

**LEGAL STATUS OF REFUGEES IN INDIA:  
NEED FOR DOMESTIC LAW**

*Dissertation submitted to the Jawaharlal Nehru University in partial fulfillment  
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**MASTER OF PHILOSOPHY**

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DECLARATION

I declare that the dissertation entitled “LEGAL STATUS OF REFUGEES IN INDIA: NEED FOR DOMESTIC LAW”, submitted by me in partial fulfillment of the requirements for the award of the degree of MASTER OF PHILOSOPHY of this University is my own work. The dissertation has not been previously submitted for any other degree of this or any other University.

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CERTIFICATE

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

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*Dedicated to my Parents*

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## **ABBREVIATIONS**

AALCC	Asian-African Legal Consultative Committee
AAPSU	All Arunachal Pradesh Students union
BSF	Border Security Force
CCRC	Committee for Citizenship Rights of the Chakmas
CHT	Chittagong Hill Tracts
CJI	Chief Justice of India
DHA	Department of Humanitarian Affairs
ECHA	Executive Committee on Humanitarian Affairs
ECOSOC	Economic and Social Council of United Nations
EPG	Eminent Persons Group
EXCOM	Executive Committee of UNHCR
FRRO	Foreigners Regional Registration Office (New Delhi)
HPF	Humanity Protection Forum
ICJ	International Court of Justice
ICPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
IGCR	Intergovernmental Committee on Refugees

IOM	International Organization of Migration
LTTE	Liberation Tigers of Tamil Eelam
LPG	Liberalization Privatization Globalization
MOA	Memorandum of Agreement
MHA	Ministry of Home Affairs (India)
MEA	Ministry of External Affairs (India)
NGO	Non-governmental Organization
NHRC	National Human Rights Commission
OAU	Organization of African Unity
PCJSS	Parbottiya Chattogram Jana Shangati Samiti
RSD	Refugee Status Determination
SAARC	South Asian Association for Regional Cooperation
SAHRDC	South Asian Human Rights Documentation Centre
SAFHR	South Asian Forum for Human Rights
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNO	United Nation Organization

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# CHAPTER - I

## INTRODUCTION

## CHAPTER – 1

### INTRODUCTION

The introduction of refugee law as a subject matter of the law of nations signals the international concern towards the protection of refugees. International refugee law is an outgrowth of general principles of international law, human rights and humanitarian law. It addresses the concerns of persons who are forced to leave their countries and are thus among the most helpless people in the world. The UN Convention Relating to the Status of Refugees, 1951 (hereinafter referred to as 1951 Convention) defines a “refugee as a person who 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”<sup>1</sup>. 147 states are party to the 1951 Convention. However, India is not a party to the 1951 Convention. In fact only five Asian countries are party to this Convention.

#### **1.1 Evolution of the Jurisprudence of Refugees in India**

India is known for providing shelter to large number of refugees. As Swami Vivekananda observed, “I am proud to belong to a nation which has sheltered the persecuted and the refugees of all religions and all nations of the earth. I am proud to tell you that we have gathered in our bosom the purest remnant of the Israelites, who came to Southern India and took refuge with us in the very year in which their holy temple was shattered to pieces by Roman tyranny. I am proud to belong to the religion which has sheltered and is still fostering the remnant of the Zoroastrian nation”<sup>2</sup>. India has experienced a periodic influx of refugees mostly from its neighboring countries. Geographical, political, social and economic factors are responsible for this influx. Geographically India’s long open border with Pakistan, China, Tibet, Bhutan, Nepal, Bangladesh, Burma and Sri Lanka allows refugees to come to India. Politically, dictatorships or undemocratic forms of government formed in the region have forced their citizens to search for

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<sup>1</sup> Article 1 (2) of the 1951 Convention.

<sup>2</sup> The Complete works of Swami Vivekananda, Vol. 1, p. 63.

refuge. The people in the neighboring countries often share a common social and cultural world with Indian people. This encourages many amongst the persecuted in these neighboring countries to seek asylum in India. At present almost 300,000 refugees are being given shelter in India.

The refugees can be classified as mandate and non-mandate refugees. Mandate refugees are Afghans, Iranian, Sudanese, Somalia, Iraqi, and refugees from Myanmar. They are under the protection of UNHCR. But most of the refugees in India are non-mandate refugees. These are refugee from Tibet, Bangladeshi refugees, Sindhi refugees from Pakistan, Bhutanese refugees, Ugandan refugees and Sri Lankan Tamil refugees. These refugees are under the direct protection of the Indian government. For example, Sri Lankan Tamil refugees are recognized as refugee by the Government of India and it takes care of them. Since 1983 Sri Lankan Tamil refugees have been granted refugee status in and around Tamil Nadu. Many of these refugees are given identity documents and a small amount of financial assistance, along with subsidized food grain. They are generally permitted free movement, although there is mandatory physical attendance a few times a month. The government also provides basic health and education facilities. In case a refugee is considered a threat to national security, the administration can detain the person. There have been such instances despite the issuance of refugee identity documents by the administration. The UNHCR assists Sri Lankan Tamil refugees for repatriation. It interviews those who wish to return and verifies the voluntary nature of their repatriation from India.

India does not have specific legislation that is applicable to refugees in the country. Due to the lack of such a statute, the judicial system is constrained, when dealing with refugees. They have to apply laws that are applicable to foreigners in general, such as the Foreigners Act, 1946. The established principle of the rule of law in India as set under Article 21 of the Constitution is that no person, whether citizen or an alien, shall be deprived of her life or personal liberty except in accordance with a procedure established by law that must be fair. The Supreme Court has gone further and elevated it to the status of one of the basic structures of the Constitution, thus making this precept unamendable.<sup>3</sup>

The Supreme Court has consistently upheld the principle of non-refoulement, though without specifically mentioning it, an important principle in international refugee law. But as the former

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<sup>3</sup> *Indira Gandhi v. Raj Narain*, 1975 (SC) AIR 2299.

Chief Justice of India J S Verma has pointed out, “the attempt to fill the void by judicial creativity can only be a temporary phase. Legislation alone will provide permanent solution”. It clearly shows that India must have a domestic legal and legislative framework to help guide its response to the refugee issue. Recently, on September 20, 2011 a trial Court in Dwarka, NCT of Delhi pointed out that “the need for enacting comprehensive legislation to deal exclusively with the problems of refugees had arisen from time immemorial, and finally, pursuant extensive deliberations on a model national law: The Refugee and Asylum Seekers (protection) Bill, 2006 was drafted. But it is unfortunate that despite its having been drafted after due deliberations and after various rounds of consultations by eminent jurist including the former Chief Justice of India, P.N. Bhagwati, this bill has not seen the light of the day”. The judge also mentioned “there have been a plethora of instances wherein Indian courts tried to evolve a humane and compassionate approach to redress individual problems; however, in the absence of a long-term, consistent and uniform solution by the way of enactment of national legislation, their treatment would be subject to, and would depend upon the individual outlook, social inclinations and other idiosyncrasies which would make it difficult for the subordinate courts to follow. Indian needs to live up to its humanitarian goals.” It is therefore high time to enact a domestic legislative framework to help guide its response to the refugee issue.

## **1.2 Scope and Objective of the study**

The scope of the present study is the legal status of refugees in India in the light of international refugee law. The judgments given by the Indian courts on refugee issues will be used to understand the evolving jurisprudence of the protection on refugees. The study will mainly focus on the absence of a domestic legal frame work in India for refugees and on the problem of Sri Lankan Tamil refugees. The study does not cover the problem of the displaced persons of the 1947 partition of the Indian subcontinent, for that situation is not relevant to the study of the contemporary refugee problem.

## **1.3 Research Questions**

1. What is the legal status of refugees in India?
2. Is it important for India to become a party to the 1951 Convention?
3. Do we need a domestic law on the legal status of refugees in India?

4. What should be the principle features of a national law on status of refugees?
5. What is the legal status of Sri Lankan Tamil Refugees?

#### **1.4 Hypotheses**

1. India should not become a party to the 1951 Convention because of its Eurocentric character.
2. The lack of a national law on refugees encourages inconsistent or discriminatory treatment of refugee groups.
3. A domestic law on refugees will help distinguish refugees from foreigners, illegal migrants, and terrorists, and specify their rights.

#### **1.5 Research Methodology**

The study will make use of both primary and secondary sources available on the subject. The primary sources include international and regional Conventions and Indian laws concerned with the subject. The relevant decisions of the Indian courts will also be used. In order to obtain authentic information on the administrative practices, some interviews with the officials of the Government of India and agencies dealing with the refugee problems in India will be undertaken. The secondary sources include books and articles on the subject, newspaper clippings, reports of research institutes and internet sources.

#### **1.6 Tentative Chapterization**

The study consists of five more chapters including introduction and conclusion.

#### **Chapter II: International Refugee Law: Definition and Core Principles**

This chapter analyses the definitional aspects of refugees, asylum and Non-Refoulement principle. Important features of the refugees safeguard measures, rights and duties are analyzed in this chapter. And also above said modes are compared with the Indian context.

#### **Chapter III: Legal Status of Refugees in India**

This chapter will briefly discuss the categories of refugees sheltered in India. However significant portion of study will be allocated to the field such due by their Indian laws, policies and practices which are applicable to the refugee protection analyses respectively.

#### **Chapter IV: Legal Status of Sri Lankan Tamil Refugees**

This chapter particularly focuses on Sri Lankan Tamil refugee's status in Tamil Nadu. And it finds out the state government and UNHCR role in this subject.

#### **Chapter V: Need for Domestic Law**

This chapter briefly discuss about the importance of uniformed legislation for refugees in India. And it analyses the Model national law on refugees, Refugee and Asylum Seekers (protection) Bill, 2006 and parliament debates respectively.

#### **Chapter VI: Conclusion:**

The results of the study work and the findings thereby derived will be summarized. Thus this chapter will provide the explanation regarding the stated research puzzle and the variations if so ever in the stated hypothesis.



## CHAPTER – II

# INTERNATIONAL REFUGEE LAW: DEFINITION AND CORE PRINCIPLES

## CHAPTER – 2

### INTERNATIONAL REFUGEE LAW: DEFINITION AND CORE PRINCIPLES

#### 2.1 Introduction

International refugee law is an outgrowth of general principles of international law, human rights and humanitarian law. The general principles of international law lay down the norms of sovereign equality of states as well as territorial supremacy over the subjects within their territories as well as respect for human rights. International human rights law obliges states to protect the fundamental rights of all human beings, particularly the right to life and liberty, without discrimination on the grounds of race, religion, language, political opinion or nationality. Like conventional obligations, international standards on the protection of refugees have universal respectability and acceptance and are applicable in all refugee situations. The states are obliged to protect and accord a minimum standard of treatment to refugees.

This chapter explores general principles related to refugee law like definition, asylum and non-refoulement in international and regional organizations. Second it discusses various salient features of the 1951 Convention and the last part compare with the Indian practice respectively.

#### 2.2 Definition of the term Refugees

Defining the term ‘Refugee’ is the first requirement for its prosecution. Several international and regional legal instruments define the term refugees, However, the definition contained in the 1951 Convention is the most widely accepted definition<sup>4</sup> as it is retained and expanded in the Statutes of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter the OAU Convention), and in the Cartagena Declaration on Refugees, 1984 (hereafter the Cartagena Declaration). Article 1 (2) of the 1951 Convention definition of the term refugee is considered as the universally accepted term.

Article 1(a) (2) of the 1951 Convention reads:

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<sup>4</sup> The 1951 Convention refugee definition is of singular importance because it has been subscribed to by more than one hundred nations in the only refugee accords of global scope. Many nations have also chosen to import this standard into their domestic immigration legislation as the basis upon which asylum and other protection decisions are made. (Hathaway 1991: 5)

“Refugee as a person who owing to

- (a) well-founded fear of being persecuted for reasons of
  - (i) race,
  - (ii) religion,
  - (iii) nationality,
  - (iv) membership of a particular social group or political opinion,
- (b) is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
- (c) who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or,
- (d) Owing to such fear, is unwilling to return to it”.

Article 1 (2) of the OAU Convention expands and includes reasons such as,

The term ‘refugee’ shall also apply to every person who, owing to

- (i) External aggression
- (ii) Occupation
- (iii) Foreign domination or
- (iv) 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.

Section III.3 of the Cartagena Declaration 1984 which provides that the term ‘refugee’ shall also apply to Central America area as the reasons like

Hence the definition or concept 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 of freedom have been threatened by

- (i) Generalized violence

- (ii) Internal conflicts
- (iii) Foreign aggression
- (iv) Massive violation of human rights or
- (v) Other circumstances which have seriously disturbed public order

The Asian African Legal Consultative Committee (hereafter AALCC) defines the term ‘refugee’ as same as the 1951 Convention. At the same it takes criteria from OAU Convention, the Cartagena Declaration and additionally includes reasons like: color, ethnic origin, gender and also external aggression, foreign domination and events seriously disturbing public order. So it offers a broad definition of the term refugees. “At the regional level though, unlike the OAU Convention, the Cartagena Deceleration is not a formally binding legal instrument, its broader definition has gradually become the established norm throughout Central America.”<sup>5</sup> However the above said legal instruments uniformly mention four key features for fulfilling the refugee definitions, first, the person must be outside the country of the region. Second, that person must have a well founded fear. Third, that there must be a well founded fear of being persecuted for reasons like race, religion etc. Fourth, that person’s home country is unwilling to protect his/her life or freedom.

### **2.3 Principle of Non Refoulement**

“The term *non-refoulement* or no return, it derives from the French *refouler*, which means to drive back or to repel, as of an enemy who fails to breach one’s defense”<sup>6</sup> The principle of non-refoulement states, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or danger to life or freedom. Article 33 (1) of the 1951 Convention states that: No 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 or political opinion”. It is considered as the heart of the 1951 Convention and it also considered as a principle norm of customary International law. It is now also incorporated into international human rights law.

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<sup>5</sup> Arboleda Eduardo (1991), Refugee Definition in Africa and Latin America: The lessons of Pragmatism, *International Journal of Refugee Law*, 3(2): 186-205.

<sup>6</sup> Goodwin-Gill. Guy S (1985), *The Refugee in International Law*, New York: Oxford University Press, p. 69.

Article (3) of the Convention Against Torture 1984 (CAT) states that no persons can be sent back to a country where there is reasonable fear of torture.

In 1951 Convention Article 33 (2) is exception for Article 33 (1). It states that provision may not apply to a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. The evidence relating to the meaning and scope of *non-refoulement* in its Conventional sense also amply supports the conclusion that today the principle forms part of general international law. At the same time CAT convention has no exclusion clause, it's strengthen the Non Refoulment principle respectively.

#### **2.4 The Concept of Asylum Seekers and Refugee Status**

Asylum seeker is a person who is seeking refugee status. It is national legislation that has the task of status determination or United Nations High Commissioner for Refugees (UNHCR) has the authority to do Refugee Status Determination (RSD). When the process is over, the authorities grant refugee status. Only then that person becomes a refugee. There have to be provision for appeal from the first determination.

RSD means establishment of well founded fear. The UNHCR determines it through the subjective and objective tests. In objective test the asylum seeker has to produce documentation like news papers, testimonials from eminent person or some written documents in support of the claim of well founded fear. In subjective test the interviewer determines whether the person is speaking the truth or not. The state of human rights in the relevant country is also considered in the RSD processes. The UNHCR hand book suggests both subjective and objective test should be applied.

Article 14 (1) Universal Declaration of Human rights clearly states that 'every person has the right to seek and to enjoy in other countries asylum from persecution'. But it doesn't say every person has right to be granted asylum. Whether to grant asylum or not is a right that rests with sovereign states. They make the final determination. Moore, in 1908, noted that the right to grant

asylum 'is to be exercised by the government in the light of its own interests, and of its obligations as a representative of social order'.<sup>7</sup>

Article 1 (f) of the 1951 Convention contains the exclusion clauses. Under it three categories of persons will not be granted refugee status. These persons are excluded from the benefits of refugee status. These are any person who has committed crime against peace, war crime or crime against humanity as defined in the International humanitarian law. A second group of persons excluded from the definition are any person who has committed serious non political crime like murder, rape etc., and prior to seeking refugee status. Third is general category a person who has been had guilty of acts contrary to the purposes and principles of the U.N Charter like aggressive war etc. These exclusion clauses need to be interpreted very restrictively, because if a broad interpretation of this exclusion clause is made, it may end up denying protection to some person who deserves refugee status. It may lead to the deportation of the person back to the countries where his person's life or freedom is in danger.

## **2.5 Salient Features of the 1951 Convention**

### **(a) Rights of Refugees**

The 1951 Convention grants a number of rights to the refugees. These are civil and political rights as well as social, cultural and economic rights. These rights are spelt out in the Convention. For example the right of employment<sup>8</sup>, right of welfare<sup>9</sup> like rationing, housing, education etc. And right to freedom of movement, access to court, and right to intellectual property and right of association<sup>10</sup>, are also mentioned as a rights of refugees. Under the Convention there is a reservation clause contained in Article - 42.<sup>11</sup> At the same time there are

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<sup>7</sup> Moore (1908) Digest ii. p. 757.

<sup>8</sup> Chapter III titled "Gainful Employment", Articles 17-19 of the 1951 Convention, UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>9</sup> Chapter IV titled "Welfare", Article 20-24 of the 1951 Convention, UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>10</sup> Chapter II titled "Juridical Status", Article 12-14 of the 1951 Convention, UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>11</sup> Article 42(1) titled "Reservation", reads, "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive. And Article 42 (2) reads, "Any state making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary General of the United Nations." UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

some rights to which no reservation is permissible. These rights include Article - 1 Definition of the term refugees. Article - 3<sup>12</sup> right of non discrimination, its include race, religion or country of origin. Article - 4 Religion<sup>13</sup>, Article - 16 (1)<sup>14</sup>, and Article - 33 non refoulement.

**(b) Safe guard measures**

First, article 9 of the 1951 Convention<sup>15</sup> states that detention can be done but only on exceptional situations where either the person is committing a fraud like presenting or submitting fraudulent papers, or there is a threat to the national security of that country etc.

Second, article 31 of the 1951 Convention speaks about refugees present unlawfully in the country of refuge. According to this article if a person enters a country without proper papers or documents and claims to be a refugee he will not punish or penalize the person for not carrying proper papers. For example, if a person is without passport, visa or is smuggled in to a country, he may have violated that country's laws at the same time he is seeking refugee status, but the state shall not impose any penalties. A condition for the applicability of this article is that the person's life or freedom is in danger in his home country.

Third safeguard clauses deal with expulsion, refugee can be expelled only if that person is a threat to the national security or public order and only after the due process of law. Article 32 (1) reads states shall not expel a refugee lawfully in their territory save on grounds of national security or public order. These are the procedural safeguards which are in the 1951 Convention in order to ensure that a person life or freedom is in danger.

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<sup>12</sup> Article 3 of the 1951 Convention reads, "The States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin". UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>13</sup> Article 4 of the 1951 Convention reads, "The States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children". UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>14</sup> Article 16 (1) of the 1951 Convention reads, "A refugee shall have free access to the court of law on the territory of all contracting states". UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>15</sup> Article 9 of the 1951 Convention reads, "Nothing in this Convention shall prevent a contracting state, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the contracting state that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security". UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

**(c) Duties of Refugee and Cessation clause**

According to article 2 of the 1951 Convention speaks about the duty or obligations of refugees. The refugee has the duty to obey the laws of the host country. Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

The cessation clause is contained in the article 1 (c) of the 1951 Convention. The idea of the clause is to specify the situation in which he ceases to exist have refugee status. Thus the refugee status is not a permanent status. That status gets over once the conditions under which the refugee status was granted transformed. It should be applied restrictively. It should not lead to the violation of the principle of non refoulement. Article 1 (c) states six conditions for cessation of refugee status. One that person has voluntarily re-availed himself of the protection of the country of his nationality. Second having lost his nationality, he has voluntarily re-acquired it. Third he has acquired a new nationality, and enjoys the protection of the country of his new nationality. Fourth he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution. Fifth he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. Sixth being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

**(d) The Principle of Burden Sharing and Burden Shifting**

The principle of burden sharing requires states to cooperate in dealing with the global refugee problem. It is not merely a moral but a legal principle. It is arguably a principle of customary international law.<sup>16</sup> The Preamble to the 1951 Convention it states that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem cannot be achieved without international cooperation. At the regional level article 2 (4) of the OAU Convention states that where a member state finds difficulty in continuing to grant asylum

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<sup>16</sup> Chimni B.S (2000), The Principle of Burden-Sharing, unpublished paper, *International refugee Law A Reader*, New Delhi: Sage Publications. p. 146.



to refugees, such member state may appeal directly to other member states to, in the spirit of African solidarity and international cooperation, take appropriate measures to lighten the burden of the member State granting asylum. The preambular paragraphs of the Cartagena Declaration mentions about burden sharing like requesting immediate assistance from the international community for Central American refugees, to be provided either directly, or through bilateral or multilateral agreements, or through UNHCR and other organizations and agencies. The report of the AALCC also speaks about burden sharing. The conclusion could be drawn that the principle of international solidarity in dealing with the refugee situations and the concept of burden sharing in that context appear by now to be firmly established in the practice of States.

However, the legal principle of burden sharing simply speaks about financial assistance for the poor world who is hosting most of the world refugees. There must however be burden sharing even at the level of asylum. This principle is strengthened by the developing countries through the refugee law instruments in their own regional level. But unfortunately, the developed states are practicing burden.

#### **(e) Durable Solutions**

Basically there are three traditional durable solutions to the refugee problem. According to Goodwin-Gill, 'a durable solution entails a process of integration into society; it will be successful and lasting only if it allows the refugee to attain a degree of self-sufficiency, to participate in the social and economic life of the community and to retain what might be described, too summarily, as a degree of personal identity and integrity.'<sup>17</sup> The solutions are first local integration, it means that where the refugee group has to remain in another country for the long period of time individual or group it integrates with the local people or host community. It is accepted by the host states for example, Chakma refugees are applying for citizenships in India that leads to local integration.

Second, resettlement in the third country it means where a country that accepted refugees gives them temporary asylum but then are resettled in another country. For example, Afghan refugees come to India and get some residence status in India. They apply to the UNHCR for resettlement to another country and are resettled in third countries. The third solution is voluntary repatriation

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<sup>17</sup> Goodwin-Gill Guy (1990), 'Refugee or Asylum: International law and search for solutions to the refugee problem', in H. Adelman and C.M. Lanphier, eds, *Refugee or Asylum: A choice for Canada*, Toronto: York Lanes Press. p. 27-43.

it is the most significant solution or preferred solution. It means that people simply go back to their country when the situation becomes normal. Local integration and resettlement in third country is a subsidiary solution but voluntarily repatriation is the principal solution

## **2.6 India and the 1951 Convention**

If we compare Indian position to the 1951 Convention on the issue of refugees, India is practicing important customary international law principles like non refoulement at the policy level. India welcomes refugees from Asian and African continents and provides good treatment to them. On the issue of refugees India's record is good. The asylums seekers are granting refugee status by the Indian government or it cooperates with the UNHCR for granting refugee status. The rights and duties of refugees are also respected by Indian government like free access to the court, providing basic facilities like ration, medicine, education and making camps for refugees. The safeguard measures which are mentioned in the 1951 convention are practiced by Indian government restrictively. Illegal entry refugees are not penalized by the government. Over all India is implementing the norms mentioned in the 1951 Convention.

However India is not ready to become party to this Convention. It gives important eight reasons for it. First, the definition of refugee is a Eurocentric definition it only consents with the violation of civil and political rights it does not mention about violation of economic cultural and social rights. Second is the 1951 Convention was adopted in the time of cold war period after the world war so it is not concerned about the third world countries. For example the partition in 1947 in India did not concern the developed nations. The third reason is the 1951 Convention simply contains too many rights for refugees which as a third world country India is not in a position to fullfill even for its own citizens. Fourth India is providing protection to refugees. So there is no need to become party. Fifth if India became party it would be obliged to the under article 35 of the Convention to cooperate with the office of the UNHCR. The UNHCR is perceived as a western donor organization that may act intrusively. Sixth India is arguing that most of the countries in South Asia are not party to this Convention. Only five Asian countries are party to the Convention. This is called Asian exceptionalisam. Seventh, is India's presence of porous borders makes it very difficult to regulate the entry and to implement the international Convention. Finally, there is a burden shifting not a burden sharing if India ratifies the

Convention. There must be assurance that global burden sharing at the level of finance and asylum will take place.

## **2.7 Conclusion**

International refugee law contains the definition of the term refugee, the extent of protection a state should give to refugees, and the obligation of states to find durable solution to their problems. The developments since 1950 provide two categories of refugees who are entitled to the protection of the international community, (a) refugees whose civil and political rights have been violated, and (b) humanitarian refugees. When the 1951 Convention was adopted, the plight of victims of persecution between two world wars still fresh in the minds of the Europeans. The result was the adoption of the term refugee characterized by individualized persecution for reasons of race, religion, nationality, membership of a particular group or opinion. At that time the consideration of refugee problems were restricted to the European continent only. It was soon realized that persecution is a universal phenomenon and the persecuted people needs to be protected everywhere. As a result the 1967 Protocol relating to the Status of Refugees was adopted. It removed the temporal and geographical limitations of the definition envisaged under the 1951 Convention. Today there is a near universality of obligation for protection of refugee who flee their countries fearing persecution for reasons of race, religion, nationality, membership of a particular group or political opinion.

Besides having problems with regard to the protection of refugees, the developing country in Asia, Africa and Latin America started experiencing the forced movement of people across the international frontiers owing to international or internal conflicts, struggle against foreign domination, or events seriously disturbing public order. To resolve the problems of these refugees at regional level, the Organization of the African Unity adopted OAU Convention in 1969. They are generally termed as humanitarian refugees.

Regarding the problems of man-made disasters, the countries in Asia expressed their *Opinio Juris* for the protection of these refugees at the forum of AALCC which adopted the Bangkok Principles in 1966 and in 1970 acknowledged the extended definition of the term refugees and extended the benefit of Articles IV and V of the Bangkok Principles 1966 to those who fall in that definition. Countries in Latin America have also resolved to apply the international

standards to protect the refugees who fled their countries owing to gross violation of human rights.

However, today apart from these refugees' different kinds of problems are arising for reasons of liberalization, privatization and globalization (LPG) economic policies. It affects the people's socio, economic and cultural rights. People are leaving their habitual places of residence in search for a better place to survive. Man-made disasters are creating refugees in poor countries. Particularly countries in Asia, Africa and Arab countries are disturbed the foreign interventions as in the case of Iraq, Afghanistan, Sudan, Somalia, Libya. At the same time this poor nation peoples are seeking refugee status in developing countries only as they can't reach Europe or Western countries for their laws are very restrictive. This is a disturbing trend. In other words developed nations are functioning like refugee producers and Third world countries like India are functioning like refugee keepers. The 1951 Convention is the only international legal instrument directly and exhaustively dealing with this aspect. Unfortunately this Convention only speaks about the "political" refugees. These gaps are filled by the regional and national instruments. It is the only hope for humans who are seeking to live with dignity.

## CHAPTER – III

### **LEGAL STATUS OF REFUGEES IN INDIA**

## CHAPTER – 3

### LEGAL STATUS OF REFUGEES IN INDIA

#### 3.1 Introduction

The Indian subcontinent has been witness to some of the largest forced population flows in contemporary history. Pia Oberoi has made an attempt to examine the problem in the Indian subcontinent<sup>18</sup>. There are no authoritative statistics on the number of people who have fled persecution or violence in their countries of origin to seek safety in India. However, because of India's porous borders and accommodative policies, it is estimated that India hosted approximately 4, 35,900 refugees and asylum seekers according to World Refugee Survey 2007.<sup>19</sup> In addition, "India's documented refugees are allegedly outnumbered by lakhs of unregistered persons who have entered the country from Nepal and Bhutan to escape violence and persecution in their countries. It is estimated that over 20 lakh Nepalese fleeing from civil conflict have entered India undetected over the open border. There are also an unknown but large number of people displaced from Bhutan because of their ethnic-Nepali origins"<sup>20</sup>. "There are also 17, 380 refugees, 3,710 asylum seekers, registered under UNHCR office and some from the Democratic Republic of Congo, Eritrea, Iran Iraq, Somalia and Sudan"<sup>21</sup>.

#### 3.2 Refugees in India

In India refugees are entering and staying legally or illegally. They often enter legally with a valid passport, visa or an entry permit, like any other foreigner. And also they enter illegally with forged documents. Sometimes they cross the vast, unmanned Indian borders by road or sea, without appropriate travel documents. But "It should be reiterated that asylum-seekers under international law need not possess valid travel documents in order to claim refugee status i.e., the

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<sup>18</sup> Oberoi Pia further states that currently, the Indian subcontinent is host to just over ten percent of the total population of refugees and persons in refugee-like situations, as defined by the UNHCR. (Pia Oberoi 2006 : 1)

<sup>19</sup> "World Refugee Survey 2007," United States Committee for Refugees and Immigrants, Available at: [http://www.refugees.org/WRS\\_Archives/2007/48-69](http://www.refugees.org/WRS_Archives/2007/48-69).

<sup>20</sup> Benoit Florina (2004), "India: A National Refugee Law Would Equalize Protection", *Refugees International*, Country Operations Plan for India, United Nations High Commissioner for Refugees, Available at: [www.UNHCR.org](http://www.UNHCR.org)

<sup>21</sup> Ramachandran Smiriti Kak (2012), "UNHCR helps refugees stitch up a livelihood" *The Hindu*, New Delhi, 20 June 2012. p. 8.

refugee claim would be considered whether or not the applicant has travel documents”<sup>22</sup>. If refugees enter India illegally, sometimes the government can waive the travel rules and regulations regarding their entry and stay in the country. Such waiver may be express or implied by the conduct of the government in permitting the privileged group of refugees into India. The Tibetans are one such example of refugees who entered India without any travel documents but who have been allowed to reside in the country and even use travel documents issued by the government of India. It depends upon the policy of the government. India practices different kinds of treatment between different kinds of refugees groups. There is no uniform practice in India. So it is very important to understand the rules, agreement or policies applied to a particular group in this sense. As mentioned earlier “refugees in India can be classified as mandate and non-mandate refugees.”<sup>23</sup>

### **3.2.1 Non-Mandate Refugees**

Most of the refugees in India are non-mandate refugees. They do not come under UNHCR mandate. They are under the direct protection of the Indian government. India also prefers to discuss refugee issues at a bilateral level with the countries concerned. These refugees are mostly groups who have reached Indian border as a mass influx.

#### **(a) Refugees from Tibet**

The influx of Tibetan refugees into north India was India’s first experience of a mass refugee influx after Independence. In 1914 a peace convention was signed by Britain, Tibet and China according to that Tibet was recognized as an independent country. The Tibetan peoples have deep faith in Buddhism. These peoples are ruled by representatives of Dalai Lama led government. In 1949 China invaded Tibet and occupied the land. Therefore Tibetan refugees had to flee and reached Indian borders. This influx was in different phases. The first influx to India was those of refugees who were targets of attack by the Chinese members of the Dalai Lama family, his personal established members of the Tibetan cabinet they called as Khashag and other Tibetan higher government officials, tutors of Dalai Lama and large number of monks and lamas.

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<sup>22</sup> Article 31 titled “Refugees unlawfully in the country of refuge” the Convention relating to the Status of Refugees, UN General Assembly Resolution 429(v) of 14 December 1950. Available at [www.un.org](http://www.un.org).

<sup>23</sup>Trakroo Ragini (2005), *Refugees and the Law*, New Delhi: Human Rights Law Network, Socio-legal Information Centre , p.58.

Except soldiers they called as Khampa warriors who fight against Chinese government. In the second phase ordinary persons, agriculturist, merchants and soldiers came.

Initially they were only 15,000 refugees. Subsequently the numbers increased to 45,000 and in the year of 1988 the number was 79,912. At the end of 2010 there was 1, 00,003<sup>24</sup> refugees are sheltered in India. These refugees crossed the border of Bhutan and Sikkim. So there are two transit camps established in Assam and West Bengal by Indian government. These camps provide ration, clothing and cooking utilities and also medical assistance. Initially Indian government considered Tibetan refugees a temporary issue but after that 1962 Sino- Indian war India realized that repatriation was impossible. Accordingly the Spiritual leader Dalai Lama requested India to arrange some long term rehabilitation programmes. For example, India allotted land for Tibetan refugees in Himachal Pradesh in the Dharamsala area. Its climate is very similar to Tibet. These refugees were initially dealt with by Ministry of External affairs.

The Tibetan refugees are mainly rehabilitated in three sectors, first land based agriculture, second agro-industry based sector and third importantly handicraft based settlement. This settlement is now become a popular tourist place in Dharamsala. The Buddhist culture and tradition attract many tourist, particularly foreigners. These settlements are also established in Jammu and Kashmir, Uttar Pradesh, Sikkim, West Bengal, Orissa, Madhya Pradesh, Karnataka and Arunachal Pradesh.

The lack of national legislation on refugees meant that Tibetan refugees are registered under the Foreigners Act. The Indian government issued registration certificates, which must be renewed once or twice a year. Tibetan who are born in India also eligible for this certificate after they are 18 years old. This exercise of powers is conferred by section 3 of the registration of Foreigners Act, 1939 and section 3 of the Foreigners Act, 1946.

“The central government issued S.R.O. 1108, dated 26 December 1950, regulating the entry of Tibetan nationals into India. The order states: Any foreigner of Tibetan Nationality, who enters into India hereafter shall

1. At the time of his entry into India, obtain from the officer in-charge of the police post of at the Indo-Tibetan frontier, a permit in the form specified in the annexed schedule;
2. Comply with such instruction as may be prescribed in the said permit;

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<sup>24</sup> UNHCR (2000), Report on Year-wise presence of all refugees in India Since 2000 to 2010, New Delhi, Available at: [www. UNHCR.org](http://www.UNHCR.org).



3. Get himself registered as a foreigner and obtain a certificate of registration.”<sup>25</sup>

The Indian government has continuously allowed Tibetan refugees to enter the country. But it is not the same like the first wave of these refugees. However, the second wave refugees are obtaining the registration certificate claiming they are born in India. Tibetan refugees have got more rights compared to other refugee groups in India. The other groups often receive only travel permits from Indian government.

#### **(b) Refugees from Bangladesh**

The 1971 Indo-Pak war resulted in massive exodus of nearly 10 million refugees from East Pakistan into Indian Territory. The Indian government established camps in West Bengal, Bihar, Assam, Meghalaya and Tripura. The government also provided food and medical assistance to these refugees. The UNHCR also made arrangements in the mountain area of both India and Pakistan borders. The legal status of this refugee was the same as foreigners. These refugees were registered as foreigners. But at the policy level these refugees were designated as “evacuees”. The Indian government stresses that these people are temporary refugees. Once the condition would become normal these refugees would to be repatriated to their own land. On December 6 1971 the Bangladesh was established as an independent state. So the Indian and Bangladesh government made arrangements for this people to repatriate. The Bangladesh government agreed to take back their nationals who arrived after March 25 1971. Most of them returned. But almost 1, 00,000 refugees chose to stay in India because of local integration. Subsequently it became a problem in the area of Assam. The outsider question was partially solved by the Assam accord in 1985.

The second influx was that of Chakma refugees. These peoples are belonging to the Tibetan-Burmese language family. These refugees had earlier migrated from Myanmar to the Chittagong Hill Tracts (CHT) in Bangladesh. After that Kaptai Dam project in 1957-62 results over 40,000 Chakmas left from their and sheltered in India mostly in north east including Arunachal Pradesh. In 1979 about 18,000 Chakmas fled from CHT and entered Mizoram. In June 1986 the number increased to 24,000. The Indian government facilitated repatriation also. In the end of 1994 the Indian governments announced in parliament that 51,000 Chakma refugees are sheltered in India.

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<sup>25</sup> Available at: <http://www.unhcr.org/refworld/docid/3ae6b52e24.html>.

The Indian government established camps for Chakmas in Assam and Tripura. Some refugees were settled in Arunachal Pradesh. The Indian government also allotted some lands for this people after consultation with the local population. The government also promised rehabilitation facility and grant of citizenship. The controversy between the state administration, Chakmas and local people resulted in three cases that reached the Supreme Court.

### **(c) Sindhi Refugees from Pakistan**

In the 1971 conflict with Pakistan, about 44,000 Sindhi refugees came over to India, entering mainly through Rajasthan and Gujarat. The refugees have integrated very well into the local Sindhi community in India. Approximately 115,000 people displaced from Pakistan have arrived in India since 1965 and most have settled in Rajasthan or Gujarat. The Indian government does not recognize this group to be refugees and as a result, they are unable to acquire residence permits and find it difficult to gain employment. The Indian government awarded 13,000 Hindu Pakistanis Indian citizenship between 2005 and 2006. Data collected by India Today defies “more than 90 families migrated to India in 2010, 145 in 2011 while 54 families have already migrated to India since January 2012.”<sup>26</sup> Once Pakistani refugees have attained citizenship they are afforded the same rights as Indian citizens. The amendment of the Citizenship Act in 2005 has increased the fee structure for citizenship application.

Indian government reply to activist S.C. Agarwal’s RTI query on November 1, 2011, on the legal status of Pakistani Hindu refugees, the Ministry of External Affairs (MEA) claimed it was an ‘internal matter’ of Pakistan. In the same reply,

“The Ministry of Home Affairs (MHA) admitted that it could not say how many Pakistani Hindus had emigrated. According to Delhi’s Foreigners Regional Registration Office (FRRO), there has been a rapid increase in the number of Hindus coming from Pakistan. Till mid 2011, it used to be around eight-ten families a month. But in the past 10 months, an estimated 400 families have come. They are settling down all over India, in Rajasthan, Punjab and Gujarat. A trickle has become a stream. Hindus, who accounted for 15 percent of Pakistan’s population in 1947, now constitute a mere 2 percent of its 170 million populations. Many have migrated, others have been killed, and yet others

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<sup>26</sup> Aurora Bhavna Vij (2012), “No Country for Pakistani Hindus”, *India Today*, New Delhi, 27 April 2012.

forced to convert to survive. In some cases, the dead have even been denied a proper cremation.”<sup>27</sup>

The Indian government has not taken appropriate step with respect to these people. The Indian Constitution and the Indian Citizenship Act 1955, made specific provisions for people who were born or whose parents were born in the time of undivided India is apply for Indian citizenship. The citizenship amendment rule specifically provide for Pakistanis to apply for citizenship in Gujarat and Rajasthan. The conditions for this provision are the person must stay in India for five years.

#### **(d) Bhutanese and Ugandan Refugees**

In 1989 the Bhutanese government introduced new policy of *driglam Nam Zha* (revival of traditional Bhutanese culture). It suppresses people whose culture and tradition belong to the ethnic Nepali Bhutanese. Unlawful arrest and detention and torture created a problem and fear in these people therefore they are entered India particularly in district of Jalpaiguri in West Bengal. There are 15,000 to 30,000 Bhutanese refugees living in India. The government of India has not acknowledged these people or given any assistance to them.

The legal status of Bhutanese refugee was better to compare to the other refugees groups in India. Because of reciprocal agreement between India and Bhutan equally treats those refugees as Indian citizen by the Indian government.

“Since 1949, Bhutanese citizens have been permitted to move freely across the Indian border. An open border between India and Nepal and India and Bhutan is provided for by a treaty between the respective states, last updated in February 2007. A reciprocal arrangement between Indian and Bhutan grants its citizens equal treatment and privileges. The right to residence, study, and work are guaranteed without the need for identity papers. For this reason, the Indian government has not acknowledged the ethnic Nepalese Bhutanese who were forced to flee to be refugees, and nor has it provided any sort of assistance. The UNHCR does not carry out status determination for the Bhutanese. This is most likely due to the friendship treaty between the two countries.”<sup>28</sup>

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<sup>27</sup> Ibid, In addition: Meher Chand 55 year old. He arrived in Delhi on January 21, 2011, with a delegation of Pakistan Hindus, carrying 135 plastic jars, aboard the Samjhauta Express. The jars contained the ashes of Hindus who had died in Pakistan, some of them way back in the 1950's and stored in Karachis Hindu cremation ground. The remains were finally allowed their final journey, to be scattered in Ganga. (India Today 2012). Available at: <http://indiatoday.intoday.in>

<sup>28</sup> Human rights Law Network (2007), *Report of refugee population in India*, New Delhi, p.9.

Some Ugandan citizens of Indian origin came to India as refugees. In 1972 Ugandan president Idi Amin's government practiced racial discrimination against people of Indian origin who were mostly belonging to the Gujarat. Some peoples left to England and some others stayed as refugees in India. The Indian government passed the Foreigners from Uganda Order 1972 to assist and rehabilitate these refugees.

### **3.2.2 Mandate Refugees**

Those who are under the protection of UNHCR are known as mandate refugees. They come under the UNHCR mandate. Therefore they are called as mandate refugees. They register in UNHCR New Delhi office. These refugees are very less in numbers compared to the non-mandate refugees. They reach Indian border legally or illegally as an individual or small group.

#### **(a) Afghan and Palestinian Refugees**

The Afghan refugees reached India border through four types of influx. The first influx was after the Soviet intervention in Afghanistan on December 1979. A large number of Afghan Sikhs and Hindus of Indian origins, along with ethnic Afghans sheltered as refuge in India. Most of them later moved to the west as they had valid visas and passports. The rest remained in India. The second major influx of Afghan refugees began in 1991-1992, after the fall of the Najibullah regime. The third arrival was simultaneous with the Taliban take over in Afghanistan. The fourth arrival was following the events of 11 September 2001 when the United States and the United Kingdom, along with other NATO supporters, launched a military attack on Afghanistan. "There are over 9,000 recognized Afghan refugees in India"<sup>29</sup> and 90 percent of them belong to the Hindu or Sikh faiths; religious minorities in Afghanistan who could not openly practice their religions in their home country for fear of persecution. Most of the Afghan Sikh and Hindu refugees in India got asylum after 1992, with the fall of the Najibullah regime. Between July and October 2007, it is estimated that 15,000 people were forcibly displaced by the conflict. In other source, "Home ministry says there are 19,115 Afghanistan refugees residing in India at present."<sup>30</sup> The Indian government does not officially recognize the Afghan community as refugees. So they are recognized and protected under the UNHCR mandate. The Indian

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<sup>29</sup> Ibid. p.20.

<sup>30</sup> Ministry of Home Affairs (2012), "Speed News" *The Times of India*, New Delhi, 22 May 2012.

government has issued most Afghan refugees with valid residence permits. Unfortunately after that Kandahar incident the Indian government withdraws residence permits. Later again Indian government establishes that facility but still that problem is there for issuing residencies permit. The Indian government allowing them to stay in India waiting for durable solutions.

After the establishment of the State of Israel, about two thirds of the Palestinian Arabs fled or were expelled from their territories most of them reached Iraq territory. The Saddam Hussein government sheltered and gave better treatment to them. After U.S.A intervention in Iraq again it problem to the Palestinian refugees, again they fled from there, the small number of peoples reached Indian border for persecution of refugee status. The UNHCR recognized them as refugee in Indian border. The Indian government not issued any residence permit for them On 2007, 160 Palestinians was seeking refugee status and are the most recent refugee group to arrive in India. The UNHCR in Delhi has recognized some of the Palestinians as refugees and the applications of others are under consideration. “On November 11 2008 More than 100 Palestinian refugees from Iraq are leaved from India in the first large-scale resettlement of Palestinian refugees from outside the Middle East. A total of 137 Palestinian refugees who fled to Baghdad for India have been accepted for resettlement by Sweden. So 91 have left for Sweden; the rest are leaved on after six months, another 10 left for Norway end of 2008”.<sup>31</sup>

#### **(b) Iranian, Iraqi and DR Congo Refugees**

Iranian refugees fled their country following the Islamic revolution in 1979. Many Iranian peoples are reached Indian border with valid or forged passport visas. Many Iranian students were studying in India in various educational institutions in different parts of India. “Following the political upheaval, they could not return to their country of origin and claimed refugee status. They had come to India on valid travel documents and subsequently became mandate refugees.”<sup>32</sup> According to UNHCR records, as of 2010, there are 66 Iranian refugees in India.

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<sup>31</sup>UNHCR (2008), “Palestinians bid goodbye to India, hello Sweden”, News Stories, 11 November 2008, available at: UNHCR.org

<sup>32</sup> US State Department (1988), *Country Reports on Human Rights Practices for 1988* US state department Publication, p. 1337.

“The U.S intervention in Iraq results two million people having fled the country and another 2.2 million displaced on 2007 reached India’s doorstep as 34 Iraqi nationals struggle to pick up the pieces of their shattered lives.”<sup>33</sup> Therefore many of the Iraqi citizens were reached Indian border to claim refugee status in Delhi UNHCR office and they are getting some monetary facilities from this office. “122 Iraqi nationals in the Delhi city who have been certified as refugees by the United Nations High Commissioner for Refugees (UNHCR), is battling for their survival in India but still shudders at the thought of returning to his country. The monetary help of Rs 2, 245 that the UNHCR used to giving many Iraqis on a monthly basis has also been discontinued some times. The UNHCR’s subsistence allowance (SA) of Rs 2, 245 was terminated on 2009 and it has made no other arrangement.”<sup>34</sup>

Iraqi refugees are mostly welcomed by India and getting close to the Indian citizen’s behalf of the Iraq war it creates some sympathy about them and local peoples are helping them. “The JNU invited some 40-odd refugees from Iraq. Lost in transition, these refugees living at Malviya Nagar in South Delhi had come to the campus on 2006 to celebrate identification function. Invited by the Foreign Students Association. In a gesture for a campus that feels strongly about the Iraq issue, students who have taken a stand against the American occupation finally got to do more than just protest, while the Association has decided to hold coaching classes for the children.”<sup>35</sup> However Iraqi refugees are interested and they want to go to their home country. They really don’t want to continue their life in asylum state. But the situation in Iraq is forcing them to stay in India. Not only in India all over the world is same situation continuing in the Iraqi refugee’s case. “The UNHCR’s whose survey covered 2,353 Iraqis returning to Baghdad from overseas in 2007 and 2008. The survey was conducted between April and September, also showed that 34 per cent of the respondents were considering seeking asylum once again ‘if conditions did not improve.’ Many of the respondents said they had returned to Iraq because they could no longer afford living in the asylum state. The results of a survey held between July and

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<sup>33</sup> Dhawan Himanshi (2007), “Iraqi refugees look for a new address in India” *The Times of India*, New Delhi, 3 September 2007.

<sup>34</sup> Sharan Abishek (2010), “Iraqi refugees fights for survival in city, *Hindustan Times*, New Delhi, 27 December 2010.

<sup>35</sup> Nayar Mandira (2006), “JNU plays host to Iraqi refugees” *The Hindu*, New Delhi, 29 October 2006.

August at a border crossing between Syria and Iraq, which showed that most of the 2,000 Iraqis polled, were reluctant to go home on a permanent basis.”<sup>36</sup>

The Democratic Republic of the Congo commonly known as DR Congo, Congo-Kinshasa or the DRC, is a country located in central Africa. The Second Congo War, beginning in 1998, devastated the country and is sometimes referred to as the African world war because it involved nine African nations and some twenty armed groups. According to the signing of peace accords in 2003, fighting continues in the east of the country. In eastern Congo, is disturbed the civilians the war results of rape and other sexual violence are described as the worst in the world. The most majority of the peoples died for the conditions of malaria, diarrhea, pneumonia and malnutrition. According to these reasons small refugee groups are reached Indian borders since 2006, 6 persons are registered under UNHCR office in Delhi. “It simultaneously increasing there are 11 persons registered as refugees in India end of 2010.”<sup>37</sup>

### **(c) Sudanese, Somalis and Eritrean Refugees**

Sudanese refugees are originating from the country of Sudan. Some Sudanese people reached Indian border because of their internal conflict and civil war and also environmental changes. According to the UNHCR record in India 109 Sudanese refugees as of 28 February 1995 as recognized by the UNHCR.<sup>38</sup> But this number increasing from 2000 to 2010 there are 351 refugees are additionally registered in India.

Somalia refugees are the largest African community in India. Approximately 400 people are staying in India less than 200 Somali refugees are registered. Somalis are under the UNHCR protection they approaching Delhi office apply for the refugee status under the UNHCR mandate. The Indian government didn't issue any residence permit for these refugees. The UNHCR giving Rs.2, 225 as principal amount for them. According to the UNHCR record that 80-90% of the Somali community in India lives in Hyderabad rather than in Delhi.

In 2005, it was reported that 215,300 refugees from Eritrea were still displaced because of drought, food shortages, and war. Small numbers of refugees registered under UNHCR mandate. In India Eritrean refugees are registered under UNHCR since 2002. The number start 1 and it

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<sup>36</sup> The Indian Express, 20 October, 2010.

<sup>37</sup> For Year-wise presence of all refugees in India since 2000 to 2010. See, [www.UNHCR.com](http://www.UNHCR.com)

<sup>38</sup> Country Report on the Refugee situation in India, South Asian Human Rights Documentation Center (SAHRDC).

simultaneously increased as 6, 3, 14, 16, in the year of 2004 - 2009. In 2010 there are 35 Eritrean refugees are registered in Indian UNHCR office.

**(d) Refugees from Myanmar, Chin and other Refugees**

In 1988, the Burmese government began suppressing the pro-democracy movement forcing 3,000 refugees to cross the border into India. These refugees are camped in Mizoram. Most of the refugees are come to Delhi and they recognized as mandate refugees by the UNHCR office. “The spokesperson of the Ministry of external affairs of the government of India stated that, in accordance with well-accepted international norms defining refugee status, no genuine refugee from Myanmar would be turned back. He added that the troops on the Indo-Myanmar border had been strictly instructed not to return any refugee to Myanmar.”<sup>39</sup>

Another influx from Myanmar refugees are Chin refugees these peoples are sheltered in Mizoram. The UNHCR recognize and registered as refugees as the UNHCR record there are 1,800 chin refugees are living in Delhi 1000 have been granted refugee status by UNHCR 300 refugees are waiting for refugee status determination. In mid 2006 UNHCR resettling some chin in third country.

“The lack of legal recognition, limited access to UNHCR protection, and difficulty in obtaining work, receiving an education and accessing health-care services and acceptable living accommodation. Like their brothers and sisters from Burma living in Thailand, the Chin in India and Malaysia are living without true refuge.”<sup>40</sup>

Apart from these refugees India have many other refugee flow experience in contemporary stage. These are Indian New Delhi UNHCR office registered five refugees from Bosnia in the year of 2006 to 2010, five refugees from Cuba on 2001. Six refugees from Cote d’Ivoire in the year of 2000-10 and 51 refugees from Israel in the year of 2000-05, nine refugees from Kazakhstan in the year of 2003-05, 11 refugees from Lao People’s Democratic Republic in the year of 2000-10, 31 refugee from Liberia in the year of 2000-06, two refugees from Pakistan in the year of 2001-02, twenty five refugees from Rwanda in 2000-03. Six refugees from Russian Federation on 2001-10, sixteen refugees from Serbia in the year of 2000-05, four refugees from Sierra Leone in

<sup>39</sup> The Hindu (Madras edition), 6 October 1988.

<sup>40</sup> Alexander, A. (April 2008), “Without Refuge: Chin refugees in India and Malaysia”, *Forced Migration Review*, vol. 30, pp.37.



the year of 2005-08, four refugees from Syrian Arab Republic on 2007, one refugee from Togo and Turkmenistan on 2010 and 2001, four refugees from Yemen in the year of 2009-2010 and 73 refugees from Ethiopia in the year of 2000-10. Most of the refugees are repatriated by UNHCR arrangement remaining persons are staying in India still.<sup>41</sup>

### 3.3 Laws relating to Refugees in India

In general there is no law in India for refugees applicable to all groups. But Ragini Trakroo list out some laws related to refugees in India. She further states that.

“a number of legislative measures dealing with refugees were passed and issued under the seventh schedule of the Constitution of India. Many of them have lost their importance in the current context; they provide a useful legislative precedent. Given below is the legislation that was enacted the partition of India and before the Indian Constitution came in to effect these are East Punjab Evacuees (Administration of property) Act, 1947, UP Land Acquisition (Rehabilitation of Refugees) Act, 1948, East Punjab Refugees (Registration of Land Claims) Act, 1948, Mysore Administration of Evacuee Property (second Emergency).”<sup>42</sup>

“Once the Constitution of India came in to operation, the following acts were passed by Center State authorities. These rules are related to refugees, evacuees and displaced persons these are:”<sup>43</sup>

1. Citizenship Act, 1955 (No.57 of 1955),
2. Extradition Act, 1962 (No. 34 of 1962),
3. Foreigners (Tribunals) Order, 1964
4. Foreigners Act, 1946 (No.31 of 1946)
5. Foreigners from Uganda Order, 1972
6. Foreigners Order, 1948
7. Illegal Migrant (Determination by Tribunals) Act, 1983 (No.39 of 1983)
8. Illegal Migrant (Determination by Tribunals) Rules, 1984

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<sup>41</sup> UNHCR Refugee Report on 2010 available at <http://twocircles.net>.

<sup>42</sup> Ragini Trakroo (2005), *Refugees and the Law*, Human Rights Law Network, Socio-legal Information Centre , New Delhi, p.67.

<sup>43</sup> Ibid, List of Legislation compiled by VijayaKumar V, available at <http://www.indiacode.nic.in>

9. Immigrants (Expulsion from Assam) Act, 1950 (No.10 of 1950)
10. India Penal Code Act, 1860 (No.45 of 1860)
11. Administration of Evacuees Property Act, 1951
12. Evacuee Interest (separation) Act, 1951
13. Displaced Persons (Debts Adjustment) Act, 1951
14. Influx from Pakistan (control) Repelling Act, 1952
15. Displaced Persons (Claims) Supplementary Act, 1954
16. Displaced Persons (Compensation and Rehabilitation) Act, 1954
17. Transfer of Evacuee Deposits Act, 1954
18. Foreigners Law (Application and Amendment) Act, 1962
19. Goa, Daman and Diu Administration of Evacuee Property Act, 1969
20. Refugee Relief Taxes (Abolition) Act, 1973.
21. The Immigration (carriers Liability) Act 2000.

All these laws are some extent, have a bearing on the wider implications of the term “Refugees”

**(a) The Constitutional Law**

The Indian Constitution law provides related provisions to refugees they are found in Articles 5 to 11, 14, 20, 21, 22, 25(1), 27, 28(3), 51(c) and 253; List I, entries 14, 18 and 19; and List III, entry 27. These provisions deals with citizenship; naturalization; aliens (excluding enemy aliens); extradition; displaced persons; fundamental rights of all people within the territory of India (including refugees); the rights of persons in criminal proceedings; and the power of parliament to recognize international treaties. Different levels of assistance and facilities. Educational opportunities, camp conditions, employment opportunities, voluntary repatriation- have been extended to special groups of refugees like Tibetans, Chakmas, Sri Lankans, and

Afghans. The right to life under Article 21 has been given an expansive meaning by the courts<sup>44</sup> to cover the due process of law, i.e., the right not merely to an animal existence but a right to live with human dignity.

“The established principle of the rule of law in India as set under Article 21 of the Constitution is that no person, whether a citizen or an alien, shall be deprived of her life or personal liberty except in accordance with a procedure established by that law must be fair. The Constitution of India expressly incorporates the common law percept. Article 51 states that the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. Article 51 is a directive principle of state policy, indicating the spirit in which India approaches her international relations and the Indian system is a common law system. Article 253 of the Constitution clearly 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 country or countries or any decision made at any international conference, association or other body.” Entry 14 of the union list of the seventh schedule, there is a clear understanding that the power to enter into treaties, conferred by parliament, carries with it the right to encroach on the state list to enable the union to implement a treaty. Therefore any law made in accordance with this article that gives effect to an international convention shall not be invalidated on the ground that it contains provisions relating to the state subject.<sup>45</sup>

### **(b) The Foreigners Act**

The provisions of the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, the Passport (Entry into India) Act, 1920, or the passport Act, 1967, deals with refugee law. Section 3(1) of the Foreigners Act does not grant an absolute right to the Indian government to expel foreigners from Indian Territory. It is not the right but the exercise of this right that is in question. That right has to be practiced in a reasonable manner. In the context of refugees, reasonableness is to be determined by international refugee law.

The passport (Entry into India) Act, 1920, is important in the refugees issue, given that they may enter and attempt to leave the country without a passport or with forged one. This is an accepted principle of refugee law by Article 31 of the 1951 Convention, states that contracting states shall

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<sup>44</sup> Luis de Readt v. Union of India, 1991 (3) SCC 554; Khudiram Chakma v. Union of India, 1994 Supp (1) SCC 614.

<sup>45</sup> Trakroo Ragini (2005), *Refugees and the Law*, New Delhi: Human Rights Law Network, Socio-legal Information Centre, p. 68.

not impose penalties on account of the illegal entry or presence of refugees in the country. Alternatively, they may leave their country in such situations that they don't have the time to travel with their passports or get one issued by the concerned authority. In this respect, refugees under Indian law have not been exempted from entering India with travel documents as provided for under section 3(c) of the 1920 Act. In practice the administrative policy of the Indian government has operated to let some groups of refugee's entre the country without the required documentation. This is because Article 21 of the Indian Constitution encompasses the principle of non- refoulement, which is an important principle of customary international law.

The passport Act, 1967, deals with the issuance of passport and other travel documents regulating the departure of Indians and other nationals from India. Under Section 20 of the act, the central government may also issue passport and travel documents to persons who are not citizens of India but on whom it is in the public interest to confer such documents. This provision has allowed many Tibetan refugees in India to travel abroad. Article 27 and 28 of the 1951 Convention state that contracting states shall issue identity papers to refugees in their territory who do not possess valid travel documents and also issue temporary travel documents for the purpose of allowing them to travel outside their territory. By providing travel documents to the Tibetans, India has complied in part with these articles of the 1951 Convention.

There are a number of such Orders in practice to restrict the movement, activity and residence of foreigners; and, require their proof of identity and regular appearance before the police.<sup>46</sup> In addition, Section 5 of this Act prevents foreigners from changing their name in India; Section 6 requires masters of ships and pilots of aircraft to maintain records of travelling foreigners; Section 7 states hotel-keepers to maintain records of the stay of foreigners; Section 9 places the burden of proving that a person is not a foreigner on that person; Section 12 provides for the delegation of these powers; and, Sections 14, 14A and 14B penalize foreigners and abettors found in contravention of the Act or any Order made there under.

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<sup>46</sup> See, for instance, the Foreigners (Restriction on Movements) Order, 1960; Foreigners (Restriction on Activities) Order, 1962; Foreigners (Restrictions on Residence) Order, 1968; Foreigners (Proof on Identity) Order, 1986; And, Foreigners (Report to Police) Order, 1971.

### **(C) The Indian Penal Code**

The Indian Penal Code (IPC), 1860, applies equally to nationals, refugees and other foreigners. A refugee may be charged under sections 418, 419, 420, 468 and 471 of IPC when, for example, he has attempted to mislead Indian authorities by using fraudulent travel documents. A refugee may travel on a completely counterfeit document; he may use a genuine document where he changes the relevant information; or he may obtain a genuine document by false means. Unfortunately the concerned state authorities often do not consider the compelling factors that may have brought the refugee to India. In many instances the gravity of the circumstances coerces the refugee to obtain a false passport or a forged visa for entry into India. Alternatively his country may not have been willing to provide him with genuine documents or he may not have had the time to obtain them.

However, Refugees are commonly detained for violating the following provisions of IPC: cheating by personating (section 416); cheating and dishonestly including delivery of property (section 420); forgery (section 463); and making and using forged documents (section 464).<sup>47</sup> These offences are interrelated. A refugee may be charged with all of these offences if he has forged a passport, visa or residential permit. Refugees detained for illegal entry into India who also possess travel documents that may be forged, false or fabricated would attract the provisions of the above sections of the Indian Penal Code and may be prosecuted for the same.

### **(d) The Human Rights Act**

The protection of Human Rights Act, 1993, provides for the establishment of a National Human Rights Commission, state Human Rights Commission and Human Rights Courts with the purpose of protecting human rights in the country, section 3 of this act deals with the National Human Rights Commission (NHRC), which is currently based in Delhi. Article 12 lists states about the functions of NHRC. These include the power to inquire suo moto into a petition presented to it, second the right to intervene with the court's approval in any judicial proceedings involving an allegation of human rights abuse, third the right to study treaties and other human rights instruments and make recommendations for their effective implementation, fourth the

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<sup>47</sup> For example State v. Chandre Kumar (FIR No. 78/2010). NCT Dwaraka Courts New Delhi.

power to promote research in the field of human rights. Apart from these section 1 of the act, the commission has the powers of a civil court under the code Civil Procedure, 1908, when inquiring into a complaint. Chapter V of the act establishes the state human rights commissions, and Chapter VI establishes the human rights courts. The National Human Rights Commission has taken an interest in issues relating to refugees.

On one time, the commission, received petition from Chakma refugees residing in the state of Arunachal Pradesh they are threatened by the All Arunachal Pradesh Student Union (AAPSU) to leave the country the issue moved the Supreme Court, indicating “that there was prima facie evidence to support the claim of the refugees. The court after considering the evidence, directed that the Chakmas protected by the state government and that all those eligible and interested in applying for Indian citizenship should be dealt with according to the relative laws.”<sup>48</sup>

### **3.4 Policies and Practice of Indian Government**

As mentioned earlier, India has not signed the 1951 convention. At the same time it has on various occasions extended protection to refugees in its territory. However, the procedure for determining refugee status is lacking. India has taken care of large-scale refugee influxes from neighboring countries and recognized them on a prima facie basis, others are treated as ordinary foreigners. This recognition is not based on any law but on ad hoc policies. The UNHCR mandate refugees are not considered as “refugees” under Indian law. The Indian government has no uniform procedure for determining refugee status and providing assistance to refugees. There is no central government body that deals with refugees. Various departments under the central and state governments handle the cases of refugees recognized on an ad hoc basis by the government of India. The administrative practices suggests that India gradually evolved a broad policy towards certain groups of refugees. It must be pointed out however that various gaps still exist in the mechanisms for dealing with refugee protection. This is because the Indian government has not enacted a specific national law on refugees or signed any international instruments relating to refugees.

The administration dealing with refugees includes the Ministry of Home Affairs, the Ministry of External Affairs and other related departments of the central state governments. Under section 3

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<sup>48</sup> National Human Rights Commission v. State of Arunachal Pradesh, 1996 (SC) AIR 1234.

of the Foreigners Act, 1946, the administration practised different policies for various groups of refugees. There is no central agency dealing with refugees in India. It is therefore possible that different administrative bodies deal with the same problem in various ways. However, in routine matters, the centre communicates its policies to the home ministry in the states. At the same time it communicates the same decision to the concerned departments, resulting in delayed decisions, with refugees taken into detention.

In some instances, “the central government may issue clear directives to the states and delegate its power under section 3 of the Foreigners Act 1946 for example, in the case of a Sudanese refugees, the policy regarding Sudanese nationals who had been students in India was expressly recorded by the central government and directives to the state of Maharashtra.”<sup>49</sup>

In other instances, the state and central governments are different practice in their policy in the issue of refugees in the concerned state. In *NHRC v. State of Arunachal Pradesh* (1996 SC AIR 1234), the central government was willing to entertain applications for citizenship from approximately 4, 012 Chakmas who were settled in Arunachal Pradesh. However the state government refused to forward their applications and in fact stood by as repressive measures were taken against the refugees in an attempt to evict them.

#### **(a) Entry, Work permits and Fundamental freedoms**

The Indian government followed a liberal policy for granting refuge to various groups of refugees. Past experience states that entry into India for most refugee groups is with the international principles of protection and non-refoulement. Such entry is generally not determined by reasons of religion, race, nationality, gender or other similar grounds. India has granted refuge to Buddhists; Tibetans; Hindu and Christian, Muslims, Sikh and Hindu Afghans; among other refugees in recent years.

Refugees are generally not allowed to work in India. Some find employment in the informal sector without facing any objection from the administration. Many refugees are self-employed and work from their homes. Some of them are supported by their community. Tibetan refugees,

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<sup>49</sup> State v. Lawrence Lora Kamilo, criminal writ petition No. 189 of 1996, Bombay High Court at Nagpur bench.

as a special case, they are getting loans and other facilities for self employment. Chakma and Afghan refugees are also in gainful employment.<sup>50</sup>

Refugees normally have the freedom to move around the country with the restrictions applicable to any other foreigner. They are also allowed to practice their religion and follow their culture. In the case of refugees whose entry into India is legal or illegal subsequently legalized, there is limited interference by the administration regarding these basic freedoms. Refugees have access to the health and education facilities in India, and no discrimination is practiced against them on the basis of their refugee status. However, refugees enter India illegally or overstay the permitted period have strict restrictions on their movement in accordance with the legislation relating to foreigners, like Foreigners act, 1946, the Foreigners Order, 1948, and the Passport Act, 1967. Provisions of the Foreigners Act apply to all distinction is made in law between asylum seekers and other foreigners.

However, courts sometime accept the special situation of refugees. But sometimes many refugees are deported because they do not have valid travel documents. This act of omission is because of the lack of a refugee statue. Courts at all the time have mostly stayed deportation orders in several cases, pending a decision on refugee status and citizenship application.<sup>51</sup>

#### **(b) The Border, Custom and Immigration Authorities**

Border authorities in the Indian country are the Border Security Force (BSF), the Indo-Tibetan Border police, the Indo Nepal Border Police and the Assam Rifles. They are usually the first representatives of the Indian system that refugees face when they enter or exit the country by land routes. Long border and not much clear line in the border making it difficult to physically guard the entire international border of India. These gaps in the border are used by refugees to illegally enter and exit Indian Territory. If a refugee is caught when he entering illegally, the authorities usually return or deport his cross the border. Alternatively, the refugee may be interrogated and detained at the border.

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<sup>50</sup> Afghan refugees employment in India see also :<http://www.unhcr.org/428c967e4.html>

<sup>51</sup> N.D. Panchoil v. State of Punjab, criminal writ petition No. 243 of 1988, supreme court of India; Khy Htoon v. State of Manipur, civil rule No. 515 of 1990, Guwahati High Court.



If authorities caught when a refugee illegally exiting India, the refugee detained for investigation and subsequently handed over to the local police for further action. “In the case of state v. Mehmud Ghazaleh, the refugee is found of invalid or fake travel documents and violation of law of the Indian country, the border authorities detains the refugee. After initial investigation, the matter referred to the area police for further investigation, detention of the refugee and the registration of a first information report (FIR). The police put the accused refugee in the area prison and produce him in the local district court for trial.”<sup>52</sup>

In the case of refugee groups that are recognized by the government of India by and specific policy they followed the procedure by the policy. Instructions to this practice are directed by the government to the concerned border authorities. If a refugee detained without registration of an FIR. This situation mostly happen by the there is no peaceful border with India that persons home state. In such a case, the refugee doubted he may be a spy or terrorist entering Indian borders harm to the stability and integrity of the country. His detention will consequently not be recorded until the authorities realize their mistake or intervention is sought by the concerned refugee or human rights group in India. This process takes a long time. Up to that the refugee continues to in the position of illegal detention; he may also suffer torture. This kind of cases are very few.

In case a refugee is detected or exiting the country in established seaports and airports without travel documents, he is immediately detained by the immigration or authorized custom officers and an investigation is conducted. In case of illegal entry, the immigration authorities immediately deport the refugee to the country where he last came from. This is in violation of the principle of non-refoulement. In the pending deportation the refugee is put in a detention cell in the immigration section of the airport or seaport the basic conditions of living are usually unsatisfactory. He has to buy his own meals also. Suppose if he deported, the cost of the

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<sup>52</sup> An Iranian refugee registered with UNHCR, was detained while illegally exiting India for Nepal via the Sonauli border in district Maharajgunji, Gorakhpur, Uttar Pradesh. The refugee was travelling on forged and fabricated travel documents. He was detained by the border authorities who discovered that his travel documents were forged. They handed the refugee over to the area police station at Sonauli for investigation and registration of FIR. He was subsequently interned at the Gorakhpur District Jail. (State v. Mehmud Ghazaleh, FIR No. 50 of 1993 was filed under section 419, 420, 468 and 471 of the IPC; read with sections 3 and 6 of the Passport Act and section 14 of the Foreigners Act.)

transport ticket is bought by the refugee. For example, in the case of Majid Ahmed Abdul Majid Mohd v. Union of India<sup>53</sup>

If a refugee violates any law, he is treated same like as other criminal in India. The authorities hand over the accused refugee to the area police for register an FIR against him. He is then taken into police custody and is subsequently produced in the local sessions court, up to that he should be in the local prison to wait for trial. Suppose the immigration or custom authorities doubt about the travel documents of a refugee when he enters the country, they may send the documents for further investigation to the local foreigner's regional registration office (FRRO). The refugee is directed to a local appearance at the FRRO. An FIR is filed against the refugee and he also arrest.

### **(c) The Police and FRRO Officials**

Suppose a refugee entered with invalid document, or if he enter with valid document but after some decades the document expired. That Border or custom authorities didn't found that but police found that or the refugee may be arrested on expiry of the documents. Or refugee fails to renew their visas or residential permits with the local FRRO. The Police, random checks are routinely conducted by the local police at places commonly frequented by foreigners and refugees, such as hotels, restaurants, religious places and markets. Given that refugees are usually fleeing a violate situation, they often do not have valid travel documents with them as required by the foreigners Act. Refugees taken care of by the government are normally not required to hold valid passports and related documents. However, the government has become strict with some mandate refugees, like ethnic Afghans, Somalis, Sudanese, requiring them to maintain a valid passport and residential permit.

“Eva Masar Musa Ahmad case refugees who not comply with the mandatory requirement to obtain and renew residential permits so he was arrested and produced before the local sessions court. The court orders them to be detained in the local prison pending trial.”<sup>54</sup>

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<sup>53</sup> A Palestinian refugee, travelled to Kathmandu from New Delhi illegally. He was caught and deported from Kathmandu to New Delhi by the authorities in Nepal. He was sent back to Nepal and was once again deported to New Delhi, thus amounting to four trips in two days. All expenses were met from his own resources. He was subsequently detained at the immigration lounge of the International Airport at New Delhi for over 25 days. His food expenses were met from his diminishing personal resources and he also met the cost of his final deportation to Bangladesh. ( Majid Ahmed Abdul Majid Mohd v. Union of India, criminal writ petition No. 60 of 1997, Delhi High Court.

<sup>54</sup> A Sudanese refugee registered with UNHCR was arrested by the Kotla Mubarakpur Police in New Delhi because her passport had expired. An FIR under section14 of the Foreigners Act 1946 was filed. She was produced before

The police normally do not consider any claims of refugee status by the refugee. According to under section 3 of the foreigner Act, 1946, the administrative authorities may leave India notices to those refugees who failed to extend their travel permits or who ordered to deported by the court. In this kind of cases, the refugee forcibly deported if he fails to comply with the notice. However, a writ petition can be filed at the concerned court. For example<sup>55</sup>

Under the Foreigners Act, all foreigners in India are required to register themselves with Foreigners Regional Registration Office (FRRO) in their area of residence. The office registers the name of the foreigner in its records and issue the person a residential permit. The lack of national legislation or specific refugee policy so the authorities followed the ad hoc policy. Some groups of refugees are issued residential permits. Afghan and Burmese refugees are issued permits allowing them to stay in India. However, refugees groups like the Iranians, Iraqis and Sudanese have not granted such documents. However, “there are instances where refugees recognized by the Indian government, and who have been issued valid refugee identity documents, are latter prosecuted for illegal entry or overstay.”<sup>56</sup>

#### **(d) Judicial Practice in India**

Indian courts, generally strictly interpret the legislation on foreigners by refusing to interfere with the powers of the executive. But in the refugees issue the court practice a more humane approach to protect the rights of refugees in India. However, some times this approach is unsystematic and dependent upon the situation. It is an exception to the normal rule.

In 1996, the Supreme Court in *National Human Rights Commission v. State of Arunachal Pradesh* intervened with a liberal interpretation of the law to suggest that refugees are a class apart from foreigners deserving of the protection of Article 21 of the Constitution. The Court held at Para. 20,

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the court of the concerned metropolitan magistrate who remanded her in judicial custody. (In Re Eva Masar Musa Ahmad FIR No. 278 of 1995, MM, New Delhi.

<sup>55</sup> Two Afghan Sikhs of Indian origin had fled persecution in Afghanistan and were registered as refugees with UNHCR. They were issued leave India notices by the FRRO to leave India within 7 days of receipt of the notice. A criminal writ petition was filed in the Punjab and Haryana High Court at Chandigarh and interim stay of leave India notice was obtained.

<sup>56</sup> The NHRC has taken up the cause of a number of Sri Lankan Tamil refugees who have likewise been prosecuted. The government subsequently had them discharged. (Ragini Trakroo 2005)

“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so.”<sup>57</sup>

There is no real and specific recognition of the right against non refoulement. But courts have, on rare occasions, accorded to individual refugees the right against forced repatriation.<sup>58</sup> Courts have also provided a certain measure of socio-economic protection in special circumstances.<sup>59</sup> The role of the UNHCR in India has also been given a limited recognition by the judiciary. Courts have stopped deportation proceedings and ordered the release of individual refugees in order to provide them with an opportunity to approach the UNHCR for refugee status determination or to allow resettlement to take place.<sup>60</sup>

### 3.5 The UNHCR and India

The India is a member of the executive committee of UNHCR. And as Shashi Tharoor observes

“As a member of UNHCR’s Executive Committee and a nation with a long and proud record of asylum and refugee protection, India can and should do more than it has done so far. India, rather perversely, does not grant UNHCR independent recognition in our country and allows it to work only as a subsidiary of UNDP. This should be changed so that the organization, as it does everywhere else, is able to work freely and to maintain independent links to the government. I am aware that UNHCR is very satisfied with the Government of India's policy towards refugees. As an Indian and a former UNHCR official, I am conscious that formally the Government of India has still not signed up to the international refugee instruments. However, the practice of the government has been very good.”<sup>61</sup>

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<sup>57</sup> NHRC v. State of Arunachal Pradesh (1996) 1 SCC 742.

<sup>58</sup> P. Nedumaran (unreported) WPs 12298 & 12313/1992, Madras High Court; and, Gurunathan (unreported) WPs 6708 & 79168/1992, Madras High Court.

<sup>59</sup> Digvijay Mote (unreported) WA 354/1994, Karnataka High Court.

<sup>60</sup> Malvika Karlekar (unreported) WP 583/1992, Supreme Court; Bogyi (unreported) WP 1847/1989; Khy Toon (unreported) WP 525/1990, (both Guwahati High Court); Shah Gazai (unreported) WP 499/1996, Punjab & Haryana High Court; Ktaer Abbas Habib Al Qutaifi 1999 Cri LJ 919 (Gujarat High Court) at paras 18 – 20; Lailoma Wafa (unreported) WP 312/1998 (Delhi High Court).

<sup>61</sup> Preserving Asylum in India: Achievements & Challenges, Speech by Sahshi Tharoor. World Refugee day, 20 June 2012, New Delhi.

India for the first time, established its formal relationship with the UNHCR in 1969 for the rehabilitation of Tibetan refugees in India. When the High Commissioner visited India in July 1963, India expressed its interest in receiving assistance from UNHCR for Tibetan refugees. UNHCR made available some funds from the proceedings of the sale of “All Star Festival” record.

In subsequent years India was not only involved in adopting rehabilitation and resettlement programs for the refugee already arrived but also in providing immediate relief assistance and finding new projects for resettling newly arrived refugees. Discussions with the High Commissioner on various circumstances the government of India to suggest that more material assistance was welcome. UNHCR was officially opened in Delhi on 1 February 1969, for co-operation with India. UNHCR under took new projects and consolidated old ones in the fields of agricultural settlements, housing for the aged and medical facilities for Tibetan refugees. A working relationship between UNHCR and India was established by the time India got involved in providing emergency relief to Bangladesh refugees.

The refugee influx from East Pakistan, on 23 April 1971 India called upon the UN to assist in relief in order to meet massive refugee problem. The UN Secretary General established the focal point programme giving UNHCR a leading role with two objectives like urgent relief measures for refugees in India and promotion of voluntary repatriation. The programme ran from May 1971 to February 1972; it directly involved UNICEF, WHO, FAO and WEP to co-ordinate fund-raising and assistance activities related to the relief action with the high commissioner at the international level. Therefore,

“after the ceasefire between India and Pakistan, a programme for an organized return of refugees was drafted and its implementation officially started from 1 January 1972. Within a short time span of three months, seven million refugees had been moved to Bangladesh by various means of transport. In addition to his function as the operator of the focal point programme and to assist refugees, UNHCR mobilized international resources which were necessary to facilitate repatriation.”<sup>62</sup>

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<sup>62</sup> Ibid,

After 1972 UNHCR branch office in Delhi concentrated on resettlement projects for Tibetan refugees again. But in 1975 UNHCR suddenly wound up its projects in India and closed its Delhi branch office for no reason.<sup>63</sup> Again in 1979 UNHCR requested the government of India to reopen its branch office in Delhi. India did not give permission to that effect, but agreed to allow a UNHCR representative to function as the “UNHCR component of the United Nations Development Programme (UNDP) in New Delhi. In government of India’s view the Delhi representative of UNHCR is just a component of UNDP and cannot even have an independent office to perform his functions. After that UNHCR provides international protection and assistance to refugees in India. That time 35,000 Afghans, 2,000 Iranians, and a few hundred nationals from other countries had registered themselves as refugees with the Delhi representative of UNHCR. These relations between India and UNHCR have been decided variously.

“Unlike its relations during 1969-75, UNHCR present relations with Indian government have not been smooth and benevolent. UNHCR’s role in India became controversial when its New Delhi representatives working under UNDP recognized the refugee status of three officials of the Afghan Ariana Airlines on 18 September 1984, and of three members of the Afghan soccer team week later, who stayed back in Delhi on their trip from Beijing after participating in a tournament.”<sup>64</sup>

This time India openly criticizes the UNHCR in this issue and India try to cut down the power of UNHCR in the issue of refugee status recognition J.N Saxena observed,

“India took objection to this and reported the matter to UN Geneva authorities against Delhi based UN officials for having played the role in granting refugee status to the officials of the Afghan Ariana Airlines and to the three soccer players. India’s stand was that “Refugee Status” could only be given by its own government to any alien within its territory and without the approval of the government, the New Delhi based UN officials should not grant refugee status to any alien in India.”<sup>65</sup>

India feels refugee problem is purely a bilateral issue with country of origin of refugees. Intervention of any foreign agency including the UNHCR is considered interference in its internal and bilateral affairs. The result is that India not only avoided intervention by any state or

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<sup>63</sup> There is no official explanation as to why India did not give permission to the UNHCR to reopen its branch office in New Delhi, but it strongly believed that the unilateral decision of the UNHCR to wind up its operations in India in 1975, and the differences on certain issues between the then high commissioner for refugees, (Agha Khan), available at [www. UNHCR.org](http://www.UNHCR.org)

<sup>64</sup> Indian Express, New Delhi, 29 September, 1984.

<sup>65</sup> Saxena J.N (1986) “Legal Status of Refugees: Indian Position”, *Indian Journal of International Law*, vol.26 p.513.

agency on protection of refugees but it is also never allowed any direct material assistance to refugees from foreign agencies for the same reason. In 1993 India agreed to allow UNHCR to the voluntary nature of the repatriation of Sri Lankan Tamil refugees at the same role in the case of the Chakma refugees. In 1995 India became a member of the Executive Committee of the UNHCR. In 2001, the UNHCR again received request for voluntary repatriation and these cases are taken up with the India government by the UNHCR. It was an important achievement in UNHCR India collaboration. In India, UNHCR will improve RSD systems and strengthen protection for all communities through centers in areas where refugees reside. Finally, there is much greater interaction and cooperation between the government and UNHCR and thus reasons to believe that the relationships between the two will significantly improving in the coming years.

### **3.6 India's International Commitments on Refugee**

India does not want to make any commitments with international instruments on refugees. But its commitments are governed by other instruments.

“India does not want to be tied down by an international legal obligation that impinges upon its discretion to regulate the entry of foreigners into its territory. This concern must be understood in the context of South Asia's unstable geopolitics, not to mention its volatile ethnicities. Indian and other commentators from developing countries also call attention to the current state of flux in international refugee law.”<sup>66</sup>

“In a statement to the Executive Committee of the UNHCR in October 2003, the Indian Permanent Representative pointed out that the situation of refugee and migratory movements in the world today are vastly different from what they were when the UNHCR was created and this had to be reflected in practice to enhance the UNHCR's ability to play a meaningful role.”<sup>67</sup>

India has signed a number of international conventions that have important obligations towards refugees. These include the International Convention on Civil and Political Rights, 1966

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<sup>66</sup> Chimni B.S (1999), “From Resettlement to Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems”, available at UNHCR.org

<sup>67</sup> Puri, H.S the Indian Permanent Representative at the Executive Committee of the UNHCR.

(ICCPR);<sup>68</sup> the International Convention on Economic, Social and Cultural Rights, 1966 (ICESCR); the International Convention on the Elimination of all Forms of Racial Discrimination, 1966 (CERD); the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT);<sup>69</sup> and, the Convention for the Elimination of all Forms of Discrimination Against Women, 1979 (CEDAW). India's international law obligations must be considered in the light of these commitments. The pressure to accede to the Refugee Convention and enact national refugee legislation for the country is exerted on the Indian Government by the National Human Rights Commission.

“The NHRC was instrumental in ensuring that the Indian Government signed the CAT on 14th October 1997. In its Fifth, Seventh, Eighth, Ninth and Tenth Annual Reports, the NHRC consistently highlights the need for an effective Indian refugee protection regime, by joining the Refugee Convention and enacting protective national legislation. Within the NHRC, a committee of experts examines matters of Indian refugee law and policy. In its Seventh Report, the NHRC addressed the need for domestic refugee protection law, which was repeated in its Eighth and Ninth Reports. The NHRC's Tenth Report, its latest, continues to push the Indian Government and chastises it for failing to meet its international law responsibilities.”<sup>70</sup>

### 3.7 Conclusion

In India, legally or illegally, refugees face a problem residing in the country. This is because travel or stay documents they have expired, or they are unable to renew them, or they were never able to acquire any documents. Sometime, the foreigner's regional registration office (FRRO) has refused to issue or renew residential permits because the refugee did not have valid passports. This should not exclude them from being treated as refugees under international law. Different kinds of treatment have often been accorded to different groups of refugees with respect to their stay in India. The policies that govern different refugee groups are rarely

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<sup>68</sup> Article 13 of the ICCPR states that, “an alien lawfully in the territory of a state-party to the present covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” General Assembly resolution 2200A (XXI) of 16 December 1966, available at: [www.UN.org](http://www.UN.org).

<sup>69</sup> Article 3(1) of the CAT states that, “no state-party 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.” General Assembly resolution 39/46 of 10 December 1984.

<sup>70</sup> Achary Bairav, (2004), “The law policy and practice in India”. Available at :

<http://www.scribd.com/doc/61128218/The-Law-Policy-and-Practice-of-Refugee-Protection-in-India>



formalized as written rules; this is based on the actions of the government. This may create some ambiguity in the minds of researcher who are accustomed to dealing with codified rules and regulations. It is therefore very important in the subject of refugee law to keep abreast of the latest development in this field.

## CHAPTER – IV

### LEGAL STATUS OF SRI LANKAN TAMIL REFUGEES

## CHAPTER - 4

### LEGAL STATUS OF SRI LANKAN TAMIL REFUGEES

#### 4.1 Introduction

For the past 20 years Sri Lanka has been embroiled in conflict between the Sri Lankan army and the Liberation Tigers of Tamil Eelam (LTTE) who are fighting for independence for the minority Tamil population. The conflict has left as many as 70,000 people dead and one million people displaced. Tamils from Sri Lanka have been fleeing their home country for India since 1983 when the conflict began. Many are forced to flee the country in order to escape torture, rape and disappearances perpetrated by the security forces. The warring parties are Buddhist Sinhalese and Tamil Hindus. The ethnic dimension to the conflict leads the civilian Tamil population to seek refuge in India. The majority of individuals fleeing the Sri Lankan conflict for India arrive by boat; risking a dangerous journey across the Palk Strait. In June 2007 it was estimated that approximately 18,000 Tamils had undertaken this journey to Tamil Nadu in the previous 18 months. On arrival they are accommodated in the main refugee camp near Rameswaram, 600km south of Chennai, before being sent to camps in other parts of Tamil Nadu. The refugees are questioned by Indian police in order to establish their identities and to discover whether they have links to the Tamil Tigers, which is an illegal organization in India. The roots of the ethnic problem go back to Sri Lanka's independence in 1948, when the rivalry between the Sinhalese majority and Tamil minority surfaced.

The Sinhalese politician's belligerent ethnic postures and institutional discrimination in education and employment against the minority Tamils led to conflict between both the communities. "Sri Lankan Tamils constitute about 12.6 percent of the total population of Sri Lanka, against the majority Sinhalese, who constitute 74 percent".<sup>71</sup> According to the Home Ministry statement on 22 May 2012 there are 69, 544 Sri Lankan Tamil refugees are sheltered in India.

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<sup>71</sup> Mayilvaganan M (2005) "Sri Lankan Refugees in India: Peace Process and the Question of Repatriation", *ISIL year book of International Humanitarian and Refugee Law*, Vol. V, p.263.

## 4.2 Categories of Refugees

According to Suriya Narayanan classification The Sri Lankan Tamils in Tamil Nadu can be divided into four categories. 1) Refugees in the camps, 2) Recognized refugees outside the camps, 3) Sri Lankan nationals and 4) Tamil militants detained in Special Camps. It is essential to keep in mind the differences among the four categories and also their legal status.

1) Refugees in the camps. According to Tamil Nadu Government, there are 73,241 persons belonging to 19,340 families, who live in 115 camps in 26 districts.

2) Refugees outside camps. This category of people after informed to the rehabilitation department they live outside the camps but in India look for means to improve their living condition. The government officials advised them to register themselves with the nearest police station, where they live and also get a refugee certificate from the Collector's office. There are 31,802 refugees who live outside the camps. They didn't get any benefit from government.

3) Sri Lankan nationals who live in Tamil Nadu. They come to Tamil Nadu with valid travel documents and live in the State with their own means. They are required to register themselves with the nearest police station. Some of them continue to live in Tamil Nadu even after the expiry of the visas. Some of them use Tamil Nadu as a transit point to go abroad. Some, through improper means, have acquired ration cards and also own property. According to informed sources, under this category there will be nearly 80,000 people living in various parts of the State.

4) Militants in Special Camps. Those Sri Lankans, who have alleged links with the militant groups, are kept in Special camp in Chengalpet. According to informed sources, there are nearly 50 Sri Lankans who are detained in the Special Camp. Living conditions in the special camp are very bad.

5) Apart from above said categories after the LTTE period some groups of refugees reached Tamil Nadu.

“There is one category of Sri Lankans, who have arrived in Tamil Nadu recently (after the LTTE decade), whose whereabouts remain unreported by the media. According to

informed sources, nearly 10,000 inmates, who were among the IDPs living in Manik Farm, after paying huge bribes to the Sri Lankan armed forces, have escaped from Vavuniya. Numbers of them have come to India after getting visa from the Indian High Commission through travel agents operating in Colombo. According to informed sources, during recent months nearly 5,000 Sri Lankans have come to Tamil Nadu by air and have sought refugee status. Presumably their applications are pending with the Home Ministry. It is very likely that some of them are hard core LTTE supporters and their presence in Tamil Nadu has serious security implications. Both New Delhi and Chennai should investigate this phenomenon and take immediate corrective measures.<sup>72</sup>

### **4.3 India's Legal, Policy and Practice on Sri Lankan Tamil Refugees**

The legal status of Sri Lankan refugees in India is officially governed by the Foreigner's Act 1946 and India's Citizenship Act 1955 which defines all non-citizens who enter without visas to be illegal migrants, with no exception for refugees or asylum seekers. Sri Lankans who are considered to be a threat to national security are deemed to be militants and detained in 'special camps' in Chenglepet or Vellore and. In general the Government of India recognizes Sri Lankans fleeing violence at home to be refugees and accordingly grants them protection.

The initial Indian response to the influx of Sri Lankan Tamil refugees in the early 1980s was welcoming. Refugees were provided with shelter and basic relief on a prima facie basis, the refugees are allowed to do employment outside the camps, and refugee children were admitted to local government-run schools in Tamil Nadu. India's policy was therefore, in accordance with international standards of refugee protection. USCR consequently noted in 1991:

“India has accorded a welcome to asylum seekers from Sri Lanka that is as generous as for any refugee group in Asia...it has largely been the case that every person who has landed on the shore and asked for refugee has been granted refuge”.<sup>73</sup>

In after the Rajiv Gandhi assassination, and largely in reaction to an upsurge in public hostility towards Sri Lankan Tamils, the immediate policy changed. However, “it must be noted that large

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<sup>72</sup> Suriyanarayana. V, “SRILANKA, focus on the Sri Lankan Tamil Refugees, South Asia Analysis Group”, Paper No: 3502, 13-November-2009.

<sup>73</sup> USCR, “Sri Lanka: Island of Refugees”, Chandrehasan, founding director of the refugee NGO, organization for Eelam Refugee Relief (OfEERR), noted also that, there was a lot of euphoria when refugees first started coming in to Tamil Nadu, and a feeling of emotional ties between the Sri Lankans Tamils and India. (Chandrasahsan 2000)

scale targeted violence in Tamil Nadu directed at refugees was absent.”<sup>74</sup> The central government was also prompted to institute polices that would address the security concerns of its citizens, some of which impacted negatively on the refugee group. “Special camps for the internment of suspected refugee militants were constructed, and the twenty-eight international domestic NGOs working in the camps were only allowed reduced access. This period also saw rising local resentment against refugees who were competing for employment within the labor market”.<sup>75</sup> De Souza asserts “that some socio-economically disadvantaged Tamils resented the fact that the refugees were being helped with Indian funds while they themselves suffered from poverty.”<sup>76</sup>

Under the leadership of Jayalalitha between 1992-95, the policy of the Tamil state government towards Sri Lankan Tamil refugees became relatively rigid. Refugees were confined to the camps after daylight hours, and some access to local education was restricted. However, following interventions by UNHCR and the NHRC, such restrictions were gradually lifted. In 1996 the AIADMK was re-elected to the Tamil Nadu state government and the joint secretary in the public department declared then that ‘the present government is definitely sympathetic towards refugee matters.’<sup>77</sup>

The MHA is responsible for the provisions of material relief and the formulation of refugee policy, while implementation of this policy is delegated to the State Government. The government of Tamil Nadu has appointed a commissioner for rehabilitation of Sri Lankan refugees, who is broadly responsible for refugees residing within government-run camps. Chandrahasan, head of the only NGO allowed officially to operate within the camps, noted

‘The Indian response has been one of large heartedness; they are willing to accommodate the refugees despite not being signatory to the 1951 Convention. In a sense they give perhaps more than they can afford to give to their own people... In the present period we have good relations with the government of Tamil Nadu. However, you have to

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<sup>74</sup> Hans further noted: “India, which had never turned back genuine refugees or used force in repatriations, blotted its record in this case. The reasons were not related to any formal change in policy towards refugees. It was a reaction to the assassination of its Prime Minister.” (Asha Hans 1993: 31).

<sup>75</sup> India and Sri Lanka After the LTTE, Crisis Group Asia Report, No.206, 23 June 2011.

<sup>76</sup> De Souza, Maya, ‘The Sri Lankan Tamil Refugees in Tamil Nadu-their future reintegration or repatriation? A Case Studies programme Case report, 1990, Refugee Studies Centre, Oxford University, Oxford, p.12.

<sup>77</sup> UNHCR, Chennai, Situation Report, 30 June 1996.

remember that this is all dependent on local bureaucrats, who sometimes can be very harsh.<sup>78</sup>

#### 4.4 Socio, Economic and Repatriation Conditions

Sri Lankan refugees remain largely in Tamil Nadu and live in refugee camps scattered across the state. At present, more than 72,000 thousand Sri Lankan refugees live in over 120 camps in Tamil Nadu. In addition to this, a further 30,000 Sri Lankans are living outside the government camps. Those that choose to live outside must register with the local police and visit the camps on a fortnightly basis to register their attendance. Refugees living within the government camps are housed in warehouses or in temporary shelters and are subject to an evening curfew at 7 p.m. Each adult refugee receives a small monthly stipend. Though not officially permitted to work in India, the refugees worked as unskilled labor in the informal sector to supplement their incomes. The Indian Government provides basic medical care and education for school age Sri Lankan children as well as subsidized food grain for the camps inhabitants. Despite these provisions, conditions in the camps are generally poor with insufficient health and sanitary facilities available for the refugee population.

Repatriation has also fallen victim to Tamil Nadu politics. UNHCR reports that over 3,200 refugees have voluntarily returned to Sri Lanka between June 2009 and April 2011.<sup>79</sup> According to government and civil society officials, Karunanidhi was allergic to any public discussion of repatriation out of concern that it might be perceived as forcing refugees out of India. He was so sensitive about his political opposition using this against him that refugee authorities say the state government even blocked information about repatriation assistance in the camps, raising concerns over refugee rights and safety. A camp official said: “I understand the government’s anxiety but it is preventing people from planning for the future or making wise decisions about going back. People needed to be aware about possible safety issues regarding returns like status

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<sup>78</sup> USCR, Sri Lanka: Island of Refugees, p.11. Chandrehasan, founding director of the refugee NGO, organization for Eelam Refugee Relief (OfEERR), ‘Interview with Chandrehasan, OfEERR, Chennai, 24 January 2000

<sup>79</sup> “Steady increase in voluntary return of Sri Lankan refugees UNHCR”, *The Island*, 2 April 2011.

of demining efforts, etc”.<sup>80</sup> It is not clear whether the new AIADMK government will be more open to repatriation.

There is no consensus on how many refugees would like to return to Sri Lanka. The head of one NGO with a presence in several of the camps believes that refugees who arrived in the early 1990s, and married locally or had their children in Tamil Nadu, are more likely to see India rather than Sri Lanka as their home. He estimates this group at roughly 25,000 people and believes they would like Indian citizenship.<sup>81</sup> However, interviews with refugee camp authorities, as well as refugees, suggest that the majority of refugees would like to return home. Most, however, will remain in India until they perceive Sri Lanka’s political and economic situation improving and the government more welcoming. A refugee from Batticaloa said, “The government says the war is finished, but there’s no security there in Sri Lanka, no job opportunities. The Sri Lankan government thinks we’re terrorists too. When that changes we’ll go home”.<sup>82</sup> Another said, “Education opportunities are better in India than in Sri Lanka for Tamils. We’ll wait until our children are finished with school before moving them”.<sup>83</sup> Camp officials say stories about Sinhalese settling in Tamil areas and destroying Hindu temples are also affecting refugees’ decisions to repatriate.<sup>84</sup> Many refugees are still unclear about what repatriation and resettlement assistance they might receive from the Indian and Sri Lankan governments. Some refugees have simply given up on both India and Sri Lanka. Lured by the promise of a better future, refugees will pay upwards of \$700 to traffickers to smuggle them to the West.<sup>85</sup> An aid worker in the camps described not only the social decay that accompanies a long-term exile existence, but also the frustrations, which border on despair and anger, of many aid workers and social activists with India’s ad hoc approach to refugee assistance. He said:

“What happens after 25 years of living in the camps? Do refugees really have a future? These are questions everyone should be asking. They have been surviving. Not living. To be living you have to be thinking. Some of these people are not able to use their minds; they’re just doing what is required to survive, not what is possible. These people have not

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<sup>80</sup> India and Sri Lanka after the LTTE, Crisis Group Asia Report, No.206, 23 June 2011. Crisis Group interview, 20 October 2010.

<sup>81</sup> Ibid Chennai, October 2010.

<sup>82</sup> Ibid Madurai, October 2010.

<sup>83</sup> Ibid Coimbatore, October 2010.

<sup>84</sup> Ibid Chennai, Rameswaram, Madurai and Coimbatore, October 2010.

<sup>85</sup> Ibid refugees and aid workers, Tamil Nadu, September-October 2010.



been prepared for the future, nor are there options for them in the camps. Now their only desire is to go to a Western country.”

Every year hundreds of Sri Lankan refugees risk their lives to make dangerous sea crossings to third countries like Australia, Canada and Europe, which have large Sri Lankan Tamil populations. Government and aid officials have launched campaigns inside the camps warning refugees of the physical and financial dangers of such trips.<sup>86</sup> Since early 2010, numerous boats have reportedly tried to leave from southern India. Refugees said that some in their community have attempted journeys from Karnataka and Kerala to seek asylum in the West. According to camp authorities and media reports, over 125 people have been arrested between September 2010 and June 2011 in Kerala and Tamil Nadu while attempting passage to Australia.<sup>87</sup> Tamil Nadu police have stopped some boats but the DMK government threatened to cancel the registration and food subsidies and cash allowances of any refugees caught leaving by boat. One aid worker said this is because “The DMK does not want refugees leaving this way since it could hurt its image”. Equally likely is that the state government has been under pressure from New Delhi, which is under pressure from Western countries, such as Australia and Canada.

However, Refugees from Sri Lanka returning home in steadily rising numbers: more than 1,200 mainly from India have returned by the end of July 2011, and more are expected in the near future.<sup>88</sup>

#### **4.5 The UNHCR and Sri Lankan Tamils**

India established a deadline for the registration of refugees living outside government run camps. Those fail to register by 31 December 1987 they are treated under foreigners Act. Suppose any one guilty to non registration they are liable to deportation. The UNHCR asked the government to not forcibly repatriate those who are failed to register. From 1989 various agreement between government and UNHCR signed. And also three to four officials appointed in Rameswaram in

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<sup>86</sup> In several cases traffickers have simply absconded with the refugees’ money. Crisis Group interviews, refugees and aid workers, Tamil Nadu, September-October 2010.

<sup>87</sup> On 14 June 2011, 24 Sri Lankan Tamil refugees were reportedly detained by Tamil Nadu police near Cuddalore for allegedly attempting to travel illegally by sea to Australia. “24 Sri Lankan refugees trying to flee to Australia held in TN”, *Press Trust of India*, 14 June 2011.

<sup>88</sup> UNHCR 2012 Regional Operations Profile - South Asia Working environment.

the issue of volunteer departures. India agreed to the involvement of UNHCR in the repatriation process. The Refugee agencies presence was formally established in Madras on 4 August 1992, following the signing of a MOU. UNHCR was allowed access to the Sri Lankan Tamil refugees in transit centers, after these refugees had filled out ‘voluntary repatriation forms’ and agreed to make the return journey to Sri Lanka. 29,102 refugees repatriated to Sri Lanka by October 1992, followed by another 9700 in January 1994. Repatriation movements to Sri Lanka were suspended by the government of India following resurgence in hostilities between the government of Sri Lanka and the LTTE in mid-1995. In 1998-2000 a very small number of refugee families asked UNHCR to assist them to return to Sri Lanka, movements that were again halted by renewed fighting in mid-2000. The NHRC and UNHCR intervened with the government of India to require that a number of the several hundred refugees who had been moved to these high security camps following the 1991 assassination have their cases reviewed in order to determine whether they represented a genuine threat to the security of the state. So in 1995, the government moved 808 Sri Lankan Tamils back to normal refugee camps, in further 500 were repatriated to Sri Lanka, with UNHCR overseeing the voluntary nature of this return. By 1998, there were a substantially reduced total of 154 persons residing in three ‘special’ camps in Tamil Nadu. UNHCR has walked an uneasy line during this refugee situation between responding to the needs of the refugees and the NGOs that represent them, and maintaining a working relationship with the central and state governments. Augustine Mahiga, former chief of mission in UNHCR’s office in New Delhi noted that

‘We have maintained a presence in Chennai because there are still refugees there, and one day they have to go back. We don’t want again to be taken by surprise, and this is the government of India understand.’<sup>89</sup>

#### **4.6 The Future of Sri Lankan Tamil Refugees**

The future of Sri Lankan Tamil refugees in India is also politicized. On 26 September 2010, in a surprise announcement, then former Chief Minister Karunanidhi claimed that he would seek Indian citizenship for Sri Lankan Tamil refugees if they so wanted. The announcement contradicted a longstanding Union government policy stipulating that refugees should return to

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<sup>89</sup> Quoted in Pia Oberoi, *Exile and Belonging Refugees and State Policy in South Asia* Oxford University Press 2006, p. 227. Interview with Augustine P. Mahiga, former Chief of Mission, UNHCR, New Delhi. 24 April 2000.

their homeland once conditions went back to normal and could set a precedent for other refugee populations. Nor did it respond to any well established demand for citizenship by Sri Lankan refugees or any agency acting on their behalf. After receiving little support from the centre Karunanidhi back-tracked, saying he would only demand that refugees be granted the status of permanent residents. Several months later he announced the state would spend Rs.12 crores to improve refugee camp conditions. V. Suryanarayan, a well respect Indian-Tamil academic, commented at the time that:

“The extraordinary interest in the welfare of the refugees that is currently being displayed by the Government of Tamil Nadu has to be seen in the context of the image building exercise that the chief minister is currently engaged in to project himself as the champion of millions of Tamils scattered across the globe.”<sup>90</sup>

Refugee experts generally agree that the DMK has had a better track record than its rivals when it comes to refugee welfare in Tamil Nadu. However, analysts, including DMK leaning ones, agree that Karunanidhi’s post-war attention to refugees was motivated as much as by his desire to deflect criticism that he did not do enough for Sri Lanka’s Tamils during the war as by genuine concern for their wellbeing. Reacting to the AIADMK government’s announcement increasing the monthly assistance for Sri Lankan Tamil refugees, Karunanidhi welcomed the scheme, but pointed out

“That more schemes and programmes were unveiled during his rule for the refugees. The hike in assistance would cost only an additional Rs.55.44 lakh per month, he said. Recalling various assistances offered to the Sri Lankan Tamils, including the despatch of provisions worth Rs.10.6 crore to Sri Lanka during the last phase of the war, Karunanidhi said that his government had decided to improve basic amenities in the refugee camps at a cost of Rs.12 crore. Subsequently, based on the reports of the ministers who visited the camps, the State government allotted Rs.100 crore. One can compare these schemes with the announcement of the AIADMK government and come to a conclusion on who has done more for the Sri Lankan refugees.”<sup>91</sup>

However, the administration of the both government made good facilities to this refugee groups but, some of the public interest groups made criticism on Tamil Nadu government.

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<sup>90</sup> Suryanarayan V, “Focus on the Sri Lankan Tamil Refugees”, *South Asia Analyst Group*, 13 November 2009.

<sup>91</sup> The Hindu, Chennai, August 4 2011.

“The human rights groups here condemned the treatment meted out to the Sri Lankan Tamil refugees at a rehabilitation camp in Tamil Nadu. The groups lashed out at both the ruling AIADMK and the Opposition DMK for their ‘apathy’ and described them as ‘hypocrites’. The groups added that they would carry out a nationwide campaign and highlight the poor state of the refugees at Chengulpet district, who are on a hunger strike to bring to notice the plight of refugees in India. Addressing a news conference here on Friday, president of New Socialist Alternative Forum Jagadish said, ‘About 13 out of 28 refugees at Chengulpet are on fast. Their movement in and around was closely monitored. They are always accompanied by policemen. Their grant of Rs 70 is also taken away by wardens.’ Sashi, a short filmmaker from the city-based Pedestrian Pictures said that the government had registered cases against the refugees for not having passport. The Madras High Court dismissed the charges citing international laws. However, the camp is not allowing the refugees to move freely.”<sup>92</sup>

#### 4.7 Conclusion

In the case of Sri Lankan Tamil refugees in India, the presence of a strong bond of kinship with Indian Tamils and has been an important motivating factor in the formulation of a generous asylum policy. Despite the fact that New Delhi has declared to the LTTE as an unlawful organisation following the assassination of Rajiv Gandhi, international and domestic pressure prevented a reorientation of India’s policy towards the Sri Lankan Tamil refugees, who continued to be accorded asylum and relief in Tamil Nadu. The domestic politics of the Indian polity, whereby New Delhi cannot afford to alienate the vast population of Indian Tamils, has also had an important influence on refugee policy. The state policy on refugees accords with international principles of refugee protection. The refugee policy towards the Sri Lankan Tamil has been motivated by a construction of who these people are, what they represent to the state in which they seek refuge and what the state’s treatment of them represents to the wider community. In the case of Sri Lankan Tamil refugees they do not wish return to their home land they feel the Sri Lankan government is ready to help them. The future could be towards a “right to a durable solution” and guide lines could be laid down with respect to permanent stay, along with laying down of “standard treatment for refugees”, considering the fact that the absence of a legal frame work for protection, would give to uncertainties. In situations of large scale influx

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<sup>92</sup> The Indian Express, Chennai, 30 June 2012.

like Sri Lankan Tamil refugees the views expressed at the 1981 EXCOM conclusions<sup>93</sup> (at its 32<sup>nd</sup> Session) could be taken as guidelines, considering the fact that such mass influxes are inevitable and bound to occur in South Asian countries, as much as at the global level in the future.

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<sup>93</sup> Conclusions on the International Protection of Refugees, adopted by the Executive Committee of the UNHCR programme No. 22 (XXXII), protection of Asylum seekers in situations of large influx, 1981.

CHAPTER - V

NEED FOR DOMESTIC LAW

## CHAPTER-5

### NEED FOR DOMESTIC LAW

#### 5.1 Introduction

In the absence of a formal legal framework governing the treatment of refugees, several South Asian countries have chosen to manage influxes of refugee through administrative decisions rather than through specific legislative enactments. This has advantages in that it allows for flexibility in the granting of asylum. For example India generously accepts large groups of refugees who are fleeing not just for reasons relating to persecution, but also generalized violence as in the case of Sri Lankan Tamils. However, this does not hold good for all groups as certain refugees like Afghans, Iranians, Iraqis, Somalis, Sudanese and Myanmarese are not recognized by the India government. For which reason UNHCR has had to intervene through determining and granting refugee status under its mandate. “This different treatment of refugees is a fundamental problem.”<sup>94</sup>

However India is not ready to ratify the 1951 Convention. At the same time it is not ready to adopt a national law on the status of refugees. It creates doubt about India’s position on the issue of refugee problem. However, the record of India is good on the refugee issue. It however wants flexibility in the granting of asylum. But there is often discrimination between the refugee groups. India’s humanitarian record is good but the lack of national legislation does not allow equally of treatment between refugee groups.

#### 5.2 International and Regional Instruments Recommendations on National law

The International and regional instruments stress the importance of the national laws in their provisions.

According to the 1951 Convention Article 35 entitled as: Cooperation of the National Authorities with the UN reads: in order to enable the office of the UNHCR to make reports to the competent organs of the UN, the contracting states undertake to provide them in the appropriate form with information and statistical data requested concerning: a. the condition of refugees, c. laws

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<sup>94</sup> Gorlick Brain and Rizvi Khan Sumbul (1997), Refugee Protection as Human Rights Protection, *Bulletin on IHL & Refugee Law*, vol.2 No.2 (A), Indian Centre for Humanitarian Laws and Research, New Delhi, 1997, p.347.

regulations and decrees which are, or may hereafter be, in force relating to refugees. “Article 36 entitled as: Information on National Legislation: states that the contracting states shall communicate to the Secretary General of the UN the laws and regulations which they may adopt to ensure the application of this Convention.” Similar provisions are laid down in Articles II and III of the Protocol.

The UN Declaration of the Rights of the Child,<sup>95</sup> in its preamble states that the General Assembly calls upon national governments to recognize these rights and strive for their observance by legislative measures. The Convention on the Rights of the Child<sup>96</sup> states in Article 4: states parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. This Convention in Article 22 deals with a refugee child and in Article 4 with family reunification which is an aspect of refugee problem.

The OAU Convention in its Article VII entitled “Co-operation of the National Authorities with the OAU”, lays down that “member states undertake to provide the secretariat with information and statistical data concerning about the conditions of refugees; laws, regulations and decrees which are decrees with are, or may hereafter, be, in force relating to refugees.”

The AALCC has left it to the member states concerned whether its recommendations would be accepted by them by entering into multilateral or bilateral treaties or by embodying them in their national legislation and this stands true also as far as the Bangkok Principles 1966 relating to refugees are concerned. However a “Model Legislation on the status and treatment of refugees” was submitted<sup>97</sup> to the thirty fourth session by the AALCC secretariat, which is still under discussion.

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<sup>95</sup> Proclaimed by the General Assembly of the UN on 20 November 1959, Res. 1386 (XIV).

<sup>96</sup> U.N. General Assembly resolution 44/25 of 20 November 1989, entered in to force on 20 September 1990. Available at : [www. UN.org](http://www.UN.org).

<sup>97</sup> Doc. No. AALCC/ XXXIV/DOHA/95/2. Available at : [aalco.int](http://aalco.int).



### 5.3 Reasons for Absence of Law and Need for Law

B.S Chimni points out six important factors to explain the absence of national legislation in India,

“The first reason is that the government feels it has the willing to host refugees and grant some sort of status to refugees within the country, so there is no need for passing national legislation on this subject. And refugees coming from outside the South Asian region, it respects the grant of refugee status by UNHCR. Second, the government feels the national legislation could be used by the terrorist and criminal elements to legally stay in this country. Because the Indian borders are not clear and porous one. Third, a law on refugees is not a priority in view of the range of crucial problems that the parliament has to address in a vast and poor country such as India. Fourth, the national law will allow the courts to intervene regularly to protect the interest of refugees. Now the courts are helpful and their role is limited by the absence of a national law. Fifth, there is the absence of knowledge about the legal points involved. Therefore, many of the apprehensions concerning accession to the 1951 Convention also play themselves out with respect to the passage of national legislation. Sixth, there is the worry about the financial costs involved in hosting refugees, and the feeling that a national legislation would tie up the hands of the government while dealing with them.”<sup>98</sup>

At the same there are many reasons for importance and urgency to enact need for a national legislation in India. These are:

The refugees rights are must in a written document. The refugees and asylum seekers rights are not spelt out anywhere. The judiciary facilitates to find out these rights but it is not enough. As Justice Varma has pointed out, ‘the attempt to fill the void by judiciary creativity can only be a temporary phase. Legislation alone will provide a permanent solution’.<sup>99</sup> For example, if India passes any refugee policy for particular group of refugees there is no guarantee that policy is practiced well or that rights really protect that person. A legislation alone will help fill these gaps. The annual expenditure is not substantial to explain the lack of law in this issue.

To differentiate refugees from illegal migrants, terrorists, foreigners, and economic migrants, a national legislation will be helpful. It will help identify who is refugee and who needs really help and who is a problem for national security. It will clearly identify categories of persons and distinguish and facilitate the identification of a refugee from others.

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<sup>98</sup> Chimni B. S (2003), “Status of Refugees in India: Strategic Ambiguity, Refugees and the State practices of asylum and care in India, 1947-2000”, Sage Publications, New Delhi, p.461.

<sup>99</sup> Varma J.S, inaugural address delivered at the conference of Refugees in the SAARC region: Building a Legal frame work’, 2 May 1997, in Chimni, op.cit., pp. 491-93 and p.493.

A law on the status of refugees will help India to avoid diplomatic problems. For example, when India gave refuge to the Karmapa Lama in the year 2000, it was alleged that it amounted to interference in the international affairs of China. In the presence of a law obliging the government to give asylum this argument would cut little ice. Indeed, the law could include the provision from the 1969 OAU Convention on the Status of Refugees which states in Article II (2): ‘the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member State.’<sup>100</sup> The absence of refugee law means the lack of effective implementation of the principle of non-refoulement. For example, the border, custom and immigration authorities send back the asylum seekers unaware of this principle. As one former Director General of the BSF has noted: ‘if caught while entering illegally, the authorities may return the refugee across the border, sometimes even without ascertaining the relevant claims of persecution in the country of origin, though this is not in strict conformity with the internationally acknowledged principle of non-refoulement.’<sup>101</sup>

The presence of law on refugees will clarify to the authorities that asylum seekers need to be treated differently from the migrants, foreigners and terrorist. Otherwise it will lead to the detention of the asylum seekers. The asylum seeker often faces long period of detention as his legal status has not been clear.<sup>102</sup> The national law can provide that the asylum seeker who enters the territory without proper documents should not be penalized for illegal entry. In 1986 the Executive committee of UNHCR adopted conclusion No.44,

“which clarifies the situations in which detention may be resorted to: only on grounds prescribed by law to verify identity, to determine the elements on which the claim to refugee status or asylum is based, to deal with cases where refugees or asylum seekers have destroyed their travel or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intended to claim asylum, or to protect national security or public order.”<sup>103</sup>

The presence of law will help ensure that the refugees are treated uniformly. It will help avoid discriminatory treatment of refugee groups. Some refugee groups today have a freedom of movement and are doing good business like hotels, restaurants, shops etc. Thus, for example, the

<sup>100</sup> Chimni B.S (2003), *Status of Refugees in India: Strategic Ambiguity; Refugees and the State practices of asylum and care in India, 1947-2000*, Sage Publications, New Delhi, p.462-463.

<sup>101</sup> Ananthachari T, (2001) “Refugees in India: Legal Framework, Law Enforcement and Security”, *ISIL year book of International Humanitarian and Refugee Law*, vol. I, pp. 118-44.

<sup>102</sup> *Ibid*, p.139.

<sup>103</sup> EXCOM conclusion No: 44, 1986.

government of Himachal Pradesh issues a certificate for Tibetan refugees as a work permit. Often refugees are buying lands to construct buildings for home and hotels. Dharmashala is a place fully covered by tourist people particularly foreigners. Their handmade handicrafts are very expensive. The tourist people want that very much. It improves our tourism and the wealth of refugees. But in Tamil Nadu, Sri Lankan Tamil Refugees situation is very difficult compared to the Tibetan refugees. In the last 25 years most of them spend their life in camps like a jail. Every day they are required to sign in the register and they are not allowed out after evening 7 pm. They don't have freedom of movement beyond the camp area. In case they want to earn more for their children education they have to leave the camp but in that case government assistance like ration, daily allowance are stopped for those people. For that reason many of those peoples are staying in the camps. Yearly the Indian government is spending more financial assistance for this people. But compared to the refugee groups from Afghanistan, Bangladesh and Myanmar they do not get this much facility from Indian government. However on one side Indian government is providing freedom and financial support for some refugee groups and on other side groups of refugees do not get any facility from the government. This kind of discrimination treatment may be avoided by a single section or provision in national legislation for refugees.

The presence of law will also help find out the special problems of refugee women and children. The UNHCR has in this regard issued guidelines which focus on how to best protect and assist refugee women. These provisions need to be integrated into the official refugee policy, and in an appropriate form, in the proposed national law dealing with the status and rights of refugees. There exist few surveys of the problem of children refugees in the country. Refugee children are confronted with a range of distinct problems, especially in relation to the registration of their birth, the security of their person, and education. The national law on refugee will help to remove threats to the security of person of the child, and to guarantee to children the right to education, adequate food, and the highest attainable standard of health.

The national law will provide for the circumstances under which refugee status comes to an end. It has already mentioned in the second chapter, the cessational clause of the 1951 convention states six conditions for cessation of refugee status. One that person has voluntarily re-availed himself of the protection of the country of his nationality. Second having lost his nationality, he

has voluntarily re-acquired it. Third he has acquired a new nationality, and enjoys the protection of the country of his new nationality. Fourth he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution. Fifth he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. Sixth being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence. A cessation provision could be added to the national law.

The refugee legislation in India will also help state the refugee's duties that they should follow. The duties of refugees towards the host country can be clearly spelt out. The principal duty is to respect the laws of the host country and not to use its territory to carry out any criminal or subversive activities. In summary:

“we need a national law on refugees to avoid diplomatic problems; to explicitly provide for security concerns; to prevent violation of non-refoulement principle; and to prevent unlawful detention of asylum seekers. The approach should be based on a right based approach not on a charity based. The law should provide for uniform treatment between refugee groups, to address the special problems of refugee women and children, to make provision for cessation of refugee status, to spell out duties of refugees, to achieve consistency with its EXCOM, finally to strengthen claims for seeking permanent membership to the UN Security Council.<sup>104</sup>

#### **5.4 The National Model Law (NML)**

The third informal regional consultation in Delhi in November 1996, a working group was established to draft a model law for South Asian nations. The National Model Law (NML) on refugee was discussed and approved by the fourth informal consultations on refugees and migratory movement in the 1997 Decca sessions. The NML is based on the fundamental principles of the 1951 Convention, the OAU Convention, the Cartagena Declaration, Bangkok principles and the various conclusions of the EXCOM.

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<sup>104</sup> Chimni B.S (2003), “Status of refugees in India Strategic Ambiguity in Refugees and the State practices of Asylum and Care in India, 1947-2000”, Sage Publications, New Delhi, p.462-466.

The NML has proposed the title of the Act as ‘Refugees and Asylum Seekers Act’.<sup>105</sup> The Preamble of the NML states following objectives:

- (a) To consolidate, streamline, and harmonize the norms and standards applicable to refugees and asylum seekers;
- (b) To establish a procedure and a requisite machinery for granting refugee status;
- (c) To guarantee them fair treatment, provide for their rights and obligations and regulate matters connected therewith.

#### **(a) The ‘Refugee’ Definition**

The NML presents the definition in two parts. Firstly, it retains the characteristics of the ‘fear of persecution’ as laid down in the 1951 Convention definition but the NML Article 3(a) adds two more grounds, namely, ethnic identity and sex.<sup>106</sup> The second part of the definition speaks about the broader definition conducted in the OAU Convention and the Cartagena Declaration. It added violations of human rights and used the word ‘serious’ for ‘gross’ but makes no reference to the term ‘generalized violence’.

#### **(b) The Exclusion Clause**

The NML exclusion clause excludes a person from refugee status on conviction of a crime against peace, a war crime or a crime against humanity in accordance with applicable international law and instruments, including, specifically, the SAARC Regional Convention on Suppression of Terrorism 1987.<sup>107</sup> A person is also excluded if he commits a serious non-political crime outside India prior to admission to the country as a refugee.<sup>108</sup> The NML makes a departure from all previous instruments by omitting the mention of exclusion to persons, ‘guilty of acts contrary to the purposes and the principles of the United Nations’.

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<sup>105</sup> Article-1 on the Short Title, Extent and Commencement.

<sup>106</sup> The Bangkok Principles has three additional grounds, namely, colour, ethnic origin and gender.

<sup>107</sup> Article- 4(a) of the NML

<sup>108</sup> Art. 2(g) states serious non-political offence as any offence which is determined in the Rules to be framed by the government under Art. 17 and as listed in the Schedule to be appended.

### **(c) The Principle of Non-Refoulement**

The NML, in Article 5(a), contains the principle of non-refoulement. The NML extends this principle to both refugees and asylum seekers. The 1951 Convention refers this principle to refugees only. But the UNHCR includes asylum seekers as well. The NML clears the confusion. The principle is applicable to refugee or asylum seekers. It is broader than the 1951 Convention, OAU Convention and the Bangkok principles respectively in the context of non refoulment.

### **(d) The Procedure for Application**

Article 6 of the NML states about the procedure for application. The asylum seeker made that application for recognition or behalf of him or any other relatives can be made. That application should be given at the time of entry or to the authority like commissioner for refugees in the time of status determination. The NML specifically calls for immediate and appropriate protection and humanitarian assistance in case of a refugee child.<sup>109</sup> The NML allows NGOs to fill the application for children.

### **(e) The Determination Authorities**

Articles 7, 8, and 9 speak about the determination authority. The determination authority is a commissioner who will hear and decide the status. This commissioner will be appointed by the President of India consultation with Chief Justice of India. The qualification of the commissioner that he must be a sitting or retired high court judge. The qualification of the Deputy Commissioner is to be a High Court judge. The appeal against the decision of the commissioner is to be sent to an appellate board. This appellate committee is also hear and decide the status of refugees. This committee will consist of four members headed by a retired Supreme Court Judge as the chairperson. He is to be appointed by the President of India in consultation with CJI. The committee will also include a sitting or retired High Court Judge. Other two members can be

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<sup>109</sup> Art. 2 (f) says that ‘refugee children’ means children below the age of 18 years who are seeking refuge, or where protection is extended by the State to children under Art. 22 of the 1951 Convention, 1989.

independently appointed by President of India. The qualification of this person is he will have knowledge and experience of refugee issues and refugee law.

**(f) The Determination Process**

Article 9 provides that during the interview the asylum seeker is entitled to the following facilities:

- (i). Services of a competent interpreter, where required
- (ii). Reasonable opportunity for presenting supporting evidence
- (iii). Opportunity, if desired, to contact a UNHCR representative
- (iv). Assistance of a person of one's choosing, including a legal practitioner. The Government is obliged to furnish a list of competent and well-versed legal practitioners.<sup>110</sup>
- (v). In case of rejection, the right to receive a well reasoned order and reasonable time for filing an appeal.<sup>111</sup>
- (vi). In case of recognition, the right to receive a certifying document.

**(g) Appeal and Cessation clause**

The NML does not say anything about appeal. It is silent in the right of the State to appeal against a decision.

Article 12 of the NML, sets out four circumstances for cessation of refugee status, these conditions are:

- (a) the refugee voluntarily re-availed herself of protection of the country of origin
- (b) the refugee acquired the nationality and protection of a third country
- (c) the refugee voluntarily re-established herself in the country that she left
- (d) refusal to avail oneself of the protection of the country of nationality even after cessation of circumstances necessitating refugee status.

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<sup>110</sup> Art. 2(h) states that 'Government' means the Union Government.

<sup>111</sup> Art. 10 states that the findings and orders of the Committee, Commissioner and other authorities established under the Act should be periodically published and that an Annual Report should also be published, available to the general public.

### **(h) The Rights and Duties of Refugees**

The rights and duties of refugees are spelt out in the Article 13 of the NML. Article 13 (a) guarantees a set of rights to every refugee so long as he remains within Indian Territory. It announces fair and equal treatment, without discrimination, on the enumerated grounds.<sup>112</sup> The right of the refugee to be provided with the means to seek a livelihood for them, and for those dependant on them is included,<sup>113</sup> The NML specifically provides that the refugees will have the right to work. Article 13(a) (4) requires India to give special consideration to the protection and the material wellbeing of refugee women and children. Refugees have also received the right to choose their place of residence and move freely within the territory of India. The NML is less restrictive about the issuance of identity documents.<sup>114</sup> The NML will remove the discrimination and create legal effects for these documents associated with the residency rights and economic and social rights. Refugees have been given the right of access to education, health and other related services. Article 13(b) provides that the laws and regulations of India shall bind every refugee.

### **(i) Mass influx, Unlawful entry and Repatriation**

Article 14 states the government through an order can permit asylum seekers to reside in India without individual status determination. They will receive the normal refugee rights except that there may be reasonable restrictions with respect to their location and movement. This clause gives a right of special consideration for women and child asylum seekers regarding their protection and material wellbeing. “Article 14 is a unique provision not found in any other refugee instrument and is definitely a desired improvement.”<sup>115</sup> Article 15 states illegal entry should not be penalized. Article 16 states about voluntary repatriation. It should be dignified and safe repatriation at the free will of the refugee, expressed in writing or other appropriate means, before the Commissioner.<sup>116</sup>

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<sup>112</sup> Art. 13(a) (1) of the NML.

<sup>113</sup> Art. 13(a)(3) of the NML.

<sup>114</sup> Art. 13(a) (6) of the NML.

<sup>115</sup> Saxena Prabodh (2007), “Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future”, *International Journal of Refugee Law*, p.13

<sup>116</sup> Art. 16. Of the NML.



## **(j) The Power to override and the Security considerations**

Saxena has summarized the problem with NML thus:

“Article 18 is the Non-Obstante Clause. The importance of this provision cannot be overemphasized in view of the different, and at times opposite, provisions in the existing legal framework, particularly the Foreigners Act 1946. In the absence of this supremacy, the entire exercise will be futile. However, in the long run, the government must rework all concerned legislation so as to remove friction and inconsistency with the NML. The biggest shortcoming of the NML is its failure to acknowledge the security concern of a country engaged in cross border terrorism. It is correct that the NML was drafted prior to 9/11, but even from pre-9/11 standards it has grossly failed to take into account corresponding provisions in other instruments and international initiatives on terrorism. It excluded acts ‘contrary to the purposes and principles of the United Nations’ from the exclusion clause, even though the Security Council has repeatedly called international terrorism as such an act. It also did not respond to various anti-terrorism deliberations, particularly, the UNGA Declaration on Measures to Eliminate International Terrorism and the Supplement to it. The NML is also silent about apprehension of subversive activities by some refugees. The absence of an expulsion clause is another demerit of the NML.”<sup>117</sup>

### **5.5 The Refugees and Asylum Seekers (Protection) Bill, 2006 and proposed changes**

Rights campaigners have for over a decade lobbied for a domestic law and two bills have been drafted - in 1997 and then in 2006. But Indian government has stalled on approving of this bill, mainly due to security concerns. The Refugees and Asylum Seekers (Protection) Bill, 2006 (hereinafter referred to as Bill) was based on the National Model Law for Refugees which was drafted by an Eminent Persons Group (EPG) headed by former Chief Justice of India, Mr. P. N. Bhagawati. The EPG was setup in November 1994. It also comprised Justice Dorab Patel from Pakistan, Dr. Kamal Hossain from Bangladesh, Mr. Rakesh Shah from Nepal and Mr. Bradman Weerakoon from Sri Lanka and was convened by the then United Nations High Commissioner for Refugees, Ms. Sadako Ogata. Following consultations in Colombo, New Delhi and Dhaka, the Model Law for Refugee Protection was adopted in 1997.

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<sup>117</sup> Saxena Prabodh (2007), “Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future,” *International Journal of Refugee Law*, p.14

However, a unanimous need was expressed in the consultation process for a statutory refugee protection regime in India, there were some misgivings concerning the substantive and procedural comprehensiveness of the Model Law. The National Human Rights Commission (NHRC) appointed an experts committee on refugee protection to examine the Model Law and suggest changes. PILSARC's (Public Interest Legal Support and research centre) Director Dr. Rajeev Dhawan was asked to assist in this process. With a view to suggesting changes to the Model Law, PILSARC studied various Indian rights-empowering statutes and the best practices of foreign refugee protection laws before suggesting the 'Refugee and Asylum Seekers (Protection) Bill, 2006'. In this proposed the NML was briefly reviewed and some changes were made on it.

### 5.6 State V/s Chandra Kumar

The government does not recognize refugees as a class, but the judiciary does recognize them. "The Indian judiciary has introduced refugee law into the legal system through the back door, as it were, since the executive has shut the front door."<sup>118</sup> In India some Parliamentarians<sup>119</sup> and academicians<sup>120</sup> have stressed the need for the appropriate legislation. Calling for the law, Rajeev Dhawan suggests that, "as refugees have no special due process rights, India's law must match its humanitarian goals."<sup>121</sup> Erika Feller, the then Director of the Department of International Protection, UNHCR, stressed the point as she said:

"Protection of refugees through the application of normal human rights principles and the ordinary judicial system must be seen as an adjunct to and not a substitute for credible national system procedures. The mere fact of frequent recourse to the ordinary courts actually underscores the need for a dedicated refugee determination process at the national level. Ideally the ordinary courts should not be burdened by this work, except in

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<sup>118</sup> Markandey Katju 'India's Perception of Refugee Law', (2001) ISIL YBIHRL 14.

<sup>119</sup> Fali S. Nariman and Eduardo Faleiro, Upper Houses, participating in the debate on amendment to the Foreigners Act 1946.

<sup>120</sup> Chimni B.S, 'Status of Refugees in India: strategic ambiguity', in R. Samaddar (ed.), *Refugees and the State-Practice of Asylum and Care in India 1947-2000* (Sage Publications, 2003). He holds the view that although the reasons cited by the government are not plausible, the practice of the Western World is reason enough to ignore the 1951 Convention.

<sup>121</sup> Dhawan Rajeev (2003) "The Refugees in India", *The Hindu*, 28 June 2003.

so far as this is required for the purposes of judicial review and as a place for last resort.”<sup>122</sup>

However, In India most of the personalities and institutions consistently stressed the need for legislation for refugees. But first time in India a remarkable judgment given by the judiciary system, for see the importance and seriousness about the problem of lack of legislation for refugees in India. The New Delhi Metropolitan Magistrate Court-II Dwaraka Arul Varma<sup>123</sup> in his order specified the importance and urgency of the law.

The fact of this case was the convict Chandra Kumar is a Sri Lankan Tamil refugee who has been staying at a refugee camp in India from the year 1990. He sought to eke out a better life in Italy but while leaving India, he was apprehended by the immigration authorities as he did not possess valid travel documents. Thereafter, he was charged for committing the offences of cheating, impersonation and forgery will reference to section 14 of the Foreigners Act, 1946. He claimed that he was duped by a travel agent. He moved an application for plea bargaining. Pursuant to moving of an application under the benevolent provisions of plea bargaining recently incorporated in the code of criminal procedure, 1973, Chandra Kumar was convicted of the aforesaid offences upon his admission of guilt. Had he been an Indian citizen, he would in all probability have been set free at this stage, having been already incarcerated in judicial custody for a period of almost 6 months. An order on sentence would have been passed forthwith. However, the Additional public prosecutor, on instructions from the State, contended that an order of deportation should form a part of the order on sentence. It is in light of these circumstances that a detailed order was be passed while handing out sentence to the accused.

In the judgment page paragraphs 19 to 24 discuss the principle of Non- Refoulment. It analyses the 1951 Convention and UNHCR Hand Book apart from other human rights instruments to which India is a party that proscribe refolement and influence the treatment of refugees, principal among them being Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, the Genocide Convention, 1948, the International Covenant on Civil and Political Rights, 1966, Convention on the Elimination of all forms of Discrimination

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<sup>122</sup> Report on Judicial Symposium on Refugee Protection, 13-14 Nov. 1999, New Delhi, jointly organized by UNHCR, International Association of Refugee Law Judges and Supreme Court of India Bar Association, at 67.

<sup>123</sup> L D. Metropolitan Magistrate (Special Court-2): Dwaraka Courts: New Delhi, FIR No. 78/10, U/s 419, 420, 468, 471, 120B IPC and 14 Foreigners Act.

Against Women, 1979, International Covenant on Economic Social and Cultural Rights, 1966, Convention on the Rights of Child, 1989 and most importantly the Universal Declaration of Human Rights, 1948.

Paras 25 to 36 of the judgment are discuss about the “well founded fear of persecution” the following paras of the affidavit filed by the convict echoes his perturbation

“If I deported to Sri Lanka, the Sri Lankan Army will put me in jail without any enquiry on the suspect of militancy/terrorism they will kill me and it is also very important to mention herein that I came to India for the purpose of only to save my life.”

The court may consider the persecution according to the present situation of Sri Lanka as per UN report So far 40,000 common people have been killed by the Sri Lankan army and there is no hope, no guarantee to secure his life in Sri Lanka. The convict also filed a book titled “What is to be done about this” edited by J. Prabakaran which contains a pictorial representation of the atrocities committed on Tamilians in Sri Lanka. The courts attention was invited to the following excerpt from this book wherein Mr. Justice V.R. Krishna Iyer, former judge of the Supreme Court of India has penned down his anguish and pain in the following words:

“the pictures in the book sent to me projects the horrendous injuries noxious by inflict. The gory scene when presented through the photos and pictures robs my sleep. Can man even be so beastly with little babies, raping girls, mutilating men and women and massacre numbers?”

In para 29 the judgment states that there is no universally accepted definition of persecution. However, it can be inferred that a threat to life or freedom constitutes persecution. Although, it is common to think of persecution in terms of human rights violations involving imprisonment or violations of the physical integrity of the individual such as torture, there is nothing in any definition that would restrict persecution in this manner. Protection against refolement should also be granted if the person is a member of a group against whom there exists a pattern of persecution. The problem determining the nature of the evidence required to establish a ‘well founded fear of persecution’ remains, i.e. what constitutes a ‘good reason’ or ‘well founded reason to fear persecution’, and how does such evidence differ from the required to establish a

‘clear probability’ that persecution will occur. And the court also discussed about the Article 21 of the Indian constitution and persecution in the paras of 37 to 43. The court also discussed the validity of the foreigners Act 1946 respectively.

In paras 75 to 83 the court underlined the urgent need for a national legislation which stresses upon the aspect of non-refoulment and lays down provisions with respect thereto. This part of the order of the court draws upon thoroughly researched article titled ‘Creating Legal Space for Refugees in India: The milestones crossed and the roadmap for the future’ written by Prabodh Saxena. In para 78 it states that:

“It is unfortunate that in spite of having an impressive record of welcoming refugees, we do not have a national law in place in order to cater to the specific needs of this class. An important distinction needs to be made between persons who, on their own volition and in order to earn a livelihood or to explore the world, reach the other shores of another country on one hand, and between refugee who, under compulsion and duress, has no option but to take shelter in another country. They are a victim of circumstances. They do not throng the shores of another country for any pleasure or for any kind of economic gain. They take changes as they do not have choices.”

The court also discussed the Refugee and Asylum Seekers (Protection) Bill, 2006 and observed that it was a welcome step in this direction. It is unfortunate that despite it been adopted after due deliberations and after various consultations by eminent jurists including the former Chief Justice of India Sh. P.N. Bhagwati, this bill has not seen the light of the day. A perusal of some of the provisions would make it clear that if this bill would have been enacted, it would have gone long way in securing certain rights for the refugees. The preamble to the bill addresses the need for protection of refugees as is explicit from the following lines: “to provide for the establishment of an effective system to protect refugees and, by providing necessary social and economic protection both before and after the date of asylum”.

In the final order the court stressed the importance of national law. In para 91 it states how can a court become a party to the persecution of an individual? The court cannot retrograde itself to the position of a mute spectator. It is high time that this bill (or another one drafted in similar lines) sees the light of the day and becomes a living document by being enacted. By doing so, lives of thousands of refugees in our country can be affected for their betterment, in as much as valuable

rights can be conferred. Our commitment to adherence to international law can be fulfilled if we enact this law. The principle of non-refoulement is a basic cornerstone of basic human rights. By handing over a person to a nation where he fears persecution, would make us nothing short of abettors in that persecution. And in para 92 states this court aware that this ex aequo et bono order seeks to fill the casus omissus left by the legislature, but it derives inspiration from the following famous words of Retd. Hon'ble justice Sh. P.N. Bhagawati spoken at a common wealth conference on "judicial interpretation in constitution law" by which he succinctly defined the role of, and expectations from a judge: "Law making is an inherent and inevitable part of the judicial process. Even where a judge is concerned with the interpretation of a statute, there is ample scope for him to develop and mould the law. It is he who infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society" In para 82 the court mentions most importantly section 7 of this bill that makes it explicit that a refugee who senses a fear of persecution ought not to be expelled/deported/removed/refouled to the country from where such fear arises.

The court ordered that convict Chandra Kumar shall not be deported and he is directed to report back to the Tahsildar, Sri Lankan refugee camp in Tamil Nadu.

On concluding the court reminded of the following verses from the poem 'Refugee Blues' by W.H. Auden whereby he has captured the emotions that a refugee experiences:

"Say the city has a million souls,  
Some live in mansions, some live in holes:  
Yet there is no place for us,  
My dear, there is no place for us,  
Once we had a country and we thought it fair,  
Look in the atlas and you will find it there:  
We cannot go there now,  
My dear, we cannot go there now.

## 5.7 Conclusion

The NML expands that definition of refugees, and it also extends non-refoulement principles to all asylum seekers, and exclusion and cessation clauses are mentioned restrictively, it specially consider about women and children. And it made special provisions for mass influx. The voluntary repatriation solutions implemented as durable solution. The rights of refugees are spelt out in this instrument. But security issues are not seriously taken in to the account. However it's a good draft and it need some changes on it. Prabodh Saxena<sup>124</sup> sums up the NML in the following words:

“The NML is a good draft that expands the definition of refugee, extends non-refoulement to all asylum seekers, restricts exclusion and cessation conditions, develops a fair and judicious determination mechanism, creates a feasible rights regime, makes special consideration for women and children and provides for situations of mass influx and the implementation of voluntary repatriation as a durable solution. Integrating humanitarian law and the law of human rights in favour of refugee care, it makes a serious effort to answer the whom, how and what questions of refugee protection.<sup>125</sup> However, it needs drastic changes to provide for security issues and an administrative-judicial model of status determination. The other suggestions do not call for any major change in rationale and principle of the NML. Inadequacies should not be an excuse to delay, but should act as an opportunity for detailed analysis and early solution. The government should, after necessary changes, introduce the legislation in the House, without referring it back to the EPG. The parliamentary procedure is capable of producing the desired legislation. There is a considerable body of opinion that favors the view that the national legislation be preceded by a SAARC Regional Convention on Refugees. Unfortunately, the anti-refugee policy of the West, and the so-called ‘war on terror’, has given an alibi for continuing the status quo. It will be prudent to accept that the national legislation will take considerable time to materialize, given the prevailing air of apprehension and lack of awareness. The more radical the proposal, the less likely it is that it will be enacted. The legislation has to take into account the legitimate perspective of the government on refugee affairs. The odds are heavily against it, but it is also the time to stand firm and to continue with the campaign of educating the decision makers and shaping public opinion. Pending legislation, it is important for the government to introduce the amending regulations under the Foreigners Act and Rules to make them more ‘refugee friendly’. The South African interim model may act as a guiding measure. Eventually, the strong democratic traditions of the world's largest democracy and its

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<sup>124</sup> Saxena, Prabodh. (2007), “Creating legal space for refugees in India: Milestones crossed and the road map for the future”, *International Journal of Refugee Law*, 19 (2): 246. P. 14-15.

<sup>125</sup> Ibid, Rajeev Dhawan explains that whom means the definition of refugee, how means the mechanism of determination and what means the rights to refugees. “The Refugees in India”, article published in *The Hindu* on 28 June 2003.

fairly impressive record of refugee care will find the adoption of the refugee legislation irresistible. This legislation will not be confined only to the territory of India, but will have strong and positive ramifications in the entire South Asia region. What the Convention on the Status of Refugees and its Protocol could not achieve in South Asia, an Indian Act on Refugee and Asylum Seeker Protection might just do.”



**CHAPTER – VI**  
**CONCLUSION**

**CHAPTER- 6****CONCLUSION**

International refugee law contains the definition of the term “refugee” and lays down the extent of protection a state should give to refugees and the obligation of states to find durable solution to their problems. When the 1951 Convention was adopted, the plight of victims of persecution between two world wars was still fresh in the minds of the Europeans. The result was the adoption of the term “refugee” characterized by individualized persecution for reasons of race, religion, nationality, membership of a particular group or opinion. At that time the refugee problems were largely restricted to the European continent only. It was soon realized that persecution is a universal phenomenon and persecuted people need to be protected everywhere. As a result the 1967 Protocol relating to the Status of Refugees was adopted. It removed the temporal and geographical limitations of the definition envisaged under the 1951 Convention. Today there is a near universality of obligation for protection of refugee who flee their countries fearing persecution for reasons of race, religion, nationality, membership of a particular group or political opinion.

The developing countries in Asia, Africa and Latin America have also started experiencing the forced movement of people across the international frontiers owing to international or internal conflicts, struggle against foreign domination, or events seriously disturbing public order. To resolve the problems of these refugees at regional level, the Organization of the African Unity adopted OAU Convention on the status of refugees in 1969.

In Asia the AALCC adopted the Bangkok Principle, 1966. In 1970 acknowledging the broader definition of the term refugees the benefit of Articles IV and V of the Bangkok Principles 1966 was extended to those who fall in that definition. Countries in Latin America have also resolved to apply international standards to protect the refugees who flee their countries owing to gross violation of human rights.

However, today apart from these political and humanitarian refugees’ different kinds of problems arising for reasons of economic problems of liberalization, privatization and globalization (LPG). It affects the people’s socio-economic and cultural rights. Peoples leave their habitual resident places to search for better place to survive. Mostly it is happening in

developing countries. There are other man-made disasters created by developed nations in poor countries especially through armed intervention in Iraq, Afghanistan, Sudan, Somalia and Libya. The poor nation peoples are seeking refugee status in developing countries only. They can't reach Europe or Western countries. Their laws are very restrictive for these people. In other words, developed nations are functioning like refugee producers, and Third World countries like India are functioning like refugee keepers. The 1951 Convention is the only international legal instrument directly and exhaustively dealing with the rights of refugees. Unfortunately this Convention only speaks about refugees fleeing persecution because of violation of civil and political rights. The gaps in the Convention regime are being filled by the regional instruments. It is the only hope for those in who search for a place for to live in dignity.

Once in India, legally or illegally, refugees offer face a problem residing in the country. This is because either their travel or stay documents (Indian visa, for instance) have expired, or they are unable to renew them, or they are not able to acquire any documents to begin with. Occasionally, the foreigner's regional registration office has refused to issue or renew residential permits because the refugee did not have valid passports. This should not however exclude them from being treated as refugees under international law.

Varying treatment has been accorded to different groups of refugees with respect to their stay in India. The policies that govern different refugee groups are rarely formalized as written rules; they can be inferred from the actions of the government. This may create some ambiguity in the minds of researcher who are accustomed to dealing with codified rules and regulations. It is therefore very important in the subject of refugee law to keep abreast of the latest development in this field.

In the case of Sri Lankan Tamil refugees in India, the presence of a strong bond of kinship with Indian Tamils has been an important motivating factor in the formulation of a generous asylum policy. Despite the fact that New Delhi had significantly renegotiated its policy of active support to the LTTE following the assassination of Rajiv Gandhi, international and domestic pressure prevented a reorientation of India's policy towards the Sri Lankan Tamil refugees, who continued to be accorded asylum and relief in Tamil Nadu. The domestic politics of the Indian polity, whereby New Delhi cannot afford to alienate the vast population of Indian Tamils, has also had an important influence on refugee policy. The state policy on refugees accords in

general with international principles of refugee protection. The policy towards the Sri Lankan Tamil has been motivated by the need to help people for who they are, what they represent to the state in which they seek refuge and what the state's treatment of them represents to the wider community. In the case of Sri Lankan Tamil refugees they do not often wish to return to their home land for they feel that the SriLankan government is not ready to assist and aid them. The future could be towards a "right to a durable solution" and guide lines could be laid down with respect to permanent stay, along with laying down of "standard treatment for refugees", considering the fact that the absence of a legal frame work for protection, leads to uncertainties. In situations of large scale influx like Sri Lankan Tamil refugees the views expressed in EXCOM conclusions No.22 could be taken as guidelines, considering the fact that such mass influxes are inevitable and bound to occur in South Asian countries, as much as at the global level in the future.

The NML expands that definition of refugees, and it also extends non-refoulement principles to all asylum seekers, and exclusion and cessation clauses are mentioned restrictively, it specially consider about women and children. And it made special provisions for mass influx. The voluntary repatriation solutions implemented as durable solution. The rights of refugees are spelt out in this instrument. But security issues are not seriously taken in to the account. However it's a good draft and it need some changes on it. Prabodh Saxena suggests some changes and observes:

"The NML is a good draft that expands the definition of refugee, extends non-refoulement to all asylum seekers, restricts exclusion and cessation conditions, develops a fair and judicious determination mechanism, creates a feasible rights regime, makes special consideration for women and children and provides for situations of mass influx and the implementation of voluntary repatriation as a durable solution. Integrating humanitarian law and the law of human rights in favour of refugee care, it makes a serious effort to answer the whom, how and what questions of refugee protection. However, it needs drastic changes to provide for security issues and an administrative-judicial model of status determination. The other suggestions do not call for any major change in rationale and principle of the NML."<sup>126</sup>

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<sup>126</sup> Saxena, Prabodh. (2007), "Creating legal space for refugees in India: Milestones crossed and the road map for the future", *International Journal of Refugee Law*, 19 (2): 246. P. 14-15.

# ANNEXURES

**ANNEXURE- I**

**CONVENTION RELATING TO THE STATUS OF REFUGEES, 1951**

**Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950**

**Entry into force: 22 April 1954, in accordance with article 43. Text: United Nations Treaty Series No. 2345, Vol. 189, p. 137**

**PREAMBLE**

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows :

## **Chapter I**

### **GENERAL PROVISIONS**

#### **Article 1. - Definition of the term "refugee"**

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) 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 or 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 that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either ( a ) "events occurring in Europe before 1 January 1951"; or ( b ) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative ( a ) may at any time extend its obligations by adopting alternative ( b ) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;



Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

( a ) He 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 has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

( c ) He has been guilty of acts contrary to the purposes and principles of the United Nations.

**Article 2. - General obligations**

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

**Article 3. - Non-discrimination**

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

**Article 4. - Religion**

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

**Article 5. - Rights granted apart from this Convention**

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

**Article 6. - The term "in the same circumstances"**

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

**Article 7. - Exemption from reciprocity**

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.
2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.
5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

**Article 8. - Exemption from exceptional measures**

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

**Article 9. - Provisional measures**

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the

Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

**Article 10. - Continuity of residence**

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

**Article 11. - Refugee seamen**

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

**Chapter II**

**JURIDICAL STATUS**

**Article 12. - Personal status**

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in

question is one which would have been recognized by the law of that State had he not become a refugee.

**Article 13. - Movable and immovable property**

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

**Article 14. - Artistic rights and industrial property**

In respect of the protection of industrial property, such as inventions, designs or models, trademarks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

**Article 15. - Right of association**

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

**Article 16. - Access to courts**

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi* .

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

### **Chapter III**

#### **GAINFUL EMPLOYMENT**

##### **Article 17. - Wage-earning employment**

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

( a ) He has completed three years' residence in the country;

( b ) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

( c ) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

##### **Article 18. - Self-employment**

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens

generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

**Article 19. - Liberal professions**

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

**Chapter IV**

**WELFARE**

**Article 20. - Rationing**

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

**Article 21. - Housing**

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

**Article 22. - Public education**

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

**Article 23. - Public relief**

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

**Article 24. - Labour legislation and social security**

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

( a ) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

( b ) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;



(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

## **Chapter V**

### **ADMINISTRATIVE MEASURES**

#### **Article 25. - Administrative assistance**

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

#### **Article 26. - Freedom of movement**

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.

#### **Article 27. - Identity papers**

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

#### **Article 28. - Travel documents**

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

**Article 29. - Fiscal charges**

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.
2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

**Article 30. - Transfer of assets**

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.
2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

**Article 31. - Refugees unlawfully in the country of refuge**

1. The Contracting States 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.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

**Article 32. - Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

**Article 33. - Prohibition of expulsion or return ("refoulement")**

1. 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 or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

**Article 34. - Naturalization**

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

## Chapter VI

### EXECUTORY AND TRANSITORY PROVISIONS

#### **Article 35. - Co-operation of the national authorities with the United Nations**

1. The Contracting States 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 this Convention.

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 Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

( a ) The condition of refugees,

( b ) The implementation of this Convention, and

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

#### **Article 36. - Information on national legislation**

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

#### **Article 37. - Relation to previous conventions**

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

## **Chapter VII**

### **FINAL CLAUSES**

#### **Article 38. - Settlement of disputes**

Any dispute between Parties to this Convention relating to its interpretation or application, 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 39. - Signature, ratification and accession**

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### **Article 40. - Territorial application clause**

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible.

Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary- General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

#### **Article 41. - Federal clause**

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

( a ) With respect to those articles of this Convention 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 parties which are not Federal States;

( b ) With respect to those articles of this Convention 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 this Convention shall, at the request of any other Contracting State 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 showing the extent to which effect has been given to that provision by legislative or other action.

**Article 42. - Reservations**

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.
2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

**Article 43. - Entry into force**

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

**Article 44. - Denunciation**

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.
3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary- General.

**Article 45. - Revision**

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.



2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

**Article 46. - Notifications by the Secretary-General of the United Nations**

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

- ( a ) Of declarations and notifications in accordance with section B of article 1;
- ( b ) Of signatures, ratifications and accessions in accordance with article 39;
- ( c ) Of declarations and notifications in accordance with article 40;
- ( d ) Of reservations and withdrawals in accordance with article 42;
- ( e ) Of the date on which this Convention will come into force in accordance with article 43;
- ( f ) Of denunciations and notifications in accordance with article 44;
- ( g ) Of requests for revision in accordance with article 45.

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

## **ANNEXURE- II**

### **NATIONAL MODEL LAW ON REFUGEES**

#### **Preamble**

Acknowledging the fact that India has a long tradition and experience in accommodating inflows of refugees, and demonstrating its faith in the principle of *non-refoulement*;

Affirming its commitment to uphold international human rights principles through accession to all major human rights treaties, and adoption of appropriate legislative steps to implement them;

Considering the pronouncements of the Supreme Court and High Courts extending the protection of fundamental rights to refugees and asylum seekers;

Reaffirming the initiatives taken by Parliament under Article 37 and 253 of the Constitution of India to provide an administrative system free from arbitrariness and guarantee equality, fairness and due process of law;

Recognising the need for an appropriate legal framework to process matters relating to forced migration in respect of determination of refugee status, protection from *refoulement* and treatment during stay;

The following Act is enacted to consolidate, streamline, and harmonise the norms and standards applicable to refugees and asylum seekers in India; to establish a procedure and the requisite machinery for granting refugee status; to guarantee them fair treatment, provide for their rights and obligations and regulate matters connected therewith. For the purposes of this Act, the grant of refugee status shall be considered a peaceful and humanitarian act and does not imply any judgement on the country of origin of the refugee.

## **1. Short title, Extent and Commencement**

- a. This Act may be called the Refugees and Asylum Seekers Protection Act, 2000.
- b. It extends to the whole of India.
- c. It shall come into force on the day specified by the Union Government by notification in the Gazette of India.

## **2. Terminology**

In this Act, unless the context otherwise requires:

- a. ‘Asylum seeker’ means a person who seeks recognition and protection as a refugee.
- b. ‘Refugee’ means a ‘refugee’ defined in Article 3 and includes dependants of persons determined to be refugees.
- c. ‘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.
- d. ‘Commissioner’ means the ‘Commissioner of refugees’, defined under the provisions of Articles 7 and 8 of this Act.
- e. ‘Refugee Committee’ means the ‘Committee’ established as an Appellate Board by the Government under Articles 7 and 8 of this Act.
- f. ‘Refugee Children’ means children below the age of 18 years who are seeking refuge or where protection is extended by the state to children under Article 22 of the Convention on the Rights of the Child, 1989.
- g. “Serious non-political offence” refers to any offence determined in accordance with Article 17 of this Act, and listed in schedule A of the Act.
- h. “Government” shall mean Union Government

### **3. Definition of a Refugee**

A refugee is defined as:

- a. any person who is outside his or her country of origin, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political 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 outside his or her country of origin.

### **4. 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 is convicted for a crime against peace, a war crime or a crime against humanity, in accordance with the applicable principles and rules of International Law/ Conventions including the SAARC Regional Convention On Suppression of Terrorism, 1987;
- b. He or she has committed a serious non-political crime as specified in the Schedule A, outside India prior to his or her admission into India as a refugee.

### **5. 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 Article 3;
- b. Where an asylum seeker or refugee has been convicted by a final judgement of a crime against peace, a war crime or a crime against humanity and constitutes a danger to the community, or where a Minister has certified that there are reasonable grounds to believe that an asylum seeker

or refugee is a threat to the sovereignty and integrity of India, such an asylum seeker or refugee may be asked to leave India. However, such an asylum seeker or refugee shall not be returned to a situation or to any country in which his or her life or liberty is threatened for reasons of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.

## **6. Application**

a. Where an application is made by, on behalf of, or in relation to an asylum seeker, for the recognition of the said asylum seeker as a refugee, either at the point of entry or subsequently, the applicant shall, in accordance with the principle laid down in Article 5 be directed and assisted to apply to the Commissioner of Refugees;

b. Where an application is made by, on behalf of, or in relation to an asylum seeker, for the determination of refugee status, 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 or public order of India. Such application may be made within such reasonable time as may be prescribed in accordance with Article 17 of this Act;

c. Where an application for refugee status is made by, on behalf of, or in relation to a child, accompanied or unaccompanied; or where a refugee child is found within the territory of India; he or she shall receive immediate and appropriate protection and humanitarian assistance in accordance with the existing policy and legal framework of the state. The requirement of filing an application form on their behalf may be entrusted to a local Legal Service Authority or their representatives or any other recognised NGO involved in the welfare of children in general.

## **7. Constitution of the Authorities**

In order to implement the provisions of this Act:

a. The President shall appoint the Commissioner of Refugees, and Deputy Commissioners of Refugees as may be necessary on the basis of the eligibility requirements and procedure laid down in Articles 7 and 8 of this Act;

- b. Other officers as may be necessary shall be appointed after consultation with the Commissioner of Refugees;
- c. The President shall appoint the Chairperson and Members of the Refugee Committee
- d. The Chairperson of the Refugee Committee shall appoint the staff of the Committee.

### **8. Appointment and Functions**

- a. The Commissioner of Refugees shall be a sitting or retired High Court Judge, and shall be appointed after consultation with the Chief Justice of India.
- b. The Deputy commissioner should be qualified to be appointed as a High Court Judge; and shall be appointed after consultation with the Chief Justice of India.
- c. The Chairperson of the Refugee Committee shall be a retired Supreme Court Judge.
- d. The Refugee Committee shall consist of the following three members: a sitting or retired High Court Judge, appointed by the President in consultation with the Chief Justice of India, and two independent members with knowledge and experience of refugee issues and refugee law.
- e. The Commissioner of Refugees may assign such of his functions as may be necessary to the Deputy Commissioner of Refugees appointed under this Act.
- f. The decision of the Commissioner of Refugees shall be final. Any appeal against such decision shall lie only with the Refugee Committee, as the Appellate Board for reconsideration of the decision.

### **9. Determination of Refugee Status**

- a. An asylum seeker who wishes to claim refugee status under the terms of this Act shall be heard by a Commissioner of refugees before the determination of his or her status;

- b. During the refugee determination interview, the asylum seeker shall be provided 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 should 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. A list of competent legal practitioners, who are conversant with refugee law, shall be provided by the Government to the asylum seeker;
- e. If the asylum seeker is not recognised as a refugee, he or she could be given a reasonable time as provided in the rules, to appeal to the Refugee Committee;
- f. Where an application by the asylum seeker is rejected, the Commissioner of refugees shall give reasons for the order in writing and furnish a copy of it to the asylum seeker;
- 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.

#### **10. Publication of Findings and Decisions**

- a. The findings, as well as the orders of the Commissioner of Refugees, the Refugee Committee and other authorities established under this Act shall be published by them periodically.
- b. The Commissioner of Refugees and the Refugee Committee shall publish an annual report. The annual report and any other periodic or special reports related to their work shall be made public.

## **11. Appellate Procedure**

The Refugee Committee shall receive and consider appeals made by asylum seekers against the decision of the Commissioner of Refugees. The Committee may also consider applications for refugee status *suo moto*.

## **12. 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 India; 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.

## **13. Rights and Duties of Refugees**

- a. Every refugee so long as he or she remains within India, shall have the right to:
  1. fair and due treatment, without discrimination on grounds of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion;
  2. receive the same treatment as is generally accorded under the Constitution or any other laws and privileges as may be granted;
  3. be provided a means to seek a livelihood for himself or herself, and for those dependent on them;



4. be given special consideration to ensure their protection and material well being in the case of refugee women and children;
5. choose his or her place of residence and move freely within the territory of India, subject to any regulations applicable to refugees generally in the same circumstances;
6. be issued identity documents;
7. be issued travel documents for the purpose of travel outside and back to the territory of India unless compelling reasons of national security or public order otherwise require;
8. 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 India.

#### **14. 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 India without requiring their individual status to be determined under Section 11 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. Asylum seekers who have been permitted to reside in India under this provision, 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;

c. Women and children asylum seekers in mass influx shall have the right to be given special consideration as to their protection and material well being.

#### **15. Refugees Unlawfully in India**

The Government shall not impose penalties on refugees on account of their illegal entry, or presence who, coming directly from a place where their life or freedom was threatened in the sense provided in Article 3, enter or are present in India without authorisation. Provided they present themselves with immediate effect to the authorities and are able to show good cause for their illegal entry or presence.

### **16. Voluntary Repatriation**

The repatriation of refugees shall take place at their free volition expressed in writing or other appropriate means, before the Commissioner of Refugees. The voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of transparency and safety to the country of origin shall be respected.

### **17. Rules and regulations**

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

### **18. Non-Obstante Clause**

The provisions of this Act shall have effect notwithstanding the provisions of any other law.

**ANNEXURE- III****Year-wise presence of all refugees in India since 2000 - 2010**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Afghanistan</b>	12,760	11,972	11,371	10,283	9,761	9,700	9,472	9,011	8,441	8,528	9,094
<b>Bangladesh</b>	0	0	2	2	2	0					
<b>Bosnia and Herzegovina</b>							1	1	1	1	1
<b>China</b>	92,343	92,344	92,346	92,349	94,349	77,200	77,200	77,200	100,003	100,003	100,003
<b>Congo</b>	1	2	5	1	0	0					
<b>Cuba</b>		5	0								
<b>Côte d'Ivoire</b>							1	1	1	1	2
<b>Democratic Republic of the Congo</b>							6	6	6	7	11
<b>Eritrea</b>			1	0	6	3	1	3	14	16	35
<b>Ethiopia</b>	10	10	14	11	2	1	2	2	5	7	9
<b>Iran (Islamic Republic of)</b>	114	95	87	73	59	41	44	45	62	46	69
<b>Iraq</b>	30	24	26	22	20	17	12	53	109	130	122
<b>Israel</b>	4	4	16	14	7	6					

<b>Kazakhstan</b>				3	3	3	0				
<b>Lao People's Democratic Republic</b>	1	1	1	1	1	1	1	1	1	1	1
<b>Liberia</b>	5	5	7	7	5	1	1				
<b>Myanmar</b>	779	876	1,043	940	1,162	1,471	1,812	1,812	1,967	2,952	4,630
<b>Pakistan</b>		1	1	0							
<b>Russian Federation</b>		3	3								
<b>Rwanda</b>	6	6	6	7	0						
<b>Serbia</b>	5	4	4	1	1	1					
<b>Sierra Leone</b>						1	1	1	1	0	
<b>Somalia</b>	84	68	68	66	27	104	130	221	489	655	747
<b>Sri Lanka</b>	64,743	64,061	63,767	60,922	57,274	50,730	69,609	72,934	73,286	72,883	69,998
<b>Sudan</b>	56	67	87	55	8	3	12	15	16	14	18
<b>Syrian Arab Republic</b>								4	0		
<b>Togo</b>											1
<b>Turkmenistan</b>		1	0								
<b>West Bank and Gaza Strip</b>							61	227	141	77	78
<b>Yemen</b>										2	2

Source: UNHCR-India

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(\* Denotes the primary sources)

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