CHAPTER-III

INDIA’S INTERNATIONAL OBLIGATIONS AND NATIONAL LAWS TOWARDS REFUGEES

3.1 Introduction

India has been receiving refugees right from its independence in 1947. Its doors have been opened to Tibetans, Sri Lankans, Chakmas, Afghans and the ten million who fled East Pakistan in 1971. The Government of India has seen the refugee problem from a broader perspective derived from its ancient cultural heritage. Reminding the Indian ethos and the humanitarians thrust, Buddha to Gandhi, Justice V.R. Krishna Iyer, has give message in these words:

“\textit{The Indian perception is informed by a profound regard for personhood and a deep sentiment to prevent suffering. Ancient India’s cultural vision has recognized this veneration for the individual. The ManuSmriti deals elaborately with Dharma even amidst the clash of arms. The deeper springs of humanitarian law has distinguished the people of India by the very that Dharma Yudha of the humanitarian regulation of the warfare, is in the very blood of Indian history. In the Mahabhartha and Ramayana, the great epics of India, we find inviolable rules of ethics and kindness to be observed even by warring rulers in battlefield. One may conclude that Indian Constitution in enacting fundamental duties in Article 51-A has cast on every citizen the duty to promote harmony among all people of India, to have compassion for living creatures and to develop humanism and abjure violence. Thus humanitarian legality and concern for refugee status are writ large in the Indian ethos.}”

The 1951 Convention Relating to the Status of Refugees goes about as the premise and establishing mainstay of international refugee law. The Convention gives a meaning of term refugee and recommends certain benchmarks which states must hold fast to while managing refugees. While ratification of a treaty clearly conveys in rem, the government's express intention that the state is willing to be bound by the convention concerned and its endeavor to satisfy the convention’s

procurements; non ratification conveys, if not otherwise, the readiness to be obliged to. The inexorably trouble in accommodating the helpful driving forces and commitments with their household needs and political substances regularly disheartens the states not to sign the 1951 Convention as it is rights based. Along these lines non signatory state implies a state, regardless of its appreciation for refugee law which has neither approved the Convention nor the 1967 Protocol. Though the non signatory states are not obliged to secure and guarantee the privileges of the outcasts, in any case, in a roundabout way they are under a legitimate commitment to regard those rights on the off chance that they are members to Human Rights Conventions and India is a glaring case of it.\(^2\)

Our country is enmeshed in laws that it does not need particularly in the area of economic regulation and embarrassed by the absence or defectiveness of laws that it does not need, particularly in respect of human rights. Conspicuous among the latter is the absence of a comprehensive national law on refugees, an omission compounded by India’s inability thus far to become a party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol on that subject. These absences and omissions euphemistically called gaps are all the mere glaring because India is a member of the Executive Committee of the office of the United Nations High Commissioner for Refugees. The members of that committee are selected on the basis of their demonstrated interest in and devotion to the solution of the refugee problem. In other words they are meant to set an example for other to emulate. It is difficult to set an example in the absence of an appropriate national law that is fully in conformity with the dictates of our Constitution and international law. The anomaly is doubly awkward because India has a great and unbroken tradition of granting asylum to those who have sought it and of responding with generosity to the needs of refugees of this historical record, India can rightly be proud. But it is now time to move on expeditiously towards making our laws and daily practice confirm more fully without finest traditions and with the constitutional and international proprieties expected of us. It is not enough to leave policies and practice in respect of refugees to adhoc administrative decisions especially when such decisions can on occasion, even if inadvertently be discriminatory or arbitrary.

Despite of the existing refugee problem in India, it is a reality that India has neither signed the 1951 Convention Relating to the Status of Refugees nor its 1967 Protocol. There is also no specific legislation that deals with refugees. The question in this case arises does India have no international obligations in the context of refugees’ issues as it is not party to the sole Refugee Convention of 1951? Before giving the answer of this question the need here is to highlight the reasons of India for not acceding to the Refugee Convention of 1951.\(^3\)

Many reasons have been put forward to explain this which are as follows:

- The perception that the 1951 Convention is a cold war instrument, titled in favour of political refugees and therefore inappropriate for the South Asian situation where the mass exodus of refugees is caused mainly by generalised conflict.
- There is a fear in the mind of policy makers that if they will sign the convention then they shall be bound by certain obligations which they may not be in a position to fulfill in terms of resource mobilization.
- The apprehension by the state authorities that the refugees are abusing the convention in a way that they are involved in the activity of collecting funds for terrorist activities in their countries of origin.\(^4\)
- Reference is also made to the Eurocentric definition of refugees contained in the 1951 Convention. It is pointed out that the definition is confined to the violation of civil and political rights and does not extend to social, economic and cultural rights. Further the definition also excludes protection to individuals or groups fleeing internal wars or situations of generalised violence.
- It is said that once India becomes a party to the 1951 Convention it would allow, vide Article 35, intrusive supervision by UNHCR of the national refugees regime. The organisation would have to be permitted among the other things, access to refugee camps and detention centres. It is alleged that


this is a problem in as much as UNHCR is an agency which acts on the behest of Western donor countries.

- It is also pointed out that the 1951 Convention does not allow an effective protection of India’s national security interests. Terrorists and other criminal elements could abuse its provisions to get refuge in the country. India’s porous borders only accentuate this problem as the nature of the borders makes it difficult for the state to administer any formal refugee regime.

- It is also argued that India’s record in giving assistance and protection to refugees is satisfactory and therefore there is no particular reason for it to accede to the 1951 Convention.\(^5\)

However, reasons for not acceding do not withstand close scrutiny. Firstly, a state that becomes a party to the convention is not prevented from including a broader definition of refugee in implementing national legislation. Albeit, there may be some merit in the argument that the convention definition should be broadened before India becomes a party to it. It could be contended that the argument for expanding the definition of refugee would receive more attention once India acceded to the 1951 Convention. Secondly, it is not true that India has to implement in totality the rights regime contained in the 1951 Convention. The Convention permits reservations to be made to the rights regime that it establishes and several third world countries have made such reservations. Article 42 (1) of the Convention provides that “At the time of signature, ratification or accession any state may make reservations to Articles of the convention other than Article 1, 3, 4, 16 (1), 33, 33-46 inclusive.”\(^6\) With respect to all other rights embodied in the 1951 Convention reservation can be entered into. To put it in a different way, India’s concern relating to the right to employment, housing and public relief can certainly be met through entering the appropriate reservations. Thirdly, while India does have genuine concerns about its national security interests, the 1951 Convention contains provisions that go some way in protecting them. Article 33, which contains the principle of non-refoulement states that a refugee cannot claim the benefit of this


\(^6\) Ibid.
provision on the grounds that when there is a reasonable apprehension that the person can be a threat to the security of that country or who has been convicted of a serious crime which constitutes a danger to the community of the country. The security interests of member states are also safeguarded by what are called exclusion clauses. As per Article 1F if a person is guilty of serious non political crimes which he has committed outside the country in which he has taken refuge prior to his acceptance as a refugee in that country cannot claim the protection of convention in such a case. In time of war or other serious and exceptional circumstances Article 9 of the Convention allows certain other provisional measures which it considers to be essential to national security. Further every refugee, vide Article 2 of the Convention, is required to respect all the laws of the host state.\(^7\)

Besides all these provisions in the 1951 Convention Relating to the Status of Refugees it is a reality that the provision of burden sharing is missing in the convention. And at present some of the poor third world countries have hosted and are hosting a large chunk of refugees. Explaining the concept of burden sharing, Amitav and David B. Dewitt have observed that “The Governments in the Third World are extremely sensitive to the fact that humanitarian operations even by supposedly neutral multilateral organizations are a violation of sovereignty and constitute an unacceptable interference in their internal affairs.” Despite having a close scrutiny at the reasons given by India for not acceding to the 1951 Convention it seems that in coming time there is no hope that India will sign the convention.

The largest movements of population so far in the world have taken place within South Asian region that has met with a very poor response by international community. Linking population movements with the concern for the growth of the regional organization have also contributed to ignoring the accession of these two instruments. Myron Weiner has observed that porous borders and cross border population movements in South Asia are regarded as issues that affect internal security, political stability and international relations, not simply the structure and

\(^7\) Id.at p.446.
competition of labour market or the provisions of services to newcomers and advanced the reason for not taking up the issue relating to migration in the region.  

3.2 India's International Commitments

In the absence of India's becoming party to 1951 Convention Relating to the Status of Refugees and its 1967 Protocol it seems that it has no international obligation in the matter of protecting refugees and their rights. But it will be too early to reach this conclusion solely on the pretext that India has no international commitments because it has not signed the sole Refugee Convention of 1951. The issue of refugees and human rights are closely interlinked. Human Rights jurisprudence flourished with the establishment of UN Charter in 1945. India has signed various international instruments that deal with human rights of refugees as well. The long tradition of India in providing humanitarian assistance to the refugees is governed by the international obligations chosen by it. Some of the human rights instruments of which India is signatory are discussed as under.

3.2.1 Universal Declaration of Human Rights (UDHR)

The UDHR which was adopted by the General Assembly on 10 December, 1948, was the consequence of the experience of the Second World War. With the end of that war and the establishment of the United Nations, the global group pledged never again to permit abominations like those of that contention happen again. World pioneers chose to supplement the UN Charter with a guide to ensure the privileges of each individual all over the place. The document they considered and which would later turn into the Universal Declaration of Human Rights was taken up at the primary session of the General Assembly in 1946.  

The preamble of UDHR clearly recognizes “The inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.” Article 2 of UDHR states that “Everyone is entitled to all rights and freedom set forth in this declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status.” Furthermore no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs whether it be independent, trust, non-self governing or under any limitation of sovereignty. While UDHR provides rights to all human beings that includes refugees also but there are certain specific articles in the declaration that addresses the issues of refugees for e.g. Articles 13, 14 and 15. Article 13 states that “Everyone has the right to freedom of movement and residence within the borders of each state\(^{10}\) and everyone has the right to leave any country, including his own and to return to his country.”\(^{11}\) Article 14 states that “Everyone has the rights to seek and to enjoy in other countries asylum from persecution.”\(^{12}\) But this right may not be invoked in the case of prosecutions genuinely arising from non political crimes or from acts contrary to the purposes and principles of the United Nations.\(^{13}\) And Article 15 (1) & (2) deals with right to nationality alongwith right to change his nationality and right against arbitrarily deprivation of his nationality.

Given that the UDHR is now considered jus cogens, these are universally accepted and enforced by all state parties, regardless of whether they have signed the 1951 Convention or the 1967 Protocol. Other important rights that the declaration advocates are the right to life, right against torture, slavery, arbitrary arrest and detention.\(^{14}\) There is also a unique inter relationship between the UDHR and the Refugee Convention. Around eighty six percent of the refugees in the world live in states that have signed or ratified the ICESR and ICCPR. Furthermore, the human rights agreements and the Refugee Convention set covering ensures. Accordingly, as James Hathaway perceives, refugee rights will as a rule involve a mix of standards coming from both refugee law and the International Bill of Rights. In addition, the

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\(^{10}\) Article 13 (1) of UDHR, 1948.

\(^{11}\) Article 13 (2) of UDHR, 1948.

\(^{12}\) Article 14 (1) of UDHR, 1948.

\(^{13}\) Article 14 (2) of UDHR, 1948.

prevailing way to deal with deciding key parts of the refugee definition is known as the "human rights approach" and draws widely on the UDHR.\textsuperscript{15}

\subsection*{3.2.2 \textit{International Covenant on Civil and Political Rights (ICCPR)}}

The International Covenant on Civil and Political rights is a multilateral arrangement embraced by the United Nations General Assembly on 16 December, 1966 and it came into power from 23 March, 1976. It confers its parties to regard the common and political privileges of people including the rights to life, opportunity of religion, the right to speak freely, freedom of assembly, electoral rights, right to due procedure and many more.\textsuperscript{16} India has ratified ICCPR on April 10, 1979. There are certain provisions in the covenant that directly deal with the refugees. Article 12(2) of ICCPR states that “Everyone shall be free to leave any country including his own.” And no one shall be arbitrarily deprived of the right to enter his own country.\textsuperscript{17} Another important provision is Article 13 which restricts the power of the state as it provides that an alien who is with the territorial limits of a state and his stay there is of lawful nature then if the state authorities want to expel him from their country they can only do so within the parameters of law. It means aliens cannot be expelled arbitrarily. A procedure has to be followed as per the law of that country. Further it states that the alien which includes refugee is permitted to present the reasons against his expulsion from the nation and to have his case explored by and be spoken to for the reason before the required authority or before a person particularly assigned to deal such cases. In other words the principle of non refoulement has been stated in Article 13 of ICCPR as similar to Article 33 of the 1951 Convention. In short a refugee can only be expelled after a due process of law is followed. India's ratification of ICCPR place the country under an obligation to accord equal treatment to citizens and non citizens wherever possible although India

\textsuperscript{15} Adrienne Anderson, “On Dignity and whether the Universal Declaration of Human Rights remains a place of refugee after 60 years”, \textit{American University International Law Review}, available at: http://www.auilr.org/ (Visited on July 2, 2014 at 5.30pm).


\textsuperscript{17} Article 12 (4) of ICCPR, 1966.
has put in a reservation to the ICCPR, reserving its right to implement its law on foreigners.\footnote{Niraja Gopal Jayal, \textit{Citizenship and its Discontents: An Indian History}, (Library of Congress, USA, 2013).}

### 3.2.3 International Covenant on Economic Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights together with its sister covenant ICCPR and the Universal Declaration from the International Bill of Human Rights which is the column for human rights protection within the United Nations. The ICESCR was embraced by General Assembly Resolution 2200 A (XXI) of 16 December, 1966. The covenant mirrors the responsibilities embraced after World War II to advance social advance and better measures of life, reaffirming confidence in human rights and utilizing the universal apparatus to that end. Since the ICESCR is a universal human rights arrangement, it makes legitimately restricting global commitments to those states that have consented to be bound by the principles contained in it. The Preamble of the agreement perceives, inter alia, that “Economic, social and cultural rights get from the inalienable respect of the human individual and that the ideal of free human beings getting a charge out of flexibility of apprehension and need must be accomplished if conditions are made whereby everybody may make the most of his economic, social and cultural rights and additionally civil and political rights.”

Moreover the general standards of the covenant are: (i) Equality and non discrimination concerning the satisfaction in all rights put forward in the treaty and (ii) State parties have a commitment to regard, ensure and satisfy economic, social and cultural rights.\footnote{“Background Information on the ICESCR”, available at: http://www.escr-net.org/ (Visited on July 3, 2014 at 1.25am).}

India ratified the ICESCR on 10 December, 1979. Though the covenant does not specifically use the term refugees but some of its provisions have direct relation in protecting the rights of the refugees. One of the important provisions of Covenant is Article 1(1) which gives the right of self determination to every individual. Because of this right they unreservedly decide their political status and freely seek their economic, social and cultural development. In other words it means that the
parties to the covenant shall allow the refugees who are residing in their territory to pursue and practice their own culture. Not only this they also have the right to pursue economic activities and practice these acts which make them socially advanced also. Another important provision is Article 2 (3) of ICESCR. In this it is written that the developing countries with due regard to human rights and their national economy may determine as to what extent they would guarantee the economic rights recognized in the present covenant to the non-nationals. Moreover the state parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.\textsuperscript{20} It means an obligation has been imposed on the parties to the covenant that the developing countries would determine the extent of providing economic rights to the non nationals which include refugees but as per their national economy. It means economic right of the refugees is well preserved by this provision of ICESCR.

3.2.4 **Convention on the Rights of the Child (CRC)**

Over history there have been various universal treaties and documents that define the privileges of a child. Before World War II the League of Nations had embraced the Geneva Declaration of the Rights of the Child in 1924. The United Nations made its first stride towards announcing the significance of child rights by setting up the United Nations Children's Emergency Fund in 1946. The main UN report exceptionally centered around child rights was the Declaration on the Rights of the Child however as opposed to being a legally binding document it was more similar to an ethical aide of conduct for governments. It was not until 1989 that the worldwide group embraced the United Nations Convention on the Rights of the Child, making it the first international legally binding document concerning child rights.\textsuperscript{21}

For the purposes of the present convention, a child means “Every human being below the age of 18 years unless under the law applicable to the child,

\textsuperscript{20} Article 2 (2) of ICESCR, 1966.
The convention clearly states in Article 2 that “The state parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” Even inherent right to life of every child is recognized under Article 6 of the Convention. Article 7 of the Convention gives the child the right to acquire a nationality and also ensures the implementation of these rights in accordance with their national laws and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless. The specific provision related to refugee status has been discussed elaboratively under Article 22 CRC. It states that “the state parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present convention and in other international human rights or humanitarian instruments to which the said states are parties.” Further it provides that “For this purpose, state parties shall provide as they consider appropriate, cooperation in any efforts by the United Nations and other competent inter governmental organisation or non governmental organisations cooperating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason as set forth in the present convention.”

India ratified the Convention on the Rights of Child on 11 December, 1992. And therefore India has obligation to protect the rights of refugee children against all forms of abuse sexual exploitation, torture, abduction, child labour and trafficking.

22 Article 1 of CRC, 1989.
23 Article 22(1) of CRC, 1989.
24 Article 22(2) of CRC, 1989.
etc. Along with it the present convention puts obligation on India as to take care of
refugee children who have been separated from their parents and to provide them the
same protection like any other child if he has been in the same situation.

3.2.5 Convention on the Elimination of All forms of Discrimination Against
Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against
Women, adopted in 1979 by the General Assembly, is often described as an
International Bill of Rights for Women. Consisting of a Preamble and thirty articles,
it defines what constitutes discrimination against women and setup an agenda for
national action to end such discrimination. India ratified this convention on 9 July,
1993 and there commits to protect the rights of women including refugee women.
The convention is important as numerous rights have been given to women under it
like condemning of discrimination against women in all its forms, to ensure the
full development and advancement of women for the purpose of guaranteeing them
the exercise and enjoyment of human rights and fundamental freedoms on the basis
of equality with men, to adopt legislation and take all appropriate measure in order
to suppress all forms of traffic in women and exploitation of prostitution of
women, to grant women equal rights with men to acquire, change or retain their
nationality, to ensure to them equal rights with men in the field of education, and
in employment. Another important provision is Article 15 of the present
convention which states that “The state parties shall accord to men and women the
same rights with regard to the law relating to the movement of persons and the
freedom to choose their residence and domicile.” Similarly Article 16 provides that
“The state parties shall take all appropriate measures to eliminate discrimination
against women in all matters relating to marriage and family relations and in
particular shall ensure, on a basis of equality of men and the same right freely to
choose a spouse and to enter into marriage only with their free and full consent.”

25 “UN Committee on the Elimination of Discriminations Against Women”, available at:
27 Article 3 of CEDAW, 1979.
29 Article 9 of CEDAW, 1979.
30 Article 10 of CEDAW, 1979.
31 Article 11 of CEDAW, 1979.
After analysing the above mentioned provisions of the convention it can be concluded that these rights hold utmost important for the refugee women as they are more vulnerable. In the absence of India's being party to the 1951 Convention which protects the rights of refugees, its obligation to safeguard the rights of women refugees in particular arises under CEDAW.

3.2.6 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment is a global human rights instrument under the review of the United Nations, that expects to avoid torment and savage, barbaric debasing treatment or punishment around the world. The convention obliges states to take compelling measures to avert torment inside their fringes and precludes states to transport individuals to any nation where there is motivation to trust they will be tormented. The content of the Convention was adopted by the United Nations General Assembly on 10 December, 1984 and its came into power on 26 June, 1987. The day of 26 June is presently perceived as the International Day in support of Victims of Torture in the honor of the Convention. Though India has signed the Convention Against Torture on 14 October, 1997 but it has not yet ratified it.

Before coming to the provisions of this convention that protects the rights of the refugees it seems pertinent here to define the term torture. Article 1 of the convention states that the term torture means “Any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession punishing him for an act he or third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The important provisions related to refugees in this convention are Article 2 and Article 3. Article 2 lays down that “Each state party shall take effective legislative, administrative, judicial or other measures to prevent

acts of torture in any territory under its jurisdiction.” Whether it is a state of war or threat of war, internal political instability or any other public emergency none of such exceptional circumstances may be invoked as a justification of torture. Even an order from a superior officer or a public authority may not be invoked as a justification of torture. Article 3 is another important provision as it contains the principle of non refoulement as mentioned under Article 33 of the 1951 Convention Relating to the Status of Refugees. It is clearly mentioned in Article 3 of the CAT that “No state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.” In simple terms it means that no person can be compelled to move at such place where there is a reason to believe that such person shall be subjected to torture. This provision is extremely important and relevant as it protects the right of non refoulement of refugees.

3.2.7 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

This convention obliges nations to censure all types of racial segregation whether taking into account race, colour, descent or national or ethnic beginning and to seek after an approach of dispensing with racial separation. Nations must ensure everybody's entitlement to uniformity in the witness of the law and to various political, civil, economic, social and cultural rights. The ICERD perceives that governmental policy regarding minorities in society measures might be important to accomplish these ends. The convention additionally builds up the Committee on the Elimination of Racial Discrimination which is enabled to consider grievances from different nations about infringement of the ICERD and in specific circumstances individual or group protestations. Its part is additionally to screen progress towards full execution of the convention in the countries that have ratified the convention.\(^{33}\)

India ratified the convention on 3 December, 1968. As a state party to ICERD, India has an obligation to prohibit and bring to an end discrimination\(^{34}\)


\(^{34}\)“Hidden Apartheid: Caste Discrimination Against India's Untouchables”, Shadow Report to the UN Committee on the Elimination of Racial Discrimination, Vol.19, No.3(c) Human Rights Watch, 114 (2007).
based on caste, colour or race. The importance of this convention lies in the fact that it prohibits the state parties to discriminate any person only on the reason that he belongs to a specific race. A refugee's right against discrimination is well safeguarded by ICERD. Article 2 calls on state parties to “Condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. For this each state party shall take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” Article 5 is the other important provision of this convention as it enumerates a bundle of rights which are available to everyone without any distinction as to race, colour, national or ethnic origin such as: Right to freedom of movement, Right to leave any country including one's own and to return to one's country, Right to nationality, Right to marriage, Right to housing, Right to education and training, Right to public health and medical care etc. In this way ICERD sets out a framework against discrimination and makes state parties to adopt effective means to curb the evil of discrimination.

3.2.8   India and Executive Committee (ExCom)

The UN Economic and Social Council (ECOSOC) built up the Executive Committee of the High Commissioner’s Program (ExCom) in 1958 and the administering body formally appeared on January 1, 1959. A UN General Assembly resolution (116 {XII}) had asked for ECOSOC to build up an official advisory group comprising of delegates of UN member states or members of any of the specialized agencies. It determined that these representatives ought to be chosen by the council on the most extensive conceivable topographical basis from those states with an exhibited interest for and dedication to the arrangement of the refugee issue.35

Since the ExCom represents the community of states in the exercise of its functions, states that are not party to the 1951 Convention Relating to the Status of Refugees are hence not excluded from UNHCR for instance, India became member

of ExCom in 1995 but it is not party to the Refugee Convention. In fact, it is
acknowledged that all member states of the UN recognize and accept UNHCR's
mandate.36

Pursuant to its statute, UNHCR can request ExCom's advice with respect to
its functions. Given that UNHCR's responsibilities related to international refugee
law are activities that UNHCR is statutorily mandated to carry out in order to fulfill
its international protection function, UNHCR may seek ExCom's advice that relates
to these responsibilities as well. ExCom's advice is provided in the form of
conclusions on international protection. Ex Com, like the General Assembly has
provided advice related to groups of refugees including refugee women, children
and elderly persons and has provided guidance on UNHCR's protection work on
topics ranging from the registration of refugees to solutions such as resettlement.37

Though India has not become party to the 1951 Convention Relating to the
Status of Refugees but by signing a number of other human rights conventions India
has accepted its obligations to protect the rights of aliens which include refugees
also. Thus despite of being non party to the Refugee Convention of 1951, India
being signatory to various other international instruments has committed to protect
and honour the rights of refugees.

3.3 **SAARC and Issue of Refugees**

Cooperation in the South Asian region predates the setting up of the South
Asian Association for Regional Cooperation (SAARC). With a common cultural
heritage and historical legacy, the ties among the people of the region have been
extensive and deep-rooted. The birth of SAARC is only an official recognition of
this commonality by the new post-colonial states. SAARC was conceptualised as an
organisation that would accelerate economic growth, gradually bring about the
formation of a unified market, promote a regional transportation network, and bring
about social development in the region. The SAARC Charter clearly lays down that
cooperation among member-states will be based on sovereign equality, territorial

37 Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation*, 53
integrity, political independence and non-interference in internal affairs. The Charter further states that such cooperation will not be an obstacle to other bilateral or multilateral cooperation or be inconsistent with them.\(^\text{38}\)

At the regional level, SAARC can play an important role in formulating a regional convention on refugee management.\(^\text{39}\) But SAARC does not permit bilateral and contentious issues to be brought on its agenda and as most of the refugee issues are bilateral and contentious in nature, SAARC cannot address them. There is a pressure for liberating SAARC from this disability of not discussing bilateral and contentious issues particularly from countries like Pakistan, Bangladesh and Nepal. But this is politically motivated pressure not sincerely concerned with the resolution of problems and evolution of mutually accommodative solutions. Notwithstanding this debate on the acceptance of bilateral and contentious issues the fact remains that the SAARC forum and frequency of meetings at various seniors and bureaucratic and political levels have exercised a benign influence on the resolution of bilateral conflictual issues including those related with refugees.\(^\text{40}\)

The SAARC already has two major conventions viz., Agreement on Establishing the SAARC Food Security Reserve (SFSR-1987) and SAARC Regional Convention on Suppression of Terrorism, 1987 which embodies and gives a regional focus to many of the well-established principles of International Law in this respect. Under its provisions member States are committed to extradite or prosecute alleged terrorists thus preventing them from enjoying safe havens. This convention also envisages preventive action to combat terrorism. Taking the lessons from other regional arrangements like that of Organization of African Unity (1969) and Cartagena Declaration (1984) some kind of debate has been initiated in South Asia also towards a comprehensive regional convention that could incorporate the aspirations of the regional member countries in a more forthright and nondiscriminatory manner. This can in fact be realized through the SAARC forum using the SAARCLAW as the pressure group. The SAARCLAW is an Association

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for persons of the legal communities of the SAARC countries, established in 1991 and is the first body (SAARC Chamber of Commerce and Industry—SCCI, 1992 was the second one recognized by SAARC as a regional apex body.) The success brought about by the consistent pressure of the SCCI on the SAARC member countries in introducing South Asian Preferential Trading Arrangement (SAPTA) and South Asian Free Trade Area (SAFTA) by 2001 can be cited as a major breakthrough in the thinking process in South Asia. Therefore, the offices of the SAARCLAW stand to be most effective instrument in trying to evolve a regional convention on the refugees. This has three distinct immediate advantages. Firstly, this will pave the way for the member States in designing their own national laws. Secondly, it will also expedite the process of ratifying the 1951 UN Convention and the 1967 Protocol by the South Asian nations. And thirdly, regional approach may persuade the other nations in the UNHCR to make the definition more comprehensive. In fact some of these countries are yet to examine the benefits these non-signatory nations have foregone as compared to the signatory nations and the price these non-signatory nations have to pay in not ratifying these instruments. A UN Convention on the Status of Refugees held in 1951 defined a refugee as “Any person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.” A growing community of scholars and practitioners in the field of refugee problem tend to follow a broader framework of refugee status in order to be as helpful as possible. An important aspect of legally defining the refugee status is that such definition decides entitlement of support and protection from international community, particularly the organizations such as UNHCR and also a number of humanitarian inter-national organizations.  

3.4 Indian Legal Framework for Refugees

India is no more bizarre to serving as a place of haven to refugees from as far back as the first millennium when the Hindu leaders of Gujarat allowed asylum to

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Parsi Settlers from erstwhile Persia. At present, refugees in India hail from places, for example, Tibet, Sri Lanka, Afghanistan and even clash zones further away, for example, Iran, Somalia and Sudan. As indicated by information gathered by UNHCR, India has near two lakh refugees living inside its region with the number continually rising. Be that as it may, informal reports put the figure at above 4.5 lakh. Right now only judicial decisions directing particular circumstances administer refugees in India. The United Nations High Commissioner for Refugees, Antonio Guterres, has recognized India's refugees arrangements during a period when numerous countries have shut their outskirts and declined assurance. Nonetheless, the actuality remains that inside India, the law keeps on coming up short for refugees. Without particular enactment relating to refugees, the general law applicable to foreigners i.e. The Foreigners Act, 1946 applies to refugees as well.42

Before discussing the laws under which refugees are dealt in India it is pertinent to mention various constitutional provisions of India which protects the rights of refugees as well.

3.4.1 Constitutional Provisions and Refugees

The zeal of the judiciary to find a solution under the Municipal laws for protection of human rights is a healthy trend. In India, Articles 14, 21 and 25 of the Constitution of India guarantee Right to Equality, Right to Life and Personal Liberty and Freedom of Religion respectively to everyone. These provisions have been held to apply to the aliens also and not merely to the citizens. In addition, the Directive Principles of State Policy in Article 51 (c) requires that the state shall endeavour to foster respect for international law and treaty obligations. Even without being a party to the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol, in India, the rights of the refugees to this extent are protected by the provisions made in the Constitution.43

The Supreme Court of India has held that the key rights reserved under Article 21 of the Indian Constitution with respect to the Right to Life and Personal

Liberty applies to all regardless of the fact whether they are natives of India or outsiders. The Supreme Court of India and different High Courts have generously embraced the principles of natural justice to evacuate issues along with acknowledgment of UNHCR as assuming a vital part in the assurance of refugees.\textsuperscript{44} There is a typical misinterpretation that ratified international conventions are not enforceable in Indian courts unless a statute is instituted. This misguided judgment depends on the American and English position without contemplating the specificities of the Indian Constitution. The clearest discussion on the issue is found in \textit{Maganbhai Ishwalal Patel vs. Union of India}\textsuperscript{45}, where in it was stated that “Making of law is vital when an arrangement or understanding works to limit the privileges of the nationals or others or alters the law of the state. On the off chance that the privileges of the nationals or others which are reasonable are not influenced, no authoritative measure is expected to offer impact to the agreement or treaty.” Justice Shah relied on Article 253 of the Indian Constitution which gives power to the parliament that it could make any law either for whole nation or for any particular part of India in order to enforce any convention, treaty or agreement done with any of the foreign states. The basic misconception is that Article 253 which enables Parliament to make law for executing any treaty, agreement or convention essentially answers that unless such a statute was enacted, the treaty, agreement or convention was unequipped for being implemented.” Justice Shah dismisses this contention saying that it continued upon a misinterpreting of Article 253. The choice of the court is in this way such that if an international instrument adds to the privileges of the natives it is enforceable specifically however in the event that it limits the current privileges of citizens, it requires for its implementation, the enactment of a statute.\textsuperscript{46}

In \textit{Gramophone Co. of India Ltd. vs. Birendra Pandey}\textsuperscript{47} Chinnappa Reddy J. speaking for the court held: "There can be no question that nations must march with the international community and the municipal law must respect rules of

\begin{itemize}
\item \textsuperscript{45} AIR 1969 SC 789.
\item \textsuperscript{46} “The Somewhat Automatic Integration of International Refugee Conventions in Indian Law”, available at: http://www.hrln.org/ (Visited on July 9, 2014 at 4.00pm).
\item \textsuperscript{47} AIR 1984 SC 667.
\end{itemize}
international law just as nations respect international conventions. 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. The position is thus quite clear. If an international convention runs counter to an Indian statute, the convention cannot be relied upon. If however the convention does not conflict with any Indian law, then the international convention must be accommodated and absorbed into India law. The sanction for this lies in Article 51(c) of the constitution which states: "The state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another." This is therefore a clear enunciation of a principle that since fundamental rights are capable of an ever expanding definition, international instruments may be incorporated into the fundamental rights and enforced in this manner. This was done by the Supreme Court in the recent case of *Vishakha vs. State of Rajasthan*\(^{48}\) where the court reiterated the principle that “In the absence of a domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equity, the right to work with human dignity in Article 14, 15, 19 (1) (g) and 21 of the Constitution of India. Any international convention consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the contents there of. Referring to the Convention for the Elimination of All forms of Discrimination Against Women (CEDAW) the court held "The international convention and norms are to be read into them in the absence of an enacted domestic law occupying the field when there is no consistency between them."\(^{49}\)

The rights of refugees in the absence of India's ratification of the Refugee Convention is based on India's claim to abide by the Universal Declaration of Human Rights. Article 14 (1) of which states "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Similarly Article 13 of the International Covenant on Civil and Political Rights and Article 22 of the Convention on the Rights of the Child specifically deals with the refugee rights.

\(^{48}\) 1997 (6) SCC 241.

\(^{49}\) Ibid.
Now the question crops up whether there exists any Indian law which deals with the issue of refugees and if there is does this law run counter to international law. The answer is simple. Neither the Citizens Act, 1955 nor the Foreigners Act, 1946 deal with the issue of refugees. Refugees as compared to other persons who either enter the country illegally or reside in the country illegally are distinguishable because they are persons governed by the doctrine of necessity as they have been compelled to either enter the country or are compelled to reside because of a reasonable fear of persecution. If there exists a reasonable apprehension or a well grounded fear of persecution or a clear and present danger as in the case of National Human Rights Commission vs. State of Arunachal Pradesh\textsuperscript{50} in which the court held that “Foreigners would be entitled to the protection of Article 21 of the Constitution and the state government would be required to act impartially and carry out its legal obligations to safeguard the life, health and well being of foreigners.”

In Khudiram Chakma vs. State of Arunachal Pradesh,\textsuperscript{51} the Supreme Court approving referred to the UDHR in the context of a refugee: “Article 14 of the UDHR which speaks of the rights to enjoy asylum has to be interpreted in the light of the instruments as a whole and must be taken to mean something. It implies that although an asylum seeker has no right to be granted admission to a foreign state, equally a state which has granted him asylum shall not return him to the country whence he came. Moreover, the article carries considerable moral authority and embodies the legal prerequisite of regional declarations and instruments”.\textsuperscript{52}

Therefore, it can be concluded that it is a fact that India has neither signed the 1951 Convention on the Status of Refugees nor its 1967 Protocol but it is also a non disputable fact that the principles of international law governing the refugees have been incorporated by the Indian judiciary via Article 21 of the Constitution of India. Since India has acceded to a number of other human rights instruments like ICCPR, ICESCR, CEDAW, CRC etc. therefore the provisions of these conventions which deal with the refugees have been incorporated under Article 21 of the Indian Constitution. Moreover the provisions of the Foreigners Act, 1946 and other acts under which the refugees are dealt in India have no where used the word refugees.

\textsuperscript{50} 1996 (1) SCC 742.
\textsuperscript{51} 1994 (1) SCC 615.
\textsuperscript{52} Ibid.
Thus there is no particular law dealing with refugees in India and hence the rights of refugees are protected via Article 21 of the Constitution of India by incorporating the provisions of international conventions of which India is signatory.

3.4.2 The Passport Act, 1920

Under Article 3 of The Passport Act, 1920 the power has been given to the Central Government that it may make rules requiring that persons who enter in India shall be having their passports and if any person is found without the passport then the Central Government has the power to prohibit the entry into India or any part there of Sec. 3 (2) (b) of the act prescribes the authorities by whom passports must have been issued or renewed and conditions with which they must comply with for the purpose of this act. Sec. 3 (3) of the present act clearly states that “If any contravention is made or any order issued under the authority is not complied with then it shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty thousand rupees or with both.”

Since there is no specific legislation for refugees in India, this act become important because the refugee can be made liable if they enter in India without valid passport. Though Article 31 of the 1951 Convention states that the contracting states shall not impose any penalty on the refugees on account of their illegal reality but the reality is somewhat different as the refugees suffer at the hands of the authorities at the borders because they do not have valid passports. Most of the time the refugees have to leave their country in such a great hurry that it is not possible for them to apply for visas. Most of the time India has tried to comply with the provisions 1951 Convention because India respects the principle of non refoulement.

Under the Passport Act, 1967 the Passport Rules (1980) have been framed by the Central Government where in it is mentioned under Rule 4 read with Schedule II that different types of passports are to be issued by the Passport Authority but the refugees and the asylum seekers eligibility to get passport has no where laid down. In Part II of the Schedule II under this Rule, it is only mentioned that certificate of identity can be issued by the passport authority to the stateless persons residing in India, foreigners whose country is not represented in India, or whose national status is in doubt. So from this provision it may be inferred that the refugees, asylum
seekers, stateless persons and undocumented immigrants may be entitled to get the Certificate of Identity from the Passport Authority in India.\(^53\)

### 3.4.3 Registration of Foreigners Act, 1939

Despite the fact that the Indian Government asserts that its arrangements comply with international guidelines, no Indian law straightforwardly alludes to refugees. The Registration of Foreigners Act, 1939 is one of the essential laws that control the treatment of all foreigners in India. Article 2 of the Registration of Foreigners Act characterizes a foreigner as "a person who is not a citizen of India."\(^54\)

Under Sec. 3 of this act the Central Government is empowered to make rules;

i) For requiring any foreigner entering or being present in India to report his presence to a prescribed authority.\(^55\)

ii) For requiring any foreigner moving from one place to another place in India to report on arrival at such other place, his presence to a prescribed authority.\(^56\)

iii) For requiring any person who is about to leave India to report the date of his intended departure and such other particulars as may be prescribed to such authority.\(^57\)

iv) For requiring any foreigner entering, being present in or departing from India to produce on demand by a prescribed authority such proof of identity as may be prescribed.\(^58\)

Sec. 5 of the present act also imposes penalties on the foreigners. It says that “If any person contravenes, attempts to contravene or fails to comply with any provision of any rule made under this act shall be punished with imprisonment for term which may extend to one year or with fine which may extend to one thousand rupees or with both.” Since refugees are also covered under the ambit of definition

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\(^{54}\) H. Knox Thames, “India's Failure to Adequately Protect Refugees”, available at: http://www.wcl.american.edu/ (Visited on August 1, 2014 at 12.05am).

\(^{55}\) Sec. 3 (a) of the Registration of Foreigners Act, 1939.

\(^{56}\) Sec. 3 (b) of the Registration of Foreigners Act, 1939.

\(^{57}\) Sec. 3 (c) of the Registration of Foreigners Act, 1939.

\(^{58}\) Sec. 3 (d) of the Registration of Foreigners Act, 1939.
of foreigner, it means penalty can be imposed even on them if they failed to comply with the provisions of this act.

### 3.4.4 **Foreigners Act, 1946**

When this legislation was enacted, the only permanent measures governing foreigners specifically were the Registration of Foreigners Act, 1939 and the Foreigners Act, 1864. The Act of 1939 provided for making of rules to regulate registration of foreigners and formalities connected therewith, their movement in or departure from India. The Foreigner Act is an archaic legislation that was enacted by a colonial government in response to the needs of the Second World War.  

The Foreigners Act, 1946 was enacted with the objective to confer on the government certain powers with respect to the entry of foreigners into their presence in and their departure from India. The Act was applicable to whole of India. The relevant provisions of the act are as follows:

1. The Central Government is empowered under sec. 3(1) to prohibit, regulate or restrict the entry into, departure from or presence in India of all or any class or description of foreigners and to make specific orders under section 3(2) with respect to specific matters such as proof of identity of a foreigner, his photograph, specimen signature and medical examination, prohibition of association with certain persons or engagement in certain activities and prohibition to possess certain articles, the regulation of conduct of foreigners in particular matters and the execution of bond for due observance of specified restrictions or conditions, their arrest, detention or confinement.

2. Section 3A confers power on the Central Government to exempt citizens of the commonwealth countries and other foreigners from the application of the Act in certain cases specified in its order. It further empowers the government to apply by order, the Act to foreigners only in certain circumstances or subject to specified exceptions, modifications or conditions.

3. Section 4(1) confers powers on the Central Government to issue orders laying down conditions as to the maintenance, discipline and punishment of

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offences and breaches of discipline in respect of a foreigner who has been ordered to be detained or confined under section 3(2) (g).

4. Section 5 prohibits a foreigner who enters India from changing his name or using any name for any purpose other than the name by which he was known immediately before he entered India.

5. Under section II, any authority empowered by the act to give any direction or to exercise any other power may in addition take reasonably necessary steps or use reasonably necessary force to secure the compliance of such direction or to prevent breach of such direction or order to ensure the effective exercise of such power. The contravention of the provisions of the act is an offence under section 14. The term contravention has been given a very wide scope under section 13. This section provides that any person who attempts to contravene, abets or attempts to abet or does any act preparatory to a contravention of such provisions, orders or directions given under any order, or fails to comply with such direction is deemed to contravene the provisions of the Act.

6. Section 14 prescribes punishment upto five years imprisonment and fine for contravention of the provisions of the act or any order made under it or any direction given in pursuance of the act or such order. The section also provides for the forfeiture of bond if a person has executed it under section 3(2) of the act and make him liable to pay the penalty or satisfy the court otherwise.\textsuperscript{60}

A number of orders have been issued by the Central Government in exercise of the powers conferred by Section 3, 3A, 4 and 8 of the present Act. These are as follows:

i) The Foreigners Order, 1948

\textsuperscript{60} Law Commission of India, 175\textsuperscript{th} Report on Foreigners (Amendment) Bill, (September 2000).
xii) The Foreigners (Restriction on Residence) Order, 1968.

3.4.5 *Foreigners Order, 1948*

In exercise of the powers conferred by section 3 of the Foreigners Act, 1946 and in the Suppression of the Foreigners Order, 1939, the Central Government passed the order which is called the Foreigners Order, 1948. Section 3 of the order gives power to grant or refuse permission to enter in India. It states that no foreigner shall enter India:

a) “Otherwise than at such port or other place of entry on border of India as a Registration officer having jurisdiction at that port or place may appoint in this behalf, either for foreigners generally or for any specified class or description of foreigners; or

b) Without the leave of the civil authority having jurisdiction at such port or place.”\(^6\)

The civil authority has the power to refuse to any foreigner to enter in India if it is satisfied that:

- The foreigner is not in possession of a valid passport or visa for India or has not been exempted from the possession of a passport or visa;
- He is a person of unsound mind or mentally defective person;
- He is suffering from a loathsome or infections disease in consequence or which in the opinion of the medical officer of the port or the place of entry, as the case may be the entry of the foreigner is likely to prejudice public health.

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\(^6\) Ibid.
\(^6\) Section 3 (1) of Foreigners Order, 1948.
• He has been sentenced in a foreign country for an extradition offence within the meaning of the Indian Extradition Act, 1903.

• His entry is prohibited either under an order issued by a competent authority or under the specific orders of the Central Government.\(^{63}\)

In this way, the Foreigner Order, 1948 empowers the state government to concede or decline a foreigner entry into the Indian region on grounds like invalid passport, public safety or is detected suffering from a loathsome disease. The civil authority can reject permission if the formalities are not satisfied under the Foreigner Act. This tenet is malafide and subjective in light of the fact that the state of a refugee is distinctive and he should be dealt with on empathetic grounds having the human rights point of view. Normal paralance is that most of the outcasts are kept in transit region, before their entrance in India. These travel regions are chiefly airports, sea coasts or land particularly reserved for this reason and they are dealt with as "International Zones" where the domestic law does not have any significant bearing. In this situation, a refugee can just look for administrative cures and not legitimate cures as he is regarded not to have entered the region of India formally. At the point when such a case is taken care of by civil servants or custom authorities, they need legitimate learning and ability which represents an incredible threat of expelling and at last oppression of the refugees. This prompts the infringement of principle of non-refoulement.\(^{64}\)

3.4.7 Indian Penal Code, 1860

Besides the above acts and orders; a refugee may also be charged under the Indian Penal Code, 1860. The sections under which refugees can be held liable are 418, 419, 420, 468 and 471 of the Indian Penal code. Section 418 deals with cheating with knowledge that wrongful loss may ensure to person whose interest offender is bound to protect. Section 419 deals with punishment for cheating by personation. Under both these sections punishment is imprisonment for 3 years or fine or both. Section 420 is about cheating and dishonestly inducing delivery of property in which punishment is imprisonment of either description for a term which

\(^{63}\) Section 3 (2) of Foreigners Order, 1948.

may extend to seven years and shall also be liable to fine. Another important section is about forgery for purpose of cheating i.e. Sec. 468 in which a person commits forgery intending that the document or electronic record forged shall be used for the purpose of cheating. The punishment is of imprisonment for a term which may extend to seven years and shall also be liable to fine. Similarly section 471 of IPC states that “Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record shall be punished in the same manner as if he had forged such document or electronic record.”

It is clear from the above sections that a refugee can be charged under them because IPC does not differentiate between citizens and refugees. It is unfortunate on part of the Indian authorities that they do not understand the plight of the refugees. The compelling life threatening circumstances do not give the refugees the opportunity of having the genuine documents. The situation sometimes compels them to adopt unfair and illegal means in order to save their life. But it’s a saddened reality that if they are caught with forged documents in India they will be held liable under Indian Penal Code and have to undergo punishment. Such practices adopted by the Indian authorities violate Article 31 of the 1951 Refugee Convention. It states that “The contracting states shall not impose penalties on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization.”

In *State vs. Gafoor Zarin & Others*, the refugees were treated for offences of forgery and dishonestly. The accused were recognized refugees under the UNHCR mandate. They were arrested when they were trying to leave India using fake passport and documents. They were charged under sections 465, 468, 471, 419 and 420 of IPC. On production of their refugee certificates, the judge took a generous view in respect of sentencing in recognition of the desperation faced by many refugees. The refugees were sentenced to imprisonment for five months per offence and also a fine of Rs. 50 was imposed for each offence. Thus to conclude it can be stated that refugees are considered at par with the citizens of India not in the

context of freedoms and liberties enjoyed by them but in the context of imposing
punishment on them under Indian Penal Code despite of the known reality that one
becomes refugees not by choice but by chance and circumstances beyond his
context.

3.4.8 Citizenship and Refugees in India

The issue of nationality and citizenship of refugees in India and subsequently
their entrance to essential administrations remains an uncertain matter and one of
concern. An amendment in the India's Citizenship Act in 2003 provides that the
children who are born to an Indian parent in India with one foreign illegal parent
won't get Indian citizenship and therefore expanding the danger of statelessness.
Tending to the rights and interests of refugee children, the Supreme Court of India
has repeated on a few events India's commitments under contemporary global law
construct both in light of the procurements of the Constitution and on the worldwide
instruments of which India is a party. For instance, the issue of refusal of the
privilege of nationality to the Chakma and Hajong children has been uncertain for
quite a while. Around 30,000 Chakmas and Hajongs from the Chittagong Hill Tracts
of the range known as East Pakistan (now Bangladesh) moved to India and settled in
Arunachal Pradesh. Offspring of these transients have not been conceded the
privilege to nationality.\textsuperscript{66} In \textit{National Human Rights Commission vs. State of
Arunachal Pradesh}\textsuperscript{67}, the Supreme Court of India very clearly established the rights
of Chakma refugee children born in the state of Arunachal Pradesh for citizenship.
The court observed that “Since Chakmas are living in India for a very long period
therefore those who have taken birth in India or those who have migrated here seek
citizenship under the Constitution read with section 5 of the Citizenship Act, 1955.
By refusing to forward the applications of the Chakmas to the Central Government,
the Deputy Collector is failing in his duty and is also preventing the Central
Government from performing its duty under the Act and the Rules.” Recently in
September 2015, the Supreme Court of India gave order to the Central and State
Government of Arunachal Pradesh that they must grant citizenship to the Chakma
refugees who have migrated to India from Bangladesh in 1964-69 and have settled

\textsuperscript{66} Twenty Years of CRC: A Balance Sheet, Vol. I, 114-115 (Centre for Child Rights, New Delhi,
2011).
\textsuperscript{67} 1996 SCC (1) 742.
themselves here in the state. Since they are living in India from past fifty years therefore the government must not discriminate them and not to treat them as foreigners. Because they are still considered as non citizens therefore they are deprived to enjoy certain benefits of various social welfare schemes. In another case of *Digvijay Mote vs. Government of India and others*[^68], the High Court of Karnataka directed that “the state government to continue supporting a school that was run by an NGO for refugee children from Sri Lanka.” In spite of all these directions it is interesting to note that no specific reference has been made by any party to a dispute or by the courts about the international obligations. India has undertaken under Article 22 of the Convention on the Rights of the Child. A much closer analysis in this regard would reveal that many other provisions of the Convention on the Rights of the Child have also been ignored. Provisions like Article 2 on non discrimination, Article 7(2) on registration of birth, and Articles 20, 26, 28, 29, 31, 35 and 39 have not been taken into consideration in dealing with one or more refugee groups in India. The only group of refugees for whom there is a clear system are the Tibetans. The children of Tibetan refugees who entered India up to 1959 till 1987 are entitled to rehabilitation benefits as temporary refugees in India. Tibetans who arrived in India till 30 May, 2003 are classified in a separate category of Long Term Stay and issued Registration Certificates by Foreigner Regional Registration Offices. Tibetans have been allowed to enter India after 30 October, 2002 on Special Entry Permits issued by the Embassy of India in Kathmandu and registration and certificate for Tibetan children born in India can be obtained from the concerned FRRO.[^69]

### 3.5 Model National Law on Refugees

While human rights jurisprudence has made impressive progress internationally, refugee law which is a part of the larger body of human rights did not receive the attention it deserved from many countries around the world.[^70] Surprisingly, there is no refugee legislation in any of the countries of South Asia,

with the result that the problem of refugees is dealt with on a purely adhoc basis. There is therefore obviously a felt need for a legal framework in each of the countries of South Asia. It was for this reason that a draft Model Law for Refugees was evolved by the Eminent Persons Group headed by Justice P.N. Bhagwati. The Model Law is a result of considerable deliberations and interaction amongst wide ranging groups of eminent jurists from the SAARC region. In pursuance of the decision taken at the Third Informal Regional Consultation in Delhi in November 1996, a working group was set up to draft a model law for South Asian nations. The “Original Model Law Suggested for the South Asian States” also known as National Model Law on Refugees was discussed and approved by the Fourth Informal Consultations on Refugees and Migratory Movement in their 1997 Dacca sessions. The law has drawn its fundamentals from the 1951 Convention Relating to the Status of Refugees and its Additional Protocol, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 and the Cartagena Declaration on Refugees, 1984 and the Bangkok Principles. It has also been benefitted from various conclusions of the ExCom on different aspects of refugee protection.

Various eminent scholars, jurists and advocates have made certain recommendations in regard to the changes need to be done in various sections of the Model Law. These changes were suggested at the "Roundtable Workshop on Refugees in the SAARC Region: National Legislation on Refugees" organised by Indian Habitat Centre on April 30, 1999. The prominent among them will be mentioned here:

- Dr. Rajeev Dhawan, senior Advocate of the Hon'ble Supreme Court has suggested that firstly the preamble of Model Law should include this fact that India is not a party to the 1951 Refugee Convention and reference must also be made that India has accepted international obligations in the matter of refugees by acceding to various international human rights treaties like CSR,

ICCPR, ICESR, CEDAW etc. Further he suggested that the ambit of refugee definition must be widened to include persecution in civil society.73

- Prof. V. Suryanarayan has suggested that it should be clearly mentioned in the Model Law that a person who is involved in drug trafficking, terrorist acts or is a member of any group which has been banned by the Indian Government or whose activities are against the national interest of our country can not get refugee status. Also if a person after getting the refugee status abuses Indian hospitality or if he commits any crime in India or does any act which is against national interest then his refugee status must be revoked.74

- Dr. N.R. Madhava Menon has rightly suggested that in view of the provisions given under Article 32 and 226 of the Indian Constitution it is not acceptable that order of the Refugee Committee is considered as final.75 In regard to original Model Law the other general suggestion needs to be mentioned here which are as follows:
  
  - To develop a model set of rules and regulations for the authorities on whom power has been conferred under the statute as legislation alone cannot guarantee a fair process.
  
  - The provision for getting compensation from those who are responsible in creating refugees and putting burden on the other state must be included in the Model Law.
  
  - The process of voluntary repatriation seems to be unworkable under the Indian situation as mentioned in the Model Law. Instead of this a regional approach and a framework in the SAARC region can best serve this purpose. Another important suggestion is in regard to the establishment of refugee fund in which United Nations, and other countries will be invited for their contribution.
  
  - The Model Law should adequately carry the sentiments relating to the federal structure of the country. In reality it is the constituent states in the

73 Recommendations Made by Participants on the Model National Law on Refugees in Roundtable Workshop on Refugees in the SAARC Region: National Legislation on Refugees, 45-46 (India Habitat Centre, New Delhi, 1999).
74 Id.at.p.47.
75 Id.at. p.49.
country that either extend protection or do not extend protection. There are some states that have been flaunting the most basic of human rights laws without consulting the Centre in Delhi.\footnote{Id.at. p.51.}

The notion of a national law was upheld in the EPG's 2004 'South Asia Declaration on Refugees'.\footnote{Allan Mackey, Adrienne Anderson, “Asylum Law-Surrogate Protection: Asian Perspectives, Challenges and Contributions”, available at: http://www.iarlj.org (Visited on April 17, 2015 at 7:45pm).} Justice P.N. Bhagwati, former Chief Justice of India has very clearly expressed his views in his presidential address at the SAARCLAW conference held at Delhi on 2\textsuperscript{nd} -3\textsuperscript{rd} May 1997. He observed that there is no legislation in any of the countries of South Asia with the result that the problem of refugees is dealt with on a purely adhoc basis. There is in the circumstances no doubt that there is great need for a legal framework in each of the countries of South Asia. He has taken a keen interest in pursuing this at various seminars, conferences and bodies. Justice V.R. Krishna Iyer has expressed deep concern with reference to the treatment meted out to refugees in general and also observed that the legal framework for them would be Articles 14 and 21 of the Indian Constitution. In his own style he went on to observe that India should be a member state and play a role by being on the Executive Committee of the High Commissioners Programme "To waiver or wobble or vacillate when moral values dictate is bankruptcy of leadership. Let us not fail humanity especially that sector which is desperate, driven out and wanders homeless in the world for sheer survival".\footnote{V. Vijayakumar, “The Need for a National Legislation on Refugees”, Roundtable Workshop on Refugees in the SAARC Region: National Legislation Refugees, 32-33 (India Habitat Centre, New Delhi, 1999).} Following paragraphs will have detailed discussion on every provision of the Model Law.

### 3.5.1 Preamble of the Model National Law on Refugees

The Preamble of the Model National Law on Refugees starts with the acknowledgement of the fact that India has a historical tradition of receiving refugees and it has always shown and reposed its faith in the international customary principle of non refoulement. The preamble further expounds that India is a party to all major human rights treaties and it has adopted various legislations to implement these treaties. Further it talks about the protection of basic rights of refugees and
asylum seekers by the hon'ble courts of India and also the initiatives taken by Parliament under Article 37 and 253 of the Indian Constitution which provides for an administration system free from arbitrariness. The preamble also throws light on the objectives and purpose which act wants to achieve which are as follows:

- To consolidate, streamline and harmonize the norms and standards applicable to refugees and asylum seekers in India.
- To establish a procedure and the requisite machinery for granting refugee status.
- To guarantee fair treatment to refugees and to provide their rights and obligations.
- Granting of refugee status to be considered as a peaceful and humanitarian act and not to imply any judgment on the country of origin of the refugee.\(^{79}\)

### 3.5.2 Definition of Refugee

Before analysing the definition of refugee it is pertinent to mention here that Article 1 (a) states that this Act may be called "Refugees and Asylum Seekers Protection Act, 2000". Article 2 clause (a) to (f) defines various terms like asylum seeker, country of origin, commission, refugee committee, refugee children, serious non-political offence and government. Article 3 of the Model Law defines the term refugee. The definition has two parts. The first part states that in order to be called as a refugee a persons must have a well founded fear of persecution based on race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion. In comparison to the definition given under Convention Relating to the Status of Refugees, 1951 the definition under Model Law is similar in the respect that it is based on the well founded persecution but different in the context as it has added two more grounds of ethnic identity and sex. The inclusion of these two terms hold importance because of the refugee history in the region of South Asia where ethnicity and violence against women have taken the form of persecution.

The refugee definition does not end here. The second part of the definition goes a step ahead of persecution and states that due to external aggression, occupation, foreign domination and serious violation of human rights or events

\(^{79}\) Preamble of the Model Law Suggested for India.
which have seriously disrupt public order if a person is compelled to leave his place or habitual residence and takes refuge in other country is to be called as a refugee. This part of the definition is a landmark in the sense that neither the 1951 Convention nor the 1967 Protocol has given such an extended version of definition.

The important point missing in the definition of the refugee in the Model Law is about dual nationality. 1951 Convention has clearly mentioned that “Where a person has more than one nationality there the country of his nationality would mean each of the countries of which he is a national.”\(^{80}\) The provision of dual nationality also found place in OAU Convention. This concept needs to be added by way of explanation in the definition of refugee under Article 3 of the Model National Law on Refugees.

### 3.5.3 Exclusion from Refugee Status

A person shall be excluded from the refugee status under the following circumstances like if a person is convicted for a crime against peace, a war crime or a crime against humanity in accordance with the principles and rules of international law and conventions and also including the SAARC Regional Convention on Suppression of Terrorism, 1987.\(^{81}\) Also if a person has committed a serious non political crime as specified in the Schedule A outside India prior to his or her admission into India as a refugee.\(^{82}\) The provisions contained under this Article are similar in respect to Article 1F (a) & (b) of the 1951 Convention. However there is yet another sub clause (c) under Article 1F which states that “the provision of this convention shall not apply to any person if he has been guilty of acts contrary to the purpose and principles of United Nations”. Moreover the convention under Article 1F focuses on the word 'serious reasons for consideration' before denying a refugee status to persons. Such words are missing from exclusion clause under Article 4 of the Model Law. Article 4 (a) has specifically mentioned about SAARC Regional Convention on Suppression of Terrorism, 1987, reason being that refugee status mechanism is not be abused by the terrorists as security concern is of major importance these days after 9/11 and 26/11 attacks.

\(^{80}\) Article 1A (2) of the Convention Relating to the Status of Refugees, 1951.

\(^{81}\) Article 4 (a) of National Model Law on Refugees.

\(^{82}\) Article 4 (b) of National Model Law on Refugees.
3.5.4 Non Refoulement and Procedure of Application

The principle of non refoulement is the basic right of every refugee under which he cannot be deported to a country where his life is in danger. This principle has been enshrined under Article 5 of the Model Law under which a refugee or asylum seeker cannot be expelled or returned to a place where there are reasons to be believe that his or her life or freedom would be threatened on account of reasons mentioned under Article 3 (a) & (b). Thus this provision is in consonance with international scenario as 1951 Convention strictly adheres to this principle of non refoulement. Also various international human rights instruments recognize this concept to which India is a signatory and thus is bound to obey this rule. Alongwith it Article 5 (b) has clearly mentioned that even where a refugee or an asylum seeker has been convicted under acts mentioned in Article 4 (a) or if the person is found to be a threat to the sovereignty and integrity of India the Indian government has the power to ask such a person to leave India but the government can not return such person to a place where his life or liberty is in danger. Further Article 6 of the Model Law deals with the process of application. It states that an application can be made to the Commissioner of Refugee by the asylum seekers or on his behalf by any other person in regard for recognizing him as a refugee. Where the application is still pending with the Commissioner in that time span only reasonable restrictions can be imposed in the interests of sovereignty and integrity or public order of India. The important provision under this article is about refugee children which is mentioned in clause (c). If a refugee child is found within the territory of India then the state shall provide requisite protection and help to the child as per Indian laws and policies. Moreover the requirement of filling an application in order to get refugee status may be given to a local legal service authority or to any recognised NGO which is involved in the welfare of children. Clause (c) of Article 6 holds paramount importance as India has ratified the Convention on the Rights of the Child and thus it has an international obligation as well towards protecting the rights of the refugee children. This provision is highly appreciable in the Model Law.

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83 Article 5 (a) of National Model Law on Refugees.
84 Article 6 (a) of National Model Law on Refugees.
3.5.5 Structural Apparatus of Authorities

Section 7 and 8 of the Model Law deals with the constitution, appointment and functions of various authorities who shall work for the refugees. As per Article 7 the President of India shall appoint the Commissioner of Refugee, Deputy Commissioner of Refugees,\(^{85}\) other officers after consulting with the Commissioner of Refugees,\(^{86}\) Chairperson and members of Refugee Committee\(^{87}\) and the staff of the Committee shall be appointed by the Chairperson of the Refugee Committee.\(^ {88}\) The qualifications of the Commissioner of Refugees has been laid down under Article 8 which states that he shall be a sitting or retired judge of High Court and shall be appointed after consulting Chief Justice of India.\(^ {89}\) The qualification of the Deputy Commissioner and the Chairperson of the Refugee has the power to assign his functions to the Deputy Commissioner as may be necessary. The decision of the Commissioner of Refugees in regard to the applications of the refugees shall be final. The aggrieved persons can appeal against such decision to the Refugee Committee which is the Appellate Board for reconsidering the decision of the Commissioner of Refugees.

Article 9 of the Model Law deals with the determination of refugee status. The provision enshrined under this article broadly covers the facilities which will be provided to an asylum seeker before giving him the refugee status. They are as follows:

a. Before determining the status of an asylum seeker who wish to get refugee status his case shall be heard by a Commissioner of Refugees.

b. Service of competent interpreter to be provided where necessary during the process of refugee determination interview.

c. An opportunity shall also be given to the asylum seeker to present evidence in support of his case.

d. On the wish of the asylum seeker an opportunity to contact a representative of UNHCR shall be given.

\(^{85}\) Article 7(a) National Model Law on Refugees.
\(^{86}\) Article 7(b) National Model Law on Refugees.
\(^{87}\) Article 7(c) National Model Law on Refugees.
\(^{88}\) Article 7(d) National Model Law on Refugees.
\(^{89}\) Article 8(a) National Model Law on Refugees.
e. The asylum seeker is entitled to be assisted by a legal practitioner of his/her choice if he/she so desires. The government shall provide a list of legal practitioners to him/her who are well conversant with refugee law.

f. If an asylum seeker is not given the status of refugee then he has right to appeal to the Refugee Committee.

g. The asylum seeker has every right to get a copy of order specifying the reasons for not giving him refugee status. But where the asylum seeker is recognized as a refugee then he shall be given the refugee status document.

The above provisions are landmarks in the context that they have met the requirements of natural justice and due process of law. Opportunity of being heard, provision of interpreter so that no justice is done because of language barrier, to have a legal practitioner, right of appeal and to have a reasoned decision are the saluting aspects of this article. In order to have transparency in the work it has been stated under Article 10 (b) that an annual report shall be published by the commissioner of Refugees and the Refugee Committee in regard to the work done by them and this report shall be made public. Article 11 further states that appeals made by the asylum seekers against the decision of the Commissioner of Refugees shall be received and considered by the Refugee Committee. The Committee has also the power of considering the applications for determining the refugee status suo motto. Proceeding further Article 12 of the Model Law enumerates certain conditions under which a person shall cease to be a refugee. The conditions are as follows:

i) If a refugee voluntarily re avails the protection of the country of his origin.

ii) If a refugee is accepted as the citizen of India.

iii) If a refugee becomes national of some third country.

iv) If a refugee of his own choice re-establishes himself in the country which he has left.
v) If a refugee refuses to avail the protection of the country to which he belongs even after the cessation of the circumstances because of which he was recognized as a refugee.\(^90\)

The provisions included under this Article is similar to the provisions under Article 1 (c) of the 1951 Convention except that the latter has included one more condition that the “Convention shall not apply to a person who having lost his nationality has voluntarily re-acquired it.”\(^91\) The Model Law is silent on this point when a person has lost his nationality but later on reacquires it.

3.5.6 Rights and Duties of Refugees

Article 13 is an important provision in the Model Law because this includes the rights of refugees who are in India along with set of duties which they are bound to obey. The following rights are available to refugees as per the Model Law:

i) Every refugee shall be given a fair and due treatment and there shall not be any discrimination on the grounds of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.

ii) The refugees shall be given the same treatment as is given under the Indian Constitution or any other laws and privileges as may be granted.\(^92\)

Both of the above provisions hold importance in the context of India's dealing with refugees belonging to different countries not on same footing. Like India recognises Tibetans and Sri Lankan refugees and gives them preferential treatment. The Model Law has uphold that Article 14 must not be forgotten while dealing with the refugees because Indian Government does make discrimination on the grounds of nationality. The opportunities which are available to Tibetans are not provided by the government to other sects of refugees. It violates the principle of equality enshrined under Indian Constitution. Since Article 14 uses the word person therefore this right is available to non citizens also and thus it is available to refugees also. The principle of non discrimination has also been there under Article 3 of 1951 Convention. One of the reasons cited for non accession to the Convention by the

\(^90\) Article 12 Clause (a) to (e) of National Model Law on Refugees.
\(^91\) Article 1 (c) (2) of the 1951 Convention Relating to the Status of Refugees.
\(^92\) Article 13 (a) (1) of the National Model Law on Refugees.
developing world is their inability to take on the range of obligations in view of scarce resources and competing claims of nationals. Yet at the same time there is a mandatory minimum standard of treatment in so many international human rights treaties to which India is a party. The National Model Law has therefore struck a balance between what is ideally desirable and what is feasible. Instead of following the division of 1951 Convention which groups the rights of refugees in different categories, the Model Law makes a simplistic provision that refugees will receive the treatment available under the Constitution. The provision of specific treatment prescribed under other laws is an open ended provision which will come to the benefit of the refugees as it leaves the scope for progressive adaptation of standards. The judicial practice argues well for that expectation.\footnote{Praboth Sexena, “Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future”, Vol. 19, Issue 2, \textit{International Journal of Refugee Law}, 267 (2007).}

iii) The refugees shall be provided means to seek a livelihood for himself and for those dependent on them.\footnote{Article 13 (a) (3) National Model Law on Refugees.}

Chapter III of the 1951 Convention under Articles 17, 18 and 19 have talked about wage earning employment, self employment and liberal professions to refugees. But truly speaking this provision under Model Law is difficult to be turned into reality. The reason behind it is that such a right has yet not been given to citizens of India. Then how come such a right to ask for livelihood from government can be given to refugees. Indian Government can impose a self obligation on itself but to give right to ask for means of livelihood to refugees is a mounting task. Instead right to do work in India in order to earn their livelihood is more appropriate here.

iv) The refugee shall have the right to be given special considerations to the protection and material well being of refugee women and children.\footnote{Article 13 (a) (4) National Model Law on Refugees.} Since India is a party to CRC and CEDAW it is obligatory on its part to protect the interest of the women and children especially the refugees one who have to leave their own country and have to take shelter in other country. By including this clause in Model Law India has shown its commitment towards international human rights convention.

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94 Article 13 (a) (3) National Model Law on Refugees.
95 Article 13 (a) (4) National Model Law on Refugees.
v) The refugees shall have the right to choose his place of residence. As per Article 13 (a) (5) a refugee has been given the right to choose his place of residence along with right to move freely within Indian territory but this right is subject to regulations which are applicable to refugees. Article 26 of the 1951 Convention contains the similar provision in this regard. This right is equally good for the refugees so long as they do not pose a threat to the security of India. Taking into considerations all the factors it is a wise step that right to move and residence has not been made an absolute right. Proceeding further clause 6 of Article 13 is about issuing of identity documents. In contrast the term used in 1951 Convention under Article 27 is "Identity Papers". It states that identity papers shall be issued by contracting states to any refugees who does not have a valid travel document. Where as the provision under Article 13 of Model Law is quite unrestrictive because here it is not mentioned that identity documents shall be issued to only these refugees who are without valid travel document. Thus every refugee who is a genuine one has the right to get identity documents. Along with the identity document travel documents shall also be issued to refugees for the purpose that they can travel outside and back to the territory of India. But getting a travel document is not a absolute right as the government can refuse for its issuance on the grounds of national security or public order. Article 13 (a) (8) has given the rights to refugees in regard to education, health and other related services. In contrast to it a whole chapter is dedicated in 1951 Convention giving a exhaustive list of rights like rationing, housing, public education, public relief and social security. All these provisions have been explained in an elaborative way under the Convention from Article 20 to 24.

There is no doubt that giving right to education to refugees is only a myth in the situations when they are without a roof and devoid of work. When the basic necessities of refugees are not met then how they can think of education and health? Problem of securing housing and difficulty in meeting their both ends are the major challenges faced by refugees. Provisions for such rights must be included on the priority basis in the model law. Article 13 (b) simply states that every refugee shall be bound by the laws and regulations of India. But this is a restricted provision as it needs more elaboration. Article 2 of the 1951 Convention states that "Every refugee has duties to the country in which he finds himself which require in particular that he
conform to its laws and regulations as well as to measures taken for the maintenance of public order”. Along with the terms "Laws and Regulations" public order has also been used in the latter which is missing in the former. Therefore this provision of the Model Law needs to be reviewed taking into consideration the security of India.

3.5.7 Mass Influx

It is a well know fact that India has faced situation of mass influx like refugees from Pakistan, Bangladesh and Sri Lanka. Article 14 of the Model Law is purely dedicated dealing with the cases of mass influx. Under this government in the situation of large scale influx of asylum seekers can issue an order allowing them to stay in India without undergoing the process of individuals status determination provided under Article 11 of this law. Reasonable restrictions can be imposed on them in regard to their location and movement but otherwise they will enjoy the same rights of refugees mentioned under Article 13 of the present law. Special provisions can be made by government for the women and children asylum seekers taking into consideration their protection and well being.

An indepth analysis of this provision brings forth its uniqueness as in situation of mass influx India does not shut its door rather accept the asylum seekers with open heart. But since there is always a danger of security in mass influx it is worth appreciable that reasonable restrictions can be imposed on the asylum seekers. India being a party to human rights conventions related to protection of rights of women and children has given due regard to its obligation by mentioning in Article 14 that special consideration can be given to women and children.

Article 15 of the Model Law has put restrictions on the Government that no penalties shall be imposed on refugees on the pretext that they have entered illegally in India or they are present in India without any valid authorisation. But it is mandatory on the part of refugees that they present their case with immediate effect to the concerned authorities and are able to show the reason for their illegal entry in India. Similar provision is there under Article 31 of 1951 Convention.

3.5.8 Repatriation

In the 1951 Convention on the Status of Refugee, the emphasis is on assimilation and naturalization. For the developing world, however voluntary
repatriation is the most favoured of the three modes of durable solution. The Government of India also wants the emphasis to remain on voluntary repatriation. The first instrument to highlight the need for voluntary repatriation and lay guidelines for repatriating to country of origin is the OAU Convention. The National Model Law lays stress on voluntary, dignified and safe repatriation at the free will of refugee, expressed in writing or other appropriate means, before the Commissioner. The catchwords are the individual and voluntary character of repatriation, conditions of transparency and the safety of the country of origin.\footnote{Praboth Sexena, “Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future”, Vol. 19, Issue 2, \textit{International Journal of Refugee Law}, 270 (2007).} India has expressed its approval of voluntary repatriation as the best solution to refugee issues. In fact during the 2001 Consultations on the Bangkok Principles of 1966, the Government of India expressed its reservation on including a separate Article 8 on “International Cooperation and Comprehensive Solutions” and wanted the emphasis to remain on voluntary repatriation.\footnote{Arun Sagar and Farrah Ahmed, “The Model Law For Refugees: An Important Step Forward?”, Vol.17, \textit{Student Bar Review}, 90 (2005).}

3.6 The Refugees and Asylum Seekers (Protection) Bill, 2006: An Overview

An attempt was once made to frame a holistic law related to refugees. Former Chief Justice of India, P.N. Bhagwati, had drafted a model refugee law, based on which the Refugees and Asylum Seekers Protection Bill was framed in 2006. But the bill was never tabled in Parliament.\footnote{“Some Refugees are More Equal”, \textit{The Telegraph}, available at: http://www.telegraphindia.com/ (Visited on May 6, 2015 at 10:15am).} The present bill contained 34 articles divided among eight chapters. The bill starts with a preamble which is quite elaborative and highlights how India has treated refugees in a responsible and humane way. It also states that India has accepted the various international human rights instruments and it also recognizes the rights of refugees so that they can lead a dignified life. Article 2 of the bill contains various definitions like asylum, asylum seeker, commissioner, country of origin, refugee, UNHCR etc. Article 3 is about the principles applicable to refugee protection which includes the following like the genuine refugees are entitled to get asylum in India, granting asylum to refugees is a humanitarian act and it should be without any political considerations, fair system must be adopted while determining the applications for asylum, social, economic
and legal protection must be provided to refugees as they are the most vulnerable communities, principle of non refoulement must be observed, rehabilitation or repatriation of refugees as durable solutions must be made as soon as possible.

Article 4 gives an exhaustive definition of refugee as compared to definition given under 1951 Convention or National Model Law on Refugees. Further Article 5 is about the persons who shall not be called as refugees like one who is convicted of a crime against peace, humanity or a war crime or a serious non political crime. Article 6 mentions the list of conditions when a person shall cease to be a refugee under this act. Article 7 is an applaudable provision as it upholds the principle of non refoulement but it also specifies certain conditions under which a refugee can be removed from India. Article 8 is about provision of making an application for asylum by a refugee to the commissioner which is to be made within a span of fifteen days following the asylum seekers entry to India and this period may be extended by commissioner if the asylum seeker shows the sufficient cause in this regard.

The Commissioner is empowered to determine application for asylum under Article 9 of the present bill. A reasonable opportunity is being given to the asylum seeker to present his case and after making a further inquiry the commissioner shall decide whether the asylum seeker is entitled to be recognised as a refugee or not. If a person is aggrieved by the decision of commission then an appeal can be preferred to the Refugee Appellate Board under Article 10 of the said act and the decision of the board is final. As per Article 11 the decision must be a reasoned one either of the Commissioner or of the Board. Chapter IV from Article 12 to 24 elaboratively discusses the constitution, functions and powers of authorities under this act. Such exhaustive provisions are missing in the National Model Law on Refugees and it is highly appreciable that such detailed version is given under the present bill. In Model Law for Refugees there is only a single section that is dedicated towards the situation of mass influx. Whereas under this bill there are four articles from 25 to 28 which deal with the provisions related to mass influx. The Central Government under Article 25 has the power to declare any group of persons in a mass influx to be refugees. Under Article 26 the Central Government may cause the mass influx of refugees to register their names so that identity card is issued to them. One
additional provision which is included under Article 27 (2) is that “If any refugee violates the restriction imposed upon him by the government then such a refugee shall be detained on the issuance of order in writing by the Central Government.” This provision is mandatory to include because security of India is of prime concern of our government. If any refugee does not cooperate with the authorities then he must face the consequences. Under Article 28 the Central Government is also empowered either to extent, alter or revoke the mass influx situation by notification.

In order to check the arbitrariness of the government section 29 of the present bill is a remarkable one. Under this article a refugee who wants to be voluntarily repatriated to his own country has to make a application to the commission in this regard who after conducting an inquiry satisfies himself whether the application repatriation is a genuine one or not. The order of Central Government for repatriating any refugee shall not be implemented unless it gets approval from the commissioner. Thus under this section a check has been imposed on the Central Government who cannot repatriate any refugee to any other country as per its own wishes. The order of the government needs to receive approval from the Commissioner.

Chapter VII of the present bill deals with the rights and duties of refugees and asylum seekers. The National Model Law on Refugees deals only with the rights and duties of refugees but does not prescribe about such provisions for asylum seekers. Following rights have been granted to refugees under the present bill:

i) To have formal written recognition of asylum that becomes a basis for his continued residence in India.

ii) To get identity and travel documents as described in section 32 of this act.

iii) Not to be discriminated and to have fair treatment as per due process of law.

iv) To choose the place of residence and right to move freely within India subject to reasonable restrictions.

v) To have adequate housing facilities, seeking employment and to get same health care rights and services which are applicable to citizens of India.

vi) Right to have free and compulsory education upto primary level.
vii) Right to move courts of law.

Where as under Article 32 of the present bill only limited rights are available to asylum seekers and mass influx refugees. The list is as under:

i) To get a temporary identity document.

ii) To have adequate housing facilities.

iii) To seek employment and get same healthcare rights which are available to Indian citizens.

iv) To get free and compulsory primary education.

v) Not to be discriminated on the ground of religion, race, caste, sex or place of birth.

vi) Right to move court to enforce rights given under this act as well as under Part III of Indian Constitution.

It is appreciable that this act aims to protect the basic rights of the refugees. But it should also not to be forgotten that India is a country with huge population with limited number of resources. It will be worth applaudable if government does really something in order to make these rights a reality. But to give the rights to refugees to move the courts of laws for enforcing these rights and also rights enshrined under Part III of the Constitution shall bound the government to fulfill these rights which may not be possible for it in situations of mass influx. Therefore this provision of right to move courts needs revision and a further thought.

In order to have clear records of refugees a highly sound provision is included under section 32 of the present act. It provides that every refugee and asylum seeker is entitled to have a document or identity which contains the following:

i) An identity number to be prescribed by the Refugee Appellate Board.

ii) Full details of the holder like his surname, gender, date of birth, place of country where he was born etc.

iii) Name of the country of which he is the citizen.

iv) A recent photograph.
This section needs to be incorporated because by issuing identity numbers a complete record of refugees will be kept by the government. This provision shall be useful in distinguishing refugees from illegal migrants. The rest of provision from section 33 to 36 under chapter VIII are miscellaneous in nature.

The inner security division of the Home Ministry, as well as intelligence and security agencies, had restricted the bill on the ground that it would represent a risk to national security, since India has an expansive tracts of porous borders with neighbouring nations and it has no powerful immigration and border control. The agencies expect that the proposed law would fill in as a motivating force for individuals from neighboring nations to come to India under the attire of a refugee. They call attention to the fact that European nations and the United States don't face such issues as they have a framework set up where every resident has an identity document. The offices have especially restricted the procurement in regards to the allowing of refugee status to a whole group after a mass inundation, with no procurments for development examination to isolate undesirable components. However, a high-level committee headed by the additional secretary (border management) in the Home Ministry overruled these objections, on the ground that there are systems in place to verify the antecedents of the persons coming from abroad.99

In its report to the Government, the committee pointed out that recently, such a scrutiny was completed to check refugees from Sri Lanka. Besides, Section 28 in the draft bill forces sensible confinements on the movement or location of mass influx refugees and accommodates detainment of any outcast disregarding these limitations. The issue was likewise analyzed by the National Security Council Secretariat (NSCS) which chose that the focal points to India in sanctioning the refugee law far exceed the weaknesses. The NSCS further proposed that the bill be actualized through an authoritative request under the Foreigners Act in the event that it confronts challenges in creating a political agreement to authorize the law. The draft bill unmistakably disallows haven to any individual who has perpetrated a serious non-political crime outside India or who has been convicted of a crime

against peace, a war crime, a crime against humanity or financed terrorism. The draft bill which depends on a model law on refugee protection, put together by previous Chief Justice of India P N Bhagwati in 2000, has dropped certain proposals about refugee's rights to avoid security risks.  

3.7 Conclusion

Refugees are victims of challenging social circumstances such as civil war, violence and discrimination over which they have no control and the importance of a uniform and humanitarian policy towards them cannot be overstated. India regardless of being a signatory to various international treaties and conventions on human rights, some of which verifiably underwrite the standard of non refoulement, does not have a particular statute managing refugees. Thus, refugees are secured by the omnibus Foreigners Act 1946, an antiquated bit of enacting that oversees the stay and exist of non nationals as a homogenous class. In the absence of enlightened rational policy, adhocism prevails. A few classes of refugees for e.g. Srilankan Tamils and Tibetans have truly fared superior to anything others. Security contemplations increased by the nearness of fanatic gatherings in some neighbouring nations are frequently referred to contend against the attractive quality of a refugee law. In any case, this is something of a red herring. All laws identifying with refugees include a careful security of the proof given by the asylum seeker with extra authenticating shields as a part of the determination procedure. But since there is no refugee law in India and there is no procedure and no reasonable guidelines for the lakhs of de facto refugees whose presence the Indian state endures yet whose status it will not formalise.

The reality of the matter is that inspite of accepting its obligation through the front door, India has picked the indirect access by becoming party to different International Human Rights Conventions and hence in a way has acknowledged the worldwide commitments to protect the refugees. Be that as it may, this is not adequate on the grounds that these human rights instruments don't extravagantly manage all aspects of refugee. Moreover in the absence of any refugee specific legislation one cannot expect that there can be any fairness on the part of Indian

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100 Ibid.
authorities while dealing with the refugees who belong to various communities, religions and sects. The outdated laws do not distinguish between a foreigner and a refugee and as a result of this there is inconsistency and adhocism on the part of authorities in the case of refugees.

The customary perspective of the Indian Judiciary on the utilization of general standards of global law and also India's treaty commitments on the Fundamental Rights chapter of the Indian Constitution was that treaties don't make rights in municipal law unless they are particularly incorporated. However, India's jurisprudence on treaties has developed to now require the general standards of international law be regarded and fused into the Fundamental Rights regardless of the possibility even if not ratified by India, where the standards or norms are such that they are meriting widespread application, particularly in connection to human rights upgrading procurements of international conventions even where they have not been particularly incorporated into Indian law by legislation. 102

Furthermore the National Model Law on Refugees is a progressive initiative taken up by Eminent Persons Group. The law aims to provide fair treatment to refugees as in the absence of any specific legislation the refugees face discrimination at the hands of authorities. The Model Law is based on keeping in mind the 1951 Convention Relating to Status of Refugees. But since Indian situation is peculiar in matter of refugees so some specific provisions have been included taking into consideration the position of our country. This law is appreciable in many contexts but there are certain flaws which are also present in it. Keeping in mind the Model Law the Government of India drafted the Refugees and Asylum Seekers Protection Bill (2006). The above law is the extended version of the Model Law with certain changes and reservations. But due to lack of political will this bill has not seen the light of the day. There is no doubt that Indian initiative in regard to making a law on refugees will serve as beacon light for other South Asian countries and therefore without any delay India must now act on this.