
India and United Nations High Commissioner for Refugees :

An Analysis

*Dr. Ram Niwas Beniwal, Assistant Professor,
Department of Political Science,
Govt. College for Women, Madlauda (Panipat), INDIA.*

The South Asian states in general and India in particular are yet to ratify the Refugee Convention and its protocols. Their recalcitrance has given rise to quite a rich and varied body of literature on the theme. Idealists have advocated ratification of the convention at the earliest, while realists have argued the pitfalls of such a position. As an underdeveloped corner of the world the region is prone to all kinds of socio-economic problems and many analysts hold that the commitments of the states to their people may be overridden by commitments to ‘outsiders’ if they ratify any such international convention. The factors of inter-state hostility and external intervention in problems in most of the countries in the region have further complicated the discourse. In essence, the states do not want to shackle themselves with commitment to international convention and pledge outsider’s rights which they cannot observe for the citizens. However, these countries have displayed extraordinary hospitality towards refugees, forced migrants and even illegal migrants. They even allowed UN High Commissioner for Refugees to operate within their territories. In this context, it becomes essential to know that how India has approached the whole issue and worked with United Nations High Commissioner for Refugees (UNHCR) to address the problem of refugees.

Particularly after the Second World War, the problem of refugees has become enormous in size and in complexity. The efforts of earlier refugee organizations have become rather deficient to meet the demands of the refugees throughout the world. In this situation, the UNO has created the UNHCR to address is a problem much more efficiently while the refugee situation is in the making and thereafter. It has also worked out the 1951 Convention as the basic

document for the UNHCR. And today, UNHCR works in a variety of ways to mitigate the problems of the refugees. In recent years, there has been a rise in regional processes of consultation, many of which have been initiated by UNHCR in partnership with NGOs and eminent personalities. Such initiatives have included annual sessions of the Asian-African Legal Consultative Committee, the Fourth Informal Consultation on Refugee and Migratory Movements in South Asia (also known as the Eminent Persons' Group) and the Third Meeting of the Asia – Pacific consultations. In addition, local NGOs have begun to take the initiative to conceive discussion on refugee issues in South Asia lately. This is exemplified in the Regional Consultation or 'Refugees and Forced Migration: Need for National Laws and Regional Cooperation' held in New Delhi in 1998. The consultation, organized by regionally-based human rights NGOs, is an important step on the path towards evolving a regional consensus on standards of refugee protection. Such meetings are valuable part of the ongoing efforts, both formal as well as informal, to promote attention to refugee issues in South Asia. The UNHCR can only act to recognize refugees within its mandate. It is at the national level that asylum is provided. Thus it is incumbent upon India, among the other South Asian nations, to adopt some consistent national approach to refugee status determination and its attendant rights, obligations and privileges.

Hence the role of UNHCR and India are portrayed in a multi-dimensional relationship between them. It is a fact that by now India has not acceded to the 1951 Convention on Status of Refugees, but UNHCR has operated in India and working among the refugees in India. Hence, first of all it is essential to know the reasons behind UNHCR's partial involvement in this country. It is equally important to know What could be the factors guiding the Indian approach towards the refugees? Why do refugees choose .India as their destination? What are the factors facilitating or inhibiting UNHCR's functioning in India? Why does India still find it, difficult to ratify the 1951 convention on the Status of Refugees?

Though the phenomenon of population displacement is quite old, yet the forcing of people from their established and known habitat emerged with the birth of a territorial nation-stateⁱ, gradually assuming religious, racial or ideological character and identity. The very process of the emergence of such identity has resulted in discriminatory practices against minorities and those groups of people who do not share the ideological or religious predilections of the dominant groups. This process of refugee generation continued as the

conflicts of state formation spilled over into inter-state conflicts and tensions and stabilisation of territorial boundaries of ethnic, religious and ideological defined state.

It is one of the greatest failure of modernity that millions of people around the world continue to experience what Euripides called “the loss of a native land,” i.e. refugees. Although the condition of refugeehood has always existed in some form or another, a comprehensive international legal regime aimed at the protection of refugees has only existed for about seventy years. Indeed, refugee law is a relatively new branch of international law. Historically, the refugee issue had been defined as a matter of sovereign privilege. It was dealt with unilaterally or bilaterally between the state of origin and the host country. The inadequacy of this approach became evident in the aftermath of the first world war when the breakup of empires and the onset of the Russian Revolution unleashed large scale refugee flows. The problem coincided with the birth of League of Nations and the notion of an international community based on international cooperation and solidarity. It was in this climate that the first office of the High Commissioner for Refugees was created. Similarly, when the United Nations came into being after the devastation of the second world war, the international community came together to create a permanent international refugee regime. In 1950, the present day Office of the High Commissioner for Refugees was created by the United Nations General Assembly through its resolution number 428(v) and began its operation on 1 January, 1951. Its mandate is to provide international protection to refugees and assist governments in finding permanent solutions to the problem of refugees.ⁱⁱ

The scale of refugee movements has expanded dramatically in recent years.ⁱⁱⁱ According to one estimate, during the nineteenth and early twentieth centuries inter-continental migrations involved some 50 million people, many of whom were fleeing persecution in Europe.^{iv} In early 1995, there were 27 million refugees and other people felt concern about them through the United Nations High Commissioner for Refugees (UNHCR).^v This figure reached to 14.5 million refugees, including the groups such as returnees and other displaced people who have not crossed an international border. By 1997, this figure reached more than 22 million refugees in the world. As a matter of fact, refugees in the legal sense of the term now constitute little more than half of this number.^{vi}

Derived - from the Latin 'refugium', the word 'refugee' literally means “shelter, security, or a haven”.^{vii} According to the 1951 Convention, a refugee is one owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being, outside the country of his former habitual residence as a result of such events, unable or, owing to such fear, is unwilling to return to it.^{viii}

Broadly speaking definition of the term refugee now includes a variety of different groups: internally displaced and war-affected populations, asylum seekers, stateless people and others whose nationality is disputed as well as returnees / refugees and displaced people who have been able to go back to their homes, but who still require some support from the international community.^{ix} Although numerous private and governmental agencies exist to attend to the needs of refugees on the local, national and international scales, the oldest, most prominent and best funded global agency for the purpose is UNHCR.

Established in 1950 as a replacement for the United Nations International Relief Organisation (UNIRO, founded in 1946 to aid Europeans after World War II), the UNHCR is the major international body mandated to aid refugees. With the exception of Palestinians (who are administered to by the United Nations Relief and Works Agency for Palestine Refugees in the Near East), all refugees who elect to register for aid fall under UNHCR's jurisdiction.^x The core functions assigned to UNHCR by its 1950 Statute involve "providing international protection" and "seeking permanent solution to the problem of refugees by assisting governments ... to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities".^{xi}

UNHCR aims to provide protection and ensure the respect of fundamental rights for all those under its concern. In the case of refugees, the most basic need is protection from refoulement or forcible return to a country in which they have reason to fear persecution or

attack. It also provides assistance to those persons of concern who cannot meet their own basic needs, and when there are no other resources available. The types of assistance include emergency help for major influxes; case and maintenance programmes that meet basic needs on a more routine basis; voluntary repatriation; local settlement assistance to promote self-sufficiency and local integration in host countries; and resettlement in third countries for refugees who cannot return to their homes and who face particular protection problems in their country of first asylum.^{xii}

Refugee problem in India

The refugee problem has been there since the emergence of India as an independent nation-state. The process of nation-building and state-building in the South Asian region has been responsible for producing a vast number of refugees. Besides, war, famine and political oppression have been the other reasons contributing to population displacement^{xiii}.

From a theoretical perspective, problem of refugees has been caused due to following six fold factors: (i) anti-colonial wars and self-determination movements; (ii) international conflicts; (iii) revolutions, coups and regime changes; (iv) ethnic, communal and religious conflicts; (v) creation and restructuring of state boundaries, and (vi) population transfers^{xiv}. Besides the above factors, Muni and Baral have identified three broad categories of refugee-generating factors in South Asia,^{xv} which obviously applies to India as well. (a) First, the breakdown of colonial rule and the rationalisation of some of the colonial legacies. In this context, exodus of large numbers of refugees created due to partition or creation of new states due to independence. Partition of British India in to the states of India and Pakistan and refugees caused due to aftermath of Independence of Burma and Sri Lanka are such examples.

Second, factor is related to state and nation-building processes, which precipitated not only political, ethnic and religious conflicts but created economic and environmental conditions that forced people to migrate within or outside their respective countries. The largest refugee flow witnessed by India caused due to above factors was the migration of large population from East Pakistan in 1971. Similar is the case of SriLanka, where the state,

through a gradual process beginning in 1950, acquired a Sinhala-Buddhist identity. The simmering ethnic conflict that exploded in July 1983 sent more than 220,000 refugees to India and 75,000 outside the South Asia, Later, Bangladeshi drifted towards authoritarian political order and assertive Islamic identity strengthened the flow of Hindus and Buddhist Chakmas to India. A vigorous policy of Bhutanisation has led to massive outflow of the Southern Bhutanese of Nepali origin. Approximately, 25,000 to 30,000 Nepalese of Bhutan have taken refugee in India's West Bengal and Assam provinces. Besides, there have been economic migrants from the neighbouring countries to India.

Finally, developments outside the region have also been responsible for refugee generation. Such extra-regional refugees have come from Tibet, Afghanistan and Myanmar. Basically, India's democratic polity, large size, secular state system, federal constitutional structure, porous borders and better economic opportunities accounted for the flow of refugees in this country.

UNHCR's Infrastructure in India

Though India is not a party to the 1951 Convention Relating to the Status of Refugees, Yet it has allowed UNHCR to operate in the country. And since February 1969, it has been caring for the hordes of refugees coming to India, officially as well as unofficially. It has been involved with numerous categories of refugee: Tibetan, Bangladeshi, Afghan and Sri Lankan. Since 1995, India has also become a member of 53 members EXCOM of the Office of the UNHCR.^{xvi} Today, UNHCR operates in India through its Office of Chief of Mission at Delhi and also has a sub-office at Chennai, which is basically meant for repatriation of refugees from Sri Lanka. The Chennai office works under a Repatriation Officer.

The office of the UNHCR in India is mainly composed of four units, which include the Legal Unit, the Social Service Unit, the Public information unit, and the Programme Unit.^{xvii} The Legal Unit as the name suggests, this unit deals chiefly with the determination of refugee status and promotion of the protocol. All asylum seekers are individually interviewed by Legal Officers at UNHCR. Those found to have genuine fear of persecution, arising out of

serious human rights violations in their country of origin, are recognized as refugees. They are issued refugee certificates for identification.^{xviii}

The 1951 Convention and its 1967 Protocol are the principal international instruments for the protection of refugees. They have been ratified by 134 countries. India has neither ratified the Convention so far, nor it does has any specific domestic laws on refugees. Refugees are dealt with under the Foreigners Act.1946, which does not distinguish between refugees and other foreigners. In order to raise awareness about these issues, and to build a favourable public opinion, UNHCR has been undertaking a host of promotional activities. These include interactive activities with the academia, including students, researchers and teachers of international law and international relations as well as with NGOs and others such agencies and institutions. The Unit is led by a Legal Officer aided by two Assistant Legal Officers. As on January 1999, there were about 17,700 refugees registered with UNHCR, Delhi.

The Social Service Unit consisting of a Social Service Officer and five workers. It looks after various aspects of the needs of refugees such as healthcare, education, employment and settlement. Assistance is provided to the refugees through projects implemented by NGOs. For instance, the Young Men's Christian Association (YMCA) assists refugees with educational, vocational training, social counselling and income generation activities. Another NGO, Voluntary Health Association of Delhi (VHAD) provides medical assistance, referral services and medical and, medical counselling to refugees.

A legal NGO, Public Interest Legal Service and Research Centre (PILSARC) offers legal counsel to refugees facing legal protection problems in India. The entry, stay and departure of refugees are handled by the foreigners' section of the Ministry of Home Affairs and Foreigners Regional Registration Officers throughout the country.^{xix} In some cases involving detention and deportation of refugees, UNHCR intervenes directly with, the Government of India to secure their release, and seek appropriate solutions. In some cases

UNHCR provides financial assistance to refugees for a limited period of 6-12 months, and to those suffering from disability, chronic illness or other forms of vulnerability.^{xx}

Program me Unit mainly looks after the overall administration of various projects and programmes undertaken by UNHCR for refugee welfare as well as the financial aspects related thereto. Public Information Unit consisting of a sole Public Relations and Information Officer, undertakes various usual public relations exercises apart from those related to refugee welfare. It also interacts with students, researchers and any other person interested in the informational aspects of the UNHCR. In India it is led by a Chief of Mission assisted by a Deputy Chief of Mission who is also responsible for programming. The total number of staff at UNHCR, Delhi is 25 including 7 project staff from UNDP and excluding 20 contracted staff. The total budget for its India operation is US \$1.6 million which is received it gets from the UN and donor countries and institutions.

Since 1981, UNHCR has been associated with about 50,000 refugees of whom over 30,000 have been repatriated. Some of them are also resettled in India and other countries. For this, UNHCR works in association with various embassies in India who take refugees as per the quota of their country. But as far as possible, it strives for their voluntary repatriation by arranging their passage.

One of the thrust areas of UNHCR's advocacy efforts in India has therefore been to highlight the absence and the need for laws to protect the rights of refugees. In this endeavour it has over the years built an institutional relationship with the judicial community in India. In collaboration with well-known lawyers, it has organised several seminars and workshops on Refugee Law and International law relating to refugees. One of the key partners in this effort has been SAARCLAW, together with whom it held a major seminar in 1997. UNHCR has also sought the services of PILSARC as an implementing partner, to provide legal assistance to refugees facing protection problems.

The Indian Centre for Humanitarian Laws ad Research (ICHLR) another Implementing partner of the UNHCR in India, has been conducting seminars, workshops and

conferences on refugee issues throughout the country. ICHLR, in collaborating with the Informal Consultations on Refugees and Migratory Movement in South Asia, has also brought out a draft National Model Law on Refugees for countries in South Asia. To disseminate the draft National Model Law, it, plans to support NGO efforts to translate it into the national languages of various South Asian countries. It is also supporting NGO efforts to bring out a handbook on well-known court cases in India relating to refugees. This will serve as useful references in future cases relating to refugees.

UNHCR, also collaborates with the National Human Rights Commission (NHRC) of India to strengthen the protection of refugees, who are very often victims of human rights violations. It is consciously working towards building a legal framework to protect refugees. Stressing on the importance of a legal framework, in 1996 it has also endowed a Chair on Refugee Law in the National Law School at the University of Bangalore. Similarly, it has supported the Centre of Refugee Studies, Department of International Law, Jadavpur University, Calcutta, in conducting several short courses for lawyers and law professors. It also interacts with the Department of Rehabilitation in Chennai. Apart from such efforts, it has encouraged the print media to take up refugee issues. Under an agreement with the Government of India, it monitors the voluntary repatriation of Tamil refugees returning to Sri Lanka.

One of the main partners in spreading information and awareness of refugees has of course been the media, whether print or electronic. UNHCR has responded to queries from journalists, and has from time to time motivated them to take up refugee issues to a broader audience. Since the subject is one of human interest the press has consistently taken a deep interest in the plight of refugees. For instance, Doordarshan, Calcutta had collaborated with UNHCR in producing a 55 minute programme on Refugees in 1997. The programme featured, among others, eminent former refugees like Mrinal Sen, Sunil Gangopadhy and Jogen Choudhury all household names in Bengal.

The Statesman in Calcutta and the West Bengal Federation of United Nations Association have been UNHCR's partners for the last two years in conducting an annual

inter-school debate on refugees. Similar debates and essay writing competitions have been organised in Chennai also. Children being future citizens, UNHCR feels it important to foster in them a spirit of tolerance and acceptance of people seeking refuge. After all, refugees do not leave their home willingly, but under threat of persecution and to save their lives and beliefs.

Role of UNHCR in India

UNHCR began its operations in 1951 on the initiative of the UN General Assembly.^{xxi} Subsequent to independence Government of India followed a cloistered approach in permitting voluntary organizations to assist refugees. Department of Rehabilitation monitored most of the assistance to refugees. However, this cloistered approach was relaxed in 1969, when India permitted UNHCR to open its first branch office in India at New Delhi. When relations between China and India began to deteriorate and the hope of Tibetan refugees to return home early waned, UNHCR was asked to assist and accelerate the process of permanent settlement of Tibetan refugees. The other time when UNHCR and Government of India happened to closely interacted was in the case of the erstwhile East Pakistan refugees. In April 1971, India received about 10 million refugees from Bangladesh on humanitarian grounds. India raised the issue to the international consciousness and attention to mobilize support from UNO and other countries. Pakistan registered its protest in the UNO on 29 April 1971. In spite of the protest, UN Secretary-General designated UNHCR to act as a co-ordinating agency between the needy refugees and helpful voluntary organizations. The then High Commissioner, Prince Sadruddin Aga Khan visited India and Pakistan in June 1971. He also made consultations with governments both the countries of both the countries on relief measures and voluntary repatriation. He made a second visit to India in November of the same year.

To assist about 1,00,000 Tibetan refugees US \$ 3,00,000 were allocated for health, housing, industrial employment, agriculture and other rehabilitation activities. In 1970, US \$ 2,00,000 were given mainly for settlement of Tibetans refugees in agriculture. In April 1971 UNHCR was appointed the focal point for all UN assistance to over ten million refugees

from East Pakistan. In the largest refugee operation ever, US \$120 million were channeled to the Indian Government for, aid and later repatriation of refugees to Bangladesh in 1972.

Since March 1981, UNHCR has recognised over 50,000 refugees in India. UNHCR was allowed by Government of India to determine the status and to offer assistance to Afghan refugees. 11,000 Afghans were accepted as refugees by UNHCR by the end of 1992. Of them, 9,800 have since been resettled in third countries. Around 3,000 repatriated voluntarily to Afghanistan with UNHCR assistance, joining some 25 million compatriots returning from exile in Pakistan and Iran. All returnees benefit from UNHCR's extensive reintegration activities in Afghanistan, including building of shelters and roads, canals and wells. In 1995, UNHCR allotted about US\$ 7,80,00,000 for assisting the Afghan refugees. Monthly subsistence allowances were given to each family at the rate of Rs. 1200 per head of the family, Rs 500 for the next three dependants and Rs. 200 for remaining members. These refugees were provided with medical facilities in government hospitals and were reimbursed of the expenses; if they had underwent treatment at Government hospitals^{xxii}. UNHCR, under its education programmes, bore the expenses incurred by refugees for school fees, uniforms and educational materials and for vocational training given to cultivate new skills.

The role of UNHCR was further extended, when it monitored repatriations of Sri Lankan Tamils. However, to begin with UNHCR had refused to involve itself in the repatriation processes of Sri Lankans. The office of UNHCR held the opinion that conditions were not conducive for the return of the refugees. But, after the opening of the Madras office, this issue was not debated^{xxiii}.

When reports of forced repatriations of Sri Lankans reached UNHCR, it objected to the arbitrary attitude of the government. The then Head of UNHCR, Sadako Ogata took up the issue directly with Government of India and signed a Memorandum of Understanding with UNHCR. In this operation, UNHCR's role was to see that the refugees were not returned forcefully. Subsequently, UNHCR opened its Madras (Chennai) branch for supervising the operations. The five conditions of UNHCR in this operation were: (i) Ascertaining the willingness of the refugees; (ii) Obtaining the list of refugees and completed repatriation

forms; (ii) Obtaining the list of camps and conduct sample checking; (iv) Review of cases of repatriates who want to postpone their departure and; (v) Permit UNHCR to give the refugees the details of assistance offered by it in Sri Lanka.^{xxiv}

Even after its involvement in repatriation process, UNHCR still considers that, unsettled situation in Sri Lanka prevents UNHCR from actually promoting repatriation from India; nonetheless the office facilitates the return of those refugees who desire to go back. However, the involvement of UNHCR in the repatriation process is criticized to be deterrent factor, since too much interference would be counterproductive. Since 1992, UNHCR started assisting Government of India in the repatriation of Sri Lankan refugees from Tamil Nadu by verifying the voluntary nature of their departure.

Though over 65,000 Sri Lankan refugees living in 133 camps in Tamil Nadu are assisted directly by the Government of India, under an agreement by the latter with UNHCR. This agency UNHCR also helps in the reintegration of returnees from India with small community-based projects in Sri Lanka. Its assistance to voluntary repatriation of Sri Lankan Tamils is expected to continue while return modalities will be discussed with the Indian and the Sri Lankan governments. It is viewed expected that 15,000 refugees (camp/non-camp, categories) that returned in 2006 of which some 5,000 were assisted by UNHCR. The timing of large-scale return will depend on further progress in the peace process in Sri Lanka and the availability of passenger boat/ferry transport which is currently lacking between India and Sri Lanka.

UNHCR has also been involved in training the personnel of the Office of the Tamil Nadu Relief and Rehabilitation' Commissioner. Presently in northern Sri Lanka since 1988, UNHCR is helping in the reintegration of returnees from India with small community-based projects. UNHCR also protects and assists civilians displaced by conflict in northern Sri Lanka in Open Relief centres, thereby reducing the compulsion to flee.^{xxv}

UNHCR has slowly developed a network to help refugees. It has arrangement with All India Institute of Medical Sciences for providing medical assistance to refugees. Upon

recommendations of UNHCR, the International Committee of Red Cross provides travel documents to refugees, who have been offered third country settlement. General Community centers of UNHCR have been established at Saket, Defence Colony and Vikaspuri in Delhi. UNHCR also collaborates with National Human rights Commission, an establishment under Government of India, which monitors the Human rights scenario in the country. The NHRC played a prominent role in protecting the Chakman.^{xxvi}

UNHCR has formally included representatives of five implementing partners in Delhi into the working group on gender and age mainstreaming in a further effort to institutionalise the practice into all spheres of activities. Emanating from UNHCR's global and regional strategic objectives, the following are the strategic goals for India: (i) Improve protection environment in India and concrete protection/ assistance response for asylum-seekers and refugees while ensuring gender and age mainstreaming in all of OCM's activities; (ii) Obtain acceptance by Government of India of the need to adopt legal framework/ mechanism to deal with asylum-seekers and refugees; (iii) Pursue durable solutions for Afghan mandate refugees through naturalization, resettlement and voluntary repatriation, if possible by applying a Convention Plus approach; (iv) Ensure timely voluntariness of return of Sri Lankan Tamil refugees through continued UNHCR involvement in facilitation of voluntary repatriation; (v) Foster partnership and complementarities between UNHCR, GOI and NGOs as the essential platform for attaining the operational objectives of 2006; and (vi) Pursue self-reliance activities and remain sensitive to welfare needs and vulnerabilities such as sexual and gender based violence.^{xxvii}

However, despite the substantial involvement of UNHCR with refugees in India, India has not yet acceded to the 1951 Convention on the Status of Refugees.^{xxviii} Notwithstanding this, India has been cooperating with UNHCR in the administration of refugee situation in the country in a significant manner. She has been more of a refugee receiving than a generating country due to its easily accessible borders, socio-cultural identities, economic opportunities and a democratic and soft state.

India's experience of coping with refugee problems goes back to the partition of the subcontinent, when eight million refugees, from the areas which are now Pakistan and Bangladesh, moved into India and were successfully integrated into the population.^{xxix} However, like other South Asian countries, India is not a party to most of the international refugee conventions.^{xxx} According to one scholar, "part of the reason for India not ratifying the 1951 Convention was ideological in nature and related to the politics of the Cold War. Since with the end of cold war old compulsions of global politics are no more, hence it is expected that India may enter into such agreements."^{xxxi} According to a report, India, in fact, is considering signing the 1951 Convention on Refugees. This because of growing complexities over the refugee issues in the SAARC (South Asian Association for Regional Cooperation) region and the absence of a national legislation on refugees. Ministry of External Affairs sources said that the Government is examining the issue of refugee protection and India's international obligations, including the option of signing the 1951 UN Convention.^{xxxii}

Notwithstanding the fact that India is not a party to the 1951 Convention, it has acceded to certain international Covenants, treaties and instruments, which by implication are also available to refugees and bind Government of India to respect refugee rights. For instance, in April 1979, India acceded to the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights. Article 13 of the ICCPR instrument deals with the expulsion of a person lawfully present in the territory of the state. India reserves its right under this article to apply its municipal law relating to aliens. In December 1992, India acceded to the 1989 Convention on the Rights of the Child. Article 22 of this Convention deals with refugee children and refugee family reunification. The 1963 Convention on the Elimination of All Forms of Racial Discrimination was ratified by India in 1969, and the 1979 Convention on the Elimination of All forms of Discrimination against Women was ratified in 1993.

Applicable non-binding international human rights instruments include the 1948 Universal Declaration on Human Rights whose Article 14(1) states that, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."^{xxxiii} Also included are: The principle of non-refoulement incorporated in the Asian-African Legal Consultative

Committee's 1966 Principles Concerning the Treatment of Refugees (Bangkok Principles)^{xxxiv}, which specifically includes non-rejection at the frontier. More recently, the Declaration and Programme of Action of the 1993 Vienna World Conference on Human Rights included a special section on refugees which reaffirmed the right of every person to seek and enjoy asylum, as well as the right to return to one's own country.^{xxxv}

The then Secretary General, Indian Centre for Humanitarian Laws and Research, New Delhi Rose Verghese, has noted that while India lacked a formal legal framework for refugee protection, its administrative policies over the years have generally been in line with international refugee law principles. However, most of these policies are directed toward refugees from South Asian countries, the problems of asylum seekers from countries outside the immediate region are not addressed in a systematic manner (**See Appendix -**). Even with respect to the former group of asylum seekers, in the absence of legislation, there are some discrepancies and treatment of refugees is affected by domestic or foreign policy considerations. While courts in the country have been humanitarian in their treatment of asylum seekers, they have been hampered by their inability to enforce provisions of international human rights instruments and refugee law norms in the absence of accession to relevant treaties or incorporating national legislation.^{xxxvi}

Article 37 of the Indian Constitution provides that the Directive Principles of State Policy in Part IV are fundamental to the governance of the country and that it shall be the duty of the state to apply these principles in making laws. Article 51(c) in Part IV of the Constitution provides that the state shall endeavor to foster respect for international law and treaty obligations.^{xxxvii} Thus, while Indian courts are not free to direct the making of legislation, they do adopt principles of interpretation that promote rather than hinder the aspirations enshrined in Part IV of the Constitution.

It is also true that India has not passed refugee-specific legislation to regulate the entry and status of refugees with the result that it has no general legislation on refugees. They are treated under the law applicable to aliens.^{xxxviii} The principal Indian laws relevant to refugees are: Foreigners Act, 1946 (Section 3, 3A, 7, 14); Registration of Foreigners Act,

1939 (Section 3,6); Passport (Entry into India) Act, 1920; Passport Act, 1967 and Extradition Act, 1962. Though jurisdiction over issues of citizenship, naturalisation and aliens rests with the Union Legislature vide item 17 of the Union List,^{xxxix} Influxes of refugees have been handled by administrative decisions rather than through legislative requirement. This administrative decision is exercised within the framework of the 1946 Foreigners Act, and refugee policy in the country has essentially evolved from a series of administrative orders passed under the authority of section 3 of the said Acts.^{xi}

Now the question arises – what are the rights available to foreigners or aliens, which by implication are available to refugees in India? In its judgement in the case Luis de Readt Vs Union of India as affirmed later in Khudiram Chakma Vs Union of India, the Supreme Court of India, held that article 21 of the Constitution of India which protects life and personal liberty by stating that they may not be deprived except according to procedure established by law, is applicable to aliens in Indian territory as well.^{xli}

Various judicial decisions have, in the absence of a concrete legislative structure, tried to provide solutions to the problems of refugees, primarily with regard to the principles of non-refoulement, right to seek asylum and voluntary repatriation. The courts have, however, arrived at their decisions without entering into a discussion of international refugee law. It may be noted, however, that courts cannot take treaty provisions mentioned earlier into account. More recently the Hon'ble Supreme Court, in National Human Rights Commission Vs Union of India,^{xlii} appears to have gone further in establishing protection to refugees in the face of Imminent expulsion from the country, The All Arunachal Pradesh Student Union (AAPSU), a nongovernmental body, had issued -quit India notices to all alleged foreigners including the Chakma refugees living in the state, with the threat of use of force if its demands were not acceded to. Justice A.M. Ahmadi held that as the constitutional rights in Articles 14 and 21 are available even to non-citizens, the state is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the state. The Court recognised that the "quit India" notices amounted to a threat to life and liberty as understood

by Article 21, and that Chakmas could not be evicted from their homes except in accordance with law.

The decision is limited to threats of expulsion posed by an activist student union and it does not enter into a discussion of issues pertaining to expulsion notices issued by the central government even if they constitute a violation of Article 21. Nevertheless, protection even against expulsion orders issued by the government has been provided to refugees through a staying of deportation orders. In *Malavika Karlekar Vs Union of India*,^{xliii} twenty-one Burmese facing deportation from the Andaman Islands filed a writ petition with the Supreme Court pleading a violation of their rights under Article 21. The Court directed that the deportation order was to be stayed to allow the asylum seekers to approach UNHCR for refugee status. In some instances, detainees have been granted leave to travel to New Delhi, where the Office of UNHCR is located, in order to seek determination of refugee status e.g. *Khy-Htoon and others Vs the State of Manipur*, Gauhati High Court, 1990; *Bogyi Vs Union of India*, Gauhati High Court, 1989; and *Zothansangpuli Vs the State of Manipur*, Gauhati High Court, 1989. In *Bogyi Vs Union of India*,^{xliv} even in the absence of a pending application for refugee status, the Gauhati High Court ordered the temporary release of a Burmese man from detention for a two-month period so that he could apply for refugee status with UNHCR.

The petitions in these cases usually allege violation of Article 21 of the Constitution in the event that' the deportation orders are carried out. While the absence of reasons given in passing these interim motions staying the deportation orders results in an unclear legal position with respect to non-refoulement, the implication of the decisions would appear to be that a Successful application for refugee status by an asylum seeker preempts refoulement. That is why to B.S. Chimni is right when he observed that, "In the context of refugee rights, it can be argued 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"^{xlv}.

Indian courts do not have the authority to enforce the provisions of the above mentioned international human rights instruments unless these provisions are incorporated into municipal law by the legislature, and this process of incorporation in the Indian context has been largely ignored with respect to the above treaties. Parliament is under no obligation to', enact law to give effect to a treaty, and in the absence of such law judiciary is not competent to enforce obedience of the treaty obligations by the Executive. Thus, while India has the duty to carry out in good faith its obligations arising out of international law, the Indian government cannot offer acts or omissions on the part of their legislative or executive organs as an excuse for failure to fulfill the above obligations. In the event of failure of the government to bring its municipal law in line with its International obligations, international Law does not render such conflicting municipal law null and void.

Benefits granted to different groups of refugees in India appear to be determined by the' situation of the refugees in relation to the local people e.g. ethnic ties between refugee groups and the local population impacts upon assistance provided and to the relative burden they impose on the states concerned. This is particularly true for subjects like education that fall under the State List in the Indian Constitution. Thus the Chakma refugees in Tripura are worse off economically than are the Sri Lankan refugees in Tamil Nadu.

Administrative discretion is also paramount in the treatment of issues like the regulations of stay in the country of foreign nationals who are recognized as refugees under UNHCR's mandate. Afghan refugees recognized by the UNHCR in New Delhi have their residential permits regularly extended on the basis of renewal of their refugees certificates while Sudanese refugees with the UNHCR are often issued "Leave India"^{xlvi} notices by the government upon the expiry of their student visas.

The 1993 Protection of Human Rights Act established a recommendatory body called the National Human Rights Commission that has power to inquire into the "violation of human rights or abetment thereof."^{xlvii} The Commission is not restricted to investigating issues of concern to citizens only and, in fact, it has visited both the special camps for Sri Lankan refugees in Tamil Nadu and the camps for Chakmas in Tripura to investigate living

conditions there. It has also filed a petition in the Supreme Court on the threatened expulsion of Chakmas in Arunachal Pradesh. An issue here is whether a body like the Human Rights Commission may be used to take up cases of discriminatory treatment between refugees, especially in light the fact that some of the areas involved are related to primary education, fall clearly within the preview of recognized human right.

An examination of the potential role of the National Human Right Commission is also pertinent in the face of recent judicial decisions establishing standards with respect to non-refoulement and voluntary repatriation. As these judgments may be limited in their scope of application to particular refugee groups in identified areas of the country, a standardization of the norms established may take place through recommendations of the Commission. A denial of non-refoulement and voluntary repatriation standards applicable to other groups of refugees in the country, especially if these are other groups of refugees recognised by the governments, is clearly violative of human rights norms.

In this context, it needs to be stressed that repatriation should only be voluntary and be carried out in conditions of absolute safety. In the only case decided on the issue in India, the Madras High Court, in Pedumaran and Dr. S.Ramadoss Vs Union of India, has set standards with regard to the repatriation of refugees by emphasising grantee the voluntary character of repatriation.^{xlviii} A writ petition was filed seeking interim relief in the form of an induction to restrain the authorities from repatriating refugees against their will. It was argued by the petitioners that the Indian government was using force by reducing rations, limiting movement of refugees, and stopping the financial assistance that was previously given. The court in its findings established that Indian government had acted properly and in accordance with international law, laid special emphasis on UNHCR's role as an impartial third party in verifying the voluntary repatriations and on the fact that individual refugees had signed forms in English and Tamil where they had expressed their willingness to return. The state government was, however was ordered to translate the decision in Tamil language and circulate it in refugee's camps. The court also ordered that q circular in Tamil be posted in all refugee campus indicating that no refugee would be forcibly repatriated.

The court did not address the issue of whether reduction of rations, limitation of movement and the stoppage of financial assistance constituted coercion so as to render the repatriation involuntary. However, by presuming from the start that repatriations are necessary to be voluntary, and by examining whether the government's actions had sufficiently established "voluntariness", standards governing voluntary repatriations have been set by the court. The moot question is whether these standards are extendable to all other refugees in the country? The Court in this case was asked to pronounce judgment upon a very specific situation where the government already had in place a repatriation policy. In its judgment, the Court merely approved the policy and did not make any observations about the larger refugee context in the country.^{xlix}

Plight of Refugees in India

In 1992, India was host to nearly 4,00,000 refugees from eight countriesⁱ, but by 31st August, 1996 this figure came down to 2,38,001 refugees comprising 1,08,000 Tibetans, 56,830 Sri Lankans, 53,465, Chakrnas from Bangladesh, 18,662 Afghansⁱⁱ and 1,043 refugees of other nationalities. At the end of 2004, there were 11,071 mandate refugees in India and an estimated 160,000 refugees from Tibet, Sri Lanka and Bangladesh (Chakmas). Among these, the Tibetans, Sri Lankans and Chakrnas, are for all practical purposes, recognised as refugees by the Government of India. Even with regard to these groups, a common administrative procedure is not followed. While the Tibetans and Sri Lankans are issued refugee identity documents (the Tibetans are also issued travel permits), no such document is issued to Chakmas in the camps in Tripura state. Lists of refugees are pasted in these camps and they serve the same function as the identity documents of the Tibetans and the Sri Lankans i.e. they serve to identify people eligible for certain assistance benefits.^{lii} The Indian government, however, considers Afghans and refugees of other nationalities to be foreign nationals temporarily in India and does not officially recognise their refugee status. Therefore, it is upto the UNHCR to recognise them as refugees and assist those in need. With respect to the Sri Lankans, the Indian government has allowed UNHCR a limited role of monitoring the voluntariness of their repatriations.

Thus from the above analysis it can be discerned that India has been a major Third World country of concern in the context of refugee movements. Almost all the refugee generating factors have been active here and have impinged on this is perhaps one reason that the refugee situation here does not seem to be alarming. But it remains a fact that over two lakhs of refugees who are still in country, do strain an already overburdened economy, sometime even inviting hostility from the local population. Apart from straining a weak economy, it also has implications for the security of the country. The pressure of hundreds of thousands of refugees has often created conditions for destabilisation and disruption of political, economic and social systems in the country.

The extent and intensity of this threat naturally depends upon the number of refugees and their demands and expectations. It is also noticed that despite being non-signatory to the international refugee regime, India has hosted some of the largest refugee movements of modern times. However, the Government of India has consistently preferred to deal with the refugee issue on a bilateral basis and without international involvement. Earlier UNHCR involvement in India was limited to assistance provided for Tibetan refugees through the League of Red Cross Societies in the 1960s, and assistance to refugees from former East Pakistan (now Bangladesh) in the 1970s. But, the closure of UNHCR's Office in 1973 blocked the opportunity to develop sustained cooperation with the Indian authorities. On the other hand, refugee groups such as the Afghans, with whom UNHCR in India has dealt directly for over a decade, are not considered to be refugees by the government and of marginal interest to it. In India, UNHCR was, therefore, for many years seem to have a mandate of little relevance to India and dealing with issues of limited relevance to the government.

Since the reestablishment of a UNHCR presence in 1981, the government has made a clear distinction, between those refugee groups who are considered as refugees by the Indian authorities and assisted by them and to whom UNHCR has not been permitted access nor allowed to play any role, and, those persons who are not considered as refugees by the government and for whom UNHCR is allowed to exercise its mandate.

In recent years, there has been a significant shift in the level of cooperation between the Indian authorities and UNHCR. The organization's role in the Sri Lankan repatriation has led to a deeper appreciation of the mandate and greater interest in its functioning. Indeed, close working relations with the Indian government on UNHCR's verification of the repatriation process has affected cooperation in a wider arena. The GOI's decision to seek membership of the Executive Committee is a reflection of this new concern. Although, UNHCR in India has functioned under the UNDP umbrella since 1981 and has not been permitted to establish an independent presence, it is time the Indian authorities enter into a Branch Office Agreement with UNHCR as soon as possible. It will facilitate better conduct and coordination of the refugee relief work. By being on the Executive Committee of UNHCR, the GOI has already, by implication, conceded the importance and utility of UNHCR.

The Primary objective in India should be to seek a formal accreditation of the former and extend its role by gaining access to all refugee groups in the country and secure accession of India to the 1951 Convention and 1967 Protocol. In fact, it has been actively soliciting greater Indian participation in refugee affairs and trying to create public interest on refugee issues through a vigorous programme of promotional activities relating to the discrimination of refugee law, encouragement of research and studies on refugee issues and creating awareness of refugee problems with local institutions of higher learning NGOs and professional bodies. Complimenting the Indian response to refugees, a study of the US Committee for Refugees observed:

Despite the curbs on international assistance and monitoring, India has accorded a welcome to asylum-seekers that is as generous as for any refugee groups in Asia. The record is not unblemished, to be sure. There have been instances of pushback and coercive measures to promote repatriation, but it has largely been the case that any person, who has landed on the shore and asked for refuge, has been granted refuge.^{liii}

Despite this India has faced and is still facing acute refugee problem, leaving aside their minor influxes, it is neither a party to the 1951 Refugee Convention or 1967 Protocol and nor has a specific legislation on Refugee Law. The government generally meets its

humanitarian obligations towards refugees and asylum seekers, but prefers to do so as a matter of administrative policy rather than as a legal requirement. It has, however, handled this issue at the political and administrative levels well. A virtual consequence is that refugees have to be treated under the law applicable to aliens in India, unless it makes a specific provision as it did in the case of Ugandan refugees of Indian origin when it passed the Foreigners from Uganda Order 1973.^{liv}

The concept of 'Refugee Law' in the Indian judicial system has evolved over a period of time. Due to lack of a refugee specific statute, the judicial system is constrained to enforce upon refugees, laws which are applicable to foreigners in general thereby 'consciously or subconsciously ignoring the unique predicament peculiar to refugees'.^{lv} Continued developments through the courts, government and international for a will all contribute to the process of making additional space for the humanitarian and legal concerns of forced population movements which result in refugee flows.

Thus, to have a proper perspective with international organization on the issue there is urgency in India to adopt the model national legislation as a first step in this direction. India has restrictive laws governing the entry and stay of foreigners. Lack of such legislation, a refugee may feel it difficult to lead a life without uncertainties and fail to work or travel and protected himself/herself from to whims of the government. A recognized system for refugees would carry the attendant privileges of government-issued travel and identity documents as well as greater freedom of movement within and outside of India. This status, in turn, would afford refugees greater protection from refoulement and make their stay in India less precarious. However, the promotion of a national legislation and framework for refugee protection is inherently a political and gradual process. From the perspective of a developing country it is indeed a worthwhile experience in respect of understanding the evolution of law. In India, the UNHCR has found ready acceptance and its work, in conformity with the Government of India, has become one of the guiding factors for solving the problems of refugees. It is hoped that in the contemporary changed global political

scenario as well as, the emergent dynamics of the 21st century, India may make an earnest attempt to recheck its decision and become a party to the Refugee Convention and the Protocol, which will add to its international stature.

Reference:

- i Lok Raj Baral and S.D. Muni, "Untroduction: Refugees, South Asia and Security", S.D. Muni and Lok Raj Baral, ed., *Refugees and Regional Security in South Asia*, Konark, Delhi;1996,p.1.
- ii J.M. Castro-Magluff, "Role of the UNHCR in Addressing the Problem of Forced Migration", ed., Om Parkash Mishra, *Forced Migration in the South Asian Region-Displacement, Human Rights and Conflict Resolution*, Manak, Delhi, 2004, pp. 97-98.
- iii Georges Vernez, "Current Global Refugee Situation and International Public Policy", *American Psychologist*, Vol.46, No.6, June 1991, p. 627.
- iv Gil Loescher, "Refugee Movements and International Security", *Adelphi Paper*, No. 268, IISS, London, 1992, p. 9.
- v *Basic Facts About The United Nations*, The UN Department of Public Information, New York, 1995, p.224.
- vi UNHCR, *The State of the World's Refugees 1997-98: A Humanitarian Agenda*, Oxford University Press, New York, 1997, p.289.
- vii Joseph M. Kitagawa ed., *American Refugee Policy: Ethical and Religious Reflections*, Fund for World Relief, New York, 1983, p. 87.
- viii UNHCR, *Convention and Protocol Relating to the Status of Refugees*, Geneva, 1996, p.16.
- ix UNHCR, *The State of the World's Refugees 1997-98*, n. 6, p. X.
- x Martin S. Kenzer, "Focus: Global Refugee Issues at the Beginning of the 1990s", *The Canadian Geographer*, Vol.35, No.2, 1991, p.189.
- xi *UNHCR Information Paper*, UNHCR Secretariat, Geneva, 1997, p.4.
- xii *UNHCR by Numbers*, Public Information Section, UNHCR, Geneva, 1996
- xiii Mel Gurtav, "Open Borders: A Global-Humanist Approach too the Refugee Crisis", *World Development*, Vol. 19, No.5, 1991, p.485.
- xiv Noilot, "The Era of Homeless Man", *Geography*, Vol. 72, No.2, 1987, pp. 109-121.
- xv S.D. Muni and Lok Raj Baral (ed.), *Refugees and Regional Security in South Asia*, Konark Publishers Pvt. Ltd., Delhi;1996, pp.9-18.
- xvi B.S. Chimni, "The International Law", *Seminar*, No. 463, March 1998, New Delhi, p. 20.
- xvii Saumitra Mohan, "India, UNHCR and Refugees: An Analytical Study", *Journal of Peace Studies*, Vol. 10, No.3, July-September, 2003, p. 44.
- xviii UNHCR, *India Fact Sheet*, No.2, New Delhi, August 1998, p.1.
- xix UNHCR, *UNHCR in India: An Information Paper for Refugees and Asylum Seekers in India*, UNHCR, Delhi, 1998, p.5.
- xx UNHCR, n.18.
- xxi A Leroy Bennet, *International Organisation: Principles and Issues*, Prentice Hall, New Jersey, 1998, p.290.
- xxii UNHCR, "Afghan Refugees in India", *UNHCR*, New Delhi, January 1996.
- xxiii Asha Hans, "Repatriation of Sri Lankan Refugees from India", *Bulletin on IHL & Refugee Law*, Vol.2, No. 1 pp. 93-118.
- xxiv *Ibid*, p. 114.
- xxv *UNHCR in India*, UNHCR, New Delhi, 1998, p.5.
- xxvi UNHCR and India, *World Focus*, Vol.20. No. 1, January 1999, p. 18.
- गगअपप न्छम्ह्ए ब्वनदजतल व्वमतंजपवदे व्वसंद वित प्दकपं.2006ए व्वंज प्रु व्वमतअपमूए न्छम्ह्ए छमू व्वमसीपए 2006ए व्वण२
- xxviii B.S. Chimni, "The Legal Conditions of Refugees in India", *Journal of Refugees Studies*, Vol. 7, No. 4, 1994, p. 379.
- xxix Dr. Najma Heptulla, Special Address, *Refugees in the SAARC Region: Building a Legal framework*, a seminar jointly organized by SAARCLAW and UNHCR, 2-3 May 1993, New Delhi, p.25.

- xxx Irene Khan, "Opening Remarks", *Ibid*, p.29.
- xxxi UNHCR, *Regional Consultations on Refugee and Migratory Movements in South Asia*, UNHCR, Delhi, 1996, p.10.
- xxxii "India may sign Convention on Refugees", *World Focus*, January 1999, p.19.
- xxxiii Rumki Basu, *The United Nations*, Sterling, New Delhi, 1992, p.357.
- xxxiv Shrinivas Gupta, "Influx of refugees and international law", *Link*, November 22, 1992, p.29.
- xxxv Smrithi Talwar, "Building a Regional Consensus or Asylum: The Indian Perspective", *Regional Consultations on Refugee and migratory Movements in South Asia*, UNHCR, New Delhi, 1996, p.45.
- xxxvi *Ibid*, pp.6-7
- xxxvii *The Constitution of India*, Central Law Publications, Allahabad, 1994, p.21
- xxxviii The word 'alien' is nowhere defined in Indian Legal corpus. However, it does appear in the Constitution of India (Article 22 para 3 and Entry 17, List I, Schedule 7), in section 83 of the Indian Civil Procedure code, and in section 3(2)(b) of the Indian Citizenship Act, 1995, as well as several other statutes.
- xxxix *The Constitution of India*, n.36, p.191.
- xl Section 3, *Foreigners Act 1946*, provides the power to make orders and is drafted very broadly- "The Central Government may by order make provision, either generally or with respect to all foreigners, or with respect to any particular foreigner or any prescribed class or description of foreigner for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefore or their pressure."
- xli Talwar, n.35, p.50.
- xlii *Ibid*.
- xliii *Ibid*,p.51.
- xliv *Ibid*.
- xlv B.S. Chimni, "The Legal Conditions of Refugees in India", *Journal of Refugee Studies*, Vol.7, No.4, 1994, p. 380.
- xlvi Talwar, n.35, p.52
- xlvii *Ibid*, p.53.
- xlviii B.S. Chimni, "Refugees in International Law", *Seminar*, No. 463, March 1998, New Delhi, p.21
- xlix Talwar, n.35, p.53.
- l United States Committee for Refugees, *World Refugee Survey*, 1993, p.89.
- li *Global Appeal: Programme Overview 1999*, UNHCR's Funding and Donor Relations Service, Geneva, 1998, p.159.
- lii Talwar, n.35, p.52
- liii V. VijayKumar, "Should India Ratify the Refugee Convention and Protocol?: A Policy Perspective", *Bulletin on IHL and Refugee Law*, Vol.2 No.2 A, July-December, 1997, p.326.
- liv J.N. Saxena, "Refugee Rights", *Bulletin on IHL and Refugee Law*, Vol3, No.2, July-December 1998, p.245.
- lv Sumbul Rizvi, "Response of the India Judicial System to the Refugee Problem", *Bulletin on IHL and Refugee Law*, Vol.2, No.1, January-June 1997, p.65