Term Paper for Module C 2005

When the politics of non-entrée collide with the principle of non-refoulement
Idil Atak

Introduction
Under traditional international law, States have a sovereign right to allow or refuse entrance of foreigners on their territory, to impose conditions to their entry, and to expel them from their territory. In accordance with their duty to protect the lives and the security of the public, States also have a legitimate interest in controlling irregular migration[1].

States are devoting more and more energy and resources outside their national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of destination[2].
Since the early 1980s, securization of borders has become the major component of migration management policies of many Western States which increasingly seek to project enforcement of their immigration laws beyond their borders.

States foster efficient repressive policies through bilateral, international and regional cooperation[3]. Numerous international treaties have consequently been adopted, regional efforts have been undertaken and a number of consultative processes have been initiated at regional level in stemming irregular migration[4]. The outcome is the emergence of sophisticated and diversified non-entrée politics which create 'security perimeters'[5] as a means to ensure greater protection of States' borders.

Non-entrée politics are aimed at the blocking of free mobility to the North. They are directed indiscriminately against all irregular migrants including refugees and asylum-seekers.

They result in asylum-seekers and refugees being denied access to international protection or being returned directly or indirectly to the frontiers of territories where their life or freedom would be threatened. As such, the politics of non-entrée ultimately erode the institution of asylum[6], especially the principle of non-refoulement.

Non-entrée politics also leave desperate people with no option but to rely on more disruptive informal networks or people-traffickers in their search for a better life.

States that enforce non-entrée measures, violate their obligations under international refugee law and international human rights law.

The dichotomy between the State's legitimate interest to ensure national security and its international obligations has become more apparent since the terrorist attacks of 9/11 on the USA.

The purpose of this article is to analyse the impact of the politics of non-entrée on States' obligations of non-refoulement under international refugee law.

1. Principle of non-refoulement: State responsibility and extraterritoriality
Article 33(1) of the *1951 Convention relating to the Status of Refugees*[7] codifies the non-refoulement principle which is the cornerstone of international refugee protection. This principle underpins the right to seek and enjoy asylum from persecution as enshrined in Article 14(1) of the 1948 *Universal Declaration on Human Rights*[8].

Non-refoulement is also considered as a principle of customary international law[9]. Several international treaties prohibit the return of persons to particular kinds of harm including the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[10], the *African Charter on Human and People's Right*[11]*s*, the *American Convention on Human Rights*[12]*. The Charter of Fundamental Rights*[13] of the European Union contains an explicit and absolute obligation of non-refoulement in its Article 19(2). Likewise, the obligation of non-refoulement under Article 3 of the *European Convention on Human Rights*[14], Article 7 of the *International Covenant on Civil and Political Rights*[15] and Article 3 of the *Convention Against Torture* is absolute. No exceptions and no derogations are permitted.

Non-refoulement is an evolving principle: State practice has broadened the scope of Article 33 of *the 1951 Convention*. It has confirmed that the duty of non-refoulement extends beyond expulsion and return and applies to measures such as rejection at the frontier and even extradition[16]. States' responsibility for their actions encompasses measures resulting in refoulement, including non-entrée politics. The principle of non-refoulement implies a positive obligation on States that intercept irregular migrants to provide them with an opportunity to claim asylum and to assess their claim fairly and effectively prior to returning them[17].

States cannot invoke the argument of extraterritoriality to escape their responsibility. Under international law, no distinction is made for actions taken outside of State territory, nor for actions taken by those acting for or under the direction or control of the State when it comes to attribution of responsibility[18].

Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission of the UN on 31 May 2001[19] confirm State responsibility for actions taken beyond their borders or carried out by individuals or bodies acting on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international

zones. It should be kept in mind that non-entrée politics are frequently carried out at borders far from public scrutiny, beyond borders in other countries or on the high seas. The prohibition on refoulement applies in all such situations[20].

States are bound by commitments in human rights conventions that they ratify and by customary international law norms. Whether on land or at sea, the extension of State enforcement mechanisms beyond national territory carries an obligation to ensure international protection for those who require it[21].

State responsibility also applies in cases of indirect refoulement by which a refugee or an asylum-seeker is removed from one country to another that will subsequently send the refugee onward to the place of feared persecution. In such cases, several countries may bear joint responsibility[22].

2. The scope of the politics of non-entrée: A "dynamic response" to the global refugee problem

The norm of non-entrée is elaborated on James Hathaway's article "The Emerging Politics of Non-entrée". It is defined as a series of restrictive legal and administrative measures taken by the States in Europe and North America to ensure that they do not have to offer protection to refugees from other regions[23]. These measures represent extra-territorial assertions of State coercion to facilitate more effective border control.

Non-entrée politics have been first established in Europe in the early 1980s in response to the arrival of an overwhelming majority of asylum seekers of non-European origin. The removal of internal border controls has been "compensated" by strengthening of external borders management[24]. Since then, Europe together with the US plays a leading role in testing and implementing non-entrée politics at regional level. It is in Europe at regional level that these policies are most highly formalised with the aim non only to foster cooperation, but also to harmonise member state legislation on return, removal, use of coercive measures, temporary custody and re-entry. A stronger variant of a security perimeter more or less adopts the EU as a precedent[25].

B. S. Chimni qualifies 'the linguistic ploy of not terming the emerging regimes in Europe and North America as regional responses to the global refugee problem'[26] as an important element of the strategy of containment.

The non-entrée concept is of a dynamic nature. Since its conceptual formulation by Hathaway, the content of legal and administrative measures has been considerably enlarged to include new techniques. Due to new challenges faced with by States in their fight against irregular migration, the politics of non-entrée become ever more sophisticated and diversified in their form and scope.

The non-entrée measures basically include the imposition of visa requirements[27] on the nationals of refugee-producing countries enforced through carrier sanctions[28].

Other policies of non-entrée are 'first host country' and 'safe third country' provisions[29]. These policies are emerging as new tools for exclusion of nationally defined groups.

Some States also designated part of their airports as 'international zones' to be able to proceed to summary removal of undesired aliens. The establishment of 'pre-clearance points' at national airports such as Toronto's Pearson Airport, the Prague airport[30] is another non-entrée mechanism used by States to avoid their duty of non-refoulement.

Other techniques include deployment of additional frontier guards and immigration liaison officers[31], integrated management of borders at regional level[32], construction of border fences and barriers[33], intensified cooperation with the source and transit countries[34], on return[35], readmission[36] and temporary custody.

The introduction of machine-readable passports and the use of biometric identifiers in identity and travel documents are sophisticated tools of recent non-entrée politics[37].

The interception and interdiction techniques are more and more accompanied by deterrent measures against asylum-seekers such as detention and denial of their basic legal rights to a fair trial and to the assessment of their asylum claims.

The detention of asylum-seekers in offshore camps which have been effectively declared rights free zones[38], or where they could be sent in the first place or be taken to after being picked up on the high seas, the time their cases would be considered, is one of these measures[39].

3. The impact of non-entrée politics on the principle of non-refoulement

Western countries which have recourse to non-entrée politics are all party to the *1951 Geneva Convention relating to the Status of Refugees.* As such, they have an obligation not to send asylum-seekers and refugees back to persecution.

The narrow interpretation given to the principle of non-refoulement is a major component of non-entrée politics[40]. These politics clearly deny the asylum seeker the opportunity to present his/her asylum claim to authorities concerned.

There are many consequences ensuing from this interpretation, the most important of which is the violation by States concerned of their obligations under international refugee law. Non-entrée politics have the effect of deterring or punishing asylum-seekers and other persons in need of international protection.

Non-entrée politics have not always been effective. They expose people to additional hazards when they seek to move in an irregular manner[41].

The attempts to weaken the scope of non-refoulement principle give rise to important questions regarding the safety of those who are intercepted and the widespread use of lengthy detention in poor conditions[42]. Moreover, refugees often resort to smugglers who furnish false documents or otherwise circumvent border control[43].

The use of biometrics and data management systems such as Schengen Information System[44] carries the risk of being used in a discriminatory manner with inadequate regard for data protection, privacy and civil liberties[45].
Another problematic development is the transfer of State competences to private security companies, immigration control officers and airline liaison officers who are not mandated to examine the reasons for an intercepted person's attempt to enter the country of prospective destination.

4. Future perspectives in striking a balance between the principle of non-refoulement and national security concerns
Since 1980s, asylum law has become politicized with the increasing arrival of refugees from countries that were politically, racially and culturally "different" from Western asylum countries[46].

After the terrorist attacks on 11 September 2001, it has become ever more challenging to strike a balance between the national security of a State and the obligation to provide protection against refoulement[47]. The attacks on the US have challenged assumptions about territoriality and borders[48].

The experience of the last 10 years has shown that border restrictions alone are not sufficient, and that people in need are prepared to take enormous risks to reach the North[49]. In such a context, the politics of non-entrée have been qualified by some scholars as ' grounding the gravest contemporary threat to refugee protection'[50].

The important question lies in the manner in which the national and international jurisdictions deal with the political pressure in adopting a balancing act between the protection needs of the individual and the security interests of a State[51].

These jurisdictions are increasingly confronted to the question of the compatibility of non-entrée politics with constitutional individual rights and States international obligations. The case-law they are developing[52] may ensure effective application of the principle of non-refoulement through the affirmation of the jus cogens status of the obligation of non-refoulement[53]. The reaffirmation of the dominant status of the Convention against Torture in international law[54] and the extraterritorial effect[55] of Article 33 are other powerful weapons at the disposal of national and international jurisdictions.
Furthermore, there is need for a comprehensive and long-term approach based on interstate dialogue and cooperation respectful of States' international obligations especially under article 33(1) of the 1951 Convention.

The legal process has to be complemented by States' political willingness to strengthen the UNHCR's supervisory role. The organization's capacity to monitor State practice, to analyse it and to intervene where necessary to redress a situation to counter negative developments[56] has to be reinforced.

Special training for all persons implementing non-entrée politics, including State officials and employees of a commercial entity is part to these measures as well as means to direct intercepted persons expressing international protection needs to the appropriate authority in the State concerned or where appropriate the UNHCR. Special attention should be paid in the implementation of the non-entrée politics to due respect of the non-discrimination principle.

The future success of the implementation of national and international measures depends on long-term projects based on "proactive approach" dealing with developmental and demographic disparities between the countries of origin and destination, as well as deficits in the quality of governance and protection of human rights in refugee-producing countries[57].

International refugee law has to be responsive to individual circumstances. All asylum-seekers irrespective whether they apply at the border or inside a country, should benefit from the same basic principles and guarantees as recognised in international refugee law.

The principle of non-refoulement needs to be interpreted in the light of the international legal developments to cover areas such as irregular migration. States commitment is a sine qua non to ensure the preservation of the 1951 Convention as a living instrument capable of affording protection to asylum-seekers and other persons in need of international protection[58].

Do you think that there is a need for a national law on refugees? Argue your case with reference to experiences of any country
Need for a National Refugees Law in India
M. Mayilvaganan

Refugee problem is one of the most pressing issues that have been at the forefront of international attention. It has been estimated that about 10.5 million are refugees in the world.[1] Refugees is a person who "owing to well-founded fear for being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[2] Refugees are a product of conflict and insecurity situation. Economic scarcity, destruction or damage of

houses and property and human rights violation were some of major factors that contribute to refugee generation. From time immemorial, people have been forced to move out of their home in large numbers often in a state of total destitution and seek refuge elsewhere, particularly to India. Almost every countries in the South Asia region has either produced refugees or received them and in some cases done both. India has been a major refugee receiving country of the region. It hosts refugees' from Tibet, Sri Lanka, Bangladesh Afghanistan and Myanmar. Besides, it has been taking care of stupendous tasks of relief and resettlement of the refugees in fair manner in accordance with international standards. Each major outbreak of conflict between the different ethnic groups of the country or between the security forces and militant groups produced displacement of people.

Influx of Refugees to India

Partition refugees

India has faced many influxes of refugees both major and minor since its independence and has handled them on humanitarian grounds. The partition of British of British India into India and Pakistan caused the large scale displacement of people which is estimated at 15 million.[3] On the influx of population from Pakistan, Indian government took necessary measures to provide immediate needs like food, shelter and medical facilities and subsequently took settlement of them on a war footing. Further, the government of India framed necessary legislative and administrative measures to meet the situation like the rehabilitation finance administration act, 1948 and the displaced persons (claims) act, 1950. It also created a separate ministry to handle the refugees' situation.

Tibet Refugees

Subsequently even before the partition refugees had been fully settled, Indian faced another major influx of Tibetans in 1959. As a result of Chinese invasion over Tibet, Dalai Lama along with his followers crossed over to India. The government of India took a positive step by which it granted political asylum to all the Tibetans. They were given registration certificate and lands later throughout the country.[4] Tibetan refugees have by and large assimilated into the Indian society.

Refugees from Bangladesh

Again in 1971, there was another massive influx of refugees from the East Pakistan on account of liberation movement. Nearly 10 million people from East Pakistan came into India. In spite of an enormous economic pressure it lays, the government of India provided relief and rehabilitation to best of its capacity. Besides, Indian government requested assistance from United Nations to ease the economic burden of the country and to alleviate the suffering of the refugees. However the Indian government made its position clear on the refugees that they were only granted temporary asylum and they would have to return to their own country when the situation improves. In this regard, on the independence of Bangladesh on December 1971, the government of India and Bangladesh reached an agreement by this arrangements where made for the return of refugees. [5]

Later in 1979 and 1980, tribals mainly Chakmas and others from Chittagong hill tracts have crossed over to India as a result of discrimination policy of successive Bangladesh government, settlement of Bengali and human rights violation. The official figure of refugees in India was nearly 57,000 as registered with the refugee welfare association. There were in addition more than 5,000 unregistered refugees,[6] staying outside the refugee camps. As a result of peace agreement in 1993 and 1998 a total of 63,407 tribal refugees returned in six phases between 1994 to February 27, 1998[7]. The report of the international working group for indigenous affairs[8] documented massive human rights violations such as murdered, torture etc. against tribals in the Chittagong Hill Tracts.

Sri Lankan refugees

As a consequence of the ethnic conflict in Sri Lanka, people have been forced to move to India. The outburst of ethnic riots in 1977 resulted in displacement of Sri Lankans Tamils. However, the 'landmark' event that made 'displacement' a permanent feature and a common problem of Sri Lanka was, the communal violence, targeted mainly at the Tamils living in the Sinhalese-majority areas that occurred in July 1983. As a result confrontations between the government security forces and the Tamil militants intensified there was an immensely increased outflow of Tamil refugees due to threats, raids and reprisal attacks and forced eviction both by government forces as well as by the militant groups for 'strategic' reasons'. Since then there have been several waves of refugee movement to India. Since 1999 the number of registered refugees has been around 66,000 refugees[9] in 130 refugee camps in Tamil Nadu and two in Orissa. On arrival the Sri Lankan refugees are sent to camps in various places in Tamil Nadu. The assistance provided to the refugees in the camps consisted of an emergency relief parcel, which contained clothes, blankets, cooking utensils (each family is provided a set of utensils every two years), and small cash allowances[10]. Later ration card are provided so that they can purchase essential commodities at fair price shops. The Government of India has so far spent more than 200 crore (Indian) rupees on providing relief facilities to the Sri Lankan refugees.[11] Repatriation of Sri Lankan refugees occurred in three phases with beginning of 1987 accord. In a report dated 18 October 1999, the UNHCR has placed the total number of Tamil refugees who have returned to Sri Lanka from India between 1987 and 1995 at 104, 000.[12] Other than the above mention refugee groups, the refugees from Myanmar, Iran and Bhutan were refuge in India.

International legislation and protection of refugees in India

International legislation, in form of declaration, resolutions and conventions like two covenants on human rights viz. the international Covenant on civil and political rights and the international covenant on economic, social and cultural rights, has been there for the protection of rights of human beings including refugees, but implementation of these legislation is what a question today. A number of countries have ratified the conventions and incorporated them into their national legislation. On the other hand, many states ratified it but not incorporated into the domestic law. As a result these states did not need to abide by the provisions of these conventions. In regard to refugees, the 1951 refugee convention and 1966 protocol is the universal instrument which is concluded by the international community.

Majority of developing countries including India has not ratified the 1951 convention and its protocol of 1967. The misapprehension and fear of instruments are few reasons other than the Eurocentric factor, for non-signing or ratifying these instruments by these countries. The few reasons that are most advanced for India not becoming a party to the 1951 convention is; first it is pointed out that the definition excludes protection to individuals or groups fleeing internal wars or situations of generalized violence. Second, it is noted that it is too burdensome for India to implement the rights regime contained in the 1951 convention, as it can hardly meet the needs of its own citizens. Third, it is said that India's record in giving assistance and protection to refugees is satisfactory and therefore there is no particular reason for it to accede to the 1951 convention.[13]

Later, although the geographical and temporal limitations have been discarded by the 1967 protocol, the "substantive rights established by the 1951 Convention have been left intact and they are still Eurocentric by nature".[14] Many of the provision of the convention are good enough, for the developing countries like India, they are still frequently lacking in content, as they cannot grant the rights like social security for the refugees where the local population hardly ever has such a right. Likewise with regard to the statute of the UNHCR is concerned, it is just an annex to a general assembly resolution which is not binding upon the states. In case of India even though it become member of the UNHCR Executive Committee in 1995, it does not support the convention. As a result accommodating refugees as the actual response of the Indian government on the whole may be, governments have followed differentiated policies towards different groups of refugees or asylum seekers originating from within the region.[15] While a state might welcome some groups and it may not be receptive or kind to others. The powers to grant shelter have been relegated to administrators at district and sub-district levels who grant and revoke these at their discretion. These policies have been mainly dictated by the politics of kinship and inter-state relations. Experience shows that there is no consistency on the part of state in admissions, grant of asylum, education, employment, rehabilitation and repatriation of refugees. Each refugees group receives a different package depending on political motivation and ethnic linkages. In the absence of laws concerning treatment of asylum seekers/refugees, the response to refugee influxes remains ad hoc.

Need for refugees law

Despite hosting large number of refugees, yet, India is not a party to the 1951 UN Convention on the Status of Refugees or the 1967 Protocol relating to the Status of Refugees. Nor has it enacted a national law on refugees. Instead, India has chosen to deal with refugees at political and administrative levels. It has only ad hoc mechanisms to deal with the refugees' problem. The Union government in India has sole jurisdiction over the subject of citizenship and aliens. Under Indian law, the term 'foreigner' is the only reference to 'aliens' of any kind; this places refugees, immigrants, and tourists in the same category.[16] Indian practices towards refugees and asylum seekers of various types have on the whole been generous and accommodating despite the absence of a legal framework dealing with refugees. Nevertheless its absence results in arbitrary, ad hoc and discretionary policy[17] which undermines fair and unilateral refugee protection. Besides, the absence of a refugee specific law in India on the status of refugees has also meant that refugees are dependent on the mercy of the State rather than on a regime of rights to reconstruct their lives in dignity.[18] For instances, India granted rights to the Tibetan refugees, Sri Lankan Tamil and Chakmas, which have not been granted, to later refugee groups. For the only above approved refugees, the government of India provides assistance and other essential services such as education for children and health services. On the other hand, refugees from Afghanistan, Myanmar, and Sudan receive no government assistance. This differential treatment of refugees in India is a basic problem and arguably contradicts the provision on non-discrimination in the 1951 convention.

Moreover, later in nineties, Indian government has been increasingly preoccupied with national security matters, the foreigners act, 1946, one of the legislation, which governs refugees, has been applied more stringently, restricting the issuance and renewal of residential permits for mandate refugees.[19] On the rights of refugees, the refugee Convention stipulates that the state shall provides those who fall within the 'refugee' definition of its article 1A (2) a number of rights and freedoms. These include free access to courts and equal treatment in elementary education and in employment with nationals of the country. But in absence of India's non-signatory to the convention and any national law on this subject, do refugees, as a special class of aliens possesses any more rights than aliens in general? Refugees can end up being treated like any other foreigner. A legal structure is necessary to effectively deal with a complicated refugee problem.

The absence of a legal framework, do not provide durable solutions to the refugee problem. As Justice P.N. Bhagwati has pointed out that there are issues concerning refugees that cannot be addressed in ad hoc mechanism. He advocates that only law on refugees would "help to provide a measure of certainty in the states' dealing with problem of refugees". It would also provide "greater protection" to them.[20] Above all it would incorporate the principle of *non-refoulement*, the basic principle of international refugee law. The adoption of national legislation for refugees will not only help establish transparency, fairness and a humane treatment of refugees, as a matter of fact, through these laws the government of India could give a formal approval to existing practices and responses to the refugees. Besides, having a national law would not only ensure the protection of refugees and uphold obligations enjoined by the Constitutions of the country, it will also enable the state to discharge their international treaty obligations. Ultimately both the state and the refugees will get benefits from such laws. It would also provide the non-governmental organisations and other institutions of civil society a basis to campaign against any violations of these conventions, nationally, regionally and internationally. Moreover, B.S. Chimni, states that the passage of national legislations will allow the state to identify and debate their individual concerns, both at the level of security and resources, and thereby bring to the fore the divergent perceptions to the refugee problem. They would also accumulate critical experience in their implementation.[21]

Need for National Laws on Refugees in India
Neena Bansal Krishna

Introduction
The Indian sub-continent has a vast and diverse area with a massive demography. Besides Pakistan, India's neighbours include Afghanistan, Bhutan, Nepal, Sikkim, Burma and Sri Lanka. Even though the territorial boundaries are clearly demarcated, there have been a vast migratory and refugee movements in the sub-continent in the last fifty years which has raised concerns about national security on one hand and the violation of human rights of refugees on the other hand.

India has a long historic tradition of welcoming refugees from all over the world. Throughout our 5,000 years of known history, we have always welcomed refugees with open arms and given them a place of honour and dignity in our society. However, in recent times, with India providing shelter to about 250,000 refugees, pertinent issues arise about its law and policy towards refugees. India is not a signatory to the Convention of Refugees, 1951 and its Protocol of 1967. This article analyses if India's apprehension against signing the Convention and the Protocol is based on well-founded reasons and if yes, then does the solution lie in having a national legislation.

The Displaced Persons in Indian Sub-continent in the Present Century
The partition between India and Pakistan in 1947 led to the migration and resettlement of about 8 million people. In 1959, the Chinese take over of Tibet created a huge Diaspora of Tibetan refugees who have since, remained in India. In 1971, there was mass influx of about 10 million people from Bangladesh, who were settled in camps and repatriated. India is also been subject to influxes of refugees from Afghanistan. The movement of Afghan people began after the Daud coup in 1973 and has continued till and after the American invasion of 2002. Around and after 1981 Tamil speaking refugees from Sri Lanka poured into India in large numbers and were placed in camps. India also acts as conduit. Refugees from Bhutan flee to Nepal through India. Some thousands have settled in Indian villages and towns. India is thus, confronted with the Herculean task of relief and resettlement of refugees.

Basically, may be classified in 3 categories. First, those who receive full protection according to standards set by Government of India. These are the Sri Lanka Tamil Refugees, the Chakma refugees from Bangladesh and the Tibetans. Second, are the refugee whose presence in Indian Territory is acknowledged by only UNHRC and are protected under the principle of non-refoulement, which are mainly the Afghans, Iranians, and Somali, Sudanese and Burmese refugees. Third, are other refugees who are acknowledged neither by the government nor by the UNHRC, they are mostly the Chin refugees from State of Burma, Nagas and Nepalese of Bhutanese nationality. They have generally assimilated into Indian society. They do not receive any state assistance or internal assistance because of their ambiguous status.

International Regimes for Refugees
The development of refugee law has its foundation on the events taking place in the Western Countries. In the aftermath of First World War the serious problem of refugees emerged which was acknowledged as having international dimensions. It led the League of Nations to create an office of the High Commissioner. Thereafter, various developments in solving the problem of refugees took place but the major break through was the experience at the end of Second World War. The architects of UN Charter in 1945 called upon state signatories to the Charter to "...save succeeding generations from scourge of war" and asked the UN to help achieve "International cooperation in solving international problem of an economic, social, cultural or humanitarian character" and to promote and encourage "respect for human rights and fundamental freedoms for all without distinction." Consequently, one of the first items on the UN agenda was the fate of refugees and displaced and stateless persons. The real movement to protect refugees began only with the 1948 Universal Declaration of Human Rights, which proclaimed basic rights to all human beings irrespective of their nationality or citizenship. This declaration was an important step since refugees face unique hardships and are particularly vulnerable in foreign countries. It is, therefore, incumbent upon the international community to protect their rights both in country of origin and asylum. In 1950, the UN General Assembly approved the Statute of the Office of the UNHCR which established the Office as a subsidiary organ of the General Assembly and which entrusted High Commission with the functions of providing international protection for refugees as well as seeking permanent solutions to their problems. The non-derogable rights enshrined in the Covenant as Article 6 of the International Covenant on Civil and Political Rights (ICCPR) is also applicable to the refugees. The principle of non-refoulement was applied where there was fear of violation of right to life of the refugees. Non-the-less the foremost authority on refugee law is the 1951 Convention relating to the Status of Refugees, known simply as the Refugee Convention that codified a precise definition of refugee followed by its Protocol in 1967. None of the South Asian countries are party to the 1951 Convention relating to the Status of Refugees, which currently is ratified by 134 nations.

India and the 1951 Convention
India has neither signed the Convention of 1951 nor the Protocol of 1967 due to a succession of historical reasons. First, it found the definition of 'Refugee' in 1951 Convention as Euro centric as it was confined only to the violation of civil and political rights and excluded protection to individuals and groups fleeing internal wars or situations of generalized violence. It also does not distinguish the illegal migrants from refugees. Second, the global refugee policy was seen as based more on geographical considerations than on general burden sharing. There is an apprehension of policy makers that it may entails obligations that they may not be able to or are prepared to meet in terms of resource mobilization. Third, is the bureaucratic wariness that once India becomes a party to the Convention, there would be intrusive supervision by the UNHCR and other International agencies. Fourth, the Convention does not allow an effective protection of National Security interests. Fifth, India's record in giving assistance to refugees is satisfactory and therefore, its confidence in tackling refugee crisis reinforces its adherence to the police of working out solutions through bilateral negotiations with emphasis on sovereign jurisdiction.

Sixth, is the belief that India has been generous to refugees and accession to convention would not necessarily improve their condition.

These apprehensions, however, on close scrutiny seem to be more imaginary than real. First, by becoming a party to the Convention India is not precluded from implementing its own national legislation incorporating a broader definition of refugee. Moreover, India's insistence on broadening the definition can in fact be a reason for it to become a party so as to be able to draw more attention on international forums.

Second, Article 42 (1) of the Convention permits reservations to be made to the right regime that it establishes other than article 1,3,4,16(1), 33,36 and 46. Several third world countries have in fact, made such reservations, while acceding to the Convention. India can thus accede to the Convention by entering into reservations.

Third, while the concerns of India about its national security are genuine, the Convention contains provisions that go some way in protecting them. Article 9 of the Convention allows certain provisional measures "in time of war or other grave and exceptional circumstances". Article 33 which contains the principle of non-refoulement provides that the provisions of convention are not available to the refugees against whom there are reasonable grounds for regarding as danger to the security of the country in which he is. Article 2, calls upon every refugee to respect all the laws of the host State.

Fourth, though it is correct that India has a good track record in offering protection to refugee, there has been discrimination in treatment to various categories of refugees. Also, the violation of human rights has been rampant in all refugee camps – whether State assisted or nor.

Legal Status of Refugees in India

There is no domestic law or specific national policy governing the protection of refugees in India. Under municipal laws, refugees being considered as foreigners are governed by the provisions of Foreigners Act of 1946, the Registration of Foreigners Act of 1939, the Passport (Entry into India) Act of 1920, the Passport Act of 1967, and the Extradition Act of 1962. These statutes do not make any distinction between the refugees and other foreigners. Using the vide discretionary powers derived from the Section 3 of Foreigners Act, the Ministry of Home Affairs may issue Residential Permits to the Foreigner and it is on this basis that large numbers of UNHCR – recognized mandate refugees have been able to secure stay facilities. India's extradition statutes provide protection to refugees who were political offenders and those who, if extradited, would not be treated well or fairly by the state seeking extradition. Thus, the embryo of the right of non-refoulement was reiterated and codified in the extradition statutes. Apart from this, specific statutes have been enacted from time to time to deal with the specific refugees situation, which arose as at the time of partition of India and due to Bangladeshi refugee influx in 1971.

India's Obligation under the International Treaties Law Regime

India has joined a number of Human Rights Conventions namely, Universal Declaration of Human Rights (1948), ICCPR (1966), ICESCR (1966), CERD (1965), CEDAW (1979) & CRC (1989). All these instruments have a bearing on India's obligation to protect refugees.

While Article 51(c) of the Constitution provides that the State shall endeavor to foster respect for international law and treaty obligations, the international Covenants are not enforceable by court of law, unless specific provisions are incorporated into existing municipal laws or given effect through separate legislation. In the absence of domestic laws, the judiciary cannot ensure that the executive branch of the Government fulfils its treaty obligations. Never the less the courts have empowered themselves to refer to international law and principles. Where there are no municipal laws giving effect to international obligations, the courts have applied the principle of international law, treaty or convention, so long as it does not contravene existing municipal law. The Supreme Court has incorporated human rights – enhancing international provisions in the fabric of the fundamental rights chapter of the Constitution even if they have not been specifically incorporated by law in the statute book.

India's Obligations towards Refugees under the Domestic Laws

Part III of the Constitution of India guarantees a series of fundamental human rights, drawing heavily from the international human rights discourse. These rights on the basis of classes of persons entitled to these protections can be classified into two strands, namely: (i) rights that are conferred only upon the citizens which are stated in Article 19 of the Constitution and (ii) rights that are guaranteed to all persons which are enshrined in Article 14 and 21 of the Constitution. In Ktaer Abbas Habib Al Qutaifi Vs. Union of India, the Gujarat High Court declared that the principle of non-refoulement is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. In Louis De Raedt Vs. Union of India (1991) 3 SCC 554 the court observed that the "due process" was available to a foreigner to prove his Indian Citizenship. In P-Mohammad Khan Vs. State of Andhra Pradesh (1978) II APWR 408, the Andhra Pradesh High Court laid down that a fair procedure needs to be followed before deportation is effected.

Although India's new human rights jurisprudence has shown an inclination to read international human rights provisions into domestic law but there appears to be dichotomy between various seemingly conflicting trends towards foreigner. On one hand, the legislations on foreigners are strictly interpreted by refusing to interfere with the powers of the Government of impose restrictions on foreigners in India or to effect their deportation out of India. On the other hand, the courts have evolved a wider approach to incorporate human rights considerations to protect foreigners from unfair and arbitrary treatment. It is thus, apparent that there is only an ad-hoc mechanism in place to deal with the status and problems of the refugees.

Role of National Human Rights Commission in India
The National Human Rights Commission (NHRC) has functioned effectively as a watchdog for the protection of refugees. The plight of the Chakma refugees in Tripura was exposed by NHRC which stepped in when the state machinery insensitive. It filed a public interest litigation on behalf of 65,000 Chakmas and sought intervention of the Supreme Court of India to safeguard their life and freedom. It also sent its team to ascertain the situation of Chakma refugees in Tripura. The NHRC has also concerned itself with the fate of Srilankan Tamil Refugees and their condition in the camps. It has time and again exhorted the Government of India to consider accession to 1951 Convention and also to enact a national legislation on refugees. A study on model national legislation on refugees has also been conducted by it.

UNHCR in India
The UNHCR operates in India under the umbrella of United Nations Development Programme (UNDP). It is playing one of two roles. With respect to the refugee of Tibet and Sri Lanka, whom the Government of India has undertaken to assist, it plays the role of a 'Watchdog', monitoring conditions and ensuring that their repatriation is voluntary. UNHCR deals almost exclusively with the remaining refugee populations. It has been essentially permitted by the Government to be concerned with the refugee status and the welfare of refugees coming from outside the South Asian Region.

The absence of formal accreditation of UNHCR imposes many constraints on its working in the country. It is unable to easily get support from other UN agencies or collaborate with them to meet the basic requirement of the refugees. It is also denied access to refugee camps. After India became a member of the Executive Committee of UNHCR in 1995, relations between UNHCR and Government of India have improved.

Non-Governmental Organizations (NGOs)
The domestic NGOs and UNHCR are complimentary to each other in a situation where Government of India denies access to UNHCR and other foreign humanitarian agencies, the

NGOs play the most crucial role to provide protection to the refugees. The NGO response is often area specific. They have done invaluable work among refugee population in the Northeast and in Tamil Nadu.

Need for National Law on Refugees
The above-mentioned mechanisms are available for the implementation of Human Rights in India. However, the ground reality is that the plight of the refugee, irrespective of whether they are looked after by the Government of India or by UNHCR, is abominable, to say the least. A peculiar situation prevails in India in this regard. While the Executive branch of alien state does not recognize the refugee or refugee laws, the judicial wing of our State does recognize refugee and refugee laws to some extent. The lack of legal mechanisms and policies on refugees is one of the fundamental flaws of refugee protection in India.

The National Human Rights Commission has been consistently expressing its concern about the human right violation of the refugees and has been recommending to the Government of India to become a signatory to the International Convention, 1951 and the Protocol of 1967. The Ministry of External Affairs has been indicating to NHRC that the process of examining the possibility of signing the Convention and the Protocol is under consideration though it may take time.

The Government of India may be justified in having reservation about ratifying the Convention but at the same time, it is not relieved of its responsibility to establish a humane and right – based regime for dealing with assailant seekers and refugees. A consistent legal framework is vital for prevention of political adhocism, which often translates into forcible repatriation for refugees. It would establish a procedure for granting refugee status to asylum seekers, guarantee them fair treatment and establish the requisite machinery for its implementation. A paradigm shift would be made from charity to right-based regime. It would enable India to draw a distinction between illegal migrants and refugees; address its concern for national security, to have clear policy on non-refoulement; to introduce uniformity in treatment of different refugee groups; to specifically deal with the problems of refugee women and children and to spell out duties of refugees towards the host country. In adopting a national legislation, India would have the flexibility to meet its own concerns while giving legal force to the humanitarian ideals of 1951 Convention.

Conclusion
The basic principle underlying the Indian policy is to view the problems strictly in a bilateral perspective. The problem of refugees is dealt with on an ad-hoc basis. Without a comprehensive policy in tune with the policies and instruments in global use, India has little chance of streamlining its machinery of compassion for optimum good. Legal framework is required for protection, rehabilitation and repatriation of the refugees. The courts National Human Rights Commission and NGOs have no doubt demonstrated zeal to protect the rights of refugees but they have their own limitations. There is an urgent need to give certainty in this field by enactment of a clear law. The attempt to fill the void by judicial creativity can only be a temporary face. Legislation alone can provide a permanent solution.

In India adopting a national legislation would be a first step towards establishing a humane and right based treatment of refugees, which fits well within the democratic framework of Indian Constitution.