The state practice of India and the development of international law : selected areas

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CHAPTER IV
REFUGEE LAW, POLICY AND PRACTICES OF INDIA

4.0. Introduction

This chapter examines some of the most important questions regarding India's policy and practical approach to refugee issues – an essential topic of international human rights law. Is India a refugee heaven?[311] Why the examination of refugee law and practice of India is one of the most important areas of state practice to understand its overall approach to international law? How does India ensure compliance with international obligations at domestic level? Why does India choose to maintain the same administrative and practical arrangements in dealing with the refugee issues? Last but not the least, whether India is likely to sign the Refugee Convention of 1951[312] in near future[313] or will it continue with the practice it has adopted since the independence?[314]

As India is neither a party to the 1951 Convention on the Status of Refugees nor to the 1967 Protocol relating to the Status of Refugees,[315] the legal regime governing the refugees in India is essentially found in the interpretation and understanding of the Constitution. There are several reasons for India's inability in signing the Convention. Among others are financial limitations. As Justice Katju says, "half of our own people are like refugees… how then can we be expected to look after other refugees?"[316] How can India afford to provide hospitality to millions of refugees while the nation itself is unable to provide basic amenities to all its population? India also considers the 1951 Convention as Euro-centric which cannot be implemented in the

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[311] The partition of India in 1947 led to influx of masses of refugees in India and Pakistan. As Schechtman describes it was 'the greatest single refuge trek in world history'. Chimni quoting Schechtman at p. 463, B. S. Chimni, *International Refugee Law: A Reader*, (New Delhi: Sage Publications, 1999), p. 463. The question whether these populations were 'refugees' or not remain debated. For example, Pakrasi and Vernant do not consider them refugees as per the 1951 Convention. K. B. Pakrasi, *The Uprooted: A Sociological Study of the Refugees of West Bengal, India*, S. Ghattack, (Calcutta, 1971). Jacuqes Vernant, *The Refugee in the post-war World*, (New Haven: Yale University Press, 1953), pp. 740-41. In the wake of independence of Bangladesh in 1971, approximately 10 million refugees came to India seeking refuge. Similarly, a large un-estimated number of Chakma refugees came to India in mid 1990s. Speaking on the occasion of the visit of Mrs Sadako Ogata, former UNHCR Commissioner to India on 4 May, the former Chief Justice of India, P. N. Bhagwati highlighted that "This [*lack of legislation*, added] is partly due to a growing concern that those who may have committed crimes against humanity, war crimes or other acts which are incompatible with the humanitarian nature of refugee status may enter and remain on Indian soil under the pretext of being refugees". NHRC Press Note 4 May 2000.

[312] The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to resolution 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950. As of 1 November 2014, there were 145 States Parties to the 1951 Convention and 146 States Parties to the 1967 Protocol.

[313] Former Chief Justice of India and former Chair Person of the National Human Rights Commission of India, Mr Justice R. P. Anand observed, while addressing the committee constituted to give opinion on the model national law on refugees, that silence of India in not signing any refugee convention "is being questioned at international fora'. http://www.nhrc.nic.in/disparchive.asp?fno=753 accessed on 5 May 2011.

[314] Only Afghanistan in the South Asian region is a party to the Refugee Convention or the 1967 Protocol.

[315] These two international legal instruments are the *magna carta* of international refugee law. The definition of Refugee as provided in the 1951 Convention is the most widely used refugee definition in the world. The Convention also contains the cardinal principle of international refugee law namely the principle of non-refoulement and the minimum standard of treatment of refugees. The Protocol of 1967 removes certain temporal and geographical limitations of the 1951 Convention.

[316] Justice Markandey Katju, "India's Perception of Refugee Law" 2001 *ISIL Yearbook of International Law*, p. 14.

region which has a distinct geopolitical, demographical and historical past. This lack of formal accession to international instruments and specific national legislation makes a compelling case for studying India's policy and practical approach to refugees.[317] Several states of India which share border with other nations have been more affected by refugee problems than some internal states. Hence, it is also useful to see how the state governments in the 'refugee-prone' region versus 'non-susceptible' regions have dealt with refugee issues. Similarly, what are the differences in the policy and practical approach of 'refugee prone' states at large?[318]

4.1. Facts and Figures

As of January 2014, there were 192,070 refugees and 11,879 asylum seekers residing in India.[319] These numbers mainly include refugees and asylum seekers from Tibet (China), Nepal, Sri Lanka, Myanmar, Bangladesh, Afghanistan and Bhutan.[320] The sheer number and origin of refugees suggest that India's foreign policy and practical approach towards these nations are considerably influenced by refugee related issues. Secondly, unlike industrialized nations of the West, internal and external conflicts, violations of human rights, political, cultural, social and religious factors are contributing factors for them to seek refuge in India. Therefore, the impact of refugees is found not only in economic areas but they also contribute to India's overall attitude in areas of foreign and domestic policy. Thirdly, India itself is a developing country and has significant challenges in providing food, clothing, shelter and employment to its own population. Fourth, at domestic level, India neither has a proper legal nor judicial framework to address the refugee issue in its entirety. The problem becomes acute owing to the fact that though executive organs of India like in case of environmental law, human rights etc. does not recognize international refugee law originating from the two international instruments, the Indian judiciary plays a proactive role in reading into the rights of refugees.[321] The Indian judiciary has gone to the extent of

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[317] Prabodh Saxena observes that "the whole of South Asia is devoid of any standards and norms on any dimension of refugee reception, determination and protection. The fact that a quarter of the world's refugees find themselves in a non-standardized, if not hostile, refugee regime is a situation which does not augur well for either the mandate of UNHCR or for any civilized society. The South Asian nations have their own apprehensions, real or imaginary, about the utility of CSR 1951 to their situations. Because of historical mishaps, political ignorance, unstable democracies and exaggerated concern over national security, there is hardly any motivation for, or any environment in which there is a possibility for, the enactment of national legislation". Prabodh Saxena, "Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future", 19 *International Journal of Refugee Law* 2, 246-72 (2007).

[318] T. N. Giri, *Refugee problems in Asia and Africa: Role of the UNHCR* (New Delhi: Manak Publishers), Daniel Kemper Donovan, "Joint U. N.-Cambodia efforts to establish a Khmer Rouge Tribunal," 44 *Harvard ILJ*, 551-76 (2003).

[319] This is more than the total combined population of three Western European nations, San Marino, Monaco and Liechtenstein. The latest figures available show that the number of refugees of concern to UNHCR stood at 10.4 million refugees at the beginning of 2011. http://www.unhcr.org/pages/49e4876d6.html accessed on 4 November 2014. In South Asia, India is the largest recipient and abode for refugees and asylum seekers. World Refugee Survey 2010 prepared by the US Committee for Refugees and Migrants suggest nearly 300,000 persons falling in this category. According to one report, there were around 330,000 refugees and asylum seeking people in India in 2004. Florina Benoit, "India: A National Refugee Law Would Equalise Protection", *Refugees International* (2004). See also, Country Operations Plan for India, United Nations High Commissioner for Refugees, 2006. In the wake of independence of Bangladesh (erstwhile East Pakistan), approximately 16 million refuges sought safety in India.

[320] Sucheta Ghosch, "Crisis in the kingdoms: Refugee question between Bhutan and Nepal", In Omprakash Mishra & Anindyo J. Majumdar (ed.) *The elsewhere people* 169-182 (2003).

[321] It is important that minimum corps of rights to asylum seekers and mass influx entrants shall be included for temporary protection in India.

prescribing norms and rules for the executive organs in this most difficult area of foreign policy.[322] Since India has neither signed the 1951 Refugee Convention nor the 1967 Protocol,[323] it does not need to fulfill the obligations prescribed in these international legal instruments. However, it can ill-afford to undermine the object and purpose of these instruments. The above reasons justify a need to assess India's policy and practical approach to refugee issues.[324] While the history of the Indian civilization and religious scriptures guide India to remain a hospitable land to all men and women of diverse creeds, cultures and races regardless of their origin, the 21st century issues and challenges before India will constrain the nation to afford such hospitality.[325]

4.2. International legal regime on Refugees

Although not a party to the international legal instruments on refugees, India has undertaken obligations under various international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), which has direct implications for India's policy and practical approaches towards the refugee issue.[326] In addition, India's attitude towards the UN Declaration on Territorial Asylum (1967), and the Universal Declaration of Human Rights (UDHR, 1948), needs examination to fully appreciate India's position. India is also a member of the Executive Committee of the UNHCR which approves and supervises material assistance programmes of the UNHCR.[327] Thus, while assessing India's policy and practice on the refugee issue, it is essential to keep in mind the legal obligations which flow from these instruments.

In the absence of its signature and / or ratification to the 1951 Convention and 1967 Protocol, India's obligation can be analyzed by examining the applicable customary international law. However, this raises a basic question of relation and effect of international law within the municipal law. The Indian Constitution, as provided in the chapters above, provides few provisions which can be utilized as a guiding source. According to Article 51 of the Constitution, India shall "[e]ndeavour to foster respect for international law and treaty

[322] The Indian judiciary which is quite strict in interpreting legislation on foreigners by refusing to interefere with the Executives, it has shown most sympathetic and liberal approach to protect the rights of refugees.

[323] It is argued that the 1951 Convention is being dismantled in the West and thus could be a good reason for India not to become a party to it. As Chimni argues, any talk of accession should also be linked to the withdrawal of measures which constitute the non-entrée and temporary protection regimes. That is to say, the countries of the region should collectively argue that they would consider acceding to the Convention only if the Western world was willing to withdraw those measures which violate the principle of burden sharing and instead practice burden shifting. B. S. Chimni, *The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia*, RCSS Policy Studies 4, Regional Centre for Strategic Studies, Colombo, (July 1998).

[324] Sumit Sen, "The Refugee Convention and practice in South Asia: A Marriage of Inconvenience?" In Joanne van Selm (et.al), *The Refugee Convention at fifty*, 203-17 (2003).

[325] Indian civilization is perhaps the only civilization in the world which considers Guests as Gods. In fact, the judiciary of India has given a legal character to this dictum. See *Kerala Education Bill* (1959) SCR 995 at 1017-8.

[326] Justice J. S. Verma, former Chief Justice of India and the former Chairperson of the National Human Rights Commission, in a public statement in May 1997, had observed that "In the absence of national laws satisfying the need to protect refugees, the provisions of the 1951 Convention and its Protocol can be relied on when there is no conflict with any provision in the municipal laws". See the Press Note of NHRC 4 May 2000 during the visit of Ms Sadako Ogata, former UNHCR Commissioner to New Delhi.

[327] It is ironical that while India has refused to sign 1951 Convention and 1967 Protocol which brought the UNHCR into existence and which gives the mandate to the UNHCR to operate world-wide, India is occupying a seat in the Executive Committee of the Agency. Of course, India allows the UNHCR to operate in India. Although a seat in the Executive Committee does not require India to sign the convention or the protocol, but can India sustainably maintain its position in the Committee. Perhaps, in the larger interest, India will be well advised to out of the Committee, if it only wishes to steer the mandate of the Committee and protect its national interests and concerns through continuous occupation of a seat.

obligations in the dealings of organized peoples with one another."[328] Normally, respect for international law is displayed by a State by observing the principles of international law in domestic laws. If they are not observed, the courts may apply these principles on the theory of implied adoption provided such principles are not inconsistent with the Constitution of India and the law enacted by the Indian Parliament. Based on the jurisprudence, if there is conflict between international and domestic law, the Indian courts must follow domestic laws.[329]

Thus, Article 51 demarcates obligations those flowing from general international law and those flowing from treaties and conventions. As per the Indian state practice on international law, it can be interpreted that international law is largely perceived as reflecting 'customary international law' and treaty obligations represent international conventional law. Article 51 is placed under the Directive Principles of State Policy in Part IV of the Indian Constitution, which means it is not an enforceable provision. Since the principle laid down in Article 51 is not enforceable and India has merely to endeavor to foster respect for international law, this Article would mean *prima facie* that international law is not incorporated into the Indian municipal law which is binding and enforceable. However, when Article 51(c) is read in the light of other Articles and judicial opinion and foreign policy statements, it suggests otherwise.[330]

Treaties in India are not self-operating. Indian courts do not enforce the terms of a treaty unless a law has been passed by the Parliament. Article 253 of the Constitution provides wide powers to the Parliament for passing a law in order to implement a treaty. Article 253 provisions enable the Government of India to implement all commitments under international law. Treaty-making power has both internal and external aspects. It should be noted that international human rights instruments for protection and promotion of human rights, can be enforced by the courts in India if there is no domestic law contrary to or inconsistent with it.[331] The human rights instruments can be enforced by the courts if there are gaps in the domestic laws which the treaty fills.[332] Such a treaty can also be used to interpret or at times enlarge the contents of fundamental rights in

[328] Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30 November 1939. The first draft (draft Article 40) provided: [T]he State shall promote international peace and security by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organised people with one another. Even though as one of the Directive Principles under Part IV of the Constitution, Article 51 is not enforceable through a court of law, Dr. Ambedkar had said in the Constituent Assembly that the intention was that the executive and legislature should not only pay lip service to these directive principles but "they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of governance of the country". Subhash Kashyap, "Constitution of India and International Law", In Bimal N. Patel (ed.), *India and International Law*, vol. 1, (Leiden: Nijhoff, 2005), at p.20. Article 51 speaks of the State endeavor to "foster respect for international law and treaty obligations", it has to be remembered that under the scheme of the Constitution and the common law system accepted by India during the British rule and continued after the Constitution, international treaties even after being signed and ratified do not become enforceable or automatically part of national law. In order to be legally enforceable and to get implemented these have to be incorporated appropriately in enabling municipal law. If the municipal law is contrary to international law, it is the former that prevails. However, if there is no conflict with national law, the courts in India generally try to so interpret the statutes as to be in harmony with international law rules.

[329] *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey* (1984) 2 SCC 534; AIR 1984 SC 667.

[330] Refugee Protection in India, Paper published by the South Asia Human Rights Documentation Centre, October 1997.

[331] *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

[332] *Ibid.*

keeping with the current international understanding of such rights.[333] International human rights treaties can also be referred to in construing domestic law or in the development of common law doctrines applicable in India.[334]

Till its independence, the Indian courts practiced the British Common Law according to which rules of international law in general were not accepted as part of municipal law. However, if there was no conflict between these rules and municipal law, international law was accepted in municipal law even without any incorporation. Since the doctrine of the Common Law is specific about certain international treaties affecting private rights of individuals, to implement such treaties, the doctrine requires modification of statutory law and the adoption of the enabling legislation in the form of an Act of Parliament.[335] This position has been continuously practiced by the Indian executive, judiciary and legislature in the post-independence era. As per Article 372 of the Constitution, all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.[336]

India has adopted the Universal Declaration on Human Rights (UDHR) which proclaimed basic rights for all human beings irrespective of their origin or nationality. UDHR has attempted to ensure that refugee rights are protected by the world community in countries of origin and asylum. Furthermore, peremptory rights defined under Article 6 of the ICCPR are applicable to the refugees. The non-derogable rights of ICCPR are also applicable to refugees. These rights clearly are regarded as possessing special place in the hierarchy of rights. The fact that a right may not be derogated from may constitute evidence that the right concerned is part of *jus cogens.*[337]

As far as the 1951 Refugee Convention is concerned, Article 1 defines a refugee as someone who, "owing to a 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." India is not a signatory to the 1951 Convention but the general principle prohibiting forced repatriation called *non-refoulement* is

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[333] This doctrine of generous interpretation was propounded by the Privy Council, taking the view that a Constituion has to be interpreted broadly to take into account international standards as a part of a generous approach to constitution interpretation. See *Minister of Home Affairs v. Fisher*, 1980 AC 319; (1979) 2 WLR 889; (1979) 3 ALL ER 21 (PC).

[334] *Nilabati v. State of Orissa* (1993) 2 SCC 746*; D. K. Basu v. State of W.B*, (1997) 1 SCC 416; *PUCL v. Union of India* (1997) 3 SCC 433; *Githa Hariharan v. RBI*, (1999) 2 SCC 228; *Apparel Export Promotion Council v. A. K. Chopra* (1999) 1 SCC 759.

[335] Jeevan Thiagarajah, "The Growing IDP Crisis in the Southern World – Tasks from a Rights and Development Perspective", 31 *Refugee Watch*

[336] The expression in this Article includes not only enactments of Indian legislature but also common law of the land as administered by courts in India before its independence. Gurdeep Singh, "Status of Human Rights Covenants in India", 28 *IJIL*, 1988, p.218. Indian state practice in the area of immunity from domestic jurisdiction and law of the sea (high seas, maritime belt and innocent passage) suggests that it has practiced customary international law in the absence of specific municipal legislations. Confirming the common law principle relating to the specific incorporation of certain treaties, Article 253 provides that: "Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." This Article implies that whenever there is a necessity to incorporate international obligations undertaken at international level or under international instruments into municipal law, the Parliament is empowered to do so. This is also acknowledged by the Indian judiciary as early as 1951. While delivering the judgement in the *Birma v. The State of Rajasthan*, the Rajasthan High Court, quoting the English common law principle, observed that certain treaties such as those affecting private rights must be legislated by Parliament to become enforceable.

[337] Malcolm Shaw, *International Law*, 6th edition, Cambridge University Press, 2008, p. 204

considered to have risen to the level of customary international law, such that they bind even non-signatory nations. However, India refutes this position.[338] Being a party to the ICCPR and ICESCR, India is required to accord an equal treatment to all non-citizens with its citizens wherever possible as far as the minimum standard of treatment of refugees are concerned.[339]

Speaking before the Parliament, the first Prime Minister of India affirmed the Indian position to abide by international standards governing asylum by adopting similar, non-binding domestic policies. This position has been practiced consistently and individuals are given asylum on humanitarian grounds. Tibetans and Tamils from Sri Lanka were given refugee status,[340] however, refugees from Bangladesh in the aftermath of the 1971 war were given the status of evacuees. They were however treated as refugees requiring temporary asylum.[341] It should be noted that India claims to observe the principles of *non-refoulement* and thus never to return or expel any refugee whose life and liberty were under threat in his/her country of origin or residence.[342]

Should India enact domestic legislation to realize the core objectives of assistance and protection to refugees?[343] Is it imperative for India to ratify the 1951 Convention, if it is strongly convinced that the country offers better protection and assistance to refugees even in the absence of the ratification? This is possible as

[338] The principle of non-refoulement shall be seen not as a right of the refugee, rather, it shall be seen and treated as an obligation of a host state. There are conflicting conclusions as far as India's adherence to the principle of non-refoulement is concerned. In the phased repatriation of Sri Lankan refugees from India to Sri Lanka, there were conflicting opinions on 'voluntary' repatriation - US Committee for Refugees, 'People Want Peace': Repatriation ad Reintegration in War-torn Sri Lanka, January 1994, p. 26, versus 'forced' repatriation – Asia Watch: Halt Repatriation of Sri Lankan Tamils, vol. 5, no. 11, 11 August 1993) principle which also happens to be an integral part of refugee law. In the Refugee and Asylum (Protection) Bill 2006, the rule of non-refoulement has been clearly stated. The *jus cogens* principle of non refoulement in the Model Law merely prevents the expulsion or return of a refugee or asylum seeker to a place where his 'life and freedom' are threatened. This important rule has been re-stated to clearly and authoritatively to prohibit any action to remove persons to any place where they may face persecution on account of any of the grounds contained in the Refugee Convention, or where their life, physical safety and freedom are threatened on account of any of the grounds set out in the OAU Convention.

[339] As B. C. Nirmal suggests, "by virtue of this reasoning the principle of non-refoulement may be deemed incorporated into the Indian municipal law.' Nirmal at 178. See also *Indian Gramophone Co. v. Birendra Bahadur Pandey and another*, AIR 1954 SC 661; *Vellore Citizens Welfare Forum* case (1996) 5 SCC 746.

[340] India's vote in favour of Resolution at the UNHRC in March 2012 to implement the Lessons Learnt and Reconciliation Commission, appointed by the Sri Lanka government, shows a mixed reaction towards the plight of Tamils in Northern Sri Lanka. Despite displeasure shown by the Sri Lanka's government to India due to vote, India could ill-afford to vote against. The negative or absent voting could have further alienated Tamil refugees in India from the Union government.

[341] India provided almost an unprecedented hospitality to the refugees from Bangladesh. If India had not granted refuge, their return or expulsion would have resulted in compelling them "to return or remain in a territory where there was well-founded fear of prosecution endangering their lives or physical integrity.

[342] Non-refoulement is an important principle to international refugee law, which acts as a complete prohibition against the forcible return of people to a place where they will be subject to grave human rights violations or where their life or personal security will be seriously endangered. The principle of non- refoulement applies equally to refugees at the border of a state and to those already admitted, and it remains in force until the adverse conditions which prompted people to flee in the first place are alleviated.

[343] Refugee and Asylum (Protection) Bill, 2006 is quite weak in relations to the rights of refugees and effective protection. Refugees, who have fled their homes because of conditions of extreme persecution and violence, form a vulnerable community anywhere. As a host country, India often adds to this trauma of flight by dealing arbitrarily with refugees, often denying them the basic right to better their lives. The Refugee Convention, in addition to the political rights of non refoulement and asylum, also requires that countries not discriminate between refugees (Article 3); respect their religious background (Article 4); respect their right to association (Article 15); provide access to courts (Article 16); provide the rights to work, both blue-collar and white-collar (Articles 17 – 19); provide access to public education (Article 22); housing (Article 21); labour equality and social security (Article 24); administrative assistance (Article 25); and, the freedom of movement (Article 26). PLSARC Note 2006, p. 6.

based upon the *Apparel Export Promotion Council v. A.K. Chopra* case. In this case, the Supreme Court clarified that "[t]his Court has in numerous cases emphasized that while discussing constitutional requirements, courts and counsel must never forget the core principle embodied in the International Conventions and Instruments and so far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law".[344] This clarifies that the Courts can resort to the 1951 Convention in interpreting the domestic laws. Considering the official commitment of India at the 4th World Conference on Women in Beijing,[345] the Court, in *Vishaka and others v. State of Rajasthan and others* case ruled that "reliance can be placed on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution".[346] Accordingly, it is expected that the Indian courts will consult the 1951 Convention based upon the official statements made by India in the Executive Committee of the UNHCR.

4.4. Legislative and Regulatory Framework of India

After analyzing India's approach to international instruments bearing upon the refugee issues, it is necessary to analyse the relevant provisions of the Constitution of India and relevant domestic legal and regulatory framework. In India, in addition to several provisions of the Constitution, the issues concerning refugees and asylum seekers are governed by, among other laws, the Foreigners Act, 1946; the Foreigners Order, 1948; the Registration of Foreigners in India, 1939 and Rules, the Passport (Entry Into India) Act, 1920; the Passport Act, 1967; the Indian Extradition Act, 1962; the Prevention Detention Act, 1950; the Criminal Procedure Code, 1898; the Citizenship Act 1955; the North-Eastern Areas (Reorganisation) Act 1971; the Citizenship (Amendment) Act, 1985; the Indian Penal Code, 1860; the Maintenance of Internal Security Act, 1971; the Immigrants (Expulsion from Assam) Act, 1950; the Illegal Migrants (Determination by Tribunals) Act, 1983; the Illegal Migrants (Determination by Tribunals) Rules, 1984;[347] the Evidence Act, 1872; the Civil Procedure Code, 1908; the Customs Act, 1962; the Illegal Migrants (Determination by Tribunals) Ordinance 1983; the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981; the Citizenship Rules 1956; the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 of India.

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[344] *Apparel Export Promotion Council v. A. K. Chopra*, (1999) 1 SCC 759.

[345] Ritu Agrawal, "The Present Condition of Indian Women" (in Chinese) Yunnan University , Kunming, China, September 2005 Beijing 2005, *Tenth Anniversary Commemoration of the Fourth World Conference on Women*- Beijing, China 29, August – 1 September 2005; Barbara Roberts, "The Beijing Fourth World Conference on Women", 21 *The Canadian Journal of Social Sciences* 2, 237-44 (1996); Centre for Social Research, "South Asia Paper on Beijing +5 Review on Political Empowerment and Governance," New Delhi: Centre for Social Research (1999); Economic and Social Commission for Asia and the Pacific, "Report of the Expert Group Meeting on the Regional Implementation of the Beijing Platform for Action," Bangkok: Economic and Social Commission for Asia and the Pacific (1999); Azza Karam, *Beijing +5: Women's Political Participation: Review of Strategies and Trends* (New Delhi: United Nations Development Program, 1998); United Nations, *Platform for Action and the Beijing Declaration*. New York: United Nations Department of Public Information (1996).

[346] 1997 6 SCC 241

[347] "The Refugees and Asylum Seekers (Protection) Bill, 2006," Public Interest Legal Support and Research Centre, www.pilsarc.org. accessed on 5 August 2013; R. Trakroo, A. Bhat and S. Nandi (eds.), *Refugees and the Law* 68-76 (New Delhi: Human Rights Law Network, 2006); S. Baruah, "Citizens and Denizens: Ethnicity, Homelands and the Crisis of Displacement in Northeast India", 16 *Journal of Refugee Studies* 1, 44–67 (2003); P. Saxena, "Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future", 19 *International Journal of Refugee Law*, 246–272 (2007).

The sheer list of acts, rules and guidelines pose a significant challenge to any member of the executive or judiciary in dealing with the refugee issues, as these issues can have direct or indirect impact on the implementation of these acts, rules and guidelines. Similarly, one shall attempt to ensure a proper understanding and analysis of these legal instruments in analyzing a particular refugee issue. Under the Foreigners Act, 1946, the Union government is empowered to regulate the entry of aliens into India, their presence and departure therefrom. It defines a 'foreigner' to mean 'a person who is not a citizen of India'. The main weakness of this Act is that it was enacted by the British government in India and mainly in response to the needs of the World War II. This Act, which has been in existence for the past 65 years, allows the Executive to use wide powers of removal of foreigners.[348] This Act, owing to several lacunae, has been under severe criticism of the National Human Rights Commission (NHRC) and the Indian judiciary.[349] Under this Act, all aliens temporarily or permanently residing in India are covered under the term 'foreigner' in the absence of the definition or meaning of a term 'refugee'.[350] The lack of definition has a direct bearing on them obtaining privileges under the 1951 Refugee Convention as this Convention considers them as immigrants or tourists. The Act also enables the Executive to refuse entry to an alien for non-fulfillment of entry conditions that invites instant deportation.[351] This Act further enables the Executive to deport a foreigner without complying with any form of extended due process and for giving a hearing to the person to be deported.[352] While practicing the policy, India is likely to come in contravention with the *non-refoulement* principle which is practiced by members who are signatory to the 1951 Convention and 1967 Protocol and jeopardizes the chances of protection of rights of genuine refugees.[353]

As per paragraph 3(1) of the Foreigners Order, 1948, "[N]o foreigner shall enter India--(a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having Jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or (b) without leave of the civil authorities having jurisdiction at such port or place." Thus, it is clear that no alien should enter India without the authorization of the authority having jurisdiction over such entry points. As per 1948 Order, if a refugee who enters India on a forged visa or a passport, or an invalid travel document can face serious consequences including the possible non-acceptance of his request for non-

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348 See the statements delivered by Mr Mujeeb and Mrs Kripalani, members of Indian delegation speaking at the 3rd Committee of the UN GA in 1949. An analysis of statements shows that India clearly did not want to have a specialized High Commissioner's Office because India was not convinced till that time to have such an office whose sole task would have been to give refugees legal protection.

349 The NHRC is a statutory body established under the Protection of Human Rights Act, 1993, and is mandated by Section 12(f) of that Act to study treaties and other international instruments on human rights and make recommendations for their effective implementation.

350 Section 2(a) of the Act defines a 'foreigner' as "a person who is not a citizen of India", thus interpreted as covering all refugees within its ambit.

351 The readings of cases like Hans Muller AIR 1955 SC 367 at para 37; Abdul Sattar Haji Ibrahim Patel AIR 1965 SC 810 at pr. 10; Ibrahim AIR 1965 SC 618; Louis De Raedt (1991) 3 SCC 554; and, Sarbananda Sonowal (2005) 5 SCC 665, suggest that the Indian courts have generally upheld deportation orders passed in contravention of the *audi alteram partem* principle.

352 There are many cases but the most prominent among others are Hans Muller AIR 1955 SC 367 at para 37; Abdul Sattar Haji Ibrahim Patel AIR 1965 SC 810 at para. 10; Ibrahim AIR 1965 SC 618 at para. 8; Louis De Raedt (1991) 3 SCC 554 at para. 13; and, Sarbananda Sonowal (2005) 5 SCC 665 at paras. 49-52.

353 The Law Commission of India has made several suggestions to harmonise provisions in the Foreigners Act and the Passport Act through 175th Law Commission Report. It, among others, suggested for the deportation of the foreigner and establishment of a grass root level mechanism to monitor the entry and stay of foreigners.

deportation. He may face even financial hardships, should he be required to bear travel expenses in connection with the deportation as per paragraph 14 of the Order. India has designated 'international zones' at airports and other entry points into the Indian territory, which are considered to be outside the Indian territory and the normal jurisdiction of the Indian courts.[354] In these areas, the refugees have administrative remedies only. No legal remedy is available in these zones. However, the Indian judiciary has liberally interpreted this provision in granting the stay to the refugees, especially, from Afghanistan, Iran and Myanmar. The cases dealing with these refugees show that Indian courts have positively accepted their plea and have stayed deporation proceeding on the grounds that their return to home-country would make them vulnerable to threats to their life and liberty.[355] The courts in such cases have favourably considered India's long-held traditions of hospitality to foreigners.

The Registration Act, 1939 governs the registration of foreigners entering, being present in, and departing from India. The Passport (Entry Into India) Act, 1920 and the Passport Act, 1967 deal with the powers of the government to impose conditions of passport for entry into India, and the issue of passports and travel documents to regulate departure from India of citizens of India and applies in certain instances to other cases too. Refugee, upon violation of the Registration of Foreigners in India 1939 and rules,[356] may face imprisonment and a fine. Refugees are also subject to the Indian Extradition Act, 1962 and bilateral extradition treaties, if an individual is a fugitive refugee. As B. C. Nirmal argues, this in turn raises the question of relationship between extradition and the principle of *non-refoulement*. He argues that "it is clear from Article 33(2) of the 1951 Refugee Convention that in the case of those persons who represent a danger to the security of the country or who have been convicted by a final judgment of particularly serious crimes, the principle of *non-refoulement* may not apply. Article 32 of the European Convention on Extradition provides that a person charged with a lesser crime shall not be extradited, if it is believed that *refoulement* would lead to the threat to the life and freedom of the person concerned."[357]

In addition to the above, it is also important to know that India, in the wake of influx of refugees following the partition in 1947, enacted various acts to deal with the situation. These were the Administration of Evacuee Property Act, 1950, the Evacuee Interest (Separation) Act, 1951, the Displaced Persons (Debt Adjustment) Act, 1951, The Displaced Persons (Claims) Supplementary, Act 1954, the Displaced Persons (Compensation and Rehabilitation) Act, 1954 and the Transfer of Evacuee Deposits Act, 1954. The entry and regulation of alien falls under the Union List,[358] hence, the matter falls under the purview of the Union government jurisdiction. Unlike the pro-active Indian judiciary, the executive organ has been reactive in dealing with the issues of refugees following the episodes of refugee influx and when the influx has acquired political momentum.[359]

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[354] International Zones are demarcated at international airports in all nations where physical presence does not amount to legal presence and from where summary and arbitral removal is possible and practiced. B. S. Chimni, "The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia", *RCSS Policy Studies* 4.

[355] Writ Petitions Nos. 450/83; 605-607/84; 169/87; 732/87; 747/87; 243/88; 336/88; and 274/88; SLP (Cr) Nos. 3261/1987; 274/1988 and 338/1988.

[356] Registration of Foreigners Rules 1939, amended in 1963 and 1965, Registration of Foreigners (Exemption) Order 1957.

[357] B. C. Nirmal, "India and International Humanitarian Law" In Patel (ed.) above at p. 184.

[358] Under the Constitution of India, powers and functions are divided into Union List (Federal Government) and State List (Provincial Government or State Government).

[359] It is important that mass influx situation are met with established procedures free from political compulsion and compulsion and some measure of minimum protection extended to such refugees. Changes have been

Refugees in India may be subjected to arrest by the immigration officials if they enter India without a valid passport or travel document, or illegally depart or attempt to depart from India without a valid passport or travel document, as per Section 30 of the Passport Act, 1920 and Rule 6A of the Indian Passport Rules, 1950. Normally, a refugee, upon detention is transferred into the custody of police and the First Information Report (FIR) is lodged against him/her, as per Section 13 of the Indian Passport Actm 1967 and the Indian Passport Act, 1920.

4.5. Policy and Practice by the Executive Organ

It is important to mention at the outset that the Union Government follows a three-category approach towards the refugees. These three primary categories are classified by description of the living conditions faced by each refugee category: (i) refugees who receive full protection according to standards set by the Government of India; (ii) refugees whose presence in the Indian territory is acknowledged only by the UNHCR and are protected under the principle of *non-refoulement*; and (iii) refugees who have entered India and have assimilated into the communities in which they live. Their presence is acknowledged neither by the Indian Government nor by the UNHCR. This creates an important legal question – what is their status – are they Indian national or not?

The Indian Constitution provides rights and obligations for the Union and individual state governments as per the entries mentioned in the Constitution. As mentioned earlier, the refugee (entry and regulation of aliens) comes under the Union government domain. The history of various refugee influxes and handling of the same by the Indian government shows that the position has been a reactive one when the matter goes beyond the Border Security Force of India and issue becomes political. Furthermore, due to lack of a cohesive legal framework and guidelines, the Border Security Forces and the state governments deal with refugees as per prevailing circumstances and abilities of the state agencies. This creates a fragmented and an uneven or non-uniform approach by the Indian states.[360] It is also observed that the practice of Indian states remain at variance with one another. Thus, the refugee faces a double uncertainty – absence of federal legislative framework and non-uniform policies and practices adopted by various states. In cases where refugees do not get recognition status as refugee by the Indian authorities, they are free to apply for the asylum status with the UNHCR, who upon assessment of individual cases accord refugee certificate. These certificates though not recognized by the Indian government, holders of the same are allowed to stay in India in the absence of political opposition. Thus, it is concluded that the Indian government though does not provide *de jure* recognition, it *de facto* considers the status accorded by the UNHCR for their stay in India.

The Indian position with regards to the question of admission and *non-refoulement* merits an analysis. This needs to be reviewed and interpreted in the context of the fact that India accepted the principle of *non-*

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proposed in the Model Law to include provisions to register mass influx refugees and enable the government to impose reasonable restrictions in the public interest. Temporary refugees must also be protected with a basic regime of rights. See *A Prefatory Note on the Refugees and Asylum Seekers (Protection) Bill*, 2006 prepared by the Public Interest Legal Support and Research Centre, New Delhi.

[360] N. Subramanya, *Human Rights and Refugee*, (New Delhi: EBC, 2004); Alborzi, *Evaluating the Effectiveness of International Refugee Law*, (New Delhi: EBC, 2006); Saurabh Bhattacharjee, "India Needs a Refugee Law", XLIII *Economic and Political Weekly* 9, 2008; N. Mishra, *Human Rights: Refugee Problem in India*, (New Delhi: Vij Books, 2011); Chunnu Prasad, *India's Refugee Regime and Resettlement Policy: Chakma's and the Politics of Nationality in Arunachal Pradesh*, Kalpaz Publications: 2013; S. M. Gokhale, *India's Refugee Problem: Causes and Cures*, Prakash Publications: 1948; Arjun Nair, "National Refugee Law for India: Benefits and Roadblocks", *IPSC Research Papers* December 2007.

refoulement as including non-rejection at its borders under the Bangkok Principles 1966.[361] India's position is clear in that it deals with the question of admission of refugees and their stay until officially accorded refugee status, under legislations, which deal with foreigners who voluntarily leave their homes in routine circumstances. This can be proven under the interpretation and practice adopted by India pursuant to the Foreigners Act, 1946. The Foreigners Act, 1946 deals with the matters of entry of foreigners in India, their presence therein and their departure therefrom. As per paragraph 3(1) of the Foreigners Order, 1948, the grant or refusal of permission to an entry into India is governed, as like, "[N]o foreigner shall enter India-- (a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having Jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or (b) without leave of the civil authorities having jurisdiction at such port or place." Pursuant to this provision, all foreigners can enter India with the authorization of the authority having jurisdiction over such entry points only. This provision was inserted to ensure that the executive machineries curb the problem of illegal entrants and infiltrators. Furthermore, it is required that unless exempted, every foreigner should possess a valid passport or visa to enter India. Thus, any refugee who does not comply with these provisions is liable to prosecution and deportation, as appropriate.

India adopted a gender refugee policy and adopted pro-refugee programs in 1947. However, there are also allegations concerning the differential treatment between women and children and at times between two refugee communities as well.[362] India considers voluntary repatriation of refugees as the most preferred solution to the problem and has successfully repatriated Bangladeshi, Sri Lankan and Chakma refugees.[363] India also allowed non-willing Sri Lankan, Bhutan, Tibet and Nepal refugees to stay back in India. Similar position is also found with regards to the Chakma refugees from Bangladesh.[364] In these cases, the Supreme Court had come to the rescue of the non-willing repatriates.[365]

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[361] "Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees, as adopted on 24 June 2011 at the 40th Session, New Delhi (2001); Sara Davies, "The Asian Rejection? International Refugee Law in Asia", *Australian Journal of Politics and History*, December 2006; Kelly Loper, "Hong Kong's International Legal Obligations toward Refugees and Asylum Seekers", Paper presented by the Centre for Comparative and Public Law, University of Hong Kong, 18 July 2006.

[362] At various instances, India's relatively more favourable treatment to Tibetan refugees and refugees who flew to India in the wake of Bangladesh independence, versus Chakma refugees have come under sharp criticisms from scholars and even an independent statutory body such as the National Human Rights Commission. See *Human Rights Newsletter*, National Human Rights Commission, vol. 3, no. 7, July 1996.

[363] It is required that decision of refugees to return to their homeland shall be written, voluntary, informed and vetted by a quasi-judicial authority to allow a safe and dignified return.

[364] The Chakma community is mainly the ethnic Buddhist Chakmas originating from the Chittagong Hill Tracts of Bangladesh. The Chakma refugee issue is largely due to the effects of partition, dominant development paradigm and religious persecution. The Chakma refugees residing in Arunachal Pradesh of India pose an ethnic and security problem for India as they are also considering themselves to be marginalized and come in conflict with the local population for the land and resources possession. Deepak Singh, *Stateless in South Asia: The Chakmas between Bangladesh and India*, (Sage: New Delhi: 2010).

[365] *P. Nedumaran v. Union of India*, 27 August 1992, (unreported) WPs 12298 and 12313/1992; In *Nedumaran* case, the Court although without specifically and really recognizing the right against non-refoulement, accorded the individuals the rights against forced repatriation. It sets the standards for repatriation including its emphasis on the voluntary character. *P. Nedumaran and Dr S. Ramadoss v. the Union of India and the State of Tamil Nadu* (1992). In the case of *Digvijay Mote v. Government of India* (1994) case, the Karnataka High Court, bringing to the notice government's failure its treatment concerning the refugee children, asked the government to do the needful.

Two main reasons for not enacting a domestic legislation are the perceived threat of terrorism and influx and precipitation of flood of migrants.[366] As India shares a number of difficult political and conflict-generating issues with neighbours, it believes that refugees may fall into the hands of destablisation forces and damage the fabric of stability and security.[367] Secondly, India, like the Western European nations, considers that influx of the migrants will destabilize the local economy and generate intrinsic conflicts.

It must be borne in mind that although the case for uniform legislation is imperative, the situation in different neighboring countries and political-security concerns would hardly enable India to come up with a uniform legislation. One of the most important factors why India has been unable to enact a uniform legislation is the security concern.[368] Because it is believed that a uniform legislation may be unable to provide full-proof guarantee against security threats and that an uncontrolled migration of refugees, by using the judicial activism laid down by the Indian judiciary, may in the long run increase economic as well as social threats to the nation.[369] As far as internal security threats are concerned, one can see that the risk is due to (a) strategic level security when refugees are armed and when the government loses the control over them; (b) structural level security is threatened by increasing demands on and conflict over scarce resources; and (c) regime level security is threatened when refugees enter the domestic political process and create pressures on government.[370] Lawmakers are, therefore, compelled to use these reasons to refrain from enacting a uniform legislation. Furthermore, India believes that "unwanted migrations, including those of refugees, are a source of bilateral and not multilateral relations, and international agreements could constrict her freedom of action."[371] Indian lawmakers also feel contented that India is already working in consonance with the basic features of the model

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[366] The Model Law's exclusion clause departs from conventional exclusion provisions in three ways: (a) it imposes a high standard of proof on the State authority; (b) it omits generalised exclusion grounds; and, (c) it makes reference to the SAARC Regional Convention on the Suppression of Terrorism, 1987 ("SAARC Terrorism Convention"). The standard of proof required – a conviction – to exclude criminals against humanity and peace and war criminals is higher than accepted international norms and is unlikely to be met considering the volatile situations from whence such people flee making it impossible for courts to function freely and fairly. The reference to the SAARC Terrorism Convention will diminish refugee protection by diluting the defences against extradition. Through its Additional Protocol, the SAARC Terrorism Convention deems certain offences as 'non-political offences' and takes away a valuable defence available to a person sought to be extradited or removed from a signatory state, even where the person is simply accused of a terrorist offence. This not only a back-door expansion of the scope of exclusion, but also a contravention of Article 14(2) of the Universal Declaration of Human Rights that denies persons the 'right to seek and enjoy asylum' only "in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." The 'political offence' exception to extradition, contained in Section 7(2) of the Indian Extradition Act, 1963, is also similarly diluted. Therefore, the requirement of a conviction and the reference to the SAARC Terrorism Convention has been removed and substituted with a revised exclusion clause.

[367] For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State by organizing hostile expeditions or by preparing common crimes against its Head, members of its Government or its property. Oppenheim's *International Law*, vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, 9th Edition, Longman Group UK Ltd., 1992, p. 903.

[368] While security concerns are valid, especially in the wake of terrorism in South Asia, it is equally important to bear in mind that the genuine refugees may have to pay an unfortunate price in India, which is otherwise, acclaimed as the Land of Hospitality or we can say, which has impressive records in receiving refugees from the time immemorial.

[369] Ms Sadako Ogata during her visit to India on 4 May 2000 emphasized to the NHRC that it was important that the management of mixed migration includes clear, recognised and practical mechanisms to separate those fleeing from persecution or conflict, and those seeking economic betterment.

[370] Maria Saifuddi Effendi, "Conflict resolution in South Asia: applicable theories and approaches," 55 *Pakistan horizon*, 3, 41-57 (2002).

[371] Paradoxes of the International Regime of Care.

law itself for treating refugees. Hence, there is no reason to enact a separate uniform legislation. These lawmakers refer to various rights that are read into law and practiceed by the Indian judiciary, even in the absence of specific legislation. The lawmakers also believe to be guided with the claim that India affirms the *non-refoulement* principle, which also happens to be an integral part of the refugee law.

4.6. Refugee Issue as an Important Factor in the Foreign Policy of India

It is important to analyse the content and import of the statements made by the Indian delegations at various international fora with regards to refugee issues. India showed a lukewarm response to the establishment of an International Organization for Refugees as it is clear from the statement of the Indian delegation during the debate on the topic in the 3rd Committee of the UN General Assembly in 1949.[372] However, this did not mean that India did not want to support the cause of refugees in the world. India would have voted for the establishment of a High Commissioner's Office if it had been convinced that there was a great need to set up an elaborate international organization primarily concerned with giving refugees legal protection.[373]

India considers the 1951 Convention and 1967 Protocol, a partial regime for refugee protection drafted in the Euro-centric context.[374] The basic contention was that the Convention does not deal with the problem faced by the developing countries, as it is drafted mainly to tackle individual cases and not mass influx.[375] India considered the 1951 Convention as a Cold War tool of the Western countries to criticize the former Soviet Bloc by accepting refugees from the Eastern Europe into what was declared to be a free world. This may have been the case prior to the collapse of the Soviet Union, but now the situation has changed, as the Western European nations are also encountering mass influx problems and dealing with the issue under the 1951 Convention or 1967 Protocol. The earlier Indian foreign policy focused on opposing the Western nations and favoured the former Soviet bloc policy. Its own Non-Aligned Movement leadership constituted its main focus to abstain from voting on UNGA resolution 319(IV) of 1949, which created the UNHCR. In the initial years of the UNHCR existence in India, the Indian executive expressed displeasure and even summoned the UNHCR representatives to express its unease with the Refugee Convention and the UNHCR itself.[376] In this regard, it is important to note that India and the UNHCR have established an Annual Open-Ended Bilateral Consultation mechanism – the fourth of such consultations took place in December 2012.[377]

As mentioned earlier, India has received hundreds of thousands of refugees over the last 65 years. Barring the last decade, the refugee issue has been one of the important foreign policy issues for India in general. India received Tibetan refugees in 1959, refugees from Bangladeshi in 1971, the Chakma influx in 1963, the

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[372] Summary Records of the Third Committee Meeting 259 (19 November 1949), GAOR, 6th Session, p. 8143.

[373] Prime Minister Nehru, as early as in 1953, stated his commitment to abide by international standards governing asylum by adopting similar, non-binding domestic policies.

[374] In the modern history of international law, the refugee problem can be traced back to 1921-22 in the aftermath of the First World War, the breakup of the Austro Hungarian Empire and the Russian Revolution. The real progress to protect and promote rights of refugees began with the adoption of the Universal Declaration of Human Rights which defined the human rights of people regardless of nationality and citizenship. 1951 Convention was a response to a regional situation and as such it was perceived and drafted keeping mind the western European nations. 1967 Protocol removed the geographical and chronological limitations, however.

[375] UN Division, Ministry of External Affairs, Refugees (No. UI/1515/9/99), quoted in Chari et. al pp. 55-59.

[376] Foreign Secretary R. K. Nehru met UNHCR representative Amir Ali in 1953-1954 and conveyed India's displeasure with the politics of the Refugee Convention. See, Rajeev Dhavan, *Refugee Law and Policy in India*, (New Delhi: PILSARC, 2004); B. S. Chimni, "The Legal Condition of Refugees in India", 7 *Journal of Refugee Studies*, 4, 394-98 (1994).

[377] Ministry of External Affairs Annual Report 2012-13, Government of India, p. x.

Tamils from Sri Lanka in 1983, 1989, and again in 1995, Afghan refugees from the 1980s and from Myanmar too in the same period.[378] With the end of the Cold War and rise of new types of internal conflicts which have often resulted into mass influx of refugees in many of the developing countries, the Indian position has started changing. This is also due to the fact that India, unlike previous decades, has not witnessed any mass influx of refugees in its own territory. The current policy and practice is based on the treatment of individual refugees or asylum seekers, similar to what the Western European nations are facing.[379]

Is India shying away from its responsibilities in the area of proper refugee protection? Is Indian approach perceived to be working adversely against its assertion as an emerging global power?[380] The analysis reveals that India perhaps does not want its voice on the world's most persecuted to be heard so as to mould future policy.

India has undertaken obligations by signing and/or ratifying various human rights instruments that require India to fulfill its obligations towards refugee as well. India is a party to the Genocide Convention, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights[381] (ICESCR), the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Convention on the Rights of Child. India, as a member of various human rights organisations, has also a moral, if not a legal obligation to ensure that those eligible for benefits of human rights treaties are given protection, and promoted for refugee status.

While there is no specific monitoring mechanism to ensure the protection and promotion of refugee rights, the National Human Rights Commission (NHRC), the supervisory bodies of human rights treaties including the Human Rights Commissions at state level, NGOs and other institutions and individuals render direct and indirect monitoring services for the same. In recent years, India has focused on very few issues of refugees, namely, the UNHCR capacity of protection, reinforcement of protection capacity, refugees in urban areas and strengthening of rapid response in emergency situations.[382] India has reiterated support for the

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[378] Rajiv Dhavan, "India's Refugee Law and Policy", *The Hindu*, 25 June 2004.

[379] Statement of Ambassador H. S. Puri at the Executive Committee Meeting of the UNHCR, October 2003. Mr. H. S. Puri, the Indian Permanent Representative at the Executive Committee of the UNHCR said that, "…the international legal framework [of refugee protection] still falls short of dealing with massive flows and mixed migration. In the absence of appropriate adjustments to match these realities, countries such as India will find it difficult to accede to this framework, their commitment to hosting refugees notwithstanding… For example, in some instances in the past, the UNHCR has closed its offices at the peak of crisis situations, leaving countries to single-handedly bear the burden of hosting millions of refugees." Although in statistical terms, India may still have higher number of refugees and asylum seekers, the Western European nations are facing more heat as these nations are getting refugees and asylum seekers from Asia, Africa and Latin American nations.

[380] Rajiv Dhawan analyzing India's Refugee Law and Policy concludes that India wants a leadership profile but does not assume concomitant responsibilities.

[381] India has made reservation to these two Covenants which reads, "With respect to Article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners". According to Article 13 of the Covenant, "An alien lawfully in the territory of a State Party to the present Covenant may be expelled, therefrom 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."

[382] Statement made by Ambassador A. Gopinathan, Permanent Representative of India to the UN (Geneva) on 5 October 2010 before the Executive Committee of the UNHCR.

UNHCR advocacy on repatriation, reintegration, rehabilitation and reconstruction. In other words, India's focus remains on solutions after refugees have arrived in a state territory. India has made it clear that the role of developing countries that are host to a large number of refugee movements, has to be recognized and their concerns addressed in direct proportion to the magnitude of the burden they carry.[383]

India considers, even today, that 1951 Convention is a discriminatory convention. India emphasizes that the role of UNHCR should be confined to international protection of refugees, instead of widening of its mandate to cover disaster relief activities, statelessness and internally displaced persons.[384] This position of India reflects its consistent approach of not allowing international agencies to interfere into internal matters of any nation state. While this is the position of the Indian Executive, the Indian judiciary has pronounced judgments that can be considered to be at variance with the position of the Indian executive organs. In appreciating the Indian executive policy on refugees, it is important to keep in mind the political factors, or what is known as the vote bank policy, which often uses the refugee problem for electoral gains.[385]

4.7. Role of the Judiciary on International Refugee Law

The Indian judiciary, like in the case of the environmental regime, has been creatively interpreting Article 21 of the Constitution, which guarantees the right to life and liberty to all persons and *not merely to citizens*.[386] Although refugees are not citizens, they are given various rights under Article 21 of the Constitution. Indian jurisprudence clearly evidence that refugees are persons who are entitled under Article 21 to have a dignified life. It is important to consider that according to the jurisprudence of the Supreme Court of India, the right to life encompasses and includes many rights, which together constitute a dignified life,[387] and same applies to the principle of personal liberty. The Supreme Court jurisprudence has widened the scope of rights under Article 21 to include the right to privacy,[388] the right to go abroad,[389] the right to legal aid,[390] the right to speedy trial,[391] the

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[383] A. G. Mezerik, *The Refugee Problem in the Middle East (*New York: 1957)*:* Amnesty International, *Bosnia-Herzegovina, All the Way Home: Safe "Minority Returns" as a Just Remedy and for a Secure Future* (1998); Penderel Moon, *Divide and Quit,* (Berkeley: University of California Press, 1962); Ebright Fossett, *Free India: the First Five Years: An Account of the 1947 Riots, Refugees, Relief and Rehabilitation* (Nasvhille: Parthenon Press, 1954); Michael M. Cernea and Chris McDowell, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (World Bank, 2000).

[384] MEA Annual Report 2010-11, p. 135.

[385] For example, by repealing the Illegal Migrants (Determination by Tribunals) Act of 1983, the refugees from Bangladesh have been benefited to a large extent that are also alleged to be supporting the Congress Government in forming the governments in the north-eastern state of Assam.

[386] Chimni concludes that Article 21 encompasses the principle of *non-refoulement* which requires that a State shall not expel or return 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'.[386] Article 21 of the Constitution encompasses the principle of non-refoulement which requires that a State shall not expel or return 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. Chimni argues that *even the principle of non-refoulement is not an absolute principle.* Article 33(2) states: the benefit of the present provision may not, however, be claimed by a refugee who 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.

[387] *Francis C. Mullin v. Administrator*, AIR 1981 SC 746.

[388] *Govid v. State of MP*, AIR 1975 SC 1378.

[389] *Satwant Singh v. Assistant Passport Officer, New Delhi*, AIR 1967 SC 1834.

[390] *M. H. Hoskat v. State of Maharastra*, AIR 1978 SC 1548.

[391] *A. R. Antulay v. R. S. Nayak*, AIR 1992 SC 1701.

right against the bar fetters,[392] the right against solitary confinement,[393] the right to shelter,[394] the right to free education up to the age of fourteen years,[395] the right to livelihood,[396] the right to live with dignity free from exploitation,[397] the right to protection against torture,[398] the right to a safe and decent environment[399] and the right to protection from sexual harassment.[400] These guarantees are unique and reinforce a conclusion that the Indian judiciary has been playing a very important role in the protection and promotion of rights of the refugees. In addition to the above, refugees can also benefit by the judicial review.[401]

Various judgments of the Supreme Court have clarified and have given legal characteristics to governmental practices on refugees as an emerging or acceptable norm. In *the Chairman, Railway Board & Ors. V. Mrs Chandrima Das & Ors.*, the Supreme Court, required the Indian state to respect international covenants and the UN declarations and also apply the provisions of the UDHR into domestic jurisprudence.[402] The Court also clarified that the fundamental rights stipulated under the Indian Constitution are available to all citizens and some of them are also available to 'persons' and that 'person' would include citizens as well as non-citizens for the purposes of Article 14 of the Constitution. Furthermore, the Court concluded that Articles 3 and 7 and Article 9 of the UDHR and Articles 20, 21 and 22 of the Constitution are in consonance with each other, hence, the state must respect the same. In this particular case, the Court came to a conclusion that Hanuffa Khatoon, despite being a non-citizen of India, cannot be subjected to a treatment below her dignity, nor could she be subjected to physical violence. The Court, concluding that her rights under Article 21 of the Constitution were violated, required the state to pay compensation to her. The Court made reference to the opinion of Lord Diplock in *Salomon v. Commissioners of Customs and Excise*, to consider a presumption that the Parliament does not intend to act in breach of international law, including specific treaty obligations.[403] It further relied upon *Lords Bridge in Brind v. Secretary of State for the Home Department*, which observed that "in construing any provision in domestic legislation, which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the international convention, the Courts would presume that the Parliament intend to legislate in conformity with the Convention and not in conflict with it." [404]

Through *Giani Bakshish Singh v. Government of India and Ors.*, the Supreme Court clarified various principles in regard to the detention of a foreigner in the Indian territory when it was established that his repatriation would enable him to undertake activities which would be detrimental to the Indian state. In this case, the Court clarified that the Union government had the right to make arrangements for expulsion including the right to make arrangements for preventing any breach or evasion of the order. The Court also suggested that the Preventive Detention Act, 1950, confers the power to use the means of preventive detention as one of the

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[392] *Charles Sobhraj v. Superintendent Central Jail*, AIR 1978 SC 1574.
[393] *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.
[394] *Sheela Base v. State of Maharastra*, AIR 1983 SC 378.
[395] *Parmanand Katara v. UOI*, AIR 1989 SC 2039.
[396] *Shantistar Builders v. N. K. Totame*, AIR 1996 SC 786.
[397] *Unnikaishnan v. State of A. P.*, AIR 1993 SC 2178.
[398] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.
[399] *Francis C. Mullin v. Administrator*, AIR 1987 SC 746.
[400] *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610.
[401] One of the most important basic features of the Constitution is power to judicial review.
[402] John F. Sawyer, "Shipbreaking and the North-South debate: economic development or environmental and labor catastrophe?", 20 *Penn State International Law Review* 3, 535-62 (2002).
[403] (1996) 3 AII ER 871.
[404] (1991) 1 AII ER 720.

methods of achieving this end. It is quite interesting to see that the Court placed significant reliance upon the legal literature instead of conventions or treaties. For example, quoting from Starke's *Introduction to International Law* (7th edition, 1972), the Court stated that the detention prior to expulsion should be avoided, unless the alien concerned refuses to leave the State or is likely to evade the authorities. It also referred to Oppenheim's *International Law* (7th edition, 1948), quoting, just as a State is competent to refuse admission to an alien, so, in conformity with its territorial supremacy, it is competent to expel at any moment an alien who has been admitted into its territory. The Court in this case also ruled that to detain a foreigner who has come to the country with a passport would be a breach of international amity. This interpretation apparently stretches the limits of liberal interpretation. The Court, while on the other hand, as seen above, reads customary law into domestic law, whereas in this case, fails to recognize the importance of customary international law in extradition matters. According to the Court, even persons, whether they are Indian citizens or foreigners, who have committed crimes in this country but have escaped to another country, could be brought back only if there are extradition arrangements with the country to which they have escaped and the offence is an extraditable offence. Thus, in the same case, the Court creatively interpreted the norm of international amity at one juncture and on the other juncture, disregarded the object of international amity, which also applies in the case of extradition.[405]

In *Anwar v. the State of Jammu and Kashmir*, the Court ruled that the Constitutional protection against illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens like the petitioner to remain in India contrary to the provisions of the law governing foreigners.[406] In *Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta and Others*,[407] the Court clarified that the power of the Government to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion. The power of the government to deport is absolute, as clarified by the Supreme Court in *Louis de Raedt v. Union of India.* According to the Court, "the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion…the executive Government has unrestricted right to expel a foreigner."[408]

The *Khudiram Chakma v. State of Arunachal Pradesh and Others*,[409] was important for clarifying the position with regards to the property rights of aliens in India. In this case, the Court believed that the general international law provides that aliens should not be discriminated against in their enjoyment of property rights once they have been acquired. If alien property is nationalized whereas the property of nationals remains unaffected then the act is discriminatory and prohibited under international law. It further held that fundamental right of a foreigner is confined to Article 21 for life and liberty and does not include the right to reside and stay in India, as mentioned in Article 19(1) (e) which is applicable only to the Indian citizens.[410] This judgment is

[405] Vijayakumar Veerabhadran, "Judicial Responses to Refugee Protection in India", 12 *International Journal of Refugee Law* 2, 235-243 (2000).
[406] 1971 AIR 337, 1971 SCR (1) 637.
[407] AIR 1955 SC 367.
[408] AIR 1991 SC 1886 at p. 1890.
[409] 1994 Sup (1) 615.
[410] The Supreme Court in *Louis de Raedt and Ors. V. Union of India and others* also clarified this position, namely, the fundamental right of the foreigner is confined to Article 21 for life and liberty does not include the right to reside and settle in India which applies only to the citizens of India. AIR 1991 SC1886. This pronouncement of the Court has been criticized in which it held that the government had an absolute right to deport aliens. See Sumbul Rizvi, "Response of the Indian Judicial System to the Refugee Problem", 2

widely seen as the bedrock in the immigration debates. It is to be noted that Chakmas are not granted citizenship. It has been suggested that, in addition to recognizing the rights of the original Chakma refugees to remain in Arunachal Pradesh, the government should work to protect the legal Chakma refugees' rights and help them apply for and receive citizenship under the terms of the Supreme Court judgment in the NHRC as discussed below.[411]

The *National Human Rights Commission v. State of Arunachal Pradesh and Anr.*,[412] is considered one of the landmark judgments in the history of the Indian judiciary as far as the position and clarification of refugee law is concerned. The case concerned the persecution by sections of citizens of Arunachal Pradesh of Chakma/Hajong Tribals who hailed originally from Bangladesh. The Supreme Court directed the state of Arunachal Pradesh to ensure the lives and personal liberty of Chakmas. It included seeking the assistance of the Union forces. This prohibited the government from evicting them from homes and occupations, asked to deal with the sections of Arunachal Pradesh who were threatening these Chakmas in accordance with law and required the government to pay compensation. This case has been also considered important as the Court ruled that it is the duty of the State to protect the life and liberty of all human-beings regardless of their citizenship and emphasized the State's obligation to do all necessary to prevent its citizens from threatening the lives and liberties of such people. In its judgment, the Court also clarified that the earlier decision of the Court in the *Khudiram Chakma* case did not foreclose the consideration of the grant of citizenship to Chakma.

In *Kubic Dariusz v. Union of India* case,[413] observing that the detention of the person was rendered illegal by non-consideration of the representation of the petitioner by the government, according to law resulting into violation of Article 22(5)[414] of the Constitution referred India's obligations in the context of preventive detention of a foreign national. It further observed that the preventive detention of a foreign national who is not a resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. Furthermore, the Court clarified that when an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognized principle in national legal system that in the event of doubt the national rule is to be interpreted in accordance with the state's international obligations.

In *Gramophone Co. of India v. Birendra Bahadur Pandey*, the Court clarified that

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Bulletin on International Humanitarian Law and Refugee Law, 1 65-7 (1997).The National Human Rights Commission judgment came against the backdrop of rising tensions between the Chakmas and local indigenous peoples, causing the Court to worry that the Arunachal Pradesh government was deliberately trying to prevent legal Chakma residents from obtaining citizenship. The Court affirmed the right of certain Chakma residents of Arunachal Pradesh to apply for citizenship, demanding that the state forward legitimate applications to the Union government under the procedures listed in Sections 8 and 9 of the Citizenship Act of 1955. Although the Court never explicitly stated that arrival in 1964 was a criterion for citizenship, the length of the Chakmas' habitation in India was employed as a justification for the decision several times.

411 http://www.morungexpress.com/mobile/analysis/60592.html accessed on 5 May 2011.

412 1996(1) SCC 742; AIR 1996 SC 1234.

413 1990 AIR 605; 1990 SCR (1) 98.

414 Article 22 (5) reads, "Protection against arrest and detention in certain cases… When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order… Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose".

> "the Comity of Nations requires that Rules of international law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of Nations or no, Municipal Law must prevail in case of conflict."[415]

In view of this the questions arises whether the principles of customary international law impose any limitation on the Indian state to constrain its absolute power under the Foreigners Act, 1946 to expel a foreigner?[416] The Union Government may by order make provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure there from or their presence or continued presence therein. Although prior to 1983, the Government's power could have been considered unfettered but these will be subject to whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.[417] Thus, the Court in 1955 only had to consider whether an action taken complied with the procedure laid down in the Foreigners Act, it has now to consider whether the same was fair, just and reasonable. It is useful to quote what the Supreme Court had to clarify. The Court clarified and held that, "these decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedures and for the Court to follow it, that it is for the legislature to provide the punishment and for the courts to impose it… the last word on the question of justice does not rest with the legislature. It is for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable."[418] The Committee constituted to draft a model refugee protection bill, under the Chairmanship of former Chief Justice P. N. Bhagwati, defined the term refugee while formulating the model law. According to this bill,[419] the term *refugee* is "any person who is outside his/her Country of Origin and is unable or unwilling to return to, and is unable or unwilling to avail himself/herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a particular social group or political opinion owing to external aggression, occupation, foreign domination, serious violation of human rights or events seriously disrupting public order in either part or whole of his /her Country."[420]

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[415] P. Chandrasekhara Rao, *The Indian Constitution and International Law*, (Delhi: Taxman, 1993) at p. 143.

[416] Section 3, 1946 Act reads, Power to make orders.

[417] *Mithun v. State of Punjab*, (1983) 2 SCR 690.

[418] *Maneka Gandhi v. Union of India* (1978) 2 SCR 621; *Sunil Batra v. Delhi Administration* (1979) 1 SCR 392; and *Bachan Singh* v. State of Punjab (1980) 2 SCC 684.

[419] The model law, drafted by the P. N. Bhagwati Commission has never been tabled before the Parliament of India. This shows clear apathy of the Indian legislature towards the refugee issue. During the visit of UNHCR Commissioner Antonio Gueterres in 2006, the acting Chairperson of the National Human Rights Commission informed that the Government has accepted in principle the necessity of legislation. See NHRC Press Note 27 December 2006.

[420] The first draft of the model refugee protection law was presented at the 1997 SAARC Law Seminar in New Delhi and it was modified and adopted by the 4th Annual Meeting of the Regional Consultation at Dhaka in 1997. This model law is, however, India-specific. This model law is largely perceived as a useful framework

The Indian judiciary has by creative interpretation accorded various rights to refugees as examined earlier. The Indian judiciary had at times prevented the executive from executing deportation proceedings to refugees from Afghanistan, Iran and Myanmar, by the way of a creative interpretation of the Foreigners Act 1946, especially paragraph 3[421] and 14.[422] In these cases, the Court prevented the executive from further proceedings on the ground of the possible suffering of threats to life and liberty by these refugees in their country of origin. The Supreme Court in the *National Human Rights Commission v. State of Arunachal Pradesh* held that Chakma refugees who had come from Bangladesh due to persecution cannot be forcibly sent back to Bangladesh as they may be killed there and thus they would be deprived of their right under Article 21 of the Constitution.[423]

Refugees have access to the Indian courts for judicial protection against arbitrary and illegal action of India in violation of their rights.[424] Furthermore, the NHRC and NGOs can also intervene on their behalf and the unique feature of the Indian litigation system, namely, the public interest litigation[425] can also be accessed by the refugees or on their behalf by individuals and institutions.[426] The Judiciary's liberal approach also reflects in the cases concerning illegal entry,[427] illegal activities in India, releasing detainees pending determination of refugee status, staying deportation, giving them opportunity to interact with the UNHCR in India. The judiciary has attempted to ensure that if refugees need protection and access to the UNHCR, it is available to them. The Indian courts have given a certain measure of socio-economic protection to refugees in special circumstances as seen in the case of *Digvijay Mote.*[428]In addition to the Indian judiciary, the role of the NHRC is valuable in understanding its position and influence in the domain of executive and judiciary. NHRC, among others, has a mandate to study treaties and other international instruments on human rights and make recommendations for

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for refugee protection. See Florina Benoit, "India: A National Refugee Law Would Equalize Protection", *Refugees International*, 2000; Rajeev Dhavan, "Treaties and People: Indian Reflections", 44 *Journal of Indian Law Institute*, 362-76 (1996).

421 Article 3 reads, The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into 1[India] or their departure therefrom or their presence or continued presence therein.

422 Article 14 reads, Penalties. If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine and if such person has entered into a bond in pursuance of clause (f) of sub- section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

423 AIR 1996 SC 1234.

424 B. C. Nirmal, "India and International Humanitarian Law", In Patel above at p.178.

425 The Public Interest Litigation protects and promotes public interest through litigation – which is introduced by the court of law or by any other private individual. This is again a unique feature of the Indian judicial activism which is almost non-prevalent in any other part of the world. A person filing the PIL must prove that the litigation is for public interest and not a frivolous litigation. Supreme Court of India, recognizing the misuse of the system, has introduced heavy penalty for those who are using the mechanism for frivolous purposes.

426 NHRC brought the matter of the Chakma Refugees to the attention of the Supreme Court through the instrument of Public Interest Litigation, using its right to take up their cause.

427 *State v. Teresi* case, no. 406 of 1996, 2 January 1990, accessed on 22 March 2011. The Chief Judicial Magistrate adopted a lenient approach and granted imprisonment for 45 days and payment of fine of 1 thousand rupees. In *State v. Md. Hashim*, the Court took a lenient approach in imposing punishment towards the Afghan national who was charged under Sections 420/471 of the Indian Penal Code and Section 14 of the Foreigners Act. In State v. Benajamin Tang Neng (1994) case, the refugee, even after having completed the imprisonment for illegal entry was detained/in jail due to "apathy on the part of the state authorities."

428 Digvijay Mote (unreported) WA 354/1994, High Court of Karnataka.

their effective implementation.[429] It has from time to time, brought pressure on the Indian executive to ratify the 1951 Convention. The above analysis suggests that the Indian judiciary is more inclined to read human rights treaties and soft-laws and has apparently not insisted on the requirement of their transformation into the municipal laws.[430]

4.8. Concluding remarks

The above examination leads us to make following concluding remarks. First, India is indeed a refugee heaven especially for persons from neighbouring countries. The refugee problem is one of the most important issues which determine India's relations with its neighbouring nations as well as with several UN agencies, dealing with human rights and refugee issues. It has been seen that India has been subjected to severe criticisms from the neighbouring countries and the international community on its approach. The Indian state practice shows relatively more favourable treatment of refugees from Tibet, Afghanistan and Myanmar.[431] This favourable tilt must be seen in the wider context of India's relations with these nations. As the neighbouring countries continue to experience political upheavals and the Indian economy and political situations are becoming better, it is likely that India will remain the most sought-after place for refugees from these and other distant nations of Asia and Africa.

India's preference and consistent position to maintain its administrative and practical arrangements in dealing with refugee issues is likely to continue in foreseeable future. However, the pressure brought by the refugees and the international community may compel India to draw guidelines. The guidelines will enable India to provide fair and equal treatment to all refugees. As there are no other than benefits of political mileage, India is unlikely to sign the 1951 Convention or 1967 Protocol.[432] A uniform legislation giving effect to international norms in a uniform manner by all states is desired. As refugees directly affect the democratic polity and institutions of political, social, cultural and economic governance, it is desired that such legislation will be of certain guiding assistance to these institutions. In the absence of a central framework, the refugee issues are

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[429] Article 12(f), NHRC Act 1993.

[430] Indian Judiciary has been insisting on the requirement of incorporation of human rights treaties into the municipal law, as seen in the cases like, *Jolly George Verghese v. Bank of Cochin*, AIR 1980 SC 970; *Xavier v. Canara Bank Ltd*. 1969, Vigilance Rights Committee case AIR 1983; *Bishambhar Singh v. State of Orissa*, AIR 1957 Orissa 1957 247. As Nirmal argues, "the application of the doctrine of incorporation in the case of human rights treaties, though laudable, ignores Article 253 of the Indian Constitution and the prerogative of the Union Government to become or not to become a party to any international convention and even overlooks the issues of state responsibility in international law for the violation of any treaty".

[431] Anne-Sophie Bentz, "Being a Tibetan Refugee in India", 31 *Refugee Survey Quarterly* 1, 80-107 (2012); Lydia Aran, "The Forgotten Dead: Representations of the Past in the Tibetan Refugee Community in India", in Graham C. Kinloch, Raj P. Mohan (et. al). *Genocide: Approaches, Case Studies and Responses*, 289-304 (New York: Algora Publishing, 2005).

[432] Although it is agreed that the "refugee" is one of the most pressing concerns of the globe and that the ratification will pave way for the UNHCR to broaden the base of state support and that it will further enhance universal treatment and protection to refugees, the potential security, economic and socio-political costs outweigh the perceived benefits. It will indeed certain increase demonstration of India's commitment to the international law on refugee in particular and international law in general. If India will be a member, the world refugees may easily find refuge in India and it will avoid political conflicts between far-distant states. However, the refugees in India are from the neighbouring nations only, it is doubtful whether the signing of the Convention will lead to less friction. One can possibly argue that signing of the Convention will have positive impacts on receiving financial aid from the international community towards the refugee protection. As the Convention lacks a carrot & stick regime, country like India will continue to remain outside the ambit of the Convention and still ensure the refugee protection as per the political and administrative conveniences.

subject to the administrative discretion of various state authorities, which must be given some uniform guidelines. It can be concluded that the pro-refugee jurisprudence of the Supreme Court and the High Courts remains irreconciliable with the Foreigners Act and India's overall practice. The lack of uniform legislation does create a number of anomalous situations. Despite the potential benefits, which a uniform legislation will bring in easing the tension between the host and origin countries of refugees, the lawmakers currently remain unconvinced of such an argument. Such legislation would provide greater relief to genuine refugees and asylum seekers and necessary guidelines to the authorities concerned and to all whose work is to apply the humanitarian principles of refugee law. It would also introduce transparency, accountability and fairness in India's refugee policy.[433] Despite the Supreme Court's efforts, there are dim prospects as far as the legislature is concerned. As former Chief Justice Verma had to say, "the attempt to fill the void by judicial creativity can only be a temporary phase. Legislation alone will provide permanent solution".[434] The Refugee and Asylum Seekers (Protection) Bill of 2006 is pending before the Parliament and is likely to provide answers to various questions posed in this chapter.[435]

It is clear that India needs to conduct a comprehensive review its refugee policy, evolve a regional approach and enact legislation to protect persecuted refugees. It also needs to revive the examination process of joining the 1951 Refugee Convention that started in 2004 under the chairmanship of former Chief Justice of India, Justice P. N. Bhagwati and pushed further by Justice A. P. Anand who speaking through the platform of the NHRC repeatedly called upon the Indian government to ratify the Convention. It can be concluded that the Indian position towards the refugee dominantly considers the national origin of refugees and political concerns (relations) with the country in handling and treating the refugees, which at times is alleged for its differential treatment within the refugee communities.[436] In absence of a national legal framework, one of the important conclusions that emerges is that India is and will continue to be prone to the differential and (sub) standard human treatment to various categories of refugees. If a legal framework is available, India's practices could be well measured against the benchmarks. Therefore, it is imperative that India enacts the legislation in order to avoid unnecessary criticisms and remove legal, political and administrative uncertainties. A good legal framework will curtail the political *ad hoc* approach which often is critized for forcible repatriation of refugees.

It can be observed that individual members of judiciary have frequently taken an assertive and bold independent view. For example, the former Chief Justice of India Justice Verma speaking at the Inaugural

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433 B. C. Nirmal, *"India and International Humanitarian Law"* in Patel (ed.) above at p. 185.

434 Chimni above at *International Refugee Law: A Reader* above at p. 464. Chimni mentions that "Indian courts have been generally helpful when approached with respect to individual cases, albeit they have done so without discussing in any manner the content of international refugee law.

435 The refugee definition set out in the Model Law reproduces both the five chief grounds of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and the four additional grounds of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention). In addition, the Model Law adds three new grounds to claim refugee status: a well-founded fear of persecution on account of (a) sex, (b) ethnic identity; and, (c) serious violations of human rights. However, in the case of an asylum seeker with multiple nationalities, a clause has been added to ensure that India is not mandated to provide protection unless the asylum seeker faces a well-founded fear of persecution in all the countries in which he is a citizen. In addition to the 'multiple nationalities clause', it may be advisable to incorporate an explanation extending refugee protection to victims of persecution committed by non-State actors also.

436 India's practice and approach towards the Tamilian refugees before the assassination of the former Prime Minister Rajiv Gandhi and Tibetan refugees are often contrasted with the treatment given to other refugee communities originating from the other neighbouring nations. The Tibetan community is considered to be the most well-treated refugee populace among all refugee communities.

Address delivered at the Conference on Refugees in SAARC region on 2 May 1997 in New Delhi said, "in the absence of national laws satisfying the need, the provisions of the [1951] Convention and its [1967] Protocol can be relied on when there is no conflict with any provision in the Municipal Laws." Justice Verma goes on to declare "it is more so, when the country is a signatory to the international convention which implies its consent and obligation to be bound by the international convention, even in the absence of expressly enacted Municipal Laws to that effect". The zeal of the Indian judiciary[437] to find a solution under the municipal laws for protection of human rights is a welcome trend. This zeal should be read with caution as there is a clear division between rights of citizens and state's obligation to protect and promote and rights of a refugee, which mainly arises from state's international obligations.

It can also be concluded that the Indian judiciary though has creatively and liberally interpreted the provisions of the Indian constitution in providing protection and promoting the rights of refugees, the fact remains that the approach is non-systematic and highly dependent upon the exigencies of the situation. It can be also concluded that refugee protection system in India almost wholly depends upon the actions of the executive organs.

An important reason why India is not signing the Convention is that a specific legislation will attract a surge of refugees and see more economic migrants across the borders posing as refugees that would add more pressure on scarce resources and opportunities.

The Bills drafted in 1997 and 2006 do not appear to see the light mainly due to security concerns. The series of terrorist attacks on India further consolidates the opposition against the Bill. Due to porous borders and consistent threat of external militancy, India can be hardly willing to abide by pressure that can impinge upon its discretion to regulate the entry of foreigners into its territory. It can be concluded that there was a lack of political will earlier and even today, hence, India is unlikely to sign the Refugee Convention or 1967 protocol. Nor it will have a specific legislation on the refugee and asylum protection. The examination of the role of the Indian judiciary and the National Human Rights Commission leads us to a conclusion that their role is and will remain essentially a remedial one.

[437] See above Justice Verma at SAARC, 1997, p. 3-9.