

**INDIA'S APPROACH TO INTERNATIONAL REFUGEE  
CONVENTIONS: 1951-2001**

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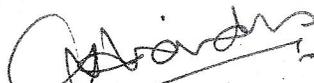
## DECLARATION

This is to certify that the dissertation entitled “**India’s Approach to International Refugee Conventions: 1951-2001**”, submitted by me in partial fulfillment for the award of the degree of Master of Philosophy of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any degree of this university or any other university.

*Lamneivah Sithou*  
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## CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

  
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## **ABBREVIATIONS**

ALLCC - Asian-African Legal Consultative Committee

ARMS- Mandate refugee status

CAT - Convention Against Torture

CATIP- Convention Against Torture and OTHER Cruel , inhuman, or Degrading Treatment or Punishment.

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

CPPG- Convention on the Prevention and Punishment of the Crime of Genocide.

CRC - Convention on the Rights of the Child

CSR - Convention Relating to the Status of Refugees

DBA- Don Bosco Ashayam

DRICL- Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live.

ECOSOC - Economic and Social Council

EPG - Eminent Persons Group

EX COM - Executive Committee

FRR0- Foreigner Regional Registration office

GOI - Government of India

HRLN - Human Rights Law Network

ICCPR - International Covenant on Civil and Political Rights

ICERD - Convention on the Elimination of All Forms of Racial Discrimination

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICSPA- International Convention on the Supression and Punishment of the Crime of Aparthied

IDPs- Internally Displaced Persons

INGO's- Inter Governmnet Organisation

IO- International Organisation

MHA- Ministry of Home Affairs

NGO- Non-Government Organisation

NPO- Non- Profit Organisation

NHRC - National Human Rights Commission

NML - National Model Law

OAU – Organisation of African Unity

PILSARC- Public Interest legal Support and Research Centre

PVO- Private Voluntary Organisation

SAARC - South Asian Association for Regional Cooperation

SAFHR - South Asia Forum for Human Rights

SLIC- Socio-Legal Information Centre

UDHR - Universal Declaration of Human Rights

UNHCR - United Nations High Commission for Refugees

VHAD- Voluntary Health Association of Delhi.

YMCA- Young Men's Christian Mission.

## **CHAPTER -I**

### **INTRODUCTION**

The 20th Century marked the biggest political and human tragedies due to the movement of millions of refugees around the world. It is a known fact that the movement of people is as old as the history of mankind. People migrate from one place to another in search of food and shelter. But the movement shift in its character at the later stage where the movement is no longer voluntary but were forced movement. The forced movement of people started in the 17th Century in Europe due to the formation of the Nation-State which created a new category of people who needs international protection. The Modern refugee movement that started in Europe subsequently spread to the Third World countries. The situations also got worsen in the 19th Century with the outbreak of the two Great World wars which give birth to millions of refugees. They were forced out of the domestic political community and were forced to seek asylum and shelter in the neighbouring country for the protection of their life and basic human rights. They were left with no choice but rather to protect themselves by fleeing to other countries crossing international boundary. It disrupts the life of millions of refugees and becomes a burden to the sending country, host country and international community .The impact of the problem is faced worldwide and influences the international politics. The refugee problem form one of the central issue of discussion at international forums.

Due to its complex in nature and immense in its impact it becomes clear that the refugee issues are beyond the capacity of any single government to deal effectively. It is a matter of great concern for all the nation states and needs a global approach. The refugee crisis has becomes a phenomena in this global world and is no longer seen as a problem of a single country but is acknowledged as a universal, continuing and recurring problem for the nation states. It affects both the national and international politics, as policy making process gets affected by the foreign policy of a country and purely shaped by the building of relations among the nation states. As a result the international communities have developed some mechanism of cooperation involving the government, international organizations and non-governmental organizations.

## **Migration in South Asia**

Migration had been a significant trend among the South Asia countries; the region is the source and the host of refugees which constitute 14 percent of the world refugee population. There are multiple forms of population movement ranging from voluntary to involuntary, internal to external, long term to temporary etc. The migration of people to new areas is mainly due to the two factors- the Pull and the Push factors. The Pull factor is voluntary while the Push factor is harsh and disturbing where people are forced to move from their habitat and take refuge in other country. The genesis of the refugee flow in the region can be traced back to the days of the Colonial times. But the movement of the people at the present times is marked by differences in ideology, religion, ethnic conflict and violation of human rights. The theoretical studies of the refugee phenomenon have identified six broad casual categories of refugee generating factors such as anti-colonial wars and self determination movement, international conflicts, revolution, coups and regime change, Ethnic, communal and religious conflicts, creation and restricting of the state boundaries and population transfers. For the past several years, ethnic conflict has become the world most common form of collective violence and major cause of refugee population such as the Tamilian and the Singhala community in Sri -Lanka. Generally movement of people in the region is easily accessible due to the porous borders and the ethnic linkage and religious affinity. The close linkages among the different communities led to the regions generosity in opening the door for the refugees.

South Asia, like other parts of the world, is faced with the growing movement of people across the border. It is estimated that South Asian region host around 1.5 million refugees who have fled across international borders due to war, persecution, ethnic violence and human rights violation in their countries of origin. In addition to the refugees, there are also large numbers of Internally Displaced Persons and Stateless Persons who have been subjected to forced displacement like the refugees but could not get consideration like the refugees. But, inspite of being a generous host to the thousands of refugees none of the south Asian countries are signatory to the refugee law which free them from the obligation mentioned under the convention for the care and protection of the refugees. Due to these facts, the refugees are left with no choice but to accept the ad-hoc treatment of the government and they are equally treated as foreigners. Both the refugees and the foreigners

can be deported at the border at any time if they do not meet the legal requirement. Thus the upholding of refugee rights had been a problem as there is no legal binding upon the government. Therefore the refugees have to suffer discrimination, harassment on the basis of nationality, ethnicity etc., and were forced to live under the hands of the political expediency.

Throughout the history of mankind, Mass migration occurred in all around the world. The south Asian states too are no stranger to the movement of the people across the border. India is one of the few countries in the world which have experienced refugee situation right from its Independence till the present times. India has been marked by a large scale migration of people from other countries and continents. India has been coping with refugees since its Independence. Since 1947 millions of people have moved across the border in the Indian subcontinent which marked the largest refugee movement. The largest migration in South Asia occurred with the partition of India and the creation of Pakistan which amounted to nearly 15 million refugees. The Partition led to 8 million Hindus and Sikhs left Pakistan to re-settle in India while 6-7 million Muslims left India to settled in the newly created Pakistan. Since then about 30-40 million people have moved across the international boundaries of India and Pakistan. The 1947 Partition marked the biggest population transfer in the history of mankind where an estimate of 14 million people crossed borders in year of partition alone ( Dhavan, 2004) . In 1948, the Rehabilitation Finance Administration Act was passed to cope up with the massive migration of people from Pakistan. Other related documents that are relevant to the refugee are the Foreigners Act 1946, the Registration of the Foreigners Act 1962, and the Passport Act etc.

In 1971 the creation of Bangladesh from Pakistan added to the rise of the movement of people in the region. This led to the movement of 10 million Bengali Muslims and Hindus across the border to India for their safety. The Government of India granted temporary asylum to millions of refugees from East Pakistan. Independence of Burma led to the flow of half a million refugees seeking shelter in India. The state sponsored ethnic cleansing in Bhutan has caused the eviction of more than 130,000 people who took shelter in the neighbouring countries. The Soviet invasion in Afghanistan followed by the rule of Taliban led to 3 million refugee population. The ongoing civil war in Sri-Lanka between the two communities i.e the Singhala and the Tamilian led to nearly a million refugees who seek

shelter in India and the neighbouring countries.

Broadly the major refugee movement in India after its Independence are -

1. 1950's – Tibetan Bhuddist
2. 1960's \_ Hindu Refugees from East Pakistan
3. 1960's \_ Chakmas from East Pakistan i,e Bangladesh
4. 1970's – Hindus and the Muslims
5. 1980's – Sri-Lankan refugees
6. 1980's \_ the Burmese refugees
7. 1990's- the Afghans refugees

### **India's approach towards the refugees**

From the time of its Independence, India had not favoured the inflow of refugees into the country. The movement of the refugees was restricted through the adoption of the various restrictive measures such as the Foreigners Act. The refugees during the partition times were called the “National refugees” as they were entitled to rights afforded by their new countries of residence (Dhavan, 2004). India felt the Convention was inadequate for their refugee regime. But the refugees who entered India at the later stage were not given the same treatment as the earlier refugees during the partition. They were charged with illegal entry, treated at par with the foreigners, and were subjected to domestic laws governing the entry and stay of the foreigners with no rights and protection by the host state. In spite of the increasing flow, the country does not have a domestic law or the determination procedure to deal with the huge refugee population. Due to the absence of the permanent institutional structures to oversee the refugee issues, the grant of the refugee status remains at the discretion of the political arbitration.

India has a liberal constitutional framework that guarantees certain fundamental human rights even to the foreigners. But the Indian Statutory regime dealing with the foreigners refuses even to acknowledge the refugees as a special class of people deserving its consideration. They usually treat the refugees as foreigners due to the influence and legacy of the Colonial rule. But India's legal regime can be examined through- the Citizenship regime, the Statutory framework, the Fundamental right regime, India's obligation to its international treaty obligation , the judicial expansion of the rights of the

refugees , the SAARC framework and the Model law on Refugee protection (Dhavan, 2004). India's humanitarian approach towards the refugees can be traced back from the pre-Independence period where the Indian Courts are administered through the English Common Law. It had adopted the dual approach to the relationship between international and domestic law as seen in the treaties signed during those period. Thus India had accepted the basic principle of the relationship between International and domestic law. This common law principle had been followed by the Indian Executive, Legislative and Judiciary even after Independence ( Chakrabarty, 1998). This is evident in the provisions of the Constitution mention in Article 253 of the Indian Constitution which states that

Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or Convention with any other country or countries or any decisions made at any international conference association or any other body.

This Constitution provisions implies that whenever there is a necessity, the Parliament is empower to incorporate an international obligations undertaken at international level into its own Municipal law. Therefore unless there is a conflict with the Acts of the Parliament, the international laws are incorporated in the national law. Thus , the National law cannot say 'yes' if the Parliament has said 'No' to a principle of international law (ibid). This can be applicable in the case of the refugee law where as long as it does not come in conflict with the National legislation it will be accepted as a part of the Municipal law.

During the time when the 1951 Convention came into force, the South Asian countries like India and Pakistan saw the highest population transfer in the region. India had a choice of acceding to the Convention or pursuing its own choice. Thus India chose the latter and adopted humanitarian approach towards the millions of refugees in the country. India along with all the South Asian states are not a member to any international refugee convention, be it the 1951 Refugee Convention or the 1967 Protocol, unlike the western countries who adopted different approaches towards the refugees such as the Cartagena Declaration (1984) for the Latin American countries and the African Charter (1969) for the African countries. However, due to the provisions in the Indian constitution such as Article 14( Right to Equality before law), Article 21 (Right to life and Liberty) and Article 25( Right to freedom of religion) etc. along with the commitments to various international and

regional treaties and conventions relating to universal human rights and refugees such as the UDHR (1948), ICCPR (1966), ICESCR (1966), CERD (1965), Torture Convention (1984) bound India to provide the least minimum standard of treatment to the refugees.

The attitude of the Indian Government towards the refugees can be seen through the statement of the then Prime Minister Mrs. Indira Gandhi on 24th May 1971 on the status of the Bangladesh refugee,

Relief cannot be perpetual or permanent and we do not wish it to be so. Conditions must be created to stop further influx of refugees and to ensure early return under credible guarantees for their future safety and well being.” She further added that “I hope this parliament, our country and our people will be ready to accept the necessary hardship so that we can discharge our responsibilities to our own people as well as the millions who have fled from a reign of terror to a temporary –refuge here.

### **India towards the Refugee Convention**

Amongst the different Convention, the 1951 Convention relating to the Status of Refugees form the backbone of the refugee protection. According to the 1951 Refugee Convention, “Refugee is a person who “owing to a well founded fear of being persecuted for the reason of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself the protection of that country”. But the concept of the refugees was expanded to include a person who had fled war or other violence in their home country as contained in the 1967 protocol

India’s non ratification of the 1951 UN convention on refugees and the 1967 Protocol was mainly due to the fact that India sees it as Eurocentric in its approach. It covers only the refugees who faced the civil and the political rights but does not extend to the refugees who are under the social, economic and cultural violations. The Convention did not include the protection to individuals or groups feeling internal wars and situations of generalized violence. It is also pointed out that the rights regime that is contained in the 1951 Convention is too burdensome for the third world countries like India to implement as it can barely meet the needs of its own citizens. The convention will allow the UNHCR of the national refugee regime which will have a control in the refugee camps and detention

centres. The international NGOs working for the refugees will embarrass the Government in front of the international community through negative reports on the refugees in India. It does not allow an effective protection of India's national security interest. Terrorist and other criminal elements could abuse its provisions to get refuge in the country. Though India is not a member to any of the Conventions and protocols of refugees, India's contribution on giving assistance and protection to refugees is satisfactory. (Samaddar, 2003).

An additional reason for the non accession of the South Asian countries towards the international Convention on refugees is due to the fact that it is not favourable to them as it is a Cold war instrument based only on 'Political refugees' while most of the exodus of refugees in the region is caused by the 'generalised conflict'. The policy makers also felt that signing of the Convention might entail the Obligation that the states may not be able to meet the resources along with the fear that the economic migrants will benefit the Convention Principles. The national legislation will allow the Courts to intervene to protect the interest of the refugees. But it is also a belief that the South Asian countries have been generous to refugees and accession to the Convention would not necessarily improve the condition of the refugees.

Since India is under a constitutional obligation to observe an international law and its non-refoulement policy upon the nation states, India has to acknowledge the refugees due to the judiciary obligation although they do not recognize them as a class. Thus the legal status of refugees in India is governed mainly by the Foreigners Act of 1946 and the Citizenship Act of 1955. These acts apply to all the non citizens equally with no exception for any class of people whether a refugee or asylum seekers.

India had adopted its own policy towards the refugees and strives for the fair, just and reasonable procedures while dealing with the refugees. India felt that there is no needs for the national legislation as India already host millions of refugees inspite of being not bounded by any legal obligation. India continue to grant asylum to large number of refugees from the neighbouring state and deal with them differently, as some refugees like the Tibetans, the Tamilians etc are recognized by the Government while the other refugee communities like the Afghans, the Iranians, the Somalians and the Burmese refugees etc are left under the mandate of the UNHCR. Thus, due to the absence of the specific refugee legislation the Government adopted its 'ad hoc' measures to different refugee communities.

The refugees were protected under the care of the Supreme Court, the National Human Right Commission (NHRC) and the UNHCR along with other different Non-Governmental Organisations (NGO's). These institutions play a proactive role in safeguarding the rights of the refugees to the host country. They intervene in the Judiciary to gain access to courts for the basic human rights of the refugees and also engage the government to address the need for legal provisions of either the National law or the Refugee convention, whichever works the best for the country.

### **Review of Literature**

The refugee issues in South Asia have been studied extensively but very few works had been done on the protection measures carried out by the governments, the non-government and the international organizations. Most of the works focus on the economic, social, environmental and the security issues and lack the clear picture of the protection measures carried out by the host states and other agencies. Thus, this paper will focus on the role played by the different agencies towards the protection of the refugees and the country's approach towards the Refugee convention among the South Asia countries with particular reference to India.

### **Refugees Influx in South Asia.**

Bose and Manchanda (1997) gives a detail account of the migratory flows of people along with the approach towards the situation of the refugees. It also gives us a clear picture of the crisis faced by the host state as the states were bound to respect the principle of non-refoulement which abide the states not to forcibly sent back the refugees to their origin state forcibly where their life is in danger. Due to this principle of non-refoulement in the international law, the helpless people were entitled to basic human rights and basic standard of living. However there is no obligation on the part of the state to accord to asylum, the state can grant the asylum status on the basis of their generosity. Thus, there are no specific laws for dealing with these situations and therefore, it is an urgent call for the government to formulate policies towards the refugees.

Baral (1990) examine the nature, trend and dynamics of interstate migrations which was due to the push and the pull factors such as war like situation, inter ethnic strife, economic factors and the socio-cultural affinity etc. favored by the open and porous borders

in the regions.

Ghosh (2003) addresses the different causal factors that led to the movement of the people and point out that there is a close and dynamic relationship between the movement of the people and the politics of the region. He deals the refugee issues from the political, humanitarian and the security point of view for both the sending and the receiving country. Thus, refugee issues can be dealt from the perspective of human development and regional cooperation.

Chari, Joseph and Chandran (2003) provides insights of the population movement of the refugees, the Internally Displaced Persons and the statelessness in the South Asian regions since the partition of India in 1947. It focuses on the different waves of the movement such as the Tamilians, the Tibetans, the Burmese, the Bangladeshi migrants etc. The generating factors of all was due to the political instability, armed conflicts, ethnic and religious, lack of resources, poor governance etc . The striking features of the refugees in the South Asian region is that all the countries send and receive the refugees. The refugees got easily absorbed within the region due to the geographical location, ethnic, cultural and linguistic linkages across the borders.

### **Legal and Constitution Protection Measures in India.**

Abrar (2001) has rightly pointed out that all the south Asian countries are both the producing and the receiving countries of refugees. The 1947 partition history marked the movement of 30-40 million refugees who crossed the national boundaries in search of refuge for a secured life and livelihood. The receiving countries were burdened with the adverse economic, social and environment consequences due to the huge inflow. In spite of these facts, there is a progress towards the development of the refugee protection regime in south Asia as initiated by the countries. The author point out that adoption of the national legislation should be the most effective step for the nation's states.

Acharya (2004) discusses about India's stand as an exception of tolerant, democratic and secular government in a neighbourhood of unstable and volatile state. The Refugees were not only given shelter but were also entitled to some degrees of constitutional protection as mentioned in Article 14, 20, 21, 22, 25-28, and 32 of the Indian Constitution which provides protective measures of the refugees. India's commitment to international

refugee protection such as UDHR (1948), ICCPR (1966), ICESCR (1966) CERD (1965) etc binds the country to provide protection to the refugees. But for the full legal protection, India along with the South Asian countries needs a proper legislation towards the refugees.

Chimni (2003) evaluates the Government's policy towards the refugees in India. India adopted the "ad hoc" approach and deal with them through the influence of the political and administrative levels. He pointed out the reason behind the non accession of the 1951 Refugee Convention or the 1967 Protocol. He also examines the protection measures carried out by the National Human Right Commission (NHRC) and the UNHCR in the protection of the refugees and the restoration of the basic rights in the country of asylum.

Samaddar (2003) discusses the practices of asylum and care in India and India's role is assisting millions of refugees in the region. The author highlights the care and protection adopted by the government, the limits of the protection by the government due to its ad hoc approach and its own political interest. It is a study of the care and protection measures wholly shaped by the existing power that formed the government.

Sen (2003) talks about the role of UNHCR in the protection of refugees in the absence of the specific refugee protection. She has rightly pointed out that due to the absence of the formal legal protection regime, the principle of refugee protection is not applied by the Indian courts. However, the courts and the Government of India have regarded the refugees as individuals who have fled individual persecution and therefore should not be returned to their place of origin where their life is in danger.

Rizvi (2003) explains the role of the UNHCR in the protection and assistance of the different refugee communities. The UNHCR also tried to assert the host government to provide basic rights to the refugees through the advocacy of judiciary and also work for the solutions of the refugee problem through resettlement and repatriation.

Sinha (2004) highlights the non obligation of India to the refugees convention as India is neither a signatory to the 1951 Refugee Convention nor the 1967 protocol. He points out that India however accept and protect the refugees due to its international obligation that directly or indirectly, and this approach to the refugee issue made her to approach the millions of refugees on Humanitarian ground. He interlinked the constitutional framework such as the Articles mentioned in the constitution along with the Directive Principles of

State policy (though not enforceable in the courts) along with the international obligation led the government give protection to the refugees.

Lama's "India as a Refugee Host Country: Management, Practices, and Policy Options" (2000) is a report of the National seminar on issues relating to refugees. The detailed account of the refugees on the ground of polity, foreign policy and security issues has been highlighted. The approach to the various problems has also been in consideration such as the reparation and resettlement of the refugees in India.

Hans (2003) has focused on the refugee women and children. In India little legal inputs is available on gendered sense. The author tries to throw light on the Government orders, mechanisms and their implementation while trying to look into the respond of the citizens, social activist and NGO'S response.

Mishra ( 2010) critically analyse the various dimensions of the refugee problem and the measures taken to combat the over rising refugee problems at the regional and international levels. The author discuss the legal condition of the refugees in the country , the policies and practices by the Government of India towards the refugees. He also discusses the relevance and interlinked of the Human Right Law and the Refugee law and also acknowledged the role of the Judiciary in the protection of the right. He also tries to point out the major potential challenges in the protection of the refugees and the prospects of the solution.

### **The Need for Refugee Law in South Asia.**

Bhattacharjee (2008) talks about India's reasonable treatment to refugees which host millions of refugees. But in reality is something different as there is evidence of the unfair treatment of the Indian government towards the refugee communities of one group over the other. Due to this fact, there is a need for the proper standards of defining a refugee and differentiate it from the other group. The absence of the refugee law gives the government to carry out arbitrary measures and the refugees suffer from the hands of the law governing bodies and the security personnel and they can be deported anytime in the border. Thus, the government and the civil society should adopt a national refugee law specifying the rights and treatments of the refugees. The paper give the detailed account of the protection laws available to the refugees in the constitution and the administrative measures carried out by

the Indian government. He urged a just and human response to the refugees for determining the refugee status and providing the refugees to enjoy their rights and live a dignified life in the host countries.

Anathachari (2004) examine the law enforcement mechanism on matters dealing with refugees. He is of the opinion that it has to be dealt jointly by both the central as well as the state government. The policies governing the refugees are dealt by the union government while the impact is borne by the state government. He also noted the fact that since the refugees do not have a permanent settlement, the security and the administrative personnel need to be well versed with the law enforcement on matters relating to refugees. In the absence of the specific law to govern, the illegal migrants are misunderstood to be the refugees and the judicial pronouncement of the refugees needs to be dealt with individual cases rather than refugee as a whole. Thus, a single national legal instrument will facilitate the need of both the refugees and the host country and it will be uniformly and unambiguously enforced all over India.

Saxena (2007) gives an account of the insight historical mishaps, unstable democracies and the concern over the security in the region and the possibility of enactment of the national legislation for the refugees. The paper is an attempt to evaluate the judicial and legal treatment of the refugees in India, the position of the refugees in India and the obligation of the government due to the refugees and the convention. He also point out that inspite of the absence of the national legislation, the judiciary in India has enlarged the role of protection of the refugees. Thus through the pressure of the non-governmental organization and agencies the government will accede to the convention and also promulgate the nation law dealing with the refugees. Thus, the draft legislation also known as National Model Law (NML) was placed for the consideration of the Indian government.

Ananthachari (2001) provides the conceptual understanding of the refugees that differ migrants, the IDP's, foreigners, temporary residents, tourist, travelers etc. and relates the refugees with the national security and the role of law enforcement authority such as the security personnel at the borders, immigration personal at the land check posts, international airports and sea ports besides a host of the state police personnel for their part in ensuring national as well as internal security of the country. India form time to time received a large number of refugees from different countries not necessary form the neighboring countries

alone. It is the home of refugees belonging to all religions and sects. The current position of the refugees in India is that the government didn't officially treat them as refugees but the UNHCR on the consent of the government of India recognize them as refugees under its mandate and provide them assistance. Whereas the government on the other hand deal them with the existing Indian laws of the both government and the specific which are applicable to the foreigners. The government continue to receive them though there is no official declaration of any policy to grant the refugee status. This was due to the reason that there are no separate laws for the refugees. Therefore, their cases are considered on case by case basis.

7th EPG Meeting (2002) is a report of all the South Asian countries on their approach and effort towards the refugee protection in the region. The meeting was held to come up with the strategies and approach towards the protection measures and the durable solutions to the refugee crisis. The Eminent Persons Group was created to promote the refugee law in the region which has made a much progress as they insert pressure to the Government. This report discuss in detail the significant development of the proposed Model Refugee legislation in the region, the policies and measures adopted by the respective countries for the promotion of National refugee law and the updated development of refugee situation in the respective country.

Trakroo, Bhat et.al (2005) explains about the need of proper law for the protection of refugees in India. He pointed out the provisions in the Constitutions and the role of the judiciary for assuring the rights of the refugees. An attempt had also been made to address the refugee women and children for their rights and protections. The main study is based on the focus on international law while framing the framework of the domestic or national law on refugees.

### **Definition, Rationale and Scope of the Study**

The Bangkok Principles on the Status & Treatment of Refugees was adopted on AALCO 40th Session (2001) clearly defines the status of Refugee for the Asian and the African countries. According to this definition a Refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group:

- Leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident,
- Being outside of such a State or Country is unable or unwilling to return to it or to avail himself of its protection.

Thus, 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. They are compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. A person who was outside of the State of which he is a national or the Country of his nationality, or if he has no nationality, the State of which he is a habitual resident, at the time of the events mentioned above and is unable or unwilling due to well founded fear thereof to return or to avail himself of its protection shall be considered a refugee.

India is the home for the millions of refugees across the borders and extended countries. The absence of the national legislation or the refugee law to determine the refugee status led to the application of the adhoc nature to deal with them. Thus the government adopted preferential treatment of the different refugee group by recognizing some refugee group over the other on the basis of their own political motives. The primary categories of refugees in India are: firstly, there are refugees and asylum seekers who enter India from the neighboring countries, these group of people tried to assimilate into the region with the local communities. Secondly, there are refugees recognized by the government of India such as the Tibetans and the Sri-Lankan refugees. Thirdly, there are group of refugees recognized by the UNHCR and not formally recognized by the national government. Thus, these groups of people seek the protection under the principle of non-refoulement and their refugee status is under the UNHCR.

This paper will try to study the historical background of the flow of refugees into the South Asia, the causal movements and its impacts on the host country. It will also analyze India’s role in the protection of the refugee’s inspite of India not bound by the refugee conventions. The fundamental approach towards refugees is mostly based on humanitarian ground rather than any legal obligations. Thus a careful examination will be done on the protection measures adopted by the government through the legal means as mentioned in the

constitution and the role of the International Organizations & Non-Government Organizations in shaping the governmental policy on refugees. The aim of the study is to see the reason for the non-accession to the international refugee convention by the government of India, the approach of the government, the international organizations and other non government organizations on the refugees and see whether India need a National refugee law or International convention for dealing with the millions of refugees in the country.

In this study attempt will be made as to why the Government of India has not approved the International Refugee Conventions. In this context particular attention will be paid to access the Contemporary International scene and to rationalize the Governments decisions in response. This often comes in conflict with the roles and arguments presented by International Organization and Non- Governmental Organizations. A study will also look into on how the Government of India deals with these pressures.

### **Objective of the Study**

1. To assess the nature and provisions of the International Refugee Conventions and their relevance to the refugees in India.
2. To critically assess India's policies towards the refugees based on the provisions of the constitutions.
3. To examine the importance of National legislations on matters pertaining to refugees.
4. To evaluate the role of international and non-government organizations as Interest groups for the government towards the issue of refugees and ratification of the conventions.

### **Research Questions**

1. Why India has not ratified the refugee convention of 1951?
2. Who are the refugees residing in India and on what conditions?
3. What are the constitutional provisions that are relevant to the question of refugee in India?
4. India adopted an 'ad hoc' approach towards the refugees. Is there a need for the special legislation to protect the refugees?
5. To what extent the International Organizations and Non- Government Organizations work as Interest groups in India?

## **1.7 Hypotheses**

1. Accession to the convention is a necessity for India due to the refugee crisis affecting the social, economic, politics and security of the country.
2. The refugee policy in India is wholly guided by domestic political compulsions.

## **1.8 Research Methods**

The study will be based mostly on descriptive and analytical methods. For doing so both Primary and Secondary data will be collected. Primary sources will be constituted mostly of Government publications pertaining to refugees and migrants and those of international agencies such as the different bodies of the United Nations most notably the UNHCR. It will also study the different Acts and provisions in the Constitution and the different Convention on issues relating to Refugees. Secondary sources would be from books, journals, articles and reports of International Non-Governmental Organizations. It will also look into few cases on issues relating to the refugees. Wherever the relevant, latest information would be gathered from the web page available in the internet.

## **1.9 Brief Summary of the Chapters**

### **Chapter1: Introduction**

This chapter outlines the concepts of Migration in general with a particular reference to South Asia. It further discuss on the different phases of refugee flow in India and the situation of those period i.e the political, socio and economic condition of India and how far it had an impacts on the country. It will look into the world politics of that period; the introduction of the 1951 Refugee Convention and India's response to it. It then provides a literature review of the influx of the refugees into the South Asian region, India's respond to the refugees and its approaches to the crisis. It also contain the definition, rationale and scope of the study, its objectives, research questions, methodology and a brief introduction of the chapters.

### **Chapter 2: The 1951 refugee convention & other international mechanisms**

This chapter will study the background of the Refugee Convention, the adoption of the 1951 Refugee Convention and the expansion of the concept 'refugee' through other international instruments. It will distinguish the refugees as a group that differs from the migrants and the statelessness. It contains a detailed study of the Convention, definition of the refugees and

the expansion of its meaning through the 1967 protocol, and the procedure for the determination of the refugee status including the exclusion clause. It will also try to analyse the different rights contain in the Convention along with the duties of the host country and the duty of the refugees towards the host country.

### **Chapter 3: India and the International Conventions**

It will study on India's approach towards the international Refugee Conventions thorough analyzing its approach towards the refugees. The different Administrative measures which is also applicable to the refugees such as Foreigners Act, the Passport Act and the Extradition Act etc. It will have a detailed study of the categories of refugees and India's approach towards the refugees through analyzing the provisions of the Constitution of India which is applicable to the refugees. It also focuses on the application and implementation of the Refugee Conventions in India. A study will include on India's obligations towards various international Conventions such as the UDHR, ICCPR, CEDAW and CATIP etc. It will also bring out the role of the Government towards the refugees and the judicial judgement through the different case studies. This chapter will study the need of the National legislation to deal with the over-rising refugee population in the country.

### **Chapter 4: International organization and Indian Non-Government Organizations as Interest groups**

This chapter will look into the role of various international organizations, inter-government organizations and International Non-Government organizations who are working in India for the protection of the refugees and the promotion of the refugee law in India. The role of the different set of organizations will not work without the contribution of the local Non-Government Organization who play an active role in safeguarding the minimum basic rights of the refugees. It will focus on the role of the international organization like the UNHCR in its collaboration with the local NGO's for the protection and assistance of the refugees. The aim is to see how far they can influence the policies and decision making power of the Government which is accessed through the case studies of the Tamil and the Jumma refugees. The different organization also played an important role in the nations approach towards the adoption of the National Law for Refugees in the country.

## **Chapter 5: conclusion**

The concluding chapter will summarize the important finding of the study, the 1951 Conventions and its progress and prospects in the protection of refugees, the South Asian country's view on the Convention and India position on it. It will also recommend the suitable policy approach towards the refugees and its position on the need for ratification of the Refugee Convention or the National law for the refugees. The conclusions will be drawn keeping in mind the hypothesis of the study.

**CHAPTER - II**  
**THE 1951 REFUGEE CONVENTION & OTHER INTERNATIONAL**  
**MECHANISMS**

**Background of the Refugee Convention**

The First World War led to the uprootment and displacement of millions of people around the world. After the end of the First World War, the League of Nations (LON) which was an inter-government organization created different treaties among the member states. The LON defined the term 'refugee' as a person who is outside the country of origin without the protection of the home country. But in 1938 the definition changed and was restricted only to such persons who had left their countries of origin for the fear of persecution which excluded the other reasons such as violation of human rights by the government, natural disasters and loss of the protection of the home state etc.

The world history marked another wave of movement of the people due to the Second World War. It was after the Second World War that the real movement for the protection of refugees emerged in the international field. On 20th April, 1946 The International Refugee Organization (IRO) was created to seek an early return of the refugees and displaced persons to their country of origin. Thus in 1947 the IRO was created in order to deal with the problems of refugees in Europe affected due to the Second World wars but proved a failure as it could not meet the demand of the rising population movement.

In 1948 the first step for the Refugee Protection worldwide started with the UN Declaration of Human Rights which tried to accord the basic human rights to all human beings irrespective of their Nationality, Citizenship etc. Later in the year 1949, the General Assembly of the United Nations decided to replace the IRO with the UNHCR which was established for an initial period of three years as a subsidiary organ of the General Assembly under Article Twenty-two of the UN Charter. On 30th June 1950 the IRO which was created after the Second war was terminated and was replaced by the UNHCR. On December 14, 1950 the General Assembly adopted the Statute of the UNHCR which was meant to provide international protection for refugees and facilitate welfare measures assisting the government in the voluntary repatriation and assimilation within the local communities. Thus in 1951, the United Nations created the United Nations High

Commissioner (UNHCR) which was wholly dedicated for the refugees alone. The development in the protection of the refugees led to the adoption of the Convention under the UN General Assembly (GA). Thus on 28 July, 1951 the United Nations Conventions Relating to the Status of refugees was created in order to identify the refugees and give the definition of refugees along with certain other provisions. The 1951 Refugee Convention main objective was to protect the individuals fleeing persecution. (Majumdar, 2003). The Convention for the first time gives a clear definition of refugees and differentiates the refugees from the other groups such as Aliens, Migrants, Statelessness and Internally Displaced Persons etc. The refugees were also accorded with the legal protection and the basic rights of human being.

A refugee may be defined as a person who flees their home due to the socio-economic and political insecurity. Refugees are person who cross international border due to manmade or natural distress in their homeland. Myron Weiner is of the opinion that mass refugee exodus is due to inter-state wars, ethnic conflict, non-ethnic civil conflict and fights from repressive, authoritarian and revolutionary regimes. He has devised ways to distinguish among the casual conditions that generate the flows. He writes:

Some governments are unwilling or unable to protect the minorities from attacks by the general population. Some governments are engaged in the persecution of their own citizen, either ethnic minorities or dissident individuals and social classes. Some government are themselves under violent attack, perhaps by secessionist group or by armed groups seeking national political power. Refugee flow can be the result of conflict between states or by population in war against the colonial rulers. Refugee may be the consequences of drought flood, famine and environmental disasters (Mishra, 2003).

### **The 1951 Refugee Convention**

The definition of refugees can be found in various international Conventions and Protocols such as the International Refugee organizations and the Statute of the United High Commissioner for Refugees, the Asian- African Legal Consultative Organization, the Organization of African Union, and the Cartagena Declaration etc. But among all these, the 1951 Refugee Convention serves as the main instrument for defining the refugees. It covers the legal protection, the standard for the treatment of the refugees covering the issues from legal status, employment and welfare and the rights of the refugees etc. It proposes the minimum standard that the refugees can least receive the treatment that is generally accorded

to aliens which was clearly stated under Article 1 A (2) of the 1951 Refugee Convention defined refugee as a person who, as a result of events occurring before January 1, 1951 and “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion is outside the country of his/her nationality and is owing to such fear, is unwilling to avail himself the protection of the country, or who not having a nationality and being outside the country of his/her formal habitual residence as a result of such events is unable or owing to such fear, is unwilling to return to it”.

The aftermath of the two great World Wars marked the continuous flow of people from one place to another. People have left their home countries or refused to return to their home due to the breakdown of the government or due to the new regime which posed a threat to their life. The main conflict was between the citizens and the government mainly due to the political nature of the country. The government tried to oppress the opponent and the citizens become a victim of persecution. Thus, the relationship between the citizen and the state lack trust loyalty, protection and assistance. During this period of turmoil, the Convention was created to give protection to the people and give direction to the states.

The very nature of granting a refugee status can be a delicate political matter between the sending and the receiving country because of the negative imputation which granting a refugee status carries along with the possible detrimental effect upon which the relationship between the country of origin and refuge. Due to this fact of political in nature, many states are hesitant to grant refugee status to the asylum seekers (Handyman, 1987).

### **The 1967 Protocol**

The United Nations recognized that the emergence of the new refugee situation situations required changes in the Convention. The protocol was adopted in 31 January 1967 but came into force on 4th October 1967 to address the limitation of the 1951 refugee convention which is bound by the time and the geography of that period. The Protocol is in considerations that the 1951 Convention limits the definition of “who is a refugee”. The new situations have arisen which may exclude some refugees from the scope of the convention. The Protocol covers all the refugees irrespective of the date that is mention in the 1961 Refugee Convention. The protocols expand the scope of the convention and tried to meet the

needs of the present day refugee problems. It seeks to amend a few other provisions of the convention as a part for providing a few more new provisions. The protocol is an independent instrument and it is not a revision within the meaning of the Article 45 of the convention (Mishra, 2010). The obvious restriction in the Convention definition i, e the requirement that the claim relate to a pre -1951 event in Europe was prospectively eliminated by the Protocol (Patil and Trivedi, 2000).

It removed the temporal limitation of the 1951 Refugee convention and further states that it will apply 'without any geographical limitation'. Even after the elimination of the temporal and the geographical limitations, only persons whose migration is prompted by a fear of persecution on the ground of civil or political status come within the scope of the convention based protection system (Patil and Trivedi, 2000). Thus, by adopting the 1967 Protocol, the governments removed the geographical and time limitations that normally restrict the application of the convention to persons who became refugees because of events occurring in Europe before 1st January 1951.

### **International Expansion on the Concept of Refugee:**

The Convention refugee concept has been expanded in practice through the evolution of the different institutions such as United Nations High Commissioner for Refugees along with the different regional refugee protection instruments. All these development do not constitute formal amendments of the Convention definition, but they are widening the circumstances in which a person may be allowed to receive international protection (ibid).

#### **1. The UNHCR:**

Article 6(A) of the UNHCR statute define refugee as “ any other person , who is outside the country of his nationality, or if he has no nationality, the country of his formal habitual residence, because he has or had a well founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because f such fear, is unwilling to avail himself the protection of the government of the country of his nationality, or if he has no nationality, to return to the country of his formal habitual residence”.

Thus, the essential criterion of the refugee status under the UNHCR is that the human suffering should lead to forced migration and therefore is linked to material assistance. The statute differs from the convention on the ground that the determination of the refugee status is no longer bounded by the restriction of time and location and applies to all refugees

around the world not focusing on Europe alone. Article 6A (ii) incorporates another ground of refugee status such as for reasons other than personal conveniences (Mishra, 2010).

### **Other Regional Instruments**

The refugee definition mention in the convention could not address the newly refugee crisis due to the increase in the rise of the refugees backed by certain factors such as political, civil, military and ethnic wars etc. Thus led to the formation of the different regional organization where refugees were defined according to the need of the region. Some of the regional definitions of refugees are as follows

#### **1. The Organization of African Unity:**

In the 1960's there were continuous flow of refugees due to the independence of many countries from the colonial clutch. In 1969 the African Union proposed the adoption of the AOU Convention due to the self determination and national development process that led to millions of refugees in the African Continent. The proposed Convention entered into force on 20th, June 1974 with a broader definition of refugees,

“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 in order to seek refuge in another place outside his country of origin or nationality”.

The AOU respects and accepts the Convention's definition of a refugee and also extends the protection of all persons who were compelled to flee across the national borders due to various by reason of any man made disaster, whether or not from fear of persecution. It is more of a humanitarian commitment to give protection even to those who are victims of natural disaster or economic misfortune. The definitions also acknowledge the reality that the fundamental norms of abuse may occur not only as a result of the acts of the government but also due to the government loss of authority due to the external aggression, occupation or foreign domination. The international protection is also extended to persons who seek to escape serious disruption of public order ‘in either part or of the whole of their country of origin’ ( Patil and Trivedi, 2000). Thus the refugee protection document recognized the

person fleeing civil disturbances. Widespread of violence and war are entitled to claim the refugee status in the states that are parties to the convention, regardless of whether they have a well founded fear of persecution. The definition of refugees mention in the AOU is broader in its approach which is more inclusive in its scope and more comprehensive in its coverage which is unlike the 1951 Refugee Convention and the 1967 protocol ( Mishra, 2010).

## **2. The Cartagena Declarations.**

The Cartagena Declaration was adopted in 1984 by a group of government representatives, academics and distinguished lawyers from the Latin American countries to address the regional needs of refugee definition. The Declaration covers the refugees who fled their country because of the threat to their life, security or liberty due to the generalised violence, massive violation of Human Rights etc. It enlarged the definition of the refugees beyond the 1951 Refugee Convention and the 1967 Protocol. The definition of the refugees are mentioned in section III (3) of the declaration where it include-

“a person who have fled their country because of their life, safety or freedom have been threatened due generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order”.

The declaration became the first international declaration recognizing that the victims of massive human rights violation deserve refugee status (Mishra, 2010). In 1985 the General Assembly of the Organisation of the American States approved the Cartagena Declaration and urged the member states to extent support and extend the recommendation and conclusions of the Declarations. The Declaration not only serves the guidelines for the Latin American countries but also became the basis of the refugee policy in region where a number of states have incorporated into their national legislation (ibid).

## **3. The Council of Europe Definitions**

The European Union adopted a wider approach towards the refugees by providing protection to the refugees such as in assistance and beneficiaries to those refugees who secure a legal status. Thus in 1997, the European Council on Refugees and Exiles proposed a supplemental

definition of refugees as

1. persons who have fled their country, and or/ who are unable or unwilling to return because their life, safety or freedom are threatened by the generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order;
2. person who have fled their country, and/ or are unwilling to return there, owing to well founded fear of being tortured or of being subjected to inhuman and degraded treatment or punishment or violations of other fundamental human rights

Overall, the different regions extend a wider approach in defining refugees. The understanding of refugee as a group will be better understood through the observation of Simpson who has made a notable observation of what constitute a refugee,

The essential quality a person need to possess to claim a refugee should be based on the condition that “ he has left his country of regular residence, of which he may or may not be a national, as a result of political events in the country which render his continued residence impossible or intolerable, and has taken refuge in another country, or, if already in absence from his home, is unwilling or unable to return, without danger to life or liberty, as a direct consequences of the political conditions existing there. In general the refugee cannot return without danger to life and or liberty, though it may be, in some cases, but by no means in all, would that complete political submissions to the authorities enable him to return and live at peace. The term political in this description is used in a sense wide enough to include religious conditions. Other features of the existence of the refugee, such as the absence of statelessness may be incidental but not essential to his quality as refugee in the non-technical sense. He is distinguished from the ordinary aliens or migrants in that he has left his former territory because of political events there, not because of economic conditions or because of economic attractions of another territory (Leyden, 1966)

### **Distinction from Other Categories of Aliens**

Refugees got its distinctiveness from the other groups in a way that there is deep-rooted controversy between the individual and the authorities. The refugees were forced to leave their country because their life and freedom are threatened by their own government. The relationship between the individual and the home country is in denial where the individual no longer enjoys protection or do not want an intervention which a state normally provides to its nationals.

### **1. Ordinary Aliens.**

An 'international refugee' is by definition an alien but cannot be termed as an ordinary Alien. An Ordinary alien has a normal relations which his country of origin and has the right to seek protection and assistance which is his right as a Citizen. Thus normally an ordinary alien is a person who is a nationality of state A but finds himself in the territory of state B as a traveller or visitor, or residing more or less permanently (Leyden, 1966).

### **2. Ordinary Migrants.**

The ordinary migrants left their home and moved to a new settlement elsewhere voluntarily without any element of persecution but mainly due to economic factors, social and other personal natures. Due to its voluntary in nature, the migrants were not given international protection. Thus a person who leaves his home voluntarily solely to improve her economic prospects are called economic migrants. They were attracted to migrate to the other countries due to the better standard of living and better economic opportunities but still have the capability of having normal relations with the home country unlike the political refugees. In certain cases, the same may be considered a refugee if she proves that she was denied of employment due to the race, nationality etc. which amount to persecution (Trakroo Bhat et.al, 2005)

### **3. The fugitives from justice.**

The fugitives left the country due to the fear of life and therefore took shelter in other country to escape the punishment for a crime. They could not return to their country for the fear of the crime he has committed which is liable to face the consequences and punishable under the law of the land.

### **4. Stateless persons.**

Stateless persons are those who are not considered to be nationals of any state under the operation of its law. An individual loss his nationality or deprived of his citizenship or unable to acquire the nationality through marriage, naturalization etc.

According to the Hague convention, the states were given the authority to determine the nationals under its own laws. In the Article 1(1) of the Convention relating to the Status of the Stateless person of 28th September 1954, "stateless person" means a person who is not considered a national by any state under the operation of its own law (Leyden, 1966).

The concept of refugee should be broadened up and should include a stateless person who has left their country due to the political events. But it we cannot say that all stateless persons are refugees as some may leave the country due to various other factors.

The relation between refugeehood and statelessness is expressed in more general terms 'Not all stateless people are not refugees, nor all refugees are technically stateless. Statelessness is the essential quality of a refugee, though many refugees are in fact stateless people'. There can be certain similarities between the status of refugees and that of stateless persons but there is no correlation between refugeehood and statelessness.

### **5. Internally Displaced persons.**

Internally displaced persons are those who leave their place of residence as a result of persecution, human rights violations, or civil and ethnic strife but who have remained in their country of origin or habitual residence. The UN current working definition of IDP's states that "persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man made disaster, and who are within the territory of their own country".

The IDP's did not fall into the category of refugees as they could not meet the criteria set out in the Convention i,e they are not outside the country of origin or habitual residence etc. They were considered as the responsibility of the state as it is the duty of the state to protect its nationals. Therefore, the international protection could not be given to them while their safety and protection lies with the national government. Thus the uninvited international protection would be considered as interference in the internal affairs of the country. eg, the fleeing Kashmiris.

### **Procedures for the Determination of Refugee Status**

The determination process is a necessity for the refugees to claim the status in the country of asylum. It is through this that the refugees avail the right and protection measures during their stay as a refugee. The Refugee Convention is under an obligation to set up procedures for the determination of refugee status, it must be noted that the Convention definition is individual in its terms, and hence each applicant will have his or her case decided individually upon his or her own particular circumstances, and that these

circumstances may vary widely ( Handyman, 1987 ). Any person is refugee within the framework of the given instrument if he meets the criteria of the refugee definition in that instrument that define the refugee. The person claiming the refugee status can get it only after the approval from the competent authority from the states concerned.

### **1. The Convention**

In order to be under the protection of the 1951 Convention and the 1967 Protocol an individual must satisfy the criteria within the Conventional definition of the term “refugee”. Thus according to the 1951 Convention, a person can qualify to become a refugee only on the condition that he possess the following characteristics-

- A person should be outside the country of his origin or outside the formal habitual residence crossing the national border and seeking protection and shelter to the other states.

The initial requirement is that the person must be “outside” his or her country of nationality of habitual residence. Many people may find themselves in refugee-like situations, and may have fled considerable distances, but if no border has been crossed they will not be considered to be refugees (Handyman, 1987). But this case does not necessary mean that whoever is outside the country of origin or crossed the border can be termed as a refugee. The protection can be provided on the condition that the individual were forced to leave or crossed the border due to the fear of persecution.

- The claimant should be unable or unwilling to avail the protection of the country or refused to return to the country of origin due to the prevailing situation which threatens his life.
- The inability or unwillingness should be based on the well founded fear of persecution.

Hathaway is also of the opinion that the Refugee convention should established the determination of the refugee status based on five essential element such as-

- The convention definition includes only persons who have fled their country of nationality, or in the case of stateless person it should be their country of formal habitual residence.

- The refugee claimant's must be genuinely at risk. It is not enough that she truly believes herself to be in jeopardy rather there must be objective facts to provide a concrete foundation for the concern which induces her to seek protection in another state.
- The claimant's flight must be motivated by the prospect of 'persecution' i, e risk of serious harm against which the state of origin is unwilling or unable to offer protection.
- The risk faced by the refugee claimant must have some nexus to her race, religion, nationality, membership in a particular social group, or political opinion.

## **2. Based on persecution and Fear**

According to the UNHCR handbook, Persecution is “when there is serious indiscriminately or other offensive acts committed by the local populace. They can be considered as Persecution, if they are knowingly tolerated by the authorities, or if the authorities refuse or prove unable, to offer effective protection”. Persecution is a sustained or systematic violation of basic human rights and the failure of state protection. Persecution can be considered as to involve a serious human right violation, including a threat to life or freedom as well as other kind of serious harm to the individual. The concept of persecution is generally related to action taken by the authorities of a country, though there are also cases of persecution even though the government may not be directly involved in it.

The convention clearly mentions that refugee status will be accorded only to an individual who have left their home country due to the well founded fear of persecution. Thus the applicant must have a sound reason of fear where his/ her existence is under threat and the persons fear is well founded only if the applicant has been a victim of persecution. The persecution may be due to various grounds such as Race, Religion, Nationality, and Membership of a particular social group and Political Opinion. The various ground of persecution may be overlapping but deriving from one of the following factors may contribute to the well founded fear of persecution. Thus, due to the well founded fear of persecution, the individual is unable or unwilling to rely on the protection of his or her country of origin.

The determination of the refugee is usually based on the evaluation of fear and interpretation of what actually amounts to persecution. The Handbook of UNHCR specified

five reasons of Fear in order to have a valid claim for refugee status. Fear is a subjective state of mind and therefore it is necessary to take into account the personal and family background of the applicant, his membership in a particular social, religious, national, social and political group, his own interpretation of his situation, his personal experiences etc.

To qualify for the refugee status, an individual's well founded fear must be related to one or more of the Convention grounds i, e the fear of persecution must arise owing to Convention definition, i.e., race, religion, nationality, membership of a particular social group, or political opinion.

### **1. Race.**

In many parts of the world, the persecution on the basis race is very common and led to refugee movement across the globe as can be seen in the case of the Jews, the Africans and the Tamilian refugees etc. It is the first form of disfranchisement within the scope of the refugee law (Patil & Trivedi, 2000). It includes all kinds of ethnic group and entails the membership of a specific social group on common descent forming a minority within a larger population. The convention notion of race includes not only persons at risk by reason of their membership in a particular category but also other group whose physical or cultural distinctiveness has caused them to suffer prejudice. Though the drafters of the convention do not specially define the term, it was clear that it include the Jewish victim of Nazism that was persecuted because of their ethnicity (Ibid).

### **2. Religion**

According to the 1951 Convention, religion based persecution form an integral part of refugee definition throughout the drafting process. The claim on 'religion' may involve one of the following elements such as Religion as belief (including non-belief), Religion as identity and Religion as a way of life (Ranjan and Valatheswaran, 2011). The persecution of people on the basis of their religion is due to various forms such as prohibiting a person from worshipping in private or public; forbidding membership of a religious community or imbibing religious instruction; taking discriminatory measures against a person because of the practice of their religion etc. (Trakroo Bhat et.al,2005). Article 18 of the Universal Declaration of Human Rights(UDHR) protects the freedom of thought, conscience and

religion. Article 18 of the Inter-national Covenant on Civil and Political Rights along with the Declaration on the Elimination of All forms of Intolerance and Discrimination based on Religion and Belief also gives the protection measures (Handyman, 1987).

### **3. Nationality**

The drafters of the Convention offers no specific definition of nationality but it has to be understood as 'citizenship'. It is generally accepted as inclusion of all the members of specific ethnic, religious, cultural and linguistic groups etc. Persecution based on the basis of nationality may consist of adverse attitude and measures directed against a national (ethnic or linguistic) minority. In certain circumstances, the fact of belonging to such a minority may in itself give rise to a well founded fear of persecution (UHNCR Handbook, 1979). Thus, some of the states who fail to guarantee the basic human rights to its citizens or denied full citizenship therefore citizens had to seek protection to the other states and thus fall into the category of refugee.

### **4. Membership of a particular social group.**

It includes all persons who were persecuted due to the fact that they belong to a particular social group based on ethnic, cultural, religious or linguistic background, habits or social status etc. The membership of a particular social group should be seen as clarifying certain elements in the more traditional grounds for persecution that either the group must be political and exhibit dissidence with the regime or be a religious sect which has been persecuted by the civil authorities because of its religious belief .( Patil and Trivedi, 2000)

### **5. Political opinion.**

It covers all those who have fled their home due to the fear of persecution due to the fact that they hold an opinion that is against the government. The protection on the ground of political opinion was to be extended not only to those with identifiable political affiliations or roles, but also to other persons at risk from political forces within their home country. Sometimes an individual opinion on matters relating to the formation and functioning of the government of the state lead to a clash with the position which becomes an actual threat to the government or its institutions for example the Tibetan demand of autonomy to the Chinese government faced both political and ethnic persecution.

## **General Principles determining Refugee Status**

The 1951 Refugee Convention gives the provision that the refugee status can be ceased or excluded depending on the individual. In the case of cessation, the claimants are not considered deserving for receiving the international protection. The convention shall not be applicable to those people who were already under the assistance of the UN organ or agency other than the United Nations High Commissioner for Refugees. This includes the refugees who are under the UNRWA and other organizations as mention in Article 1 (D) of the Refugee Convention. But once the protection ceases from these organizations, the refugees can claim the refugee status under the Convention on the condition that they fulfill the criteria mention in the 1951 Convention.

Article 1(E) States those persons who are granted most of the rights normally enjoyed by the nationals (except citizenship) in the country where they have been received shall not enjoy the protection of the 1951 Refugee convention. The convention does not define the specific rights that must be granted by the receiving state. However the person's status must be equivalent to that of the national of the country and she must be given protection against expulsion and deportation. According to the Convention a refugee will cease his/her claim for refugee status when /heshe voluntarily re-avail herself the national protection, acquiring a new nationality etc. as mentioned in Article 1(c)

## **The application of the Exclusion Clause**

The exclusion clause in the 1951 Refugee Convention is not to grant refugee status to those people who do not deserve international protection. The overall objective of the exclusion clause was that certain acts are so serious that the perpetrators do not deserve the international protection as a refugee. It avoids granting refugee status to those who are criminals of war and who might jeopardise the international security of the asylum countries. The provisions in Article 1 (F) denote the convention shall not be applied to any person with respect to whom there is serious reason for considering that:

- He has committed crime against peace, at war time, a crime against humanity, as defined in the international instruments draw up to make provision in respect of such crimes;
- He has committed a serious non-political crime outside a refuge prior to the

admission to that country as a refuge;

- He has been guilty of acts contrary to the purpose and principles of the United Nations.

The claim of refugee status to those who have committed serious non political crime outside the country of refuge prior to their admission to that country as refugees. This ground disallows the claims of person who are liable to sanctions in another state, for having committed a serious crime, and who seek to escape legitimate criminal liability by claiming refugee status and who acts against the principles of the United Nations. While the most prevalent among all the above categories that do not deserve the international protection are divided into three sub groups such as –

- Crime against peace that includes war against aggression or a war in violation of international treaties, agreements etc.,
- War crimes which cover the laws and customs of war as noted under the Geneva conventions including the murder, ill treatment or deportation to slave labour etc.
- Crime against humanity covers all the fundamentally inhumane conduct often grounded on political, racial, religious etc which led to genocide, slavery, apartheid and torture etc.

But it is to be noted that the exclusion clause clearly outlines that it is generally upto the state to decide whether they should exclude the refugee under the terms of the 1951 Refugee Convention. In this case, the states remain the sovereign right to grant the status and conditions of the residence that is to be excluded (Mishra, 2003).

### **Non- Refoulement and the Right to Asylum**

The principle of non-refoulement ensures that the refugees should not be returned to any country where he or she is likely to face persecution. The principle prohibits the rejection of refugee at the frontier and expulsion of after the entry in the country. It is widely accepted that non-refoulement is a part of customary international law. That means that all States must respect the principle of non refoulement even if they are not party to the 1951 Refugee Convention. Thus, the refugee rights under the Convention and Protocols consist of two primary components; the principle of non-refoulement presents the state from returning a refugee to his or her home country where he has a well- founded fear of

persecution. This is often considered as the duty of the state rather than the right of the refugee. Secondly, it relates to the rights available for the refugee which effects his day to day life in the host country like the right to Education, the right to hold movable and immovable property etc. (Vijaykumar,2000). It is also to be taken into account that the later rights arise only when the first principle is exercised (ibid). Through the principle of non-refoulement, national boundaries are losing their significance as barriers as it forbid the states to return the refugees or deny their entry and ensures that they will be given social, economic and political rights etc.

The principle of non-refoulement is also supported by different international conventions such as the 1951 Refugee Convention, the International Convention on the civil and Political Rights, the United Nations Convention Against Torture and the European Convention on Establishment and European Community on Extradition. Among all these conventions, the 1951 Refugee Convention form the basis of the provisions which is mention in Article 33 which provides that

“No contracting state shall expel or return (“refouler”) a refugee in any manner whosoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

The principle of non-refoulement prohibits the expulsion of forcible return of refugees or rejection of the refugees at the border and also prohibits the state to expel the refugees after they enter the territory. This claim is also supported by Article 32 of the 1951 Refugee Convention which states that;

“The contracting state shall not expel the refugees who are lawfully in their territory, saved on grounds of national security or public order”

In addition, the 1969 Organisation of African Unity Convention, that governs the Specific Aspects of Refugee Problems in Africa, mentions that ‘No person shall be subjected to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened’. Article 14 of the Universal Declaration of Human Rights states that “Everyone has the right to seek and enjoy in other countries asylum from persecution.

Among the Asian countries, the 1966 Principles Concerning Treatment of Refugees

propounded by the Asian–African Legal Consultative Committee observes the international consensus surrounding the principle of non-refoulement by providing an analogous provision. Refoulement is also explicitly prohibited in a number of other documents, including the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the United Nations Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5). The non-refoulement principle reflects the concern and commitment of the international community to ensure protection to those who are in need. The refugee under the principle of non-refoulement were provided the basic fundamental rights like the right to life, liberty and security, freedom from torture and degrading threat( Chakrabarty,1998). Through this principle, the refugee should not not forced to return to their territories where their life is under threat. The member countries were obligated to refrain themselves from forcibly returning a refugee to a country where he is likely to faced persecution in their country of origin.

The principle of non-refoulement is well rooted in the Conventional and customary international law. Due to this principle, asylum has been given to people who seek shelter in other country. Asylum is the protection which a state grants on its territory or in some other place under the control of certain of its organ, to a person who seeks it (Trakroo, Bhat et.al 2005). By granting asylum to a refugee, the country accepts its obligation to protect the refugee against refoulement, to respect and safeguard the refugee's human rights, and to allow the refugee to remain in its territory until a durable solution is found.

Under the traditional law, Asylum is the right of the state where asylum is given to those fleeing persecution and it becomes a legal obligation if the state becomes a signatory of the treaty. Thus it is wholly at the discretion of the state whether to grant asylum to those who seeks it. An individual can only see it and enjoy only if granted but is not obligatory on the part of the state the willingness of the state to received asylum is the litmus test for the commitment by the affluent states to human rights (Patil and Trivedi, 2000). Asylum is given to the refugees on the condition that they enjoy temporary protection until the durable solution are made by the country; be it a repatriation to the home country or resettlement in the third country.

In the international law, the denial of asylum in the case of the genuine refugees is the denial of existence of common humanity. It is also repulsive on the principle of common concern for the welfare of each human being which form the basis of the current refugee regime. Moreover the promotion and protection of all human rights is the legitimate concern of the international community. The denial of the rights of the asylum to the genuine refugees is also against the concern of the UNHCR (Nirmal, 2001). It is the heart of the national protection for the survival of the refugees without which the refugee will be in jeopardy ( Chakrabarty, 1998)

In determining the asylum, states should give greater emphasis on the quality of the first instance interview and decision which they grant to the asylum seekers. Once asylum is granted, the asylum seeker becomes a refugee the state is bound to protect them. Granting asylum is a peaceful and humanitarian act of State sovereignty and should not be regarded as unfriendly by any State, especially the refugee's State of origin. But the principle of non-refoulement and the claim of asylum cannot be considered if a refugee was convicted for a serious crime and if it posed a threat to the security of the asylum country.

The asylum-giving country need to treat the refugees with humanity and are obliged to give protection under the customary international law. Violation of the principle of Non-refoulement occur when an asylum seeker were rejected at the border before seeking asylum. When a refugee is expelled from the country of asylum to a territory where his/ her life, liberty or physical security may be in danger; and also when a refugee are forcibly returned to their country of origin where they fear persecution, or are sent to a country where they can be deported to their country of origin where they fear persecution.

### **Rights of the Refugees**

The 1951 Convention is a comprehensive charter of the rights which the signatory countries agree to confer to the refugees in the country. These rights ranges from the simplest to the most elaborate rights ranging from the policy of non discrimination for the reason of race, nationality and religion etc. to the right to cease from being a refugee. The Convention covers enormous rights such as freedom of movement, religion, liberal profession, and access to wage earning or self employment, right to hold property both movable and immovable, right to housing and education etc. Along with the protection measures, the Convention declares the rights and duties of the refugees in the country of asylum. With

regard to the rights, the most important right the refugees benefit from the Convention would be of non-refoulement which forbids states from returning them in any manner to the country where their life would be at risk. In addition to this, the countries of asylum have an obligation under international law to ensure that the refugees enjoy a range of economic, social and political rights etc. The rights of the refugees were extended by article 31 as they can be exempted from penalties for illegal entry into the territory of a contracting state and also got the right not to be expelled, except under certain strictly defined conditions mentioned in article 32. In cases like when the asylum seekers are sent for deportation he/she must be allowed to submit the reasons against her expulsion. She has the right to have her case reviewed by a competent authority and should be brought to the competent authority before being sent for deportation.

The contracting states accorded the refugees with the basic fundamental rights such as

- Right to Equality and non-discrimination which is mentioned in the 1951 Refugee Convention. Article 3 states that “The Contracting States shall apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin”. The rule of non-discrimination in the refugee law provides that the right recognized must be respected without discrimination on the basis of the race, colour, sex, religion, political opinion, national and social origin, birth and other status etc. This means that the rights mentioned in the Convention must be enjoyed by all the refugees in their country of asylum.
- Right to freedom of religion (Article 4) seeks the contracting states to accord the refugees within their territories with a favorable treatment accorded to their nationals with respect to freedom to practice their religion and freedom of religious education to their children. It includes the freedom to manifest one’s religion or belief, either individually or in a community with others and in public or private in worship, observance, practice and teaching (Ranjan and Valatheeswaran, 2011).
- Right to freedom of movement (Article 26) states that “Each contracting state shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances”.
- Right to Education (Article 22) declares that the refugee will receive same treatment

as nationals regarding elementary education. They should be allowed to access the same with the nationals on the ground of remission of fees and charges and award of Scholarships.

- Right to work (Article 17, 18 and 19) which states for the gainful employment, self employment and liberal profession. Article 17 (1) states that “The Contracting states shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in the wage-earning employment”. Article 17 (2) mentions that the restrictions imposed on the non-nationals shall not be applicable to refugees if the refugees meet the following criteria such as if –
  - the refugees had completed three years residence in the country
  - married to the nationals of the country and
  - have children who are nationals of the country.

Article 18 and 19 of the Convention accords the treatment as favorable as possible. The states should encourage the refugees to set up self employment opportunities on every sphere such as agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies. They should be allowed to follow their own liberal profession without any restriction from the country of asylum.

### **1. The Right to welfare and the Administrative measure.**

The refugees were provided with different welfare measures at par with the citizens on different grounds such as rationing, housing, public relief and assistance, remuneration on employment and other social security services such as maternity etc. (article 20, 21, 22, 23, 24).

### **2. Administrative Provisions.**

The convention also covers the administrative provisions of the Convention mention in Article 25-34 of the Refugee Convention. It covers all the issues regarding the assistance, freedom of movement, identity papers, travel documents, fiscal changes, transfer of assets, unlawful entry, expulsion, non-refoulement and naturalization etc

### **3. Others Extended provisions**

There are also certain other rights which the convention provides to the refugees in their

country of asylum. Article 31 gives the right to exempt from penalties and illegal entry on the condition that they present themselves without delay to the authorities. The contracting state shall not restrict the movement of the refugees and should help the refugees to obtain admission in another country. This is also supported by article 32 which states that the contracting state shall not expel the refugees who are lawfully in their territory. In certain cases, where the refugees have destroyed their travel or identity documents or have used fraudulent documents in order to misled the authorities of the state in which they intent to claim asylum, the refugees can still seek the right to release from detention through the provisions of article 152.

Thus broadly, the 1951 Refugee Convention provides equality in the treatment of the citizens with regards to the following rights:

- Freedom of religion.
- Right to Intellectual Property.
- Right of access to Courts.
- Right to elementary education.
- Right to public relief.
- Rights associated with employment, labour legislation and social security.

The Convention also provides for equality of treatment with the other non-citizens:

- Movable and immovable property rights
- Right to association.
- Right to work.
- Right to start a private business or practice of profession.
- Right to housing.
- Right to post elementary education.
- Freedom of Movement.

### **Duties of the States**

The concept of state responsibility, it has been the continuing responsibility of the state to protect the life and liberty of its citizenry . Article 27 of the 1951 Refugee Convention states that “The contracting states shall issue identity papers to any refugee in their territory who does not possess a valid travel document”. This claim can also be supported through the provisions of article 28 which gives the provision of issuing travel document to refugees in

their territory who were unable to obtain a travel document from their country of origin. It is to be noted that the issue of the travel document to a refugee does not mean the grant of nationality (Trakroo, Bhat et.al. 2005).

Every nation state is bounded by the customary international law and should meet the international standards. It is the duty of the government to protect the fundamental human right of its citizens such as the right to life and physical security. Thus the primary responsibility of the state is to give protection to its citizen. When the government is unwilling and unable to do so, individuals may suffer serious human right violation and will force them to leave their home and seek safety in another country.

The Geneva Convention of 1951 provides a basic definition of refugees and spell out the legal status of refugees, including the rights and obligations. It also sets forth elaborate legal regimes that create duties for the state parties while receiving a refugee. The 145 member countries are bound by the provisions of the convention to identify the 'refugees' in accordance with the criteria set forth in the Convention. They should also provide protection to such identified persons, in accordance with the standards mention in the convention with regards to the admission, stay as well as treatment of the refugee. They were also entitled with the different protection measures such as the judicial, employment, welfare and the administrative provisions.

### **Duties of the Refugees**

Refugees are persons whose fundamental rights have been violated and were forced to seek protection of their basic human rights in another state. Due to the inability to obtain protection from their country of origin and their subsequent involuntary separation from that state, refugees were identified as individual in need of special protection. The refugees had a general obligation to respect the laws and regulations of the county of asylum. Thus when protection is provided to them, they should be under the law of the land and abide by it.

Article 2 of the Refugee Convention states that Every refugee has duties towards the country in which he finds himself, which requires in particular that he confirms to its laws and regulations as well as to measure taken for the maintenance of public order. They have a general obligation to respect the law and regulations of their asylum country. They have a duty to refrain from engaging in subversive activities directed against their country of origin such as armed insurrection.

## CHAPTER-III

### INDIA AND INTERNATIONAL CONVENTIONS

India has not ratified the 1951 Refugee Convention and its 1967 Protocol relating to the status of refugees. In spite of this, the country has been the host of millions of refugees who came to seek protection for their life due to various reasons such as wars, military dictatorship, persecution and violation of various human rights in their home country. India also witnessed a large scale flow of refugees due to the ongoing struggle of the independence movement, during the partition of India, and the creation of Bangladesh in 1971 which estimate more than 10 millions of refugees who came to India. The situations also worsened with the arrival of more than 300,000 refugees from the neighboring countries; there are over 50,000 Jumma refugees from the Chittagong Hill Tracts of Bangladesh who settled in Tripura, another 70,000 Sri Lankan Tamil refugees living in the Indian state of Tamil Nadu, and about 21, 143 Tibetan refugees who are under the Protection of India. India has pursued generous refugee policies by giving accommodation to the refugees who are under the UNHCR that has about 22,000 refugees that constitute the Afghans, the Iranian, the Somalis, the Burmese, the Sudanese etc ( Patil, 2003).

The absence of specific legislation led to the varying treatment of different refugee groups; the policies are generated by the political and administrative measures. The identification of refugees and the status determination is carried out by the Government and the UNHCR. Overall the refugee protection in India is under the United Nations though some of the refugees are recognized by the GOI such as the Tibetans, Sri-Lankans and the Chakmas from Bangladesh. While the others are under the care and protection of the UNHCR.

India adopted the same approach towards the refugees and the foreigners i.e the refugees are treated under the same laws that are applicable to the foreigners. They were deal as per with the laws applicable to the foreigners such as the Foreigners Act, 1946 , the Registration of the Foreigners Act 1939, the Passport Act, 1967 and the Extradition Act 1962 etc. India has its own unique identity as the refugees also are treated as per the general laws that are available in the Constitution of India. But there specific law of refugee under the Constitution. The judicial system that were imposed on the foreigners were applicable to the refugees too. Some of the judicial provisions are-

### **1. Passport (Entry to India) Act 1920**

The act deals with the requirement of passport for person who is entering and leaving the country by means of air, land and water. The act prohibits the entry of persons into the country that is not in possession of passport. According to this act, the foreigners who attempt to enter on a forged passport or visa shall be punishable with imprisonment. Under Section (c) of the 1920 Act, the refugees were not exempted with the travel documents but in practice certain group of refugees were allowed to enter the country without the required documentation due to the principle of non-refoulement which form an important principle of customary International law ( Trakroo, Bhat et.al 2005). The pre-independence Acts like the Passport (Entry to India) Act 1920, the Registration of the Foreigners Act 19476 etc. continue to deal the refugees and the foreigners due to the absence of proper mechanism, these status are still relevant in India,

### **2. The Passport Act 1967**

The act provides for the issue of passport and travel document, to regulate the departure of its citizens and other nationals from India. The acts set out different types of passport that can be issued to various categories of people such as Ordinary passport, Official passport and diplomatic passport. The act also identified different classes of travel documents such as

- Emergency certificate authorizing a person to enter India;
- Certificate of identity for the purpose of establishing the identity of person;
- Such other certificate or document as may be prescribed.

The act also deny the refusal of passport and travel documents to an applicant on different grounds such as activities of an applicant which can be prejudicial to the sovereignty, integrity and security to India etc. The Passport act of 1920 and 1967 deals with the power of the Government to impose conditions for issuing passport and travel documents to regulate the entry and departure of the citizens and non –citizens of the country.

### **3. The Registration of the Foreigners Act, 1939.**

The act provides the registration of the foreigners entering the country, their stay and departure in India. It empowers the Central government to make rules regarding the procedure for foreigners to report to a prescribed authority about their presence, movements,

departure and proof of identity. The foreigner had to report to the prescribed authority the detailed information of his stay and purpose of visit with all the detailed information of his movement.

#### **4. Foreigners Act, 1946.**

The Foreigners Act was passed in 1946 to deal with the presence, and departure of the foreigners. Under this act, “refugee” is covered under “foreigner”, and then the term is used to cover aliens temporarily or permanently residing in the country ( Ranjan and Valatheeswaran, 2011). It gives the Central government the right to impose conditions and restrictions to the foreigners during their stay in the country. It also got the full authority to expel or deport the foreigners from the country incase of violation of the acts. Thus, Section 3(1) of the Foreigners act allows the Central government to “Make provision either generally or with respect to all foreigners or with respect to any particular foreigners or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of the foreigners into India or their departure there from or their presence or continued presence therein.”

The Act also set out the type of restrictions that were imposed on the foreigners such as their entry and departure which is mention in Section 2( a&b) while section 2(c) deals with the expulsion from the country. The Act also prescribes the restriction and conditions the foreigners had to be abide during the stay which is mention in article 2 (d, e, f & g). The acts clearly states that it is for the foreigners in the country, but is applicable to the refugees since the government considered every non –citizens of the country are foreigners. But there are certain cases in which the refugees that were recognized by the government were free from these restrictions based on humanitarian ground.

#### **5. Foreigners Order, 1948.**

The Foreigners Order 1948 restricts the entry of foreigners into Indian Territory without proper authorization at the given entry points .Every foreigner should be in possession of a valid passport and visa at the time of entry into India, unless exempted. In the case of the refugees, often they are not in possession of these documents and thus are refused entry into India. The act was passed in exercise of the powers conferred by Section 3 of the Foreigners Act 1946, and in suppression of the Foreigners Order 1939. The act provides the

appointment of the civil authorities by the state government, who has the power to grant or refuse permission to a foreigner to enter India.

#### **6. The Extradition Act 1962.**

This act has reserved the right to extradite any person whose surrender is not sought in good faith, or if the person is going to face persecution. The Indian Penal Code (IPC) 1860 applies equally to all persons residing in India, whether be it a nationals, refugees and foreigners.

#### **7. Illegal Migrants (Determination by Tribunals) Act, 1983.**

This act was passed by parliament to check the growing number of illegal migrants entering the north-eastern states of India. Due to the ethnic, linguistic and cultural similarities the people share with the neighboring countries it is hard to identify and distinguish the foreigners among the citizens.

Thus, the all act that is meant for dealing with the foreigners applies to the refugees too. They can be charged with illegal entry, Illegal stay and the Illegal departure with false passport under the Foreigners Act, the Passport Act and the Indian Penal Code etc.

#### **Refugees in India**

The Indian government has followed a fairly liberal policy towards the various refugee groups. The entry of the refugees is mainly due to the fact that India practices the international obligation of the non-refoulement policy. Most of the refugees in India enter through the porous border and they assimilate into the region due to the ethnic and the religious links that the local community tolerated and welcome them in their community. The refugees were charged under the Foreigners Act where their illegal entry will be dealt by the border control authorities and will face deportation at the border or will be kept at the detention cell because of the non possession of the valid travel document. But there are also cases where refugees were allowed to enter the country without travel documents like the Sri-Lankan refugees.

In India and many of the South Asian countries, the refugee status determination is conducted not by the government but by the UNHCR. Since, India is not a party to the 1961 Refugee Convention nor has legislation on refugees; the refugees have no choice but to approach the UNHCR for the determination of the refugees and the protection measures. The UNHCR issue a certificate for identification to those refugees who are without a valid

passport but in certain cases, the refugees were recognized by the government but that does not mean they will be given the refugee rights. This also does not mean they were entitled the right to work, but in practice the governments allow them for self employment such as grant of loans and other facilities for their gainful employment. They can have access to the local facilities such as schools and hospitals etc while it will be restricted to others who are not under the recognition of the Indian government.

Broadly speaking the refugees in India can be classified into two categories:

### **1. The Mandate refugees**

The Mandate refugees are under the protection of the UNHCR like the Afghan refugees, the Sudanese, Somalian, the Iraqi, and the Myanmarese refugees etc. They were allowed to enter India due to the principle of non-refoulement and are not under the protection of the Government of India. Their presence is acknowledged by the UNHCR, who engage in the status determination of the refugee status and also issue them temporary residence permit. The UHNCR issue refugee certificate to the genuine refugees and try to engage with the government of India in protecting the refugees and for the grant of asylum to them. They are required to maintain a valid passport and residential permit failing without which might lead to arrest by the Indian government. They do not have a work permit and therefore are forced to work at the informal sector where they are subjected to constant threat and abuse from the employers and the police (Bhattacharya, 2008).

### **2. The Non- Mandate refugees**

These refugees are under the direct protection of the Government of India and are issued residential permits. The refugees who fall under the protection of the Indian government are the refugees during the partition movement, Tibetan refugees, the Bangladeshi refugees, the chakmas, the Sri Lankan, the Sindhis, the Bhutanese, the Ugandan refugees etc. Unlike the Mandate refugees, they received full protection according to the standards set by the Government of India (GOI). Thus, apart from the security screening, no formal status determination procedures exist; the government adopted a generous asylum policy with the recognition of the legal stay. But there are also cases that the refugees who got recognition and protection from the government also faced persecution .

There are also refugees who are neither recognized by the Indian government nor the

UNHCR but have entered India and assimilated into the local community as the local tolerate them due to the ethnic and religious similarities such as the Chin refugees from Burma living in the state of Mizoram. This group of refugees face harassment and periodic eviction from the drives of the sections of the civil society as seen in the case of the Chin refugees in Mizoram. Therefore, the consideration of refugees as a special class of aliens is wholly dependent on the Indian Judiciary as it gives primacy to customary international law. The Indian courts have been in tune with the customary law by applying the principle of non-refoulement principles among the different refugee groups.

### **India's obligation to other International Conventions.**

India is a signatory to a number of instruments dealing with the human rights, refugees and other related matter though it has not ratified the most important instrument for refugees i.e the 1951 Refugee Convention and the 1967 Protocols. Numerous international conventions that India became a signatory that can be applicable for the protection of the refugees are as follows-

#### **1. Universal Declaration of Human Rights (UDHR).**

In 1948, the General Assembly passed the United Declarations of Human Rights which foster for a common standard of achievement for all people and all nations. It urged all the members to recognized human rights and fundamental freedom such as right to life, liberty, freedom of movement, right against torture, arbitrary arrest and detention etc. The rights mention in the UDHR is applicable to all individuals irrespective of race, religion, nationality, political pinion etc.

Article 13, 14 and 15th of the UDHR applies to the protection of the refugees which is universally accepted and enforced by all the parties. Article 14(i) binds India in its statement that "Everyone has the right to seek and enjoy in other countries asylum from persecution". Thus, the member states were obliged to give protection to the refugees irrespective of not being a member of 1951 and 1967 protocols.

#### **2. International Covenant on Civil and Political Rights (ICCPR).**

The ICCPR was established to give civil and political rights to the member countries such as equal protection of laws which is applicable to the citizens and the refugees. The provision

includes the Right to life, right against torture, and arbitrary arrest etc.

Article 12 (2) Of the Covenant states that “Each person shall be free to leave any country including her own”.

Article 12(4) states that no one shall be arbitrarily deprived of the right to enter her own country.

Article 13, which states that Aliens (including refugees) who are lawfully residing in the territory of a state party may be expelled only in pursuance of a decision reached in accordance with the law. The refugees were also allowed to submit reasons against expulsion or to be brought before the competent authority before deportation.

### **3. International Covenant on Economic, Social and Cultural Rights (ICESCR).**

India ratified the ICESCR on 10th December 1979 which deals with the right to work and other basic rights. Article 1(1) of the covenant on self determination implies that the member countries must allow people residing in their territory to practice their own culture, social and economic activities without any restriction. Thus, the refugees who are under asylum to the ICESCR countries can enjoy the provisions of the covenant along with the citizens.

### **4. Convention on the Right of the Child (CRC).**

The convention is for the provision of adequate means the protection of child. It gives emphasis on the fundamental right of the child such as freedom of expression, association, religion and education etc. Thus, the refugee children can enjoy the protection of the child mention in the convention. Article 22 of the Convention states that

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

The article provides the state party to co-operate with the United Nations to protect and assist such a child and trace the parents or other family members of the refugee child to facilitate family reunification (Trakroo, Bhat et.al. 2005).

**5. Convention on the Elimination of All Forms of Discrimination against Women. (CEDAW).**

On 9th July 1993, India ratified the CEDAW which was created to give protection to women and free them from all kinds of discrimination. Article 6 entitle the member states to ensure the protection of women from sexual exploitation, Article 10 & 11 right to education and unemployment, while Article 12 guarantees the health care & socio-economic rights mentioned in article 14(1). Article 15 ensures the law concerning the movement of persons, and that the freedom to choose one's residence and domicile should be equally accorded to men and women and etc.

**6. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. (CATIP).**

On 14th October 1997, India signed the CATIP which is a convention against torture and punishment. Article 2 of this Convention calls for the state parties to take effective, administrative, judicial or other measures to prevent the act of torture.

Article 3 of the convention is one of the most important provisions in International human rights law relating to refugees. The provision states that no state party shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. This article is applicable to the refugees on the ground that the main cause of refugee movement is torture or persecution.

**7. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**

The convention sets out the regime against discrimination and does not allow human rights violation on the part of the state against the non-nationals. The ICERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedom in the political, economic, social, and cultural or any other field of public life.

## **8. Convention on the Prevention and Punishment of the Crime of Genocide (CPCG).**

The convention was ratified by India on 27th August 1959. The convention makes genocide a crime and allows the perpetrators to be punished under international law. From the legal standpoint, the Convention does not directly relate to refugee protection but certainly deals with the mechanisms that prevent the problem of the refugees from arising in the country of origin (Trakroo, Bhat et.al 2005).

## **9. International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPA).**

India ratified the ICSPA on 22nd September 1977 to abolish the practice of apartheid. This is relevant in the case of the South African countries where there was evidence of massive flow of refugees in the countries.

## **10. Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live( DCRIL)**

This is not a convention but a declaration in the United Nations general Assembly which articulates the various rights and obligations of the state and the foreigners. Article 5 states that aliens shall be treated according to the domestic and relevant international obligation of the state in which they are present. They are also protected against arbitrary arrest or detention; are given the right to be equal before the courts and other judicial and administrative authorities, have freedom of thought, opinion, conscience and religion and have the right to retain their own language, culture and tradition (ibid). Article 4 of the declaration states that aliens shall observe the law of the state in which they reside and respect the customs and tradition of the people in that state.

## **11. Territorial Asylum.**

India on 14th December 1967 ratified the United Nations Declaration on Territorial Asylum which strengthens her obligation on protection, asylum and non-refoulement. The 8th session of the Asian –African Legal Consultative Organization contains the guidelines for the status and treatment of refugees such as repatriation, right to compensation, grant of asylum and minimum standard of treatment to the state of asylum.

Even though India did not ratify any of the international refugee conventions, her

commitment to the various international organizations on Human Rights shows that India developed an interest in the protection of the refugees. Thus accession to the different Convention obliges the state to uphold and protect the rights of the of the refugees directly or indirectly and accorded them with humane treatment. India not only accepts the principle of non-refoulement as customary international law but also accepted the principle as it is envisaged in the 1966 Bangkok Principle on matters relating to the status of refugees.

### **The Constitutional Laws applicable to the Refugees**

The Constitution of India upholds the dignity of the individual and guarantee the protection of life and liberty to every individual who are residing in the country. The provisions not merely guarantee the protection of its citizen but also covers everyone, who inhabit the terrain of this country, is assured of protection of life and liberty (Trakroo, Bhat et.al 2005). The Foreigners were entitled to some degrees of constitution protection treatment of the refugees such as –National treatment; treatment accorded to the foreigners, special treatment.

#### **1. National Treatment**

##### Article 21- Protection of Life and Personal Liberty

The Constitution guarantees the rights and personal liberty to all persons be it a citizens or otherwise. It clearly states that “No person shall be deprived of his life or personal liberty except according to the procedure established by law. The objective of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to the procedure established by law. The rights mentions in article 21 of the Constitution form one of the basic structures of the Indian constitution (Mishra, 2010). It relates to the acts of the state which are not in accordance to the procedure established by the law. It assures the right to live in human dignity and free from exploitation. Through this provisions, a person is guaranteed free access to Courts and protection from arbitrary arrest and detention. Due to this , the state is under the obligation to prevent violation of the fundamental right of any person be it a citizens or Aliens.

#### **2. Article 14 – Equal protection of Law**

The Constitution states that “the state shall not deny to any person equality before the law of equal protection of the law within the territory of India”. It prohibits the discrimination on the ground of religion, race, sex and place of birth. This right entails that there shall not be

any discrimination between different classes of people i, e the right to fair trial has been recognized by the Supreme Court as a component of the right to protection of life and liberty. This also applies to the right to be produced before the Magistrate within 24 hours of arrest. Thus article 14 guarantee complete absence of arbitrary discrimination by the law and the administrators.

### **3. Right to freedom of Religion-Article 25**

Article 25 of the Constitution provides all persons equal entitlement of freedom of conscience, practice and propagate their own religion. The objective of this right is to sustain the principle of secularism in India. According to the Constitution, all religion is equal before the state and no religion shall be given preference over the other.

Thus the Constitution of India regards the same rights to the citizens and the foreigners on certain cases. The refugees in India enjoyed the basic fundamental rights such as the freedom of movement, religion and culture etc. They also enjoyed all the rights that the Foreigners can access in the country. The foreigners would be entitled for protection where the state government should carry out its legal obligation to the refugees. Along with the entitlement of rights from the Citizens and the Foreigners, they also got special rights i,e the Principle of Non-Refoulement which only the refugees can enjoy. The supreme court also foster on the state government on Article 14 & 21 that “The state is bound to protect the life and liberty of every human being be a citizen or otherwise”. The claim can be supported through the case of the *National Human Rights Commission v. State of Arunachal Pradesh* (1996 (SC) AIR 1234)

While Article 51 (c) of the Constitution states that “the state shall be endeavour to foster, respect for international law and treaty obligation in the dealings of the organized people with one another”, India accepted the non-refoulement as a principle of customary international law and thus treats the refugees on humanitarian ground though she is not member of any or the Refugee Convention. The provisions are mentioned in the Directive Principle of State Policy which shows guidelines i,e fosters for the respect of international law and treaty obligations but are not enforceable in the court of law.

The Indian Constitution that have a bearing on the refugees are found in Article 5-11, 14, 20, 21, 22, 25 (1), 27, 28(3) 51 (c) and 253; List 1, entries 14, 18 and 19; and List III ,

entry 27. These provisions deals with the Citizenship; naturalization; aliens; extradition; displaced persons; fundamental rights of all people within the territory of India ( including the refugees); the right of the persons in criminal proceedings; the power of the Parliament to recognizes international treaty. Different level of assistance and facilities eg, pertaining to educational opportunities, employment and voluntary repatriations etc. are extended to special groups of refugees like the Tibetans, the Chakmas and the Sri-Lankans (Trakroo, Bhat et.al 2005).

### **The Judicial Protection of Refugees in India**

The Indian Judiciary protects the basic human rights of every person including the citizens and the refugees by incorporating the provisions of the International human rights convention in the Constitution ( Mishra, 2010) . The judiciary plays an important role in protecting the refugees as the Court orders have filled the legislative gaps and in many cases provide humanitarian protection to the refugees (Parikh, 2010). The Supreme Court emphasize that the international convention which are not in consistent with the fundamental rights and are in harmony with their spirit must be read into these provisions to enlarge their meaning and content thereof, so as to promote the objective of constitutional guarantee.

The Courts in India had adopted a liberal approach towards the refugees. The Indian courts decided in a number of cases that the constitutional protection of life and liberty must be provided to the refugees (Bhattacharjee, 2008). The role of the UNHCR in the protection of the refugees had been recognized by the Indian government. The Courts directed the asylum seekers to approach the UNHCR for recognizing and determining the refugee status and also issued stay orders to those refugees who were sent for deportation for violating the of Foreigners Act. The court even granted bail to the detained asylum seekers while undergoing sentence so that they approach the UNHCR regarding their claim for the “Refugee status”. A number of judicial decisions of various High Court and Supreme Court provide a series of rights to the millions of refugees who has cross the internationally recognized borders. In the recent past, the constitutional courts have also extended the required legal as well as the constitutional protection to a number of refugees by invoking appropriate provisions from the Constitution of India ( Vijaykumar, 2000)

The Constitution confers certain rights to every human being and certain other rights on the citizens. Every person is entitled to equality before law and equal protection of the

laws. So, no person can be deprived of his life or personal liberty except according to the procedure established by law. Thus, the state is bound to protect the life and personal liberty of every human being, be it a Citizen or otherwise. The case can be supported by the role of the judicial body in the case of Khudiram Chakma (1994 supp.(1) SCC 615) .

The Supreme Court was required to consider the case as the Chakmas who were seeking citizenship under section 5(1) (a) of the Act which provide for citizenship by registration. The court concentrated specifically on Section 6-A (2) of the Citizenship Act 1955, section 3 of the Foreigners Act 1946, the Foreigners Order 1948 as well as Article 19(1) (d) and (e) of the Constitution. The Supreme Court held that there are two conditions needed to be satisfied under subsection (2) of Section 6-A.

- First, those claiming citizenship under the section must be of Indian origin (undivided) India and must have come to Assam before 1 January 1966 from the specified territory.
- Secondly, they must have been ordinary residing in Assam as it existed in 1985 since their date of entry ( Mishra, 2010)

The Supreme Court went to the extent of issuing the writ mandamus directing the state of Arunachal Pradesh to ensure the life and personal liberty of each and every Chakma residing in the state. The courts suggested that the application filed by the Chakmas for citizenship should be forwarded to the Central government for considerations. It issued stay orders to the Chakmas till the decision of the Citizenship was taken into consideration by the Central government. The government of Arunachal Pradesh is duty bound to give protection due to the fact that, if it fails to do so, it will lead to failure in the constitutional as well as the statutory obligations (Vijaykumar, 2000).

Therefore, the state government protects the Chakmas from the AAPSU as it fits in the provisions of the subsection (2) of Section 6-A .The decision of the Supreme Court is a landmark achievement in the protection of refugees in the country inspite of being not a member of any of the international refugee convention or any national legislation.

The Supreme Court emphasise that the foreigners be entitled the principle of natural justice and the Fundamental rights that is mention in article 21 of the Constitution and should be made available to the foreigners. But the foreigners are not entitled to settle in the country or invoke any provision of Article 19 (1) (d) and (e) of the Constitution. Thus, the

foreigners were provided with certain rights but cannot avail the right that is meant only for the citizens.

The Supreme Court and the High Court foster the protection of the refugees in various judgements the Supreme Court stayed the deportation order of the Burmese refugees and allow them to seek refugee status from the UNHCR office in New Delhi. In *Bogyi v. Union of India (Civil Rule No.1847/89)*. The H.C. of Guwahati,dated 28 September 1989 ( unreported) , the High Court of Guwahati issued stay order of a deportation order against Burmese refugees by releasing him from the custody so that it seeks protection from the UNHCR. In the case of *Dr. Malavika Karlekar v. Union of India (Criminal Writ Petition Nos. 124 and 126 of 1986)*, the Supreme Court stayed the deportation order issued against 21 Burmese refugees from the Andaman Islands and allows them to seek refugee status before the UNHCR in New Delhi. The court also further ordered that the refugees should not be deported until their application for the refugee status determination is approved by the UNHCR.

In the case of *P.Nedumaran and Dr. Ramdoss v. Government of India and others*, the High Court issued notice to both the Central and the State government about the forced repatriation that was taking place. Both the government gave an undertaking that they would not repatriate anyone without their consent and the petition was disposed off accordingly.

In the case of *K.A.Habib v. Union of India (Criminal Writ Petition Nos. 124 and 126 of 1986)*, the Gujarat High Court decided the principle of non-refoulement is encompassed in the Article 21 of the Constitution. The case concluded that the two refugees from Iraq should not be sent back as long as they have fear for their life in their home country. There are also some other cases like the *Ms. Zothansangpuii v. The State of Manipur*, (Civil Rule No. 981 of 1989),*Mohammed Siddique v. Government of India and Others* , *Mr. Syed Ata Mohammad v. Union of India etc.*

After examining the provisions in the Constitution and the decisions of the Judiciary in different cases, through the judgement of different cases, all the citizens along with the foreigners are entitled to protection according to the constitutional provisions. They will have the right to live as long as they are here, with human dignity. The state is under an obligation to protect the life of every citizens and foreigners who are in the country thus, while enforcing the refugee law in the country, the Courts takes into account the following

aspects:

- The international Conventions and Treaties are not as such enforceable by the Government and Treaties as such enforceable by the Government, nor they give cause of action to any party, but there is no obligation on the government to respect them.
- The power of the Government to expel the foreigner is absolute.
- Article 21 of Constitution of India guarantees the right of life on Indian soil to non-citizen as well, but not right to reside and settle in India.
- The International Covenants and Treaties which effectuate the fundamental rights guaranteed in our Constitution can be relied upon by the Courts as facets of those fundamental rights can be enforced as such.
- The work of UNHCR being humanitarian, on certification of Refugees, the Government of India is under an obligation to ensure refugees received international protection until their problems is solved.
- The principle of Non-refoulement is encompassed in Article 21 of the Constitution of India and the protection is available so long as the presence of refugees is not prejudicial to the national security.
- In view of the directives under Article 51 (c) of the Indian Constitution provides that India "shall endeavor to foster respect for international law and treaty obligations in the dealings of organised peoples with one another". and, Article 253 of the Constitution gives the Indian Parliament the "power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body "international law and treaty obligation are to be respected. The courts may apply those principles in domestic law, provided such principles are not inconsistent with domestic law.

The Supreme Court also had given its effect to the provisions of UDHR, ICCPR, ICESCR, CRC, CEDAW, and European Convention on Human Rights and has generally been given to the effect to the principle of International Law. But, the decision of the government to enforce the provisions is absolute and therefore the government can still work for its national

interest.

### **The Application of Non-Refoulement and the Conventions in India**

The principle of non-refoulement is encompassed in Article 21 of the Constitution of India. Due to this fact the refugees cannot be deported arbitrary if his life and freedom is threatened, but it should be provide only on the condition that his presence is not prejudicial to the national security. While this decision does not question the power of the Government of India, it lays down that the principle of non-refoulement must be respected before deportation once a person has been granted asylum. But the Government of India will be in favour of deporting a foreigner if found indulging in criminal activities. The court also upheld the stand of the Government to deport any refugees if he has prejudicial to the interest of the state and the extent of reasonable opportunity of being heard would depend on the facts and circumstances of each case (Mishra, 2010). The Foreigners Act allows the Indian government to refoule foreigners, including asylum-seekers, through deportation, and is therefore in violation of international customary law.

Due to the two sided approach towards the refugees, they seek the protection and assistances from the host country as well as the internal community mainly based on the moral and legal grounds. Therefore it is the moral, legal and humanitarian duty on the part of the host state to protect and assist the refugees at least on temporal basis and also cooperate with the international community for the long lasting solution of the refugee problem ( ibid). Thus, the protection approach is different from the other international community as none of them is bounded by any legal provisions like the 1951 Refugee Convention and the 1967 Protocol. India's protection measures are wholly based on humanitarian grounds and pursue the protection of the refugee through the Judiciary and the Constitutional provisions. Hence, as long as the judiciary is capable of relying on the existing constitution or other legal provisions, as well as the principle of international law, the basic rights of the refugees will be safeguarded by the Government.

India also provide the protection measures to the refugees based on

- India allows the UNHCR to operate in its soil among the refugees. The work of the UNHCR is also supported through the different organization like the NHRC and different NGOs.

- Article 21 of the Convention direct the state not to expel and return in any manner in any manner in which the life or freedom is threatened on the account of race, religion, membership of a particular social groups or political opinion etc.
- Article 51 automatically incorporates the international rule of non-refoulement in India domestic laws ( Vijaykumar, 2000)

India's obligation to observe the customary international law principles of non-refoulement is strengthened by the fact that India is signatory the 1966 Bangkok Principles and the Convention Against Torture (CAT) which articulate a legal basis to the principle of non-refoulement. Thus, India directly or indirectly promotes the rights of the refugees, due to the fact that India is a member to a number of international human rights treaties such as the 1965 Convention on the Elimination of all forms of Racial Discrimination which was ratified in 1969 and the Elimination of all forms of Discrimination of women in 1993 and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was signed in 1997.

Though India, being a member of various international conventions, could not be effective in the implementation, as the conventions is usually not followed by the Indian law. It is also a well known fact that the courts cannot enforce the principle of customary international law if they are in conflict with the statute. Therefore, there is no specific refugee legislation i.e neither in the international law nor in the domestic law. Due to this fact, India's policy towards the refugees living in its soil can always change, even radically, and the legal situations of refugees in India remain precarious. In the absence of the domestic law, the judiciary cannot ensure that the executive branch of the government fulfils the treaty obligations. Thus, in practice, there is no municipal law that give effect to the international law and principles.

### **The need for National Legislation**

The south Asian countries are known for its refugee population but none of them had adopted the International Convention on refugees nor the national legislation to deal with the over increasing flow of refugees across the border. India is not a signatory of the Convention and the protocol as it was felt that there was no need to set up an elaborate international organization whose sole responsibility would be to give legal protection to the refugees (Bhattacharjee, 2001). There was no official response from the Government of

India on its refusal to ratify the Convention except a statement by the External Affairs Minister in Parliament which declared that the Government was studying the implication of ratifying it (ibid). Due to the absence of the specific law, refugees are dealt on an adhoc basis. The policy of the Indian government towards the refugees is non-binding and therefore is not applicable as a law in the country. The refugees in India are dealt either bilaterally or unilaterally.

The adhoc approach of the government led to the preferential treatment among the refugee groups. It will allow the officer in charge to decide on its own whom to grant the refugee status without assessing who the asylum seekers are or on what ground the claim had been based. The national legislation will put forth a standardized and acknowledge principle for the determination of the refugee status; in that case, an asylum seeker who are genuine and need protection will be protected by the government. This will prevent the misuse of power by the official's towards the refugees. It will provide clarity and guidance on many legal and administrative issues pertaining to the recognition and protection of refugees. It will also enable in the easy assistance of the need of the refugees be it legal, social and economic conditions etc. Without the national legislation, the rights available to the refugees are in no way different from those granted to aliens in general. Accordingly, the adoption of National legislation will establish consistency and predictability in handling asylum seekers and refugees (Trakroo, Bhat et.al 2005). It will also identify the illegal Migrants who are posing as refugees and it will give a status to those who are genuine refugees i.e an ought based and not a charity based refugee status to the refugees.

The national legislation will enhance standardized mechanism for refugee status determination. It will enable the government to distinguish between migrants, refugees and bonafide asylum seekers etc. It will also help in avoiding the diplomatic problems i.e a friction between the country of origin and the host country. The act of granting asylum will be understood by the other states as humanitarian, peaceful and legal act under the judicial system rather than a hostile political gesture (ibid). It will serve the interests of both the refugees and the host country. The asylum seekers who deserve the refugee status will be dealt in accordance with rules set out by the immigration authority. In this case, the refugee status will be accorded only to those individual who deserve it and those who get recognition will be treated with the accepted standards and principles (Ibid). The adoption of the national

legislation will end the arbitrary refoulement of genuine refugees and will prevent unlawful detention of the asylum seekers. The refugees will get better treatment than the migrants and will provide a uniform code of conduct to different refugee groups based on race, nationality etc (Chimni, 2000). It will provide cessation clause of the refugees in the most possible way either naturalization or voluntary repatriation.

The enactment of the national law for refugees will show that India is serious about her membership in EXCOM. This will also strengthen her membership in the Security Council in the United Nations which will strengthen India's power in international politics. The former Chief Justice of the Supreme Court of India, J.S.Verma stated the plight of the refugees and the need of the legislation, that

Refugees being deprived of the support and protection of their home country are required to be given to the needed protection by the international community. This is necessary commitment of civilization. Refugees are often without means of sustenance and may not have the requisite identity papers. For this reason, provisions have been made for these basic needs

He also argued that

while India has an excellent record in giving asylum to those who flee threats to their life and freedom, and the Indian Judiciary has mostly been helpful in safeguarding the interest of the asylum-seekers, the need to establish a formal legal framework for the protection of refugees has still not been fulfilled.

He is of the opinion that Legislation only will provide a permanent solution. The adoption of the national legislation would allow more consistent policy towards the different refugee groups. Such a law would systematize the standard of the refugee protection and establish accountability of the government authorities. The legislation could seek to balance the security and sovereignty concerns of the Indian government and the need for a systematic refugee protection regime (Sen, 2003). Hence, analyzing the realities of South Asia, efforts should be given towards developing a comprehensive national laws which uphold the Universal Principles of International refugee protection while taking into account the distinctive traits in the region (Chowdhury,2001).

## CHAPTER -IV

### INTERNATIONAL ORGANISATION AND INDIAN NON-GOVERNMENT ORGANISATIONS AS INTEREST GROUPS

The overflow of the refugees around the globe affects all the countries directly or indirectly. In order to give protection assistance to them, the various organizations, inter-governmental organizations and the non-governmental organizations collaborate to deal with the crisis. The Non-Governmental Organizations (NGOs) are an organized body that are functionally independent of, and does not represent, a government or State. They are made up of activist who are devoted to working on particular issues and usually meant for voluntary and open ( non-secret) associations of individuals outside the formal state apparatus (central and local governments, police and armed forces, legislative and judicial bodies etc) and they are neither work for profit nor engage in political activities. Sometimes they are also called non-profit organizations (NPO) or Private Voluntary Organizations (PVO) . They are engaged in the humanitarian relief programmes in times of war, natural disasters, and cooperation across the national boundaries on safeguarding the rights of the refugees and minorities section of the society etc. As a result, the international organizations, international non government originations, inter governmental organisations and the local non-government organizations are closely interlinked in the development process for the refugees. Therefore, the term NGO is normally applied to organizations that are devoted to humanitarian and human rights causes, many of which implement the refugee-related programmes that are in partnership with UNHCR and other agencies.

- The Twenty First century is marked by the rise of the civil society, and the growing participation of the non-state actors. The civil society organization help in dealing with the emerging global threats (Lester, 2005). The NGO's derive their sources from the public and the private sources. There are four models that governed the effects of the ngos:
- First, all began and some remain with one headquarters based entirely in one country, even though they work internationally in others. E.g. International Rescue Committee.
- Some may have autonomous national chapters with independent field organizations,

each reporting back to the home offices. This means several offices may work independently of each other in the same country eg. Oxfam

- Some have chosen to create many national fund raising offices that pool their collective funds and spend them through a single window field organization, which is indigenously staffed and managed. Eg world vision international and International Federation of Red Cross.
- They work through the indigenous local NGOs that are not part of their organizational structure; they have no independent operational capacity in the field. eg. Christian Children Fund. (Natsios, 1995).

NGOs represent the most diverse sector participating in UN processes in terms of mandate, capacity, experience and outlook. Some are issue specific, others have very broad mandates. Some are in industrialized countries, others are from developing countries. Some are humanitarian in their orientation, others are human rights oriented. Some have a faith based orientation or dimension, others are secular. Some of the notable International NGOs working for the refugees are International Council of Voluntary Agencies (ICVA), International Social Service, Inter Action, Amnesty International , World Vision Inc, Refugee International and CARE etc. A perpetual challenge for NGOs is to ensure that governments, UNHCR and other inter-governmental institutions are answerable in reality for their rhetoric in Geneva; that is, for the declarations and statements they make, or the resolutions they adopt (ibid). The centrality of the role of the NGOs may be traced back to the genesis of the United Nations and the lobbying by the NGOs for the inclusion of human rights protection in the UN Charter (Breen,2005). NGOs play a vital role in the elaboration and protection of human rights norms. In times of refugee crisis, the NGOs help the refugees by providing relief materials such as healthcare, food, water supplies and shelter etc and also engage in the social services. They help in bridging the gap between the law and policy and perform essential functions in lobbying the government.

### **International Organizations & NGOs influence the policy makers.**

India is widely believed to be a vibrant civic society where most of the NGOs indicate their dominance in the in the development of human rights, environment, women and refugees etc. But here, focus will be given to the NGOs working for the promotion of human rights and refugees. The international organizations like the UNHCR and the NGOs work hand in

hand with the refugees. It is due to their main focus which is protecting and assisting the refugees. In consequence, while assessing their involvement with the refugees, they contribute jointly in different cases, be in the protection measures, advocacy to the government and the judicial protections etc. Therefore, their role as an interest group to the government will be discussed in a parallel.

The NGO make an important contribution in response to humanitarian cause and play a vital role in the protection of refugees. Because of their independent status, NGOs are often the first agencies to arrive and provide assistance during an emergency. NGOs can use their presence and direct involvement with individuals to help protect refugees by:-

- reporting protection concerns, either to the government authorities and international bodies or other NGOs, as they occur
- alerting the public and the media to those concerns;
- promoting international standards among government and local officials;
- offering legal and social advice, education and training programmes to refugees; and
- monitoring human rights both within the country of origin and within the country of asylum ( Protecting refugees: A field guide to the NGO's, 1999).

The NGOs greatly contribute in the development policies, standards and norms for the refugees and become the voice of the refugees on various issues such as violation of their rights etc. They are active in the participation of the refugee protection at the national, regional and international levels, both in public and in behind the scenes. They try to advocate to the governments, inter-government, organization and other actors on the protection of the refugees (ibid). The humanitarian and human right NGOs co-operate with one another to strengthen the refugee protection. They try to influence in the decision making of the government and policy development to enhance the protection measures of the refugees both at the national and international level. Thereby, become an integral part of the refugee protection system in its implementation as well as in setting and maintain the protection standards. By assisting, negotiating, monitoring, reporting, analyzing, lobbying or advocating policy and practice they strengthen the refugee protection standards. Consequently, the refugees has recieved recognition in many international conventions on human rights. They are now widely recognized as assisting in promoting debate in the forums for human right and their role has become increasingly prominent in the policy

making, and intervenor in times of crisis.

The NGOs address the issue of human right abuse by the government and the right to asylum and exit of the refugees which sometimes might be against the policy of the government. They play a significant role in providing various resettlement services. The role and function of NGOs vary from country to country; but in many cases, these organizations act as liaisons between the refugee, UNHCR and the receiving Government. In many resettlement countries, NGOs are in the forefront of advocating refugee protection and assistance with the Governments, the public and other organizations. Advocacy can take the form of individual casework for specific refugees or working more broadly with officials and politicians to promote positive and expedited admission decisions. Sometimes, the NGOs have become entangled between their humanitarian assistance and the politics of the government due to their involvement in the rights of the refugees such as non-refoulement and status determination process etc.

. In India, there are various international organizations that are engaged in the humanitarian cause but in the case of the refugees; the UNHCR contribution outshines the others. The UNHCR was created and entrusted for the protection of the refugees who are in need of assistance. The UNHCR provides protection to the refugees on different areas such as - promoting accession to and implementation of refugee conventions and law; ensuring that refugees are treated in accordance with recognized international standards of law; ensuring that refugees are granted asylum and are not forcibly returned to the countries from which they fled; promoting appropriate procedures to determine whether or not a person is a refugee according to the 1951 Convention definition and to definitions found in regional conventions; assisting refugees in finding solutions to their problem, such as voluntary repatriation, local integration, or resettlement to a third country; helping reintegrate returnees when they go home; and providing protection and assistance, when asked to do so, to internally displaced persons ( Protecting refugees: a field guide for NGO's, 1999)

UNHCR advocates that governments adopt rapid, flexible and liberal procedures since it is often difficult for refugees to document and prove persecution. Sometimes, UNHCR conducts status determination procedures on behalf of governments: for example, when a State is not a party to any international refugee treaty or when the national authorities ask for UNHCR's assistance. If a person seeks asylum in a State that has no refugee status determination procedures, UNHCR can conduct the procedures under its

mandate to protect refugees. If the State concerned does not respond to UNHCR's advice, NGOs can help protect the asylum seeker in question by pressuring the Government to do so. This can be achieved through advocacy, representations to the concerned authorities and public information campaigns.

The different inter government organisations and the non-government organisations engaged in the protection of the refugees which had an influence in the government directly or indirectly on its policy towards the refugees. The Asian Pacific Consultation acts as a forum for unifying the various initiatives in population movement.

The local NGOs like the SAFRHR work for the formulation of the refugee protection in South Asia the proposed Model National Law serves as an ideal instrument for the protection of the refugees in the region. It not only placed as a binding obligation on the participating states but also influence in the public opinion of the people along with the official view of refugee protection. Thus compelled the government to participate itself in the recognition on their part of the value of the process ( Oberoi, 1999).

The NGO's perform an indispensable role at the every stage of development programmes for the refugees. They involve in the preventive efforts in times of crisis; once an emergency is underway they are instrument in saving the lives and meeting the basic needs of the victims. They play a key role in the identification and implementation of solution for the refugees including voluntary repatriation (Chakrabarty, 1998). Because NGOs agencies can administer more resettlement aids, the refugee have been able to access assistance through the various organization more sympathetic to their situation than the governments. The NGOs not only provide substantial aid from their own resources but also act as UNHCR's operating partner in carrying out the specific projects. The NGOs could also bridge the gap between the state and the communities and also put pressure on the state to respect and enforce human rights and broader sense of belongingness. They are positioned between the refugee and the state and are important partners in advocating the refugee crisis.

### **Role of the UNHCR & local NGOs towards the Refugee in India**

From the time of its inception in 1951, the UNHCR has maintained its integral part of its activities in collaboration with the NGOs. In the initial phase the UNHCR was humanitarian and engaged mostly in the planning and coordination while its operations and implementation of the proposed projects for the refugees were largely considered as

responsibility of NGOs. But there was a shift in their role due to the rise of the refugees in Europe, Asian and the African countries, which needs the collaboration of both, henceforth, they joined their efforts to address the problems of the refugees. The UNHCR engaged in the protection of the refugees such as promotion of grants and asylum, reunion of families, application of the doctrine of Non-Refoulement, maintenance of material assistance, voluntary repatriation, assimilation or resettlement, supervision, co-ordination and public relations between the refugees and the country of asylum. They became a focal point for the maintenance and assistance of the refugees (Chakrabarty, 1988). The NGOs are the main partners in the delivery of humanitarian relief and in the implementation of the relief programs of the UNHCR. In 1994, at Oslo Conference, their partnership has also been strengthened and is known as Partnership in action ( PARinAC). The Oslo Conference marked the NGO-UNHCR cooperation in the areas of protection, emergency preparedness and response, internally displaced persons ,solution and the continuum from relief to development (Thakroo,2007). Any foreigner who enter India and seek the refugee status must approach the UNHCR for assistance to claim the refugee status. If the applicant is found eligible, the UNHCR will assist to find a durable solution either issuing a refugee certificate or accord the refugee status. In the absence of the national law on refugees, the only validity the refugee can get hold of is genuineness of his/ her claim for refugee status is the UNHCR certificate. Without this, the refugee will be treated as alien and can be deported anytime at the border of will be kept under detention by the Indian government authorities.

The domestic NGOs and the UNHCR are complimentary to each other. Both the organization main emphasis is on humanitarian and the protection of the people who are in need such as Statelessness, Internally Displaced Persons and the Refugees etc. The UNHCR also focus on addressing the requirement of people with specific needs, by collaborating with the local NGOs in order to give protection and assistance to the refugee communities. It also helps the refugees in the repatriation of the refugees and intervene in case of forced raptraiation measures carried out by the Government. Among all, their contributions in the case of the refugees are most significant as seen in the case of India. In a situation where the Government denies the access of the UNHCR and other foreign humanitarian agencies, the domestic NGOs play the most crucial role in the protection of the various refugee groups. Hundreds of international and local NGOs perform an indispensable role in the protection of the refugees and its development measures. So, their role through the various programmes

undertaken by them is evident amongst the refugees. Such as-

### **1. The Refugee status determination:**

All the refugees who approach the UNHCR for the status determination are asked to fill a registration form which gives the detail information of the applicant such as the family background, education, work experience, and travel particulars etc. known as Application for Mandate Refugee Status (ARMS). According to the refugees, the determination process of the refugee status is arbitrary, complicated and full of delays as the applications are being rejected by the UNHCR without any given reasons and re-appeal proves practically meaningless. Sometimes, there is delay in the determination process, the interviewed being rescheduled, cancelled or the interviews letters do not reach on time further jeopardizing the refugees. The SAHRDC reports that the refugees and the representative NGO's do not understand the UNHCR criteria for determining the refugee determination process.

### **2. The Subsistence allowances to the refugees.**

The refugees whose claim was accepted or who are under the mandate of the UNHCR were provided with Subsistence allowance (SA) and self-reliance. The UNHCR administered the SA scheme through its implementing partner YMCA. The allowances covers Rs. 1,400 per month to the recognized refugees, Rs. 600 each to the first three dependants, Rs. 450 for the next three, and Rs. 250 each for the remaining family members. The YMCA also provides short language course in Hindi and English to the refugees. Thus the government should issue work permit to the recognized refugees so that they can have a basic means of earning for their livelihood. The self reliance programme is also administered by the Don Bosco Ashalayam (DBA) which provides for six month vocational course to the refugees in different fields such as computers, beauty parlour, television-repairing and tailoring etc. But all these efforts proved to be futile as they do not lead to the proposed plan of self reliance due to the fact that the refugees were without the work permit. Consequently, the vocational course programme do not offer a guarantee to employment for a regular source of income. Therefore, they were forced to seek employment in the informal sector where they face discrimination as they are treated as outsiders by the local population.

### **3. Medical Assistance Programme**

The UNHCR offers medical services to recognised refugees through the Voluntary Health Association of Delhi (VHAD). The VHAD is an NGO, coordinated with the refugee project

to provide medical assistances to the refugees, support in finance and ensuring health service to the refugees. Persons who are approved for medical assistance can be categorized into four groups such as Chronic Medical ailment, Medically vulnerable individuals, Disabled groups and others which include Reproductive health care, optometric care, dental care etc.

The VHAD clinic provides medical facilities and basic medicines free of cost to refugees. It also has an outreach programme that provides medical services to refugees who do not have an access to hospitals. VHAD/UNHCR also refers patients to government hospitals and reimburses medical expenses to a limited extent (only if the patient is being treated at a government medical facility). Expenses incurred for medical treatment at a private hospital are not reimbursed by VHAD/UNHCR. Even those who are eligible for medical reimbursement do not receive it in full and the procedure for providing reimbursements is also extremely discretionary.

#### **4. Education Assistance Programme.**

The Education Assistance Programme is in association with the Young Men's Christian Association (YMCA), Delhi. Through this, educational assistance is provided to refugee children of primary class till they reach class X. But this education allowance does not cover the full costs of a child's education. Although admission to government schools provides subsidised education facilities to children, the admission procedure is strict and cumbersome, as a result of which refugee children often find it difficult to gain admission. In that case, the YMCA helps the refugee children in getting admissions to schools. In cases where they could not provide the relevant documents, the Children were forced to take admission in private schools but are forced to drop midway as they are unable to pay high fees.

#### **5. The Socio-Legal Service.**

The UNHCR provide legal assistance to the refugees through the NGOs or other advocates who will assist them in legal matters. The refugees face harassment by the FRRO Officials who refuse to issue or renew their Residential Permit or unnecessarily delay the process. They also face constant threat of illegal arrest, detention and deportation etc. Therefore, the UNHCR appointed the Socio-Legal Information Centre (SLIC) to provide legal assistance to the recognized refugees. They can approach the SLIC on matters related to the Residential Permit and renewal of refugee certificate from the Foreigners Regional Registration Office

(FRRO) of the Ministry of Home Affairs (MHA). The SLIC also provides legal support to the refugees who have problems with the local community or with the local authorities and the police and also ensure that no refugee is unrepresented in a court of law and has access to legal aid. They also helped the refugees to apply for durable solution of naturalization to become the naturalized citizens. The refugees are also assisted by Public Interest Legal Support and Research Centre (PILSARC) on matters related to refugee status with legal support. PILSARC support only those refugees who are abide by the law of the asylum country and who are registered under the Foreigners Act or the Passport Act and deny its involvement with refugees who are charged with criminal offence ( Trakroo, 2007)

### **Role of the Local NGOs as Interest Group.**

The non-governmental organizations (NGOs) played the role of an interest group which main focus is on the humanitarian assistance. They got involved in various issues such as developmental programmes, human rights, and refugees, etc. Among the local NGOs like other Media organised Seminars and discussion with the different refugee groups to have a shared platform for the refugee group so that they can approach Parliament and the Government on issues pertaining to them. The other organisations like Pak Visthapit & Seemant Lok Sangathan organised initiate dialogue and share experiences among the different groups. The different NGOs thus engaged in the protection of the refugees and intervene in cases of violations of the refugee rights by the authority. The South Asia Human Right Documentation Centre (SAHRDC) is an NGO working for the human right specially civil and political, treaties and conventions, refugee protection and asylum etc. It becomes a watchdog for the human rights and the refugee by assessing the movement of the UNHCR and the Indian government on the treatment of the refugees and the violation to their rights. The SAHRDC look into the following issues-

#### **1. The Tamil refugees.**

In 1983, ethnic conflict erupted in Sri-Lanka between the Sinhalese majority and the Tamil minority. Refugees due to this ethnic conflict started to come to India in different waves between 1983-1991 and were welcomed by the Indian government where settlements were provided at the refugee camps in Tamil Nadu. But the situation changed after the assassination of Mr. Rajiv Gandhi by a suicide bomber suspected to be the member of Liberation Tigers Tamil Ealam. This incident changed the attitude of the Indian government

towards the Tamil refugees; the Indian government started the “voluntary” repatriation programme under which 23,000 Tamil refugees were repatriated without international supervision. Those who were left suffered due to the poor living conditions in the camps because of the cutoff of the supply from the NGOs who provide medical health care, meager monthly stipends and food rations such as rice, sugar, kerosene which was been provided by the State government of Tamil Nadu. The government banned the NGOs in the camps and restricted the movement of the refugees. The government detained hundreds of refugees on Special camps to charge the Tamils on the suspect of being a terrorist.

As a result, the SAHRDC intervened in the issue due to the fact that the policies of India and the State of Tamil Nadu directly contravene the conventional human right laws as well as the customary international law regarding non-refoulement. The SAHRDC along with the NHRC have compiled various reports on the detainment of the non-militant refugees simply charged with the Foreigners Act. The SAHRDC recommended the Indian government to allow the NGOs to resume their duties in the camps (Patil,2003)

## **2. The Jumma refugees.**

The Jumma refugees from the Chittagong Hill Tracts fled to India due to the religious harassment by the Muslim government of Bangladesh. Since 1978 they were provided with temporary settlement in Tripura and Mizoram by the Indian government. In 1986 the flow of refugees increased due to the series of massacre conducted by the Bangladesh government which as totalled upto 70,000 refugees in six camps in Tripura. After some years, since India wanted to improve its relation with Bangladesh India started to pressurise the Jumma refugees to return to the Chittagong Hill Tracts. Finally in 1992, the government took an extreme step not to supply rations to the refugees, medical and other basic amenities. The State government along with the support of the Central government denied the education facilities to the refugees. In 1992 the state government suspended the supply of ration to the refuses which led to starvation in the camps. In 1994, the SAHRC along with the NHRC filed a case against the acts of the government on the forcible return of the refugees. The NHRC asked the Ministry of Home Affairs, the Ministry of the External Affairs and the State government of Tripura to reply to the allegation of the forced repatriation. Finally in 1996, Mr. A.Chakraborty, Senior Superintendent of Police was sent for an investigation against the allegation made by the SAHRDC (Ibid).

## **3. The case against the UNHCR.**

The refugees who are under the mandate of the UNHCR like the Afghani refugees, the Somali, the Sudanese and the Burmese refugees were against the UNHCR as their subsistence and protection were in no better than the refugees who are under the UNHCR. There has been a complaint against the UNHCR on their standard guidelines on issues related to cancellation of the refugee status and allowances to certain individuals.

The SAHRDC conducted an investigation on the UNHCR on matters such as aid, subsistence allowances, accommodation, employment, legal aid, travel documents etc. The report shows that the UNHCR has become inadequate and therefore recommend the UNHCR to improve the conditions of the refugees which was being forwarded to the New Delhi office and the headquarters in Geneva ( SAHRDC Report).

Therefore, after assessing the above mentioned cases, the role of the local NGOs i.e SAHRDC played a significant role examining and questioning the acts of the government and the international organization like the UNHCR on its policy and actions against the refugees. In consequence, they had influenced the government in the policy making and assured that the rights of the refugees are not violated by the authority.

Konzolo had pointed out the general involvement of the international organizations and the NGOs such as –

- Expert advice and analysis- it facilitate the negotiation by giving politicians access to competing ideas from outside the normal bureaucratic channels.
- Intellectual competitions to the government- NGOs often have a better analytical and technical skills and capacity to respond more quickly than the Government officials.
- NGOs working in the refugee sector have always played a unique role in mobilizing public opinion and instigating political support in defense of humanitarian and human rights principles in guaranteeing refugee protection.
- Keeping the hope alive- NGOs involved in advocacy help vocalize the interests of refugees who are not well represented in policy making. Their activities also include public and private interaction on behalf of the displaced persons.
- Service provision- NGOs deliver technical expertise on particular topics as needed by the Government officials as well as participate directly in operational activities , NGOs have extensive networks and influence at national level that international; agencies do not.

- Monitoring and assessment- NGOs help strengthen International Agreements by monitoring negotiation efforts and Government compliance.
- NGOs play a role of offering effective protection, which starts with sharper awareness of international obligations and standards but depends upon state commitment
- Capacity building amongst the displaced populations on various fundamental issues of benefit to them. e.g. human rights issues.

In recent years, there has been a rise in regional processes of consultation, many of which have been initiated by UNHCR in partnership with NGOs and eminent personalities. Such initiatives have included annual sessions of the Asian - African Legal Consultative Committee, the Informal Consultation on Refugee and Migratory Movements in South Asia (also known as the Eminent Persons' Group) and the Meeting of the Asia - Pacific consultations. In addition, local NGOs have begun to take the initiative to convene discussion on refugee issues in South Asia lately. Such consultations, organized by the regionally-based human rights NGOs, are important steps on the path towards evolving a regional consensus on standards of refugee protection. These meetings are valuable part of the ongoing efforts, both formal as well as informal, to promote attention to refugee issues in South Asia.

### **NGO'S role in the formation of different regional conventions**

#### **1. The Asian- African Legal Consultative Organisation. ( ALLCO)**

The Asian-African Consultative Organisation is an inter-governmental consultative group formed in November 15, 1956 was set up to co-operate on matters relating to common concern. The 1966 Bangkok principles set on the principles for the status and treatment of refugees in the Asian and African region. The Principle sets out the guidelines for its treatment towards the refugees in the region. Though non-binding in its nature, it serves as guidelines to the government on its dealing with the refugees. The Bangkok principle was finally adopted on its New Delhi session on 24th June 2001 and define refugees “ As a person who, owing to persecution or well founded fear of persecution for reasons of race, color, religion , nationality, ethnic origin , gender, political opinion or membership of a particular social group leaves the state of which he is a national , or the country of his nationality , or if he has no nationality , the state or country of which he is a habitual

resident or being outside of such a state or country, is unable or unwilling to avail himself of its protection and also 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 in order to seek refuge in another place outside his country of origin or nationality”

## **2. Eminent Persons Group (EPG) and the proposed National Law on Refugees**

In 1994 Mrs. Sadako Ogata initiated a forum, the Regional Consultation on Refugees and Migratory Movement in South Asia, to discuss the refugee issues in South Asia regional level so as to come up with strategies and common approaches for strengthening refugee protection and intensifying the search for durable solutions. The EPG members consist of former senior Government Officials, former Judges, Lawyers, Academics and Journalist in the region. The need for a stable and secure guarantee of refugee protection in India led to the establishment of an Eminent Persons Group (EPG), chaired by former Chief Justice P. N. Bhagwati, to suggest a model law for refugee protection. The first draft of this proposed law was presented at the 1997 SAARCLAW Seminar in New Delhi, modified and then adopted by the Fourth Annual Meeting of the Regional Consultation at Dhaka in 1997.

- The Eminent Persons Group proposed a National law based on the common principles. This led to the formation of Model refugee law in 1996 which was meant to grant statutory protection to the refugees in the region. The main purpose of the Model National Law was to establish a procedure for granting refugee status to the asylum seekers, to guarantee them fair treatment and to establish the requisite machinery for its implementation. Henceforth, the 1997 Dhaka EPG approved the Model National Law and defined the Refugees mentioned in Article 14 –
  - 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 the protection of that country because of the well founded fear of persecution on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion, or
  - 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 but outside his or

her country of origin.

The EPG group work for the development and the promotion of the national refugee legislation in the country by trying to influence the Ministry of Law, Ministry of External Affairs and the Ministry of Home Affairs on the need of National Law. The adoption of the National Law will provide consistency in the country's approaches towards the refugees . The proposed law should be in tune with the international norms and meet the standards keeping in mind the 1951 Refugee Convention and the 1967 Protocol.

The EPG along with the UNHCR tried to lobby the government towards the enactment of the national refugee law. The Model National Law has long been considered in India but is yet to be implemented. The EPG in India pursue a two track strategy- Persuading the government in the enactment of the national law for refugee protection, and to support a set of principles or Declarations. It also collaborates with the NGOs in the protection measures and the enactment of the law on refugees.

The EPG also attempted to link itself with inter-regional organizations like AALCO and SAARC on issues related to refugees which directly or indirectly affect them. The institutional link with the EPG influence the SAARC countries which led to the formation of the SAARCLAW which will deal with the problem of refugees in the region and durable solutions.

The Government of India is not much in favour of the expanded refugee definition as the definition is drawn from the Human Rights and humanitarian law instruments is too broad (Saxena,2007). The India-specific model law was born out of this regional consultative process to provide statutory protection to refugees in the diverse South Asian region. Despite technical or specific misgivings about the model law, there has been unanimity about its necessity and widespread acceptance of its use as a framework for future protection (Acharya, 2004).

## CHAPTER- V

### CONCLUSION

The world history is marked by the voluntary movement of people across the globe and Mass migration is not a new phenomena. But forced mass migration started only in the 15th century due to various reason like colonial expansion, great world wars, decolonization etc. Though the world had experienced the large movement of people since long, the region South Asia experienced the waves of refugees due to the decolonization process and the emergence of the nation state system. Since then, the regions have experienced unprecedented growth in the movement of people from across the neighbouring countries. The present day situation is marked by the growing nature of migration of people from one region to another. The over increasing flow of refugees is due to many factors such as political, ethnic and religious violence, economic hardship and developmental changes and the natural calamities etc. which led to migration of people across the globe. As a result to these situations, it posed a matter of grave concern globally, regionally and nationally, affecting the governance, economy and international peace and security among the nation states and the international community as a whole. No country in the region is able to tackle the problem of their demographic change, as the problem is very acute.

To meet the needs of the situation, the United nations adopted the two legal instrument i,e the 1951 Refugee Convention relating and the 1967 Protocol refugee convention. It is the most comprehensive instrument at the international level to safeguard the fundamental rights of refugees and regulate their status in the country of asylum. Under this, a person claiming a refugee status must have a well founded fear of persecution against which the state of origin is unwilling or unable to offer protection. The 1951 Convention covers only those fleeing persecution on the grounds of race, religion, nationality, membership of a particular group or political opinion. The convention is limited and narrow in its approach since it is bound by the time and the region and does not include all the people who have been forced to flee. This led to the adoption of the 1967 Protocol which cut down the barriers of the period and geographical boundaries. The definition of the refugees broadened in its approach with the formulation of the regional approach like the AALCO, the AOU, the Cartagena, and the European Union etc.

The 1951 Convention on the status of refugees along with its 1967 Protocol is the

backbone of the refugee protection law. The definition of refugees in the 1951 Refugee Convention is narrow in its approach as it covers only those of political refugees of Europe therefore the 1967 Protocol was created to cut off the time and the geographical boundaries of the refugee definition. The 1951 Convention was designed to give protection to the refugees by granting equal treatment so that no national legislation is required but it proved to be a failure as it caters the need of the few European refugees. As a consequence, the different Regional Conventions like the Organisation of African Unity, the Cartagena and the Council of Europe etc. Which have broader approach towards the definition of refugees that includes all fields according to the need of the fleeing population started to developed.

According to the Convention, the refugee must satisfy the criteria mentioned in the Convention in order to avail the protection in the country of Asylum. But in practice, as seen in the case of the present day refugee situation, there is no particular specified determination procedure as it is wholly dependent on the state that differs from one another.

Inspite of the growth and development of the different conventions across the globe, none of the South Asian countries accede to the international refugee law nor has a legal mechanism to deal with it. It may be due to the fact that the South Asian countries felt the Convention is Eurocentric and not favorable for the region, partly due to the fear of the economic burden and partly due to the fact that it will attract more refugees in the region because of the easy accessibility across the border.

The purpose of the Refugee law is to provide international protection for the people who are denied protection by the state. Since the inception of the refugee law, it has been based wholly on the human rights and the humanitarian perspective to the fleeing population who were forced to leave due to the situation in their home country. Accordingly, refugee law has been linked extensively to the human rights and humanitarian law with its objective of providing them shelter and protection to the country where they seek asylum. They were prevented from the returning to the country where their life and security are under threat. The sending country were expected to negotiate the issue and work to bring back the refugees to their home country while the receiving country were expected to give them minimal protection and assistance. On the other hand, the international communities are expected to support the hosting and the sending country for peaceful co-existence between the nations and assure the protection of the refugees. Henceforth, the refugees policy

involves all the individuals, the government, and the refugees themselves.

The State is bound to give protection to the refugees based on their accession to international instrument on Refugees. Protection may not necessarily be derived from the Conventions but can be due to the country's own legislation grounded on the basis of Customary International Law. There are also cases where the state give protection to the refugees based on the country's national interest and moral commitment of humanity etc. Since India is not bound by the International Refugee convention of 1951 and its protocol of 1957, and do not have a specific refugee assistance policy, and inspite of being not under any obligation, India give protection to the different refugee groups such as the Tibetans, the Sri-Lankan refugees etc. based on moral humanitarian assistances. India not only recognize and give protection to them but also acknowledge the refugees which are under the mandate of the UNHCR too such as the Afghans, the Iranian, the Somalia and the Burmese refugees etc. Chakrabarty mentions the observation of Prof. L.C Green on the nature of the states towards the refugee law

“Unfortunately, one is bound to recognize that whatever be the international law on the aspect of the refugee problem, states will in fact condition their policies by their ideology. They may even acknowledge the existence of the International legal rule just mentioned, while at the same time finding excuses , such as the need to support freedom or combat communism or fight colonialism in the name of self determination , to justify contrary behaviour” . This applies in the case of the adhoc treatment of the refugees as it is guided on the basis of the domestic political compulsions keeping in mind the national interest of the country.

The foreign policy of every nation takes a shift based on the leadership and the world politics. Similarly India approach towards the refugees is also based on ground where leadership and the situations prevailing at that period of time bind the foreign policy of the country as seen in the case of India's policy towards the Tamil and the Jumma refugees. The government also adopted the same policy towards jummas refugees of Tripura. In the Bangladesh struggle for Independence, the P.M Indira Gandhi expressed full support for freedom and open its border to provide shelter along the border lines by establishing shelters. But the attitude of the Indian government towards the refugee changed due to geo-political and economic interest of the government. The Indian government tried to build a

good neighborhood policy towards Bangladesh and tried to improve their relation which was wholly political and economic in character.

India has a liberal Constitutional framework that guarantees certain fundamental rights even to the refugees but in legal regime deny acknowledging refugees as a special class of people which deserved consideration. They were provided equal treatment with the foreigners which can be deported at the border at anytime for illegal entry. Therefore, India's refugee policy is not based on any ground of rule but, wholly, is a matter of choice than an obligation. The refugees were accepted in the country mainly due to India's commitment to various International Human Right laws such as the UDHR which promote common standard to all irrespective of race, religion, nationality political opinion etc. Others provisions in the different Conventions like ICCPR, ICESCR, CEDAW, ICERD etc. relates to the refugees in one way or the other. Moreover, the international law principle of Non-refoulement is regarded as the customary law of the land. It is through this principle and humanitarian ground that millions of refugees took shelter in India and received protection either through the Government of India or the UNHCR. The non-refoulement policy is for temporary protection after which the refugees are expected to return back to their country when the situations turn normal. Therefore, the policies of non-refoulement do not mean full protection from the state as the grant of Asylum is non-binding and is wholly at the discretion of the state. So, the application of non-refoulement differs from one's country policy to the other.

In India the refugees are recognized as a special class of people legally but in practice they were treated at par with the aliens. A special protection measure is provided only to those groups which are recognized by the government. Generally, India still work for the protection of the refugees through the Judiciary and the different Constitutional Provisions which gives certain rights to the foreigners. The judiciary is vigilant in the protection of the rights of the refugees as seen in the decisions of various cases of the Supreme Court and the High Court. As long as the judiciary is capable of relying on the existing constitution or other legal provisions, as well as the principle of international law, the basic rights of the refugees will be safeguarded by the Government.

Due to the absence of the legal legislation or a central government body to deal with the refugees, the issues of the refugees are addressed on an adhoc basis by the Ministry of

External affairs, the Ministry of Home affairs, Commissioner of rehabilitations etc. India lacks a cohesive national policy for refugees. The status of refugees is presently determined by the extend of protection they receive from the Government of India which is totally influenced by the political equations rather than the legal obligations. As a result, the vital decisions are left at the hands of the bureaucrats who lack awareness in the humanitarian principle which in turn lead to incompetency in handling the refugee policy. In order to have a tension free policy the government need to adopt a formal legal framework or refugee policy which will solve the problem caused by the refugees and also to be more predictable and consistent. The refugee problem will only be solved when the country adopts a national legislation which will put an end to all the adhoc treatment of the refugees. Thus, only legislation has so far proved to be the only solution for the refugee issue in the country. Without the uniform policy, the application of the law lacked consistency and coherency. As far as the case of India is concerned, the National law or legislation will be a better option than acceding to the International Refugee Convention for the fact the problems need a regional approach as international approach will not suit the case.

Though India do not have a refugee policy the recent developments show that India give importance to the refugees issues as it effects nationally, regionally and globally. In regard to this, India has become a member of EXCOM, Asian African Legal Consultative Committee (AALCC), The South Asian Association for Regional Cooperation (SAARC) and the Model National Law developed by the Eminent Persons Groups in South Asia. This shows that the Government of India has taken actions, to some level, regarding the protection of the refugee in the region. India's upholding the universal moral values and seeking constitutional measures to accommodate the refugees shows its commitment to the various Pacts and agreement. Even though India has not signed the Refugee Convention, it host millions of refugees in the country. India has on various occasion extend humanitarian protection to refugees in the country as can be seen through the judicial decisions of the various cases. India also respect some of the core elements of the international refugee law through its obligation to the various human right convention which got interlinked with the refugee protection. India's policies and practices are in consistent with the main tenets of the international protection regime of the refugees. India successfully accommodated the millions of refugees for the past 50 years its role towards the refugee has been appreciated by the international community.

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## **Appendix I**

### **The UN Convention on Refugees:**

The 1951 UN Convention on the Status of Refugees and its 1967 Protocol are the main international instruments that regulate the conduct of the states relating to the treatment of refugees. The 1951 convention is a legally binding treaty that attempts to establish an international code of rights for refugees on general basis. The 1951 convention also creates numerous rights for the refugees in the country of asylum. There are 46 articles in the 1951 convention; among these the most important are article 1, 31 and 33.

#### Article 1. Definition of the term “Refugee”

“Any person who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of the country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it”.

#### Article 31. Refugees unlawfully in the country of refuge.

“The contracting state shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

#### Article 33. Prohibition of expulsion or return (“refoulement”)

“No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group of political opinion”.

The other articles of the 1951 convention that create specific rights for the refugees are:

- Non-discrimination in regard to race, religion or the country of origin.(Article3)
- Freedom to practice their own religion (Article 4)
- Right of association (Article15)
- Right of access to the courts (Article 16)
- Right to work (article 17, 18)
- Social rights like rationing, housing, relief and security (Article 20, 21, 23, and 24)
- Right to education (Article 22)
- Freedom of movement (Article 26)
- Right to travel document (Article 28)

The Convention also grants wide ranging authority to the contracting states to deny refugee status to criminals and persons perceived to endanger national security. The Convention encourages for the assimilation and naturalization of refugees in the country of asylum.

Initially, the scope of the 1951 Convention was confined to people who became refugees in Europe during the Second World War. However as refugee movements continued it became necessary to revise the definition of the refugee and some other provision of the 1951 Convention in order to make it applicable to new refugee situations. Therefore, a protocol was introduced in 1967 to remove these restrictions, and to universalise the protection offered to the refugees. However, as we have seen, the states of South Asia are not parties to this convention and its protocol. The South Asian states are not legally obliged to respect the provisions of the 1951 Convention on the Status of Refugees and its 1967 Protocol. Over the years, almost all the South Asian states have developed informal and formal relationship with the UNHCR. Some of the states have also become members of the Executive Committee of the UNHCR. The courts of some of the South Asian states have stayed the deportation of asylum seekers and allowed them to approach the offices of the UNHCR in their countries for determination of their status as refugees. South Asian states in general respect “certificates” issued by the UNHCR and treat the certificate holders as bona fide refugees. In conclusion it may not be wrong to say though the states of the region are formally opposed to acceding to the UN Convention on refugees, in practice, they seem to respect and abide by many of the provisions of this convention.

### International Human Rights Laws Applicable for the Protection of the Refugees:

International human rights law is inherent in the UN Conventions, Covenants and Protocols created for global standard setting and protection of the rights inherent in these instruments. The contracting states are obliged to honour the provisions of these instruments. In the absence of the refugee convention and its protocol, international human rights laws ensure a minimum standard of treatment for all refugees to live in dignity. Several international instruments like the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), International Convention for Elimination of all forms of Racial Discrimination (ICERD), Convention for the Elimination of Discrimination against Women (CEDAW), the Child Rights Convention (CRC) and the Convention against Torture (CAT) obligate the contracting states to create legal provisions for the protection of refugees during the stay in the host countries. All the SAARC nations are member of the United Nations, while some of them have signed and ratified the international instruments named above. The chart below shows the status of the UN conventions and covenants in South Asia.

#### **Ratification of the some of the UN Instrument by the SAARC countries**

Countries	ICESCR	ICCPR	CEDAW	CRC	ICERD	CAT
Bangladesh			1984	1990	1979	
Bhutan			1981	1990	Signed	
India	1979	1979	1993	1993	1969	
Maldives			1993	1991	1984	
Nepal	1991	1991	1991	1990	1971	1991
Pakistan			1996	1990	1969	
Sri Lanka	1980	1980	1981	1991	1981	1994

Refugees, although they are outside their country, are still entitled to respect for their basic human Rights. The international instruments mentioned above include numerous articles to protect refugees, while they are in the country of asylum. The Universal Declaration of

Human Rights (UDHR) is one of the basic instruments for the protection of refugees. All the SAARC countries promised to respect the 30 articles of the UDHR when they joined UN. We present a list of specific rights of refugees and asylum seekers which are protected by the above mentioned UN instruments.

#### Right to seek asylum

Among the international covenants signed and ratified by SAARC countries, Article 14 of UDHR and Article 12 of CRC protect the right to seek asylum.

#### UDHR article 14:

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

#### Article 22 of CRC

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

#### Right to return

Right to return is guaranteed in article 13(2) of the UDHR:

“Everyone has the right to leave any country, including his own, and to return to his country.”

It is also guaranteed in article 12 (4) of the ICCPR:

“No one shall be arbitrarily deprived of the right to enter his own country.”

#### Non-refoulement:

Article 33 of the 1951 Convention sets the principle of non-refoulement but none of the SAARC countries are members to this Convention. However as they are members of UN

they have to respect the principle of non-refoulement because it is guaranteed by several other Conventions.

The principle of non-refoulement is powerfully expressed in article 3 of the 1984 UN Convention against Torture. “No State shall expel return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”

Non-refoulement is also embodied in regional instruments. Article II (3) of the 1969 OAU Convention. The Cartagena Declaration also confirms the fundamental principle of non-refoulement.

(Please see Appendix II)

#### Civil and Political Rights of Asylum Seekers

International bill of Human Rights includes various articles to protect the rights of the refugees in exile; some of the basic rights are mentioned below.

- Protection against arbitrary detention is recognized by article 9 of UDHR and ICCPR.
- Freedom of conscience and religion is in article 18 of UDHR and ICCPR.
- Freedom of opinion and expression is in article 19 of UDHR and ICCPR.
- Freedom of movement is in article 13 of UDHR and article 12 of ICCPR.
- Protection of the family is in article 16 of UDHR; article 23 of ICCPR.
- Freedom from torture and degrading treatment, article 5 of UDHR and article 7 of ICCPR.

#### Economic Social and Cultural Rights of the Asylum Seekers

These rights of the asylum seekers are protected in the host countries by the provisions of the following international instruments.

- Right to social security is in article 22 of UDHR; article 9 of ICESCR
- Right to work is in article 23 of UDHR and in article 6, 7 of ICESCR.
- Right to education is in article 26 of UDHR and in 13 of ICESCR.
- Right to an adequate standard of living is in article 25 of UDHR and in article 11 of ICESCR.

## Appendix II

### The Protocol relating to the Status of Refugees

The Protocol was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966. In the same resolution the General Assembly requested the Secretary-General to transmit the text of the Protocol to the States mentioned in article V thereof, with a view to enabling them to accede to the Protocol

Entry into force 4 October 1967, in accordance with article VIII

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

#### Article 1. General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.
3. The present Protocol shall be applied by the States Parties hereto without any geographic

limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

#### Article 2. Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

#### Article 3. Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

#### Article 4. Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

#### Article 5. Accession

The present Protocol shall be open for accession on behalf of all States Parties to the

Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### Article 6. Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

#### Article 7. Reservations and declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the

Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph I of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs I and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

#### Article 8. Entry into Protocol

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

#### Article 9. Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

#### Article 10. Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto .

Article 11. Deposit in the archives of the Secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

### **Appendix III**

#### **Regional Convention on Refugees:**

Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee

Problems in Africa:

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa expanded the definition of a refugee to include people who were compelled to leave their country not only as a result of "persecution" but also "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality"

Article II (1) and (2) of the OAU Convention 1969 has made the following provision under Asylum:

- Member of the OAU shall use their best endeavors consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality.
- The grant of asylum to refugees in a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member state.

The 1951 Convention and the 1967 Protocol do not specifically deal with the right of asylum. The OAU Convention deals with asylum in sub-paragraphs 2-5 of Article 2. Para 2 states that the grant of asylum to the refugees is a peaceful humanitarian act and shall not be regarded as an unfriendly act by any member state. It is a humane consideration that requires a state not to deport an alien or asylum seeker to the country of origin if persecution is likely.

Article III of the OAU Convention has made the following provision on Prohibition of subversive activities.

Every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.

In Articles IV and V of the OAU Convention there are provisions for Non-Discrimination on account of race, religion, nationality, membership of a particular social group or political opinions and Voluntary Repatriation - that no refugee shall be repatriated against their will. These provisions are intended to ensure that countries of asylum, international organizations and voluntary agencies will facilitate the voluntary repatriation of refugees and that the country of origin will not impose any sanction nor discriminate in any way against refugees who voluntarily return home.

#### Cartagena Declaration of Refugees

In 1984, the Central American nations, joined by Mexico and Panama, adopted a declaration that build upon the OAU definition, adding to it the additional provision of "massive violation of Human Rights". Article III (3) says, "To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concepts of a refugee, bearing in mind as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, para, 20) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concepts of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees 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"

## **Appendix IV**

### **Model National Law on Refugees**

#### 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.
- 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 the well-founded fear of persecution on account of race, religion, sex, nationality, ethnic identity membership of a particular social group or political opinion,<sup>1</sup> or, 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<sup>2</sup>.

#### 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<sup>3</sup>.

#### 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 would be threatened on account of any of the reasons set out in sub-sections (a) or (b) of Section
- 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 judgement of a crime against peace, war crimes or crimes against humanity and constitutes a danger to the community.

#### 7. Application

- a. Where an asylum seeker requests to be recognised 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.

#### 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 Commissioner 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 or Appeal Court Judge designated by the Government in consultation with the Chief Justice of the Supreme Court as Chairperson,
- ii. two independent members, preferably gender balanced conversant with refugee matters.

#### 11. Finality of Order

Every order of the Refugee Committee shall be final.

#### 12. Determination of Refugee Status<sup>4</sup>

a. 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 process, 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 recognised 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.
- g. If the asylum seeker is recognised 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
- c. 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 recognised 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 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.

viii. be given the right of access to education, health and other related services

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 authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

#### 17. Voluntary Repatriation<sup>5</sup>

a. 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.

b. The states should frame guidelines to ensure safe return of the refugees to their countries of origin

## 18. Rules and Regulations

The Government may frame rules and regulations, from time to time, to give effect to the provisions of this Act.

1 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.

2 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 is one of the purposes of the United Nations, and realising 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.

3 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 recognised as a refugee, unless the punishment for such crime is expected to be discriminatory or disproportionate.

4 This Article is based on UNHCR Ex Com Conclusion No. 8 (XXVII) - 1977 on 'Determination of Refugee Status'.

5 This provision is derived from UNHCR Ex Com Conclusion 40 (XXXV) - 1985 on 'Voluntary Repatriation', at para (b).