CHAPTER IV

INDIAN POSITION ON LEGAL STATUS OF REFUGEES
India is one of the few countries in the world which has experienced refugee situation, time and again, and that too on a gigantic scale in the last less then half-a-century\(^1\). History of India is marked by large scale migrations of people from other countries and continents. These migrations had principally taken place across the two gateways - Hindukush mountains in the West and the Patkoi range in the East. As Prof. M.P. Singh observed:

"from the times immemorial, people from different parts of the world have been coming to India in various categories such as travellers, invaders, settlers, refugees etc., and have made, this land their home with or without separate identity"\(^2\).

Here it is important to note that in the first twenty five years after independence India had to accept the responsibility of 20 million refugees. It was mainly because of the partition of the country. As a result of partition of the Indian sub-continent in 1947, India had to confront a gigantic task of providing relief assistance and rehabilitating displaced persons from West Pakistan. The situation may best be described in the words of Prof. J.N. Saxena:\(^3\)

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\(^3\) See Supra note 1, at
"The Declaration of Independence in 1947 resulting in the creation of India and Pakistan, caused the world's largest uprooting and movement of population in recent history in the Indian sub-continent estimated at 15 million, nearly 8.5 million immigration from India to Pakistan and 6.5 million the other way round." At the initial stage, 160 relief camps were organized and the total expenditure incurred on relief up to the end of 1950 was Rs.60 crores. Various schemes were prepared for the rehabilitation of the refugees. The Government of India took necessary legislative and administrative measures to meet the situation. The Rehabilitation Finance Administration Act, 1948 was passed in this direction. The two Governments (India and Pakistan) entered into a special treaty on April 8, 1950, regulating the flow of refugees and evolving modalities for settlement of claims of refugees over property, land and payments. As Prof. Rahamatullah Khan observed:

"The main features of the Agreement could be divided in four parts. The first part aimed at allaying the fears of the religious minorities by giving them an assurance about their basic human rights. The second part was concerned with the solution of the immediate problem by promoting communal peace and normalizing the disturbed situation. It was sought to be achieved by

restoring confidence among the members of the minority community. The third part aimed at establishing a climate in which other differences could be solved amicably. The last part referred to the implementation machinery which aimed at redressing the grievances of minority communities of the two countries”.

Here it is interesting to note that an intricate legal question arose as to the legal status of these displaced persons as the definition of 'displaced person' provided by the Rehabilitation Finance Administration Act of 1948, is at variance from the definition of the term 'refugee' provided by the 1951 Convention relating to the Status of Refugees. In this case, the situation creating the refugees was the result of an agreement between the two governments. So how could these persons be termed as refugees as their predicament was mainly due to civil disturbances? Prof. Khan aptly observed that the plight of the people who had migrated was the same as that of refugees. They were displaced from one country to another, had undergone harrowing experiences, and had sought refuge in a country not of their origin. The refugees of India and Pakistan who had commenced a journey in fear and commotion and had abandoned their hearth and home - deserve the status of refugees under international law. They were so considered by the world community⁵.

⁵. Ibid.
As a result of the Chinese take-over of Tibet in 1950, India had faced another refugee influx in 1959 when Dalai Lama along with his 13,000 followers fled the country and reached India as refugees. The Government of India granted political asylum to the Dalai Lama and his followers. The institution of Dalai Lama was dealt a severe blow. It was politico-religious persecution. "One can state candidly that the political asylum granted to the Tibetan refugees did play a small but significant part in the evolving hostility between the two nations".6

India faced another massive refugee influx in 1971 when 10 million people fled from the erstwhile East Pakistan, now Bangladesh and reached India as refugees. India was forced to abide by its humanitarian obligations and gave shelter to these people on condition that these people would have to return to their own country when the conditions improve there. However, after a gap of one decade India was once again severely affected by the influx of thousands of refugees from Sri Lanka and Bangladesh since 1983 and 1986 respectively. As per the record of the 'World Refugee Report', prepared by the Bureau for Refugee Programmes, Department of States (July 1993): at the end of 1992 India hosted approximately 400,000 refugees along with at least 2,000,000 migrants and some 237,000 internally displaced persons.

6. Ibid.
It is most important to note that India is not a party to the 1951 UN Convention on Refugees or its 1967 Protocol, nor is there any Indian law establishing asylums or refugee status. The Government of India handles refugee matters administratively, according to internal domestic and bilateral political and humanitarian considerations. UNHCR has no formal status in India and it is usually permitted to deal only with nationals from countries not bordering India. The Indian authorities generally grant renewable temporary residence permits to UNHCR-recognized refugees. Official policy of the Indian government is that all refugees, whether those it protects or those under UNHCR mandate, are allowed temporary refuge only in India. Besides, India does not offer permanent resettlement to refugees granted temporary asylum elsewhere.

The following discussion examines the general law relating to refugees focusing mainly on the status of refugees and protection under international law. It also highlights elaborately on the legal aspects of the current refugee situations in India keeping in view the question of bindingness of international refugee law on India and its relations with Indian municipal law. This study however does not cover the problem of the 'displaced persons' of the 1947 partition of the Indian sub-continent.

4.1 Status of Refugees under International Law:

Before taking up the legal aspects of the refugee problems in India, it may be appropriate to briefly review the evolution of the
international law of refugees as well as recent development on the subject, including the conventions, declarations and principles adopted relating thereto by the United Nations and in the different regions of the world. The legal framework within which the refugee is located remains characterised, on the one hand, by the principle of state sovereignty and the related principles of territorial supremacy and self-preservation, and, on the other hand, by competing humanitarian principles deriving from general international law and from treaty. Refugees are for the most part victims of human rights abuses. And more often than not, the great majority of today's refugees are likely to suffer a double violation: the initial violation in their own country of origin which will usually underlie their flight to another country; and the denial of a full guarantee of their fundamental rights and freedoms in the receiving state. The international legal regime for the protection of refugees, whose basis is provided by the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol, attempts to guarantee against such violations. Or, at any rate, these conventions prescribe duties and obligations which are incumbent upon States in their treatment of asylum-seekers and refugees.

International guarantees for the protection of refugees, of course, are in themselves largely without much effect unless

supported by parallel guarantees within the domestic structures of the various states which comprise the international community. This suggests the need for a certain concordance between international law, on the one hand, and municipal law, on the other. This need is an acknowledgement of the fact that, international refugee law largely, if not wholly, depends for its effectiveness on the willingness of States to respect and apply to the individuals concerned. Thus, realistically, the protection enshrined in the provisions of international refugee conventions may only be enjoyed by the refugees through provisions in the municipal laws enacted by the host or receiving State.

The formal instruments on refugees are three: (i) the Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the United Nations General Assembly in 1950 (ii) the Convention relating to the Status of Refugees, 1951; and (iii) Protocol relating to the Status of Refugees, 1967. The Statute of the Office of the High Commissioner for Refugees is an important instrument, sometimes overlooked because it is not in treaty form. It invests the High Commissioner with the function of protection of refugees. These functions include the promoting measures to improve

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the situation of refugees by special agreements with governments, assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities, promoting the admission of refugees, facilitating the welfare and improvement of conditions of refugees, and maintaining liaison with governments in all matters concerning refugee questions. The High Commissioner is assisted by the advice of the Executive Committee of the High Commissioner's Programme, which in turn established, in 1975, a Sub-Committee of the Whole on International Protection.

Indeed, the principal legal instrument concerning refugees is the Convention Relating to the Status of Refugees of 1951 which has been described as the Magna Carta - the Great Charter - of refugees. Although it does not go back as far in history as the memorable proclamation of rights and freedoms conceded in 1215 by the King of England to his subjects, the Convention is the veteran of many battles it has helped to win by providing a unified code of rights and duties for refugees, which still today protects them from arbitrary treatment by states. The 1951 Convention is a comprehensive charter of the rights which signatory countries agree to confer upon refugees. These rights range from the simplest to the most elaborate, and it is provided that there shall be no discrimination for reasons of race, nationality or religion. They include the right to practise a religion, to have access to

wage-earning or self-employment and to the liberal professions, to housing and public education, and to hold movable and immovable property. The refugee shall also have access to courts of law, to public relief and to social security. He shall be granted freedom of movement, and shall be entitled to identity papers and a travel document. He shall also have the right to cease to be a refugee, that is the right to seek and acquire the citizenship of the adopted country. Regarding the application of these rights, the Convention often refers to treatment at least as favourable as that accorded to other aliens in the same circumstances, and recommends that refugees shall benefit from the most favourable treatment possible. However, the most notable omission from the Convention is any statement of obligation on the part of contracting States to admit a person qualifying as a refugee under its terms. But it is also true that in 1951, the events of the preceding years seemed unlikely to be repeated, and the Convention was seen as achieving its primary objective of resettlement and integration of dislocated persons without the need for any obligation of admission of refugees. This expectation proved, of course, to be wrong.

Here it is interesting to note that the term "asylum" does not appear in any of the instruments discussed above relating to refugees. But asylum (meaning territorial and not diplomatic asylum) aptly describes the status of a person accorded refugee status and permanent settlement in a State other than that of his nationality.
The status of refugee and of enjoyment of asylum are thus largely, but not exactly, coterminous. For asylum is a wider notion embracing in addition protection for reasons other than those particular grounds of persecution set out in the 1951 Convention. Also, the notion of asylum connotes a decision by the host State to grant the asylee permanent, or at least indefinite, residence, whereas refugee status can be granted without such an assurance of residence; an obligation is assumed only against expulsion and refoulement.

4.1.1 Asylum and Non-Refoulement:

The concept of asylum is an ancient one going back to the sanctuary ranted to those who, against political or even criminal prosecution, sought refuge in a place of religious devotion. During the Middle Ages and the formative stages of international law up to the end of the nineteenth century, asylum was frequently granted by one State to the enemies of another usually because the granting State disapproved of the political or religious intolerance of the State fled. Britain, for example, had virtually an open door policy to the victims of persecution, and for that reason was antipathetic to the idea of concluding extradition treaties with other countries, even limited to ordinary criminals, until very late in the nineteenth century. 10.

The concept of asylum has undergone a significant change in the twentieth century. The United Nations Charter again and again, stresses 'faith in fundamental human rights' and 'promoting and encouraging respect for human rights and fundamental freedoms' for all without distinction as to race, sex, language or religion.\textsuperscript{11}

The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, stated in Article 14(1) that -

"everyone has the right to seek and enjoy in other countries asylum from persecution".

Here it is interesting to note that no definition of the term 'persecution' was offered, thus leaving the matter entirely to the discretion of the host State to judge and no corresponding duty was laid on states to grant asylum.

Like the 1951 Convention on Refugees, the 1967 Declaration on Territorial Asylum does not seek to impose on states an obligation to grant territorial asylum to any person qualified to seek it. What the Declaration essentially does is to emphasize the rule of non-refoulement. Article 3(1) states that -

"no person shall be subjected to measure such as rejection at the frontier or, if he has already

\textsuperscript{11} See United Nations Charter-Preamble and Articles 1(3), 13(1)(b); 55(c), 62, 68 and 76(c).
entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution".

Article 33 of the 1951 Convention also lays down the principle of non-refoulement by stating that -

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

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

The Committee on the Enforcement of Human Rights Law of the International Law Association - in its report for the Buenos Aires Conference held in August 1994 stated, inter alia, that despite widespread acceptance of the 1951 Convention on the Status of Refugees and the 1967 Protocol thereto, the right set forth in Art. 14 of the Universal Declaration has not been identified by commentators or states 'as falling within customary international
law'; however, returning a person to a country where he would be tortured might well violate a developing customary norm against the refoulement of refugees. So, the central problem to be addressed is the legal status of the right to seek and enjoy asylum in general and the principle of non-refoulement in particular.

The international community has reacted to the asylum crisis inter alia by trying alternative methods of improving the legal framework of territorial asylum. Within United Nations this has been done mainly through the Executive Committee of the High Commissioner's Programme. The UNHCR Executive Committee has adopted significant conclusions on asylum and non-refoulement, particularly at its twenty-eighth, thirtieth and thirty-first sessions in October 1977, 1979 and 1980 respectively. One of the conclusions "reaffirms the fundamental importance of the principle of non-refoulement both at the border and within the territory of a state of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees".


United Nations Conference on Territorial Asylum:

In view of the General Assembly Resolution 3456 (XXX) of December 9, 1975, delegates of 92 countries met at a Conference in Geneva from January 10 to February 4, 1977. The task of the Conference was to adopt the Convention on Territorial Asylum, working on the basis of the draft Convention drawn up in May 1975 by a group of experts (convoked by the United Nations General Assembly). But, due to highly diverse stands taken by individual delegations, the conference failed to agree on the text of the new Convention. In view of this situation, the delegations deferred further consideration of the proposed new convention to an indefinite date.

However, today, the generally accepted position would appear to be as follows: states consistently refuse to accept binding obligations to grant to persons any rights to asylum in the sense of a permanent right to settle. Apart from any limitations which might be imposed by specific treaties, states have been adamantly maintaining that the question of whether or not a right of entry should be afforded to an individual or to a group of individuals, is something which falls to each nation to resolve for itself.\textsuperscript{14} Anyway, non-refoulement has not become a rule of general customary

international law\textsuperscript{15}, although there are some disputes both as to the existence of any binding rule, and as to its exact ambit\textsuperscript{16}.

So far as the practice of the states is concerned, it undoubtedly indicates that they have been very generous in granting asylum, not only to individuals, but also in the case of mass influx. The most recent example of this is the decision of the Bhutan Government not to give effect to its earlier decision to repatriate 400 Tibetan refugees who refused to accept Bhutanese citizenship, because of the common religion of Tibet and Bhutan and also because Bhutan is a Member of the United Nations\textsuperscript{17}.

The concept of 'Temporary Asylum':

During the cold war, asylum tended to be linked either to permanent settlement in the country where refuge was first sought or to resettlement in another country. At the time, safe return was not viewed, among western governments, as a realistic possibility for refugees - coming from most communist countries. The provisions of


\textsuperscript{17} Times of India, New Delhi, 20 March 1980.
the 1951 Convention that relate to the economic and social rights of
refugees were therefore seen as tools to promote their integration in
the country of asylum. But, today, the opportunities for permanent
integration in receiving countries are limited. It seems very unlikely
that people who have fled en-masse to a neighbouring country will in the
future be offered large-scale resettlement elsewhere, as happened in the
case of the Vietnamese boat people in the 1980s and that of the
Hungarian three decades earlier. Most asylum countries in the
developing world suffer from increasing pressure on land and water
resources. Local integration is correspondingly less practical, both in
economic and political terms. So, these countries do not view asylum on their
territory as permanent but as a temporary and pragmatic response to
humanitarian emergencies offered until such time as refugees feel safe to
go home voluntarily. Western governments, too, are increasingly resorting
to temporary asylum.

However, during the past 15 years millions of refugees have been
admitted to countries on a temporary basis. Many remained there for
months, even years, and only a few were granted refugee status or the
rights usually accorded to alien residents. The often precarious situation
of people given temporary asylum is aggravated by the lack of a definite
legal status to protect them. As there is no provision in the 1951
Convention which can satisfactorily be applied to this category, except to
describe them as 'refugees unlawfully in
the country of refuge" (Art.31), and as they can not remain indefinitely in that condition, the experts thought that basic minimum standards should be formulated to save them from arbitrary treatment. So, the fundamental rule of protection, non-refoulement of persons to frontiers of territories where their life would be threatened, has to be retained. Further, their safety, and their right to care and maintenance, should be assured, and they should not be penalised for their entry into, or presence in, the country. They should also not be submitted to inhuman treatment, or measures of discrimination, and the unity of the family should be respected.

Finally, it may be submitted that, despite controversy over many issues, the 171 countries which are parties to 1993 Vienna Declaration on Human Rights reaffirmed 'their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights' and also emphasized that the Declaration "is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing human rights instruments". Moreover, the Vienna Conference stresses the importance of the right to seek and enjoy asylum as a normative provision of the Universal Declaration; prohibition against torture being considered another such normative provision.  

4.1.2 The Status of Refugees in the Country of Asylum:

Once the asylum seeker has been admitted to the country of refuge, and the danger of persecution thereby averted, the inevitable question of his rights and duties arises. According to customary international law, the asylum seeker's status is chiefly governed by the fact that he now falls under the territorial jurisdiction of the receiving State. Generally speaking, he occupies the position of any normal alien, with the proviso that he may not be expelled to his home country unless there are grave reasons for doing so.

As an alien, the refugee is entitled to treatment in accordance with the rule of law, as well as to the benefits of the "minimum treatment" rule. The refugee can not claim rights not otherwise granted by legislation to foreigners, such as permission to work, assistance under public or social schemes etc. In addition, he has to submit to the rules pertaining to alien administration.

General international law is silent on the question of the political rights of refugees in their country of residence. The attitude of some states is stricter in this matter than others. It would seem that, in general, refugees have no right to engage in political activities going beyond the normal freedoms, such as
freedom of speech, conscience, etc. On the contrary, states may incur international responsibility if they allow or support the activities of exiles directed against the government of another State. It remains a moot point in how far the country of nationality remains entitled to protect, or to enforce its laws against, a refugee who has fled abroad. Under customary international law, nationals abroad remain under the supremacy of their home-state, and according to the rules of conflict of laws, their personal status is governed by the country of either nationality or legal domicile. This means in effect that unless the country of asylum, in the exercise of its rights to afford refuge, adopts special provisions regulating his status and legal capacity, the refuge may find himself in difficult circumstances. The law is indeed vague on this point, and all depends on the arrangements made by the individual States.

The 1951 Convention relating to the Status of Refugees lists the principal rights which the contracting states undertake to grant them, subject to exceptions related to each country's particular requirements. Interesting from both a juridical and a political point of view is, first, the international nature of the status afforded to persons qualifying under Article I of the Convention. They have been officially released to a large extent from their attachments to their country of origin, and placed under
an internationally guaranteed protection, and this under the supervision of a United Nations organ, the Office of the High Commissioner for Refugees. Secondly, the treatment of refugees is enhanced far above that of ordinary aliens¹⁹.

The 1951 Convention establishes three standards of treatment as regards specific rights of refugees:

1) National treatment, i.e., the same treatment as is accorded to nationals of the contracting state concerned;

2) Most favoured nations treatment, i.e. the most favourable treatment accorded to nationals of a foreign country, and

3) "treatment as favourable as possible, and in any event not less favourable than that accorded to aliens generally in the same circumstances".

According to 1951 Convention, refugees are to be given the same treatment as nationals in respect to certain basic rights, such as freedom of religion, access to courts, possession of property, as well as in matters pertaining to public relief, rationing and elementary education. Subject to certain qualifications, national treatment is also granted in wage-earning employment, labour and social security legislation. The personal status of refugees is to be governed by the laws of the country of

asylum, and they are to be exempted from exceptional measures. Moreover, after three years' residence, exemption from legislative reciprocity is ensured.

Most-favoured nation treatment is to be accorded to refugees in respect of permission to create and join non-political and non-profit making associations and trade unions, as well as in matters relating to the right to engage in wage-earning employment for those who have not yet fulfilled the requirements for national treatment.

"Treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally" is granted as regards the acquisition and lease of property, the right to engage in agriculture, trades, handicrafts or business, and to practice a liberal profession. Matters such as housing, higher education and related subjects are regulated in a similar manner.

However, among the main rights of concern to the refugee is that of free access to employment, which in practice means the right to an independent existence. In the case of wage earning employment, Art.17 of the Convention provides that the contracting state shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to aliens. In addition to this general principle there are special provisions in favour of refugees who have completed three years' residence in the country,
or whose children or spouse possess the nationality of that country. The latter are exempted from any restrictive measures imposed on aliens for the protection of the national labour market.

So far the freedom of movement is concerned - Art.26 of the Convention proclaims the rights of refugees to choose their place of residence and to move freely within the territory of the country concerned. Although the principle of the free choice of place of residence is very widely accepted, its application is sometimes hampered by the regulations on access to employment. The OAU Convention provides that refugees shall, as far as possible, be settled at a reasonable distance from the frontier of their country of origin.

Travel Documents for Refugees: Unlike an ordinary alien, a refugee does not enjoy the protection of the country of his nationality and can not therefore avail himself of a national passport for travel purposes. When the international community, after World War I, approached the task of establishing an internationally recognised status for refugees, one of the first measures taken was to ensure that refugees were provided with documentation to enable them to travel. The form and content of this documentation varied at different times, but provided the basis from which the "Convention Travel Document" developed. The Convention Travel Document is now regularly issued by States
parties to the 1951 Convention or to the 1967 Protocol relating to
the Status of Refugees and is also widely recognised by States
which are not parties to these instruments.

Here it is interesting to note that the first international
instrument drawn up for the benefit of refugees in 1922 dealt
exclusively with the issue of certificates of identity to refugees
for use as travel documents. The issue of such certificates of
identity was also provided for in various later international
instruments adopted between the two world wars. Originally, these
certificates of identity, which came to be known as "Nansen
Passports", were issued on a single sheet of paper and were not,
like later refugee travel documents, in booklet form resembling a
national passport. The earlier instrument contained no indications
as to the period of validity of the certificate of identity, and
also provided expressly that the certificate did not in any way
imply a right for the holder to return to the issuing country
without special authorization. In the later instruments it was
specified that the period of validity should normally be one year.
As regards the right of return, provisions were in due course
introduced enabling the holder to return to the issuing country
within the period of the certificate's validity. At the same time
it was specified that limitations on this right of return should only be introduced in exceptional circumstances.

Article 28 of the 1951 Convention provides that:

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

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

An obligation to issue travel documents in accordance with this article is also assumed by States upon becoming parties to the 1967 Protocol relating to the Status of Refugees.\(^\text{20}\)

Here it may be submitted that an exception to the requirement that contracting states issue travel documents to refugees lawfully

\(^{20}\) Article 1.1 of the Protocol provides: "The states parties to the present protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugee, as hereinafter defined".
staying in their territory is to be found in the words "unless compelling reasons of national security or public order otherwise require". So, not every case which would ordinarily fall under the latter concept would therefore justify a refusal of a travel document, but only reasons of a very serious character 21.

In the 1969 OAU Convention, there are no provisions relating directly to the rights of refugees granted lawful residence. This was because, as the preamble to the convention makes clear, the 1951 Convention constitutes "the basic and universal instrument relating to the Status of refugees". As the 1969 OAU Convention was designed to complement and supplement the 1951 Convention, it was not considered necessary to add to the 1969 OAU Convention provisions relating to the rights of refugees granted lawful residence.

The 1966 Bangkok Principles contain a provision on minimum standard of treatment. Article VI states:

1. A state shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances.

2. The standard of treatment referred to the preceding clause shall include the rights relating to aliens contained in the Final Report of the Committee on the Status of aliens.

annexed to these principles, to the extent that they are applicable to refugees.

3. A refugee shall not be denied any rights on the ground that he does not fulfil requirements which by their nature a refugee is incapable of fulfilling.

4. A refugee shall not be denied any right on the ground that there is no reciprocity in regard to the grant of such rights between the receiving state and the state or country of nationality of the refugee or, if he is stateless, the state or country of his former habitual residence.

Right of Family re-unification:

A refugee may be granted all the normal rights of lawful residence but if he is separated from his spouse, children or parents, he may endure acute suffering. To his isolation is added the pain of the loss of the society of his family. The right to family re-unification is derived from the basic principle of human rights stated in Art.16(3) of the 1948 Universal Declaration of Human Rights:

"The family is the natural and fundamental group unit of society and is entitled to protection by society and the state".

Unfortunately, none of the existing international legal instruments on asylum or the protection of refugees contain a provision on family re-unification.
The Final Act of the 1951 Convention of the Status of Refugees contained a recommendation stating:

"The Conference:

Considering that the unity of the family, the national and fundamental group unit of society, is an essential right of the refugees, and that such unity is constantly threatened, and noting with satisfaction that .... the rights granted to a refugee are extended to members of his family;

Recommends Governments to take the necessary measures for the protection of the refugees' family, with a view to

(i) that the unity of the refugees' family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;

(iii) the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption".

Here it may be noted that the Executive Committee of the United Nations High Commissioner for Refugees, at its twenty-eighth Session in 1978, adopted a conclusion on family reunion which
"(a) reiterated the fundamental importance of the principle of family reunion;

(b) reaffirmed the co-ordinating role of UNHCR with a view to promoting the reunion of separated refugee families through appropriate intervention with Governments and with inter-governmental and non-governmental organizations:"

Further, in 1981, recognizing the necessity of the minimum standards of treatment of asylum seekers who have been temporarily admitted to a country pending arrangements for a durable solution, the Executive Committee of the LINHCR Programme adopted all these basic standard of treatment of refugees as described above.\textsuperscript{22}

Needless to say, the interpretation and application of the 1951 Refugee Convention are left first and foremost, with the contracting states. Its provisions become national law, and the asylum seeker is thereby placed in a position to claim his rights before the competent municipal authorities and tribunals. However, the international community, in particular the United Nations, has aimed higher in its attempts to provide an international standard

\textsuperscript{22} No.22 (XXXII) Protection of Asylum Seekers in Situations of Large-Scale Influx, 1981, Conclusions on the International Protection of Refugees (Geneva, 1990), P.48.
of treatment of refugees. By a series of General Assembly Resolutions, the world's refugees were formally placed under the protection of international society as a whole.23.

Prince Sadruddin Aga Khan, the former United Nations High Commissioner for Refugees, has rightly observed:

"A rule of the law cannot be judged solely by its actual wording and purport; everything depends on how it is applied. This fact has been confirmed by the UNHCR's own day to day experience in performing its protection function. Its efforts to persuade governments to make their internal legislation more favourable and equitable for refugees therefore have to be accompanied by constant vigilance, to ensure that a rule which has been adopted is not evaded, wrongly interpreted or simply ignored. This applies particularly, and above all, in such vital areas as the grant of asylum ..... Hence the great importance, in the country of reception, of the presence of a UNHCR representative who can know the details of particular cases and who can intervene before it is too late".24.


4.2 State Implementation of the International Norms of Refugee Law:

Although there are international institutions for the protection of refugees, still, ultimately the protection of refugees depends on individual sovereign states who have to follow their respective national legislation. Essentially, the refugee has no nationality so that he has no national protection and therefore needs international protection. The legal basis for this international protection may either be customary international law or conventional international law, but the problem here is how to translate this international law to national legislation.

As regards customary international law, the general practice of most states is to consider this as "part of the law of the land". Some states however would require a specific act of incorporation into the national legislation; while other states would require that such customary rule be not inconsistent with national legislation. But these states are in the minority; and the general rule is that customary international law, i.e., generally accepted practices and principles of international law, are deemed part of national legislation and should prevail in case of conflict with municipal law. But here, many times, there is difficulty in ascertaining with certainty the customary international law, so that judicial application and interpretation comes in.
States have the responsibility to protect refugees by reason of their accession to international instruments, by reason of their own national legislation, by reason of their political and moral commitments, or by reason of customary international law. By the exercise of their sovereign authority to control borders, states may take responsibility for refugees; from which action certain rights flow. By the exercise of their authority to legislate and enforce, states may extend asylum to those who have been given refugee status, committing themselves to ensure refugees' safety and security. Already in its ninth session in 1954, the United Nations General Assembly recognised that 'while the ultimate responsibility for the refugees within the mandate of the High Commissioner falls in fact upon the countries of residence'.

As regards international protection of refugees, it is submitted that the basic customary international law applicable to them are those pertinent fundamental human rights found in the International Bill of Human Rights. Hence it is submitted that all states should protect the fundamental human rights of refugees under customary international law. As regards conventional

25. The International Bill of Human Rights is consisting of

i) the Universal Declaration of Human Rights adopted by General Assembly on December 10, 1948,

ii) the International Covenant on Civil and Political Rights adopted by General Assembly on December 16, 1966 with its Optional Protocol, and

international law, this is generally law only between the states which are parties to it under the principle of "Pacta tertiiis nee nocent nee prasunt". But to the parties - states, this law is binding on them and must be performed by them under the principle of "Pacta Sunt Servanda".

The basic conventional international law for the protection of refugees is the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967. More than hundred and twenty States have already acceded to this Refugee Convention but it still has a long way to go before it attains the status of a general practice accepted as law" under Article 38 of the Statute of the International Court of Justice, so as to be applicable to all States.

However, states parties to the 1951 Convention and the 1967 Protocol have not only assumed Obligations concerning the status and treatment of refugees but have also undertaken to implement these instruments effectively and in good faith. Legislation is but one way in which compliance with international obligations may be assured. Proper fulfilment of this undertaking often becomes a function of political will and government policy, which in turn can be influenced by perceptions of the national interest and problems of a geopolitical nature.
In reviewing their own policy, certain states consider that their territory may act as a "pull factor". In other states there is the belief that full enjoyment of rights might work against voluntary repatriation which they regard as the best durable solution. Curtailment of rights in certain of these countries is also adopted as a deterrence measure to dissuade further arrivals. Practices such as detention of asylum-seekers may also have a policy base in deterrence. In many countries, such measures are permitted or required by law, although in effect they penalize refugees for their illegal entry, despite the prohibitions in this regrd contained in Article 31 of the 1951 Convention. Here it may further be submitted that, inspite of widespread international recognition that the grant of asylum is a peaceful and humanitarian act which should, therefore, not be the cause of tension among states, preservation of friendly relations with the neighbouring countries also often plays a significant role in many decisions taken by States as to what rights refugees should enjoy. In many instances there are serious bureaucratic impediments to full implementation. As Prof. L.C. Green rightly observes:

"Unfortunately, one is bound to recognise that whatever be the international law on this aspect of the refugee problem, states will in fact condition their policies by their ideology. They may even acknowledge the existence of the international legal rule just mentioned, while at the same time finding excuses, such as the need to support freedom or combat Communism or fight colonialism in the name of self-determination, to justify contrary behaviour".

Indeed, as a rule, the Refugee Convention is self-executing, particularly regarding those provisions granting equal treatment as aliens to refugees, so that no subsequent national legislation is needed. And here, the general rule is that prior or subsequent national legislation can not prevail in case of conflict with provisions of self-executing international instruments. However, as regards those provisions which are not self-executing, such as those calling for expenditure of public funds, then the necessary national legislation must be duly enacted. In the event that a state does not want to enforce the Refugee Convention, in whole or in part, although it is a party to it, and this it can do for it is a sovereign state; still, the Refugee Convention subsists as an international obligation, and the international institutions relative to the protection of refugees should act towards its enforcement.
As regards those States not parties to the Refugee Convention or any international instrument concerning refugees; then they are bound by customary international law to provide certain minimum standards of treatment which should at least respect the fundamental human rights of the refugee, and this is usually found in national legislation, both in the Constitution such as in the Bill of Rights or in the municipal law such as the Alien or Immigration laws. So, the states which are not parties to these international instruments relating to refugees, should fully enforce and implement the generally accepted practices and rules regarding refugees, particularly the minimum standards of treatment to which they are entitled, under customary international law, likewise by proper and appropriate national legislation; and if those customary rules still are vague or uncertain, then national courts should give an authentic interpretation. It is submitted that customary and conventional international law takes priority over all prior or subsequent national legislation, including administrative action; and national courts should be authorized to declare them valid.

4.3 Indian Practice of International Refugee Law:

As discussed earlier - India is one of the countries in Asia which has received millions of refugees during the last 47 years since its independence. As Prof. Rahmatullah Khan observed:

"Indian experience with the problem of refugees has been rich and rewarding, in the sense that no country in Asia had suffered such massive migration of peoples and had faced such stupendous tasks of relief and resettlement of refugees and had come out comparatively so successful"

At the end of 1992 as stated earlier, India hosted approximately 400,000 refugees along with at least 2,000,000 (mostly Bangladeshi) migrants and some 237,000 internally displaced persons. The most significant refugee groups were Tibetans, Bangladeshi Chakmas, Sri Lankan Tamils and Afghans. There were also considerable numbers of Bhutanese of Nepali origin and Burmese. Truly speaking - the root causes of these influxes may be traced in two factors - political and social. Politically, dictatorships or undemocratic form of governments in its vicinity often created political upheavals and thereby forced their people to leave their countries for a new shelter; and socially, the people in the neighbouring countries share common roots in patterns of social behaviour, ethnicity and religion. These similarities tended to encourage many amongst the persecuted in these neighbouring countries to seek asylum or refuge in India.

Here it is most important to note that India, like the majority of Asian states, is not a party to the 1951 Refugee
Convention or the 1967 Protocol, and is, therefore, under no treaty obligation to admit the activity intended for the international protection of refugees. Of course, India, being a sovereign nation, has the absolute right either to grant asylum or to refuse to admit an alien. But, at the same time India, like any member of the International Society, has to respect its international obligations. At least, India is bound by customary international law to provide certain minimum standards of treatment which should respect the fundamental human rights of the refugees. In spite of the fact that India faced many times in the past and is still facing acute refugee problems there is no specific legislation to deal with the problem. It has handled the issue at the political and administrative levels, with the single exception at the time of partition in 1947. The Rehabilitation Finance Administration Act was passed in the year 1948 to cope with the massive migration of people from Pakistan. The other relevant documents and legislations are - The Constitution of India, The Foreigners Act of 1946, The Registration of Foreigners Act of 1939, The Extradition Act of 1962 and a few decisions of the Indian Courts.

The Constitution of India contains just a few provisions on the status of international law in India, Article 51(c) states that -

"the State [ India ] shall endeavour to foster respect for international law and treaty obligations
in the dealings of organized peoples with one another".

This above-mentioned provision is placed under the Directive Principles of State Policy in Part IV of the Constitution which are not enforceable in any court. Here it may be submitted that before its independence, the Indian Courts administered the English common law. They accepted the basic principle governing the relationship between international law and municipal law under the common law doctrine. English law has traditionally adopted a dualist approach to the relationship between international and domestic law, seen most clearly in the case of treaties. In British doctrine a treaty does not automatically become part of the domestic legal order by virtue of its conclusion and promulgation by the executive government. A treaty imposing obligations on, or creating rights in favour of, individuals (whether citizens or aliens) require legislation in order to make it effective and enforceable in the courts. For some time it was thought that customary law also was not part of the law of England until expressly 'adopted' as part of the domestic law by statute or by the declaration of a higher court. This theory has recently been rejected by the English Court of Appeal, with the apparent consent of the House of Lords. The position now is that customary law, established to be such by sufficient evidence, is regarded as part of the law of England

unless contrary to Statute.

This common law practice has been followed by the Indian executive, legislature and judiciary even after the independence of India. Article-253 of the Constitution lays down that -

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

This constitutional provision implies that whenever there is a necessity, the Parliament is empowered to incorporate an international obligations undertaken at international level into its own municipal law. In the case "Gramophone Company of India Ltd. v. Birendra Bahadur Pandey"29a, Justice Chinnappa Reddy observed that -

"The doctrine of incorporation recognizes the position that rules of international law are

29a. A.I.R. 1984 S.C., P. 667,
incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. National courts can not say 'yes' if Parliament has said 'no' to a principle of international law'.

Against this backdrop when one examines the binding force of international refugee law on India and its relations with Indian municipal law, one can easily draw a conclusion that as long as international refugee law does not come in conflict with Indian legislations or policies on the protection of refugees, international refugee law is a part of the municipal law.

4.3.1. Matters Relating to International Convention -
Indian practice of Asylum and Non-refoulement:

Asylum is the protection which a state grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it. To speak of refugees is to speak of asylum, the very condition of their existence. The international law on asylum is comparatively new and it took its present from only little more than a century ago. Art.14 of the Universal Declaration of Human Rights lays down the fundamental rule of asylum which may not be invoked in the case of persecution genuinely arising from non-political crimes or from acts contrary to

29(b) This definition of asylum was adopted by the Institute of International Law at its 1950 Session.

the purposes and principles of the United Nations.

Here it is very much important to note that the term 'asylum' has no universally accepted definition. So, generally it is used in the sense of admission to the territory of a state, and a distinction is made between admission which is granted as an emergency measure, guaranteeing refuge of a temporary nature only, and admission which encompasses the more durable aspect involved in the grant of a permanent right to settle\textsuperscript{31}. The fundamental principle governing admission is that of non-rejection at the frontier, which has been considered in aspect of the more general principal of non-refoulement. The rule of non-refoulement thus incorporates the obligation to refrain from forcibly returning a refugee to a country where he is likely to suffer political persecution. This principle of non-refoulement constitutes the very basis of the institution of asylum and an essential guarantee for the asylee that he would receive the protection - defined in Art.14 of the Universal Declaration; in some cases it would be tantamount to an asylee's right to life\textsuperscript{32}.


India has all along asked according to the principle of non-refoulement. The Government of India allowed the unending streams of refugees in utter distress entry into India and gave solace and comfort. Evidence of India's ancient history shows that once the king granted shelter to any individual it was his sacred duty to protect the refugee at all times. In 1959 when Dalai Lama of Tibet crossed over to India along with nearly 13,000 of his followers - the Government of India granted the political asylum to all those people on humanitarian ground. But it made the asylum conditional upon the Dalai Lama residing in India peacefully and not engaging himself or his followers in political activities. The condition imposed by the Government of India was at per with the international norm. The refugees have a general obligation to respect the laws and regulations of the country in which they find themselves. In this respect they are not on different footing from the citizens of the country, or for that matter, any other foreigner. This obligation includes a duty to refrain from engaging in subversive activities directed against their country of origin, such as armed insurrection.

Again in 1971, when 10 million people crossed over in its territory from the erstwhile East Pakistan, the Government of India

33. Nagendra Singh, "Indian Practice of International Law", New Delhi, 1972, P. 84.
granted them temporary asylum on humanitarian ground. Mrs Indira Gandhi, the then Prime Minister, in her statement in Lok Sobha on May 24, 1971 on "situation in Bangladesh" made it very clear that—

"Relief can not be perpetual, or permanent, and we do not wish it to be so. Conditions must be created to stop any further influx of refugees and to ensure their early return under credible guarantees for their future safety and well-being".

She further added that—

"I hope this Parliament, our country and our people will be ready to accept the necessary hardships so that we can discharge our responsibilities to our own people as well as to the millions, who have fled from a reign of terror to take temporary - refuge here". 34

In reply to a reporter's question in Calcutta on 5 June, 1971, Mrs. Indira Gandhi clearly stated that the refugees would be looked after on a temporary basis. They needed to be treated as foreigners to be repatriated to Bangladesh for which conditions should have to be created within that country 35. As she stated further—


"they have to go back. They are certainly not going to stay here permanently. I am determined to send them back."\(^{36}\)

In view of the above, the status of asylum given to the refugees from East Bengal must be deemed to be provisional or temporary asylum. In all other subsequent cases viz.; in the case of Tamil refugees from Sri Lanka, in the case of Chakma refugees from Bangladesh - India followed the same practice of 'temporary asylum'

Article III of the Bangkok Principles of 1966 provides the provision on this temporary or provisional asylum.

**Article III lays down that** -

1. A state has the sovereign right to grant or refuse asylum in its territory to a refugee.

2. The exercise of the right to grant such asylum to a refugee shall be respected by all other states and shall not be regarded as an unfriendly act.

3. No one seeking asylum in accordance with these principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would

\(^{36}\) Ibid, June 18, 1971, P.9.
result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

4. In cases where a state decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country".

So, India granted 'provisional asylum' or 'temporary asylum' to the refugees as per the present international norms. However, here it may be submitted that even though India accepted the principle of non-refoulement as including non-rejection at the frontier under the 'Bangkok Principles' of 1966, it did not observe that principle in its practice. The actual practice is that India deals with the question of admission of refugees and their stay, until they are officially accorded refugee status, under legislations which deal with foreigners who voluntarily leave their homes in normal circumstances.

The chief legislation for the regulation of foreigners is the Foreigners Act - 1946, which deals with the matters of entry of foreigners in India, their presence therein and their departure therefrom. Para 3(1) of the Foreigners Order, 1948 lays down the power to grant or refuse
permission to a foreigner to enter India. This provision lays down a general obligation that no foreigner should enter India without the authorization of the authority having jurisdiction over such entry points. In case of persons who do not fulfil certain obligations of entry, the Sub-Para 2 of the Para-3 of the Order authorizes the civil authority to refuse the leave to enter India. The main condition is that unless exempted, every foreigner should be in possession of a valid passport or visa to enter India. If refugees contravene any of these provisions they are liable to prosecution and thereby to the deportation proceedings.

Here it is noteworthy that India has not established any refugee determination criteria or procedure and it is the union Cabinet which decides on the kind of protection to be provided to the entrants. Since, there is no legislation and legal procedure for determining their status, so they are being treated as 'alien refugees' under Entry 17, List I, Sch.7, of the Indian Constitution. The difference between an alien and an alien refugee is that the latter is given a residential permit exempting from certain conditionalities of stay of a foreigner depending on his political refugee status in India, whereas an alien or foreigner has to show valid grounds for his stay if he intends to stay more than ninety days in India. 37.

37. Section 3 of the Registration of Foreigners Act 1939 and Rules 5 and 6 of the Registration of Foreigners Rules, 1939.
So, the natural consequence is that refugees have to be treated under the law applicable to aliens in India, unless it makes a specific provision as it did in the case of Ugandan refugees (of Indian origin) when it passed the **Foreigners From Uganda Order 1972**. The **Registration Act of 1939** deals with the registration of foreigners entering, being present in, and departing from India. Besides this, there are (i) the **Passport (Entry into India) Act 1920** and the **Passport Act of 1967**, dealing with the powers of the Government to impose conditions of possession of a passport for entry into India; and the issue of passports and travel documents to regulate the departure from India of citizens of India and applies in certain cases to others too, respectively.

4.3.2. **Treatment of Persons Granted Asylum in India**: 

This may be discussed under these heads -

(a) National treatment  
(b) Treatment that is accorded to foreigners  
(c) Special treatment.

(a) **National Treatment** -

(i) **Equal Protection of Law** - Article 14 of the Indian Constitution guarantees the right that state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This right is available to all persons including non-citizens. So, as per the provision of this Article, State would not discriminate a refugee against other refugees of same class regarding any
benefits or rights they enjoy by virtue of their refugee status.

(ii) Religious Freedom - Article 25 of the Indian Constitution provides that subject to public order, morality and health and to the other provisions of the constitution, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(iv) Right to Liberty, etc. - Art 21 of the Indian Constitution guarantees the right to life and personal liberty of all persons. A person is further guaranteed protection against arbitrary arrest and detention, and free access to the courts. Here it is important to note that the right to life, personal liberty and free access to the courts (under Arts. 21 and 22) have been extended to every person irrespective of the fact whether the person concerned is an alien, refugee, or a citizen of India. His free access to the courts is assured under Article 32 and 226 of the Constitution particularly with regard to the right to equality and protection of law, right to practice his own religion, the right to life and personal liberty. So, as desired in Art.16 of the 1951 Refugee Convention, a refugee has free access to the courts of law in India as permitted under the Constitution.
iv) Right to Social Security - Regarding right to Social Security, there is no special provision on social security in any Indian legislations, but non-citizens in India enjoy social security - equally with citizens.

v) Educational Rights - India has been providing free primary education to all recognised refugees, although there is no legal guarantee for the enjoyment of that facility as a matter of right. As for higher education, only Tibetan refugees enjoy that privilege.

(b) Treatment that is accorded to foreigners -

(i) Right to employment or profession:

Among the main rights of concern to the refugee is that of free access to employment, which in practice means the right to an independent existence. In the case of wage-earning employment, Article 17 of the 1951 Convention provides that the contracting state shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to aliens. Art.17 further invites contracting states to give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals. The
provisions of Articles 18 and 19 concerning self-employment of and the liberty/profession do not go so far. They merely refer to "treatment as favourable as possible and in any extent, not less favourable than that accorded to aliens generally".

However, so far the Indian practice is concerned in this field, no foreigner in India has a right to a wage-earning employment, self-employment or profession, but he can do that with the permission of the Government of India. When it comes to the question of refugees, there are in fact no restriction on wage-earning or self-employment but they are not usually allowed to undertake any work since India has a large population of unemployed citizens. Instead, refugees are provided with some subsistence allowance and ration by the Union Government of India. Exception to this are Tibetans who are allowed to engage themselves in wage-earning employment in agriculture, agro-industries and handicrafts specially set up for their rehabilitation. They are also engaged in small business such as selling of handicrafts and winter clothes.

(ii). Freedom of movement and residence:

Article 26 of the 1951 Conention proclaims the right of refugees to choose their place of residence and to move freely within the territory of the country concerned. In
India this freedom of movement and residence is available to all refugees, subject to the restrictions necessary for the safety of India or its international relations. The refugees who could afford to live on their own are allowed to live wherever they want and they are given freedom to move within India subject to conditions such as national security or public order. In case of large number of refugees such as Chakmas in Taipura and Sri Lankan Tamils in Tamil Nadu, their right to freedom of movement and residence is hampered by the fact that they are totally dependent on the Government. They are therefore, confined to camps. When they need to go out from the camps they need to take permission of the camp authorities.

iii) Right to housing - The requirement of Art. 21 of the 1951 Refugee Convention in connection with 'housing' is fulfilled, and while the refugees are free to live in refugee camps, there is no rule to prohibit them from residing in private houses if they can afford. Many Afghan and Sri Lankan refugees are residing in private houses in Delhi and Madras respectively.

iv) Right to form association -

Art.15 of the 1951 Convention Relating to the Status of Refugees lays down that as regards non-political and
non-profit making associations and trade unions the contracting states shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

In India, like foreigners, refugees too enjoy the right to form peaceful associations. Burmese and Chakma refugee communities have formed student and welfare refugee associations. In Tripura, the Chittagong Hill Tracts Jumma Refugees Welfare Association headed by Mr. Upendralal Chakma is actively engaged in the day to day welfare activities of the Chakma refugees.

(v) Property Rights - Art.13 of the 1951 Convention states that the contracting states shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts - relating to movable and immovable property.

However, in India this right has not been accorded to the refugees. Even after three decades of their rehabilitation, Tibetans do not enjoy any property rights over the agricultural lands and houses which they were allowed to use on lease.
(c) **Special Treatment**

(i) **Exemption from penalties:**

Art.3(1) of the 1951 Refugee Convention provides that "the contracting state shall not impose penalties, on account of their illegal entry or presence on refugees who coming directly from a territory. Where their life or freedom was threatened ..... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." This is one area where India is very apathetic towards refugees. Under section 14 of the Foreigners Act, 1946 a foreigner is liable to the punishment with imprisonment for a term which may extend to five years and is also liable to fine. Due to lack of a procedure for considering asylum claims, all individual asylum seekers who entered illegally or stayed in India without authorization were prosecuted and punished under this section. However, in case of large-scale influx, India has always acted according to the principle laid down in the Refugee Convention and has not imposed penalties on the refugees.
(ii) Identity and travel documents:

Since refugees do not enjoy the protection of the government of their country of origin, they cannot claim a national passport. Only the authorities of the country of residence can make good this deficiency by issuing them suitable travel documents. Since, however, this document is of no value unless it is recognized internationally, each of the agreements concluded after the First World War to assist various groups of refugees make explicit reference to it. The 1951 Convention was no exception to this rule. Article 28 of the Convention provides that:

"The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require."

In India, all refugees who were recognized so were given identification certificates showing their refugee status. But, as regards travel documents; no refugee has so far had a privilege of getting travel documents except Tibetan refugees. Tibetan refugees can even travel to foreign countries and come back to India on the basis of such identification paper.
4.4 Co-Operation with UNHCR:

India for the first time, established its formal relationship with the United Nations High Commissioner for Refugees in 1969 for rehabilitating Tibetan refugees in India. When the High Commissioner visited India in July 1963, India expressed its interest in receiving assistance from the Office of the United Nations High Commissioner for Refugees for Tibetan refugees. UNCHR made available some funds from the proceedings of the sale of "All Star Festival" record. Since a pre-requisite for such assistance was the proper supervision of UNHCR funds and careful coordination of international efforts, Indian Government agreed that the presence of an on-the-spot UNHCR representative was desirable. A Branch office of UNHCR was officially opened in Delhi on February 1, 1969. In co-operation with India UNHCR undertook new projects and consolidated old ones in the fields of agricultural settlements, housing for the aged lamas, and medical facilities. Thus, a close working relationship between UNHCR and India was established by the time India got involved in providing emergency relief to Bangladesh refugees.

Here it is worthwhile to mention that to cope with the refugee influx from East Pakistan, on 23 April 1971 India called upon the UN family to assist in bringing relief in order to meet massive refugee problem. Responding to India's call, the Secretary General

of the United Nations appointed the United Nations High Commissioner for Refugees as the Co-ordinator of assistance, and in June, a unit (UNPRO) was created in East Pakistan itself to relieve the plight of civilians in that territory. In May 1971, the High Commissioner sent a fact finding Commission to India. The Commission's report stated that two matters were of utmost importance: urgent relief measures and the promotion of voluntary repatriation. The assistance programme ran from May 1971 to February 1972. It directly involved UNICEF, WHO, FAO and WFP to co-ordinate fund-raising and assistance activities. The High Commissioner for Refugees was entrusted with the work of liaison with the Government of India and the governments which contributed to the relief efforts in cash and kind.

After 1972, UNHCR Branch office in Delhi concentrated on resettlement projects for Tibetan refugees again. But in 1975 UNHCR suddenly wound up its projects in India and closed its Delhi Branch office for no reason. Again in 1979 UNHCR requested the Government of India to reopen its Branch Office in Delhi. India did not give permission to that effect, but agreed to allow a UNHCR representative to function as the "UNHCR component of the United Nations Development Programme (UNDP)" in New Delhi. However, in 1981 the Government of India allowed the UNHCR to re-open its office in New Delhi after a significant number of refugees had arrived from Afghanistan and Iran. But it imposed that the UNHCR
must function under the banner of the UNDP.

A controversy raised in 1984 when the UNHCR granted refugee status to three Delhi based officials of the Afghan Airlines Arina. The Indian position has been that 'refugee status' cannot be granted by New Delhi based U.N. officials without the approval of the Government of India to an alien within the Indian territory. India also objected to the UN officials granting international protection to three members of the Afghan soccer team who defected in Delhi while returning from Beijing after participating in a tournament.

However, despite the absence of a formally strong relationship India has a good rapport with UNHCR and it co-operates and assists the latter in resolving international refugee problem. In practice, the UNHCR tactfully avoids confrontation and tries to achieve practical results through conciliation. This style is very evident in the manner in which the UNHCR has been operating in New Delhi under the umbrella of the UNDP. Recently, India has applied for the membership of the Executive Committee of the United Nations High Commissioner for Refugees Programme. So, it is hoped that the relation between the two will improve further.


40. Ibid.