



## The King's Student Law Review

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Author: Nafees Ahmad

Source: *The King's Student Law Review*, Vol. 8, No. 1 (2017) pp. 30-55

Published by: [King's College London](#) on behalf of [The King's Student Law Review](#)

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# The Constitution-Based Approach of Indian Judiciary to The Refugee Rights and Global Standards of the UN Convention

Nafees Ahmad\*

## **Abstract**

*Global standards of refugee protection have insidiously been discarded into recidivism by the very governments who once espoused the cause of refugee protection in Europe and elsewhere in a post-World War-II era. Today, refugee protection has transcended all human susceptibilities and sensibilities to geo-political and ethno-cultural manifestations. India has always been home to a variety of immigrants, including refugees, since time immemorial and accommodated them in the best possible manner. But, off late, the geo-strategic response of India to refugee influxes is guided by the resurgence of majoritarian primacy and religion-driven policies which are deviant to the global standards of human rights and refugee law. However, the constitution-based approach that Indian courts have been required to follow has resulted in little if any divergence on the ground in terms of both who is recognized as a refugee, and what their rights are relative to the standards of the UN Convention. Thus, the Indian judiciary has been grappling hard to have an interpretative equilibrium between refugee protections and state concerns whilst measuring global standards of international refugee law. Whereas, state institutions adopt ad-hoc solutions based on procrastination for non-Hindu refugees and selectively puts refugee protection issues on tenterhooks. Therefore, the article broadly deals with desideratum of what is international refugee law in mobility becomes a profound intellectual consciousness in the transcendental order in the wake of paradoxes of changing face of forced human migration in its new dynamics, the failure of transcendental international refugee law consciousness and re-building the culture of forced minimalist primacy in state affairs of India by envisioning the functions of law, locating rights, exercising rights, encountering ambivalence of governance institutions and re-configuring the changing face of freedom of movement between resistance to the communal constructs of prescriptive functionalism and endurance of transcendental foundation of international refugee law consciousness that brings out the old dialectics and new dynamics to the fore for possible solutions at the anvil of Constitution-based Approach of the Indian Judiciary on refugee rights. Thus, this polemical premise has been examined hereunder in the wake of failure of transcendental institutionalism in India.*

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\* Ph.D. (International Refugee Law & Human Rights), LL.M. (International Law & Human Rights), LL.B. (H) B.A. [(H)-Anglo-American English Literature], Assistant Professor of International Law, Faculty of Legal Studies, South Asian University, New Delhi, India.

## I. INTRODUCTION

Humanity finds itself at trial and tribulation of unprecedented magnitude since its inception. War and conflict have gripped humanity from continent to continent, from region to region and from country to country. Persecution of peoples based on their caste, creed, ethnicity, gender, social origin, race, religion, region, and political opinion remains unabated and continues to be made exacerbated. It is regrettable but veritable platitude that the modern world is a disturbed world. This modern world is also witnessing the new horizons of human migration that is precipitated by a multitude of socio-economic, civil and political human rights quests. The contemporary international refugee protection framework is confronted with a twofold challenge i.e. a national security narrative [host state benefits, interests and responsibilities] and a human rights narrative [individual rights (right to return, etc.); identity, diversity, and socio-economic progress]. Primarily, the protection of national security, peace, and territorial integrity of India is argued by the government as a national security narrative where under refugees are perceived as a threat and danger to the national security. Therefore, this national security narrative is flagrantly invoked to deny and deprive protection to refugees by the national governments across the board. In the garb of national security, India does not want to account itself to international human rights commitments and obligations. Moreover, there are benefits to not having a law on refugee protection as Law has to have a range of rights and responsibilities for refugee protection. It requires financial support for its implementation and that is the bone of contention among all the national governments. On the other hand, the human rights narrative vis-à-vis refugees are projected as an anti-nationalist activity of human rights defenders and NGOs in India. Defending rights of refugees is a politically incorrect advocacy because the government is selective and exclusive in its refugee policy that does not subscribe to international human rights standards. Thus, today the 1951 UN Refugee Convention relating to the Status of Refugee is a pillar of the international refugee protection framework that is more balanced but less diversified in the present circumstances. The present paper offers some reflections on refugee protection and devises new alternatives (perspectives) without upsetting the architecture of state sovereignty within the framework of international human rights law.

Human mobility with all its permutations and dimensions is perennial since time immemorial. Today, national borders are patrolled day and night, but even then human trafficking is rampant and operates as an industry. In case of refugees, persecution puts them in a state of denial and deprivation of basic security and safety in their country of origin. Therefore, they cannot be prevented from being refugees. Today, India is a host to extra-regional<sup>1</sup> and intra-regional

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<sup>1</sup> B.S. Chimni, 'The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia', (*RCSS Policy Studies 4*), <[http://rcss.org/images/pdf\\_file/english/RCSSPolicyStudies4.pdf](http://rcss.org/images/pdf_file/english/RCSSPolicyStudies4.pdf)> accessed on September 01, 2015

refugees<sup>2</sup> in a quest for safety and sanctuary<sup>3</sup> from Afghanistan, Bangladesh, Iran, Iraq, Myanmar, Palestine, Somalia, Sudan, Syria, Sri Lanka, Tibet etc. In South Asia<sup>4</sup>, India with its socio-cultural diversity<sup>5</sup> and migration dynamics<sup>6</sup> has behaved, since antiquity, as a cradle of human integration from all nook and corners of the world. India was home to over 200,000 refugees in the first six months of 2014, a period that saw over 5.5 million people displaced worldwide, mainly due to war and violence across large swathes of the Middle East and Africa. The U.N. Refugee Agency<sup>7</sup> (UNHCR) in its new Mid-Year Trends 2014 report said that of the 5.5 million who were newly displaced, 1.4 million fled across international borders, becoming refugees, while the rest were displaced<sup>8</sup> within their own countries.<sup>9</sup> But, unfortunately, no South Asian country has acceded to the existing international refugee protection framework<sup>10</sup> except for Afghanistan<sup>11</sup>. States are

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<sup>2</sup> Erika Feller, 'Refugee Protection and International Migration in the Americas-Protection Considerations in the Context of Mixed Migration', (*Keynote Address in the Regional Conference San Jose, Costa Rica, 19-20 November 2009*), <<http://www.unhcr.org/4e0dc1619.pdf>> accessed on September 10, 2015

<sup>3</sup> India is regarded a sanctuary by the refugees from the neighbouring countries and from elsewhere due to its commitment to democratic values like accountability, transparency, political stability, peace and security, etc.

<sup>4</sup> South Asia is an area consisting of eight countries as SAARC i.e. Afghanistan, Pakistan, India, Nepal, Bhutan, Bangladesh, Maldives and Sri Lanka. The term "South Asia" and SAARC are used inter-changeably to denote the same region.

<sup>5</sup> The concept of diversity embraces acceptance and respect in the contemporary world. It means understanding that each individual is unique, and recognizing our individual differences of race, ethnicity, gender, sexual orientation, socio-economic status, age, physical abilities, religious beliefs, political beliefs, or other ideologies. It is about understanding each other and moving beyond simple tolerance to embracing and celebrating the rich dimensions of diversity contained within each individual.

<sup>6</sup> Migration dynamics in South Asia have undergone fundamental changes since 1947. Countries in the region still have to cope with the consequences of large-scale displacement caused in 1947 in the wake of the Partition of India. Migration dynamics involves social exclusion that includes the lack of or denial of resources, rights, goods, and services, and the inability to participate in the normal relationships and activities, available to the majority of people in a society.

<sup>7</sup> Annual Report, 2014, United Nations High Commissioner for Refugees (UNHCR) *See*: Alexander Betts, *Conceptualizing Interconnections in Global Governance: The Case of Refugee Protection*, RSC Working Paper Series No. 38, Department of International Development, University of Oxford, 2006. "UNHCR is often assumed to be the only relevant international organization in relation to refugee protection. However, in reality, refugee protection is interconnected with a range of other issue-areas including migration, security, development, peace-building, and human rights, and these interconnections have significant implications for the politics of protection. Structurally, refugee protection is embedded in these areas through a range of normative and legal frameworks, inter-organizational structures and mandates, discourses on causal connections, and identity structures (Betts 2003; 2005)."

<sup>8</sup> Internally Displaced Persons (IDPs) due to insurgency and terrorism in Kashmir, and internal disturbances in North-East India, civil strife, massive violations of human rights, organized crimes and communal clashes, etc. The concept of IDP is based on a set of recognized human rights instruments and conventions that gives a much weaker protection than the refugee concept because of the question of sovereignty.

<sup>9</sup> India Home to 200,000 Refugees in first half of 2014: UNHCR.' (*The Hindu*, Jan 9, 2015), <http://www.thehindu.com/news/national/india-home-to-200000-refugees-in-first-half-of-2014-unhcr/article6771040.ece>, accessed on May 12, 2015.

<sup>10</sup> The 1951 UN Convention relating to the Status of Refugees and its 1967 Additional Protocol. The Convention was drafted and signed by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951. The Conference was convened pursuant to the General Assembly resolution 429 (V) of 14 December 1950. The Convention was adopted on 28 July 1951; in accordance with Article 43, it entered into force on 22 April 1954. The Protocol was adopted on 31 January 1967; it entered into force on 4 October 1967 in accordance with its Article VIII.

<sup>11</sup> Afghanistan has signed the 1951 UN Convention Relating to status of Refugees on August 30, 2005 and its 1967 Protocol, a significant sign of recovery for a country that used to be one of the world's largest producers of refugees

increasingly challenging the logic of simply assimilating refugees to their own citizens. Questions are now raised about whether refugees should be allowed to enjoy freedom of movement, to work, access public welfare programs, or be reunited with family members. Doubts have been expressed about the propriety of exempting refugees from visa and other immigration rules, and even about whether there really is a duty to admit refugees at all<sup>12</sup>. India and Pakistan have been on the Executive Committee of the UNHCR since 1995, but these two principle states of the SAARC<sup>13</sup> grouping have put international refugee protection<sup>14</sup> framework on procrastination. However, mass human migrations contribute to the upsurge that essentially creates a volley of ambiguous, inconsistent, and mixed responses from the people in the host country that is fundamentally suffering from contradictory responses--- senses of sympathy and reception for frantic fellow human beings confronted with whims of exclusion with an agenda to protect individual financial systems, cultural identity, and nations from interlopers and foreigners. The citizens of these nation-states grapple with a twofold perception: should these refugees be perceived as human beings fleeing persecution, and pursuing safety from man-made calamities (war, conflict, etc.)? Or do these refugees intend to seek greener pastures in other well-to-do national economies? They deserve to have rights such as the right to leave and the right to return under international law.

Global standards<sup>15</sup> of refugee protection have insidiously been discarded into global recidivism<sup>16</sup> by the very governments who once espoused the cause of refugee protection in Europe and elsewhere in a post-World War-II era. Today, refugee protection has transcended all human

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and asylum seekers. In a press statement of 2 September 2005, UN High Commissioner for Refugees, António Guterres, welcomed Afghanistan's accession to the Convention and Protocol, which takes effect a week after several months of close collaboration between UNHCR and Afghan authorities. "It is possible at times to forget the true meaning of the refugee Convention, but if anyone can understand its significance, it is the people of Afghanistan," said Guterres. "During the long, dark years of fighting and extremism, millions of Afghans had to flee their homeland to seek refuge elsewhere. It is testimony to the remarkable progress Afghanistan has made on the road to recovery that it is now able to join the Convention."

<sup>12</sup> James C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, 2005, ISBN-13 978-0-521-54263-0 Paperback

<sup>13</sup> South Asian Association of Regional Cooperation (SAARC), established in 1985 as an inter-governmental organization to promote cooperation of common understandings among the eight countries of South Asia such as Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

<sup>14</sup> Alexander Betts, *Conceptualizing Interconnections in Global Governance: The Case of Refugee Protection*, RSC Working Paper Series No. 38, Department of International Development, University of Oxford, 2006, pp. 11-12.

<sup>15</sup> The global standards of refugee protection are durable solutions that include voluntary repatriation, local integration, and resettlement. The Durable Solution Framework for Refugees and Persons of Concerns (UNHCR, 2003e) has three programmatic approaches such as Development Assistance for Refugees (DAR), Development through Local Integration (DLI), and Repatriation, Reintegration, Rehabilitation and Reconstruction (4Rs).

<sup>16</sup>Presently, international law is confronted with issues of human rights, use of force, climate change, gender justice, and development models which have inflicted upon earth horizontal hazards of crises proportions and got divested of its vertical canopy of protection where under it had been sustaining itself for so long. Thus, vicious vicissitudes of global change have presented a picture of development which is murky, mawkish, and manipulated by the political powers that are around the chess board of common heritage of humankind and around national and supranational jurisdictions whereas humanity is at war within the humanity.

susceptibilities and sensibilities of geo-political and ethno-cultural<sup>17</sup> manifestations. India has always been home to a variety of immigrants, including refugees, since time immemorial and accommodated them in the best possible manner. But, off late, the geo-strategic response<sup>18</sup> of India to refugee influxes is guided by the resurgence of majoritarian primacy<sup>19</sup> and religion-driven policies<sup>20</sup> which are deviant to the global standards of human rights and refugee law. However, the constitution-based approach<sup>21</sup> that Indian courts have been required to follow has resulted in little, if any, divergence on the ground in terms of both, who is recognized as a refugee, and what their rights are relative to the standards of the UN Convention.<sup>22</sup> Thus, the Indian judiciary has been grappling hard to have an interpretative equilibrium<sup>23</sup> between refugee protections and state concerns, whilst measuring global standards of international refugee law. Whereas, state institutions adopt ad-hoc solutions based on procrastination for non-Hindu refugees and selectively put refugee protection issues on tenterhooks. Thus, this sordid premise has been examined hereunder in the wake of the failure of transcendental institutionalism<sup>24</sup> in India.

Regional traditions of refugee protection are very rich and adequately reflected in South America, Africa and Europe. Latin American countries have a rich tradition of providing asylum to individuals facing political persecution; this has been especially true for members of the political,

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<sup>17</sup> See: John Duckitt, *Ethno-cultural Group Identification and Attitudes to Ethnic Out-groups*, Department of Psychology, University of Auckland, Private Bag 92019, Auckland, New Zealand. All Port, G.W. (1954). *The Nature of Prejudice*. Oxford: Addison-Wesley.

<sup>18</sup> Geo-strategic response can be defined as a response concerning the expansion and consolidation of military or economic considerations in refugee status determination that subscribe to the political supremacy of national sovereignty of macro-regions. This is reflected in groupings of states within the international or national systems as a result of the supranational forces used in political geography to determine the response to refugee reception or rejection in India.

<sup>19</sup> India is a sovereign, socialist and democratic republic, as most democracies are. Majoritarian primacy is determined by the majority group that is the Hindu religion which enjoys primacy in the development of public policy. The Founding Fathers of the Constitution of India understood the importance of a democratic form of government in which the majority of the population would set the course, but where the minority would also be able to influence the process through the structures established in the Constitution. This remains a distant dream.

<sup>20</sup> By basing asylum policy on religion, the Union Government has set a dangerous precedent. The Centre has marked out Hindu, Sikh, Christian, Jain, Parsi and Buddhist refugees for special treatment allowing them to stay in India even without any visas. See: Shoaib Daniyal, 'By basing asylum policy on religion, Modi government has set a dangerous precedent' (*Scroll.in*, Sep 10, 2015), <<http://scroll.in/article/754455/by-basing-asylum-policy-on-religion-modi-government-has-set-a-dangerous-precedent>>

<sup>21</sup> Rights of the non-citizens, Constitution of India, Articles 14 and 21 etc.

<sup>22</sup> See British Year Book of International Law, Vol 30 (1953), p 478; American Journal of International Law, 48 (1954), p 193; British Year Book of International Law, Vol 42 (1967) p 39.

<sup>23</sup> I perceive the idea of interpretative equilibrium as an act of balancing refugee rights and duties vis-à-vis state sovereignty. This idea has been predominantly understood in terms of intrinsic and extrinsic political priorities since time immemorial by the national and international jurisdictions at the level of nation-states and by the individuals, institutions, and groups at the communitarian level.

<sup>24</sup> Amartya Sen, *The Idea of Justice*.

academic and artistic elite.<sup>25</sup> Massive violations of human rights<sup>26</sup>, external aggression<sup>27</sup>, generalized violence<sup>28</sup>, foreign domination<sup>29</sup>, occupation<sup>30</sup>, domestic discrimination<sup>31</sup>, and economic exclusion<sup>32</sup> produced vertical divisions between rich and poor that will continue to make Afghans, Bulloch, Chakma, Pakhtoon, and Sri Lankans in South Asia, Hazara, and Uzbeks in Central Asia, Rohingyas in South East Asia, Iraqis, Kurdish, and Palestinians in the Middle-East and Far-East Asia, Congolese, Liberians, Somalis, and Sudanese in Africa vulnerable and victims. However, Chechens, Roma, Montagnards, and Acehenese displacements in the Euro-Asia region have further precipitated the refugee crises. There are many countries grappling with internally displaced persons (IDPs) as well as climate refugees who are outside the protection framework of international refugee law. There are many more countries that fall on refugee routes. These countries receive refugees, accommodate refugees, and also provide transit passage for refugees. The latest European refugee crisis is being caused by the Syrian civil war and is reminiscent of the fact that despite India being a liberal and secular<sup>33</sup> democracy,<sup>34</sup> it is not party to the international refugee laws<sup>35</sup> where under global standards of state behavior have been set to treat refugees who

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<sup>25</sup> 1984, The Cartagena Declaration on Refugees, *See* L. Franco and J. Santistevan de Noriega, 'La contribución del proceso de Cartagena al desarrollo del derecho internacional de los refugiados en América Latina' in United Nations High Commissioner for Refugees (UNHCR), *Memoria del vigésimo aniversario de la Declaración de Cartagena sobre los Refugiados* (San José, Costa Rica, Editorama, 2005), 79-138. *See also* F.G. Velez, 'Protección de refugiados, repatriados y desplazados centroamericanos, 1981-1999' in UNHCR, *Comisión Nacional de los Derechos Humanos (CNDH) & Universidad Iberoamericana, Protección y asistencia a refugiados en América Latina. Documentos regionales 1981-1999*, (Mexico, 2002), 21-50.

<sup>26</sup> Cartagena Declaration on Refugees 1984

<sup>27</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Article 1 (2).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> 'Domestic' discrimination means that state institutions and agencies generally practice discrimination in matters relating to minorities as an unwritten policy of the bureaucratic and executive authorities based on their ideological affiliations, religious commitments, and political perceptions in a given situation.

<sup>32</sup> No standard definition of 'economic exclusion' exists so far. This lack of conceptual specification makes it almost impossible for empirical work to catch up with recent normative developments. However, there is a strong security argument against the economic exclusion of minorities because once mobilized, the continuous and systematic economic marginalization of a particular identity group can increase the likelihood of inter-ethnic mistrust, fear, and competition for scarce resources. *See*: Tim Dertwinkel, *Economic Exclusion of Ethnic Minorities: On the Importance of Concept Specification*, European Centre for Minority Issues, ECMI Issue Brief #19, November 2008.

<sup>33</sup> Preamble to the Constitution of India, 1950

<sup>34</sup> *Ibid.*

<sup>35</sup> 1951 UN Convention relating to the Status of Refugees with its 1967 Additional Protocol

flee persecution<sup>36</sup> or persecutory conditions<sup>37</sup> in their country of origin. In South Asia, India has been hosting one of the largest refugee populations in the absence of national law. Moreover, South Asia could not evolve any regional consciousness<sup>38</sup> to have a South Asian Refugee Framework that has deprived India from having a regional leadership role at such a juncture of human displacement and migration. Therefore, what are the reasons for India not acceding to UN Refugee Convention and Additional Protocol? *Primarily*, India's concerns are security and terrorism due to its porous borders which are poorly managed for such conditions and likely to result in mass migration. *Secondly*, India argues that refugee migration may immensely disturb its already fragile demographic settings as it is a flashpoint in South Asia. *Thirdly*, India has not acceded to the 1951 UN Refugee Convention and does not take any financial assistance from the UNHCR but it has been discharging its refugee protection obligations. *Fourthly*, India contends that existing International Refugee Law does not address the concerns of third world refugee problems as the dimensions and ramifications of refugee issues are different from the Western and European understandings. *Fifthly*, India has cynicism about the UNHCR that stems from its experiences in the 1971 Bangladesh War of Liberation and the UNHCR's talks<sup>39</sup> regarding the need for repatriation of refugees when people were fleeing to India due to Pakistani atrocities.

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<sup>36</sup> The concept of "persecution" is central to the universal refugee definition laid down by the 1951 Geneva Convention (GC). Article 1(A) GC defines the refugee as someone who has a well-founded fear of "being persecuted". If this concept of persecution could be expanded or narrowed at will, then the states would be at liberty to re-define the scope of their obligations as they see fit. See UN Treaty Series n° 2545, vol. 189, p. 137. The word "persecution" comes straight from U.S. immigration law, which mentions it in its definition of "refugee." See the Immigration and Nationality Act at INA Section 101(a) (42).) However, the Law does not give any separate definition of persecution, nor specifically list the types of harm that will be considered. The exception is that the law states that people who have, or fear, being "forced to abort a pregnancy or to undergo involuntary sterilization, or . . . persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program" meet the definition of refugee. In most cases, however, individual applicants will need to prove that what they suffered - or feared - should be viewed as persecution, drawing on court decisions initiated by previous applicants." See *Cordon-Garcia v. INS*, 204 F. 3d 985, 991 (9th Cir. 2000). On the other hand, the Seventh Circuit notes that, "actions must rise above the level of mere 'harassment' to constitute persecution." See *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000). The First Circuit added that the experience "must rise above unpleasantness, harassment and even basic suffering." See *Nelson v. INS*, 232 F. 3d 258, 263 (1st Cir. 2000). Another important case from the Ninth Circuit described persecution as "an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive." See *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004).

<sup>37</sup> Refugees flee owing to any number of reasons but the most common are: War (Bangladesh), Domestic Conflicts (Afghanistan, Iraq, Sri Lanka and Tibet), Natural Disasters (Earth-quake, Famine and Climate Change), and Human Trafficking.

<sup>38</sup> Regional consciousness is the backbone of the modern day concept of a civilized state and its agencies, institutions, and instrumentalities. The grand notions of good governance, grandeur of transcendental institutionalism, and grace of state action derive their constitutionality, legitimacy, validity, justice, rule of law, and human rights from the Constitution. Therefore, the idea of understanding a particular geo-strategic region such as South Asia and its people, their socio-economic trajectory, lego-institutional apparatus, cross-cultural dichotomies, intra-regional transactions, and development modules can only be understood by having a recourse to the dialectics, delineations, and dimensions of all the eight Constitutions of South Asian Nations. This, within the premium paradigm of Constitutional Comparativism for the purpose of creating a new identity called South Asian-ness based on South Asian approach, analysis, and approbation to be reckoned with constitutional internationalism of South Asian orientation.

<sup>39</sup> The UNHCR performed a stellar role in facilitating India's administrative response to the 9.8 million Hindu refugees who poured in India from Bangladesh. It also helped mobilize huge international finances to pay for Indian bills (and it was not even the West's war). When it came to repatriation of the refugees, again the UNHCR helped roll out an orderly return journey. But India got upset due to UNHCR's talks of the need for repatriation of refugees which India

Therefore, what does acceding to the Refugee Convention imply for India? I am of the view that India must ratify the Refugee Convention as it would conform to its history of refugee reception, universal humanism, and democratic liberalism coupled with new found international overwhelming support for its permanent membership of the UN Security Council. India being a party to Refugee Convention shall not be repatriating refugees against their free will as mandated in one of the core principles of the international refugee law known as *non-refoulement*<sup>40</sup>. However, India is bound by the principle of *non-refoulement* under Article 3 of the Torture Convention (CAT)<sup>41</sup> where under India being privy to CAT cannot expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Although there have been few aberrations of involuntary repatriations in the late 1980's, when India repatriated a large number of Sri Lankan Tamil refugees in the wake of the Ex-Prime Minister Rajiv Gandhi's assassination, India and its role have otherwise been extolled for its aid and assistance to refugees. Though, refugees are not employed as per global standards set in the refugee convention to eke out a dignified livelihood in India; rather they are exploited, harassed and not integrated. In 2015, whilst the West is confronted with the biggest refugee crises since World War II, India has to endorse its international commitments, accountability, and leadership by ratifying the 1951 UN Refugee Convention Relating to the Status of Refugees with its 1967 Additional Protocol.

Currently, the challenges facing states and the international community alike demand very different responses and, thus, new roles for the international legal system. The processes of globalization and the emergence of new transnational threats<sup>42</sup> have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From

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had initially emphasized from the very start of the refugee crisis. Whereas in June 1971--- just around the time Pakistani atrocities were causing millions more to flee to India---the UNHCR repatriation talks at that point in time gave the wrong message to the world which made India uncomfortable. Moreover, India was far from pleased by UNHCR high commissioner, Sadruddin Agha Khan's visit to Bangladesh (then East Pakistan) on the invitation of Pakistani President Yahya Khan. It was seen as an endorsement of Pakistani propaganda that its eastern territory was normal and peaceful.

<sup>40</sup> Article 33, 1951 UN Convention Relating to the Status of Refugees, Article 33 says "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

<sup>41</sup> Ibid. "No state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."

<sup>42</sup> The spread of radical political Islam, the criminalization of state institutions and economic transactions, the increase in cross-border narcotics trafficking, and the potential proliferation of weapons of mass destruction (WMD) represent an interrelated network of transnational threats to the states and societies within the region and serve as a potential catalyst for conflicts among these states and between their neighbours. See Graham Turbiville, "Flashpoints in Central Asia: Sources of Tension and Conflict—Drug and Weapons Trafficking," paper presented at the U.S. Institute of Peace, Washington, DC, May 16, 1997; "Hearings on International Organized Crime and Its Impact on the United States," Senate Hearing 103-899, Senate Permanent Subcommittee on Investigations, 103d Congress, 2nd Session, 1994

cross-border pollution<sup>43</sup> to terrorist training camps<sup>44</sup>, and from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives.<sup>45</sup> Therefore, the international system requires congenial and conducive conditions to be created to address the capacity of national governance institutions to respond to issues like refugee crises at their sources in commensurate with global standards of human rights.

## II. INTERNATIONAL HUMAN RIGHTS LAW AND INDIA

International Human Rights Law (IHRL) has traditionally been a Western and modern discipline but it is now a humongous and homogenous branch of learning that has, since its inception, been traversing the untrodden paths of human cogitation which has diversified the understanding and research goalposts. The normative mainstream of IHRL has been founded in Western schools of thought, rooted in the modernity project. Whereas, the IHRL lawyers from developing countries have transplanted critically the mainstream schools of international law and reinforcing what I call the “transforming world approach to global law”<sup>46</sup> (TWAGL). Nevertheless, the heterodox approaches to IHRL have been promoted, basically, from a Western perspective, and the approaches are very heterogeneous and unconnected. Primarily, any understanding of IHRL can only be sustained on constitutional law foundations such as sovereign equality, democracy, social justice, human rights, fundamental human freedoms, affirmative action, and international rule of law along with *jus cogens* (pre-emptory norms of international law) that constitutes the basic structure of international law wherefrom no derogation or exemption or reservation is permitted.

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<sup>43</sup> Daniel Deudney, “The Case Against Linking Environmental Degradation and National Security,” *Millennium: Journal of International Studies* (1990); 19: 461-476.

<sup>44</sup> A phrase coined by US Secretary of State Richard Armitage. See Daniel Bayman, “Should Hezbollah Be Next”, *Foreign Affairs* (November/December, 2003)

<sup>45</sup> Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic* (or, The European Way of Law), *Harvard International Law Journal*, Volume 47, Number 2, Summer 2006

<sup>46</sup> Should “international law” be addressed as Global Law, World Law, Universal Law or Cosmopolitan Law as the parameters and structure of conventional inter-state community have been hovering in a state of limbo? Since the conclusion of World War-II, international law has been transforming and shifting in its focus from public affairs to private affairs by emphasizing the concerns of peoples, human beings, individuals, humanity, and future generations as new norms which have further devitalized to the proliferation of new prognostications. However, the state sovereignty is being re-calibrated and re-defined owing to the developments in the field of Human Environment Law, International Common Heritage Law, International Sustainable Development Law, and International Trade Law. In the contemporary world affairs, the new power centres and various decision-making bodies have bourgeoned the supra-national normative regimes, special treaty regimes, and self-contained regimes that have handed down their own legal norms and principles and further expanded the mandate of global regulatory regimes. Therefore, I perceive a world that is committed with development and change based on the inclusive growth of peace, prosperity, and progress. The lives of the people in the developing world and its quality of development must have the ability to match. Thus, Transforming World Approach to Global Law (TWAGL) is based on an assumption that includes equality, universality, and cosmopolitanism of democracy, justice, rule of law, human rights, and fundamental freedoms.

Therefore, international law derives its norms and principles from substantive constitutional law which bloomed into customary international law that enriched progressive development of international law into IHRL and its codification.

The last decade has appreciated a spell of theoretical understanding pertaining to the large scale movement of people across the borders concerning membership<sup>47</sup>, culture<sup>48</sup>, identity<sup>49</sup>, law, sovereignty, etc. Therefore, an impressive intellectual effort has been made to catch up with these vertiginous changes of a rapidly globalizing world in which freedom of mobility seems to be decreasing rather than increasing.<sup>50</sup> However, issues such as asylum and protection of refugees have remained marginal in this premise and have not received the same determined, concentrated, and widespread philosophical consideration that many of the other ideas have collaterally received. The philosophy of international refugee law (IRL) gravitates around states' practices that pandered to the neglect of all foundationalism of aspirations which have turned global standards of IRL, interpretative equilibrium, and geo-strategic response to refugee crisis upside down. Making and conclusion of international treaties is an attribute of state sovereignty<sup>51</sup>, whereas a state has to ratify international treaties to implement them into domestic legal systems as per international law<sup>52</sup>. However, the process of domestic implementation of international treaty obligations has not been uniform, ubiquitous, and universal in international law. In fact, states have been following diverse procedures to incorporate and codify international law into municipal legal systems in conformity with their constitutional orders.

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<sup>47</sup> Membership of a Particular Social Group; UN Convention Relating to the Status of Refugees 1951, article 1

<sup>48</sup> Linguistically, the term "culture" derives its meaning from the Latin term "cultura" or cultus, with multiple meanings such as "cultivate", "culture", "civilization", "adoration", "worship", "way of life", "dress", "attire", "adornment", etc. See e.g., ICCPR, Art. 27.

<sup>49</sup> "Identity" is a distinct and autonomous right explicitly and implicitly protected by international law. Any attempt to define the right to identity must begin with a nuanced understanding of the concept of identity itself. While there is no prevailing legal definition of identity, See Samantha Besson, *Enforcing the Child's Right to Know his Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 Int'l J. L. Pol'y & Fam. 137, 141 (2007). The scholars of law, social science, and philosophy emphasize the importance of an individual's personal and social realities in the formation of a stable yet dynamic identity. See carlos fernández sessarego, *derecho a la identidad personal* 113-114 (1992); Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 Int'l J. L. Pol'y & Fam. 147, 157 (2004); Andrew J. Weigert & Viktor Gecas, *symbolic interactionist reflections on erikson, identity, and postmodernism*, *identity: an international journal of theory and research*, 5(2), 161-171 (2005); Jeffrey weeks, *the value of difference in identity—community, culture, difference* 88 (ed. J. Rutherford 1990)

<sup>50</sup> Nanda Oudejans, *Asylum: A Philosophical Inquiry into the International Protection of Refugees*, (Dissertation. Tilburg) (Oisterwijk: Boxpress, 2011)

<sup>51</sup> The cardinal principle of sovereign equality has been enunciated under the UN Charter that is construed as the cornerstone of the international relations between the States. See Articles 2(1) and 2(2) of the UN Charter; See also R. P. Anand, *Sovereignty of States in International Law*", in: R.P. Anand, *Confrontation or Cooperation: International Law and the Developing Countries* (1987).

<sup>52</sup>Vienna Convention on Law of Treaties, 1969, Article 28

Broadly speaking, different state practices have been addressed by the two schools of international law which are known as the Monist<sup>53</sup> and Dualist schools. International law has the distinction to have a multifaceted relationship with the domestic laws of a country. The two systems are usually understood as distinct legal systems of rules and principles.<sup>54</sup> India goes along with this dualist approach to implement International Law in its domestic legal system<sup>55</sup> as international treaties do not spontaneously develop into the national laws of India. It, therefore, entails legislation to be passed by the Parliament of India to incorporate international law in India. This means there is no uniformity among the countries in dealing with the problem of refugees, despite their being privy to the 1951 UN Convention Relating to the Status of Refugees with its 1967 Additional Protocol that has shaken the aspirations and expectations of refugees legitimately interpreted by the different jurisdictions.

#### *A. International and Refugee Protection in India*

The 1951 UN Convention Relating to the Status of Refugees has crafted a structure for affording shelter to people at risk of persecution in their countries of origin. There are not many countries keen to risk turning away such people. However, many governments are not willing to accede to the Convention in the present circumstances. They contend that the drawback with the Convention is that it was created for a different period that has been identified since the late 1980s with the operation of the Convention in Western countries. The present wave of refugees in Europe and South Asia has highlighted the limited options for dealing with them under the UN Convention.

The Indian practice of refugee status determination is propounded and propelled by the politico-religious exclusivism-oriented administrative decisions. IRL has come to be recognized as an inalienable part of the larger human rights regime and India has acceded to a catena of human rights conventions, treaties, and obligations. The judiciary has further broadened the ambit of its role. Higher Judiciary has fashioned broad strategies that have transformed it from a positivist dispute-resolution body into a catalyst for socio-economic change, and a protector of human rights and environment.<sup>56</sup> Appreciating Article 51 of the Constitution of India, Sikri C.J. observed that “It seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all an intractable law, in the light of

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<sup>53</sup> This approach is intimately connected to the monist aspect of international law. Monists contend that international law and domestic law are branches of the same system wherein international law is hierarchically preceding to domestic law. Dualists, in contrast, claim that international and domestic law is part of two distinct systems and that domestic law is generally prior to international law. *See generally* J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 Brit. Y.B. Int'l L. 66 (1936). While both of these theories provide important linkages between international law and domestic law, for adherents of either approach the functions and institutions of international law remain largely at the international level.

<sup>54</sup> *See* Hilary Charlesworth and Others, eds., *The Fluid State: International Law and National Legal Systems* (Sydney, Australia: The Federation Press, 2005)

<sup>55</sup> *Jolly George Vs. Bank of Cochin*, AIR 1980 SC 470

<sup>56</sup> *See* S.P. Sathe, “Judicial Activism: The Indian experience,” *Washington University Journal of Law and Policy*, vol. 29, No. 6, 2001.

the United Nations Charter and the solemn declaration subscribed to by India.”<sup>57</sup> Therefore, India is obliged to protect refugees under these international human rights instruments. The Supreme Court of India observed that gaps between municipal law and international law have to be bridged by harmonious construction of national and international law<sup>58</sup> in deference to international human rights law. The rights of refugees are reflected in UDHR<sup>59</sup>, ICCPR<sup>60</sup>, ICESCR<sup>61</sup>, CERD<sup>62</sup>, CAT<sup>63</sup>, and CEDAW<sup>64</sup> along with other human rights standards<sup>65</sup> as these international human rights instruments complement Refugee Convention.

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<sup>57</sup> *Kesavananda Bharathi vs. State of Kerala*, (1973) Supp. SCR 1

<sup>58</sup> *Vishakha v. State of Rajasthan* (1997) 6 SCC 241

<sup>59</sup>UDHR, articles 5, 7, 9, 13, 14, and 15. Article 14(1) states that, “everyone has the right to seek and to enjoy in other countries asylum from persecution”. The Universal Declaration of Human Rights (UDHR) 1948 is the UN’s First Major Statement Of Basic Human Rights: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [...]”

<sup>60</sup> Articles 9, 12, 13, 17 and 23. Article 13 states that, “an alien lawfully in the territory of a state-party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

<sup>61</sup> UN Convention against Torture 1984, article 10

<sup>62</sup> UN Convention on Elimination of Racial Discrimination, articles 5 and 6.

<sup>63</sup> Articles 2, 3, and 16. Article 3(1) states that, “no state-party shall expel, return (*‘refouler’*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

<sup>64</sup> UN Convention on Elimination of all Discrimination against Women 1979.

<sup>65</sup> *Standards Dealing with Specific Human Rights of Refugees adumbrated in* Declaration on Territorial Asylum (1967), Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989), Declaration on the Protection of All Persons from Enforced Disappearance (1992). *Standards Dealing With Particular Groups enunciated in* Standard Minimum Rules for the Treatment of Prisoners (1955), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), Declaration on the Rights of Disabled Persons (1975), Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), Declaration on the Elimination of Violence against Women (1993) and Standards Dealing With Discrimination stipulated in Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)

### III. DISCRIMINATORY STATE PRACTICES

The resurgence of Islamic fundamentalism<sup>66</sup> and Hindu extremism<sup>67</sup> have presented a prescriptive functionalism<sup>68</sup> wherein paradoxes of theoretical expositions and identity politics practices have shrunk the liberal space and fail to resonate with accepted global standards of international refugee law, human rights norms, and cosmopolitanism<sup>69</sup>. Human mobility is a state of inhuman reality, propelled by the breakdown of public order. Internal strife, civil war, ethnic cleansing, massive violations of human rights, and genocide are increasingly the cause of refugee movements. Human stability is a state of ideality which is driven by the institutional transcendentalism of peace and harmony in any geo-political entity that rests at the universality of good governance, global citizenship, and world hospitality. However, the confluence of democracy, human rights, and multi-culturalism<sup>70</sup> is an inalienable part of modern state-crafting, constitutional calibrations, and human constellations emanating from transcendental international refugee law consciousness. Though India in South Asia is considered to be a reservoir of diversity and multi-culturalism since time immemorial, unfortunately, socio-cultural and religion-driven forced human migration has become the fate of the region. Moreover, institutional constitutionalism<sup>71</sup> discourses on diversity, identity, and multi-culturalism have been disoriented by indoctrinating in political miscommunication, politicization<sup>72</sup> of diversity, and trans-nationalization of cultural conflicts.

Today, human mobility in India operates in the socket of communal constructs to establish its efficacy in terms of old dialectics of parochial policy paradigms, which are reflected in the behaviour of governance institutions, social structures, and religious stratifications towards refugees. Thus, there is a desideratum of what is international refugee law in mobility. This becomes a profound intellectual consciousness in the transcendental order in the wake of

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<sup>66</sup> Islamic fundamentalism has risen to worldwide prominence since the 1970s. Islamic fundamentalism is growing at such a rapid rate that many believe it threatens to take over the entire world. See: David Zeidan, *Islamic Fundamentalism*, Stephen C. Pelletiere, *A Theory of Fundamentalism: An Inquiry into The Origin and Development of the Movement*, 1995, Zaniah Marshallsay, *Islamic Fundamentalism: Myth and Reality Confronted?* School of International Studies, University of South Australia, 2004, Michael O. Emerson and David Hartman, *The Rise Of Religious Fundamentalism*, Dallas Morning News, November 27, 2005.

<sup>67</sup> Willy Fautre, Alfiaz Vaiya and Serena Romeo, *Hindu Extremist Movements and their Impact on Religious Minorities -Human Rights Without Frontiers International*.

<sup>68</sup> Prescriptive Functionalism is a theologically crafted dogma that commands the doing of certain acts in a manner that does not conform to the cosmopolitan composition of the ideas in a civilized society. It preaches and prescribes all solution narratives in religion.

<sup>69</sup> Jeremy Waldron, What is cosmopolitan? *The Journal of Political Philosophy*, Volume 8, Number 2, 2000 pp.227-243

<sup>70</sup> Multiculturalism is a term introduced into the political bureaucratic language decades ago and has since become synonymous with diversity and tolerance. See: *Kirsty Knight: What is multiculturalism? Griffith Working Papers in Pragmatics and Intercultural Communication* 1, 2 (2008), 106-118

<sup>71</sup> Christine E. J. Schwöbel, 'Situating the debate on global constitutionalism', *International Journal of Constitutional Law*, I•CON (2010), Vol. 8 No. 3, 611–635

<sup>72</sup> The process whereby individuals, groups, communities, or other social groups are pushed to the edge of a group and accorded less importance. This is predominantly a socio-political phenomenon by which a minority or sub-group is excluded, and their needs or desires are ignored.

paradoxes of changing face of forced human migration in its new dynamics, the failure of transcendental international refugee law consciousness, and the re-building of the culture of forced minimalist primacy in state affairs of India by envisioning the functions of law, locating rights, exercising rights, encountering ambivalence of governance institutions, and re-configuring the changing face of global human mobility between resistance to the communal constructs of prescriptive functionalism and endurance of transcendental foundation of international refugee law consciousness that brings out the old dialectics and new dynamics to the fore for possible solutions at the anvil of Constitution-based Approach of the Indian Judiciary on refugee rights.

The Government of India adopts an *Ad hoc* approach to different refugee influxes that does not provide any clarity on many issues such as naturalisation, renewal of refugee certificates, registration of new-arrival refugees, residence permits, asylum applications, deportations, mass migrations, and ethnic and racial discrimination against refugees. The legal status of refugees in India suffers from inherently discriminatory state practices. The dichotomy in Indian *Ad hocism*, that has flagrantly shrouded the contours of refugee framework and the process of refugee status determination under it, falls below national and international benchmarks. The governmental agencies in India ostensibly claim to observe fundamental human rights norms in refugee protection whereas they discriminate among refugees on the ground of religion, membership of a particular social group, and ethnicity. The refugees who follow any religion that did not originate in India are discriminated in terms of aid, assistance, and protection that is incompatible with international human rights norms. Hindu, Sikh, and Buddhist refugees from Afghanistan, Bangladesh, Pakistan, Sri Lanka, and Tibet are extended the full range of benefits contemplated under the 1951 UN Convention Relating to the Status of Refugees with its 1967 Additional Protocol, and comfortably accommodated in India by the governmental agencies. However, Christian and Muslim refugees from Myanmar, South East Asia, and other South Asian countries are not so fortunate to be treated as per International Refugee Law and dubbed as infiltrators, saboteurs, and threats to national security and integrity.

The legal assessment of claims in refugee status determination procedures is flawed, fallible and frail; particularly in relation to the political opinion and religion criteria enshrined in the definition clause and incidental issues concerning the credibility of torture and persecution survivors who have sought protection under the *non-refoulement* provisions of the UN Convention against Torture. The absence of common standards for assessing claims in refugee status determination procedures remains an obstacle in India. Politico-religious exclusivism shaping treatment traditions and approaches creates a credibility crisis for its government institutions who are accountable to international human rights law monitoring bodies.

#### **IV. THE CONSTITUTION OF INDIA AND REFUGEE PROTECTION**

India is one of the countries in South Asia which have been hosting millions of refugees since its independence. Indian experience with the problem of refugee has been rich and rewarding, in the

sense that no country in Asia has suffered such a massive migration of peoples, has faced such stupendous tasks of relief and resettlement of refugees and came out comparatively so successful.<sup>73</sup> Truly speaking – the root causes of refugee 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. *Socially*, the people in the neighbouring countries share common roots in socio-cultural patterns and they encourage many amongst the persecuted to seek asylum or refuge in India.

India, like the majority of Asian states, is not a party to the 1951 Refugee Convention, nor to 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. It has handled the refugee issue at the political and administrative levels – with the single exception<sup>74</sup> at the time of its partition in 1947 – along with other relevant documents and legislations<sup>75</sup> which are inadequate to deal with the problems of refugees and asylum seekers in India.

The Constitution of India contains just a few provisions<sup>76</sup> where under refugees enjoy a catena of protection due to the status of international law<sup>77</sup> and its respect in India. It 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.”<sup>78</sup> The provision *supra* is placed under the *Directive Principles of States Policy*<sup>79</sup> part which is not enforceable by any court in India. It is submitted that before its independence, the Indian Courts administered the English common law. They accepted the basic principle governing the relationship<sup>80</sup> 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

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<sup>73</sup> Rahmatullah Khan, “*India: India and its Refugees*”, in Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, Manila, 1980, p. 106.

<sup>74</sup> India passed in 1948 *The Rehabilitation Finance Administration Act*, 1948 to cope with the massive migration of people from Pakistan.

<sup>75</sup> *The Foreigners Act of 1946, The Registration of Foreigners Act of 1939, The Extradition Act of 1962, Passport Act of 1967*,

<sup>76</sup> The Constitution of India 1950, articles 13, 14, 15, 20, 21, 22, 23, 24, 25, 27, 32 and 51.

<sup>77</sup> The Constitution of India 1950, article 51.

<sup>78</sup> The Constitution of India 1950, article 55(c).

<sup>79</sup> Part-IV, Directive Principles of State Policy, the Constitution of India 1950.

<sup>80</sup> John Dugard observes as follows concerning the relationship between public international law and municipal law: “Whatever the jurisprudential basis for the application of international law in municipal law may be, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. In so doing courts seldom question the theoretical explanation for their recourse to international law.”

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) requires legislation in order to make it effective and enforceable in the courts.<sup>81</sup> However, internationalization, broadly speaking, has increased over time with more constitutions incorporating specific treaties, providing for treaty superiority over domestic legislation, and making customary law directly applicable, even as the scope of customary law has expanded dramatically.<sup>82</sup> 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.<sup>83</sup> 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.

The Indian executive has followed this common law practice; legislature and judiciary have followed this common law practice even after the independence of India. Article 253 of the Constitution lays down that Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any 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 obligation undertaken at international level into its own municipal law. Justice Chinapa Reddy observed in a case<sup>84</sup> that the doctrine of incorporation recognizes the position that rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. National courts cannot say ‘yes’ if parliament has said ‘no’ to a principle of international law.<sup>85</sup> 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.

## **V. THE CONSTITUTION-BASED APPROACH OF INDIAN JUDICIARY: THE REFUGEE RIGHTS AND GLOBAL STANDARDS OF UN CONVENTION**

The Constitution of any country is regarded as what I call “Base Law” to measure the quality and magnitude of equality, equity, and rule of law available to its citizens. India is not an exception thereto. I perceive the Constitution of India as the Covenant of Democracy of Commonkind,<sup>86</sup> the

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<sup>81</sup> Ian Brownlie, “*Principles of Public International Law*”, 3<sup>rd</sup> edition, 1979, pp. 49-50

<sup>82</sup> Ginsberg, Chernykh and Elkins 2008 U Ill L Rev 210

<sup>83</sup> *Trendtex Trading Corporation v. Central Bank of Nigeria*, 1977, I Q.B., 529

<sup>84</sup> *Gramophone Company of India Ltd. V. Birendra Bahadur Pandey*, AIR 1984, SC, p. 667

<sup>85</sup> *Ibid.*

<sup>86</sup> I have coined the term “Commonkind” to denote socio-economic layers and fragmentations in the Indian society whereat the lowest strata of Indian social order is alienated, excluded, and deprived from justice of all kinds as enunciated in the Constitution of India.

Covenant of Equality of Rights Order, the Covenant of Liberty of Social Justice, the Covenant of Fraternity of Public Interest, and the Covenant of Freedom of Perfect and Imperfect Rights where under a just state, a re-distributive state, an equal opportunity state, a restorative state, a reparative state, an inclusive state, and a progressive state are engrained in the nethermost crust of diversity and multi-culturalism of India. Therefore, the Constitution of India has envisioned an ample architecture of human rights protection of all and sundry sans discrimination. The highest judicial establishment of India has charted a roadmap to protect the rights of refugees, migrants and aliens by interpreting the salient silences and gospel gratifications within the provisions of the Constitution that is an approach I call a ‘constitution-based’ approach<sup>87</sup> of Indian judiciary.

#### A. *Legal Framework for Refugee Protection in India*

Contrary to its historical traditions of hospitality<sup>88</sup>, openness, and generosity, India is not a state party to either the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol. However, it has acceded to other international instruments whose provisions are relevant to the rights of refugees. In April 1979, India acceded to the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights. However, Article 13 of the former instrument deals with the expulsion of a person lawfully present in the territory of a state. India has reserved its right under this Article to apply its own municipal law relating to aliens. In December 1992, India acceded to the 1989 Conventions on the Rights of the Child, Article 22 of which deals with refugee children and refugee family reunification.<sup>89</sup> The 1963 Convention on the Elimination of all Forms of Racial Discrimination was ratified in 1969, and the 1979 UN Convention on the Elimination of all Forms of Discrimination against Women was ratified in 1993.

Applicable non-binding international human rights instruments includes the 1948 Universal Declaration on Human Rights who’s Article 14 (I) states that, “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. The principle of non-refoulement

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<sup>87</sup> The Constitution of India is the most progressive document ever produced by the collective and inclusive wisdom of the Constituent Assembly in 1950. Within the framework of the Constitution of India, solutions are rummaged by the Supreme Court by resorting to intrinsic and extrinsic constitutional interpretations based on harmonious constructions of constitutional language, interpretative equilibrium, and institutional constitutionalism which I call Constitution-Based Approach of Indian Judiciary. See: Thomas Piketty, *Capital in the Twenty-First Century* (2014),

<sup>88</sup> India has been accepting, accommodating, and assimilating since time immemorial of aliens, immigrants, migrants, and refugees from Central Asia, South-East Asia, South Asia, and West Asia. It always maintained a multi-cultural and cosmopolitan society with aberrations. However, illegal immigrants are also residing in India without official permission as per relevant Indian law. Those who are explicitly granted refugee status do not fall under this category. As per a 2001 census, there are 3,084,826 people in India who came from Bangladesh. No reliable numbers on illegal immigrants are currently available. Extrapolating the census data for the state of Assam alone gives a figure of 2 million. Figures as high as 20 million are also reported in the government and media circles and 2001 India Census gives information about migrants but not exclusively illegal immigrants, therefore, as per the 2001 Census, the Bangladeshi form the largest group of migrants in India, followed by Pakistanis.

<sup>89</sup> Article 10, dealing generally with family reunification, and Article 38, dealing with children in situations of armed conflict, are also relevant.

incorporated in the Asian-African Legal Consultative Committee's 1966 Principles Concerning the Treatment of Refugees ("Bangkok Principles"), specifically includes non-rejection at the frontier. The Declaration and Programme of Action of the 1993 Vienna World Conference on Human Rights included a specific section on refugees, which reaffirmed the right of every person to seek and enjoy asylum, as well as the right to return to one's own country.<sup>90</sup>

Indian courts do not have the authority to enforce the provisions of the above international human rights instruments unless these provisions are incorporated into municipal law by legislation<sup>91</sup>. This process of incorporation in the Indian context has been largely ignored with respect to the above treaties. Parliament is under no obligation to enact laws to give effect to a treaty and, in the absence of such laws, the judiciary is not competent to enforce obedience of the treaty obligations by the Executive.<sup>92</sup> Thus, every state has the duty to carry out in good faith its obligations arising out of international law and they cannot offer acts or omissions on the part of their legislative or executive organs as an excuse for failure to fulfil the above obligations.<sup>93</sup> In the event of failure of a state to bring its municipal law in line with its international obligations, International Law does not render such conflicting municipal law null and void.<sup>94</sup>

Various court decisions have – in the absence of a concrete legislative structure – tried to provide humane solutions to the problems of refugees, primarily with regard to the principles on non-refoulement, right to seek asylum, and voluntary repatriation. The courts have, however, arrived at their decisions without entering into a discussion of international refugee law.<sup>95</sup> It may be noted that courts can take the treaty provisions mentioned earlier into account in certain circumstances. Article 37 of the Indian Constitution provides that the Directive Principles of State Policy in Part IV are fundamental to the governance of the country and that it shall be the duty of the State to apply these principles in making laws. Likewise, Article 5 (c) in Part IV of the Constitution of India provides that the State shall endeavour to foster respect for international law and treaty obligations.<sup>96</sup> Thus, while Indian courts are not free to direct the making of legislation, they do

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<sup>90</sup> Vienna Declaration and Programme of Action, A/CONF. 157/CONF. 157/23 of 12 July 1993 at p. 8.

<sup>91</sup> The well-established position that "the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action" was stated in the Privy Council Case of *Attorney General for Canada v. Attorney General for Ontario* (1937) AC 326 This position still holds: see for example, *State of Gujarat v. Vora Fiddali* A.I.R. 1964, SC 1043.

<sup>92</sup> P. Chandrasekhara Rao, *the Indian Constitution and international Law*, Taxman, 1993, 130, also see: *S.R.C.L v. Union of India*, A.I.R. Kant. 85.

<sup>93</sup> Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p.174, at p. 180: also: Article 13 of the Draft Declaration on the Rights and Duties of States, adopted by the International Law Commission in 1949; Articles 27 and 46 of the Vienna Convention on the Law of Treaties, 1969.

<sup>94</sup> *Supra* note 65, p. 18.

<sup>95</sup> B.S. Chimni, *Legal Condition of Refugees in India*, Journal of Refugee Studies, vol. 7, No. 4 1994, pp. 378-401, p. 380.

<sup>96</sup> For a compilation of Supreme Court judgements that refer to international instruments. Fali S. Nariman, "Economic, Social and Cultural Rights and the Role of Lawyers", The Review, International Commission of Jurists, Dec. 1995, no. 55, pp. 141-151, p. 145.

adopt principles of interpretation that promote rather than hinder the aspirations in Part IV of the Constitution.<sup>97</sup>

India has non refugee-specific legislation and hence refugees are not classified and treated differently from other aliens. The principal Indian laws relevant to refugees are: The Foreigners Act, 1946 (Section 3, 3A, 7, 14); the Registration of Foreigners Act, 1939 (Section 3, 6); the Passport (Entry into India) Act, 1920; the Passport Act, 1967; and the Extradition Act, 1962. Jurisdiction over issues of citizenship, naturalisation and aliens rests with the union legislature.<sup>98</sup> However, influxes of refugees have been handled by administrative decisions rather than through legislative requirements. This administrative discretion is exercised within the framework of the 1946 Foreigners Act, and refugee policy in the country has essentially evolved from a series of administrative orders passed under the authority of section 3 of the said Act.<sup>99</sup> It may be noted that the impact of administrative policy on judicial decisions is minimal and developments in one area occur quite independently of developments in the order.

Positive rights accruing to refugees in India therefore are those that apply to all aliens under the Indian Constitution: the right to equality before the law (Article 14), free access to courts for protection of life and personal liberty which may not be deprived except according to procedure established by law (Article 21), freedom to practice and propagate one's own religion (Article 25). Indeed, any law or administrative action in violation of these rights is null and void and can be so declared by the courts (Article 13 read with Articles 32 and 226).

#### *B. INEFFECTIVE PROTECTIONS AND SAFEGUARDS*

Humanitarian mandate enunciated in Articles 30, 31, and 33 (*non-refoulement*) of the 1951 UN Refugee Convention is the least respected. The Constitution of India does not have any specific provisions relating to refugee protection, but, it envisages an understanding of refugee protection that is gleaned by the Supreme Court and the High Courts by interpreting non-discrimination clauses of the Constitution of India, i.e. Article 14 (Equality before law) and Article 21 (Protection of life and personal liberty) which use the expression "person" instead of "citizen", that are equally applicable to nationals and non-nationals in India. The Supreme Court of India observed<sup>100</sup> that state and its instrumentalities are bound to protect the life and liberty of every human being. The Constitution of India envisages a broil of rights like the right to protection against arbitrary

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<sup>97</sup> Supra note 65 at p. 125; also. *Delhi Transport Corporation v. D.T.C. Mazdoor Congress A.I.R. 1991 SC 101, Central Inland Water Transport Corp. Ltd. V. Brojo Nath, A.I.R. 1986, SC. 1571.*

<sup>98</sup> Item 17 of the Union List (Schedule Seven appended to Article 246).

<sup>99</sup> Section 3 provides the power to make orders and is drafted very broadly – "The Central government may by order make provision, either generally or with respect to all foreigners, or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating, or restricting the entry of foreigners into India or their departure there from of their presence or continued presence therein."

<sup>100</sup> *National Human Rights Commission v State of Arunachal Pradesh* (1996) 1 SCC 742

arrest<sup>101</sup>, protection against *ex post facto laws*<sup>102</sup>, double jeopardy<sup>103</sup>, self-incrimination<sup>104</sup>, freedom of religion<sup>105</sup>, and right to constitutional remedies<sup>106</sup> which are equally available to non-citizens including refugees, immigrants, and aliens.

The Protection of Human Rights Act 1993, has created the National Human Rights Commission (NHRC) for the protection of human rights in India. The NHRC is empowered to undertake any inquiry or investigation pertaining to the violation of human rights<sup>107</sup> or other institutions of detentions.<sup>108</sup> In a landmark case of Chakma refugees known as *NHRC v. State of Arunachal Pradesh*,<sup>109</sup> Articles 32 and 21 of the Constitution of India were resorted to by the NHRC to get refugee rights enforced. The Registration of Foreigner's Act 1939, Foreigners Act 1946, and Foreigner's Order 1948 are other instruments implemented to deal with the refugees in India. However, the Foreigners Act 1946 is a specific law on foreigners' where under entry and stay of refugees are regulated<sup>110</sup> as foreigners under its Section 2. There are few other laws such as the Extradition Act 1962, the Passport Act 1967, and the Citizenship Act 1955 which do not directly deal with refugees but are, rarely, resorted to for the refugee protection in India.

In *Ba Aung and Another v. Union of India and Others*<sup>111</sup> the petitioners were accepted Burmese refugees who had been held guilty of offences under Section 14 of the Foreigners Act 1946 by the trial court. The Act stipulates various conditions which must be fulfilled by non-citizens residing in India, including: registration with the authorities and holding valid passports. Therefore, since their being guilty and illegally present on Indian Territory, the trial court had ordered their detention and issued a deportation order. The petitioners were later granted resettlement in Sweden by the UNHCR. They approached the High Court by filing a writ petition seeking the court's permission to allow them to travel to Sweden. They argued that since they were refugees they should not be deported and should be allowed to travel to Sweden in order to resettle there. At a previous hearing, two weeks previously, the court had ordered the State Government to file an affidavit and to inform the court whether the State Government continued to detain the Appellants for a particular purpose. No response was given to these orders. The court took the view that the continuing detention of the asylum seekers was unlawful and an affront to their personal liberty. It stated that since the State Government had not provided good reason for their continued detention, the State Government should release them. The State authorities were therefore ordered

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<sup>101</sup> Article 22, Constitution of India 1950

<sup>102</sup> Article 20(1), Constitution of India 1950

<sup>103</sup> Article 20(2), Constitution of India 1950

<sup>104</sup> Article 20(3), Constitution of India 1950

<sup>105</sup> Article 25, Constitution of India 1950

<sup>106</sup> Article 32, Constitution of India 1950

<sup>107</sup> Section 12, Protection of Human Rights Act 1993

<sup>108</sup> *Ibid*

<sup>109</sup> AIR 1996 SC 1234

<sup>110</sup> The Foreigners Act 1946. Section 2(a) of this Act defines a foreigner as a person who is not a citizen of India.

<sup>111</sup> SC AIR 2006

to release the petitioners from detention. As a result, the petitioners were released from custody and were allowed to travel to Sweden.

In the unprecedented decision of *Vishaka*<sup>112</sup> the Supreme Court of India stated that the contents of international conventions and norms consistent with the fundamental rights must be reflected in safeguarding gender equality and right to work with human dignity that lacks in municipal law as it is axiomatic from the Articles 51(1) and 253 of the Constitution of India. However, in the case of *Louis De Raedt & Ors v. Union of India and Others*,<sup>113</sup> the Supreme Court of India stipulated that the fundamental rights of the foreigner are limited to Article 21 where under life and personal liberty does not envisage the right to reside and settle in India, as averred in Article 19 (1) (e) of the Constitution of India, as it is exclusively available to the citizens of India. The Andhra Pradesh High Court judgement in *Vincent Ferrer v. District Revenue Officer, Anantpur*<sup>114</sup> propounded that foreign nationals are eligible to enjoy protections enunciated under Article 14 regarding right to equality but foreigners are not entitled to assert their claims under Article 19 (1) (d) and (e) of the Indian constitution. On the other hand, in the judgement it was observed by the Andhra Pradesh High Court that foreigners are eligible to have equality before the law and equal protection of laws under Article 14 of the Constitution of India but foreigners cannot claim any protection under Article 19(1) (d) and (e) under the fundamental rights part of the Constitution of India.

There are countless refugees and migrants staying in India illegally who are dealt with under the Foreigners Act 1946 where under unfettered powers are exercised by the government of India regarding expulsion, deportation, and involuntary repatriation of these migrants deviant to the provisions of International Refugee Law. The Foreigners Act 1946 penalizes illegal entry and exit, and refugees continue to be subjected to arbitrary arrest and harassment. It is distressing to note that absolute powers on expulsion and deportation under the Foreigners Act 1946 might have detrimental and draconian ramifications for the refugees in their country of origin. Thus, the Foreigners Act 1946 proved disastrous for the protection of refugees and their status determination. However, in 1983 the Government of India has enacted new legislation<sup>115</sup> specifically for one state of North-East India called Assam to detect illegal immigrants from Bangladesh and expel them from Assam. However, in the case of other states of India, detection and identification of foreigners are done under the Foreigners Act 1946. The Illegal Migrants (Determination by Tribunal) (IMDT) Act envisaged procedures and special protections against undue harassment to the minorities

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<sup>112</sup> *Vishaka Vs. State of Rajasthan*, (1997) 6 SCC 241

<sup>113</sup> *Louis De Raedt & Others v. Union of India and Others* (1991) 3SCC 554

<sup>114</sup> *Vincent Ferrer v. District Revenue Officer, Anantpur*, AIR 1974 AP 313

<sup>115</sup> Illegal Migrants (Determination by Tribunals) Act 1983, popularly known as the IMDT Act (1983)

affected by the Assam Agitation<sup>116</sup> and by other state tolerated actors.<sup>117</sup> Consequently, IMDT Act had made it difficult to deport illegal immigrants from Assam. Its constitutionality<sup>118</sup> and efficacy was challenged in the case of *Sarbananda Sonowal v. Union of India & Another*<sup>119</sup>. The Supreme Court of India held that the Illegal Migrants (Determination by Tribunals) Act 1983 and rules thereunder “has created the biggest hurdle and is the main impediment or barrier in the identification and deportation of illegal migrants. The presence of such a large number of illegal migrants from Bangladesh, which runs into millions, is in fact an aggression on the State of Assam and has also contributed significantly in causing serious internal disturbances in the shape of insurgency of alarming proportions”.<sup>120</sup> Thus, the IMDT Act is coming to the advantage of such illegal migrants as any proceedings initiated against them almost entirely end in their favour, enabling them to have a document with official sanctity, to the effect that they are not illegal migrants.<sup>121</sup> The IMDT Act and the Rules clearly negate the constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act, which contravenes Article 355 of the Constitution is, therefore, wholly unconstitutional and must be struck down.<sup>122</sup> The impact of such large-scale illegal migrants not only affected Assam but also other north-eastern States as the route to these places passed through Assam. The influx of Bangladeshi nationals into Assam posed a threat to the integrity and security of the north-eastern region<sup>123</sup> and it was quashed by the Supreme Court of India in 2005. Unfortunately, the Supreme Court of India in the instant case has frustrated the cause of human rights in its reasoning of striking down the IMDT Act that goes against the global standards set out in the 1951 Convention Relating to the Status of Refugees with its 1967 Additional Protocol and other international human rights instruments.

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<sup>116</sup> The Assam Agitation (1979-1985) was a movement of protests and demonstrations against undocumented immigrants in Assam led by All Assam Students Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP) to compel the government to identify and expel illegal immigrants from Assam. The Assam Agitation ended in August 1985 following the Assam Accord, which was signed by leaders of AASU-AAGSP and the Government of India. The agitation leaders formed a political party, Asom Gana Parishad (AGP) that came to power twice in the state of Assam: in the Assembly elections held in 1985 and 1996 respectively.

<sup>117</sup> I call State Tolerated Actors (STAs) those persons who are part and parcel of the governance establishment, enjoy the power patronage, and indulge in extra-constitutional exercise of powers deviant to rule of law, accountability, and transparency in eyes of people at large.

<sup>118</sup> A Public Interest Litigation (PIL) under Article 32 of the Constitution of India was filed for declaring certain provisions of the Illegal Migrants (Determination by Tribunals) Act (Act No.39 of 1983) 1983, as ultra vires the Constitution of India, null and void and consequent declaration that the Foreigners Act 1946, and the rules made thereunder shall apply to the State of Assam. The second prayer made was to declare the Illegal Migrants (Determination by Tribunals) Rules, 1984 as ultra vires the Constitution of India and also under Section 28 of the aforesaid Act and, therefore, null and void.

<sup>119</sup> *Sarbananda Sonowal v. Union of India & Another*, 12 July, 2005

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

The principle of *non-refoulement* is regarded as a non-derogable norm of all situations of human rights violations but the principle of *non-refoulement* is under threat in India. The norm of *non-refoulement* under the Foreigners Act 1946 was tested before the Supreme Court of India in the case of *Hans Muller v. Supt. Presidency Jail, Calcutta*<sup>124</sup> wherein a German national was put under preventive detention by the provincial Government of West Bengal in India under the provisions of Preventive Detention Act 1950 on the ground of him being a foreigner within the ambit of the Foreigners Act 1946. Therefore, it was decided by the provincial government to expel him from India and, accordingly, the Government of India was apprised of his expulsion arrangements and an order of expulsion was sought from the central government. The petitioner contested the order of his arrest and detention under Section 3 (2) (c) of the Foreigners Act 1946 and Section 3 (i) (b) of Preventive Detention Act 1950 on the ground of them being inconsistent with Article 14 of the Constitution of India. His contentions were resisted in the wake of India's international human rights endorsements.

Therefore, any deportation, expulsion, repatriation or transfer of refugees by the country of reception to the territories of persecution is a violation of the principle of *non-refoulement* that is prohibited under Article 33(1) of the 1951 UN Convention Relating to the Status of Refugees with its 1967 Additional Protocol. The principle of *non-refoulement* is invariably applicable to all human rights settings where torture is a lurking danger. The jurisprudence on the principle of *non-refoulement* has evolved under Article 21 of the Constitution of India by the various High Courts and Supreme Court of India such as the Gujarat High Court wherein it did not allow the deportation of two Iraqi nationals to Iraq.<sup>125</sup> In another case<sup>126</sup>, the Guwahati High Court stayed the deportation order against Burmese nationals.

## VI. CONCLUSION

The Government of India has dealt with refugee issues as an integral part of bilateral relations with neighbouring states. The importance of administrative discretion in the government's dealings with refugees is therefore governed by the practical considerations of relations between states. However, this administrative discretion has been exercised in restricted consonance with international refugee law norms. Thus, the *de facto* definition of "refugee" being employed in administrative policy accords with the 1969 OAU Convention definition (although it appears that the definition is being used not to create a legally separate category of persons, but rather for

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<sup>124</sup> *Hans Muller v. Supt. Presidency Jail, Calcutta*, 1955 AIR SC 367

<sup>125</sup> *Ktaer Abbas Habib Al Qutaifi v Union of India*, 1999 Cri LJ 919 Para 3

<sup>126</sup> *Khy Htoon v. State of Manipur*, W.P. No. 515/1990, Guwahati HC, In *N.D Pancholi v. State of Punjab*, the Supreme Court stayed the deportation order against a Burmese refugee and allowed him to seek refugee status from the UNHCR office in New Delhi. In *Dr. Malvika Karelkar v. Union of India*, the Supreme Court stayed the deportation order issued against 21 Burmese refugees from the Andaman Islands of India and allowed them to seek refugee status from the UNHCR.

administrative purposes of identifying beneficiaries to certain types of assistance provided by the government). Standards with respect to the voluntariness of repatriations have been established through the practice of the Tamil Nadu government and through a High Court decision. Deportation orders for asylum seekers have been stayed pending refugee's status determinations with the implication that successful applications preclude *refoulement*. The Indian government believes that, even in the absence of refugee specific legislation and in spite of being a non-signatory to the principal refugee conventions, adequate protection to refugees is being provided, in particular thanks to a generous asylum policy and administrative structure. However, by not differentiating refugees from other aliens in the country, gaps in their protection occur – particularly with regards to asylum seekers that enter the country illegally and with regards to the equitable regulation of their stay in the country.

Under the current framework, no system of protection exists for such asylum seekers and if it were not for the intervention of a third party, these persons might have run the serious risk of being *refouled* at the expiry of their initial stay permits. A legislative framework would clearly be beneficial in sealing these lacunae in the protection of refugees. The experience of resolving the problem of the stateless persons of Indian origin in Sri Lanka indicates the importance of recognising the inter-connectedness of refugee problems and solutions in the region. The Draft Regional Declaration on Refugees in South Asia is therefore a very useful first step in this regard. The challenge in drafting a regional declaration is that it takes cognisance of two imperatives – the need to provide adequate, encompassing protection to asylum seekers and refugees and the simultaneous need to allow governments some measure of administrative discretion in their management of refugees. It may be noted here that the Draft Declaration incorporates both a refugee definition that is already in consonance with the definition being used by the Indian government in relation to asylum seekers from neighbouring countries and a reaffirmation of “the sovereign right (of a State)” to grant or refuse asylum in its territory to a refugee.

Voluntary repatriation of refugees is the preferred solution to the refugee problem, particularly in the situation of mass influx of refugees to developing countries which are not in a position to carry the burden of refugees for a long period, unless the international community shares that burden. Though voluntary repatriation is the preferred solution, it is by no means an easy one. In most of the major refugee repatriations, despite all efforts by the UNHCR, the host countries, and the countries of origin to ensure return in safety and dignity, the success has been only partial. A vast majority of refugees continue to live in the host countries. In many situations, the voluntary aspect of refugee repatriation gets compromised either due to pressure from the host countries or the adverse situations in the host countries forcing refugees to repatriate. In most of the major refugee repatriations it is found that a large number of refugees have repatriated spontaneously, at their own initiative. Successful refugee repatriations clearly show the close link between safety and voluntariness. It can be inferred that if the conditions of safety could be ensured, the majority of refugees would return voluntarily. In spontaneous repatriation, the UNHCR may not directly have

taken initiative in actual repatriation but could have contributed in creating conditions of safety. Though more refugees may have repatriated spontaneously, it cannot undermine the importance of organized repatriation by the UNHCR. Organized repatriation becomes necessary when situations are complex; but for successful organized repatriation, millions of refugees would have continued living as refugees in the host countries.

Refugee repatriation is generally spread over a number of years and varies from situation to situation and from country to country. The number of refugees repatriated may not be the true index of success of refugee repatriation. Refugee repatriation of a small number of refugees in complex situations may require more efforts and the successful repatriation of small number of refugees in complex situations will always pave the way for future repatriation in greater numbers. Settlement of land and property disputes with timely re-integration assistance helps in finding durable solutions for the repatriating refugees. Post return monitoring of returnee refugees is also very important. In many situations, the host countries and the countries of origin prefer bilateral arrangement for refugee repatriation and there is no direct involvement of the UNHCR and its role is reduced to the status of an observer only. Repatriation of refugees under bilateral arrangements without full involvement of the UNHCR can always be questioned. In the bilateral arrangement, despite the best of intentions of the country of origin and of the host country, doubts about the voluntary aspect of the repatriation can always be raised and it can always be said that the refugees have been forced to repatriate contrary to the principal of *non-refoulement*. Therefore, full involvement of the UNHCR is a necessary prerequisite in any refugee repatriation situation.

Confidence building measures like mass information campaign, visit by refugee, etc. help refugees in taking decisions regarding repatriation. However, there may be refugees who may not be willing to repatriate due to continued fear of persecution. Such refugees should continue to get the protection of host countries. In every refugee repatriation situation, there would always be residual cases and one may not achieve total repatriation of all the refugees. Refugee repatriation will always be temporary and reverse outflows of refugees can occur at any time if the peace accords are not fully implemented and the causes of refugee outflow are repeated. Further, peace accords alone, without reconciliation in real terms, cannot help in finding durable solutions for the repatriating refugees. The role of the UNHCR from a passive facilitator to that of active promoter has emerged in view of the complex refugee situation, the demands of the international community, overburdened host countries, and, in certain situations, the refugees themselves due to miserable life in the camps in the host countries. Its role as an active promoter has evolved over time, the international community has accepted it, and now there is no possibility of going back.

However, refugee repatriation as a concept and process has evolved over the years and helped in finding durable solution for millions of refugees. This is the solution which needs to be pursued vigorously with the cooperation of all concerned. It will require intense involvement and commitment from the country of origin, the country of asylum, and the international community.

The international community also has to address the causes of the refugee flow and adopt a proactive role to bring about peace and reconciliation. Adequate and timely reintegration assistance plays a very important role in the successful repatriation and therefore, should get the due attention of the international community.

Therefore, in India, the guarantees regarding rights of refugees are insufficient when measured against the standards secured by the international refugee and human rights instruments to which India has acceded in the absence of a national law. Over the years, the existing international refugee laws have come to be recognized as the pre-emptory norms of international law and attained the status of *jus cogens* wherefrom no derogation is possible. The international obligation to protect refugees must be traced to the juridical basis available in the 1951 UN Convention Relating to the Status of Refugees with its 1967 Additional Protocol that ought to be regarded as the *Magna Carta* of refugees. However, protecting refugees is a legal obligation of India that emanates from the customary international law. The judicial system of India is left with no option but to engraft the provisions of the international human rights regime in the constitutional *juris corpus* of India enunciated under Articles 14, 21, and 32 for refugee protection. However, the judiciary alone cannot address this problem unless a national legal framework is emplaced for the durable solutions of refugee protection like repatriation, re-integration, and re-settlement in the third country which are, unfortunately, not provided by the existing Foreigners Act 1946. Therefore, India commands immense weight in South Asia due to its geo-political settings that makes it take the lead in extending refugee protection and abolishing gaps in refugee protection by developing a coherent response to the refugee crisis in the form of uniform national and regional refugee laws and policy whilst reflecting upon the global standards of international refugee law.