officer Rishiram Dhakal said border security camps can only be established after inspecting the border region. “We’ve heard about the plight of these villagers and the concerned ministry has also been informed. We’ll shortly be sending a fact-finding team.”

The table below, an illustrative list of incidents of human rights violations by the SSB in recent years, has been compiled from news reports and other sources.

Table I: Illustrative List of Incidents of human rights violations by SSB at Indo-Nepal Border

Date of reporting & Location	Incident
8.12.2013 Raxaul/Birganj (India/Nepal)	<p>News report¹³ detailing abuse and interruption of work by the SSB. One interviewee, Sahbabu Patel stated:</p> <p>“They stop our tractors. Even if you show them the documents, they still abuse us. They call us Maoists, terrorists, ‘China ka admi’ [China sympathiser].”</p> <p>Another resident, Jagdish Shah Turaha, stated:</p> <p>“The first thing they do is start using abusive words and beating us. If we are crossing the camp we have to get off from our motorcycle and walk.”</p>

¹³ Gaikwad, Rahi. “Locals Suffer as India, Nepal Crack the Whip on Unauthorised Cross-border Trade.” *The Hindu* [Raxaul/Birganj] 8 Dec. 2013.

<p>25.4.2012 Taplejung District, Nepal</p>	<p>News report¹⁴ regarding gang rape by SSB of Kanchan Tamang, aged 20 years, a resident of Prangbung VDC-3, who had gone towards the bordering area known as Char-Rate along with her six brothers and sisters and a friend. According to one of the accompanying persons:</p> <p>“Kanchan was taking photographs while having food with her brothers and sisters. The SSB from a nearby post all of a sudden arrested her. After she was arrested we ran away. We informed the villagers about her arrest. The villagers made a group and went towards the SSB post. A completely naked Kanchan was later released from the post.”</p>
<p>10.8.2011 Manebhajang, at the border between Nepal and Darjeeling</p>	<p>News report¹⁵ detailing another incident of SSB harassment of locals during transit, states that the villagers are particularly unhappy with the way the SSB is frisking their vehicles and luggage. One local is quoted as saying:</p> <p>“We are being treated as terrorists. They (SSB) are checking our vehicles and luggage with suspicion. But it must be remembered that we are local residents who are residing here since generations.”</p> <p>Another local resident, a vegetable trader, is quoted as saying:</p> <p>“The SSB behave rudely with us in a drunken state. They detain our vehicles carrying vegetables for long hours and even demand money in some cases.”</p>

¹⁴ “Indian SSB Men Rape Nepali Girl En Masse, Nation Stunned.” Telegraph Nepal 2012.

¹⁵ Gazmer, Deep. “Villagers in Hills Protest SSB ‘torture’” The Times of India. Darjeeling. 10 Aug. 2011.

Durgalal, KC. “Indian Excesses Trigger Exodus.” The Kathmandu Post HC. 2 June 2009.

<p>2.6.2009 (See Box) Dang District, Nepal</p>	<p>According to a news report,¹⁶ more than 2,000 people from 22 bordering villages of Dang district fled their homes fearing persecution and sexual harassment from the SSB and various other armed Indian groups. Krishna Gharti of bordering Gobardiha village reportedly stated: “In the name of interrogation, SSB men keep our women captive for months and abuse them.”</p>
<p>26.11.2008 Shravasti District, UP</p>	<p>A news report¹⁷ stated that seven SSB personnel were accused of gang rape, this time on the Indian side of the border</p>

Source: compiled as part of the present study from news reports.

These incidents are extremely serious and clearly demonstrate the sense of impunity with which the SSB operates. This writer, however, did not find any reports to demonstrate that any effective steps have been taken by the Governments on either side of the border to hold the security personnel accountable for their criminal actions. No small part in this state of affairs is played by the special protections provided to the SSB under a variety of statutes, which are examined later below.

Cross Border Violations by Security Forces

Although the evidence is skeletal at present, there does appear to be a disturbing trend of security forces crossing over borders and committing human rights violations on the other side of the border.

¹⁶ Section 8 of the Jammu & Kashmir Public Safety Act, 1978 (PSA), under chapter IV titled “Powers to make orders detaining certain persons”.

¹⁷ Durgalal, KC. “Indian Excesses Trigger Exodus.” The Kathmandu Post HC. 2 June 2009.

Since these are often in the guise of ‘operations’, these security forces cannot be held to account under any law for such violations.

The SSB also has a significant presence along the border between India and the Kingdom of Bhutan. This highly porous border has 16 battalions and 153 outposts of the SSB.¹⁸

It is reported that several leaders of the United Liberation Front of Assam (ULFA) went missing after this Operation, and remained missing for several years. In 2007, when the whereabouts of these individuals were yet unknown, their wives went on an indefinite hunger strike to force the state to disclose information. The protesters were arrested for “attempted suicide”. Finally in 2011, almost eight years later, it was found that these missing persons had been in the custody of the Bhutanese Army all along.¹⁹

Another important factor is that the SSB, which administers India’s borders with Bhutan and Nepal, also has an intelligence unit of its own. In December 2014 the Home Ministry of the Government of India decided to double the strength of the intelligence unit of the SSB, and to equip it with state-of-the-art equipment. While the purported objective is to help counter terrorist and espionage activity, both from the northwestern frontier and of northeastern insurgents, the increased vigilance raises major concerns regarding violation of privacy of people living in these areas. In recent years,

¹⁸ According to the official website of the SSB, <http://www.ssb.nic.in/index1.aspx?lid=9&clsid=37&cpid=18&lev=2&langid=1&Cid=0> See also, *Parliament of India, Rajya Sabha Secretariat*. “Department-Related Parliamentary Standing Committee On Home Affairs One Hundred And Twenty Third Report On Sashastra Seema Bal Bill, 2006”. New Delhi.

¹⁹ “Missing ULFA Leaders in Secret Custody of Bhutan” *Times of Assam* 13 May 2011, <https://www.timesofassam.com/headlines/missing-ulfa-leaders-in-secret-custody-of-bhutan/> .

there are reports of harassment by security personnel on the Bhutan side, targeting those coming in from India to meet their relatives in Bhutan. To date, the SSB has deployed 29 battalions with 471 outposts on the India-Nepal Border.²⁰

Declaration of vast areas as ‘Disturbed’ along the Borders

The application of the J&K Armed Forces Special Powers Act (AFSPA), 1990 allowed the Indian government to declare the entire region of Kashmir “a disturbed area”. A detailed examination of this law is discussed later in this report. For now, it may be noted that apart from enabling the active presence of the Indian armed forces in the region and vesting them with enormous powers of arrest, entry into property, search and seizure, this law also permits the armed forces personnel to shoot to kill in specified circumstances. The law also lays down special procedures to be followed in case armed forces personnel are to be prosecuted for any wrongdoing. In addition to the AFSPA, the armed forces and paramilitary forces in Kashmir are under special legislations which govern both their internal functioning as well as the mechanisms for accountability.

Civil society organizations in the Kashmir region as well as human rights groups from other parts of India have methodically documented the systematic abuse of power by the armed forces in Kashmir, in an attempt to counter the increasing ‘normalisation’ of such excesses in the purported interest of ‘national security’. A detailed examination of these documents is neither necessary nor required for the purpose of the present study. It would, however, be

²⁰ According to the official website of the SSB, last accessed on 26.5.2016 <http://www.ssb.nic.in/index1.aspx?lid=9&clsid=37&cpid=18&lev=2&langid=1&Cid=0>

useful to look at an indicative list of the kind of human rights abuses which are ubiquitous in the area:

- Arbitrary arrests²¹ and unlawful detention;
- Use of repealed terrorism laws,²² and cases registered many years previously, to arrest and detain people contrary to the extant laws;²³
- Use of torture as a tool for spreading fear and oppression among the local populations;²⁴
- Custodial killings in armed forces custody, many times preceded by unlawful arrests, illegal detention, and torture;²⁵
- Killings of civilians in firings without following the due process of law, such as the provisions of the Criminal Procedure Code, 1973 regarding firing upon unlawful assemblies;²⁶
- Extrajudicial killings, also known as ‘fake encounters’;²⁷

²¹ Amnesty International. “India: Punitive Use of Preventive Detention Legislation in Jammu and Kashmir”. 2000. Index: ASA 20/10/00, <https://www.amnesty.org/en/documents/asa20/010/2000/en/>.

²² This includes the Terrorism and Disruptive Activities (Prevention) Act, 1987 which ceased to be in force after it came under a cloud of criticism regarding its misuse in 1995.

²³ Amnesty International. “India: Abuse of Public Safety Act in Jammu and Kashmir”. 2000. Index ASA 20/13/00

²⁴ *Ibid.*

²⁵ Human Rights Watch. “The Human Rights Crisis in Kashmir” June 1993.

²⁶ *Ibid.*

²⁷ Human Rights Watch. “India’s Secret Army in Kashmir”. May 1996.

- Enforced disappearances, which is a severe problem in the State of J&K, and has in recent years been compounded by the discovery of unmarked graves in huge numbers;²⁸
- Denial of basic rights, such as medical attention, while in custody;²⁹
- Using people as human minesweepers;³⁰
- Use of children as Special Police Officers and as child soldiers;³¹
- Use of rape and sexual violence as a tool of asserting domination over the local population.³²

The high concentration of armed forces in the area, as well as the environment of impunity with respect to human rights violations committed by armed forces personnel, have resulted in tremendous suffering for the people of Kashmir.

²⁸ Amnesty International. “Disappearances in Jammu and Kashmir.” 1999.

²⁹ Amnesty International. “India/Kashmir: Remaining prisoners of conscience should be released immediately”. 2000.

³⁰ “Human Rights Violations in Jammu and Kashmir- A report”. *The Outlook*. March 19, 2001.

³¹ Child Soldiers International. “India: Shadow Report to the Committee on the Rights of the Child”. August 2013, <https://www.child-soldiers.org/Shop/india-shadow-report-to-the-committee-on-the-rights-of-the-child-1> .

³² Asia Watch and Physicians for Human Rights. “Rape in Kashmir: Crime of War”. Vol 5, Issue 9. Retrieved from: <http://www.hrw.org/sites/default/files/reports/INDIA935.PDF> Accessed on August 15, 2015.

Tribal areas of Pakistan

In the Federally Administered Tribal Areas (FATA) region, the population comprising 4 million people has been denied the full civil and political rights enjoyed by other Pakistanis, as a result of the differentiated treatment of tribal areas under the Pakistan Constitution³³. All the social and economic indicators in FATA are the lowest compared to anywhere else in Pakistan. Illiteracy, unemployment and criminality are remarkably high compared to the rest of Pakistan. Lack of economic opportunities and corruption have deeply divided the local tribes and stunted their development.³⁴ The region is contiguous with tribal areas in Afghanistan, and despite their separate governments these regions are intrinsically connected as a result of clan or tribal identities which in turn are vulnerable to pressures from armed groups.

Maritime Borders and the Impact on Fisher-folk

The maritime borders are also highly securitized, and this impacts traditional fishing practices in these waters.³⁵

³³ The governance of FATA is theoretically based on Frontier Crime Regulations (FCR) designed and implemented by colonial government in British India in 19 Century. The Ministry of States and Frontier Regions (SAFRON) at federal level has been assigned the task to keep a close watch on certain issues of management, development and other related matters across the FATA, Ullah, Altaf (2015) Governance reforms in Federally Administered Tribal Areas (FATA) of Pakistan: Past and Present, Journal of Political Studies, Vol. 22, Issue - 1, 2015, 215:235, http://pu.edu.pk/images/journal/pols/pdf-files/14%20-%20ALTAF_22_2015.pdf

³⁴ Neil, Alexander. *Towards Cross-Border Security*. Page 21: Royal United Services Institute (RUSI), 2010.

³⁵ Gupta, C & Sharma, M. Bonded Bodies: Coastal Fisherfolk and National Anxieties in South Asia, http://www.ssvk.org/pdf_doc_files/ssvk_study_coastal_fisherman.pdf

Traditional fishing practices along the maritime border between India and Sri Lanka are continuing till today, and Tamil fisherfolk from India regularly cross over the maritime border in order to fish in the abundant reserves around the Katchatheevu island.³⁶ Indian fisherfolk arrested on the Sri Lankan side are released from time to time based on the political environment in these countries.³⁷

Pakistan and India also have a fractured history of disputes over the maritime border. The dispute relates to a 96 km tidal estuary strip of water³⁸ known as the Sir (Seer) Creek, which lies between Gujarat in India, and Sindh in Pakistan. Fisherfolk from both sides of the border have been fishing in Sir Creek for centuries. However, now that it is a disputed territory, according to some commentators, a large number of arrests for maritime issues between the two countries take place in this area.³⁹ These fishermen are arrested at mid sea, charged with violation of the maritime border and Exclusive Economic Zone (EEZ), detained and sent to jail. Maritime Security Agency (MSA) in Pakistan and Indian Border Security Force (IBSF) are the two bodies which conduct these arrests.

³⁶ Gupta C (2007). Bonded Bodies: Coastal Fisherfolk, Everyday Migrations and National Anxieties in India and Sri Lanka, http://www.academia.edu/2185111/Bonded_Bodies_Coastal_Fisherfolk_Everyday_Migrations_and_National_Anxieties_in_India_and_Sri_Lanka (Accessed on 4 November, 2016); Also see “The maritime boundary between India and Sri Lanka stands settled – Minister Bogollagama”, <http://www.mfa.gov.lk/index.php/component/content/1396?task=view>

³⁷ PTI, “Sri Lanka frees 34 Indian Fishermen May 16, 2016, <http://indianexpress.com/article/india/india-news-india/sri-lanka-frees-34-indian-fishermen-2803988/>; PTI, “Jayalalitha writes to Modi to get fishermen released from Sri Lanka” June 7, 2016, <http://indianexpress.com/article/india/india-news-india/tamil-nadu-fishermen-captured-sri-lanka-navy-jayalalitha-modi-2834534/>; TNN, Sri Lanka releases 73 Indian fishermen from prison, July 27, 2016, <http://timesofindia.indiatimes.com/city/madurai/Sri-Lanka-releases-73-Indian-fishermen-from-prison/articleshow/53407768.cms>

³⁸ In some writings this is described as a one hundred nautical mile strip.

³⁹ Gokhale, Nitin A. Personal interview dt. 31.03.15

Yet the fisherfolk continue to fish in these waters, taking calculated risks weighed against the potential compensation from the abundant catch available. The security forces on both sides tend to turn a blind eye or take strict action depending upon whether the hostilities between the two countries are in ebb or flow. When caught, however, the plight of these fisherfolk is pitiable, and sometimes they are charged under special laws relating to terrorism.

Unfortunately, since they are arrested by a hostile foreign country, their situation becomes precarious. There are no mechanisms in place to inform the family of the arrest of these fisherfolk, and bail is out of the question, as more often than not there is no one to take responsibility for them (for fear of terrorist or other negative links). Moreover, such arrests also result in impounding or even destruction of the boats involved, leaving people with no source of livelihood even if they manage to get out of prison and return to their own country. In case of release, these individuals often do not have the economic resources or wherewithal to return to their country as a result of which they undergo numerous hardships.⁴⁰ There are also instances of deaths in custody, where there can be considerable delay in handing over the bodies to the family members for the last rites.

According to the Pakistan Fisherfolk Forum (PFF), in October 2014, there were 241 Pakistani fisherfolk in Indian custody, while there were 400 Indian fisherfolk in Pakistani jails.⁴¹ Since then, 113 Indian fisherfolk were released from Pakistani prisons in June 2015,⁴²

⁴⁰ Munir, Sarah. "Fisherman of Pakistan and India: in enemy waters." October 26, 2014. *The Express Tribune, Sunday Magazine*. October 26, 2014, <https://tribune.com.pk/story/779338/fishermen-of-pakistan-and-india-in-enemy-waters/>.

⁴¹ Khan, Zafar A. "150 Pakistani Fishermen in different Indian jails, *Daily Balochistan Express*, December 13, 2016, <http://www.bexpress.com.pk/2016/08/150-pakistan-fishermen-in-different-indian-jails/>

⁴² PTI. "Pakistan Releases 113 Indian Fishermen on Ramzan." *NDTV*. June 18, 2015.

and a further 163 fisherfolk in August 2015.⁴³ However, on October 4, 2015 one hundred Indian fisherfolk were arrested and imprisoned in Pakistan. According to the National Fishworkers' Forum, as of November 2015 there are about 239 Indian fisherfolk in Pakistani prisons.⁴⁴ Prisoners have also been released from time to time.⁴⁵

Government reports, while giving different numbers, also acknowledge that there is a large number of prisoners in custody on both sides. According to government reports released by the Government of Pakistan, in January 2015 there were 50 prisoners for civil offences and 476 Indian fisherfolk in Pakistan prisons. The Government of India stated that it had 253 Pakistani prisoners for civil offences and 132 Pakistani fisherfolk in custody.⁴⁶

⁴³ PTI. "Pakistan releases 163 Indian fishermen". *The Indian Express*. Karachi. August 2, 2015, <http://indianexpress.com/article/india/india-others/pakistan-releases-163-indian-fishermen/>.

⁴⁴ Dominique, Bosco. "650 Indian fishermen languish in jails of Sri Lanka, Bangladesh, Myanmar says federation" *The Times of India*. November 4, 2015, <http://timesofindia.indiatimes.com/india/650-Indian-fishermen-languish-in-jails-of-Sri-Lanka-Pakistan-Bangladesh-Myanmar-says-federation/articleshow/49663856.cms>.

⁴⁵ "India releases 16 Pakistani prisoners". *The Dawn*. August 8, 2015. Lahore, <https://www.dawn.com/news/1199234>; PTI. "India releases 88 Pakistani fishermen as goodwill gesture during Ramadan". *The Indian Express*. June 19, 2015, <http://indianexpress.com/article/india/india-others/india-releases-88-pakistani-fishermen-as-goodwill-gesture-during-ramadan/>.

⁴⁶ PTI. "352 Indian prisoners lodged in Pakistan jails: Government." *The Times of India*. May 04, 2015, <http://timesofindia.indiatimes.com/india/352-Indian-prisoners-lodged-in-Pakistan-jails-Government/articleshow/46456511.cms>; PTI. "As many as 516 Indian Fishermen in Pakistani Jails: Government, *The Indian Express*, December 7 2016, <http://indianexpress.com/article/india/as-many-as-516-indian-fishermen-in-pakistan-jails-government-4415621/>; PTI. "518 Indians, including 463 fishermen, in Pakistan jail" *The Hindu*, July 1, 2016, <http://www.thehindu.com/news/international/518-Indians-including-463-fishermen-in-Pakistan-jails/article14465377.ece>

The plight of those in custody in foreign prisons, whether for violating maritime boundaries, or otherwise, is deplorable in both countries. Reports of atrocities by both sides have been covered widely in the media. In an unfortunate turn of events in March 2013, Sarabjit Singh, an alleged Indian spy on death row in Pakistan, was brutally attacked by other inmates and killed. In retaliation, inmates in a Jammu prison brutally attacked Sanaullah Ranjay, a Pakistani prisoner, who succumbed to his injuries six days after the attack.⁴⁷ When deaths in custody take place, there is no mechanism to ensure that these were not the result of natural causes. The cause of death of Bikha Lakha Siyal, a fisherman incarcerated in a Pakistani prison, in December 2013, remained unknown, and his body was not returned to the Indian authorities for a long time. In February 2014, an Indian fisherman, Kishore Bhagwan, died in a Pakistani prison. Pakistani media reported that post-mortem reports showed signs of assault.⁴⁸ In February 2015, the 172 Indian fishermen released from Pakistan, claimed that the cause of death of the three fishermen who had died in custody was lack of proper care and treatment.⁴⁹

Conditions in prisons in both countries are abysmal, with complaints of poor food and drinking water, lack of healthcare, and systemic violence. There have also been instances of persons being incarcerated for periods far exceeding the sentence. In several cases, individuals spend years or decades in prison while the punishment may have

⁴⁷ Kanwar, Shimona. "Sanaullah follows Sarabjit's horrifying route to death." *The Times of India*. May 10, 2014, <http://timesofindia.indiatimes.com/india/Sanaullah-follows-Sarabjits-horrifying-route-to-death/articleshow/19977868.cms>

⁴⁸ Panwar, Preeti. "Indian prisoner Kishore Bhagwan found dead in Pak Jail." *One India*. February 4, 2014, <http://timesofindia.indiatimes.com/india/Indian-prisoner-found-dead-in-Pakistani-jail-Report/articleshow/29858422.cms> .

⁴⁹ "3 Indian Fishermen Died in Pakistan Jail Due to Lack of Treatment". *The New Indian Express*. 17 Feb. 2015, <http://economictimes.indiatimes.com/news/politics-and-nation/3-indian-fishermen-died-in-pak-jail-due-to-lack-of-treatment/articleshow/46275646.cms> .

only been for a couple of months, as the prisoners from these countries are generally not released without a joint consultation. For instance, a prisoner in India, Yasin, hailing from the city of Multan in Pakistan was released after 21 years, although he was sentenced to six years imprisonment.⁵⁰

Civil society organisations such as the PFF have demanded a visible demarcation of the border at Sir Creek, and declaration of a buffer zone of 50 nautical miles on either side as a fishing zone. However, these demands have gained no traction as control over the creek has important implications on the energy potential of each nation. There can be no rationale, however, for the failure to accede to their demand that representative organizations of fisherfolk in both countries be informed when arrests take place, so that family members can be alerted in time.

Similar to the above, there are unresolved issues with regard to the maritime boundaries between **Bangladesh and India**.⁵¹ Comparatively, Bangladesh's coastline is narrower. Its people have historically been seafarers. The limited land-based food and fuel resources available to them, and the disparity between resources and subsistence needs of a large population as well as negative impact of climate change make it imperative for Bangladesh to recognise the potential of oceans as a tangible promise for the future. Thus the government enacted the Territorial Waters and Maritimes Zones Act, 1974. This Act, however, did not specify the breadth of the EEZ of Bangladesh in the Bay of Bengal in clear-cut terms.

⁵⁰ "Released Indian and Pakistani Prisoners Describe Trauma." *BBC News*. South Asia. April 20, 2011, <http://www.bbc.com/news/world-south-asia-13043478>.

⁵¹ Sharma, M & Gupta, C. "Need for coastal Integration in South Asia", the Hindu, October 21, 2009, <http://www.thehindu.com/opinion/lead/need-for-coastal-integration-in-south-asia/article36840.ece>;

The delimitation of maritime boundaries has created a conflict between Bangladesh and its neighbours. Disagreement arose mainly with India when Dhaka in 1974, signed contracts to share production with six international oil companies, granting them oil and natural gas exploration rights in its territorial waters in the Bay of Bengal. The Bangladesh line moved towards the south from the edge of the country's land boundary, while the Indian line took a south-easterly direction, thus creating an angle within which lie thousands of square miles of the Bay, claimed by each country as its economic zone. This overlapping claim has become a critical problem between the two neighbours. For example, the territorial sea, the EEZ, and the continental shelf will depend on how this dispute is resolved. Consequently, it is fishermen who take the brunt of these disputes.⁵²

Stateless People

Article 1 of the UN Convention relating to the Status of Stateless Persons defines a 'stateless person' as

“a person who is not considered as a national by any State under the operation of its law.”

Further, Article 12 of the Convention requires that

⁵² Bandyopadhyay, K. “Fishermen languish in Bangladeshi jail, West Bengal unaware of new maritime border” *The Times of India*, November 29, 2014, <http://timesofindia.indiatimes.com/india/Fishermen-languish-in-Bangladeshi-jail-West-Bengal-unaware-of-new-maritime-border/articleshow/45314610.cms>; Our correspondent, “16 Bangladeshi Fishermen land in jail”, *The Independent* September 24, 2015, <http://www.theindependentbd.com/printversion/details/17015>; A correspondent, 57 Fishermen return from Indian jail, *The Daily Star*, March 2, 2016, <http://www.thedailystar.net/country/57-fishermen-return-indian-jail-784714>

“the personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence”

This Convention protects the social, economic and civil rights of persons deemed to be stateless.

The political and social turmoil in the Asian region, and the consequent shifting of political borders, has made several populations stateless. In the present section, we look at two examples of how different countries have approached the issue of stateless people. While these examples are drawn from Bangladesh and India, they reflect the problems faced by stateless persons in the region.

As a result of the border re-alignment subsequent to the 1971 war, certain sections of people found themselves cut-off from Bangladesh, Pakistan and India, being lodged within a small area not belonging to either India or Bangladesh. Rendered stateless for almost four decades, these people lived in the most difficult conditions, with minimal access to essential goods and services, and practically no access to education, healthcare, and other necessities.

The Human Rights Commission of Pakistan (HRCP) drew attention to the plight of hundreds of thousands of Pakistanis stranded in Bangladesh since 1971. Also known as Biharis, an Urdu speaking community, they have lived, similar to refugees, in camps and faced discrimination even though the Ministry of Home Affairs has accepted them as citizens.⁵³ After Bangladesh became an independent country, many Biharis maintained that they were

⁵³ Hassan, K. Citizenship Rights still a far cry for Bangladeshi Biharis, *Dhaka Tribune*, December 9, 2016, <http://www.dhakatribune.com/bangladesh/2016/12/09/citizenship-rights-still-far-cry-bangladeshi-biharis/>

Pakistani nationals and sought repatriation. But the Pakistani government denied them citizenship and repatriation. Trapped in Bangladesh, they lacked access to government jobs, schooling or even access to many basic facilities. On May 18, 2008, the Supreme Court of Bangladesh granted them citizenship and voting rights ending a long lasting argument about the status of the stranded Pakistanis in Bangladesh.⁵⁴

A few years ago, Bangladesh granted the right to vote to the Biharis who were minors at the time of the 1971 war or were born later, although there was no legal recognition for people who were adults in 1971.⁵⁵ In 2009 a petition was filed in the Supreme Court of Pakistan seeking repatriation of the Pakistanis stranded in Bangladesh, and arguing that the Pakistan government had no Constitutional or statutory basis to withhold repatriation of its citizens. The petition also requested the Court to direct the government to look after the stranded Pakistanis living in camps and provide food and medicines till the time they were repatriated to Pakistan. Although the matter was pending at the end of 2014, it is hoped that it will come up for hearing in the near future.

⁵⁴ How a Bangladesh court ruling changed the lives of more than 300,000 stateless people, UNHCR, 23 February, 2015, <http://www.unhcr.org/news/latest/2015/2/54ec22869/bangladesh-court-ruling-changed-lives-300000-stateless-people.html>; Shahnaz Parveen. Citizenship debate comes to an end but doubts and worries remain, *The Daily Star*, May 26, 2008, <http://www.thedailystar.net/news-detail-38148>; Khalid Hussain. The end of Bihari statelessness, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/statelessness/hussain.pdf>

⁵⁵ Human Rights Commission of Pakistan(HRCP), 2014. "State of Human Rights in 2014" P351, <http://hrp-web.org/hrpweb/data/HRCp%20Annual%20Report%202014%20-%20English.pdf>

Meanwhile, important strides have been made between India and Bangladesh with the signing of the Land Boundary Agreement⁵⁶ on 7th June 2015. As discussed previously, the India- Bangladesh land boundary has some disputed sites since it was determined by the Radcliffe Award in 1947. This had led to a situation where people living in disputed lands suffered pitiable conditions of insecurity for decades. Previously, inhabitants of these enclaves could not enjoy full legal rights as citizens of either India or Bangladesh. Infrastructure facilities such as electricity, schools and health services were deficient. Furthermore, due to the lack of access to these areas by the administration of either country, including the law enforcement agencies, certain enclaves became hot-beds of criminal activity.

The 2015 agreement, in an effort by both countries to avoid large scale uprooting and displacement of populations against their wishes, recognises that it is necessary to preserve the status quo of adverse possessions instead of simply exchanging territories.

On the night of July 31st 2015, India and Bangladesh exchanged enclaves in order to finally implement the 1974 Land Boundary Agreement. India has transferred 111 enclaves with a total area of 17,160.63 acres to Bangladesh, while Bangladesh has transferred 51 enclaves with an area of 7,110.02 acres to India.

As per the agreement, persons living in these enclaves have been recognised as citizens of the country they choose to be in, and have been given the option to return and resettle in the country of origin.⁵⁷ This agreement has been welcomed with unprecedented

⁵⁶ Excerpts from the Executive Summary to India & Bangladesh Land Boundary Agreement. Retrieved from: http://www.mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf

⁵⁷ "Historic India, Bangladesh Land Boundary agreement: implementation to begin today?". *The First Post*. India. July 31, 2015, <http://www.firstpost.com/india/historic-india-bangladesh-land-boundary-agreement-implementation-to-begin-today-2372702.html> .

support and relief by the populations who had been living in practical imprisonment inside these enclaves, though some have chosen to stay in the respective countries that they were residing in even after the exchange. It is a promising reminder of the enormous potential of statesmanship upon the lives of people living in the border areas. It also underlines the fact that resolutions which take their lived realities into account are likely to be more sustainable and long-lasting.

Unfortunately, this agreement has been met with stiff opposition from certain quarters, and violent resistance and attacks on the enclaves of these individuals.⁵⁸ In addition, the tribal community in Meghalaya has threatened to approach the United Nations (UN) challenging the agreement, as they claim that they have not been consulted or made party to the decision.⁵⁹

⁵⁸ Mehbooba Jelani. "Homeless No Longer". *The Hindu*. June 16, 2015, <http://www.thehindu.com/opinion/op-ed/homeless-no-longer/article7318972.ece> .

⁵⁹ PTI. "Tribal landowners in Meghalaya threaten to move UN over LBA". *The Economic Times*. June 26, 2015, <http://economictimes.indiatimes.com/news/politics-and-nation/tribal-landowners-in-meghalaya-threaten-to-move-un-over-lba/articleshow/47689531.cms> .

IV

Refugees and the Impact of National Boundaries

The fractured political history of these countries and the turbulent conditions in the last century in particular, have seen a significant movement of refugees in the region. While many refugees are fleeing political or social oppression, others are pushed outside their homelands because of destitute economic conditions.

In this section, the situation of refugees in different border areas in the SAARC countries is examined, along with an examination of the role of the state machinery, and the United Nations High Commissioner for Refugees (UNHCR).

A recurrent theme in the context of refugees is the disenfranchisement of entire populations on the basis of their ethnicity, and their subsequent vulnerability to abuse at the hands of state as well as non-state actors. Because they lack citizenship or even domicile status in the country where they have taken refuge, their protection under the constitutional dispensation as well as ordinary law becomes precarious. There appears to be regular violation of some of the basic principles of international law relating to refugees, in particular the non-refoulement principle.

International Instruments for Protection of Refugees

The three major international instruments for the protection of refugees are:

1. Statute of the Office of the UNHCR, 1950
2. United Nations Convention relating to the Status of Refugees, 1951
3. Protocol relating to the Status of Refugees, 1967

The UNHCR emerged in the wake of World War II to help Europeans displaced by that conflict. At the time it was optimistically believed that the mandate of the UNHCR would be completed in three years, after which it could be disbanded.¹ These hopes would prove to be unfounded - since its formation, there has never been a situation in which the UNHCR became unnecessary. Major refugee crises throughout the 20th century have only led to an expansion of its role. In recent years, the UNHCR has also been asked to help with large numbers of Internally Displaced Persons (IDPs).

The mandate of the UNHCR is to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.² In this regard, the UNHCR is supposed to complement

¹ UNHCR. "History of UNHCR.: A Global Humanitarian Organization of Humble Origins.". Retrieved from: <http://www.unhcr.org/pages/49c3646cbc.html>

² UNHCR. "What We Do: Help the Uprooted and Stateless". Retrieved from: <http://www.unhcr.org/pages/49c3646cbf.html>

the role of nation states, contributing to the protection of refugees by:

1. Promoting accession to, and implementation of, refugee conventions and laws;
2. Ensuring that refugees are treated in accordance with internationally recognized legal standards;
3. Ensuring that refugees are granted asylum and are not forcibly returned to the countries from which they have fled;
4. Promoting appropriate procedures to determine whether or not a person is a refugee according to the 1951 Convention definition and/or to other definitions found in regional conventions; and
5. Seeking durable solutions for refugees, which can include voluntary repatriation, local integration, or resettlement to a third country in situations where it is impossible for a person to go back home or remain in the host country.³

The 1951 Convention, which came into force on July 28, 1951, emerges from Article 14 of the Universal Declaration of Human Rights (UDHR), reproduced below:

“(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

³ UNHCR. “The 1951 Convention Relating To The Status of Refugees and Its 1967 Protocol”. 2011. P. 6, <http://www.unhcr.org/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>

The 1951 convention forms the legal basis of the UNHCR's mandate for the protection of refugees. It defines the term 'refugee'⁴ and specifies the legal obligations of states with respect to refugees.⁵ It explicitly outlines the legal protections and social rights a refugee is entitled to, as well as a refugee's obligations to the host country. It also specifies categories of people who do not qualify for refugee status, such as war criminals.⁶

These Conventions articulate certain fundamental principles:⁷

- (a) *Non-discrimination*: the Convention must be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination,
- (b) *Non-penalisation*: the Convention further stipulates that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules. Prohibited penalties might include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum, and

⁴ UNHCR. "Introductory Note by the Office of the United Nations High Commissioner for Refugees to the Text of Convention and Protocol on the occasion of 60th anniversary." 2011. A refugee is defined as follows:

"A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."

⁵ History of UNHCR. Retrieved from: <http://www.unhcr.org/pages/49da0e466.html>

⁶ Op cit 95, page 1.

⁷ UNHCR. Introductory Note by the Office of the United Nations High Commissioner for Refugees to the Text of Convention and Protocol on the occasion of 60th anniversary". 2011.

(c) *Non-refoulement*: meaning that no one shall expel or return (*refouler*) a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. This is the most important principle under the Convention laid down under Article 33.

The Convention also stipulates the ‘basic minimum standards for the treatment of refugees’.

Other rights contained in the 1951 Convention include:

<ul style="list-style-type: none"> • The right not to be expelled, except under certain, strictly defined conditions (Article 32) 	<ul style="list-style-type: none"> • The right to housing (Article 21); 	<ul style="list-style-type: none"> • The right to access the courts (Article 16);
<ul style="list-style-type: none"> • The right not to be punished for illegal entry into the territory of a contacting State (Article 31); 	<ul style="list-style-type: none"> • The right to public relief and assistance (Article 23); 	<ul style="list-style-type: none"> • The right to freedom of movement within the territory (Article 26); and
<ul style="list-style-type: none"> • The right to work (Articles 17 to 19); 	<ul style="list-style-type: none"> • The right to freedom of religion (Article 4); 	<ul style="list-style-type: none"> • The right to be issued identity and travel documents (Articles 27 and 28).

In 1967 the Protocol relating to the Status of Refugees was introduced to expand the scope of the 1951 Convention, which was originally limited to European refugees displaced by World War II. The 1967 Protocol removed these limitations, thus giving the

Convention universal coverage.⁸ At present there are 148 countries across the world that have acceded to one or the other of the two instruments.⁹

Also relevant are the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. There are also regional instruments relating to refugees that have been put in place subsequently, such as the 1969 Organisation of African Unity (OAU) Refugee Convention in Africa, the 1984 Cartagena Declaration in Latin America, and the development of a common asylum system in the European Union. International instruments which indirectly enforce accountability on nation states to protect refugees and their rights include the UDHR, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations Convention on the Rights of the Child (UNCRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPA).¹⁰

⁸ UNHCR. “Note by the Office of the United Nations High Commissioner for Refugees to the Text of Convention and Protocol on the occasion of 60th anniversary”. p.2. Retrieved from: <http://www.unhcr.org/3b66c2aa10.html>

⁹ UNHCR. State Parties to the 1950 Convention and 1967 Protocol. Retrieved from: <http://www.unhcr.org/3b73bod63.html>

¹⁰ For details on these instruments, see Zutshi, Ragini Trakroo. “Refugees and the Law”. HRLN. Chapter 3 under Part II, pp. 41 – 55.

Changing Definition of Refugees in International and Regional Instruments

The definition of the term ‘refugee’ has changed over time in international and regional instruments.¹¹

In 1922, the Nansen Passport, an identity certificate issued to stateless persons by the League of Nations, defined ‘refugees’ as persons of international concern who were outside the country of their origin without protection of the government of that state. The difference between voluntary and involuntary asylum seekers emerged in 1938 owing to the large number of persons fleeing Germany. In 1950 the Statute of the UNHCR was extended to anyone who *“is outside the country of his nationality, or is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.”* Following the adoption of the Convention in 1951, the principle of non-refoulement, which prohibits the return of a refugee to a territory where their life or freedom is threatened, was established. The 1967 Protocol gave universal coverage to the 1951 Convention. Again in 1984, the Cartagena Declaration on Refugees further expanded the definition.

However, the definition of refugees as it presently stands in international law has been criticized for differentiating between political refugees, who are ‘pushed’ out of the borders, and economic refugees, who are attracted by the ‘pull’ of better economic opportunities. This distinction between migrants, who are perceived as voluntary, and refugees who are categorized as involuntary, is not necessarily accurate. The international law regime also fails to take into account IDPs or those displaced due to reasons of natural

¹¹ Goodwin-Gill, Guy S and McAdam, Jane. “The refugee in international law”. OUP. 2007.

calamities or other reasons,¹² although in some areas the UNHCR has been asked to assist with rehabilitation of IDPs.

Compliance in the South Asian Region with International Law on Refugees

Most countries in South Asia have not acceded to any of the international instruments relating to refugees. Afghanistan is the exception, having acceded to the 1951 Convention and the 1967 Protocol only in 2005. Despite the high numbers of refugees in the region, the response of local nation-states has been ad hoc and uneven at best. This has even extended to their willingness to allow the UNHCR to establish its presence and assist these massive distressed populations.¹³ The absence of any binding regional instrument on refugee rights in South Asia, unlike Africa or Latin America, has exacerbated these problems.

Instead, it has been the domestic laws relating to aliens and foreigners which have been applied to refugees, leaving them intensely vulnerable to prosecutions, displacement and day-to-day harassment because of their ambiguous and unprotected status.

¹² Bose, Tapan. "The Changing Nature of Refugee Crisis" in *States, Citizens and Outsiders: The Uprooted Peoples of South Asia*. South Asian Forum for Human Rights. Kathmandu. 1997.

¹³ Abrar, C.R. "Legal protection of refugees in South Asia". *Forced Migration Review*. Review No 10. April 2001, <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR10/fmr10.8.pdf>

The Table below summarizes this legal position.

Table II: Status of SAARC Countries' Compliance with International Instruments on Refugees

Country	1951 Convention	1967 Protocol	1954 Convention	1961 Convention	Constitutional provisions*	Domestic legislations
Afghanistan	a	a	×	×	Chapter I	NA
Bangladesh	×	×	×	×	Article 25	Foreigners Act of 1946; Registration of Foreigners Act 1939; Passport Act 1920 Bangladesh Citizenship (Temporary Provision) order 1972; Extradition Act 1974; Naturalization Act 1926
Bhutan	×	×	×	×	Article 9, (24); Article 10(25)	NA
India	×	×	×	×	Article 51(c)	Foreigners Act 1946; Registration of Foreigners Act 1939; Passports Act, 1967; Passports (Entry into India) Act 1920; Extradition Act 1962 Illegal Migrants Act, 1983; Foreigner's Order, 1948.
Maldives	×	×	×	×	Article 68	NA

Country	1951 Convention	1967 Protocol	1954 Convention	1961 Convention	Constitutional provisions*	Domestic legislations
Nepal	×	×	×	×	Article 55(b)(3); Article 248(2)(g)	Aliens Act ; Citizenship Act 2063, 2006; Immigration Act 2049, 1992; Extradition Act 2045, 1988.
Pakistan	×	×	×	×	×	Foreigner’s (Amendment) Ordinance, 2000; Foreigner’s Order of Pakistan, 1951; Pakistan’s Citizenship Act, 1951; The Foreigner’s Act of Pakistan, 1946; The Registration of Claims Act, 1956; The Displaced Persons (Compensation and Rehabilitation) Act, 1958
Sri Lanka	×	×	×	×	Article 27(15) Article 157	NA

a= Acceded; X= Not a party; NA= legislations relating to this country were not readily available to this study.

*The constitutional provisions listed in this column are general provisions relating to compliance with international treaties under domestic law, and do not specifically relate to refugees.

Compiled for the present study. Status available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx

It is important to note that the principle of non-refoulement is considered a rule of customary international law. As such, therefore, it is binding on all States whether or not they have acceded to the 1951 Convention, the 1967 Protocol, or any other international instrument. Over the years, certain principles have also developed through actual implementation of domestic laws within constitutional boundaries, and through court decisions and judicial precedents. Therefore it is useful to examine how different countries in the SAARC region have approached specific situations relating to refugees in their jurisdiction.

Role and Status of UNHCR in South Asia

As will be demonstrated below, over the last few decades the UNHCR has been able to make substantial inroads in the South Asian region, despite the fact that none of the countries in the region are a party to the main international instruments related to refugees, with Afghanistan being the only exception. It is clear that the presence of UNHCR in different host countries has improved the conditions of refugees to some extent. The UNHCR has set up camps in different countries and undertaken relief efforts. It has also attempted to explore other durable solutions for refugees, for instance, the resettlement in different countries of ethnic Nepalese refugees from Bhutan.

Interestingly, the most serious challenges to UNHCR operations in the region are the governments faced with refugee crises. In a number of instances, the UNHCR was not allowed access to refugees at all, such as in India, or was prevented from conducting its registration process, such as in Pakistan. Despite India and Pakistan being members of the UNHCR Executive Committee, the UN agency has not been allowed to function freely in these countries.

The Government of Bhutan did not allow the process of repatriation to happen, forcing the adoption of third country resettlement as the only durable solution. In some cases the UNHCR operations have been made defunct by the local governments themselves, such as in the case of Sri Lankan open relief camps.

As can be clearly seen, the UNHCR has found its hands tied on a number of occasions in the SAARC region. An important factor governing the effectiveness of UNHCR operations is the current political relationship between the two relevant countries. Other considerations relate to foreign policy considerations (India's intervention in Sri Lanka), the force of nationalistic policies (Bhutan) or political incidents (attack on school in Peshawar).

At the same time, the tedious procedures adopted by the UNHCR for Refugee Status Determination (RSD) have also led to the exclusion of a number of refugees from the registration process. This has resulted in a lot of misery for those who did not possess necessary documents or evidence. On occasion, the UNHCR has been accused of colluding with the local governments in forcible repatriation of refugees to their country of origin, such as in the case of Sri Lankan Tamil refugees in India, and Afghan refugees in Pakistan. It has also been observed that the UNHCR has not pursued local governments adequately in order to gain access to refugees and camps, such as in India. It has also engaged in tripartite agreements with nations thereby indirectly preventing them from acceding to the international instruments relating to refugees.

While the UNHCR has been working hard to provide relief for refugees in South Asia, it has also made some mistakes in the process. The specific role it has played in different countries in the region is examined in greater detail below.

Status of Refugees in India

India is home to refugees from several countries like Afghanistan, Bangladesh, Pakistan, Sri Lanka, Myanmar, Bhutan and Tibet. The legal framework within which this diverse group of refugees has to negotiate their rights in India will be examined here.

As stated earlier, India is not a signatory to the 1951 Convention or the 1967 Protocol. Also, there is no domestic law or policy or procedure to govern the protection and treatment of refugees, although it is reported that the Ministry of Home Affairs has initiated the process of drafting a national refugee law.

Instead, refugees are viewed as ‘foreigners’ under a variety of ordinary domestic laws,¹⁴ making them subject to domestic laws relating to passports and entry, stay, and exit from Indian territory. Using the wide discretionary powers available under Section 3 of the Foreigners Act of 1946, the Ministry of Home Affairs can issue Residential Permits to any foreigner. Large numbers of UNHCR-recognized refugees have been able to secure their stay in India on the basis of the informal recognition of the UNHCR-issued refugee certificates.¹⁵

The question of which refugees are granted such protection, and which are not, depends upon a variety of extraneous considerations, not the least of these being the political relationship between India and the country of origin. There is no standardization of treatment

¹⁴ This includes the Foreigners Act, 1946; the Registration of Foreigners Act, 1939; the Passports Act, 1967; the Passports (Entry into India) Act, 1920; the Extradition Act, 1962; Illegal Migrants Act, 1983; the Foreigner’s Order, 1948; etc.

¹⁵ Sen, Sarbani. “Paradoxes of the International Regime of Care Refugees and the State”. *Practices of Asylum and Care in India. 1947-2000*. Ed. Ranabir Samaddar. Sage Publications. 2003.

of refugees, and therefore the policy and approach of India to refugees remains ad hoc and variable. This inconsistency has serious consequences.

This approach is also evident in the status and recognition of the UNHCR in India. The relationship between the Indian government and the UNHCR has not always been smooth, and although the UNHCR has been operating in India for a long time, the Indian government has in recent decades worked to significantly diminish the agency's role. It was only in 1969, after considerable resistance, that the Indian Government allowed the establishment of the UNHCR office. The immediate reason was the tremendous influx of Tibetan refugees after the Indo-China War of 1962. However, the agency was forced to leave in 1975 due to its failure to help deal with the massive influx of refugees from East Pakistan,¹⁶ estimated at 10 million people.¹⁷ The office of the UNHCR was re-established in 1981, after a large number of Afghan refugees began to arrive in India, leading the Indian government to invite the UNHCR to take over the responsibility of handling these refugees. Since that time, the agency has been responsible for the recognition and protection of urban refugees within the capital. Even today, UNHCR is permitted to operate within a limited jurisdiction out of its office in New Delhi,

¹⁶ Sarbani, Sen. (in *Practices of Asylum and Care in India*, Ranabir Samaddar 2003) explains that it is after a lot of resistance by the Indian Government, that the UNHCR office was established in India in 1969 in the light of the Indo-Chinese War of 1962 and the need for assistance to Tibetan refugees. But by June 1975 assistance to Tibetans and Nepalese was discontinued due to China becoming part of the UN in 1973 and its criticism of UNHCR assistance to Tibetan refugees.

¹⁷ On this point, see K.C. Saha. "The Genocide of 1971 and the Refugee Influx in the East" *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*. Ed. R. Samaddar. Sage Publications, 2003. pp. 240-41

and a small office in Madras. The UNHCR also faces hurdles in its work because of lack of formal accreditation.¹⁸

The agency has been refused access to refugees in camps, where they would normally provide or support international assistance. This includes the denial of access to the camps established in Manipur and Mizoram in 1988 for Burmese refugees. In 1994, UNHCR was also refused access to refugees being involuntarily repatriated to Bangladesh from the northeastern state of Tripura. UNHCR is responsible for determining refugee status only for asylum seekers who find their way to New Delhi, and that on a case-by-case basis. Those near the borders remain at the mercy of the BSF, the SSB, or any other military/ security force which is deployed in the area.¹⁹

The UNHCR must take its share of the responsibility for this situation, having never adequately appealed to the Indian government, the UN or the international community for much-needed support – a critical breach of its mission to provide protection and seek long-term solutions for these refugees. However, the relations between the UNHCR and India have improved since 1995 when India became a member of the Executive Committee of the UNHCR.

In the absence of any domestic legislation or administrative framework for the recognition and protection of refugees generally, the RSD processes remain ad-hoc. Therefore, different legal and administrative procedures apply to different group of refugees in the

¹⁸ Chimni, B.S. "Status of Refugees in India: Strategic Ambiguity in Refugees and the State". *Practices of Asylum and Care in India, 1947-2000*. Ed. R. Samaddar. Sage Publications. 2003.

¹⁹ Nair, Ravi. "Refugees and agency". *Himal Southasian*. December 2006, <http://old.himalmag.com/component/content/article/1488-Refugees-and-agency.html> .

country.²⁰ One writer²¹ has categorized refugees in India based on the assistance they have received from the Indian Government and the State, as under:

Category I	Refugees who receive full protection from the Indian government as per standards set by the government of India, such as Tamil refugees from Sri Lanka.
Category II	Refugees who are granted refugee status by the UNHCR and are protected under the principle of non-refoulement, such as Burmese and Afghan refugees. These are called ‘mandate’ refugees.
Category III	Refugees who are neither recognised by the Indian government nor the UNHCR, but have entered India and assimilated into the local community, such as Chin refugees from Burma living in the state of Mizoram.

It is important to state that the UNHCR is not constrained by any legal classification of refugees in its distribution of aid, yet it does relatively little work in India, focusing mainly on ‘mandate’ refugees. This is partly because of the constraints of working with the Indian Government. The UNHCR requires a request from the host government before it can provide material assistance to refugees.²² In the result, refugees are often denied any officially recognised

²⁰ Sen, Sarbani. “Paradoxes of the International Regime of Care: The Role of the UNHCR in India”. *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*. Ed. R. Samaddar. Sage Publications. 2003.

²¹ Nair, Ravi. “Refugee Protection in South Asia” *States, Citizens and Outsiders: The Uprooted Peoples of South Asia*. Ed. Manchanda, Rita and Bose, Tapan. *South Asian Forum for Human Rights*. Kathmandu. 1997.

²² Nair, Ravi. “Abandoned and Betrayed: Afghan Refugees under UNHCR Protection in New Delhi”. *South Asia Refugee Watch*, 1999, <http://www.calternatives.org/resource/pdf/Abandoned%20and%20Betrayed%20-%20Afghan%20Refugees%20under%20UNHCR%20Protection%20in%20New%20Delhi.pdf> .

status, are subject to police harassment, and vulnerable sections like women and children remain inadequately protected. Restrictions on employment further hinder their ability to become self-reliant.

Judicial interventions

Despite its failure to accede to international conventions on the subject, and its limited support to the UNHCR, India cannot escape its obligations to comply with the principle of non-refoulement under international customary law. In addition, India is accountable to its own Constitution and various international treaties that indirectly protect the right of refugees.²³

It is also settled law, as laid down by the Supreme Court of India, that provisions of international conventions, even if not ratified by India, can be read into domestic laws unless they are patently inconsistent, and the Courts have drawn from international instruments to flesh out a number of fundamental and constitutional rights.²⁴ The rights of refugees in varying situations have come up for consideration in Indian constitutional courts in a number of cases.²⁵

²³ Article 51 of the Constitution of India, found in Part IVA - Fundamental Duties states: "51. *Promotion of international peace and security The State shall endeavour to*

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration".

²⁴ See, for this purpose, *Maganbhai Ishwarlal Patel v. Union of India* (1970) 3 SCC 400; *Gramophone Company Of India Ltd vs. Birendra Bahadur Pandey & Ors* (1984) 2 SCC 534; *Vishaka & Others v. State of Rajasthan & Ors.* (1997) 6 SCC 241.

²⁵ For a detailed examination of judgments and court decisions, see B.S. Chimni, "Status of Refugees in India" in *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*" Ed. Ranabir Samaddar. Sage Publications. 2003.

A Constitution Bench of the Supreme Court in **Hans Muller of Nurenburg v. Superintendent Presidency Jail & Ors.**²⁶ has upheld the constitutional validity of Section 3(2)(c) of the Foreigners Act, 1946, which authorizes the Central Government to make provision, either generally or with respect to all foreigners, for prohibiting or regulating or restricting their entry into India or their departure therefrom or their presence or continued presence therein.

In **Louis De Raedt v. Union of India**²⁷ the Supreme Court of India held that the principle of *audi alteram partem* applies to all persons, and therefore a refugee would have a right to be heard before he is deported, although it also observed that there is no hard and fast rule regarding the manner in which this right to be heard is provided.

However, the Court also held that that Article 21 of the Constitution of India guarantees the protection of personal liberty to citizens and foreigners alike, and that no person can be deprived of his personal liberty except according to the procedure established by law. The Court further relied upon the decision in **Maneka Gandhi vs. Union of India**²⁸ which established the principle that such procedure must be reasonable and free of arbitrariness. Therefore the principle of natural justice has to be read into Section 3(2) (c) of the Foreigners Act, 1946, the arbitrary exercise of power is not permissible, and a reasonable opportunity of being heard must be provided. The extent of opportunity to be heard has to depend on the facts and circumstances of each case.

²⁶ (1955) 1 SCR 1284

²⁷ (1991) 3 SCC 554

²⁸ (1978) 2 SCC 248

This principle has been followed in numerous subsequent decisions. In **Mohammad Sediq vs. Union of India**,²⁹ the Delhi High Court rejected the argument of the government of India that the petitioner, as a foreigner, has no right to stay in India. The Indian government had sought to deport the petitioner to Afghanistan, his country of origin, even though he held a valid refugee certificate issued by the UNHCR and renewed it from time to time. The government argued that he was ‘undesirable and dangerous to the security of India’. The Court held:

*“In so far as rights of persons other than citizens are concerned, there is no manner of doubt that we are a country governed by the rule of law. Our constitution confers certain rights on every human being and certain other rights on the citizens alone. Every person whether he is a citizen or not, is entitled to equality before the law and equal protection of the laws. As such, no person can be deprived of his life or personal liberty except according to the procedure established by law.”*³⁰

Despite this acknowledgement of the petitioner’s constitutional rights, the order of the government was upheld by the Court after it examined the material available, and satisfied itself that a proper opportunity to be heard had been provided to the petitioner. Since the right to be heard had been provided, concerns about national security could now justify deportation within the bounds of constitutional law.

In the context of Sri Lankan refugees in Tamil Nadu, in **P. Nedumaran and Dr. S. Ramadoss v. Union of India and the State**

²⁹ (1998) 47 DRJ 74

³⁰ *Ibid* at page 77

of Tamil Nadu,³¹ the Madras High Court was of the view that certain standards have to be met before refugees can be repatriated to the country of their origin. Above all, repatriation could only be undertaken if it could be proved to be voluntary. Consequently, it would not be wrong to conclude that the Madras High Court accepted the principle of voluntary repatriation as the basic standard that had to be met with respect to refugees, despite the overall right of the State to deport.

The issue of protection of refugees or foreigners under the fundamental rights chapter of the Constitution of India came up in the case relating to Chakma refugees in the Supreme Court. In **National Human Rights Commission vs. State of Arunachal Pradesh & Anr.**³² the Supreme Court examined the long line of preceding decisions where it has been held that foreigners are entitled to the protection of Article 21 of the Constitution. The Court observed:

“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the All Arunachal Pradesh Students Union (AAPSU), to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group

³¹ Civil Writ no. 12342 of 1992, Madras High Court, judgment delivered on 27 August 1992, unreported.

³² (1996) 1 SCC 742.

of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, Constitutional and statutory, to be considered for being registered as citizens of India.”³³

In the context of migrants from Bangladesh, a three-judge Bench of the Supreme Court in **Sarbananda Sonowal vs. Union Of India & Anr**³⁴ struck down the Illegal Migrants (Determination by Tribunals) Act, 1983 (‘IMDT Act’). A special piece of legislation, the IMDT Act, described itself as a statute to purportedly deal with the detection of ‘foreigners who migrated into India across the borders of the eastern and north-eastern regions of the country on and after the 25th day of March, 1971’ and illegally remained in India, which was declared to be ‘detrimental to the interests of the public of India’. In stating that this is being done ‘by taking advantage of the circumstances of such migration and their ethnic similarities and other connections with the people of India’, the statute plainly points to the migration of Bangladeshis into India after the 1971 war.³⁵ However, according to the petitioner the provisions of the IMDT Act provided many safeguards to an alleged illegal migrant

³³ *Ibid* at paragraph 20.

³⁴ (2007) 1 SCC 174.

³⁵ The preamble of the IMDT Act went on to state that:

“AND WHEREAS on account of the number of such foreigners and the manner in which such foreigners have clandestinely been trying to pass off as citizens of India and all other relevant circumstances, it is necessary for the protection of the citizens of India to make

whose presence in India had given rise to serious national security problems. The petitioner further argued that such persons are trying to pass off as citizens of India in a clandestine manner. He argued that the IMDT Act, which is enforceable only in the State of Assam, contains numerous provisions which make it virtually impossible to detect and deport a foreigner.

Accepting the arguments of the petitioner, the Supreme Court held that the IMDT Act failed to serve the purpose for which it was enacted, observing that:

“A deep analysis of the IMDT Act and the Rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to undocumented migrants who came to Assam from Bangladesh on or after 25-3-1971 rather than to identify and deport them.”³⁶

The Supreme Court further observed:

“It is the foremost duty of the Central Government to protect its borders and prevent trespass by foreign nationals. Article 51-A(d) of the Constitution says that it shall be the duty of every citizen of India to defend the country and render national service when called upon to do so. If an Act made by legislature has the disastrous effect of giving shelter and protection to foreign nationals who have illegally transgressed the international border and are residing in India and further the Act is unconstitutional, any citizen is entitled to bring it to

special provisions for the detection of such foreigners in Assam and also in any other part of India in which such foreigners may be found to have remained illegally”.

³⁶ Sarbananda Sonowal vs. Union of India & Anr. (2007) 1 SCC 174 at para 28.

*the notice of the Court by filing a writ petition under Article 32 of the Constitution.*³⁷

The Court accordingly struck down the IMDT Act as *ultra vires* the Constitution, and also divested the Tribunals established under the Act of any further role in pending cases, directing that all these and further cases will be governed by the 1946 Foreigners Act.³⁸

Thus, we find that while the courts of law in India have been careful in observing that foreigners on Indian soil must be granted a hearing before they are deported, and that such processes cannot be arbitrary and capricious, they have also recognised the sovereign power of the state to deport persons which it decides are inimical to national interest. That considerations of national security and integrity of borders weigh heavily on the mind of the judicial officers is clear from the observations in the Sonowal case, where eventually the Court rejected a statute which provided greater processual rights to aliens in favour of one where their rights to even due process are severely restricted. It is also a matter of concern that the international common law principle of non-refoulement, which is undoubtedly binding upon the Indian government in such situations, has not been adverted to by the Courts. This invisibilisation of international law obligations with respect to ‘foreigners’ or refugees plays out in different ways with different categories of refugees.

³⁷ *Ibid* para 56.

³⁸ For an analysis of the judgment and its implications, see Abir, Phukan. “Price of Inaction.” *Frontline*. Vol 29. Issue 16. 11-24 Aug. 2012, <http://www.frontline.in/static/html/fl2916/stories/20120824291601700.htm>

Afghan Refugees in India

With the continuing turmoil in Afghanistan, it is not surprising that a large number of Afghan refugees have fled to both Pakistan and India, from as far back as the end of the pro-Soviet regime and the execution of Najibullah in 1992. In India, a number of these refugees are from the Sikh community, and a few of them are from the Hindu Community. The Sikh community which was seen as one of rich bankers, were particularly targeted over time, as money lending with interest was prohibited under Islamic Law.³⁹ Over the years, the status of Sikhs in Afghanistan became increasingly precarious, with the Islamic fundamentalist Taliban initiating a number of discriminatory practices, such as ordering Sikhs to wear yellow patches.⁴⁰

Although India does not allow the UNHCR to work in border areas, it has allowed the UNHCR to carry out the RSD procedure with registration as asylum seekers. Accordingly, Afghans who are recognized as refugees according to the UNHCR mandate are provided with a residence permit in India.

Unfortunately, these permits are given on a case-by-case basis through individual investigations. As a result there are a large number of people from Afghanistan who do not possess residence permits, either because these are rejected or their applications are still pending. This entails a daily struggle to protect themselves and their families, with many being forced to work in the informal sector where they are further exploited, particularly the women. Yet, Afghan

³⁹ Human Rights Feature. "Harassment of Sikhs in Afghanistan". New Delhi. Feb 2012. Index: HRF/219/12.

⁴⁰ Reminiscent of the Star of David patch that the Jews were forced to wear in Nazi Germany.

refugees are better placed in India than the refugee populations from other countries such as Myanmar or Somalia.⁴¹

Refugees from the Chittagong Hill Tracts in Arunachal Pradesh

The Chittagong Hill Tracts (CHT) is a hilly region located in the south-east part of Bangladesh. It borders the Indian States of Tripura on the North and Mizoram on the East. Among the various indigenous groups that reside in the CHT, the Chakmas and the Marmas are numerically the largest groups. The people in CHT differ from the majority Bengali population in the plains by way of race, religion and language.

The people of CHT have been uprooted twice⁴² since the partition of India and Pakistan in 1947. Although the CHT was attached to East Pakistan at the time of partition, the Chakma leaders hoisted the Indian tricolor at Rangamati because they had expected that the predominantly Buddhist region would become a part of India. But a special announcement was made four days after independence of India and Pakistan that the Boundary Commission headed by Sir Radcliffe had attached the region to East Pakistan. The Constitution of Pakistan in 1956 recognised the CHT as an Excluded Area, but later in 1964 the National Assembly removed CHT from the list of Tribal Areas.

⁴¹ JIPS. "Urban Profiling of Refugee Situations in Delhi." October 2013, http://www.jips.org/system/cms/attachments/817/original_Urban_Profiling_of_Refugee_Situations_in_Delhi.pdf

⁴² For a detailed examination of the CHT refugees, see Chaudhry, Sabyasachi Basu Ray. "Uprooted Twice" *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*. Ed. Ranabir, Samaddar. Sage Publications. 2003.

The first displacement of the people of CHT resulted from the construction of the Kaptai Hydroelectric Power dam over the Karnaphuli River in 1964. Thousands of people, mainly Chakmas, were displaced internally and about 40,000 crossed over into the Indian states of Tripura, Assam and Mizoram when the Government failed to provide them with compensation and/or rehabilitation. These refugees were accommodated in a desolate land of the North Eastern Frontier Agency (NEFA), now known as Arunachal Pradesh. The reasons for such permission to remain being granted by the Indian state, however, remain ambiguous.

The Chakmas were forced to flee a second time in 1978 when the Government of Bangladesh started a land policy of settling people from the plains in the fertile part of the hills. In the face of growing militarization and Islamisation of the Bangladesh State, many were forced to cross over into the Indian states of Mizoram and Tripura once again. The ethnic tensions on the Bangladesh side of the border forced hundreds of thousands of people to move over the years to Tripura, where they resided in Government run camps.

Unfortunately, these refugees have become victims of xenophobia in India as well, facing persecution from various quarters. The Arunachal Pradesh state government has actively and passively persecuted them through laws preventing 'outsiders' from owning property, and restrictive policies such as the Inner Line Permit System.⁴³ In 1994, a full-fledged agitation led by the All Arunachal Pradesh Students Union (AAPSU) was started to oust the refugees from the state, setting deadlines for the government to expel the Chakmas. The state government supported these demands at different points in time by banning employment of Chakmas and Hajongs, denying trade

⁴³ The Inner Line Permit system restricts the entry of outsiders into certain sensitive border regions of India, except through the written permission of the State government.

licenses, ration cards, citizenship applications, electoral roll inclusion applications, admission in schools etc. Schools built by Chakmas were either burned down or destroyed by the state government.⁴⁴

In a public interest litigation before the Supreme Court of India, these atrocities were brought to light and were deprecated in no uncertain terms. The Supreme Court passed a detailed judgment⁴⁵ containing directions in the nature of mandamus to the central and state governments:

- “1) the first respondent, the State of Arunachal Pradesh, 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 by organised groups, such as the AAPSU, shall be repelled, if necessary by requisitioning the service of para-military or police force, and if additional forces are considered necessary to carry out this direction, the first respondent will request the second respondent, the Union of India, to provide such additional force, and the second respondent shall provide such additional force as is necessary to protect the lives and liberty of the Chakmas;
- 2) except in accordance with law, the Chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein;
- 3) the quit notices and ultimatums issued by the AAPSU and any other group which tantamount to threats to the

⁴⁴ Mahanirban Calcutta Research Group. “Executive Summary of the Report of ‘The State of being Stateless: A Case Study of Chakmas of Arunachal Pradesh’”. Retrieved from: www.mcrga.ac.in/Statelessness.pdf

⁴⁵ National Human Rights Commission vs. State of Arunachal Pradesh & Ors. (1996) 1 SCC 742

life and liberty of each and every Chakma should be dealt with by the first respondent in accordance with law;

- 4) the application made for registration as citizen of India by the Chakma or Chakmas under Section 5 of the Act, shall be entered in the register maintained for the purpose and shall be forwarded by the Collector or the DC who receives them under the relevant rule, with or without enquiry, as the case may be, to the Central Government for its consideration in accordance with law; even returned applications shall be called back or fresh ones shall be processed and forwarded to the Central Government for consideration;
- 5) while the application of any individual Chakma is pending consideration, the first respondent shall not evict or remove the concerned person from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf; and (6) the first respondent will pay to the petitioner cost of this petition which we quantify at Rs. 10,000/- within six weeks from today by depositing the same in the office of the NHRC, New Delhi.”⁴⁶

Despite this judgment, the Chakmas and Hajongs remained victims of harassment and torture. The persecution of 65,000 refugees and their statelessness continued.

In 1997, after the Awami League Government came to power, a delegation from Dhaka visited the refugee camps in India. They

⁴⁶ *Ibid*, paragraph 21.

persuaded the refugees to resettle in the CHT,⁴⁷ in return for amnesty from criminal charges, safety assurances, job guarantees, and financial help to build houses and resettle land. About 6,708 refugees walked back to the CHT, but the Bangladeshi government was able to rehabilitate less than half of the returnees.

The matter came to a partial closure after a peace accord was signed between the Government of Bangladesh and the *Parbatya Chattagram Jana Sanghati Samiti* (PCJSS)⁴⁸ on 2 December 1997, after which the PCJSS surrendered their arms. Following this agreement almost the entire population of refugees (about 60,000 at the time) returned to Bangladesh.

Difficulties resulting from the slow implementation of the accord by the Government persist. Criminal charges were not dropped against many returnees, contrary to the assurance given. The military presence in the CHT was not reduced by the Government. The plains people, who were settled in the CHT by the Government in 1978, are refusing to give back the lands they had got in this once exclusive and autonomously managed region. Security forces continue to harass the refugees who are now ethnic minorities in their own land, and have to struggle to get back the lands wrested from them since 1964.

⁴⁷ The terms were incorporated in an agreement dated 9 March 1997 between leaders of the refugees and the team from Dhaka.

⁴⁸ The PCJSS, or the United People's Party of the Chittagong Hill Tracts, is a political party which fought for self rule in CHT region, and which also had a military wing called Shanti Bahini to fight the government forces and Bengali settlers in the CHT.

Sri Lankan Tamil refugees in India

As a result of the civil war in Sri Lanka which lasted about three decades, there has been an ebb and flow of Sri Lankan Tamils from the country, particularly to India.⁴⁹ Even today, a sizeable population of refugees continues to reside in India. Although these populations are not necessarily located in the border areas between the two countries, it makes for an important case study. There have been bilateral agreements between the two countries as many of these refugees reside in camps in India. These camps are not monitored or supervised by the UNHCR, and there are a number of human rights violations which recur.

Broadly, the Sri Lankan refugees in India can be classified into three groups:⁵⁰

- (a) camp refugees, or those who are living in 111 camps spread over 23 districts in Tamil Nadu.
- (b) non-camp refugees, or those who have been living in cities and small towns, either in rented houses or with friends and relatives. According to some reports, there are nearly 40,000 such non-camp refugees living in Tamil Nadu at present.

⁴⁹ V. Suryanarayan. "Sheltering Civilians and Warriors' in Refugees and the State: Practices of Asylum and Care in India 1947-2000" Ed, Ranabir, Samaddar. *Sage Publications*. 2003. Also, The Encyclopedia of the Sri Lankan Diaspora page 75. Accessed on 18 March 2015 at: <https://books.google.co.in/books?id=4N5UAgAAQBAJ&pg=PA74&dpq=PA74&dq=fourth+eelam+war+exodus+refugees+number&source=bl&cots=9YmzvYT2D2&sig=32I9lLhT3eGGDwCL4tOlwp8k6-Y&hl=en&sa=X&cei=KjUJVC2FCIOYuQSk2ILYDA&ved=oCCEQ6AEwAA#v=onepage&q=fourth%20eelam%20war%20exodus%20refugees%20number&cf=false>

⁵⁰ Dasgupta, Abhijit. "Repatriation of Sri Lankan Refugees: Unfinished Tasks". *Economic and Political Weekly*. June 14, 2003. pp. 2365-2367

- (c) a third smaller group consists of those who are now living in 'special camps' under the strict surveillance of the local police belonging to the 'Q' branch. They have been sent to special camps because of their alleged links with the LTTE, and are located in Kanchipuram, Vellore and Madurai.⁵¹

The role of the UNHCR in the case of Tamil refugees from Sri Lanka in India appears to be ambivalent. This is due to a combination of reasons, some of which are outside the control of the UNHCR.

When the influx of refugees began, the Indian Government was reluctant to allow UNHCR to intervene. In July 1992, UNHCR and the Government of India reached an agreement that allowed the former a token presence in Madras. Several months elapsed before UNHCR was allowed to open its office in Madras (now Chennai), and the agency was allowed access to the refugees at their point of departure, that is, at the time of repatriation. UNHCR officials were only permitted to interview those refugees who had already signed an agreement to go back to Sri Lanka, thus curtailing its ability to prevent forcible repatriations. Also, UNHCR was unable to visit the camps, nor were the refugees able to visit its office in the city, thus preventing it from sharing critical information regarding conditions in Sri Lanka.⁵²

⁵¹ A detailed list of camps with respective number of refugees in Tamil Nadu in 2002 and a map of Tamil Nadu showing the location of camps can be referred to in V. Suryanarayan. "Sheltering Civilians and Warriors" in *Refugees and the State: Practices of Asylum and Care in India 1947-2000* Ed, Ranabir, Samaddar. Sage Publications. 2003.

⁵² Nair, Ravi. "Abandoned and Betrayed: Afghan Refugees under UNHCR Protection in New Delhi". *South Asia Refugee Watch*. 1999.

According to official statistics shared by the State government, in January 2015 there were a total of 102,055 Sri Lankan Tamil refugees in Tamil Nadu, of whom 64,924 were living in 107 refugee camps.⁵³ The conditions in these refugee camps have come under severe criticism, particularly by human rights and civil society groups, which have raised concerns regarding a number of violations taking place in these camps.

1. Inhuman living conditions

The People's Union for Civil Liberties (PUCL) conducted a fact-finding in 2006 in some of the camps, after which it reported that the living conditions in the camps are deplorable, with lack of proper accommodation, inadequate number of toilets, inadequate supply of electricity, negligible medical facilities and lack of cleaning by the concerned municipality. Those refugees who have been unable to get themselves registered remain deprived of any facilities.⁵⁴

2. Arbitrary arrests and detentions

The same PUCL report found that "(t)hose newly arrived (at the camps) are quarantined under police custody at the Mandapam Camp. This is a prison house. When we visited, 39 people were confined to the quarantine (nearly 20ft/20ft) for males." The legal tenability of placing refugees under such detention is questionable.

3. Special Camps

⁵³ Janardhanan, Arun. "Explained: The Sri Lankan Refugee Question" *The Indian Express*. 31 January, 2015.

⁵⁴ PUCL. "Conditions in Sri Lankan Tamil refugee camps". 18 June, 2006.

Special camps have been set up purportedly to protect 'vulnerable' refugees, but these are actually for detaining persons who are suspected of terrorist links. According to one report, in 1990 January, the Tamil Nadu Government picked up 1700 camp refugees, including 72 children below 12 years of age, and incarcerated them in Vellore till 1995.⁵⁵ They were later put in 'special camps' to protect 'vulnerable' refugees. In another incident, 18 boys were arrested and moved to 'special jails' in 1997.

4. Violations during repatriation

Errors and misleading information during repatriation of Sri Lankan Tamils to Sri Lanka have been well documented, violating the basic international law of non-refoulement. According to one writer:

"No attempt was made to evaluate the situations prevailing at the place of origin of the people to ascertain whether the time was right to send them back. The refugees were asked to leave on short notice; many of them were asked to sign a voluntary consent form just before boarding the ship. They were sent to places like Mannar, Jaffna, Kilinochi and Wannu, where the LTTE was gearing up for battle against the IPKF⁵⁶ and Sri Lankan army."⁵⁷

⁵⁵ Raj, Fr. C. Amal. "Srilankan Tamil Refugees in India: Accords, people and UNHCR". States, Citizens and Outsiders: The Uprooted Peoples of South Asia. Ed. Manchanda, Rita and Bose, Tapan. South Asian Forum for Human Rights, Kathmandu, 1997.

⁵⁶ Indian Peace Keeping Force - the military contingent that carried out peacekeeping missions between 1987 and 1990

⁵⁷ Op cit 147

Another writer,⁵⁸ while critiquing the flawed strategy followed by the Government of India while repatriating refugees to Sri Lanka, observes that it was unfair of the Government not to give the refugees an option, and unrealistic to give them 3 to 5 days notice to leave the camps. Tightening of security outside camps, thus hindering the refugees' ability to go out for work, was combined with withdrawal of ration cards, curtailment of education facilities, and beatings. This at a time when the third Eelam war had commenced and the situation in Sri Lanka was uncertain at best. As one writer observes:

*“As part of its protection mandate the UNHCR is expected to share information with the Tamil refugees about the conflict situation in the country of origin. It informed the refugees that “certain liberated zones” were safe for them to go back to. Repatriated back to Sri Lanka, the refugees found that they could not go back to their native place.”*⁵⁹

Indeed, according to some reports, the UNHCR has also been accused of colluding with the local government in forced repatriations, and misleading the Tamil refugees, thereby violating the principle of non-refoulement which it is mandated to promote.

⁵⁸ Hans, Asha. “Repatriation of the Sri Lankan Refugees from India” *Bulletin on International Humanitarian Law and Refugee Law*. New Delhi. Vol. 2, No. 1. January-June 1997. pp 93-122

⁵⁹ Op cit 147

Hindus from Pakistan

The minority Hindu population in Pakistan often faces religious persecution, with girls being particularly targeted. The percentage of the population of Hindus in Pakistan, which was about 15% at the time of partition in 1947, has now been reduced to less than 2%. Not surprisingly, the greatest influx of Hindus from Pakistan has been into the border areas of India, particularly Rajasthan. It is estimated that approximately 1000 people cross into India every year. During war time, or other skirmishes between the countries, or even attacks on Muslims in India (such as during the attack following the demolition of the Babri Masjid in 1992) the number of refugees is seen to increase. There are over 400 refugee settlements across Rajasthan, but the plight of these places is deplorable. They lack basic infrastructure and facilities, and the refugees are often seen to be suffering from physical manifestations of psychosomatic disorders.⁶⁰

It is unfortunate that the status of these refugees does not improve upon arrival in India. They are treated with suspicion for having come from Pakistan. In addition, under the Citizenship Act, 1966 there are specific barriers to the grant of citizenship to persons from Pakistan, although efforts have been made to address the problem through recent statutory amendments. While some are unable to obtain naturalized citizenship as a result of the discretion of government officials, others are unable to meet the high costs involved. Like other refugees in India, they are treated as 'foreigners' and are therefore unable to get jobs, BPL certificates, and a large number of them are unable to get caste certificates despite being dalits. Often their educational qualifications from Pakistan are not

⁶⁰ The Hindu American Foundation. "Victims of History: The Untold Story of Pakistani Hindus Refugees in India". March 31, 2014.

recognized in India. If at all, their only means of identification being their Pakistani passports, they become vulnerable once these expire, leaving them stateless.⁶¹

The Indian government has also imposed a number of restrictions on the grant of visas to border areas. This means that families on the other side of the border are unable to visit, causing further anguish. It is not unusual for cross-border marriage ceremonies to take place, and while women who marry into Pakistan attain Pakistani citizenship within 2 years, the reverse is much more difficult.⁶²

Status of Refugees in Pakistan

Article 40 of the Constitution of Pakistan states that the government would act towards “(s)trenghening bonds with Muslim world and promoting international peace. The State shall endeavour to preserve and strengthen fraternal relations among Muslim countries based on Islamic unity, support the common interests of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations and encourage the settlement of international disputes by peaceful means.”

However, Pakistan is neither a party to the 1951 Convention nor the 1967 Protocol relating to the Status of Refugees. Similar to India and Bangladesh, refugees are subject to the same law as illegal aliens.⁶³ Since there is no refugee-specific law, asylum seekers and

⁶¹ Ibid

⁶² Gill, Bani. “Border Dialogues”. *Peace Prints: South Asia Journal of Peace Building*. Vol 4, No. 2. 2012.

⁶³ This includes the Foreigner’s (Amendment) Ordinance, 2000; the Foreigner’s Order of Pakistan, 1951; Pakistan Citizenship Act, 1951; the Foreigner’s Act of Pakistan,

refugees are dealt with through ad-hoc administrative arrangements that are generally arbitrary and discriminatory. Although over the years the state has amended existing laws and devised mechanisms for the management of refugee issues, these measures have not been comprehensive.⁶⁴

Afghan refugees in Pakistan

In the wake of the Soviet invasion of Afghanistan, Pakistan has absorbed a large number of refugees, many of whom it continues to host. Three million refugees⁶⁵ crossed the open border to Baluchistan in the post-war era. Unfortunately, this migration was accompanied by militancy and an attendant “Kalashnikov culture”. More recently, the prevalence of small arms and the penetration of the region by militants have resulted in a situation of rapidly deteriorating security. Using refugee movements as a cover for border transit, terrorist militant groups are able to move undetected.⁶⁶

Afghan refugees have been flowing into Pakistan since the 1970s, and the government has made sporadic efforts to register such refugees and provide them with a modicum of legal protection. There are about 1.6 million registered and an estimated 1 million unregistered Afghans residing in Pakistan.⁶⁷ In the initial years,

1946; the Registration of Claims Act, 1956; the Displaced Persons (Compensation and Rehabilitation) Act, 1958.

⁶⁴ Sheikh, A.R. “Towards A Legal Regime for Refugee protection in Pakistan”. *Refugee Watch*. Volume 18. April 2003.

⁶⁵ Neil, Alexander, ed. *Towards Cross-Border Security*. Page 3: Royal United Services Institute (RUSI), 2010. Print. (At page 12.)

⁶⁶ *Ibid.* page 15.

⁶⁷ Khan, Muhammad Abbas. “Pakistan’s national refugee policy.” *Forced Migration Review*. Vol. 46. May 2014. pp. 22-23. See also State of Human Rights. “Refugees”. 2014.

the refugees were issued “passbooks” which entitled them to receive assistance. The passbooks, however, did not provide identification, and as such, gave no legal protection.

The condition and status of these refugees has attracted the attention of national as well as international human rights organisations. According to a study by Human Rights Watch:

“Outside of these isolated cases, throughout the past decade, and contrary to international standards including ExCom Conclusion No. 91,⁶⁸ the majority of Afghan refugees in Pakistan have not been registered, granted legal status, or issued identity documents. In addition, starting from late 1999 the government refused to consider newly arriving Afghans as prima facie refugees.”⁶⁹

Pakistan has had an on-again, off-again approach to the Afghan refugees taking shelter in its territory, the consequences of which have been enormous. In November 2000, Pakistan officially closed its border with Afghanistan, citing an inability to absorb the 30,000 refugees who had arrived in the previous two months, as well as the thousands more expected to arrive in the coming days. In January 2001, the Governor of Pakistan’s Khyber Pakhtunkhwa (previously known as North West Frontier Province), and thereafter the Federal government, issued public orders empowering the police to detain and deport newly arrived Afghans in the NWFP and all undocumented Afghans already in Pakistan. New arrivals who were not detained or deported were shifted to refugee camps, where the

⁶⁸ “Executive Committee Conclusion No. 91: Registration of refugees and asylum-seekers”. *UNHCR*. 2001

⁶⁹ Human Rights Watch. “Closed Door Policy: Afghan Refugees in Pakistan and Iran”. Vol. 14, No. 2(G). 2002.

deplorable living conditions have been consistently criticized. The UNHCR was denied access to these camps, stalling the refugee registration process which could have allowed food and non-food supplies to be provided.⁷⁰

In August 2001, there was some improvement, both in the conditions of the camps and in the status of the UNHCR. The government entered into an agreement with the UNHCR, under which thirty UNHCR and government teams were to interview an estimated 180,000 Afghans in the NWFP to determine their eligibility for relief and refugee status, focusing mainly on new Jalozai, Nasirbagh and Shamshatoo camps.⁷¹ However, these advancements were soon lost when, a few months into the agreement, Pakistan forcibly repatriated about 150,000 Afghan refugees who had not yet been assessed under the screening programme. UNHCR was clearly dismayed by this breach of the agreement, and by reports that some of these repatriated Afghan refugees included unaccompanied children.

With the 9/11 attacks on the United States, there was a further surge in refugees from Afghanistan into Pakistan, but the screening programme could not be reinstated.⁷² Without official registration, newly arrived refugees do not have the necessary documentation, or “passbooks”, required to obtain assistance. This means that refugees have to rely on the generosity of their longer-established relatives in the camps to share their rations.⁷³

⁷⁰ *Ibid.* p.19-20

⁷¹ *Ibid.* p.21.

⁷² *Ibid.* p.22

⁷³ *Ibid.* p.29

In 2005-06, a one-off registration exercise for Afghans in Pakistan was conducted. All those who registered with Pakistan's National Database and Registration Authority (NADRA) received Proof of Registration (PoR) cards. The holders of these cards could be protected against expulsion through mechanisms facilitated by the UNHCR. Since then, no new registration has taken place except for children born to registered Afghans. On 25th July, 2013 the government adopted the National Policy on Management and Repatriation of Afghan Refugees, which was approved by the Federal Cabinet. This policy seeks to focus on voluntary repatriation in safety and dignity as the most preferred option, sustainable reintegration inside Afghanistan, and assistance to refugee host communities. It calls for extending the PoR Cards and the tripartite agreement till December 31, 2015.⁷⁴

The UNHCR has played a role in ensuring agreements between Pakistan and Afghanistan regarding repatriation of refugees.⁷⁵ Presently, an agreement between Pakistan, Afghanistan and UNHCR administers voluntary and gradual repatriation of registered Afghan refugees living in Pakistan. According to official sources, over 3,840,000 Afghan refugees have repatriated on their own since March 2002 under this tripartite pact, which has now allowed each returnee to USD 200 from UNHCR.

However, there are reports that repatriation has been done in a forced manner. Similar to other examples examined earlier in this study,

⁷⁴ Bhutta, Zafar. "New policy to guide Afghan repatriation till 2015". *The Express Tribune*. August 4, 2013, <https://tribune.com.pk/story/586277/new-policy-to-guide-afghan-repatriation-till-2015/> and "Pakistan Factsheet: September 2014", UNHCR.

⁷⁵ For details of agreements, see: Zieck, Marjoleine. "The Legal Status of Afghan Refugees in Pakistan: A Story of Eight Agreements and Two Suppressed Premises." *OUP*. 2008.

there is evidence to show that Pakistan has pushed the repatriation drive by creating harsh conditions for Afghan refugees.⁷⁶ According to the Human Rights Commission of Pakistan (HRCP),⁷⁷ the government created an environment of fear and persecution to force many refugees out.⁷⁸ Electricity was cut off in the villages and camps, houses were destroyed, camps were closed down and thousands of refugees were pressured to leave against their will. The HRCP also notes that state policy has empowered the police to make random arrests without warrants, and refugees are often victims of harassment and beatings by law enforcement officials.

Tragically, whenever there are terror attacks in Pakistan a shadow of suspicion falls on refugees from Afghanistan, sometimes followed by acts of violent, misdirected retaliation. According to one report, the aftermath of the 16th December 2014 attack on a public school in Peshawar, where 132 children and 9 adults were killed, saw a massive exodus of Afghan refugees. The drive came from the Pakistan government, which has included the repatriation of refugees in its new anti-terror action plan. According to one report:

“Nearly 52,000 Afghans living in Pakistan have, within the past ten weeks, packed their belongings and crossed the border back into Afghanistan – more than twice as many as in the whole 12 months of 2014....At the same time, the countdown

⁷⁶ Hiegemann, Valentina. “Repatriation of Afghan Refugees in Pakistan: Voluntary?.” *Oxford Monitor of Forced Migration*. Vol. 4, No. 1.

⁷⁷ The Human Rights Commission of Pakistan was registered in 1987 under the provisions of the Companies Ordinance, 1984. Societies Registration Act (XXI of 1860)

⁷⁸ Human Rights Commission of Pakistan. “Afghan Refugees in Pakistan: Push comes to shove”. April 2009. pp 23 - 26.

*is running on the validity of the ID cards that allows registered refugees to stay in Pakistan.”*⁷⁹

The UNHCR in Pakistan was also assisting some 666 non-Afghan asylum-seekers and refugees, mostly from Somalia, Iran and Iraq.⁸⁰ However, it is the presence of the large number of Afghan refugees residing in Pakistan which remains its biggest challenge. Intense societal hostility about the impact of Afghan refugees on resource scarcity and security in the host country has only exacerbated the hurdles faced by UNHCR in this area.

Status of Refugees in Bangladesh

The legal situation of refugees in Bangladesh is similar to that in India, in that it is neither a party to the 1951 Convention nor its protocol of 1967. Bangladesh does not possess any national laws to define and regulate the status of refugees. Although the country has acceded to a number of international human rights tools which circuitously uphold the rights of refugees, in reality such conventions are not enforceable in courts of law unless specific provisions are incorporated into existing municipal laws or given effect through separate legislations.⁸¹

The result is that refugees are considered foreigners, and are governed by the numerous statutory laws in this regard.⁸² In the absence of

⁷⁹ Roehrs, Christine. “The Refugee dilemma: Afghans in Pakistan between expulsion and falling aid schemes” *Afghanistan Analysts Network*. 9 March, 2015.

⁸⁰ HRCF Annual Report 2014 Accessed on 25 August 2016, at <http://docslide.us/documents/hrcf-annual-report-2014-englishpdf.html>

⁸¹ Mohammad, Nour. “Refugee Protection Under the Constitution of Bangladesh: A Brief Overview, Bangladesh”. *Refugee Watch*. 29, June 2012

⁸² This includes the Foreigners Act, 1946; Registration of Foreigners Act, 1939; Passport Act, 1920; the Bangladesh Control of Entry Act, 1952; Extradition Act, 1974; Naturalization Act, 1926; etc.

any legal or specialized statutory framework for the protection of refugees, Bangladesh relies on these statutes to govern the entry, stay and exit of foreigners.⁸³ Citizenship laws further make it difficult for refugees to become naturalised over time.⁸⁴

The Constitution contains provisions which require adherence to basic international principles, such as Article 25 which requires that “(t)he state shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter.”

Regarding the applicability of International covenant law as well as customs and their interface with municipal laws, there have been a few judgments by the Bangladesh courts. In **Bangladesh vs. Unimarine S.A. Panama and Others**⁸⁵ the court stipulated that customary international law is binding on the state, and usually makes the rules and norms of the customary international law operative. The court referred to the rule of immunity of foreign missions, envoys, etc., as worthy instances of the customary international law which would be binding on the state. The question whether private foreign companies enjoy immunity from arrest and seizures cropped up in this regard.

⁸³ Mohammad, Nour. “Refugee Protection under the Constitution of Bangladesh: A Brief Overview, Bangladesh”. *Refugee Watch*. 29, June 2012.

⁸⁴ The Constitution of Bangladesh, the Bangladesh Citizenship (Temporary Provision) Order, 1972 and the Bangladesh Citizenship Order, 1972 govern this area of law. See also, Hassan Faruk Al Imran and Md. Nannu Mian, Department of Law, Uttara University, Dhaka, Bangladesh “The Rohingya Refugees in Bangladesh: A Vulnerable Group in Law and Policy, *Journal of Studies in Social Sciences*, Volume 8, Number 2, 2014, pp. 226-253.

⁸⁵ *Bangladesh vs. Unimarine SA Panama & Ors.*, 1977, 6 CLC (HCD) [5231] Also at 29 DLR (1977) 186

The court rejected the argument that such immunity be accorded to private foreign companies, or that they be protected from arrest and seizures, observing:

“Immunity is available under the public international law to persons and properties of classified companies as mentioned in the list which is usually filed by foreign missions and international agencies.”

When there is a clear domestic legislation on a disputed issue, the courts in Bangladesh, as in India, have decreed that effect be given to the domestic law, and not to the customary norms of international law. In **Bangladesh and Others vs. Sombon Asavhan**⁸⁶ the Bangladeshi navy captured three Thai fishing trawlers for illegally entering and fishing in the country’s territorial waters. The question was whether the trawlers were within the territorial waters or the EEZ of Bangladesh. Instead of applying the existing international law regarding the territorial waters, the Supreme Court settled the issue on the basis of Bangladeshi Territorial Waters and Maritime Zones Act, 1974 which laid down specific provision for maritime boundaries for the country. The Appellate Division of the Supreme Court observed as follows:

“It is well settled that where there is a municipal law on an international subject the national court’s function is to enforce the municipal law within the plain meaning of the statute.”

⁸⁶ *Bangladesh & Ors. vs. Sombon Asavhan* 32 DLR (1980), p. 198

The position of law was stated with utmost clarity in **Hussain Muhammad Ershad v. Bangladesh and Others**⁸⁷ where the court observed,

“The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments... But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies.”

Asylum seekers are accorded refugee status by the Government of Bangladesh under “executive order”, which remains discretionary. As a result, at the ground level refugees are dealt with arbitrarily by the Bangladesh authorities. For example, during 1978 and the time between 1991 to 1992, the Rohingya asylum seekers from Myanmar were provided *prima facie* refugee status under executive orders of the government of Bangladesh. During this period, the government invited the UNHCR to launch its operation in Bangladesh, and also allowed both national and international NGOs to participate in the refugee operations. However, the same standards are not adopted for other refugees.

There has been some litigation regarding the status of refugees in Bangladesh courts. A significant ruling was delivered by the High Court Division of Bangladesh in May 2003 in **Abid Khan and Others vs. Government of Bangladesh**.⁸⁸ This judgment granted voting rights to ten Urdu-speaking people from Bangladesh

⁸⁷ *Hussain Muhammad Ershad vs. Bangladesh & Others*, 2000, 29 CLC (AD). This case has also been reported in 21 (2001) BLD (AD) 69.

⁸⁸ *Abid Khan and Ors (Md) v. Government of Bangladesh*, (2003) 23 BLD (HCD) 364.

rendered stateless by the 1971 war⁸⁹ and declared that they were citizens of Bangladesh. Subsequently, on 18 May 2008, in the case of **Md. Sadaqat Khan**, the Supreme Court of Bangladesh (High Court Division) reaffirmed that all members of the Urdu-speaking community were nationals of Bangladesh in accordance with its laws and directed the Election Commission to “*enroll the petitioners and other Urdu-speaking people who want to be enrolled in the electoral rolls and accordingly, give them National Identity Card without any further delay.*”⁹⁰

Compliance in Nepal and Bhutan: the problem of Ethnic Nepalese Refugees from Bhutan

Over 100,000 people from Bhutan were found in UN refugee camps in Nepal after Bhutan adopted the ‘one nation, one people’ policy. Although a majority of these refugees have been relocated and resettled in other countries, a significant number continue to exist in a twilight zone of statelessness, as no country is willing to give them citizenship. Efforts to repatriate them to Bhutan have resulted in violent attacks against them.

The crisis being faced by ethnic Nepalese refugees from Bhutan has been well documented over the last 35 years since the problem began. In the early 1980s, a large number of Hindu Nepalese who had settled in Bhutan, also known as Lhotshampas, started facing harassment as they were seen as a threat to the ethnic Bhutanese culture, which is predominantly Buddhist. Several measures taken by the government tended to exacerbate the situation. This included the ‘one nation, one

⁸⁹ Urdu speaking refugees stranded in Bangladesh after the 1971 war are known as ‘Biharis’.

⁹⁰ *Mohammad Nour Md. Sadaqat Khan (Faku) & Ors. vs. Chief Election Commissioner, Bangladesh Election Commission*, (2008) 28 BLD (HCD) 261

people' policy, restricting government jobs, and banning Nepalese as a second language in educational institutions. With the Citizenship Act in 1985, several ethnic Nepalese individuals residing in Bhutan lost their status as citizens.

Not surprisingly, by 1988 these people had begun to migrate out of Bhutan and into Nepal on the one hand, and the Indian states of West Bengal, Assam or Sikkim on the other. Violence erupted and tens of thousands of Nepalese fled to refugee camps in Nepal. It is estimated that approximately 100,000 refugees lived in UN-supervised camps in Nepal. However, since Nepal does not grant citizenship to refugees, their status has remained precarious.

Those that migrated to India also found themselves vulnerable as India does not allow refugees to enter its territories between Bhutan and Nepal, nor does it allow them work permits. Even today, there are between 15,000 to 30,000 Lhotshampas who are exiled in India, but they have not been given refugee status and are ineligible for UNHCR assistance.⁹¹

In the year 2000, the Bhutanese government decided to allow certain classes of the refugees to return to Bhutan, but this decision was met with violent reactions from the Bhutanese people. By this time the UN had also terminated a number of its services, particularly in the area of education. As Bhutan's unwillingness to take these people back persisted, in 2006 many countries such as the USA and Australia offered to settle them in their countries.⁹² By April 2014,

⁹¹ Eli, Jenelle. "Lhotshampas: Evicted from Bhutan". *Info Change News & Features*. July 2008

⁹² Human Rights Watch. "Last Hope: The Need for Durable Solutions for Bhutanese Refugees in Nepal and India". 2007.

about 75,000 refugees had been resettled in the USA and about 13,000 in other countries.⁹³

However, all is not well with those thus resettled, and there have been tragic reports regarding the high incidence of depression and suicide among these populations. According to a report by the Center for Disease Control and Prevention, in the three years leading up to February 2012, the rate of suicide among Bhutanese refugees resettled in America was 20.3 per 100,000 people.⁹⁴

In 2014, around 26,000 ethnic Nepalese from Bhutan still lived in refugee camps in Nepal, located near the Indian border and less than 300 miles from their home country. Over 13,000 were waiting to migrate from the camps to Western countries through the ongoing resettlement programme.⁹⁵ Another estimate is that in January 2014, the Bhutanese refugee population in Nepal was 30,977 individuals, and by the end of 2014, there remained around 18,000-19,000 refugees without any durable solutions to their situation.⁹⁶ In January, 2016 the EU contributed €2 million to the UNHCR which had 17,000 refugees in two camps across Nepal.⁹⁷ They continue to hold the status of stateless individuals. Those in the camps, as well

⁹³ US Department of State, Bureau of Population, Refugees, and Migration (PRM), Worldwide Refugee Admissions Processing System (WRAPS)

⁹⁴ Mishra, T.P. "American Dream Becomes Nightmare for Bhutanese Refugees". *India Realtime*. 7 January 2014.

⁹⁵ *Ibid.*

⁹⁶ ICMC Europe, Bhutanese Refugees In Nepal. Retrieved from: <http://www.resettlement.eu/page/bhutanese-refugees-nepal>

⁹⁷ The Himalayan Times. "EU supports UNHCR in protecting Bhutanese refugees in Nepal". January 13, 2016, <https://thehimalayantimes.com/nepal/eu-supports-unhcr-in-protecting-bhutanese-refugees-in-nepal/>. Kathmandu, Nepal.

as those resettled in third countries, have not been able to regain a sense of belonging.⁹⁸

“As for the refugees themselves, despite being excluded from the Bhutan/Nepal negotiations and banned by UNHCR from political activity in the camps, they have mobilized to insist on their repatriation to Bhutan, the state that they regard as their own.”⁹⁹

An offshoot of this lingering uncertainty is that a number of insurgent groups have been able to take advantage of the dislocated populations and find root there. This includes the Bhutan Communist Party (Marxist-Leninist-Maoist), the Bhutan Tiger Force and the United Revolutionary Front of Bhutan, to name a few. Indeed, the Bhutanese security forces believe these groups are behind the wave of bombings that rocked the Kingdom in the run-up to the 2008 parliamentary elections.

The political and historical compulsions of regional actors have made it difficult to find a lasting solution to this refugee crisis. The situation is made even worse by the vacuum in legal protections available to refugees. Although Nepal is party to the overarching UN conventions on civil, political and socio-economic rights, such as the UDHR, ICCPR, UNCRC, and so on, it has not ratified the 1951 Convention or its 1967 Protocol, nor has it ratified the 1954 and 1961 Conventions on statelessness. Furthermore, Nepal does not have any national legislation on the subject of refugees. The legal status of asylum seekers and refugees in Nepal is governed by

⁹⁸ Concoran, Ann. “Bhutanese refugees in Ohio need more costly mental health care due to high suicide rate”. *Refugee Resettlement Watch*. July 31, 2015.

⁹⁹ Khan, Gerrard. “New Issues In Refugee Research: UNHCR working paper no. 47”. *Citizenship and statelessness in South Asia*. October 2001.

the statutory law as related to foreigners¹⁰⁰ and by administrative directives, leaving the legal status of the Bhutanese refugees in Nepal far from secure.¹⁰¹ Although Nepal allows the Bhutanese refugees to remain on its territory, it accords them few legal rights.

In August 1991, the Government of Nepal invited UNHCR to help out with the problem. Most of the refugees lived in camps run by the UNHCR for years. They have been provided relief and support by UNHCR, the World Food Programme, the Lutheran World Federation, Caritas, AMDA, and the Nepal Bar Association. From time to time, concerns have been raised by civil society organizations about the budgetary cuts that UNHCR made after a few years of their support.¹⁰²

The situation in Bhutan regarding ratification of international refugee laws is the same as Nepal and other countries in South Asia. None of the specific conventions on refugees have been ratified, and there is no domestic legislation protecting these vulnerable populations.

However, an additional matter of concern is that Bhutan has openly flouted all international norms in violating rights of thousands of ethnic Nepalese who should rightly be recognised as citizens. These actions have forced them to flee their homes to live as refugees on foreign soil for decades, and then successfully prevented them from returning to Bhutan.¹⁰³

¹⁰⁰ The national laws that govern refugees in Nepal are: Interim Constitution of Nepal, 2007; the Nepal Citizenship Act, 2006; The Immigration Act, 1992; and The Extradition Act, 1988.

¹⁰¹ Human Rights Watch. "Last Hope: The Need for Durable Solutions for Bhutanese Refugees in Nepal and India." HRLN. 2007 (See Chapter IX for details)

¹⁰² Ibid.

¹⁰³ See HRW report for details: Ibid.

The government of Bhutan's resistance to repatriation of refugees has been a major cause of suffering. In addition, Bhutan has not allowed the UNHCR to set up its operations in the country. There is also no UN agency or other human rights agency in Bhutan.¹⁰⁴

The unreasonableness of the Bhutan government can be gauged also from the flawed categorization process adopted in camps. The Bhutanese government, in collaboration with the government of Nepal and without the international community's participation, has set up a system of categorization of camp residents that effectively denies refugees the right of return, as under:¹⁰⁵

1. Bona fide Bhutanese who have been forcibly evicted;
2. Bhutanese who have voluntarily emigrated;
3. Non-Bhutanese people;
4. Bhutanese who have committed criminal acts.

While the Bhutanese government defends the above categorization by maintaining that many camp residents are actually Nepalese taking advantage of UNHCR charity, these classifications are confusing and fiercely contested by the Lhotshampas themselves. According to them, this classification fails to take into account the historical process which resulted in the exodus, namely the resettlement of Drukpa Bhutanese on vacated lands, to which the Lhotshampas will be unable to return. The Bhutan government further requires that refugees who fall within the second category, on their return to Bhutan, reside in a camp for three years, after which they will be evaluated on their knowledge of Bhutanese history, culture, and the Dzongkha language. This is indeed a burdensome process of

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

naturalization. In addition, bona fide Lhotshampas falling within the third category, those who could not prove residence in Bhutan, are left stateless. Finally, those in the fourth category will, on their return to Bhutan, be tried for their alleged crimes.

This recalcitrant attitude of the Bhutan government violates its commitments under a plethora of international conventions relating to the protection of human rights of individuals. More so, the plight of the Lhotshampas is a violation of its own Constitution. The newly formed Bhutanese Constitution of 2008 explicitly grants universal standing to all people, not just citizens, to approach the courts “for the enforcement of the rights conferred” by the Constitution. In particular, there are three key provisions in the Constitution which are noteworthy:¹⁰⁶

1. The Constitution establishes Buddhism as the state’s “spiritual heritage” which it describes as promoting “the principles and values of peace, nonviolence, compassion and tolerance.”¹⁰⁷ Such compassion, which is a *sine qua non* of a Buddhist state, must be interpreted to include the dispossessed, such as the Lhotshampas.
2. The Constitution contains an important equality clause, stating that “(a)ll persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status.”¹⁰⁸

¹⁰⁶ Ferraro, Matthew F. “Addressing Bhutan’s Refugee Crisis Through the Courts” *The Diplomat*. July 23, 2013, <http://thediplomat.com/2013/07/addressing-bhutans-refugee-crisis-through-the-courts/> .

¹⁰⁷ Article 3(1), The Constitution of the Kingdom of Bhutan, 2008

¹⁰⁸ Article 7(15).

Under such an equality clause, the denial of citizenship to the Lhotshampas and forcing them into exile, is a clear violation.

3. An important principle of state policy is stated to be that it “shall endeavour to promote goodwill and co-operation with nations, [and] foster respect for international law and treaty obligations...”¹⁰⁹ As stated earlier, the treatment of the Lhotshampas has contravened numerous obligations of Bhutan under international laws and conventions.

The leaders of Nepal and Bhutan had promised to try and repatriate the refugees before the elections, which many refugee leaders believe is the only acceptable path. However, there has been little progress on this front. As has been observed in a recent report by the Human Rights Watch:

*“One of the core components of international protection for refugees is finding durable solutions. The refugee regime offers **three durable solutions** for refugees: **voluntary repatriation, local integration in the region of displacement, or resettlement in a third country** (emphasis added in the original). The principal objective of each durable solution is to restore national protection to refugees. Sixteen years after the first ethnic Nepalese fled or were expelled from Bhutan the Bhutanese refugees are still awaiting a durable solution. While the Bhutanese refugees have found basic protection in Nepal, the continuing confinement of more than 100,000 refugees to*

¹⁰⁹ Article 9(24).

camps is clearly not sustainable either for the refugees or for the international community.”¹¹⁰

Refugees in Sri Lanka

Sri Lanka has produced more refugees than it has received, since a lot of people have fled the country. This is mainly because of the three decade long ethnic conflict which lasted till 2009.

The UNHCR in Sri Lanka was established in 1987. In Sri Lanka the UNHCR tried the concept of open camps for people to stay in case of emergency. Unfortunately, one of the camps in Pesalai was attacked by the Sri Lankan army and a number of refugees were picked up for questioning from there.¹¹¹

There have also been recent reports of forcible deportation of refugees from Sri Lanka to their country of origin, clearly in flagrant violation of the international principle of non-refoulement.¹¹² The Sri Lankan government in 2014¹¹³ acknowledged that there were about 1500 Pakistani and Afghan nationals who were staying in the country illegally and 205 of them were being held in detention. The government defended its actions in deporting Pakistani Ahmadiyya, Christian and Shia Muslim asylum seekers, stating that these refugees are a drain on the island's resources, and its international obligations

¹¹⁰ Op cit 193;

¹¹¹ Op cit 147.

¹¹² There are reports regarding court orders directing stay of such deportations in some cases. However, the decisions could not be located and hence are not referred to here.

¹¹³ Press Trust of India. “UNHCR asks Lanka to stop deporting Pakistani asylum seekers.” (Colombo). Business Standard. August 6, 2014, http://www.business-standard.com/article/pti-stories/unhcr-asks-lanka-to-stop-deporting-pakistani-asylum-seekers-114080600373_1.html .

have to be “nuanced and balanced by domestic compulsions”. This situation came to light when UNHCR objected to the forcible deportation of 36 Pakistani asylum seekers from Sri Lanka in the first week of August, 2014, with more expected to follow.

International human rights organisations have also raised concerns regarding the fate of civilians caught in the conflict zone during the final stages of the war which ended in 2009. Accordingly, there are thousands of IDPs in Sri Lanka.

According to the UNHCR, the numbers of IDPs in Sri Lanka were:

Residing in Sri Lanka	
Refugees	511
Asylum Seekers	950
Returned Refugees	504
Internally Displaced Persons (IDPs)	30,847
Stateless Persons	0
Various	0
Total Population of Concern	33,170
<i>*As of December 2014</i>	

The UNHCR has also estimated that there are 123,028 documented refugees originating from Sri Lanka in different parts of the world. The status of Sri Lankan refugees in India has been examined in some detail earlier, including the serious rights violations at camps and forced repatriations.

According to a UN report¹¹⁴ published in 2011, the 2009 operations saw both sides committing war crimes against civilians.¹¹⁵ The Sri Lankan government has rejected this, and subsequent reports as biased.

A detailed examination of the status of refugees in the region clearly demonstrates that the mechanisms for handling this complex and difficult issue are neither fully in place, nor are the limited mechanisms fully functional. Domestic administrative processes and institutions are unable to transcend the mindset of the ‘alien’ in the application of the law to refugees, and are prone to view such persons with suspicion. The only international mechanism which exists for this purpose, the UNHCR, is unable to meet even the minimum requirements of its mandate in light of the restrictive attitude of many of the countries regarding its role. We also find that even within the limited domain within which the UNHCR is permitted to operate, it tends to focus its energies on the ‘mandate’ refugees, and makes no effort to expand its area of operation by providing assistance to the vast swathes of economic refugees who are in extreme distress, even though they face no political threat as such.

¹¹⁴ “Report of the Secretary General’s Panel of Experts on the Accountability in Sri Lanka”. *United Nations*. March 31, 2011.

¹¹⁵ Human Rights Watch. “We Will Teach You a Lesson: Sexual Violence against Tamils by Sri Lankan Security Forces.” 2013.

V

Law and Practice of Immunity to Security Forces at Border Areas

Considerable information exists regarding arrests, detention, and other human rights violations by security forces against people living in border areas. Here we will be exploring how the nature of human rights violations by security forces is closely correlated to whether the diplomatic relations between the two concerned countries are friendly or hostile. This determines the kind of powers vested in the security forces, but even more importantly, what is the kind of legal immunity they enjoy.

It is a truism that security forces, when sheltered under provisions of legal immunity (such as the need to obtain sanction for prosecution for crimes committed by them) tend to abuse their special status.

In border areas, this becomes greatly amplified, with normalization of abuses against persons who may be ‘illegal’ migrants, or persons helping such ‘illegal’ migrants. For instance, at the Bangladesh border, Indian security forces have been given *carte blanche* to shoot-at-sight ‘illegal’ immigrants, something which is not permitted by the domestic law of either country, or indeed by international law.¹ On

¹ Adams, Brad. “India’s shoot-to-kill policy on the Bangladesh border”. *The Guardian*. January 23, 2011, <https://www.theguardian.com/commentisfree/libertycentral/2011/jan/23/india-bangladesh-border-shoot-to-kill-policy> .

the India-Nepal border, in spite of the greater degree of freedom relative to other border areas, human rights violations are also continuing - to the extent that entire villages have been forced to flee and re-locate. In particular, sexual abuse of women seems to be a serious problem. In this section we will be exploring how and why these human rights abuses are taking place.

To a greater or lesser degree, all the countries under study provide special status to the armed forces insofar as prosecution for criminal offences is concerned, with statutory provisions requiring the establishment of military or security courts for the prosecution of offences committed by armed forces personnel. In addition, some countries also have specific provisions where criminal prosecutions of military and armed forces personnel in the ordinary criminal courts (also known as civil or civilian courts in armed forces parlance) require the specific sanction of the government. Again, these protections extend, to a greater or lesser degree, to the police and paramilitary forces in the specific statutes that govern them or in the general laws.

Civil society organisations in these countries have on a sustained basis made unambiguous critiques of the various laws which protect the armed forces and security forces insofar as violations of human rights are concerned.² These protections are found in constitutional provisions, statutory legislations, in executive actions and judicial pronouncements, and create a pervasive atmosphere of impunity, which becomes increasingly pronounced in border areas where the perception of threat by the 'enemy' provides a further layer of protection against prosecutions for human rights violations.

² People's Union for Democratic Rights, Concept Note on Impunity to Armed Forces. 11 July 2014. Retrieved from: http://e-pao.net/epSubPageExtractor.asp?src=news_section.opinions.Opinion_on_Killing_of_Manorama.Impunity_to_the_Armed_Forces_in_Armed_Conflict_Areas_By_Seram_Rojesh

The legal dispensation provides several kinds of immunity. For the purpose of the present examination, we will look at three different kinds of laws- those that override ordinary criminal laws in favour of the armed forces in the border areas, laws which shield armed forces personnel from criminal prosecutions by requiring prior sanction from the government, and laws which subordinate the ordinary criminal courts to the martial courts or special forces courts. While there are significant differences in the laws which govern the different countries, there are striking similarities in the overarching approach of the law to the armed forces.

Special Laws Overriding the Extant Criminal Laws

In **India**, special dispensation regarding the powers of Armed Forces in civilian operations has been put into place through the *Armed Forces (Special Powers) Act, 1958* (for the North East States) and the *Armed Forces (Jammu & Kashmir) Special Powers Act, 1990* (for J&K). Under this dispensation, the Governor can declare an area “disturbed area” vide **section 3** where it is found that there is a disturbed or dangerous condition requiring the use of armed forces “in aid of civil power”.

Section 4 gives the power to any commissioned officer, warrant officer, non-commissioned officer or any person of equivalent rank in the armed forces in a disturbed area to “*fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances.*” (s. 4(a)). It also gives such an officer the power to destroy an arms dump or shelter, arrest without warrant, search and seizure.

Section 5 requires the said officer to make over any arrested person “to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest”. These powers have been circumscribed by the Supreme Court in the five-judge bench decision **Naga Peoples Movement for Human Rights vs. Union of India**³ in order to bring them under the Constitutional dispensation of Article 21.

The Armed Forces (Special Powers) Act, 1956 (AFSPA) has been in operation for more than half a century in large areas of North East India, and coinciding with the borders with Bhutan, China and Burma. A similar law, the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, operates in the border areas with Pakistan and Afghanistan in the North West.

Both these statutes have been fiercely criticised for the kind of powers that are vested in the armed forces and paramilitary forces purportedly to aid the civil power of the state administration, but effectively supplanting it. Extensive powers to arrest, use force, shoot, search and seizure, and so on, which are beyond the scope of the Criminal Procedure Code, are invested in the armed forces personnel.

The constitutional validity of AFSPA was challenged by the Naga Peoples Movement for Human Rights (NPMHR) after documenting numerous cases of horrific human rights violations by the Indian Army against the Nagas. The Supreme Court of India, in a detailed judgment delivered by a five judges bench⁴ upheld the constitutional validity of the law to the great chagrin of the NPMHR and the

³ Naga People’s Movement of Human Rights v. Union of India & Ors (1998) 2 SCC 109.

⁴ *Ibid.*

numerous other civil rights organisations which had impleaded themselves in its support. The Court laid down certain safeguards which have to be followed by the armed forces in operations in these areas, such as the presentation of an arrestee to the nearest police station at the earliest, and definitely within 24 hours of arrest. The Court also stated that the detailed “do’s and don’ts” drawn up by the Government of India Ministry of Defence must be adhered to.⁵

As a result, the armed forces and security forces in the North East as well as in Jammu and Kashmir continue to operate within the shield of protection of the AFSPA, with accountability being reduced to a case-by-case examination by the judiciary, in those rare cases where victims are able to approach the writ courts. It is well known that approaching the writ courts, especially where the armed forces are in virtual control, is not easy. These efforts, when made, do not necessarily meet with a positive response. For instance, in a case where the husband of the petitioner was brutally killed in army custody, a writ petition filed before the Supreme Court was dismissed on the ground that the guidelines under the AFSPA and the NPMHR judgment “cannot be mechanically applied”. The Court further observed that “prompt action by the army in such matters is the key to success”.⁶ Decisions such as this have only added to the perception, both within the armed forces as well as the people in these areas, that the law provides the security forces with immunity against prosecution, no matter how heinous the crime.

In **Pakistan**, the provisions relating to special dispensation in the border areas with Afghanistan are found in the Constitution of

⁵ Ironically, these ‘do’s and don’ts’ are not readily available in the public domain, thus holding the security personnel accountable for their violation becomes, at best, difficult.

⁶ *Masooda Parveen vs. Union of India* (2007) 4 SCC 548

Pakistan itself. The Constitution of the Islamic Republic of Pakistan under Article 8(3)(a) exempts laws relating to the armed forces from the constitutional requirement of conformity with fundamental rights. Article 199(3) of the Constitution, which provides the jurisdiction of the constitutional courts, namely the High Courts, and their power to issue various kinds of writs including the writ of habeas corpus, specifically exempts the exercise of such power “in relation to a person who is a member of the Armed Forces of Pakistan, or who is, for the time being subject to any law relating to any of those Forces”⁷ Again, Article 145(3) iterates that “a High

⁷ Article 199 of the Constitution of Pakistan states:

“(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,—

(a) on the application of any aggrieved party, make an order—

(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

(ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order —

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.

Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245.” In the case of a legal proceeding being initiated, it remains suspended during the period the army is active in the area.

Most relevant for our purpose is Article 246, relating to special dispensation in tribal areas, including the FATA and the Provincially Administered Tribal Areas (PATA). These areas are contiguous with the border of Pakistan with Afghanistan, which has been experiencing considerable upheaval for the last several decades. Mountainous and thus inaccessible, these areas have had the great misfortune of being used by insurgent groups, such as the Taliban, to escape the ‘war against terror’ and re-group. As a result, these areas have also seen massive army operations and violence from both sides, with thousands of villagers fleeing to the relative safety of refugee camps in Central Pakistan, becoming IDPs. Unfortunately, these operations have witnessed numerous instances of human rights violations, torture, enforced disappearance, and extra-judicial killings at the hands of the armed forces.

Article 247(7) states that neither the Supreme Court nor any of the High Courts shall have jurisdiction on any matter under the Constitution with regard to the tribal areas. This exclusion of the jurisdiction of the constitutional courts has resulted in rampant and continuing violations of human rights. According to investigations conducted by Amnesty International, human rights violations are being committed against people in tribal areas of Northwest

3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.”

Pakistan both by the Pakistan government and the Taliban.⁸ The constitutional exclusion of the courts from ruling on fundamental rights violations in tribal areas, supplemented by statutory laws and practices, enable the pervasive atmosphere of impunity enjoyed by the armed security forces. This deprecation of the law is a key driver of impunity for state and non-state perpetrators. The report states:

“...rather than seeking to apply and strengthen the human rights safeguards of Pakistan’s ordinary criminal justice system in the Tribal Areas, the Pakistani authorities are applying old and new security laws that authorize prolonged, arbitrary, preventive detention by the Armed Forces, and breach international human rights law. The Actions (in Aid of Civil Power) Regulations 2011 (AACPR) in particular, along with the century-old Frontier Crimes Regulation 1901 (FCR), provide a framework for widespread human rights violations to occur with impunity.”⁹

The report further notes that “no serving or retired member of Pakistan’s Armed Forces, law enforcement authorities, or intelligence services has been prosecuted for their alleged involvement in unlawful detentions, torture and other ill-treatment, or the unlawful killing of detainees in the Tribal Areas, including all the cases documented in this report. The state has a poor record of bringing Taliban and other perpetrators of abuses to justice in fair trials.”¹⁰

⁸ “As if Hell Fell on Me: The Human Rights Crisis in Northwest Pakistan”. *Amnesty International*. 10 June 2010. Index: ASA 33/004/2010. & Amnesty International. “The Hands of Cruelty: Abuses by Armed Forces and Taliban in Pakistan’s Tribal Areas” 13 December 2012. Index: ASA 33/019/2012.

⁹ Amnesty International “The Hands of Cruelty: Abuses by Armed Forces and Taliban in Pakistan’s Tribal Areas”. 13 December 2012. Index: ASA 33/019/2012, at page 8.

¹⁰ *Ibid.* page 9

Similar to Pakistan and India, statutory provisions in **Bangladesh** grant special protections to the armed forces. These mainly pertain to special powers to use force in abrogation of fundamental rights, exemption from action for violation of fundamental rights, and jurisdiction of army courts over civilian courts.

The Constitution of the People's Republic of Bangladesh contains a number of provisions creating a special dispensation with regard to the armed forces and security forces. Article 45 of the Constitution exempts 'disciplined forces', which includes, the army, navy, air force, police, and any other force so declared, from the fundamental rights chapter insofar as ensuring proper discharge of duties and the maintenance of discipline is concerned.¹¹ Article 46 permits the Parliament to indemnify any person for "*any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area*" of the country.¹² On the positive side, Article 47(3) provides that the fundamental rights chapter of the Constitution shall not be a barrier to the detention, prosecution or punishment of any person who is a member of any armed or defence

¹¹ Article 45 of the Constitution of the People's Republic of Bangladesh states as under:

"45. Modification of rights in respect of disciplinary law:- Nothing in this Part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force."

¹² Article 46, Constitution of the People's Republic of Bangladesh states as under:

"46. Power to provide indemnity:- Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration of order in any area in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area."

or auxiliary force for the commission of “*genocide, crimes against humanity or war crimes and other crimes under international law*”.¹³

Since the beginning of civil unrest in 1971, **Sri Lanka** has seen the imposition of national security legislations, including emergency provisions in the Constitution, at regular intervals. Even a cursory examination of these provisions reveals cause for considerable concern.

The Public Security Ordinance, 1947 (PSO), is a colonial legislation which empowers the President to make such emergency regulations “*as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.*”¹⁴ This must be done through a Proclamation published in the Gazette. The ordinance includes a list of areas such a regulation could cover, including arrest and detention of persons, search and seizure of property, and trial in special courts. Noteworthy is Section 9 of the Ordinance which is alarming in its overreach, as under:

¹³ Article 47, Constitution of the People’s Republic of Bangladesh states as under:

“47. Saving for certain laws

xxx

(3) Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or any individual, group of individuals or organization or who is a prisoner of war for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or even to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to, any of the provisions of the Constitution.”

¹⁴ Section 5(1) of the Public Security Ordinance, 1947.

“9. Protection in respect of acts done in good faith under any emergency regulation or any order or direction thereunder:— No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of any emergency regulation or of any order or direction made or given thereunder shall be instituted in any court except by, or with the written sanction of, the Attorney-General; and no suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision.”

Two kinds of exceptional provisions are made in this clause. First, any person acting under an emergency regulation, or an order made under such regulation, cannot be prosecuted in a criminal proceeding, without the written sanction of the Attorney General. This provision provides a partial protection from prosecution.

What is completely alarming is that the second part of the provision prohibits any ‘suit, prosecution or other proceeding, civil or criminal’ against a person who was acting ‘in good faith’ in pursuance or supposed pursuance of the regulations. This clause provides blanket immunity to all persons acting under such emergency regulation from any kind of criminal or civil proceeding, as long as they are able to demonstrate ‘good faith’.¹⁵

¹⁵ The regulations enacted under this Ordinance often echo this clause. For instance, the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation, 2006 (no longer in force) declared that ‘no action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these regulations, provided that such person has acted in good faith and in the discharge of his official duties’ in clause

The courts are also prohibited from entertaining any challenge to any such emergency regulation, or any order, rule or direction made under such regulation.¹⁶

Article 155 of the Constitution of the Democratic Socialist Republic of Sri Lanka recognises the validity of the pre-constitutional PSO and cements its status as law enacted by Parliament. It further empowers the President¹⁷ to issue emergency regulations under the PSO “having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution”.¹⁸ Such regulation comes into force only through a Proclamation by Parliament, and detailed provision is made regarding how this is to be done in an emergency situation.

The Prevention of Terrorism Act, 1979 was enacted under questionable circumstances, in less than 24 hours with insufficient time to debate, and at a time where a large number of the members were boycotting Parliament. It describes itself as “*(a) n Act to make temporary provision for the prevention of acts of terrorism in Sri Lanka, the prevention of unlawful activities of any individual, group of individuals, association, organisation or body of persons within Sri Lanka or outside Sri Lanka and for matters connected therewith or incidental thereto.*” Under this

¹⁶ Section 8 of the Public Security Ordinance, 1947 states as under:

“8. Regulations, orders, &c, not to be called in question in any court: No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.”

¹⁷ It is clear that the Constitution concentrates a great degree of power in the President. In turn, it is the President who makes key appointments, such as that of the Chief Justice, and Attorney General, and so on. The President also enjoys immunity from legal proceedings of any kind, including prosecution, under Article 35 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

¹⁸ Article 155(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka, under Chapter XVIII-Public Security.

law, new offences in the nature of terrorism were defined, and in addition, the state was given broad powers of arrest, search, seizure, and preventive detention, even while the orders passed under the statute by the relevant government authority were not to be called in question in a court of law.

After the military operations against the Liberation Tigers of Tamil Elam (LTTE) were concluded in 2009, these emergency provisions continued to operate until they were lifted in 2011. However, the end of the emergency did not end the military's emergency policing powers, and the government has continued to invoke Section 12 of the PSO to allow the armed forces (army, air force and navy) to retain policing powers, including search and arrest, particularly in the North and the East. A new bill to extend some of these emergency powers has also been proposed.

Investigations by civil rights and civil society organisations during this period reveal rampant violations of human rights by the Sri Lankan Army (SLA) and the Sri Lankan police forces, particularly in the areas which were considered to be LTTE strongholds. A report by Human Rights Watch in 2013¹⁹ documents large number of cases of rape of both men and women by SLA and police forces in detention camps, and observes that such sexual violence was clearly used as a tactic for intimidation and amounts to war crimes under the Rome Statute. The report also refers to numerous instances of torture, enforced disappearances, and other forms of human rights

¹⁹ Human Rights Watch. "We Will Teach You a Lesson: Sexual Violence against Tamils by Sri Lankan Security Force", <https://www.hrw.org/report/2013/02/26/we-will-teach-you-lesson/sexual-violence-against-tamils-sri-lankan-security-forces>. 2013 Human Rights Watch. "Recurring Nightmare State Responsibility for "Disappearances" and Abductions in Sri Lanka", <https://www.hrw.org/reports/2008/srilanka0308/>. 2013

abuse, although this was not the primary focus of the study. It observes:

“Since the end of the armed conflict in 2009, the continued large-scale deployment of the armed forces in former LTTE areas of Northern Sri Lanka, coupled with increased surveillance of civil society groups, has stymied community responses to rights abuses including sexual violence.”²⁰

The report finds an alarming trend where, even in the rare situations where criminal cases are initiated against the security forces, these are not treated with due seriousness by the criminal justice system. The report observes:

“As a general rule, cases of sexual violence and rape by the security forces have been poorly investigated or not pursued at all. Complaints of rape, like other complaints of torture, are often not effectively dealt with by the police, magistrates, or doctors. Weaknesses in the early stages of the criminal investigation process have repeatedly contributed to the ultimate collapse of investigations of alleged rapes and other acts of sexual violence.”²¹

The Army Act, 2006 of **Nepal** provides significant and far-reaching immunities from prosecution against acts done in discharge of duty, not only to members of the army but also to other persons who are assisting the army in its work or in a military operation zone, which would include paramilitary and central security forces.²²

²⁰ Human Rights Watch. op cit 227, Page 14-15.

²¹ Op cit 227 at page 27.

²² Section 3(1)(b) of the Army Act, 2006 of Nepal.

The Act, vide Section 22²³ further provides an overarching immunity from prosecution to such armed forces persons where death or loss occurs as result of their actions, upon the condition that they committed such actions “*in the course of discharging his/her duties in good faith*”. However, offences relating to “*corruption, theft, torture and disappearance*”²⁴ and the offences of rape and homicide²⁵ are excluded from such immunity from prosecution.

The International Commission of Jurists (ICJ) had severely criticized the Army Act when it was at a draft stage, particularly Section 22²⁶ above. However, the statute was enacted without making the recommended changes.

²³ Section 22 of the Army Act, 2006 of Nepal, under the Chapter ‘Privileges and Immunities’ states as under:

“22. Protecting the acts performed during the discharge of duties: *If, someone suffers death or loss while a person under the jurisdiction of this Act is committing an act in the course of discharging his/her duties in good faith, no case shall be filed against such person in any court.*

Provided that, any of the offences as referred to in Sections 62 and 66 shall not be deemed to be an offence committed in the course of discharging duties in food faith.

Explanation: *For the purposes of this Section, “committing any act, in the course of discharging duties”, means an act committed during the performance of duties and it includes any action taken for internal security or self-defence, including flag march, patrolling and sentry (Chapate) duty.”*

²⁴ See Section 62 of the Army Act, 2006 of Nepal.

²⁵ See Section 66 of the Army Act, 2006 of Nepal.

²⁶ International Commission of Jurists. “Nepal: Recommendations For Amendments To The Draft Army Act”, <https://www.icj.org/nepal-recommendations-for-amendments-to-the-draft-army-act/> . September 2006

Prior Sanction For Prosecution

In **India**, a plethora of statutory provisions grant protection to the armed forces and the security forces from criminal prosecution without the prior sanction of the Central government. In this section we demonstrate how, in fact, these provisions operate as virtual immunity from prosecution, with the result that there is a pervasive impunity in the armed forces' interaction with civilian populations.

Section 6²⁷ of the AFSPA, which applies to all armed forces personnel deployed in “disturbed areas” to which the AFSPA has been made applicable, protects such persons as follows:

“6. Protection to persons acting under Act – No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.”

Other than the AFSPA, which is a special law applicable only to disturbed areas, the Code of Criminal Procedure (CrPC) also provides a general power to call upon the armed forces to assist the civil power to disperse unlawful assembly where “public security is manifestly endangered by any such assembly”.²⁸ Section 132 of the CrPC provides for protection of such armed forces personnel against criminal prosecution for such acts, in that prior sanction of the Central Government is required. It is further provided that acts

²⁷ It may be noted that the provisions of the Armed Forces (Jammu & Kashmir) Special Power Act, 1990 are almost exactly the same as the 1958 Central legislation, and therefore a separate examination of the said statute is not being made. The analysis and comments regarding the 1958 Act apply mutatis mutandis to the 1990 Act.

²⁸ Sections 129 to 131 Code of Criminal Procedure, 1973 (India).

done “in good faith” in this regard by the armed forces shall not be considered an offence.²⁹

Section 197 of the CrPC states that no Court can take cognizance of an offence purported to be committed by a public servant (which includes the armed forces) while acting in the discharge of his official duty, except with previous sanction of the central government. This provision has been specifically extended to the armed forces.³⁰

It is well known that the Central Government rarely sanctions the prosecution of armed forces personnel in ordinary criminal courts. In a submission made to the Verma Committee in January 2013, Ms. Vrinda Grover, Advocate, stated:

“The information received from the Ministry of Defence, Government of India states, (1) 44 applications were received by the Ministry of Defence for grant of sanction for prosecution of members of the Indian Army, posted in Jammu and Kashmir between 1989–2011. (2) 33 requests for grant of sanctions for prosecution of Indian Army personnel were rejected (3) 11 requests for grant of sanction of prosecution of Indian Army personnel are still pending determination (4) NIL requests for grant of sanction of prosecution of Indian Army personnel have been granted. (Reply of the Ministry of Defence is enclosed as Annexure 4). These figures lay bare the truth that the

²⁹ Section 132(2) of the Code of Criminal Procedure, 1973 (India) states:

“(2) (a) No Executive Magistrate or police officer acting under any of the said sections in good faith; (b) no person doing any act in good faith in compliance with a requisition under section 129 or section 130; (c) no officer of the armed forces acting under section 131 in good faith; (d) no member of the armed forces doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby, committed an offence”

³⁰ Section 197(2) of the Code of Criminal Procedure, 1973 (India).

Government has refused to grant sanction for the prosecution of any member of the armed forces or the Central Armed Police Forces, for prosecution before the regular criminal court.”³¹

These statutory provisions have not been enacted to provide blanket immunity from prosecution to security forces. Section 6 of AFSPA clearly applies only “in respect of anything done or purported to be done in exercise of the powers conferred by (AFSPA)”, the plain meaning being that its operation is restricted to actions of the armed forces which are in furtherance of its purpose of assisting the civil power. The provisions of the CrPC also, quite clearly, cannot be interpreted to confer immunity from prosecution, and indeed are only meant to provide a layer of protection from malicious prosecutions at best. However, in practice, these statutory provisions are extended to all actions of armed forces personnel, within or outside the mandate of the law, and by refusing to sanction prosecutions in a majority of cases, the perception that the armed forces are immune from criminal prosecution for human rights violations has gained strength.

The CrPC of **Pakistan** also provides for the use of armed forces for the dispersal of unlawful assembly, at the request of the civil administration. The Code further provides that the Federal government or the Provincial government may request the assistance of the armed forces “for the public security, protection of life and property, public peace and the maintenance of law and order”.³²

³¹ Submission by Ms. Vrinda Grover Advocate to Justice Verma Committee. Retrieved from: <http://feministsindia.com/women-and-law/justice-verma-submissions/vrinda-grover/>

³² Section 131-A, Code of Criminal Procedure, Pakistan is as follows:

“Power to use military force for public security and maintenance of law and order. (1) If the Provincial Government is satisfied that, for the public security, protection of life and property, public peace and the maintenance of law and order, it is necessary to secure the assistance of the armed forces, the Provincial Government may require, with the prior

The Code states that no such person shall be prosecuted in any criminal court for an act which is purported to be done under these provisions, “*except with the sanction of the Provincial government*”. In any case, it is provided that where an ‘inferior officer, or soldier, sailor or airman in the armed forces’ does any act pursuant to such request, and in obedience of an order which he was bound to obey, no such act shall be deemed to be an offence.³³ The Code further requires that where any public servant (which would include armed forces personnel) is accused of an offence “committed by him while acting or purporting to act in the discharge of his official duty”, no court can take cognizance of the offence except with the previous sanction

approval of the Federal Government, or the Federal Government, on the request of the Provincial Government, direct, any officer of the armed forces to render such assistance with the help of the armed forces under his command, and such assistance shall include the exercise of powers specified in sections 46 to 49, 53, 54, 55(a) and (c), 58, 63 to 67, 100, 102, 103 and 156: Provided that such powers shall not include the powers of a Magistrate. (2) Every such officer shall obey such requisition or direction, as the case may be, and in doing so may use such force as the circumstances may require. (3) In rendering assistance relating to exercise of powers specified in subsection (1), every officer shall, as far as may be, follow the restrictions and conditions laid down in the Code.”

³³ Section 132 of the Code of Criminal Procedure, Pakistan is as follows:

“132. Protection against prosecution for acts done under this Chapter. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Provincial Government; and: (a) no Magistrate or police officer acting under this Chapter in good faith. (b) no officer acting under section 131 in good faith. (c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130 [or S. 131-A], and (d) no inferior officer, or soldier, sailor or airman in the armed forces doing any act in obedience to any order which he was bound to obey. shall be deemed to have thereby committed an offence: Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier, sailor or airman in the armed forces except with the sanction of the Central Government. Scope—Section 132, Criminal P.C. is a protection against prosecution and has nothing to do with ingredients of any offence. In order to obtain benefit of S. 132 the accused has to prove that the acts complained of were done under circumstances mentioned in the section, He need not prove that he committed no offence. In other words he must place before the Judge materials and circumstances justifying an inference that there was an unlawful assembly and the acts complained of were purported to have been done while dispersing that assembly.”

of the central government or the President. While granting such sanction, the central government or President can also specify the Court before which such trial shall be held.³⁴

In **Bangladesh**, the Armed Forces (Special Powers) Ordinance similarly gives special powers to the armed forces in a situation of emergency, including the power to arrest, enter, search and seize property, and use necessary force. A brief legislation, it dedicates one provision to stating that “*no prosecution, suit of other legal proceeding*” for acts done under this Ordinance, can be instituted “*except with the previous sanction of the Government*”.³⁵ This protection has been further extended to “*officers and members of any police force or portion of a police force*” as notified by the Government.³⁶

³⁴ Section 197(2) of the Code of Criminal Procedure, Pakistan states as follows:

“(2) Power of President or Governor as to prosecution. The President or Governor, as the case may be, may determine the person by whom, the manner in which, the offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.”

³⁵ Section 4, Armed Forces (Special Powers) Ordinance, 1942 states as under:

“4. Protection to persons acting under this Ordinance - No prosecution, suit or other legal proceedings for any order purporting to be made under this Ordinance or for any act purporting to be done in obedience to any such order shall be instituted in any Court except with the previous sanction of the Government, and notwithstanding anything contained in any other law for the time being in force, no person purporting in good faith to make such an order or to do any act in obedience thereto shall, whatever consequences ensue, be liable therefore.”

³⁶ Section 2, Armed Forces (Special Powers) Extension Ordinance, 1942 states as under:

“2. Power to extend Ordinance XLI of 1942, to police forces:- The Government may, by notification in the official Gazette, direct that the provisions of section 2 and section 4 of the Armed Forces (Special Powers) Ordinance, 1942, shall apply to the officers and members of any police force or any portion of a police force specified in the notification, when employed on any duty specified in the notification, as they apply to officers and members of the military forces of Bangladesh; and on such direction being made the powers exercisable by an officer not below the rank of Captain in the military forces of Bangladesh shall be exercisable by any officer of a police force so specified who holds a gazetted appointment in such force.”

Chapter IX of the CrPC, 1898³⁷ of Bangladesh provides for the army to be called in order to assist the civil authorities to disperse unlawful assemblies. This chapter also specifically exempts any armed forces personnel or soldier from criminal liability for any act taken by him in pursuance of an order under this chapter, and in any case requires that “*no such prosecution shall be instituted in any Criminal Court against any officer or soldier in the Bangladesh Army except with the sanction of the Government.*”³⁸ In addition, Section 197 of the code is a general provision requiring that where any public servant “*is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty*”, the previous sanction of the government is required before a Court can take cognizance of it.³⁹ As with similar statutes in other countries in

³⁷ See Sections 129, 131, 132 of Chapter IX [unlawful assemblies], and Section 197 of Chapter XV [of the jurisdiction of the criminal courts in inquiries and trials].

³⁸ Section 132 of the Criminal Procedure Code, 1898 states as under:

“No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Government; and-

(a) no Magistrate or police-officer acting under this Chapter in good faith,

(b) no officer acting under section 131 in good faith,

(c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and

(d) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence: Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in the Bangladesh Army except with the sanction of the Government.”

³⁹ Section 197 of the Code of Criminal Procedure states as under:

“(1) When any person who is a Judge within the meaning of section 19 of the Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Government.”

the region, the phrase ‘in discharge of his official duty’ is interpreted widely when it comes to security forces, especially those deployed in the border areas.

In **Sri Lanka**, Article 15 of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No. 7 of 2006 provides immunity from prosecution for government officials who commit wrongful acts when they implement the regulations. Legal proceedings are prohibited if an official acted “*in good faith and in the discharge of his official duties*”. A similar provision is found in the PTA in Article 26. As in the case of India, Pakistan, and Nepal, prosecutors and courts are likely to interpret this language broadly in order to provide the widest possible protection to armed forces personnel from prosecutions.

Certain provisions of the Sri Lankan Criminal Procedure Code also provide immunity from prosecution to armed forces and police forces. To initiate prosecution for any act done in aid of civilian authorities to disperse unlawful assemblies,⁴⁰ or for any offences by or relating to a public servant,⁴¹ the previous sanction of the Attorney General is a prerequisite.⁴² Until such sanction is obtained, the proceeding remains in abeyance.⁴³

There is no requirement for sanction for prosecution of armed forces personnel in the **Nepal** Army Act of 2006. However, this must be viewed in light of the fact that there is a sweeping immunity from prosecution in the first place.

⁴⁰ Section 97 of the Code of Criminal Procedure Act (No. 15 of 1979) of Sri Lanka.

⁴¹ This includes Sections 158, 159, 160, 161, 210, 211 and 212 of the Penal Code.

⁴² Section 135(1)(b) of the Code of Criminal Procedure Act 1979.

⁴³ See, for instance, Section 170 of the Code of Criminal Procedure Act 1979.

Prosecution in Military/Security Courts

In addition to the above statutory protections, the special laws relating to the various armed forces contain specific provisions which mandate the prosecution of armed forces personnel in special military courts or security forces courts in a large majority of cases.

The law in **India** relies upon provisions of the Army Act, 1950 (Sections 70, 125 and 126), Border Security Force Act, 1968, the Central Reserve Police Act, 1949, the Sashastra Seema Bal Act, 2007, and other such legislations relating to the armed forces and central paramilitary forces, which require that armed forces personnel be tried in special military courts.

In 2012, the Supreme Court decided in favour of the armed forces in the *Pathribal judgment*,⁴⁴ finding that the “option” of the Commanding Officer (CO) whether the accused personnel be tried in a military court or an ordinary criminal court remains intact, even though such option was not exercised by him for almost a decade, bringing the prosecution to a complete standstill. In this case, despite an investigation by the Central Bureau of Investigation finding that the security forces had, in fact, killed civilians, the Supreme Court allowed the CO to exercise the “option” to prosecute the case in the military courts, where the accused were subsequently acquitted for want of evidence.⁴⁵

This decision demonstrates the failure of the writ courts to comprehend the enormous power and control exercised by the armed forces in these border areas, thus reinforcing the atmosphere

⁴⁴ *General Officer Commanding Rashtriya Rifles vs. Central Bureau of Investigation & Anr.* [2012] 6 SCC 228

⁴⁵ “Reopen the Pathribal case”. *The Hindu*. January 27, 2014.

of impunity which shields the armed forces from accountability for heinous crimes committed in the interests of national security. By acceding to the argument that proceedings against the forces will demoralise them,⁴⁶ and that the actions of the armed forces were done in ‘good faith’ and in ‘the interest of the nation’, the courts have denied justice to civilians who have been at the receiving end of military wrath.

The approach of the courts in this regard is unfortunate, particularly since there is a high incidence of extrajudicial executions (often disguised as ‘encounters’) by armed and paramilitary forces in these ‘disturbed areas’ along the borders. Bringing the security personnel to trial in such cases is difficult to begin with; where there is an insistence that such prosecutions be conducted in military courts or special security courts, the purpose is completely defeated.

In a writ petition filed by the Extra Judicial Execution Victim Families Association (EEVFAM)⁴⁷ before the Supreme Court of India, it was pointed out that over the years a large number of people have been killed by the security forces while in custody or in extrajudicial executions disguised as staged ‘encounters’. The number of people killed in the state of Manipur alone during the period May 1979 to May 2012 was 1,528. The government argued that these deaths occurred within the lawful exercise of power by the security personnel and were justified by Manipur’s status as a sensitive border area with a long-standing problem of armed insurgency. In 2013, the Supreme Court appointed a Special Investigation Team (SIT) to

⁴⁶ See, for instance, Supreme Court of India’s observations in *Masooda Parveen vs. Union of India* (2007) 4 SCC 548.

⁴⁷ *Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. vs. Union of India & Ors.* (2013) 2 SCC 493.

investigate six cases of encounter deaths from this list.⁴⁸ The report of the SIT revealed that in the last 66 years, only three cases of complaints against central security forces have been investigated, and even in those the details of action taken remained unknown.⁴⁹

In **Pakistan**, the Pakistan Army Act, 1952 provides for the prosecution of offences by personnel in the armed forces by martial courts, and their detention during trial in military custody. Thus, where a civilian offence is committed by such personnel, and both the ordinary criminal court and the martial court have jurisdiction, “*it shall be the discretion of the prescribed officer to decide before which Court the proceedings shall be instituted*”.⁵⁰ During this period, such accused shall be detained in military custody. Since there is no protection against double jeopardy in the Code, the law provides that such person may subsequently be also tried in an ordinary criminal court for the same offence, in which case the sentence of the martial court shall be taken into consideration.⁵¹

Bangladesh also has special laws which govern the armed forces and which specifically provide that prosecutions for offences committed by personnel of such armed forces will be conducted in special martial courts. The Army Act of 1952 therefore provides that members of the armed forces are to be tried by martial courts in the general course, except where the crime of murder, culpable homicide not amounting to murder, or rape, is committed against a civilian. In such cases also, the martial courts will have jurisdiction where such offence is committed:

⁴⁸ *Ibid*, Court order dated 4th January, 2013.

⁴⁹ PUDR. “Impunity to the Armed Forces in Armed Conflict Areas: A Concept note”. July 11, 2014.

⁵⁰ Section 94 of the Pakistan Army Act, 1952.

⁵¹ Section 96 of the Pakistan Army Act, 1952.

- a) *while on active service, or*
- b) *at any place outside Bangladesh, or*
- c) *at a frontier post specified by the Government by notification in this behalf.*⁵²

Needless to say, it is difficult to comprehend how an offence of rape could be committed “while on active service”, but such is the letter of the law. Where the martial court as well as the ordinary criminal court both have jurisdiction, the civilian authorities will hand over custody of the accused to the martial court,⁵³ and it shall be the discretion of the prescribed military officer to decide in which court such crimes shall be tried.⁵⁴ Even where the ordinary criminal court is of the view that it is the proper court to try such an offence, it must give the prescribed military officer a notice in writing to exercise his option “*either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Government.*”⁵⁵ A decision of the martial court cannot be appealed against in any court of law.⁵⁶ The application of the Army Act, 1952 in its entirety has been extended to the Bangladesh Territorial Army⁵⁷ and the Bangladesh National Guard.⁵⁸

The Border Guard Bangladesh (BGB - formerly known as Bangladesh Rifles) is the main paramilitary force in charge of

⁵² Section 59(2) of the Army Act, 1952 of Bangladesh.

⁵³ Section 76 of the Army Act, 1952.

⁵⁴ Section 94 of the Army Act, 1952.

⁵⁵ Section 95 of the Army Act, 1952.

⁵⁶ Section 133 of the Army Act, 1952.

⁵⁷ Section 13 of the Bangladesh Territorial Force Act, 1950.

⁵⁸ Section 12 of the National Guard Act, 1950.

protecting the borders of the country.⁵⁹ While during peace-time the BGB is governed by its own statute, during times of war it comes under the control of the Ministry of Defence as an auxiliary force to the Bangladesh Army.

In **Sri Lanka**, the CrPC Act of 1979 places an obligation upon a civilian court to hand over a person who is to be tried by a military court to the concerned CO of the ship, regiment, corps or detachment to which he belongs, or the nearest such officer, as the case may be.⁶⁰

The statutory and constitutional provisions giving special protections to security forces in Sri Lanka have had a chilling effect upon civil society organisations and victims taking the necessary steps to prosecute security personnel who have committed an array of human rights abuses. As a Human Rights Watch report⁶¹ observes:

*“During the armed conflict, the police force in Sri Lanka became significantly militarized and emergency provisions conferred police powers on the army, thus blurring the distinction between the two forces. This overlap, which has continued up to the present, has made it more difficult for people to file complaints or seek redress, particularly against the military”.*⁶²

The Army Act, 2006 of **Nepal** establishes special military courts for the prosecution of armed forces and paramilitary personnel insofar

⁵⁹ An analysis of the Border Guard Bangladesh Act, 2010 could not be done for the purpose of this study as the same is available only in Bengali.

⁶⁰ Section 445, Code of Criminal Procedure Act, No.15 1979 (Delivery to military authorities of persons capable of being tried by court-martial).

⁶¹ Human Rights Watch. We Will Teach You a Lesson: Sexual Violence against Tamils by Sri Lankan Security Force”. 2013

⁶² *Ibid* at page 50.

as these relate to offences defined under this statute. However, the Act states that any offence of rape or homicide, unless committed against another armed forces personnel, is to be tried in an ordinary criminal court.⁶³ Also, where an armed forces personnel commits an offence over which the civilian courts have jurisdiction, then such offence can be prosecuted in an ordinary criminal court. There is a further provision that “*nothing in this Section shall be a bar to form a court of inquiry and conduct an investigation and take necessary action on the offence that falls under this Act*” even if the prosecution is being conducted by an ordinary court.

It further provides that where such personnel commits the offence of “*corruption, theft, torture and disappearance*”, an investigation and

⁶³ Section 66 of the Army Act, 2006 of Nepal states as under:

“66. Offences under other Laws: (1) In a case a person under the jurisdiction of this Act commits any offence as referred to in Sections 38 to 65 and except in a that condition such an offence is committed by any military personnel against any other military personnel, if the person under the purview of this Act commits any of the following offences such a lawsuit shall fall under the jurisdiction of other courts:

(a) Homicide,

(b) Rape.

(2) If the agency or investigating officer conducting an investigation and inquiry issues an order to handover the accused (alleged person) involved in the offence as referred to in Sub-section (1), the commanding officer or Commander (Pati) or concerned officer shall hand him/her to the agency or officer issuing such order. The retirement or desertion of a person shall not bar to conduct an investigation and take action in accordance with law.

(3) The person who comes under the jurisdiction of this Act is being investigated fallings under the jurisdiction of other court shall ipso facto be suspended during the period of his/her custody and until the final decision if a case so lodged.

(4) Even if an investigation into an offence under the jurisdiction of other courts is started in respect to a person under the jurisdiction of this Act, nothing in this Section shall be a bar to form a court of inquiry and conduct an investigation and take necessary action on the offence that falls under this Act.”

inquiry will be conducted by a specially constituted committee comprising of the following members:⁶⁴

- (a) Deputy Attorney General as designated by the Government of Nepal Chairperson;
- (b) Chief of legal section of the Ministry of Defence Member;
- (c) Representative of Judge Advocate General Department not below the rank of Major (*Senani*) Member.

Therefore, while the ordinary courts' jurisdiction is not completely subordinated to the military courts as in other countries, there is a high degree of control maintained by the armed forces on how and where their personnel will be held accountable for any offences committed by them.

There is material to demonstrate that in Nepal there have been cases where despite judicial intervention and executive compliance, the army has successfully shielded its personnel from prosecution in ordinary criminal courts for human rights violations, even heinous crimes such as rape and extra-judicial killings. The Maina Sunuwar case is just such an example. In this case, a 15 year old girl was electrocuted to death by personnel of the Nepal army, but they escaped any strict punishment.⁶⁵ Data also shows the number of cases of abuse by men in uniform has been constantly on the rise.⁶⁶

⁶⁴ Section 62 of the Army Act, 2006 of Nepal

⁶⁵ Ramakrishnan, Nitya. "In Custody: Law, Impunity and Prisoner Abuse in South Asia". *South Asians for Human Rights* and Sage Publication. 2013. pages 311-314.

⁶⁶ *Ibid.* page 330.

Although laws that govern the Royal Bhutan Army were not readily available to this writer, secondary materials have documented⁶⁷ instances of human rights violations by the Bhutanese forces, including harassment, assault, torture and rape of the ethnic Nepalese who were forced out of Bhutan by the armed forces.

Box 2: Preventive Detention Laws

Although very rarely are the armed forces vested with the power of preventive detention, the vesting of vast powers even with the police forces can have important consequences on the atmosphere of impunity which prevails in a border area. A brief examination of the Jammu & Kashmir Public Safety Act, 1978 ('PSA') demonstrates how such a law can cast a cloud upon the civil society and general public, with regard to its ability to negotiate with the state in general, and demand accountability of the armed forces in particular.

The PSA is one among the many laws in J&K which provides for preventive detention without a trial for upto two years in case of threat to the security of the State. The PSA empowers the State government to detain any person it perceives to be a threat to the security of the State or to the maintenance of public order. The government has similar powers with respect to those who are foreigners within the meaning of the Foreigners Act, 1946 and with respect to any person residing in areas of the State under occupation of Pakistan.

A variety of protections against misuse are provided under the law. For instance, an order of preventive detention needs to be approved by the Central Government within 12 days of it being passed, otherwise it will lapse.

contd

⁶⁷ See, for instance, *Amnesty International*. "BHUTAN: Human Rights Violations against the Nepali-speaking population in the South". December 1999; AI Index: ASA 14/04/92; *Human Rights Watch*. "Trapped by Inequality, Bhutanese Refugee Women in Nepal". 2007.

For its part, the Central government refers the matter to an Advisory board for examination within 4 weeks, whose decision is binding upon the government. However, it is also provided that a detention order will not fail only on the technicalities.⁶⁸

The PSA has been relied upon heavily over the last several decades for the suppression of public opinion and opposition to the state in Kashmir.⁶⁹ In a written reply provided by the Chief Minister of the State to a query raised in the Legislative Council, it was stated that “during last six years 1,309 persons were detained under PSA out of which detention of 852 persons was quashed. As on March 20, 2015 only 73 persons are detained under PSA out of whom 17 are Indians and 20 are foreigners, he said.”⁷⁰ Another estimate claims that “(m)ore than 27,000 people have been arrested and jailed by different governments on different occasions in Jammu and Kashmir under this law since its promulgation in 1978.”⁷¹ However, these estimates are contested in a report of Amnesty International, which claims that “the number detained under the PSA over the past two decades (1991-2011) range from 8,000-20,000.”⁷² The extensive use of the PSA to arrest protestors and organizers of protests has had a chilling effect upon the ability of the public to protest against violations of human rights committed by the armed forces and paramilitary forces in the State.

⁶⁸ Section 10A and 11 of the PSA.

⁶⁹ International Peoples Tribunal on Human Rights and Justice in Indian-Administered Kashmir[IPTK]. “Alleged Perpetrators – Stories of Impunity in Jammu & Kashmir”. December 2012.

⁷⁰ Press Trust of India, Jammu. “1,309 persons detained under PSA in last 6 years: J-K Govt”. Published in Business Standard on 24 March 2015. Retrieved from: http://www.business-standard.com/article/pti-stories/1-309-persons-detained-under-psa-in-last-6-years-j-k-govt-115032400596_1.html

⁷¹ India Opines. ‘Public Safety Act is a Draconian Law in Jammu and Kashmir’. Retrieved from: <http://indiaopines.com/public-safety-act-is-a-draconian-law-in-jammu-and-kashmir/>

⁷² Amnesty International. “A ‘lawless law’: Detentions under the Jammu and Kashmir Public Safety Act “. 21 March 2011. AI Index: ASA 20/001/2011.

The above analysis reveals a complex web of legal protections which prevent security forces from being held accountable for wrongs committed against civilians. When such violations occur in border areas, overarching anxieties about sovereignty and border protection naturally come into play, making the general impunity of security forces even more pronounced.

VI

Mechanisms for Protection of Human Rights at the International and Regional Level

It is clear from the preceding chapters that national level institutions, such as judicial and administrative remedies, are inadequate when addressing human rights violations at the borders. Not only do such violations often involve persons from across borders, in many situations the borders themselves are disputed. The fundamental question of jurisdiction and *locus standi*, therefore, becomes a preliminary barrier to the adjudication of such cases, or even their redressal. Clearly, there is a need for an institutional arrangement and/or authority which can transcend such jurisdictional barriers.

Yet it is clear that serious human rights violations are taking place in border areas in the South Asian region, and that the security forces and other non-state actors responsible for such violations have not been brought to account. Consequently, there is an overarching atmosphere of impunity which feeds upon itself and continues to grow. Clearly, there is an urgent need to hold the violators accountable. This is not happening. The UNHCR, which is the only UN body that has any role to play, has also found its operations seriously restricted both in terms of access as well as the nature of remedy it is permitted to provide.

In the present chapter we examine the different institutional arrangements available at the international and regional level, through the lens of protection, promotion and advancement of human rights in the border areas. We begin with an examination of the National Human Rights Institutions (NHRIs) which are mandated and monitored by the Office of the High Commissioner for Human Rights (OHCHR) of the UN. This is followed by an examination of the international mechanisms. Some of the good practices which are available both within and outside the region have also been examined, such as the Inter American Court in the Americas, and the ASEAN initiative in South East Asia.¹ Through this examination, the potential for advancement of similar initiatives within the SAARC mandate have been explored.

National Human Rights Institutions

The Principles relating to the Status of National Institutions,² also known as the Paris Principles, were approved by the UN General Assembly in 1993. The Paris Principles are minimum conditions that must be met for a NHRI to be considered credible by its peer institutions and within the UN system. Under the Paris Principles, NHRIs are required to:

“Protect” human rights, including by receiving, investigating and resolving complaints, mediating conflicts and monitoring activities; and

¹ See for this purpose Annexures A and B.

² Principles relating to the Status of National Institutions, General Assembly Resolution 48/134, 20 December 1993. <http://www.unhchr.ch/html/menu6/2/fs19.htm#annex>

“Promote” human rights, through education, outreach, media, publications, training and capacity building activities, as well as by advising and assisting governments.

The OHCHR has established a mechanism for accreditation of NHRI’s on the basis of their conformity to the basic standards the Paris Principles, as under:

- “a clearly defined and broad-based mandate based on universal human rights standards
- autonomy from the government
- independence guaranteed by legislation or the constitution
- pluralism, including membership that broadly reflects their society
- adequate resources
- adequate powers of investigation”.³

The Bureau of the International Coordinating Committee of National Institutions (ICC) accredits institutions based on their compliance with the Paris Principles as being “A-Status”, “B-Status”, or “C-Status”. An “A-Status” accreditation signifies compliance with the Paris Principles and means that the NHRI is considered credible by the ICC and the international community. “B-Status” accreditation signifies that the NHRI meets some but not all the requirements of the Paris Principles. “C-Status” accreditation signifies that the NHRI is non-compliant. Only “A-Status” NHRIs have the right to participate as voting members within the ICC and to take part in the work of the UN Human Rights Council (HRC).

³ Paris Principles, <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>

The NHRIs, as autonomous bodies, are meant to act as a bridge between the state and the UN treaty bodies and committees, and are therefore encouraged to collaborate with governments in providing reports to the UN treaty bodies, and also advise and facilitate their governments in acting in accordance with the recommendations of the treaty bodies. Naturally, concerns arise over how far the governments concerned are able to exercise control, explicitly or implicitly, over these institutions. The tendency of the NHRIs to provide reports which are in conformity to government positions, rather than independent accounts, is therefore a matter of concern.⁴

As part of the OHCHR led initiative to establish NHRIs, the countries in the SAARC region have also established institutions at the national level to meet the mandate of the Paris Principles. In the present chapter we briefly examine the effectiveness of these institutions and the potential for addressing human rights violations in the border areas.

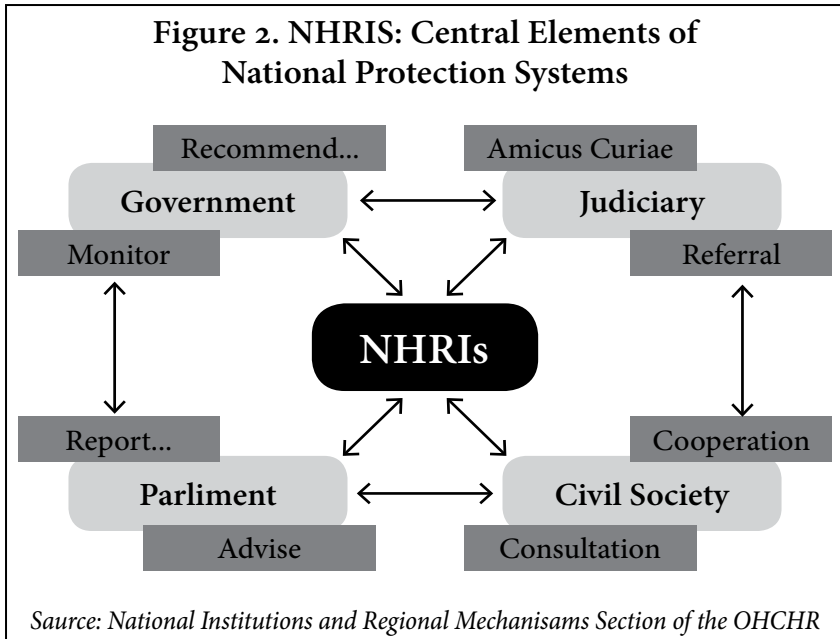
The NHRIs in the SAARC countries under study have no standardized model and have been categorized as follows depending on their structure:

1. National Human Rights Committees
2. Human Rights Ombudsman Institutions
3. Hybrid Institutions
4. Consultative and Advisory Bodies

⁴ United Nations Development Programme. "UNDP-OHCHR Toolkit or collaboration with National Human Rights Institutions" December 2010.

Institutes and Centres.

The inter-relationship of the NHRI with the government is graphically represented below:



The OHCHR plays a significant role in the functioning and support of the NHRIs, which includes the following initiatives:⁵

- Country engagement: supports States to establish or strengthen NHRIs in accordance with the Paris Principles.

⁵ United Nations. “National Human Rights Institutions: History, Principles, Roles and Responsibilities”. New York and Geneva, 2010. Professional Training Series No.4 (Rev. 1), http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

- Leadership: strengthens NHRI capacity to work effectively and independently.
- Interaction with the UN human rights system: Supports an effective interaction between NHRIs and Treaty Bodies, and mechanisms such as Special Procedures and the Universal Periodic Review (UPR).
- Partnership within the UN system: mainstreaming of the work of NHRIs throughout the UN system.

The NHRIs which are able to satisfy the minimum standards set by the Paris Principles, and receive accreditation by the ICC, are permitted to partake in the HRC's work.

In the South Asian region, the NHRIs of the States of Afghanistan, India and Nepal have attained the status of full members of the ICC of National Institutions for the Promotion and Protection of Human Rights (holding A Status Accreditation), while Bangladesh, Maldives and Sri Lanka continue to be Associate Members. The Associate Members or members with B Status accreditation can become eligible for full membership if they demonstrate compliance to the Paris Principles. Pakistan has a newly established National Commission for Human Rights while Bhutan has no NHRI.

Full members having “A” status

The Bonn Agreement⁶ of June 2002 led to the establishment of the **Afghanistan** Independent Human Rights Commission (AIHRC) on the basis of the decree of the Chairman of the Interim Administration. In terms of Article 58 of the Constitution, the AIHRC is premised as a “*constitutionalized, national and independent human rights body in Afghanistan*”.⁷

The Commission consists of nine members or Commissioners, who are appointed by the President for a five year period. The manner of appointment of AIHRC commissioners has in the past raised some concerns, particularly in 2013 when it underwent a review. The UNHCR representative stated that “*if the AIHRC loses its A status accreditation, this should be seen as a reflection on the government’s commitment to human rights and not as a reflection on the AIHRC’s work.*”⁸

From time to time, the AIHRC has been able to raise issues of concern regarding the state of human rights in the country, but its effectiveness remains limited. For instance, in May 2015, the AIHRC voiced its concern regarding the government’s decision to distribute arms among civilians in the provinces, as a method to fight insurgency. The Commission asserted that this move would

⁶ The Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions is referred to as the Bonn Agreement.

⁷ Information retrieved from the Afghanistan Independent Human Rights Commission official website at: <http://www.aihrc.org.af/> on 02 July, 2015.

⁸ Clark, Kate and Kouvo, Savi. 2013. “Dismantling Human Rights in Afghanistan: The AIHRC facing a possible downgrading of status”, <https://www.afghanistan-analysts.org/dismantling-human-rights-in-afghanistan-the-aihrc-facing-a-possible-downgrading-of-status/>

encourage the further violation of human rights.⁹ Given that the density of armed forces to population is among the highest in the world in Afghanistan,¹⁰ particularly in the bordering tribal areas, this is a serious matter. However, as in the past, the Commission's concerns were dismissed and its opinion was not taken into account by government agencies.

Given the kind of serious human rights and security concerns in the country as a whole, it is not surprising that the AIHRC has rarely taken up issues relating to the border areas, where the situation is even more fraught.

The National Human Rights Commission (NHRC) of **Nepal** is an independent, statutory, and autonomous body. Initially established under the Human Rights Commission Act, 1997, the Commission was recognised as a constitutional body in the subsequent Interim Constitution of 2006, and currently exists under the Human Rights Commission Act, 2012.¹¹

The Commission has one Chairman and four other members who are appointed by the Prime Minister upon the recommendation of the Constitutional Council. The budget of the Commission arrives from the government, but it can also receive funds directly from other sources. If the Commission draws the attention of any agency, or official, to a matter of human rights violation, the said agency, or

⁹ Majidi, Tariq. "Human Rights Commission Concerned Over Govt's Move To Arm Civilians." *Tolonews*. May 2015. Retrieved from: <http://www.tolonews.com/en/afghanistan/19662-human-rights-commission-concerned-over-govts-move-to-arm-civilians>

¹⁰ One estimate puts the ratio at 1:73 (Bagchi, Suvojit. "Chhattisgarh seeks record number of Central forces for polls". (Raipur) October 3, 2013.)

¹¹ Information retrieved from the NHRC, Nepal official Website at : http://www.nhrcnepal.org/nhrc_about.html

official must take action accordingly, and inform the Commission. The Commission may also consult with or advise the government.

Ten years after its establishment the NHRC has very little to show in terms of protection of human rights and advocacy. The government has continued to ignore the recommendations of the Commission, and in recent years the politicization of the Commission has attracted great attention. Critics find that the establishment of the NHRC has hardly anything to show in terms of practical achievement.¹² However, despite all the criticism, the Commission has retained its “A” status awarded by the ICC in 2014.

The NHRC of **India** is an autonomous statutory institution which was established under the Protection of Human Rights Act, 1993.¹³

The members of the NHRC of India are appointed on the recommendation of a committee comprising the Prime Minister, Home Minister, Speaker of the Lok Sabha, Deputy Chairperson of Rajya Sabha and leaders of the Opposition in the two houses of Parliament. It is chaired by a retired Chief Justice of the Indian Supreme Court, and two more members are required to be retired judges of the Supreme Court and High Courts. In addition, two members are appointed from among persons having knowledge of, or practical experience in, matters relating to human rights.

¹² Basnet, Gyan. “Nepal Human rights Commission: Defender or Pretender?”. *Foreign Policy Journal*. December 2012, <http://www.foreignpolicyjournal.com/wp-content/uploads/2012/12/121215-Basnet-Nepal-Human-Rights-Commission.pdf>.

¹³ For a detailed review of the NHRC in India, see G.P. Joshi. “National Human Rights Commission- Need for Review”. *Commonwealth Human Rights Initiative*. Delhi. 2004.

An interesting innovation is that the Chairpersons of four National Commissions dealing with specific marginalised groups are ex-officio members, being:

- National Commission for Minorities
- National Commission for Scheduled Castes
- National Commission for Scheduled Tribes, and
- National Commission for Women.

As with other NHRIs, the NHRC of India is only as effective as the members appointed to it. While there have been some exemplary appointees in the past, in recent years the appointment process has invited considerable criticism, primarily for its lack of transparency. It is also unfortunate that the ex-officio members from other National Commissions have not been given a more active role, so that there is little reference to them even in the annual reports.¹⁴

More often than not, complaints are dismissed or disposed of merely on the basis of a simple denial of violations by the state agency concerned, with the NHRC exercising its investigative powers sporadically.¹⁵ Even where findings are made against the state agencies, these are merely recommendatory in nature, and not binding upon the government.

¹⁴ An NGO Report on the Compliance with the Paris Principles by the National Human Rights Commission of India. People's Watch for All India Network of NGOs and Individuals working with National and State Human Rights Institutions (AiNNI). 2011, http://www.peopleswatch.org/dm-documents/HRD/NGO%20Report_Paris%20Principles_NHRC_India.pdf.

¹⁵ Submission By The Commonwealth Human Rights Initiative To The Advisory Committee Created To Review The Human Rights Act 1993.

It is also not surprising that the finances of the NHRC are tightly controlled by the government, through its Ministry of Home Affairs, which is also the ministry in charge of the law enforcement authorities against whom cases of violations are largely filed.

The case-load of the Commission, nevertheless, is very heavy. While it was receiving less than 500 complaints a year at the time of its establishment, today the number of cases has crossed 100,000. Naturally, there are enormous delays in the handling and disposal of complaints.

Most relevant for the purpose of the present examination is the jurisdiction of the NHRC over armed forces and paramilitary forces. Where the armed forces, which include the naval, military and air forces and any other armed forces of the Union, are concerned, the statute provides a special procedure to be followed by the NHRC.¹⁶ In complaints relating to human rights violations by the armed forces the NHRC is limited to seeking a report from the government and making a recommendation, and cannot make any independent

¹⁶ Section 19 of the Protection of Human Rights Act, 1993 states as under:

“19. Procedure with respect to armed forces:

(1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:

(a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

(b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendation to that Government.

(2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

(3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

(4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.”

investigation. Unfortunately, this provision has been interpreted in a manner that, for a long time, the NHRC did not entertain complaints against armed forces personnel at all. Recent efforts to exercise the limited powers under the statute have gradually been abandoned. This seriously curtails the potential role the NHRC in India can play in border areas, where the police and security functions are largely performed by military and paramilitary forces.

The NHRC has also fallen short in the area of planning, and its commitment to prepare a National Human Rights Plan of Action (NHRAP), is yet to be fulfilled. However, the NHRC of India continues to retain its “A” status.

Associate members

The **Bangladesh** Human Rights Commission is a statutory independent institution, which was set up under the National Human Rights Commission Act, 2009.¹⁷ Members of the Commission are appointed by the President of Bangladesh upon the recommendation of a high-ranking Selection Committee, consisting of seven members under the Chairmanship of the Speaker of the Parliament. The members are appointed for a term of five years, up to a maximum of two terms. In reality, however, a majority of the members are part-timers, which hampers the efficiency and professionalism of the Commission.

Although the Commission operates independently of the government and does not require its approval for budgetary allocations, a modicum of indirect control does inhere. This is

¹⁷ Retrieved from The NHRC, Bangladesh website at: <http://www.nhrc.org.bd/about.html> on 3 July, 2015.

because the Commission cannot receive funds directly from a donor, but can only receive these payments indirectly as grants from the government or the local authority. Moreover, the bulk of the funds of the NHRC go towards salaries and remunerations of employees.¹⁸

The Commission conducts jail visits, and visits to areas where human rights violations are reported. It also undertakes training and awareness campaigns. A serious criticism has emerged in recent years is that the role of the Commission has been limited to conducting seminars and symposiums, and writing letters to relevant government authorities.¹⁹

While the Commission has the power to formulate procedural rules, the only rules which have been enacted till date are in relation to the staff. Even these have been considerably watered down in the process of being gazetted through the office of the President.²⁰ The absence of procedural rules has also led to an increased reliance upon the mediation process and ad-hoc procedures.²¹

An analysis of the Annual Reports reveals that the number of complaints taken up by the Commission, and their disposal, has increased over the years. The participation of the NHRC in the UPR of Bangladesh in the United Nations Council in 2012, and

¹⁸ Ain O Salish Kendra (ASK). "NHRC, Bangladesh: Institutional, functional and financial independence need to be strengthened", <http://www.askbd.org/ask/2014/01/15/ask-made-submission-official-capacity-assessment-nhrc/> . 2014.

¹⁹ Ain O Salish Kendra (ASK). "Bangladesh: Still To Prove Itself", <http://www.askbd.org/ask/2013/11/17/bangladesh-prove-itself-chapter-anni-report-2013/> . 2013.

²⁰ Op cit 293

²¹ Majidi, Tariq. "Human Rights Commission Concerned Over Govt's Move To Arm Civilians." *Tolonews*. May 2015, <http://www.tolonews.com/afghanistan/human-rights-commission-concerned-over-govts-move-arm-civilians> .

the conduct of a mock UPR by the Commission, has received great appreciation.²²

However, the Bangladesh NHRC has not responded positively to criticism of its performance by civil society organisations. In 2012, a Human Rights Watch report²³ recommended the disbanding of the Rapid Action Battalion (RAB), and the creation of a new “*non-military unit within the police or a new institution, which puts human rights at its core to lead the fight against crime and terrorism*”. This recommendation echoed the views of many human rights organisations in Bangladesh. Not unexpectedly, the report received strong criticism from the government. What came as a surprise was the criticism from the Chairman of the NHRC that “*a foreign organization like Human Rights Watch cannot recommend disbanding the Rapid Action Battalion*”.²⁴ He further opined that that any report on the human rights situation of Bangladesh should have prior consultation with the NHRC of Bangladesh.²⁵

A matter of concern is that the Commission itself has appeared to limit the full scope of its own power through selective interpretation of the statute. Thus, in cases of extra-judicial killings, and allegations of disappearances, the NHRC has interpreted Section 18 of the

²² Clark, Kate and Kouvo, Savi. “Dismantling Human Rights in Afghanistan: The AIHRC facing a possible downgrading of status.” 2013, <https://www.afghanistan-analysts.org/dismantling-human-rights-in-afghanistan-the-aihrc-facing-a-possible-downgrading-of-status/>

²³ Human Rights Watch. “The Fear Never Leaves Me: Torture, Custodial Deaths, and Unfair Trials after the 2009 Mutiny of the Bangladesh Rifles”. 2012, <https://www.hrw.org/report/2012/07/04/fear-never-leaves-me/torture-custodial-deaths-and-unfair-trials-after-2009-mutiny> .

²⁴ Majidi, Tariq. “Human Rights Commission Concerned Over Govt’s Move To Arm Civilians.” *Tolonews*. May 2015, <http://www.tolonews.com/afghanistan/human-rights-commission-concerned-over-govts-move-arm-civilians>.

²⁵ Clark, Kate and Kouvo, Savi, *op.cit*

Act in a manner which is highly restrictive and does not allow it to investigate these cases.²⁶ It is not surprising, therefore, that the Commission has not taken up contentious issues relating to human rights violations in the border areas, especially where the security forces are involved.

The NHRC of **Sri Lanka** is statutory institution established under the Human Rights Commission of Sri Lanka Act No. 21 of 1996.²⁷ It received constitutional recognition in 2001. Under this statute, five commissioners are appointed by the constitutional council to investigate complaints of violations of fundamental rights.

As with the other NHRIs in the region, the Commission has no powers to enforce its directions and orders, and public authorities often fail to comply with them. According to some civil society observers, the former Rajapaksa Government has particularly marginalized the role of the Sri Lanka NHRC.²⁸

The Commission has played a pro-active role in forwarding a few cases to the Supreme Court regarding deprivation of personal liberty, torture, and inhuman and degrading treatment. In these cases, compensation has been either provided by the state, or the respective government officials.²⁹

²⁶ Majidi, Tariq, *op.cit*

²⁷ Skanthakumar, B (2009). ‘Window Dressing’? The National Human Rights Commission of Sri Lanka http://lawandsocietytrust.org/content_images/publications/documents/nhrc%20report%202009.pdf

²⁸ *Human Rights Watch*. “World Report 2013: Sri Lanka” 2013; also see *Sri Lanka: The National Human Rights Commission – Marionette of the State* in 2013 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, pp202, <https://www.forum-asia.org/?p=16848>

²⁹ Wijegoonawardena, S. “The Human Rights Commission of Sri Lanka” *Asia Pacific Human Rights Information Centre*. Volume 26. December 2013,

Even the three countries where the NHRIs have been awarded an 'A' status, namely, Afghanistan, India, and Nepal, we find the Paris Principles are not being followed in their true spirit. As a result, there continue to be structural constraints upon the powers of the NHRIs. Even where the statutes provide extended powers, the NHRIs are chary of exercising their full power. When it comes to security and armed forces in border areas, with the attendant rhetoric of nationalism and protection of the integrity of borders against the 'enemy', the NHRIs are unable to take effective action. Even assuming they would be able to surmount such constraints, the jurisdiction of each NHRI is limited to the geographical boundaries of the nation-state, and there are no mechanisms for cross-border collaboration or communication between various NHRIs, or any potential space for taking up issues which affect populations at the border areas of two or more countries. Therefore, we must turn to an examination of mechanisms which have cross-border jurisdiction to search for an avenue where the violation of human rights in border areas can be effectively addressed.

Complaints Procedure of the Human Rights Treaty Bodies

Most of the countries in the SAARC region have signed the major international treaties and conventions relating to human rights. However, other than the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the optional protocols of these key conventions have not been signed by any of the countries. This is a matter for concern since the optional protocols recognise the jurisdiction of the Treaty bodies to entertain complaints/petitions with regard to violations of the relevant instrument.

Each human rights instrument has a separate treaty body,³⁰ which has been invested with the responsibility of examining complaints. Broadly, the complaints mechanism allows for three kinds of complaints procedures.

1. Individual Complaint Procedures

The individual complaint procedure is available in exceptional circumstances with respect to a limited number of the treaty bodies. The CCPR, CERD, CAT, CEDAW, CRPD and CED allow petitions from individuals, provided that the concerned State has recognized the competence of the concerned Committee to receive such complaints,³¹ and only where the domestic remedies have been exhausted. A third-party may also file a complaint on behalf of an individual, if the individual has provided written consent, or the petitioner is able to show why such permission cannot be attained.

At times the requirement of non-availability of domestic remedies can become a barrier, as often a domestic remedy may be available only in theory. It is also not a guarantee of redress, as the remedy is available at the discretion of the Committee. In addition, for some

³⁰ The treaty bodies of the key human rights instruments are as under:

- CCPR: Human Rights Committee
- CESCR: Committee on Economic, Social and Cultural Rights
- CERD: Committee of the Elimination of Racial Discrimination
- CEDAW: Committee on the Elimination of Discrimination against Women
- CAT: Committee Against Torture
- SAT: Subcommittee on Prevention of Torture
- CRC: Committee on the Rights of the Child (CRC)
- CMW: Committee on the Migrant Workers (this committee is not yet functional to receive complaints)
- CRPD: Committee on the Rights of People with Disabilities
- CED: Committee on Enforced Disappearances

³¹ Mere signing of the treaties or the optional protocol does not amount to recognition of competence of Committee to receive complaints.

of the Committees, such as the Committee on Migrant Workers, the remedy is not available as yet.

2. Inter-state Complaints

The second procedure available for complaints regarding the violation of rights is the state-to-state complaints procedure. This allows for one state to make complaints to the concerned Committee regarding another state. In order to exercise this procedure, both states need to have signed and ratified the optional protocol in this regard.

The challenge in such procedures is not just that it is only the state which can file complaints (which could result in a likelihood of a bias or exclusion of certain sections of the society). The problem is obvious as this procedure has never been used, and the likelihood of its use remains low due to the political repercussions of such a complaint. As such, the efficacy of this procedure remains untested.

3. Inquiries

Under this procedure, the Committee may itself inquire into a matter that it feels is of grave concern, when it is brought to its notice by a reliable source. Like other procedures above, the exercise of this procedure is also subject to the states' recognition of competence of the Committee to take such action.

Naturally, whether a matter is grave enough to invite its intervention remains a matter of subjective determination for the Committee, as is the precise definition of a "reliable source".

All the three procedures described above are only available in special circumstances with conditions that are difficult to satisfy. Vulnerable

sections of society may find the procedural aspects of making such complaints daunting. For instance, the complaints need to be written in a prescribed format, using a UN working language. Keeping in mind that many sections of people in the SAARC countries have poor literacy rates, this could be a challenge, even if the language barrier is surmounted.

The Table below summarises the position with regard to the ratification of the key international instruments and the relevant optional protocols for the South Asian countries.

Table III: Ratification/ accession by SAARC countries of major international instruments on human rights

Country	Afghanistan	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
CERD	1983	1979	* (S - 1973)	1968	1984	1971	1966	1982
ICCPR	1953	2000	N	1979	1906	1991	2010	1980
ICCPR-OP	N	N	N	N	2006	1991	N	1997
ICCPR-OP ₂	N	N	N	N	N	1998	N	N
CESCR	1983	1998	N	1979	2006	1991	2008	1980
CESCR-OP	N	N	N	N	* (S - 2011)	N	N	N
CEDAW	2003	1984	1981	1993	1993	1991	1996	1981
CEDAW-OP	N	2000	N	N	2006	2007	N	2002
CAT	1987	1998	N	1997	2004	1991	* (S - 2003)	1994
CAT-OP	N	N	N	N	2006	N	N	N
CMW	N	2011	N	N	N	N	N	1996

Country	Afghanistan	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
CED	N	N	N	2007	2002	N	N	N
CRPD	2012	2007	* (s - 2010)	2007	2010	2010	2011	* (s - 2007)
CRPD-OP	2012	2008	N	N	N	2010	N	N
CRC	1994	1990	1990	1992	1991	1990	1990	1991
CRC-OP(AC)	2003	2000	2009	2005	2004	2007	* (S - 2007)	2000
CRC- OP (IC)	N	N	N	N	* (S - 2002)	N	N	N
CRC- OP (SC)	N	2000	2009	2005	2002	2006	2011	2004
ICC- Rome Statute	2003	2010	N	N	2011	N	N	N

Legend: The figures indicate the date of ratification; * = signed but not ratified; CERD= Convention on Elimination of Racial Discrimination; ICCPR= International Covenant on Civil and Political Rights; ICESCR= International Covenant on Economic Social and Cultural Rights; CEDAW= Convention on the Elimination of all Forms of Discrimination Against Women; CAT=Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); CMW=International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; CED=International Convention for the Protection of All Persons from Enforced Disappearance; CRPD=Convention on the Rights of Persons with Disabilities; CRC=Convention on the Rights of the Child; ICC=International Criminal Court; OP=Optional Protocol; AC=on the involvement of children in armed conflict; IC= a communications procedure; SC= on sale of children, child prostitution and child pornography.

Even a cursory glance at the table reveals that most countries have, while ratifying the international instrument, refused to sign and ratify the optional protocol which would make them subject to the full operation of the international instrument and the treaty body concerned. The Optional Protocols to the ICCPR have been ratified by Maldives and Nepal, while Afghanistan, Bangladesh, Pakistan, Bhutan, Sri Lanka and India have not signed even the first Optional Protocol. The Optional Protocol to the ICESR has not been ratified by any of the SAARC countries.

It is also a matter of concern that while all of the Americas, most of Europe, and a considerable number of countries in Africa have signed the Rome Statute of the International Criminal Court, amongst the SAARC countries only three countries are party to the Statute, namely, Bangladesh, Afghanistan and Maldives. Accordingly, serious crimes relating to war and war-like situations, such as genocide, crimes against humanity, war crimes and crimes of aggression, remain outside the purview of international mechanisms.

Reporting procedures

The result is that most of the countries are only accountable to the treaty bodies to the limited extent of providing periodic reports. Each Convention requires that an initial report be submitted within a year of ratification, and thereafter that periodic reports be submitted at regular intervals. The periodicity of the reports to be provided to different treaty bodies is given in the table below.

Table IV: Periodicity of reporting under different international instruments

TREATY	PERIODICITY OF STATE REPORTS	
	INITIAL REPORT	PERIODIC REPORTS
ICERD	1 Year	Every 2 years (but in practice generally every 4 years as two combined periodic reports)
ICESCR	2 Years	Every 5 Years
ICCPR	1 Year	Generally every 4 years, but the HRC varies the periodicity in accordance with its follow-up procedure
CEDAW	1 Year	Every 4 years, or whenever requested by CEDAW
CAT	1 Year	Every 4 years, but varies due date for next periodic report
CRC	2 Years	Every 5 years
CMW	1 Year	Every 5 years, and whenever requested by CMW
CRC-OPSC	2 Years	Every 5 years or with next CRC report
CRC-OPAC	2 Years	Every 5 years or with next CRC report
CRPD	2 Years	Every 4 years

Source: The International Service for Human Rights. 2010. "Simple Guide to the UN Treaty Bodies"

These reporting procedures are important mechanisms for ensuring accountability of state parties to their international human rights obligations, especially since in recent years many of the treaty bodies have encouraged the submission of alternative reports by civil society

organisations and NHRIs. Unfortunately, there are continuous and endemic delays in the submission of these periodic reports by most SAARC countries, to the extent that the Treaty bodies have been forced to accept severely delayed reports, and even combined reports for two or more reporting periods. For instance, Pakistan submitted its first report to the Committee on Economic, Social and Cultural Rights, due in 1979, with a delay of 11 years in 1990. Bangladesh submitted its report to the Human Rights Committee, due in 2001, in the year 2015. Similarly, Afghanistan submitted its second ICERD report due in 1984 in 1990, and India took over 16 years to submit its CEDAW report due in 1994. Maldives and Nepal each took 10 years to submit their CAT report, while Bhutan took 10 years to submit its CRC report, and Sri Lanka submitted a report to the ICCPR after a delay of 7 years.³²

Special Procedures

It is apparent that serious structural limitations prevent UN treaty bodies from enforcing compliance with international human rights standards and obligations. The establishment of Special Procedures and Special Rapporteurs under the OHCHR is a recent initiative that attempts to address some of these limitations.

The special procedures refer to a range of varying procedures established with respect to particular themes or human rights issues, or situations in countries. The special procedures, unlike other UN mechanisms, do not require the state parties to be party to any human

³² The OHCHR website provides information according to the country from the treaty body database which can be accessed at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx.

rights treaty. As of 27th March 2015, there are 41 thematic mandates and 14 country mandates, which have the following functions:³³

- **analyse** the relevant thematic issue or country situation on behalf of the international community;
- **advise** on the measures which should be taken by the Government(s) concerned and other relevant actors;
- **alert** UN organs and agencies and the international community in general to the need to address specific situations and issues. In this regard they have a role in providing “early warning” and encouraging preventive measures;
- **advocate** on behalf of the victims of violations through measures such as requesting urgent action by relevant States, and calling upon Governments to respond to specific allegations of human rights violations and provide redress;
- **activate** and mobilize the international and national communities to address particular human rights issues and to encourage cooperation among Governments, civil society and inter-governmental organisations.

There are two kinds of special procedures. **Special Rapporteurs** are independent experts which are mandated to examine a particular issue. There are also **Working Groups**, which are a group of members, one from each of the five UN Regional groupings.³⁴ Members function in their individual capacities for a term of up to six years, and are not

³³ Manual of the United Nations Human Rights Special Procedures. 2006.

³⁴ The United Nations regional groups are African Group, Asia-Pacific Group, Latin America and the Caribbean Group, Eastern Europe Group, and the Western European and others Group.

remunerated. The special rapporteurs coordinate with the OHCHR to report annually to the HRC, as well as to the General Assembly.

The initiatives and interventions which the Special Procedures can take are as follows:

1. **Country visits** - where either at the invitation of the state, or a “standing invitation”³⁵ the Special Rapporteur analyses the human rights situation of the country. Amongst the SAARC Countries, India is the only country to have extended a standing invitation.
2. **Communications** – refers to sending appeals or letters to the respective state, or in exceptional circumstances to non-state actors, on receiving information of a human rights violation. The communication seeks clarifications regarding specific situations, and subsequent action taken, when required. An annual record of such communications is maintained.
3. **Working visits**- consist of mediation, as well as establishing best practices, and working with partners to raise awareness.
4. **Others** such as preparation of studies, establishing guidelines, or expert consultations, seminars and conferences.

Apart from reporting on these activities and interactions with the government, the Special Procedures also conduct follow-up and interactions with other international and regional human

³⁵ By extending a standing invitation, States announce that they will always accept requests to visit from all special procedures. As of 1 June 2015 there are 110 members states which have extended a standing invitation to thematic special procedures.

rights mechanisms. Being a relatively new mechanism, the special procedures are slowly gaining traction in the South Asian regions. However, even at this early stage the impact is significant. For instance, the country visit of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Christof Heyns, to India in March, 2012 became a rallying point for victims groups and civil society organisations to raise awareness regarding the egregious practice of ‘fake encounters’. The report of the country visit has been widely broadcast, and has been placed before the Supreme Court in pending litigations on the issue, where it has been cited with approval.³⁶

Universal Periodic Review

The adoption of the UPR mechanism by the UN in 2006³⁷ created a significant opportunity and space to hold governments accountable to their national and international human rights commitments. The UPR is a unique peer review process of the HRC which involves a review of the human rights records of all 193 UN member states once every four and a half years. The reviews are conducted by the UPR Working Group which consists of the 47 members of the HRC. However, any UN member state can take part in the discussion/dialogue with the reviewed states. Each state review is assisted by groups of three States, known as “troikas”, who serve as rapporteurs.³⁸

³⁶ Order dt. 4th January, 2013, in Writ Petition (Criminal) No.129 of 2012, *Extra Judicial Execution Families Association (EEVFAM) & Anr. vs. Union of India & Anr.* Supreme Court of India.

³⁷ Resolution adopted by the General Assembly, 60/251. Human Rights Council, 3 April 2006, A/RES/60/251.

³⁸ Basic facts about UPR. Accessed on 25 August, 2016 at <http://ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>

The ultimate goal of the UPR is an improvement of the human rights situation in every country with significant consequences for people around the globe. The UPR is designed to initiate, support, and expand the promotion and protection of human rights on the ground. To achieve this, the UPR involves assessing states' human rights records and addressing human rights violations wherever they occur.³⁹

During the course of the UPR, the member states give recommendations to the state under review, leaving it for the country under review to accept or reject the recommendations offered. During the first cycle, all UN member states have been reviewed. The second cycle, which officially started in May 2012 with the 13th session of the UPR Working Group, will see 42 states reviewed each year. The reviews take place during the sessions of the UPR Working Group which meets three times a year.

The documents on which the reviews are based are:⁴⁰

1. information provided by the State under review, which can take the form of a “national report”;
2. information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities;

³⁹ *ibid*

⁴⁰ Universal Periodic Review (UPR), IAS Preparation Online accessed on 25 August 2016 at <https://iaspreparationonline.com/2013/01/31/universal-periodic-review-upr/>

3. information from other stakeholders⁴¹ including NHRIs and non-governmental organizations.

On the basis of these documents, the UPR assesses the extent to which states respect their obligations set out in the various international instruments relating to human rights to which the state is a party, and also voluntary pledges and commitments made. International humanitarian law obligations are also considered.

Following the review by the Working Group, an “outcome report” is prepared by the troika with the involvement of the state under review and assistance from the OHCHR, which provides a summary of the actual discussion, and the recommendations. The report then has to be adopted at a plenary session of the HRC. During the plenary session, the state under review can reply to questions and issues that were not sufficiently addressed during the Working Group and respond to recommendations that were raised by peer states during the review.

The state has the primary responsibility to implement the recommendations contained in the final outcome, and during the second review the state is expected to provide information on what they have been doing to implement the recommendations made during the first review as well as on any developments in the field of human rights. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with the country concerned.⁴²

⁴¹ OHCHR has released “Technical guidelines for the submission of stakeholders”, <http://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf> .

⁴² Basic facts about UPR. Accessed on 25 August, 2016 at <http://ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>

If necessary, the HRC can address cases where States are not cooperating, and decide on the measures it would need to take in case of persistent non-cooperation by a State with the UPR.

A detailed examination of the UPR process is beyond the scope of the present study. It would be useful, however, to look at the example of India to gain an insight into this process. India's first UPR took place in 2008. At its second UPR in 2012, India received 169 recommendations, and the Indian Government appeared before the HRC to respond to these recommendations.

The Government of India's response reflected a pattern of accepting recommendations that were generalized and broadly worded, while avoiding those recommendations which require specific and targeted commitments. A number of key recommendations, therefore, were not accepted by the government. According to a press release issued shortly thereafter by a civil society organisation:

“The blatant refusal of the Government to adopt any recommendation to review or repeal the Armed Forces (Special Powers) Act, which is a cause of systematic human rights violations, is very disturbing. Despite multiple recommendations that were made by the Special Rapporteur on extra judicial, summary and arbitrary executions who visited India in March this year, and by the Council members during the second UPR, the government has failed to accept any recommendations to curb the impunity of security forces and bring the perpetrators of human rights violations to justice.”⁴³

⁴³ Working Group on Human Rights in India and the UN (WGHR). “Comprehensive review of India's human rights record at the UN Human Rights Council: Glaring Omissions, Some Progress”. Press Release dated 21.9.2012, <http://wghr.org/wp-content/uploads/2013/07/WGHR-UPR-press-release-21.09.2012.pdf>.

Needless to say, the failure to address impunity of security forces under special laws has important implications for human rights excesses in border areas in particular.

Unfortunately, during the UPR of Sri Lanka in 2012, the Sri Lankan government rejected 98 recommendations made to it, including those regarding accountability of security forces (made by Canada).⁴⁴ Sri Lanka has time and again rejected the UPR recommendations. In the first periodic review it rejected several recommendations including one to establish an independent human rights monitoring mechanism.⁴⁵ It also rejected the recommendation to combat impunity, and refused to ratify the Rome Statute.⁴⁶

The UPR process, by its very voluntary nature, has tremendous potential for ensuring compliance by the state parties, even while it is compelled to accept the pace of advancement set by the country itself. Whether the UPR process has the potential to advance cooperation between South Asian state parties on the sensitive issues of human rights violations in border areas, as highlighted in the present study, still remains to be fully examined.

⁴⁴ Rutnam, Easwaran. "Lanka rejects 98 recommendations at UPR". *The Sunday Leader*. Retrieved from: <http://www.thesundayleader.lk/2012/11/05/lanka-rejects-100-of-210-recommendations-at-upr/>

⁴⁵ Amnesty International. "Sri Lanka: Eighth Session of the UN Human Rights Council: Review of Sri Lanka under the Universal Periodic Review: Amnesty International's reflections on the outcome". June 2008 AI Index: ASA 37/023/2008, <https://www.amnesty.org/en/documents/asa37/023/2008/en/>

⁴⁶ Amnesty International. "Submission to the UN Universal Periodic Review 14th Session of the UPR Working Group". April 2012. Index: ASA 37/008/2012.

South Asian Association for Regional Cooperation

SAARC was formalized in 1985 by adopting the SAARC Charter, and therefore is one of the most recent regional mechanisms in place. SAARC was established with an aim to promote the welfare of the citizens of the various states in the South Asian region through mutual cooperation in areas which require development. Even though SAARC has been effective to a certain extent at multilateral level, Article X(2) of its Charter totally constraints it from engaging in bilateral issues.⁴⁷

Conventions of the SAARC countries deal with multilateral issues such as drug trafficking, human trafficking, terrorism, and welfare of children. The SAARC conventions on these issues are:

- SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution
- Convention on Promotion of Welfare of Children
- Convention on Mutual Assistance on Criminal Matters, July 2008
- SAARC Convention on Narcotics Drugs
- SAARC Regional Convention on Suppression of Terrorism

The SAARC Social Charter calls for “promotion of welfare of people”, and endeavours to target social development and economic growth through focusing on health, food security, child development, and equality for women. None of the treaty obligations at the level of SAARC, however, deal squarely and directly with the core issue of human rights.

⁴⁷ SAARC Charter, <http://saarc-sec.org/SAARC-Charter/5/>

Unfortunately, even though most of the state parties in the South Asian region have common challenges and concerns, the requisite level of cooperation and collaboration, as envisaged at the time of establishment of the Association, has not been forthcoming. The SAARC has been beset by numerous sub-regional conflicts, and perhaps a lack of commitment on the part of the respective state parties. An unfortunate result has been the proliferation of human rights violations.

The regional conventions have certainly dealt with some important issues which require collaborative efforts between the state parties. The SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution is an example of one such positive initiative. Unfortunately, like many other initiatives, the convention against trafficking relies heavily on existing legal mechanisms within the states, and the assumption of mutual assistance and cooperation of these domestic institutions. Thus Article V of the Convention against trafficking states:

“In trying offences under this Convention, judicial authorities in Member States shall ensure that the confidentiality of the child and women victims is maintained and that they are provided appropriate counseling and legal assistance.”

Further Article VI places an obligation on the state parties to provide each other with ‘*legal assistance in respect of investigations, inquiries, trials or other proceedings*’ with regard to offences under the Convention, and, as if in recognition of the reality that on occasion such cooperation may not be forthcoming, requires the nation states to provide ‘reasons’ where they are not able to provide prompt

support.⁴⁸ Without additional mechanisms, investigative resources, special procedures and subsidiary bodies, it is no surprise that these efforts have not resulted in a substantive change.

In theory, the remedies under the UN treaty bodies and conventions on various human rights issues are available to the SAARC countries in case of violations. However, in practice the situation is more complicated. While the conventions endeavour to recognise rights, such as rehabilitation in the case of trafficking, the lack of regional mechanisms for redress in case of violation of such rights means that there is no practical protection for the individuals.

In most matters relating to human rights, there continues to be excessive reliance upon the international treaty bodies and conventions for the protection of these rights and redressal for their violation. Since most of the state parties have not signed the optional protocols giving adjudicatory power to the treaty bodies, and some have not even ratified the core UN conventions on human rights, this is a serious gap. There continues to be a lack of a consolidated uniform effort to develop committees which could deal with the most basic human rights violations.

⁴⁸ Article VI (1) of the SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution states as under:

“(1) The State Parties to the Convention shall grant to each other the widest measure of mutual legal assistance in respect of investigations, inquiries, trials or other proceedings in the requesting State in respect of offences under this Convention.

.....

(2.) Requests for assistance shall be executed promptly in accordance with their national laws and in the manner requested by the Requesting State. In the event that the Requested State is not able to comply in whole or in part with a request for assistance or decides to postpone execution it shall promptly inform the Requesting State and shall give reasons for the same.”

Even the limited number of conventions which have been ratified by the state parties are timid in their formulation, in that many merely reiterate the international treaty on the relevant subject. For instance, the SAARC Convention on the Promotion of the Welfare Children simply reiterates its commitment to the UN Convention on the Rights of the Child.⁴⁹ Given that several of the states have refrained from signing these UN Conventions, such regional conventions are not binding.

A comparison between the ASEAN mechanism and the Inter American mechanism reveals that the former is at a nascent stage of development and has a long way to go before it meets some of the basic requirements of a viable regional mechanism for the redressal of human rights violations (see Annexures A and B). The mechanism available at the level of SAARC, however, does not even match the limited achievements of the ASEAN mechanism, and is very far indeed from the kind of responsive and responsible mechanism which is essential to meet the human rights needs of the region, in the nature of the Inter American system.

Clearly, a regional mechanism such as the European Commission or the Organisation of American States, both of which have proven their efficacy, is required in the region to address human rights concerns. Where these human rights violations are taking place in border areas, and with respect to populations in the border areas, the absence of a regional mechanism which has authority over nation states across borders has led to grave consequences.

⁴⁹ Article III (3) the SAARC Convention on the Promotion on the Welfare of Children states as under:

“The State Parties consider the UN Convention on the Rights of the Child as a comprehensive international instrument concerning the rights and well being of the child and shall, therefore, reiterate their commitment to implement it.”

VII

Preliminary Recommendations and Conclusion

The present study demonstrates that the availability of information is uneven across different countries, a natural result of the location of this writer and the research team in India. Therefore, for instance, relevant statutory and constitutional provisions, as well as court decisions from different countries were not readily available. On certain issues information was not available at all. It would be appropriate if the study is examined in-depth by civil society representatives from different countries in the SAARC region and recommendations for action emerge from a consultative process which would benefit from the experiences of experts.

Nevertheless, the study demonstrates certain cross-cutting aspects of human rights violations in border areas in this region, and based on these emerging trends, a few preliminary recommendations are being made below. These can be treated as starting points to begin such discussion.

1. *Cross border conversations* between civil society organisations to draw attention to human rights violations which occur in border areas, and an attempt to challenge the received wisdom that protection of national borders, by any means including force and violence, is acceptable. The language and meaning of human rights must permeate popular discourse

through a special focus and also joint initiatives which transcend borders themselves. One initiative where such conversations have already begun is the People's SAARC; these can be strengthened. Another initiative is the Justice Project, where issues of human rights and justice in SAARC countries are under scrutiny. While human rights violations in border areas are not an area of focus at present, it can be something these networks take up in future.

2. *Holding security forces accountable for violations:* civil society organisations in every country in the region are engaged in this challenging task. This study highlights that there are parallels in the law and legal framework in these countries, due to their shared historical development. However, different strategies have been used with varying results in challenging the status quo and strengthening the rule of law. It is important that these strategies and experiences are shared, in the hope that they can enable civil society organisations to explore new approaches if they have reached dead-ends.
3. *Holding nation states accountable to international human rights standards:* The study reveals serious gaps in legal and policy frameworks to hold nation-states accountable to international standards of human rights, particularly with regard to border areas. Overcoming these shortcomings will require a multiplicity of efforts.
 - a. Failure of most of the countries in the region to sign the optional protocols, and thereby subject themselves to the international dispute redressal mechanisms,

is a glaring gap, especially with regard to violations committed by security forces in the border areas. Renewed efforts are required to ensure these optional protocols are acceded to.

- b. Special laws which grant immunity/ protection from prosecution to security forces for violations in border areas need to be revisited. While these laws may be important, where violations occur in border areas, the failure of the legal framework is intense. The generally accepted mind-set that borders must be protected at any cost, including use of force, finds no counter-narrative within the normative framework of the laws applicable in the areas, since these laws seem to reinforce this worldview rather than challenge it.
- c. Another systemic failure results from the restricted jurisdiction of civilian courts. By and large, it is the special military courts which have overriding jurisdiction in such cases. Even otherwise, the jurisdiction of courts is restricted to geographical areas, and most certainly courts on one side of an international border have no jurisdiction over offences committed on the other side of the border, albeit against citizens over which it has such power. This is a real conundrum which needs to be addressed, especially in light of the fact that international dispute redressal mechanisms are not available.
- d. Enactment of special protective laws at the national level is important, especially in areas where there are clear gaps as pointed out by the present study, such as

in the case of refugee law. Towards this end, a draft legislation which was proposed several years ago by civil society organisations, has been included at Annexure C. This draft legislation can be the starting point for advocacy in the region in favour of such legislations.

- e. The development of a Regional Protocol for the protection of rights of refugees, migrants, internally displaced and stateless persons had been suggested earlier (see Annexure D below). A protocol which specifically acknowledges the historical dynamics as well as the nature of human rights violations in the SAARC region would act as a normative standard for governments to which they can be held accountable by civil society, judiciary, international agencies and NHRIs.
4. *Regional human rights mechanism:* A regional human rights mechanism does not exist in SAARC. A regional mechanism to address human rights violations, similar to the Inter-American Commission and Court of Human Rights has been called for by the regional civil society. However, initiatives made in this direction¹ have not received the necessary traction.
 5. *Strengthening the NHRIs and expanding their mandate:* It is important to ensure that NHRIs are able to function as autonomous bodies within countries based on the

¹ See, for instance, “KATHMANDU STATEMENT – 2011”- Outcome Document of the Second Sub-Regional Workshop on Human Rights Mechanism in South Asia, 25-26 July 2011, Kathmandu, Nepal.

Paris Principles. It is also crucial to ensure that the curtailment of their jurisdiction, whether by statute or due to geographical boundaries, is eased. Collaborative joint missions/consultations of NHRIs are necessary to ensure that human rights violations of the nature described in the present study are addressed.

6. *The role of the international community:* Civil society organisations are struggling with the refusal of governments to accede to optional protocols of a host of human rights conventions and their consequent refusal to be subject to the jurisdiction of international dispute redressal mechanisms. While pressure on governments to accept these optional protocols must continue, the UN Special Procedures can be activated to address the specific violations in the border areas. This could be done through the appointment of a Special Rapporteur tasked with examining human rights violations in border areas, taking up these issues at the UPR, and so on.

These are only broad and preliminary recommendations, and it is important that more nuanced and targeted initiatives emerge through a process of examination and discussion.

The present report commenced with a brief analysis of the *Feluni Khatun case*, where a young girl of sixteen years, travelling across the border from India to Bangladesh for her marriage, was shot dead by the BSF and left to die a gruesome death entangled on the fence. While a security force personnel was indicted and prosecuted for the offence, perhaps in response to pressure from the international press, he was eventually acquitted. The various threads of violation which intersect in this one incident have been examined in detail in this

study. What emerges clearly is that while incidents of human rights violations in the border areas may not have the same immediate intensity of the *Felani Khatun case*, nor attain such notoriety, they constitute a largely neglected fabric of human tragedy that continues to unfold. A large number of people continue to live within a cloud of insecurity and threat of violence which is unrelenting and oppressive, and often manifests in acts of grave brutality that remain unaddressed by existing institutions.

In conclusion, it is clear that there are some basic steps which need to be initiated rapidly, even as a multi-pronged approach is pursued to ensure that such tragedies, which are manifold and ongoing, can one day become a thing of the past.

ANNEXURE A

A Brief Note on the Inter-American Mechanisms for Protection of Human Rights

The OAS or the Organisation of American States is governed by the Charter of the OAS, which is a treaty creating the OAS which was to “put into practice the principles on which it is founded, and to fulfill its regional obligations under the Charter of the United Nations”.¹ It is also governed by the American Convention of Human Rights, which aims “to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.”²

The Inter-American system comprises of two key bodies, namely, the Inter-American Commission of Human Rights (‘the Commission’), and the Inter-American Court of Human Rights (‘the Court’). Both these bodies are empowered to examine the violations by member states of the conventions that govern it. The Commission and Court are charged with interpreting and applying a number of regional human rights instruments, which include the:³

- American Declaration of the Rights and Duties of Man
- American Convention on Human Rights

¹ Article 2, Charter of OAS, http://www.tjssl.edu/slomansonb/3.5_OASChart.pdf

² Preamble, American Convention of Human Rights, http://www.hrcr.org/docs/American_Convention/oashr2.html

³ International Justice Resource Center. Accessed on 25 August 2016 at <http://www.ijrcenter.org/regional/inter-american-system/>

- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty
- Inter-American Convention to Prevent and Punish Torture
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem do Para”
- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities

Additionally, the following documents guide the Court and Commission’s interpretation of the above instruments:

- Declaration of Principles on Freedom of Expression
- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas
- Inter-American Democratic Charter

The Inter-American Commission of Human Rights

The Commission monitors the human rights situation in all of the 35 countries of the American continents. The Commission has seven ranked officers from various states known as Commissioners

who serve for a period of four years, and may be re-elected only once. To be elected the person must be “of high moral character and recognized competence in the field of human rights”⁴ It is also required that the Commissioners must be from different states, and that no one state can have more than one Commissioner serving at a given time. The Commissioners serve in a personal capacity, and are not to be viewed as representing their states. Nevertheless, in case a matter of their home country is to be considered, the concerned Commissioner must refrain from participation.

The Commission also has Special Rapporteurs who work on thematic areas of work of the Commission. Thematic rapporteurships are usually overseen by one of the seven Commissioners, who may include the account of the rapporteur into their reports.

The Commission meets several times a year and monitors the human rights practices of the member states, and publishes special reports, including annual reports, conducts country visits, facilitates dialogue, and provides suggestions in matters of human rights violations.

Importantly, the Commission also receives complaints regarding human rights violations, in the form of petitions. The petitions may be submitted by individuals or groups, such as NGOs (recognized by the respective Member State). Petitions can also be filed on behalf of another person, either with the express permission of the individual, or citing reasons why the individual cannot submit the petition personally, and their permission cannot be obtained. The petition must be submitted in the standard form, in the official language of the respondent country.

⁴ Article 34, American Convention of Human Rights, <http://www.refworld.org/docid/3ae6b36510.html>

The conditions which must be satisfied for the purpose of filing a petition are similar to those of other international committees, as under:

- The petitioner must have exhausted domestic remedies in accordance with general principles of international law.
- The petition should be submitted within a period of 6 months from the date on which the victim of the alleged violation was notified of the final domestic judgment in his case.

The latter requirement, however, does not prevent the admissibility of a petition if it can be shown that domestic remedies do not provide for adequate due process, effective access to those remedies was denied, or there has been undue delay in the decision on those remedies. The rules of procedure of the Commission provide that the burden of demonstrating the non-exhaustion of domestic remedies by the victim shall be on the respondent government.⁵

Where a particular matter has previously been decided by other international dispute settlement mechanisms, such as treaty bodies of the United Nations, the Commission cannot take up such issues.

Upon receipt of the petition, the Commission also sends the same to the respondent state, which submits its reply, and thereafter an opportunity is given to the petitioner to comment upon the reply.⁶

Where the Commission finds that there may be danger to an individual or group of individuals in a particular matter, the

⁵ "Inter-American Mechanisms". *Redress*. Retrieved on August 10, 2015 from: <http://www.redress.org/regional-human-rights-mechanisms/inter-american-mechanisms>

⁶ *Ibid.*

Commission may allow a request for “precautionary measures” as an interim measure. For this purpose, an application must be submitted enumerating the risks, and must mention if the state is aware of such risks, and if any measures have subsequently been taken.

The Commission has the option of facilitating a “friendly settlement” between the parties. After considering both sides of the matter, the Commission prepares a report with its findings. The Commission also has the option of presenting the case to the Court (see below), and also request the Court to order “provisional measures” in apt situations, where there is danger to a person or persons.

The Inter-American Court of Human Rights

The Inter-American Court of Human Rights is an autonomous judicial institution with advisory, as well as adjudicatory jurisdiction. The advisory jurisdiction is available to all members of the Inter-American States, and not just those who have ratified the convention. Therefore, as part of its advisory function any member state of the Organization may consult the Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American states. The Court may also, at the request of any member state of the Organization, issue an opinion on the compatibility of any of its domestic laws with the aforementioned international instruments.⁷

The adjudicatory jurisdiction of the Court extends to those state parties which have specifically recognized the said jurisdiction by a declaration, and mere ratification of the Convention does not mean a recognition of adjudicatory jurisdiction of the Court. Thus, out of

⁷ See Article 64 of the American Convention of Human Rights. The right of consultation also extends to the organs listed in Chapter X of the OAS Charter.

the 35 countries governed by the Convention, only 20 countries are subject to the jurisdiction of the Court.⁸ In addition, some of the states who had ratified the Convention, subsequently denounced it⁹ thereby excluding the jurisdiction of the Court as well.

The Court, like the Commission, has seven judges from seven different States. Each judge is elected for a term of six years, which can be renewed for another term of six years.

The Court receives cases for adjudication in several different ways. One mode is through reference by the Commission, of cases which it is unable to resolve. Concerned states may also approach the Court to exercise its jurisdiction in specific cases. It is important to note that individuals, organizations, or members of civil society cannot approach the Court directly. Only if a specific matter is forwarded by the Commission or their respective country can the Court take it up.

The Court is empowered to issue “provisional measures” in the interim, such as for protection of persons who are in danger, including witnesses. The final adjudication of the Court may include directions for pecuniary and non-pecuniary reparations. The Court, however, cannot establish individual guilt.

⁸ The following countries have signed the Convention, but do not fall under the Court’s jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Dominica, Jamaica, and Grenada.

⁹ The States of Trinidad & Tobago and Venezuela had ratified the Convention, but have denounced it in 1998 and 2012 respectively. The State of Peru had also desired to denounce the mechanism, but has not followed the prescribed procedure of denunciation.

During the initial years, the Court primarily played an advisory role, and it was only in 1986 that it began exercising its adjudicatory jurisdiction to address a variety of contentious issues. Since then, the Court has not only adjudicated on matters relating to the Inter-American Convention, but also on ancillary agreements, and a variety of human rights issues ranging from extrajudicial executions and enforced disappearances, to rights of labour, land rights, and freedom of speech and expression.

A significant critique of the Inter-American Court has been that it has several procedural and structural weaknesses, and its functioning is infrequent. More serious, however, is an absence of guidelines or standards for referral of cases for adjudication by the Commission to the Court, making it an arbitrary procedure. The Commission also faces an additional challenge in that it must take an objective decision whether to refer a case to the Court, and then also represent the victim before the Court.¹⁰

The Court has been criticized for its politicization, which is a key reason why the Convention itself has been denounced by Trinidad and Tobago. Some of the decisions of the Court have also been highly criticized, such as the *Mapiripán Massacre case* from Colombia.¹¹

¹⁰ Redress. "Inter-American Mechanisms". Retrieved on August 10, 2015 from: <http://www.redress.org/regional-human-rights-mechanisms/inter-american-mechanisms>

¹¹ Inter-American Court of Human Rights. September 15, 2005. "Mapiripán Massacre" v. Colombia.

This case relates to a massacre committed by an outlawed paramilitary force of Colombia from July 15-20, 1997 where several people (number known, approximately 49) were killed by beheading, dismembering, including children, and then thrown into the river. Several other civilians were also kidnapped. The Colombian Government admitted to violating Articles 4 and 5 of the American Convention of Human Rights by acts of omission by the military who failed to stop the massacre. Also violated was Article 19 of the Convention, as the Colombian government failed to protect

There can be no doubt, however, that the Inter-American system for redressal of human rights violations has played a critical role in the advancement and protection of human rights in the region, through turbulent times and many political and socio-economic upheavals.

It is important to point out that the Court and Commission's human rights promotion work is complemented by the Inter-American Institute of Human Rights (or 'IIDH'), an autonomous research and educational institution based in San José, Costa Rica.¹² The Institute provides free online courses on various human rights topics, publishes numerous books, operates a digital library, moderates a discussion listserv, and organizes seminars and workshops for civil society throughout the Americas. In addition to its online resources, the Institute is open to visitors seeking research assistance, use of the physical library, or to purchase publications. This is an important initiative to facilitate and enable the use of the Inter-American system to its full potential for the advancement and protection of human rights.

the rights of the citizens. The Inter-American Court ordered a full investigation to identify the perpetrators, as well as unknown victims. Additionally, the victims and their families were to be compensated and programmes be put into place to educate the members of the armed forces on matters of human rights and humanitarian law.

¹² Hauser Global Law School Programme. Accessed on 25 August, 2016 http://www.nyulawglobal.org/globalex/Inter_American_Human_Rights1.html

ANNEXURE B

Short Note on ASEAN Mechanisms with Reference to Human Rights

The Association of South East Asian Nations (ASEAN) is an intergovernmental regional organization which has established a regional human rights system, for the ten member states of South-East Asia, including Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

ASEAN was established with the 1967 ASEAN Declaration.¹³ Also known as the Bangkok Declaration, 1967, this document did not mention human rights. However, the ASEAN Charter of 2007¹⁴ pertaining to human rights, which was ratified by all member states in 2008, currently endeavours to ensure that human rights violations are addressed.

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009. The AICHR's role ranges from observing human rights situations, conducting on-site visits and publishing reports regarding the same, in order to provide early warning systems in case of serious human rights violations.

¹³ The 1967 ASEAN Declaration, http://www.internationaldemocracywatch.org/attachments/220_The%20ASEAN%20Declaration%20-%20Bangkok%20Declaration.pdf

¹⁴ ASEAN Charter of 2007, <http://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf>

Under its terms of reference (TOR),¹⁵ the AICHR may provide advisory services, and technical assistance on human rights issues on request. However, the Commission has no powers to investigate, monitor or enforce the implementation of its recommendations. The AICHR has to create awareness, facilitate capacity building, as well as encourage the accession, and ratification, of various instruments on human rights, whether regional, inter-regional, or international. This has been called a “promotion first, protection later” approach.¹⁶

The AICHR is directed by a group which consists of representatives from each state party. These representatives are nominated by and answerable to their respective governments, and participate for a three-year term, which is renewable once. In practice, the representatives have been drawn from a variety of backgrounds, including judges, lawyers, retired ministers, and even members of civil society.

The Commission is required to meet at least twice a year, though, of course, more meetings can be held. The decisions, if any, made by the Commission are merely of a consultative nature, and are arrived at by consensus.

As per its TOR, the AICHR is to evaluate the human rights situation in the region on the basis of an established work plan at the completion of five years of its existence, that is, in the year 2015.

¹⁵ ToR AICHR,
<https://drive.google.com/file/d/oBolEcMiPqAm1ZFc3OEhpcnozZGs/view>

¹⁶ Wahyuningrum, Yuyun. “The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward”. *International Institute for Democracy and Electoral Assistance*. 2014, <http://www.idea.int/sites/default/files/publications/the-asean-intergovernmental-commission-on-human-rights-origins-evolution-and-the-way-forward.pdf>

In accordance with its TOR, the AICHR has adopted the ASEAN Human Rights Declaration (AHRD). Unfortunately, this is not a legally binding document, and for this reason has drawn considerable criticism from the international community as well as civil society organizations.¹⁷ Further, as has been pointed out by the OHCHR itself, the AHRD ignores several international human rights norms, and also makes human rights laws subject to domestic national laws, instead of requiring that domestic laws meet international standards.¹⁸

In 2012, a group of 64 civil society organisations signed a document denouncing the AHRD for the above mentioned reasons, and also for its excessive focus on the balancing of the enjoyment of fundamental rights with government imposed duties on individuals.¹⁹

More recently, in 2014 a consultation of various stakeholders including civil society organisations was held, where a scathing critique of the AICHR was made (see box).

¹⁷ Wahyuningrum, Yuyun, *op.cit*

¹⁸ *ibid*

¹⁹ Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration. November 2012. Retrieved from: <http://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>

Box 3: Critique of the AICHR

The following critique of the AICHR was made during a consultation with civil society organisations in 2014.

- “1) The lack of a protection mandate and the absence of strong expertise and a dedicated secretariat are the main hindrances to AICHR’s work to promote and protect human rights in the region.
- 2) AICHR mandates as stipulated in the ToR have not been implemented:
 - a) institutionalizing relationships with national human rights institutions and civil society organizations (articles 4.8, 4.9);
 - b) obtaining information from ASEAN member states on their promotion and protection of human rights (article 4.10);
 - c) encouraging member states to ratify and accede to international conventions (article 4.5), fully implementing ASEAN instruments (article 4.6);
 - d) providing advisory and technical assistance to ASEAN sectoral bodies (article 4.7); and
 - e) developing common approaches to and positions on human rights (article 4.11).

- 3) There has been a contradiction in conceptual frameworks and formulations in relation to the principles of the rule of law, good governance, respect of fundamental freedoms and sovereignty, and the non-interference doctrine in ASEAN.
- 4) The ongoing lack of respect for human rights and impunity has undermined efforts to keep the ASEAN human rights standard on par with international standards.
- 5) The AICHR has not been transparent and accessible at the national and regional levels, which generates gaps in understanding the role of regional human rights mechanisms in ASEAN.
- 6) The AICHR is dominated by representatives who were government appointed rather than domestically selected, which contributes to the body's lack of independence.”

Detailed suggestions²⁰ have also been made to strengthen the functioning of the AICHR and make it more relevant, including

- Review of the TOR in order to incorporate more protection mandates, including precautionary measures, monitoring and complaint mechanisms, country visits, country peer reviews and a communication strategy.
- Active engagement of stakeholders in decision-making, including civil society organisations, at the national and regional levels.

²⁰ Wahyuningrum, Yuyun, *op.cit.*, page 21-22.

- Strengthening the participation of NHRI
- Prioritization of human rights of vulnerable groups
- Awareness raising and training of its members
- Articulation of the state party's responsibility and accountability to uphold international human rights obligations to the AICHR.

Importantly, it is observed that “the AICHR should pay more attention to intergenerational rights in regards to sustainable development”.²¹ In light of the fact that cross-border multinational corporations are now ubiquitous in the region, this is indeed a very important area in which the AICHR must assert a role for itself.

It is clear from the above analysis that the ASEAN mechanism is at a very nascent stage, and has considerable distance to cover before it can be on a par with the Inter-American or the European human rights mechanisms.

²¹ *Ibid.*, page 22.

ANNEXURE C

Model National Law on Refugees¹

1. Purpose of the Act

The purpose of this Act is to establish a procedure for granting of refugee status to asylum seekers, to guarantee to them fair treatment, and to establish the requisite machinery there for. For the purposes of this Act the grant of refugee status shall be considered a peaceful and humanitarian act, shall not be regarded as an unfriendly act and does not imply any judgement on the country of origin of the refugee.

2. Terminology

In this Act, unless the context otherwise requires:

- i. 'Asylum seeker' means a foreigner who seeks recognition and protection as a refugee.
- ii. 'Refugee' means a 'refugee' defined in Section 4 and includes dependants of persons determined to be refugees.
- iii. 'Country of origin' means the refugee's country of nationality, or if he or she has no nationality, his or her country of former habitual residence.

¹ Bose, Tapan K. and Manchanda, Rita (eds.). "States, Citizens and Outsiders: The Uprooted Peoples of South Asia". South Asia Forum for Human Rights Kathmandu (1997), at Appendix A. The footnotes in this Annexure are also drawn from the same source.

- iv. 'Commissioner' means the 'Commissioner for Refugees', an executive officer, referred to in Section 8 of this Act.
- iv. "Commissioner" means the 'Commissioner for Refugees', an executive officer, referred to in Section 8 of this Act.
- v. 'Refugee Committee' means the 'Committee' established as an appellate tribunal by the Government under Section 8 of this Act.

3. Non-Obstante Clause

The provisions of this Act shall have effect notwithstanding the provisions of any other law including The Foreigners Act.

4. Definition of Refugee

A refugee is:

- a. any person who is outside his or her country of origin, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnic identity membership of a particular social group or political opinion², or,

² This part of the definition is based on Article 1 (A) (2) of the 1951 Convention on Refugees, which has universal approval for the refugee definition. However, taking note of the fact today's conflicts are linked to inter ethnic violence also, ethnic identity is added in the definition as given in the 1951 Convention on Refugees. It is also understood that membership of a particular social group includes gender based persecution.

- b. any person who owing to external aggression, occupation, foreign domination, serious violation of human rights or other events seriously disrupting public order in either part or whole of his or her country of origin, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin.³

5. Persons who shall be excluded from refugee status

A person shall be excluded from refugee status for the purpose of this Act if:

- a. he or she has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- b. he or she has committed a serious non-political crime outside the country of asylum prior to his or her admission into this country as a refugee .

6. Principle of Non-Refoulement

- a. No refugee or asylum seeker shall be expelled or returned in any manner whatsoever to a place where there are reasons to believe his or her life or freedom

³ This part of the definition is based on a border definition incorporated in Article 1 (2) of the 1969 OAU Convention. Remembering that promotion of human rights throughout the world of one of the purpose of the United Nations, and realizing that in practice there are massive violations of human rights in many parts of the world, and also finding that the Cartagena Declaration on Refugees in 1984 incorporates massive violation of the human rights as a ground for treating asylum seekers as refugees, the same is incorporated in this part of the definition.

would be threatened on account of any of the reasons set out in sub-sections (a) or (b) of Section 4.

- b. The benefit of the present provision may not, however be claimed by a refugee or asylum seeker where there are reasonable grounds for regarding him or her as a danger to the security of the country or who has been convicted by a final judgement of a serious crime and constitutes a danger to the community.⁴

7. Application

- a. Where an asylum seeker requests to be recognized as a refugee either at the point of entry or subsequently, the country concerned shall act in accordance with the principle laid down in Section 6 and refer the case to the Commissioner of Refugees for disposal.
- b. Where an application is made by an asylum seeker for determination of his or her status as a refugee, pending determination of such status, no restrictions shall be imposed on the asylum seeker save and except those that are necessary in the interests of sovereignty and integrity of the State or public order.

⁴ This provision does not mean that persons having committed political crimes are automatically to be considered as refugees. On the contrary, when there are serious reasons to believe that the asylum-seeker has committed a politically-motivated crime to endanger the right to life or physical integrity of another person, this asylum-seeker would normally, not be recognized as a refugee, unless the punishment for such crime is expected to be discriminatory or disproportionate.

8. Constitution of the Authorities

In order to implement the provisions of this Act the Government shall appoint:

- a. Commissioners for Refugees; and
- b. A Refugee Committee as the appellate authority

9.

- a. A Commissioner for Refugees shall receive and consider applications for refugee status and make decisions.
- b. The Commissioners for Refugees shall be of a rank not less than that of an Administrative Head of a District.

10.

- a. The Refugee Committee shall be the appellate authority and receive and consider applications for refugee status suo moto, or those made by the asylum seekers in appeal against the decision of the Commissioner.
- b. The Refugee Committee shall consist of the following three members:
 - i. a sitting or retired High Court Judge designated by the Government in consultation with the Chief Justice of the Supreme Court as Chairperson.
 - ii. two independent members conversant with refugee matters.

11. Finality of Order

Every order of the Refugee Committee shall be final.

12. Determination of Refugee Status⁵

- a. An asylum seeker who wishes to claim refugee status under the terms of this Act shall be heard by a Commissioner for Refugees before the determination of his or her status.
- b. During the Refugee determination interview, the asylum seeker shall be given necessary facilities including the services of a competent interpreter where required, and a reasonable opportunity to present evidence in support of his or her case.
- c. The asylum seeker, if he or she wishes, shall be given an opportunity, of which he or she could be duly informed, to contact a representative of UNHCR.
- d. The Asylum seeker, if he or she wishes, shall be entitled to be assisted in the determination of the status by a person of his or her choice including a legal practitioner.
- e. Where an application by the asylum seeker is rejected, the Commissioner for Refugees shall give reasons for the order in writing and furnish a copy of it to the asylum seeker.
- f. If the asylum seeker is not recognized as a refugee, he or she could be given a reasonable time to appeal to the Refugee Committee as the appellate authority for reconsideration of decision.

⁵ This Article is based on UNHCR Ex Com Conclusion No.8 (XXVII) - 1977 on 'Determination of Refugee Status'.

- g. If the asylum seeker is recognized as a refugee, he or she shall be informed accordingly and issued with documentation certifying his or her refugee status.

13. Persons who shall Cease to be Refugees

A person shall cease to be a refugee for the purpose of this Act if:

- a. he or she voluntarily re-avails himself or herself of the protection of the country of his or her origin; or
- b. he or she has become a citizen of the country of asylum; or he or she has acquired the nationality of some other country and enjoys the protection of that country, or
- d. he or she has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
- e. he or she can no longer, because the circumstances in connection with which he or she was recognized as a refugee, have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality.

14. Rights and Duties of Refugees

- a. Every refugee so long as he or she remains within this country shall have the right to:
 - i. fair and due treatment, without discrimination on grounds of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.

- ii. receive the same treatment as is generally accorded to aliens under the Constitution or any other laws and privileges as may be granted by the Central or State Governments.
 - iii. receive sympathetic consideration by the country of asylum with a view to ensuring basic human entitlements.
 - iv. be given special consideration to their protection and material well-being in the case of refugee women and children.
 - v. choose his or her place of residence and move freely within the territory of the country of asylum, subject to any regulations applicable to aliens generally in the same circumstances.
 - vi. be issued identity documents.
 - vii. be issued travel documents for the purpose of travel outside and back to the territory of the country of asylum unless compelling reasons of national security or public order otherwise require.
- b. Every refugee shall be bound by the laws and regulations of the country of asylum.

15. Situations of Mass Influx

- a. The Government may, in appropriate cases where there is large-scale influx of asylum seekers, issue an order permitting them to reside in the country without requiring their individual status to be determined under Section 12 of this Act, until such time as the reasons for departure from the country of origin have

ceased to exist, or the government decides that their status should be determined on an individual basis under this Act.

- b. In the case of asylum seekers who have been permitted to reside in the country under this provision, they may be subject to reasonable restrictions with respect to their location and movement, but will otherwise be granted normally the same rights as refugees under this Act.

16. Refugees Unlawfully in the Country of Refuge

The Government shall not impose penalties, on account of their illegal entry, or presence, on refugees who, coming directly from a place where their life or freedom was threatened in the sense of Section 4, enter or are present in the country of asylum without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

17. Voluntary Repatriation⁶

The repatriation of refugees shall take place at their free volition expressed in writing or other appropriate means which must be clearly expressed. The voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of safety to the country of origin shall be respected.

6 This provision is derived from UNHCR Ex Com Conclusion 40 (XXXV) - 1985 on 'voluntary Repatriation', at para (b).

18. Rules and regulations

The Government may frame rules and regulations, from time to time, to give effect to the provisions of this Act.

ANNEXURE D

Recommendations of the Seminar on Refugees, Migrants, Internally Displaced and Stateless Persons in South Asia: Need for a Regional Protocol¹

The participants of the Kathmandu seminar on Refugees, Migrants and Stateless Persons in South Asia: Need for a Regional Protocol, November 18-22, 1996,

Considering that South Asia has the fourth largest refugee population in the world, not taking into account the millions of internally displaced persons and environmental refugees;

Noting that in the region of South Asia, governments by arbitrarily changing their citizenship laws and introducing severe restrictions to retaining, acquiring or re-acquiring citizenship have created millions of stateless persons;

Cognizant of the peculiar process of colonial and post-colonial border making between India, Pakistan, Bangladesh and Nepal which has divided several trans-border communities disrupting their economy society and family, and that it has also affected trans-border communities between Bangladesh, India and Myanmar on

¹ Bose, Tapan K. and Manchanda, Rita (eds.). "States, Citizens and Outsiders: The Uprooted Peoples of South Asia". South Asia Forum for Human Rights Kathmandu (1997), at Appendix B.

the eastern side and between Afghanistan, Iran and Pakistan on the western side;

Recognising that sometimes states do not accept refugees from another country for fear of incurring the displeasure of the refugee creating state;

Concerned that the situation of the refugees and displaced persons in South Asia has evolved in recent years to the point at which it demands special attention and action, call upon the South Asian states to develop and adopt a Regional Charter and a Protocol for the protection of refugees and displaced persons.

The Participants call upon the states to accede to and ratify the 1951 UN Convention on the Status of refugees and the 1967 Protocol, without reservation.

A Regional Charter/Protocol must make it incumbent on the states to receive refugees on humanitarian ground and the regional charter should provide for a mechanism to support the refugee receiving country in such instances.

While recognizing the right of a state to refuse permanent asylum to a refugee, the regional mechanism must ensure that the states grant temporary asylum and protection to the refugee till the person finds another country willing to accept her/him;

Underlining that states have a responsibility to prevent incitement of racial, religious and other hatred against refugees, migrants and displaced persons;

The Regional Charter/Protocol should ensure that any repatriation of refugees is voluntary and is declared to be soon on an individual basis, and is carried out in an atmosphere of transparency with the cooperation of UNHCR and NGOs working in the area of relief and protection.

The Participants demand that the Regional Charter/ Protocol must ensure that no person or community can be deprived of the right to citizenship, habitat, language, religion and culture arbitrarily by states/ governments or be made stateless. Citizenship must not be taken away because of marriage. There should be no gender discrimination on grant of citizenship including all rights flowing therefrom. States must ensure that all citizens enjoy the right to freedom of movement and residence within their borders. The states individually and the regional governments collectively must agree to protect these basic rights of the people of the South Asian region.

Aware that the definition of Refugees in the 1951 Convention is restrictive and that it applies only to persons who are outside their country, - "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or opinion"- and that the definition does not provide protection to those who have been forced to flee or have been internally displaced because of ethnic strife, civil disturbance, breakdown of law and order, denial of human rights and insecurity of food, land and water caused by forces beyond their control;

Bearing in mind that the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, while retaining the definition of refugee contained in the 1951 UN Convention, expanded it by adding,

“the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence...”

Observing that the Cartagena Declaration on refugees adopted by the Central American governments in 1984 further expanded the definition of refugees to include

“persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order...”

The participants call upon the states of South Asia to expand the definition of refugees along the lines of the OAU Convention and the Cartagena Declaration and also taking into consideration the following:

Victims of forced eviction, man-made and natural disasters and environmental refugees

Noting that some policies pursued by South Asian governments have impoverished vast sections of their peoples, particularly those belonging to minority communities and economically backward sections and that some of these development projects have adversely impacted the economy and livelihood of peoples across the border forcing them to be uprooted and some of them have crossed international borders to become “refugee/ migrants”;

Concerned that millions of people have been uprooted by such development projects and by natural environmental disasters to become internally displaced;

Regretting that the failure of governments to provide the security of food, shelter, land and water has caused mass migration of their peoples across borders in search of livelihood and shelter;

Observing that the integration of the economies of South Asia into the global economy has intensified the free flow of capital and goods, the participants urge the states to adopt a policy of developing an integrated labour market in the region of South Asia. This is essential to prevent the exploitation of migrants and displaced persons by unscrupulous employers in “sweat shops”.

Recognising that migrant women and children are the worst affected, the states are called upon to make special efforts to protect their rights.

The participants further recommend that the South Asian Charter/ Protocol on refugees, migrants, internally displaced and stateless persons should recognize all such persons who have been displaced by natural and/or manmade disasters and the denial of food, land and water security as Persons of Concern.

The states have an obligation to protect the rights of its citizen to remain in their habitat. The states shall endeavour not to create a situation which compels citizens to be displaced. States shall be responsible for the rehabilitation of all internally displaced persons in a dignified and secure manner. The participants are of the opinion that the states shall be held accountable for the displacement of their citizens to other countries.

However, when such displaced persons seek refuge in another state, the host state should respect the principle of non-refoulement.

Accepting that it is important to retain the distinction between people who flee because of political, ethnic and cultural persecution, discrimination, violation of human rights and the disruption of law and order and those who leave their homes because of insecurity of food and shelter;

But noting that the migration is complicated by the fact that governments and or majority groups are systematically denying relief and violating the human rights of affected communities, the participants urge caution in matters of classification of refugees and displaced persons as “economic refugees or migrants”.

The assumption that migrants cause economic hardship to the poorer sections of the host country population by competing for lower wage jobs may not necessarily be correct. There is a need for research on this in South Asia.

Governments and NGOs should take up the task of developing a detailed status report on cross border population movements. Existing policies are based on assumptions and conjecture. The Nepal-India case is a telling example.

Minimum standards

Understanding that the South Asian states cannot be called upon to provide for high standards of relief and support to refugees, stateless and displaced persons as envisaged in the 1951 UN Convention and the 1967 Protocol, it is necessary that minimum standards be maintained, otherwise the act of granting temporary

asylum or residence permit becomes meaningless. This should be ensured through a regional standard setting exercise which must be enforceable. A regional fund and responsibility sharing mechanism need to be created to help smaller and poorer states.

In this regard the OAU Convention and the Cartagena Declaration can serve as models.

States should provide access and support to UNHCR, international and national aid and relief agencies to fulfill their obligations.

UNHCR and regional mechanism

While appreciating that UNHCR is expanding its mandate to cover internally displaced persons, there is concern that it has been diluting its protection mandate for refugees. This trend needs to be arrested. Anxiety is being expressed at the tendency of UNHCR to support “imposed repatriation” of refugees to home countries under “less than desirable conditions”.

UNHCR has been decreasing its financial support for refugees in South Asia. This needs to be checked. The refugee determination process should be transparent. The process of status determination followed by UNHCR is not open to scrutiny. It is recommended that in the region of South Asia refugee status determination should be done jointly by the states and UNHCR under a Regional Charter/ Protocol. This process should be open to judicial scrutiny and appeal.

Kathmandu,
November 22, 1996

