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Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future

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Abstract

The whole of South Asia is devoid of any standards and norms on any dimension of refugee reception, determination and protection. The fact that a quarter of the world's refugees find themselves in a non-standardized, if not hostile, refugee regime is a situation which does not augur well for either the mandate of UNHCR or for any civilized society. The South Asian nations have their own apprehensions, real or imaginary, about the utility of CSR 1951 to their situations. Because of historical mishaps, political ignorance, unstable democracies and exaggerated concern over national security, there is hardly any motivation for, or any environment in which there is a possibility for, the enactment of national legislation.

Non-governmental agencies, in their own way, have been trying to influence the States to accede to the Convention and, also, to promulgate national laws. The most noticeable contribution is the draft national law for India, 'Refugees and Asylum Seekers Act', discussed and approved by the Fourth Informal Consultations on Refugees and Migratory Movement Sessions in their Dacca Session. The draft legislation has been under consideration by the Indian government for some time but the issue, nonetheless, remains both important and urgent. There is an almost complete absence of discussion about it in any forum, even the media. This paper is an attempt to examine the provisions of the draft law, insofar as it conforms to the international standards, and to show where it is found wanting. The paper also evaluates the competence of the draft law to answer security considerations after 9/11. The paper suggests suitable amendments that may make the enactment of national law a reality, so that the void in the international regime of refugee protection can be filled effectively and fast.

1. Introduction

The migration and movement of populations have immensely enriched the history of human civilization. However, such movements came under severe restrictions as the desire to settle, consolidate and expand territorial boundaries gained increasing recognition in practice and in law.

The international legal response to refugee management is the Convention Relating to the Status of Refugees 1951 (CSR) and the Protocol Relating to the Status of Refugees of 31 January 1967 (the Protocol). While the

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CSR and the Protocol have attained very wide acceptability, it is striking that none of the countries in South Asia (1.5 billion population bloc of India, Pakistan, Bangladesh, Nepal, Sri Lanka, Maldives and Bhutan) are signatory to them and, in addition, none of them have their national legislation in place. South Asia is a major theatre for refugee movement and this lack of confidence in the CSR and the Protocol is a matter of grave concern and introspection. Among all the South Asian countries, India occupies the most prominent place, not just because of its size and population but, also, due to its geo-political, strategic and economic capacity to influence the events in the sub-continent.

This Paper is an attempt to measure the judicial and legal treatment of refugees in India. Section 2 introduces preliminary facts about refugee care in India, so vital to understanding the legalistic response to the refugee problem. It touches, in brief, the refugee situation in India, its position on signing the CSR and its international obligations. In Section 3, the Paper will outline the legal framework and how the judiciary has considerably enlarged the ambit of protection, notwithstanding absence of legislation. It will also stress the need for legislation pertaining to refugees and the required ingredients. Section 4 is devoted to clause-by-clause analysis of the National Model Law (hereinafter, the NML) prepared by a non-governmental body for consideration by the Union Government for enactment. The analysis draws comparison with existing international and regional conventions and non-binding instruments. Section 5 is the conclusion.

2. Preliminary facts on refugee care in India

The independence and partition of India were authored together, resulting in an unprecedented population movement between India and Pakistan, accompanied by wanton violence and uncivilized cruelty of the severest order. This tragic experience of mistrust, hostility and suspicion has left scars on the issue of refugee protection in both India and Pakistan.

Post-Independence India, just as the ancient India, is the home of refugees belonging to all religions and sects. As well as those from neighbouring countries, India has received refugees from distant countries like Afghanistan, Ethiopia, Iran, Iraq, Liberia, Myanmar, Somalia and Sudan.[1] According to the World Refugee Survey, 2006, the number of refugees and asylum seekers living in India is 515,500.[2] However, it is a universally accepted fact that there are an unknown number of Bangladeshis and Nepalese. The crux is the number of these unknowns. It defies calculation, but it is estimated that as a result of continuous migratory movement, there

[1] UNHCR is involved in their status determination and relief assistance.
[2] Available at http://www.refugees.org/countryreports.aspx?id=1588.

are up to 20 million illegal migrants now resident in the country,[3] and this does not include citizens of Nepal and Bhutan, who are permitted to travel, reside and work freely in the country, based on bilateral agreements.[4] However, the number of Nepalese fleeing the Maoist insurgency is likely to be drastically reduced in view of the Nepal Peace Pact 2006.

Even without any substantial international assistance, the record of Indian hospitality is impressive and generous.[5] By and large, the instances of refusal at the frontier and mass *refoulement* are rare. However, different treatment among various classes of refugees, and between similar refugees at different times, is a major element of Indian policy. It is a hard and harsh reality that Convention or no Convention, refugee protection is subjugated to the domestic interests of the receiving nation. This paper is restricted to the legal aspects of refugee protection in India and, accordingly, will not address the issue of politics in refugee care.

2.1 Why did India not sign the CSR?

India, as a non-aligned state, was always sceptical about the CSR.[6] Although the geographical and temporal restrictions were lifted by the Protocol, the impression in South Asia, real or imaginary, is that the CSR is Euro-centric and not capable of delivering in the unique regional situation. Giving the reasons for not ratifying the CSR, the government maintains:

> India has regarded 1951 Convention and the 1967 Protocol as only a partial regime for refugee protection drafted in the euro centric context. It does not address adequately situations faced by developing world, as it is designed primarily to deal with individual cases and not with situation of mass influx. It also does not deal adequately with situations of mixed flow. In India's view, the Convention does not provide for a proper balance between the rights and obligations of receiving and source states. The concept of international burden sharing has not been developed adequately in the Convention. The idea of minimum responsibility for states not to create refugee outflows and of cooperating with other states in the resolution of refugee problem should be developed. The credibility of the institution of asylum, which has been steadily whittled down by the developed countries, must be restored.[7]

[3] Mostly Bangladeshi.

[4] Mrs Deepa Gopalan Wadhwa, Joint Secretary, Ministry of External Affairs, Government of India, in opening address to the workshop on 'Strengthening Refugee Protection in Migratory Movements', organized by AALCC and UNHCR in New Delhi in 2003.

[5] Refugees in India are mainly from Bangladesh, Nepal Sri Lanka, China (Tibet), China and other minorities from Burma, Bhutan and Afghanistan. The situation in South Asia is precarious, as borders are porous and without natural boundaries and a thread of ethnicity, language and religion runs across. No State has the capacity to patrol their borders, much less to control movements of population.

[6] India abstained from voting on the UNGA res. 319(IV) of 1949 pertaining to the setting up of the CSR. None of the South Asian countries were among the 26 nations involved in the drafting of the CSR.

[7] Rajya Sabha (Upper House of Parliament), Starred Question in Aug. 2000, Monsoon Session.

Other than this, there is a self-congratulatory belief that India has been generous and responsive, without the CSR, on a crisis-to-crisis basis. However deep inside, the planners are worried about the expected financial burdens that accompany the CSR obligations when it cannot cater to the socio-economic needs of its own millions.[8] Added to this is the security concern, heightened after 9/11. Another unstated reason may be a lack of willingness to accept the UNHCR mandate. In a Consultation organized by the South Asia Forum for Human Rights (SAFHR), bureaucratic reticence, ignorance among policy measures and overriding national security concerns were identified as three major national hindrances for the accession to international instruments in South Asia.[9] The 'turn-around' policies and attitude and practice of the industrialized States, the original authors of the CSR, towards refugees have further damaged opinion in favour of the CSR.[10]

Reasons for not joining the CSR are really not very persuasive, but joining the CSR without enabling domestic legislation is at best only of symbolic interest. This continuing debate, therefore, does not have any bearing on the need for national legislation.

2.2 The international commitments

The long tradition of humanitarian assistance in the country is extended by the international obligations chosen by the country. India is a signatory to the Universal Declaration of Human Rights (UDHR), Article 14 of which is the fountainhead for subsuming refugee protection in human rights. India also voted to adopt the UN Declaration of Territorial Asylum in 1967.

The other treaties[11] to which India is a party, and which influence the treatment of refugees, are the Genocide Convention 1948, ICERD 1965, ICCPR 1966, ICESCR 1966, CEDAW 1979, CAT 1984 and CRC 1989.

Apart from the Executive Committee of the UN High Commissioner's Programme (EXCOM), India also participates in the deliberations of the Asian-African Legal Consultative Committee (AALCC), the 1966 Principles Concerning the Treatment of Refugees, popularly known as the Bangkok

[8] By 2050, India is likely to be the most populous nation of the world with a population of 2 billion resulting in more severe competition for resources and opportunities.

[9] 'Refugees and Forced Migration: Need for National Laws and Regional Co-operation', Delhi, 5–7 Sept. 1998, available at http://www.safhr.org/refugee_rights_regional.htm.

[10] See B.S. Chimni, 'Status of Refugees in India: strategic ambiguity', in R. Samaddar (ed.), *Refugees and the State-Practice of Asylum and Care in India 1947-2000* (Sage Publications, 2003). He holds the view that although the reasons cited by the government are not plausible, the practice of the Western World is reason enough to ignore the CSR.

[11] India ratified ICERD in 1969, ICCPR and ICESCR in 1979, CEDAW and CRC in 1993. Joined CAT in 1997.

Principles, and the Informal Consultation on Refugee and Migratory Movement in South Asia[12] (also known as the Eminent Person's Group or EPG) and the Asia/Pacific Consultations.

None of these have any binding force but the creation of convergent expectations through repeated participation in such processes of consultation over time would tend, eventually, to influence state behavior.[13] The fact that governments join some of these deliberations signifies the compelling influence of such platforms.

3. The expanding umbrella of protection under existing legal framework

The refugee flow from Pakistan coincided with the drafting of the Indian Constitution. To take care of the citizenship requirements of such a situation, the Constitution, in Part II, made specific provisions for those who migrated to India from the territories of the new State of Pakistan.[14] These measures continued after the adoption of the Constitution. The only other instance of a similar legislative measure is the Foreigners from Uganda Order 1972, when Idi Amin's regime of Uganda expelled tens of thousands of Indian expatriates overnight.

Although there is no definition of the term 'refugee' in any Indian statute, the term has been loosely used in administrative correspondence and decisions. The positive rights available to refugees are the same as those for aliens[15] as the refugees have not been recognized as a sub set of aliens requiring a special standard of treatment due to their peculiar and tragic circumstances. The principal legislation dealing with the regulation of foreigners is the Foreigners Act 1946, which deals with the 'entry of foreigners in India, their presence therein and there departure therefrom'.[16] The Foreigners Order 1948[17] lays down [in Paragraph 3(1)][18] a general provision that no foreigner should enter India without the authorization of the authority having jurisdiction over such entry points. In the case of persons

[12] Established in Nov. 1994.

[13] Pia Oberoi, 'Regional Initiatives on Refugees Protection in South Asia', 11 *IJRL* 193 (1999).

[14] See Arts. 5, 6 and 7 of the Constitution of India.

[15] The word 'alien' is not defined anywhere, although it is mentioned in the Constitution (Art. 22(3), Entry 17 in List I of Schedule VII and in some statues, like the Civil Procedure Code 1908 (Section 83), and the Indian Citizenship Act (Section 3(2)(b)).

[16] Foreigners Act 1946, Preamble.

[17] Made by the central government in exercise of the powers conferred by Section 3 of the Foreigners Act 1946.

[18] 'No foreigner shall enter India -

(a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or

(b) without leave of the civil authorities having jurisdiction at such port or place.'

who do not fulfill certain conditions of entry, paragraph 3.2 of the Order authorizes the civil authority to refuse leave to enter India. Unless exempted, every foreigner should be in possession of a valid passport or visa to enter India.[19] Besides Section 3, Sections 3A, 7 and 14 of the Foreigners Act 1946 are also relevant. The Registration of Foreigners Act 1939 (Sections 3, 6); the Passport (Entry into India) Act 1920; the Passport Act 1967; the Extradition Act 1962; and the Citizenship Act 1955, are the other legislative measures that deal with regulation, status and treatment of foreigners, including refugees.[20] The country has always treated the refugee issue as an essential appendage of its foreign and domestic policy and politics.

3.1 The judicial approach

The courts in India have devised an imaginative, innovative and compassionate approach to lay down what may be referred to as a 'shadow of refugee law'. They have done so by introducing internationally recognized standards in municipal law and by revolutionizing the parameters of legality of government laws and procedures.

3.1.1 The international obligations introduced in municipal law with the aid of Directive principles

The government of India is under a constitutional obligation to observe international law. The Constitution declares that it shall be the fundamental principle of governance. The declaration is contained in Article 51 under the Chapter of Directive Principles of State Policy.[21] Article 51A casts a fundamental duty on every citizen to show compassion. Although these provisions are not enforceable, the courts have drawn heavily from them to introduce international human rights standards into domestic situations.[22] This is a departure from the conservative view that international obligations are only recognized insofar as they are translated into specific municipal statutes. The Supreme Court explained this new dimension in the case of *Vishaka & Others v. State of Rajasthan & Others*:[23]

Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and

[19] Para. 3(2)(a) of the Foreigners Order 1948, read with Rule 3 of the Passport (Entry into India) Rules 1950.

[20] In practical term, these laws and their instruments give power to the State to restrict entry, allow discretionary deportation and prescribe limitations on stay conditions of the refugees.

[21] Art. 51(c) enjoins that the state shall endeavour to foster respect for international law and treaty obligations in the dealing of organized peoples with one another.

[22] *Gramophone Co. of India v. Birendra Bhadur Pandey*, All India Reporter (AIR) 1984, Supreme Court (SC) 667, is one of the earliest authorities on the issue.

[23] 1997 (6) Supreme Court Cases (SCC) 241.

content thereof, to promote the object of constitutional guarantee. This is implicit from the Article 51 (c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution.[24]

International humanitarian law has found its way into the Fundamental Rights of the Constitution, even if it is part of declarations or non-ratified treaties.[25] On the particular issue of refugee protection, Justice J. S. Verma opined:[26]

> In the absence of national laws satisfying the need, the provisions of the Convention and its Protocol can be relied on when there is no conflict with any provision in the municipal laws. This is a canon of construction, recognized by the courts in enforcing the obligations of the State for the protection of individuals.[27]

3.1.2 The Constitutional provisions for 'persons'

The Bill of Rights of the Constitution confers rights on two categories, namely, citizens and all persons. While citizens enjoy the protection of all the fundamental rights, the rights that are for all persons are comparatively restricted. The history of the judicial response to refugee protection in India relates to the history of expansion of the contents of Articles 14[28] and 21[29] by an extremely proactive and creative judiciary. Both these Articles are very brief, but are the strongest of all the provisions in the Constitution due to the way they have been interpreted.

Initially the Constitution was interpreted narrowly, denying refugees the freedom to enter the country, the freedom to settle and the freedom to practice a profession on the basis that the rights under Article 19 were for citizens only. At that time, the courts were satisfied if there was a law and the procedure was followed.[30] They did not consider it necessary to look beyond that. Later the courts began to insist that the 'law' establishing the

[24] Art. 253 provides power to Parliament to make legislation to give effect to international agreements, while Entry 14 in the Union List relates to the legislative competence of Parliament to implement treaties, agreement and conventions with foreign countries. Under the Constitution, powers and functions are divided into the Union List, the State List and the Concurrent List.

[25] Among the international instruments relied on by courts in various cases are UDHR (*Maneka Ghandi v. Union of India* AIR 1978 SC 597), ICCPR (*Jolly George Verghese v. Bank of Cochin* AIR 1980 SC 470), CRC (*M.C. Mehta v. State of Tamil Nadu* AIR 1997 SC 699).

[26] He was Chief Justice of India and, subsequently, Chairman of National Human Rights Commission.

[27] Inaugural address, Conference on 'Refugees in the SAARC Region: Building a Legal Framework', New Delhi, 1997.

[28] The Constitution of India, Art. 14 reads, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

[29] Ibid., Art. 21 says, 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

[30] *A.K. Gopalan v. Union of India*, (1950) SCR 88.

procedure should be a just, fair and reasonable law as there cannot be any arbitrary law if it is to meet the requirements of Article 14.[31] With time, the judiciary further widened the meaning of the Articles. It is now recognized by all that the concept of 'due process' (both procedural and substantive), rejected by the drafters of the Constitution in favour of the milder 'procedure established by law', is now an essential ingredient of Article 21. The way Article 21 is being seen, interpreted and applied can be best described in the following extract taken from the judgment of the Supreme Court in *Mithun v. State Of Punjab*:

> … it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it … the last word on the question of justice does not rest with the legislature. It is for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair just and reasonable.[32]

It is also significant to note that such a constitutional scheme falls within the protection of the concept of 'basic structure', putting its abridgement beyond the legislature's competence.[33]

3.2 How does this help the refugees?

Indian law permits, through Article 21, any person, including a refugee, to claim that the action against him is not a fair, just and reasonable procedure. In addition, Article 14 forbids discrimination on account of arbitrary action.

In an earlier decision, *Hans Muller v. Superintendent, Presidency Jail*,[34] the Supreme Court held that the Foreigners Act gives an unfettered right to the Union Government to expel. Decades later, in another often quoted case, *Louis de Raedt v. Union Of India*,[35] the Supreme Court reiterated that the Indian government has a general power of deportation, albeit subject to be heard, which may not necessarily be a personal hearing in all cases. The judgments now need to be revisited in light of subsequent law that all procedures, including deportation in disregard of a right to *non-refoulement*, have to be fair, just and reasonable.

In the first *Chakma* case,[36] the decision of the Supreme Court was that, although foreigners are entitled to fundamental rights under Article 21, their right to life and liberty does not include the right to reside and settle in the country, as provided under Article 19(1)(d) and (e) of the Constitution.

[31] *Maneka Ghandhi v. Union of India*, (1978) 1 SCC 248.
[32] (1983) 2 SCR 690.
[33] See *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, for the historical pronouncement of the doctrine of basic structure.
[34] AIR 1955 SC 367.
[35] (1991) 3 SCC 554.
[36] *Arunachal Pradesh v. Khudiram Chakma*, AIR 1994 SC 1461.

The case came before the Supreme Court again, the Chakmas seeking protection from the threats of locals, as well as a decision on the issue of citizenship. In the landmark decision, the Supreme Court categorically laid down that the protection of Article 21 applied with equal force to both citizens and non-citizens. The court reminded the state government of its constitutional obligation to protect each and every refugee and that in doing so it may requisition paramilitary forces from the centre. Orders were also given for expeditious transmission and decision on the citizenship applications of the Chakmas.

> Our country is governed by Rule of Law. The State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or any group of persons, e.g., the AAPSU, to threaten the *Chakmas* to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats from one group of persons to another group of persons. It is duty bound to protect the threatened group from assault and if it fails to do so, it will fail to perform its constitutional and statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law … without being inhibited by local politics.[37]

In another progressive pronouncement, the Supreme Court[38] upheld the decision of the Calcutta High Court directing the Railway Board to pay Rs. 1,000,000 to a rape victim, a Bangladeshi national, raped by the railway employees.[39] Appalled at the argument of the state that the victim, being a non-citizen, was not entitled to compensation, the court stressed that rape is a crime against society and remedies are independent of the citizenship status of the victim. The court referred both to domestic jurisprudence drawn from the Constitution and the human rights jurisprudence as reflected in the UDHR, primarily its preamble, and CEDAW.

Refugee protection, therefore, is a part of Indian jurisprudence, integrating human rights law and humanitarian law with issues of refugee law. The Supreme Court has, in a number of unreported cases, stayed the deportation of refugees, especially where the individuals have a *prima facie* case to be recognized.[40] The High Courts have also been very considerate and protective.[41] These decisions have affirmed the right to protection

[37] *National Human Rights Commission v. State of Arunchal Pradesh*, AIR 1996 SC 1234, per Ahmadi CJ.

[38] *Chairman Railway Board v. Chandrimadas & Ors*, AIR 2000 SC 988.

[39] Approximate exchange rate is Rupees 84–85 : 1 GBP.

[40] *Maiwand's Trust of Afghan Human Freedom v. State of Punjab* (Criminal Writ Petition No 125 & 126 of 1986), *N.D. Pancholi v. State of Punjab* (Writ Petition Civil No 1294 of 1987). In *Malvika Karlekar v. Union of India* (Criminal Writ Petition No 243 of 1988), the Supreme Court directed the stay of deportation of the Andaman Island Burmese Refugees, since their claim for refugee status was pending.

[41] The High Court of Gauhati has in various judgements (*State v. Khy-Htoon* Civil Rule 515 of 1990, *Bogyi v. Union of India* Civil Rule No. 1847 of 1989) recognized the refugee issue, permitted refugees to approach the UNHCR for determination of their refugee status and stayed the deportation order issued by the district court or administration. To the same effect are the orders in *State v. Khy-Htoon* (CR 515 of 1990) and *Kfaer Abbas v. State* (Civil Rule 3433 of 1998) of Gujarat High Court.

against *refoulement*, the right to seek asylum, voluntary repatriation, the right to life and personal security in the country of asylum, and the right to equality and non-discrimination. Courts have reposed a good deal of confidence in the certificates issued by UNHCR. The relaxation of the doctrine of *locus standi* and the increase in Public Interest Litigation has made courts more accessible to asylum seekers and other aliens. The Protection of Human Rights Act 1993 has added another positive and encouraging dimension to refugee protection. The Act has established the Human Rights Commission. The Commission is empowered to inquire *suo motu* or on the basis of a complaint of a violation of human rights or abetment thereof.[42] The interlocking of the Constitution, the courts and the National Human Rights Commission (NHRC) has resulted in a more secure environment for refugees in India.

3.3 Is it enough?

A plethora of unreported cases demonstrates that the courts have treated these matters on purely technical grounds; no pronouncements on law are made nor are any general guidelines laid. This explains why the majority of these cases do not find a place in law reports. Interim non-speaking orders may provide relief in individual cases, but their contribution to jurisprudence is negligible, even negative at times. Ranabir Samaddar has argued that the judicial reasoning has been mainly humanitarian and not rights based, dispensing kindness and not justice, and that the Court has nothing to say on 'refugee-situation'.[43]

3.4 Is a dedicated law for refugees necessary?

The scenario that emerges is paradoxical. The government does not recognize refugees as a class, but the judiciary does recognize them. The Indian judiciary has introduced refugee law into the legal system through the back door, as it were, since the executive has shut the front door.[44] Is it, therefore, necessary, that this ambiguous situation is resolved through enactment of a complete law?

Some Parliamentarians[45] and academicians[46] have stressed the need for the appropriate legislation. Calling for the law, Rajeev Dhawan suggests that, as refugees have no special due process rights, India's law must match

[42] The Protection of Human Rights Act 1993, Section 12.
[43] See above n. 10.
[44] Markandey Katju 'India's Perception of Refugee Law', (2001) *ISIL YBIHRL* 14.
[45] Fali S. Nariman and Eduardo Faleiro, Upper Houses, participating in the debate on amendment to the Foreigners Act 1946.
[46] See above n. 10, at 447–8, 460–6.

its humanitarian goals.[47] Erika Feller, the then Director of the Department of International Protection, UNHCR, stressed the point as she said:

> Protection of refugees through the application of normal human rights principles and the ordinary judicial system must be seen as *an adjunct to and not a substitute for* credible national system procedures. The mere fact of frequent recourse to the ordinary courts actually underscores the need for a dedicated refugee determination process at the national level. Ideally the ordinary courts should not be burdened by this work, except in so far as this is required for the purposes of judicial review and as a place for last resort.[48] (Emphasis added.)

The Law Commission of India has not considered the issue of national legislation but has recommended major changes to the Foreigners Act 1946 to tackle the menace of illegal migrants.[49] The NHRC is, however, categorical. In its Eighth Report (2000–2001), the Commission advised that a comprehensive national law ought to be devised.[50]

A new law is essential both for standard setting and enforcement. What is urgently called for is a law that lays down a definition of refugee and criteria and a system for status determination. It also has to recognize the non-derogable right of *non-refoulement* and to incorporate the rights and duties of both the refugees and the State. Last but not the least; it has to strike a balance between humanitarian considerations and security concerns.

4. National Model Refugee Law

In pursuance of the decision taken at the Third Informal Regional Consultation in Delhi in November 1996, a Working Group was set up to draft a model law for South Asian nations. The NML on Refugees was discussed and approved by the Fourth Informal Consultations on Refugees and Migratory Movement in their 1997 Dacca Sessions.

The Law has drawn its fundamentals from the CSR, the Protocol, the Organisation of African Unity Convention Governing the Specific Aspects of Refugees Problems in Africa 1969 (hereinafter, the OAU Convention), the Cartagena Declaration on Refugees 1984 (hereinafter, the Declaration) and the Bangkok Principles.[51] It has also benefited from various conclusions of the EXCOM on different aspects of refugee protection. The Schengen (1985) and the Dublin (1990) agreements were also available for reference.

[47] 'The Refugees in India', article published in *The Hindu* on 28 June 2003.

[48] *Report on Judicial Symposium on Refugee Protection*, 13-14 Nov. 1999, New Delhi, jointly organized by UNHCR, International Association of Refugee Law Judges and Supreme Court of India Bar Association, at 67.

[49] *Law Commission: One Hundred and Seventy Fifth Report of 2000*.

[50] Para. 4.23–4, at 46–7.

[51] AALCC adopted an Addendum to the Principles concerning the Treatment of Refugees on 27 Jan. 1970 and the second Addendum on Burden Sharing Principles on 13 Jan. 1987. The 1966 Principles were updated in 2001.

It will be necessary to evaluate the important provisions of the NML vis à vis analogous provisions in other international and regional instruments on refugees, including non binding ones.[52] However, the NML can only be compared to these refugee instruments insofar as they lay general principles and obligations on the receiving state, as these instruments are drawn in regional context[53] encompassing both the receiving and refugee generating states.[54]

4.1 Preamble

The NML has proposed the title of the Act as 'Refugees and Asylum Seekers Act'.[55] The Preamble of the NML sets the following objectives:

(a) To consolidate, streamline, and harmonize the norms and standards applicable to refugees and asylum seekers;
(b) To establish a procedure and a requisite machinery for granting refugee status;
(c) To guarantee them fair treatment, provide for their rights and obligations and regulate matters connected therewith.

Commitment to international human rights principles, accession to all major human rights treaties and their adoption into municipal law, consideration of pronouncements of Supreme Court and High Courts and reaffirmation of initiatives taken by Parliament under Article 37[56] and 253[57] of the Constitution are specifically mentioned in the Preamble. It further announces that grant of refugee status shall be considered a peaceful and humanitarian act and does not imply any judgment on the country of origin of the refugee. It is argued that the lack of such a provision resulted in the reaction from China to the asylum granted to the Dalai Lama. This may be an oversimplification of diplomatic and strategic nuances, but nobody can deny the usefulness of such a declaration by any State.

4.2 The Refugee Definition

The NML presents the definition in two parts. The first part retains the characteristics of the 'fear of persecution' test based on the CSR

[52] The Declaration is a result of an *ad hoc* group of experts and representatives from governments in Central America, meeting as a colloquium at Columbia. The Bangkok Principles are also only persuasive.

[53] OAU Convention will be presumed to subsume the CSR.

[54] See the Bangkok Principles, which were revised in 2001 and adopted on 24 June 2001 at the AALCO's 40th Session at New Delhi.

[55] Art. 1 on the Short Title, Extent and Commencement.

[56] The Article states that although fundamental duties are not enforceable, they are, nevertheless, fundamental in the governance of the country and it shall be duty of the State to apply these principles in making law.

[57] See above n. 24.

definition but Article 3(a) adds two more grounds, namely, ethnic identity and sex.[58]

The two inclusions are in response to the inadequacies of the CSR definition in general and to the felt need of South Asian refugee history in particular, where ethnicity has always been a major cause for refugee movement.

Refugee misery in terms of numbers and magnitude is primarily a female misery.[59] In many instances, protection for women was made available on account of membership of a social group, when the violence against the women took the form of persecution and denial of rights.[60] The UNHCR Global Consultation on International Protection, in its summary conclusions on gender-based persecution, records that:

> The refugee definition, *properly* interpreted, *can* encompass gender related claims. The text, object, and purpose of the Refugee Convention require a gender-inclusive and gender-sensitive interpretation. As such, there would be no need to add an additional ground to the Convention definition.[61] (Emphasis added.)

Nevertheless, the practice and precedents in this regard have been inconsistent and country specific and did not answer the concerns of women facing persecution because of their gender.[62] Therefore, the inclusion of 'sex' as a ground of persecution is a desired improvement and in tune with the times.[63]

The second limb of the definition moves beyond the persecution requirement to include the major cause of modern refugee movements, namely, 'serious violations of human rights'.[64] The CSR and the Protocol do not address these realities.[65] The refugee crisis in Africa, Latin America, Asia

[58] In fact, the inclusion of these grounds is not entirely a novel idea. The Bangkok Principles has three additional grounds, namely, 'colour, ethnic origin and gender'. The original Principles had only 'colour' out of these three.

[59] The first International Consultation on Refugee Women, organized by small group of NGOs and UNHCR, was held in Geneva in Nov. 1988.

[60] The Canadian Supreme Court in *Attorney General v. Ward* (1993) 2 SCR 689 recognized that 'women' could be a particular social group within the meaning of the Convention definition.

[61] Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law*, (2003), 351.

[62] Some courts hold that the CSR will only operate if the State protection is not 'adequate, not necessarily perfect' (*Zalzali v. Canada Minister of Employment and Immigration*, (1991) 3 FC 605 (FCA)), but there is no consensus regarding whether 'adequate' implies effective protection or a lower standard.

[63] The 1993 UN Declaration on the Elimination of Violence against Women (UNGA res. 48/104, 20 Dec. 1993) and 1994 Inter American Convention on the Prevention, Punishment and Eradication of Violence against Women cast an obligation on the States to eradicate violence against women.

[64] Art. 3(b).

[65] See UN doc. A/AC.96/SR.401. In his opening statement at the 37th Session of the EXCOM. (1986), the High Commissioner remarked that the concept of individual persecution had been overtaken by forced mass migration, and that, while still useful, the 1951 CSR no longer fully matched realities.

and, recently, in the Balkans fall outside the ambit of CSR.[66] The OAU Convention was the first to introduce the expanded concept. It was further improved in the Declaration which included grounds of 'generalized violence' and 'massive violations of human rights' as a reason for being recognized as a refugee.[67] The difference in approach of the two is understandable, embedded, as the two are, in their own context.[68] The Bangkok Principles in its revision added Article 1(2), identical to Article 1(2) of the OAU Convention, as most of the African States were parties to the OAU Convention.[69]

The NML, while retaining the OAU definition, added violations of human rights from the Declaration, although it used the word 'serious' for 'gross' and makes no reference to the term 'generalized violence'. The word 'events' is preceded by the word 'other'.[70] For the sake of clarity, the NML, in the terminology section, defines 'country of origin' to mean refugee's country of nationality, or, if he or she has no nationality, his or her country of formal habitual residence.[71] The NML also provides that 'refugee' includes dependants of persons determined to be refugees.[72] The NML grounds are thus far more exhaustive than any other refugee instrument, although, it does not specifically clarify that the fear of persecution can originate from non-state actors as well.[73] It remains to be decided by legislative drafting or judicial pronouncement as and when the NML transforms into legislation.

What is the position of the government of India with respect to this definition? While much of the government viewpoint on refugee law is in the realm of unstated and 'unofficial', this time there is some indication. The Indian delegate, in a meeting called to finalize the revised Bangkok

[66] However, the Guidelines of Immigration and Refugees Board of Canada on Civilian Non-Combatants fearing Persecution in Civil War Situations in Mar. 1996 states that 'when one is determining whether the case is one of "persecution", the question to be addressed is whether there are violations of human rights of sufficient degree and importance to constitute persecution'.

[67] Under the OAU Convention, the situations covered are external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of the country. (Art. 1, para. 2). The Declaration does not specify as to whether the public order disturbance has to be nationwide or whether it may be in a part of the country. The emphasis on occupation is also not as prominent as in the OAU Convention. The Declaration drew heavily from the 1975 amendment to the UNHCR's power.

[68] The OAU Convention is the result of deliberations in a freshly decolonised Africa, whereas the Declaration is a product of experience gained from the massive flow of refugees in the Central American area.

[69] Both expand the definition of refugee by including the conditions of external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of the country of origin or nationality.

[70] The OAU convention mentions events seriously disturbing public order. The NML speaks of other events seriously disturbing public order.

[71] Art. 2(c).

[72] Art. 2(b).

[73] See above n. 48, at 49. B.S. Chimni, speaking generally, wanted refugee protection to extend to situations created by non-state actors.

Principles, placed the following reservation to the inclusion of Article 1(2) of the OAU Convention in the definition article of the Revised Principles:

> The Government of India is not in favour of the expanded definition of refugees. This definition drawn from Human Rights and humanitarian law instrument is too broad in its scope. The universally accepted criteria of 'well founded fear of persecution' should remain the core of the definition. Any expansion of the definition of refugees will have an adverse effect on promoting the concept of 'durable solutions' and may result in the weakening of protection afforded to genuine refugees.[74]

There are two significant things to be noted about this reservation – perhaps the only official version available on the issue. First, this is a reaction to the OAU definition (as adopted in the Bangkok Principles), which is milder and narrower than the definition adopted in the NML, and the response to the NML definition can, thus, easily and safely be anticipated. Secondly, the government of India, which has throughout argued the incapacity of the Convention to deal with the refugee issues of South Asia, has now, interestingly, taken a U-turn by insisting that the universally accepted criteria of 'well founded fear of persecution' should remain the core of the definition.[75] The NML is likely to encounter great resistance from the executive in relation to the definitional clause.

4.3 Exclusion

The exclusion clause excludes a person from refugee status on conviction of a crime against peace, a war crime or a crime against humanity in accordance with applicable international law and instruments, including, specifically, the SAARC Regional Convention on Suppression of Terrorism 1987.[76] A person is also excluded if he commits a serious non-political crime outside India prior to admission to the country as a refugee.[77]

What is striking is that the NML makes a departure from all previous instruments by omitting the mention of exclusion to persons, 'guilty of acts contrary to the purposes and the principles of the United Nations'. Although the *travaux preparatoires* of the CSR do not lead to much clarity, it appears that this provision was included to exclude persons in power and of influence from taking undeserved refuge. This is an unusual lacuna. With the International Criminal Tribunals a reality, the requirement of this provision is very topical.[78]

[74] AALCC Report of the Working Group on the revision of the AALCC 1966 Bangkok Principles, DOC.NO.AALCC/XL/JAKARTA/2001/S.3, 14.

[75] See above n. 7.

[76] Art. 4.

[77] Art. 2(g) defines serious non-political offence as any offence which is determined in the Rules to be framed by the government under Art. 17 and as listed in the Schedule to be appended.

[78] The International Criminal Tribunal for Yugoslavia and Rwanda is in existence, whereas the International Criminal Court is functioning at Rome under the Rome statute of the International Criminal Court.

Another difference is that the CSR and the OAU Convention allows exclusion on the basis that, 'there are serious reasons considering' that the individual has committed the specified crimes, whereas, the NML, like the Bangkok Principles, allows exclusion only if the individual has committed the specified crime. This obviously places the standard of proof to a very high degree.

The *travaux preparatoires* of the NML clarify that where an asylum seeker commits a politically motivated crime against the right to life or physical integrity of another person, s/he would not normally be recognized as a refugee.[79] Reacting to this, a commentator has noted that, 'This interpretation of the Model National Law appeared to be overtly restrictive when compared with the interpretation placed on the comparable exclusion clauses in International and Regional Refugee Instruments'.[80] Similarly, Dhawan is of the opinion that the NML should provide for examination of those cases on merits where allegations of non-political offences are a front for political offences.[81] Arbloleda points out the dilemma between the tendency to expand protection beyond the limitations which afflict the notion of political offence and the international action to counteract terrorism.[82] Striking a balance is a challenge to which the NML has not responded adequately.

4.4 *Non-refoulement*

The principle of *non-refoulement* has arguably acquired the status of *jus cogens*, a peremptory norm of general international law.[83] This is based on a wide-ranging and tangible manifestation of State practice coupled with *opinio juris*.[84] Indian courts have also recognized the principle. In *K.A. Habib v. Union of India*,[85] the Gujarat High Court decided that the principle of *non-refoulement* (Article 33 CSR51) is encompassed in Article 21 of the Indian Constitution and decided that the two refugees from Iraq could not be sent back to that country as long as they had fear there for their life and security.

[79] Fifth Regional Consultation on Refugees and Migratory Movements, Kathmandu, 9–10 Nov. 1998.

[80] Ibid., S.S. Wijeratne in his paper, 'International Refugee Law and the Proposed Model National Law for Countries in South Asia'.

[81] In a meeting with him in New Delhi on 15 Jan. 2004.

[82] 'The Cartegena Declaration of 1984 and its Similarities to the 1969 OAU Convention - A Comparative Perspective', 7 *IJRL Special Issue* (1995).

[83] See G.S. Goodwin-Gill, *The Refugee in International Law*, 1996 (2nd edn.), Clarendon Press. Also see G. Goodwin-Gill, '*Non-Refoulement* and the New Asylum- Seekers', 26 *Virginia Journal of International Law*, 897 (1986).

[84] See above n. 61. Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*, expert opinion'.

[85] (1998) 2 *Gujarat Law Herald* 1005. See also, Writ Petitions Nos. 450/83; 605–607/84; 169/87; 732/87; 747/87; 243/88; 336/88 and 274/88; SLP (Cr) Nos. 3261/1987; 274/1988 and 338/1988.

The NML, in Article 5(a), contains the principle of *non-refoulement*. The strength of the Article is that it extends the principle to both refugees[86] and asylum seekers.[87] The CSR refers to refugees only.[88] States have interpreted it to mean that the principle is inapplicable in cases of rejection at the frontier, although UNHCR has taken it as including asylum seekers as well.[89] The NML has cleared the confusion, although the OAU Convention is still wider as it talks of rejection at the frontiers in terms of 'no person'.[90]

Further, under the NML, the protection of *non-refoulement* is available for a 'place'. The term is definitely wider than 'frontiers of territories',[91] 'territory'[92] and 'State or country'[93] used in the CSR, the OAU Convention and the Bangkok Principles, respectively. The phrase 'where there are reasons to believe his or her life or freedom would be threatened' is again wider than the phrase 'where his life or freedom would be threatened' used in the CSR, the OAU Convention and the Bangkok Principles. Moreover, while the exception in the CSR is invoked only in relation to 'particularly serious crime',[94] the NML restricts it to the crimes mentioned in the exclusion clause.

Confirming the qualified nature of the principle, Article 5(b) provides for the exit of a refugee or asylum seeker if

(a) S/he has been convicted by a final judgment of a crime against peace, a war crime or a crime against humanity and constitute a danger to the community, or
(b) Where a Minister has certified that there are reasonable grounds to believe that s/he is a threat to the sovereignty and integrity of India.

However, the Article proceeds to clarify that s/he shall not be returned to a *situation* or to any country in which his or her life or liberty is threatened by the reasons enumerated in Article 3(a).[95] This is in consonance with Article 7 of ICCPR and Article 3 of the CAT to which India is a signatory (ratification awaited) and general humanitarian law, which can be argued to be subsumed under Article 14 and 21 of the Constitution. Further, there

[86] Art. 2(a) defines 'asylum seeker' as a person who seeks recognition and protection as a refugee.
[87] The position is the same in Art. III (1) of the Bangkok Principles. It provides that 'no one seeking asylum' shall be subjected to measures such as rejection at the frontier.
[88] CSR, Art. 33(1).
[89] UNHCR, 'Executive Committee of the High Commissioner's Programme - 52nd Session - Note on International Protection', 13 *IJRL* 654 (2001).
[90] OAU Convention, Art. II (3).
[91] Above n. 88.
[92] Above n. 90.
[93] The Bangkok Principles, Art. V (3).
[94] CSR, Art. 33(2).
[95] Race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.

is unambiguous jurisprudence that prohibition against torture is absolute and it prevails over the concern of national security or conduct of the person to be deported.[96]

4.5 The procedure for application

Article 6 lays down that an application for recognition of the asylum seeker as a refugee can be made either at the point of entry or subsequently to the status determination authority, the Commissioner of Refugees. The application can be made on behalf of an asylum seeker or in relation to the asylum seeker. The application is to be made within such reasonable time as may be prescribed. It also lays down that pending determination of refugee status, only such restrictions can be imposed which are necessitated by the interest of sovereignty and integrity or the public order of India.

The NML specifically calls for immediate and appropriate protection and humanitarian assistance in case of a refugee child.[97] It entrusts the job of filing the application to recognized NGOs in the field of child welfare. These provisions are unique and must be welcomed.

4.6 The Determination Apparatus

The NML provides for a two-tier apparatus for implementation in Articles 7, 8 and 9. The authority to hear and decide the determination status shall be the Commissioner of Refugees.[98] The President of India, in consultation with Chief Justice of India (CJI), shall appoint the Commissioner (a sitting or retired High Court Judge)[99] and necessary Deputy Commissioners (qualified to be appointed as High Court Judges)[100] under Article 7(a).

Appeals against the decision of the Commissioner lie to the Refugee Committee,[101] established as an Appellate Board.[102] The Committee may also consider an application for refugee status *suo moto*. The Committee will be a four-member body headed by a retired Supreme Court Judge as the Chairperson[103] to be appointed by the President of India.[104] The Committee will have a sitting or retired High Court Judge, appointed by the

[96] See *Chahal v. UK*, (1996) 23 EHRR 278, for a case involving deportation of an Indian to India from the UK.

[97] Art. 2 (f) says that 'refugee children' means children below the age of 18 years who are seeking refuge, or where protection is extended by the State to children under Art. 22 of CRC, 1989.

[98] Art. 9(a). He is referred to as Commissioner, as per the terminology contained in Art. 2(d).

[99] Art. 8 (a).

[100] Art. 8 (b).

[101] Art. 2 (e) calls it Committee.

[102] Art. 11.

[103] Art. 8 (c).

[104] Art. 7 (c).

President in consultation with CJI. The President will further appoint two independent members with knowledge and experience of refugee issues and refugee law.[105]

The exclusion of administrative officers dealing with the refugees is a serious flaw. A more workable composition calls for a mechanism where the applications for determination are decided by the administrative officers and the appeal therefrom lie to the Committee, as provided.[106]

Given the size of the country, wide dispersal of refugee receiving points and need to establish refugee determination bodies nearest to the entry point, a better model should be to designate the district heads as Commissioners under the Act.[107] As it is, they exercise vast judicial and quasi-judicial powers, in original and appellate jurisdiction, under a plethora of Central and State laws.[108] They can be safely relied on to determine the status strictly in accordance with law, procedural requirements and principles of natural justice. The institution has historical recognition and credibility. This is crucial, as the subject invariably relates to internal security.[109] If the volume of the work is large, concurrent powers can be given to senior administrative officers in the district, subordinate to the district head, and they may even be dedicated exclusively for the job. There is also a need to provide the *suo moto* power to the first stage determination agency.

A high-ranking Commissioner sitting at a particular location is no substitute for an already existing mechanism at the district level. The proposed system may even be counter-productive due to its remoteness and the inherent complicated nuances associated with the judicial working in India.

Similarly, the Refugee Committee should be proposed at the State level, as only one Committee for such a huge country as India will defeat the objective of the legislation that promises fair treatment to an extremely

[105] Art. 8 (d).

[106] In the Indian sub-continent, the colonial model of administration continues. The District is the administrative unit of governance. It is headed by a civil service officer designated as the District Magistrate/District Collector/Deputy Commissioner. The district head and his subordinate civil service officers are entrusted with the responsibility of land revenue collection, law and order maintenance, development and overall administration.

[107] See above n. 9. SAFHR has made suggestions to the same effect. The law, as is the practice, should confer on Commissioners the required powers of civil courts under the Civil Procedure Code, 1908.

[108] They preside over proceedings in a Court, assisted by parties to the dispute and their counsels.

[109] In the secretarial briefs presented by AALCC to the 34th Session held in Tokyo in Jan. 1994 on Model legislation on the Status and Treatment of Refugees, it was reviewed that in the majority of the Asian and African countries, the determination and appeal is basically dealt with by executive and enforcement officers. The cases cited were of Thailand, Malaysia, the Philippines, Malawi and Lesotho. While the appeal should definitely lie to a body headed by a Judicial Member, these practices support my contention of reserving the domain of determination to administrative officers exercising quasi-judicial powers. This is also in consonance with international practice, across the continents.

vulnerable group, spread all over the country. It would be better if a sitting or retired High Court Judge heads it. The other judicial member can be a person who is qualified to be appointed as a High Court Judge. The SAFHR has suggested that independent members, under Article 8(d), should preferably be 'gender based conversant with refugee matters'. The change in composition of the Refugee Committee, to be constituted at the State level, is all the more relevant in the case of the North Eastern States, with low High Court strength and a large volume of refugees. A senior District judge may be considered competent to be a member.

The administrative-judicial system would inspire confidence, ensure speed and provide accessibility. Above all, it will enjoy greater acceptability and is more workable.

4.7 The Determination Process

Article 9 provides that during the interview the asylum seeker is entitled to the following facilities:

i. Services of a competent interpreter, where required
ii. Reasonable opportunity for presenting supporting evidence
iii. Opportunity, if desired, to contact a UNHCR representative
iv. Assistance of a person of one's choosing, including a legal practioner. The Government is obliged to furnish a list of competent and well-versed legal practioners.[110]
v. In case of rejection, the right to receive a well reasoned order and reasonable time for filing an appeal.[111]
vi. In case of recognition, the right to receive a certifying document.

The procedure provides for due process throughout and meets the requirements of EXCOM Conclusion No. 8. It is, however, necessary to concede to the forceful and valid point of SAFHR that as the interview is only part of the 'refugee determination' process, the word 'interview' should be substituted with the word 'process'.[112] Another significant point to be noted is that access to UNHCR amounts to formal recognition of the role and responsibility of UNHCR in India, a considerable departure from the current uneasy relationship.

4.8 Appeal

Another aspect about which the NML is silent is the right of the State to appeal against a decision with which it disagrees. Denial of such an essential right to the State is both unfair and inexcusable.

[110] Art. 2(h) states that 'Government' means the Union Government.

[111] Art. 10 enjoins that the findings and orders of the Committee, Commissioner and other authorities established under the Act should be periodically published and that an Annual Report should also be published, available to the general public.

[112] Above n. 9.

4.9 Cessation

The protection of an individual is the responsibility of the country of his/her nationality or the country of his/her habitual residence. If conditions normally causing the need, under the CSR, for protection no longer exist, there remains no need for the surrogate protection. Article 12 of the NML, in recognition of this basic principle, sets out four circumstances (other than naturalization) for cessation of refugee status. These conditions are:

(a) the refugee voluntarily re-availed herself of protection of the country of origin
(b) the refugee acquired the nationality and protection of a third country
(c) the refugee voluntarily re-established herself in the country that she left
(d) refusal to avail oneself of the protection of the country of nationality even after cessation of circumstances necessitating refugee status.

This is a departure from the CSR and the OAU Convention to the extent that it omits the reference to refugees 'who having lost their nationality, voluntarily re-acquire it'.[113] The Bangkok Principles do not contain this particular ground, either, and use the term 'returns permanently' in place of 're-establishment' in relation to a refugee who has returned to his country of origin.[114] The NML also makes no express provision for refugees without nationality and does not provide for the exception of compelling reasons in case of refusal to avail the protection even after cessation of circumstances.[115] It would have been better to cease refugee protection as well, if the same was acquired through false information, incorrect documentation or cheating.[116] The clause, therefore, needs to be rewritten to the extent suggested.

4.10 The rights and duties of refugees

Article 13(a) guarantees a set of rights to every refugee so long as he or she remains within India. It announces fair and due treatment, without discrimination, on the enumerated grounds.[117] In fact, non-discrimination is the single most common dominant theme of all international and regional human rights instruments.[118] The NML is obviously guided by the Indian Constitution and case law on non-discriminatory legislation and its application.[119] The CSR, the OAU Convention and the Bangkok Principles contain

[113] CSR, Art. 1 C (2).
[114] The Bangkok Principles, Art. 1 (6) (i).
[115] See Arts. 1 C (5), (6) of the CSR.
[116] The Bangkok Principles, Art. 1 (6)(v).
[117] Art. 13(a)(1).
[118] Prominent are UDHR, ICCPR, CERD, CEDAW and CRC.
[119] See discussion under Section 3.1.

the principle in Article 3, Article IV and Article IV (5), respectively, but the NML is more exhaustive than them as it covers more grounds.

One reason cited for non-accession to the Convention by the developing world is their inability to take on the range of obligations in view of scarce resources and competing claims of nationals. Yet, at the same time, there is a mandatory minimum standard of treatment in so many international human right treaties to which India is a party. The NML has, therefore, struck a balance between what is ideally desirable and what is feasible. Instead of following the division of the CSR, which groups the rights of refugees in different categories,[120] the NML makes a simplistic provision that refugees will receive the treatment available under the Constitution.[121] They will also be accorded specific treatment prescribed under other laws as well as privileges granted. This is an open-ended provision which will come to the benefit of the refugees as it leaves the scope for progressive adaptation of standards. The judicial practice augurs well for that expectation.

The right of the refugee to be provided with the means to seek a livelihood for himself or herself, and for those dependant on them,[122] is much less restrictive than Articles 17 and 18 of the CSR, but the silence of the OAU Convention and the Declaration about such a right speaks about the realities of third world countries. It remains to be seen if the lawmakers agree to this, as there is no such corresponding right to citizens. The NML, instead, should have specifically provided that the refugees will have the right to work. Such a negative wording would represent the reality and would face less resistance.

Article 13(a)(4) obliges India to give special consideration to the protection and the material well being of refugee women and children. This provision is definitely a significant improvement over the CSR, the OAU Convention and is in tune with recent concern for women[123] and children.[124] It is closer to the Bangkok Principles, which call for effective and appropriate measures for refugee women and children[125] and for special attention in relation to elderly refugees.[126] Children under the age of 18 account for 45 percent of refugees worldwide and over 60 percent in

[120] CSR requires States to accord certain rights to refugees in the same manner as they are accorded to nationals, to foreigners in the same circumstances, or to aliens generally. The OAU Convention has not set any specific rights regime, presumably accepting the Convention criteria. The Bangkok Principles in Art. IV (1) guarantees the treatment to which an alien is entitled in similar circumstances.

[121] Art. 13(a)(2).

[122] Art. 13(a)(3).

[123] UNHCR *Guidelines on the Protection of Refugee Women*, 1991, EXCOM Conclusion 39 on Refugee Women and International Protection, and 73 on Refugee Protection and Sexual Violence.

[124] UNHCR *Refugee Children: Guidelines on Protection and Care* 1991 and 1994, EXCOM Conclusions Nos. 47 and 59 on Refugee Children to ensure access to basic education and to provide food and security. Also of relevance are Conclusions Nos. 24, 84, 85 and 88.

[125] The Bangkok Principles, Art. IV (6), (7).

[126] Ibid., Art. IV(8).

several African countries.[127] The protection needs to be specifically provided, also, because of the country's commitment to the CRC.[128]

Refugees have also received the right to choose their place of residence and move freely within the territory of India, subject to any regulations applicable to refugees generally in the same circumstances. The CSR contains similar provisions[129] while the Bangkok Principles are silent about it. Article 13(a)(5) is needed in view of the position taken by the courts that being aliens, refugees are not entitled to protection of residence, stay and movement guaranteed to citizens under Article 19(1)(d) and (e) of the Constitution.[130]

The NML is less restrictive about the issuance of identity documents.[131] In contrast the CSR only permits identity papers to refugees without valid travel documents,[132] and the Bangkok Principles lack such a provision. Regarding travel documents, Article 13(a)(7) is modeled on Article 28 of the CSR. It gives the right to refugees to receive travel documents for the purpose of travel outside and back to the territory of India, unless compelling reasons of national security or public order otherwise require.

Previous practice is that the Indian government officially recognizes three groups of 'refugees' - Tibetans, Sri Lankans and *Chakmas*. Out of the three, only Tibetans and Sri Lankans are issued refugee identity documents.[133] However, after the initial Tibetan mass influx, the system of giving Registration certificates was discontinued. Moreover the legal effect of these documents and the terminology used on them seems to be of very negligible consequence.[134] These papers have, at best, provided a separate recognition for police interaction and state sponsored schemes. The NML will remove the discrimination and create legal effects for these documents.

Associated with the residency rights are the economic and social rights. Refugees have been given the right of access to education,[135] health and other related services. Except for the CSR, refugee instruments are silent about such a provision. The Declaration, though, refers to assistance and programs in the area of health, education, labour and safety.[136]

[127] See above n. 89.

[128] The importance of child protection can also be measured from the Bangkok Principles, which provide that while the responsibility of the States in the case of women and the elderly refugee is 'to the extent possible'; there is no such relaxation in the case of refugee children.

[129] CSR, Art. 26.

[130] See *Louis de Raedt v. Union of India*, AIR 1991 SC 1886, related to Section 3(1) of Foreigners Act, 1946.

[131] Art. 13(a)(6).

[132] CSR, Art. 27.

[133] The travel document, called an 'Identity Certificate', has also been issued to some Bangladeshi, Pakistani and Chakma refugees.

[134] After the death of Former Prime Minister Rajeev Gandhi, all suspected Sri Lankan refugees were booked under the Foreigner Act, with no regard to possession of such papers.

[135] The Constitution has recently introduced, in 2001, Art. 21A creating a fundamental right to education. It comes into force on such date as the central government notifies.

[136] Declaration, Art. II (h).

For obvious reasons, these provisions are a highly diluted version of the CSR, which devotes a complete chapter to the welfare of refugees.[137] Refugees are currently already availing themselves of these rights. In matters before the courts, the government has been directed to ensure humanitarian conditions in refugee and detention camps.[138] It is, nonetheless, essential to incorporate such a provision in view of the misgivings and genuine difficulties faced by refugees, particularly, in securing housing.[139]

Article 13(b) provides that the laws and regulations of India shall bind every refugee. This is much more limited in impact than Article 2 of the CSR, Article 3 of the OAU Convention and Article XI of the Bangkok Principles. It needs to be revisited in terms of contemporary concern for the security of the State and its international commitment to anti-terrorism campaigns.

4.11 Mass influx

Taking account of the history of large scale movements and such tendencies in South Asia, Article 14 enables the government, through an order, to permit such asylum seekers to reside in India without individual status determination. They will receive the normal refugee rights except that there may be reasonable restrictions with respect to their location and movement. The clause creates a right of special consideration for women and child asylum seekers regarding their protection and material well-being. Such treatment has to continue untill such time as the government decides to operationalize the individual status determination mechanism, or reasons for departure from the country of origin have ceased to exist. Article 14 is a unique provision not found in any other refugee instrument and is definitely a desired improvement.[140]

4.12 Refugees unlawfully entering India

Article 15, aims to de-criminalize illegal entry. It is couched in the language of Article 31(1) of the CSR. It is disappointing to the extent that it is silent about the legality of confinement to camps. The predominant view is that detention of refugees is not an administrative detention, subject to due process. The alternative view that all detentions have to be tested on the touchstone of constitutional provisions[141] is more in conformity with the new jurisprudence.

[137] CSR, Chapter IV.

[138] The High Courts in *Digvijai Mote v. Union of India* and *Majid Ahmed Abdul Majid Jad Al-Hak v. Union of India*.

[139] Tapan K. Bose, 'Protection of Refugees in South Asia: Need for a Legal Framework', available at http://www.safhr.org/pdf/refugee.pdf.

[140] Although the situation was recognized for the first time in the Declaration (Art. 3[8]), and there are some guidelines in EXCOM Conclusion No. 22.

[141] The Constitution of India, Arts. 22(3) to 27.

4.13 Voluntary repatriation

In the CSR, the emphasis is on assimilation and naturalization.[142] For the developing world, however, voluntary repatriation is the most favoured of the three modes of durable solution.[143] The government of India also wants the emphasis to remain on voluntary repatriation.[144] The first instrument to highlight the need for voluntary repatriation and lay guidelines for repatriating to country of origin is the OAU Convention.[145] The Bangkok Principles reiterate them in Article VII and also refer to the right of return.[146] The NML lays stress on voluntary, dignified and safe repatriation at the free will of the refugee, expressed in writing or other appropriate means, before the Commissioner.[147] The catchwords are the individual and voluntary character of repatriation, conditions of transparency and the safety of the country of origin.

Indian courts have assiduously stressed the voluntary character of repatriation. The Madras High Court in the cases of *Gurunathan v. Union of India* (WP No S 6708 & 7916 of 1992) and *A.C. Mohd Siddiqui v. Union of India* (1998(47) DRJ (DB) p. 74), expressed its unwillingness to let any Sri Lankan refugees be forced to return to Sri Lanka against their will. In the case of *P. Nedumaran v. Union of India*, the Madras High Court, however, refused to sit in judgment over the findings of UNHCR regarding the voluntary character of repatriation. The Bombay High Court, in the case of *Syed Ata Mohammadi v. Union of India* (Cr WP No 7504 of 1994), directed that there was no question of deporting the Iranian refugee to Iran, since he had been recognized as a refugee by UNHCR. The court permitted the individual to travel to whichever country he desired.

4.14 The power to override

Article 18 is the *Non-Obstante* Clause. The importance of this provision cannot be overemphasized in view of the different, and at times opposite, provisions in the existing legal framework, particularly the Foreigners Act 1946. In the absence of this supremacy, the entire exercise will be futile. However, in the long run, the government must rework all concerned legislation so as to remove friction and inconsistency with the NML.

[142] CSR, Art. 34. Of late, UNHCR has attempted some guidelines on voluntary reparation and has published a Handbook on it in 1996.

[143] UNGA res. 2790 (XXVI) recognized voluntary repatriation as the *only* 'satisfactory solution'. Reference was the refugees of East Pakistan in India in 1971. Also relevant are EXCOM Conclusions Nos. 18, 40 and 85.

[144] Above n. 74.

[145] OAU Convention, Art. V.

[146] The Bangkok Principles, Art. VI.*

[147] Art. 16.

4.15 The manifest lack of empathy for security considerations

The biggest shortcoming of the NML is its failure to acknowledge the security concern of a country engaged in cross border terrorism. It is correct that the NML was drafted prior to 9/11, but even from pre-9/11 standards it has grossly failed to take into account corresponding provisions in other instruments and international initiatives on terrorism. It excluded acts 'contrary to the purposes and principles of the United Nations' from the exclusion clause, even though the Security Council has repeatedly called international terrorism as such an act.[148]

It also did not respond to various anti-terrorism deliberations,[149] particularly, the UNGA Declaration on Measures to Eliminate International Terrorism and the Supplement to it.[150] The NML is also silent about apprehension of subversive activities by some refugees.[151]

The absence of an expulsion clause is another demerit of the NML. The CSR, drafted in 1951, provided for it.[152] The Bangkok Principles also allow expulsion and deportation.[153]

The situation has changed drastically after the collapse of the Twin Towers. The Security Council is vigorously active in ensuring complete denial of 'safe havens'.[154] This is all the more reason to reconsider the provisions of the NML, particularly the exclusion and the cessation clause. An additional provision on Expulsion is also necessary. The objective is to balance the need for the security of the host state and the human rights of the refugees, a legitimate expectation, so succinctly stated in Article II (p) of the Declaration.

5. Conclusion

The NML is a good draft that expands the definition of refugee, extends *non-refoulement* to all asylum seekers, restricts exclusion and cessation conditions, develops a fair and judicious determination mechanism, creates

[148] SC res. 687,748,1189,1267,1269 and 1333.

[149] UNGA res. 2321(XXIII), 10 Dec. 1967 on Territorial Asylum; EXCOM Conclusion No. 22 on the Protection of Asylum-seekers in situations of Large-scale Influx; the Caracas Convention on Territorial Asylum 1954; the Bangui Declaration Adopted by Seven African States and Government, Nov. 1986; and the CIREFCA/89/14, 31 May 1989, regarding the meeting at the International Conference on Central American Refugees.

[150] A/RES/49/60, 9 Dec. 1994 and A/RES/51/210 of 17 Dec. 1996. It calls on the member States to ensure that asylum seekers and refugee terrorists do not take advantage of asylum and refugee status before, during and after determination of status.

[151] Above n. 74. During the revision of the Bangkok Principles, India had proposed that a refugee should be obliged to refrain from subversive activities, not only against the country of refuge but also 'any other country', but the same was not adopted. See also Art. III of the OAU Convention.

[152] CSR, Art. 32.

[153] The Bangkok Principles, Art. V.

[154] SC res. 1368, 1373, 1390, 1452, 1520, 1526, and so forth.

a feasible rights regime, makes special consideration for women and children and provides for situations of mass influx and the implementation of voluntary repatriation as a durable solution. Integrating humanitarian law and the law of human rights in favour of refugee care, it makes a serious effort to answer the *whom*, *how* and *what* questions of refugee protection.[155]

However, it needs drastic changes to provide for security issues and an administrative-judicial model of status determination. The other suggestions do not call for any major change in rationale and principle of the NML. Inadequacies should not be an excuse to delay, but should act as an opportunity for detailed analysis and early solution. The government should, after necessary changes, introduce the legislation in the House, without referring it back to the EPG. The parliamentary procedure is capable of producing the desired legislation.

There is a considerable body of opinion that favours the view that the national legislation be preceded by a SAARC Regional Convention on Refugees. Unfortunately, the anti-refugee policy of the West, and the so-called 'war on terror', has given an alibi for continuing the *status quo*. It will be prudent to accept that the national legislation will take considerable time to materialize, given the prevailing air of apprehension and lack of awareness. The more radical the proposal, the less likely it is that it will be enacted. The legislation has to take into account the legitimate perspective of the government on refugee affairs.

The odds are heavily against it, but it is also the time to stand firm and to continue with the campaign of educating the decision makers and shaping public opinion. Pending legislation, it is important for the government to introduce the amending regulations under the Foreigners Act and Rules to make them more 'refugee friendly'. The South African interim model may act as a guiding measure.[156]

Eventually, the strong democratic traditions of the world's largest democracy and its fairly impressive record of refugee care will find the adoption of the refugee legislation irresistible. This legislation will not be confined only to the territory of India, but will have strong and positive ramifications in the entire South Asia region. What the Convention on the Status of Refugees and its Protocol could not achieve in South Asia, an Indian Act on Refugee and Asylum Seeker Protection might just do.

[155] See above n. 48, 98. Dr Rajeev Dhawan explains that *whom* means the definition of refugee, *how* means the mechanism of determination and *what* means the rights to refugees.

[156] It has an agreement with UNHCR for determination procedure, although the colonial Aliens Control Act 1991 is still in place.