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**REIMAGINING THE ASYLUM LAW IN INDIA: A STUDY ON THE DUTY OF
NON-REFOULEMENT**

ABSTRACT

The right of refugees to seek asylum is undisputedly provided by international instruments but traditionally, the right to grant asylum has been the prerogative of the state concerned. States have a duty of non-refoulement under Article 33 of the Refugee Convention, prohibiting the expulsion or return of refugees.

Given the correlation between International Human Rights Law and International Refugee Law, non-refoulement comprises non-rejection at the frontiers as well. Despite the principle being a part of customary international law, due to the ambiguity prevailing in its application, it is constantly flouted by the member-states. Further, as the principle of non-refoulement includes the duty to not reject refugees at frontiers, the lack of economic stability of a state is not accepted as a defence to non-acceptance of the refugees.

Moreover, countries like India that are non-signatories to the convention are not bound to adhere to International Refugee Law. Yet, India continues to accept refugees and makes efforts to comply with international norms, despite not having national legislation for the same. Therefore, there is a need for India to formulate a robust legal framework in furtherance of its humanitarian objective.

KEYWORDS: Refugees, Frontiers, Economic stability, India

I. INTRODUCTION

International Refugee law ('**IRL**') has evolved since the formation of the Convention on Status of Refugees, 1951 ('**Refugee Convention**'). The emergence of refugees is an inevitable side-effect of state sovereignty and its absolute power. They are a result of the state's failure to secure the protection offered to its citizens.¹ So, the international community is duty-bound to protect refugees and asylum-seekers through humanitarianism as well as international obligations. Refugees have a right to seek asylum and enjoy asylum once granted under Article 14 of the Universal Declaration of Human Rights, 1948 ('**UDHR**'). Yet, states retain the prerogative of granting asylum traditionally.

The existing body of IRL is an attempt to resolve the issue of refugees between exclusive sovereign states. It includes the efforts of the drafters of the Refugee Convention to introduce the principle of non-refoulement under Article 33 to prevent the return and expulsion of refugees from the asylee states where they risk persecution. The non-refoulement clause, often defined as a 'trump card' for refugees,² has been disregarded by states constantly in many methods of non-entrée to prevent the entry of refugees into their territory.

The derogation of the principle of non-refoulement has two schools of thought. One that maintains that non-refoulement, when applicable in the context of torture, cruelty, inhumane or degrading treatment or punishment, is non-derogable, acquiring the status of a peremptory norm.³ On the other hand, it is believed that non-refoulement of refugees has not even achieved the status of customary international law as there is not sufficient evidence to establish consistent state practice and *opinio juris*.⁴

Yet, the duty of non-refoulement is not new to the Refugee Convention, as it has been a part of almost all human rights conventions, like the UDHR, International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture (CAT), Declaration on Territorial Asylum and regional treaties like Organisation of African Unity Refugee Convention (OAU), Cartagena Declaration, etc. However, non-refoulement under Article 33 of the Refugee Convention is disputed to have certain geographical limitations due to the ambiguous language, as well as protection of the state's sovereignty. Many questions, like whether non-

¹ Thomas Gammeltoft-Hansen, *Access to Asylum- International refugee Law and the Globalisation of Migration Control*, 14 (CUP 2011)

²*Ibid*

³ Aoife Duffy 'Expulsion to Face Torture? Non-refoulement in International Law' 20 (3) IJRL 388 (2008).

⁴ Setu Gupta, 'Non-Refoulement during a pandemic-with a contextual Analysis of border closures imposed by the EU, the US and India', ILI Law Review 80 (2022)

admittance, rejection at the frontier, and state policies of non-entrée are a breach of the non-refoulement obligation, have arisen with the increased immigration and globalisation.⁵

Moreover, many South Asian countries like India, Bangladesh, and Pakistan, being non-signatories to the Refugee Convention, have acted in adherence to the obligations under it by allowing refugees into their territories and treating them in conformity with IRL.

But the question remains as to whether the non-signatory states are obligated to accept refugees in the first place. Considering the socio-economic conditions of most South Asian nations, it is important to deliberate upon the existence of a responsibility to adhere to international law in granting asylum on humanitarian grounds. As for India, it has not been consistent in its stance against the refugees. Despite accepting asylum-seekers from different states as a non-signatory to the refugee convention, it has also violated the non-refoulement duty in many circumstances.⁶

Therefore, to further the understanding of the application of the non-refoulement principle at an international level, its limitations, and whether India as a non-signatory to the Refugee Convention must comply with the same, the article is divided into 4 parts. Part II shall discuss the nexus between the law of asylum and the application of the principle of non-refoulement, and the duty of states therein. Part III will engage with the idea of whether nations have a duty to adhere to IRL despite their economic circumstances and discuss the concepts of burden-sharing and durable solutions for efficient refugee management. Finally, Part IV shall deal with existing Indian laws, the role of the judiciary in extending protection to refugees, and the way forward for India.

II. THE NEXUS BETWEEN LAW OF ASYLUM AND DUTY OF NON-REFOULEMENT

The 20th century witnessed vast global movements of millions of people seeking asylum due to political events and has been described as the century of the homeless man.⁷ This led to closer integration between humanitarianism and the refugee regime, leading to the creation of a more-humanity-friendly definition of sovereignty and rise of human rights.⁸ The increased acceptance of sovereignty being conditional led to states accepting aliens into their territory.

⁵Thomas, (n 1)

⁶ Setu, (n 4)

⁷ P. Weis, 'Territorial Asylum' in Helene Lambert (ed), *International Refugee Law* (Routledge 2010) 14

⁸ Michael Barnett, 'Refugees and Humanitarianism' in Elena, Gil Loescher, Katy Long (eds), *The Oxford Handbook of Refugees and Forced Migration Studies* (OUP 2014) 248

Asylum originated from the Greek word ‘Ayslon,’ meaning freedom from seizure.⁹ Historically, it pertained to a religious institution providing shelter to persons fleeing their homes, not restricted to political persecution, in ancient Greece and imperial Rome and later was significantly incorporated into international law.¹⁰ The Institute of International Law in 1950 defined asylum as “the protection which a state grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it”.¹¹

Asylum is different from refugee status as the former constitutes an institution for protection while the latter refers to the content of the protection offered to the ones who meet the requirements under the IRL.¹² According to Pufendorf and Vattel, sovereign states were free to grant asylum as it was their discretion but, jurists like Grotius, Wolff, and Suarez opined that granting asylum was the duty of the states for reasons of humanity, rejecting the sovereign right of states.¹³

The law on asylum has developed a lot as the emphasis has been increasingly on the humanitarian basis of granting asylum, due to the large-scale exodus and persecution of persons on account of political events. Many international instruments were adopted to facilitate the accommodation of people and provide appropriate protection¹⁴ to them leading to the establishment of UNHCR and the Refugee Convention, 1951 as the beginning of a new international refugee law regime.

A. The Right to Grant Asylum

Every person has a right to leave his country in pursuit of asylum, as recognised by the UDHR under Article 13(2).¹⁵ The right to grant asylum has always been the right of the sovereign state.¹⁶ International instruments like UDHR proclaim the right of an individual to

⁹ Roman Boed, ‘The State of the Right of Asylum in International Law’, 5 *DUKE J. COMP. & INT’L L.* 1, 2 (1994).

¹⁰ Seshaiiah Shastri, ‘The Role of International Organisations in protection of Refugees’ in Rafiqul Islam and Jahid Hossain Bhuiyan (eds), *An Introduction to International Refugee Law* 246 (MartinusNijhoff Publishers 2013)

¹¹ 5th Institute of International Law Commission Resolution, ‘Asylum in Public International Law’ (1950)

¹² Maria-Teresa Gil-Bazo, Elspeth Guild, ‘The Right to Asylum’ in Cathryn Costello, Michelle Foster, Jane McAdam (eds), *The Oxford Handbook on International Refugee Law* (2021) 868.

¹³ P. Weis, (n 7) 15

¹⁴ UNHCR ExCom, 5th sess., Conclusion No. 103 (LVI), A/AC.96/1021, (2005), para. (i).

¹⁵ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948), art. 13; Organisation of American States, American Convention on Human Rights, (22 Nov. 1969) 1144 U.N.T.S. 123 *entered into force* 18 July 1978, art. 22(2)

¹⁶ Declaration on Territorial Asylum 1967, art. 1

seek and enjoy in other countries asylum from persecution but scholars observe¹⁷ that it does not implicate a right to receive asylum.¹⁸ Regional agreements also address asylum but with restrained authority over states' sovereignty.¹⁹

For instance, the regional instruments like the American Convention on Human Rights, 1969, OAU, African Charter on Human and People's Rights, 1981 and the Cartagena Declaration, 1985 have explicitly located the right to asylum in it but with reservations, as it has to be in accordance with their respective legislations and international obligations.²⁰ Further, constitutions of different countries have also conferred individuals right to asylum within their municipal laws, in furtherance of their obligations under International Human Rights Law (IHRL).²¹ Therefore, the above-mentioned human rights treaties squarely place IRL within the human rights paradigm.

While affirming the inclusion of right to grant asylum, the UNGA and Executive Committee of the High Commissioner's Programme ('**ExCom**') reiterated that states have an "obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments".²² The ExCom conclusion No. 82 also affirms that the institution of asylum derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the UDHR.²³ In addition to it, the *travaux preparatoires* of the Refugee Convention show that the French delegate proclaimed that the right to asylum was implicit in the convention even if not mentioned explicitly, as the contrary would defeat the purpose of the convention.²⁴ But, nowhere is the right of the state to grant asylum

¹⁷ Boed, (n 9) 9; Felice Morgenstern, 'The Right of Asylum', BRIT. Y.B. INT'L L. 327 (1949); Hersch Lauterpacht, 'The Universal Declaration of Human Rights', BRIT. Y.B. INT'L L. 354, 373 (1948)

¹⁸ Thomas, (n 1) 64

¹⁹ Organisation of American States, American Convention on Human Rights, (22 Nov. 1969) 1144 U.N.T.S. 123 *entered into force* 18 July 1978, art. 27

²⁰ Convention Governing specific aspects of Refugee problems in Africa, (10 Sept. 1969) 1001 U.N.T.S. 45 *entered into force* 20 June 1974, art. II (1), American Declaration of the Rights and Duties of Man, art. 27; Organisation of American States, American Convention on Human Rights, (22 Nov. 1969) 1144 U.N.T.S. 123 *entered into force* 18 July 1978, art.22 (7); European Convention on Human Rights, (4 Nov. 1950) 213 U.N.T.S. 221 *entered into force* 3 September 1953; Association of Southeast Asian Nations, ASEAN Human Rights Declaration, (18 Nov. 2012);The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America, (22 Nov. 1984).

²¹ P. Weis, (n 7) 20; Constitution of the Republic of Albania, 1950, art. 40.

²² UNGA Res 48/116, (1993); UNHCR ExCom Conclusion No. 82 (XLVIII), 12A (A/52/12/Add.1) (1997) para. d(vi); UNHCR ExCom Conclusions Nos. 19(XXXI) (1980), para. (e); 22(XXXII) (1981) para. (b); 36(XXXVI) (1985) para. (f).

²³ UNHCR ExCom Conclusion No. 82 (XLVIII), 12A A/52/12/Add.1, (1997)

²⁴ Weis, (n 20)

mentioned explicitly except in the 1967 Declaration on Territorial Asylum, a non-binding treaty that failed to become a part of international law.²⁵

Therefore, though international agreements do not explicitly mention the right to grant asylum, the procedural requirements of seeking asylum must be interpreted in the light of rights contained in subsequent human rights conventions.²⁶ Nevertheless, state's discretion to grant or refuse asylum is not absolute, as it is limited by the operation of the principle of non-refoulement and the procedural characteristics inherent to it.²⁷

B. The Principle of Non-Refoulement and Rejection at Frontiers

The non-rejection of frontiers is widely recognised as an element of the principle of non-refoulement and has attained the status of Customary International Law. This principle prohibits states from refusing entry to individuals at borders when their life or freedom would be threatened if returned. Article 33 of the Refugee Convention enshrines this prohibition stating that a “non-contracting state shall not expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”. The language of the provision suggests that it applies regardless of the location of the actions, prohibiting all kinds of return and expulsion, both by judicial and administrative authorities, including at the border.²⁸

Article 33 establishes a “negative obligation” on states not to expose individuals to persecution, which in cases of border rejection amounts to a *de facto* duty to admit, since refusal of entry would otherwise result in exposure to persecution. Thus, while the Refugee Convention does not expressly confer a right to asylum, the obligation not to refoule necessarily implies at least temporary admission at frontiers to avoid violating the prohibition. The scope of Article 33 has been the subject of judicial interpretation. While the US Supreme Court once restricted its application to persons physically present within a state's territory²⁹, this narrow view has been rejected by international bodies. The Inter-American Commission on Human Rights and the UNHCR have affirmed that Article 33 applies extra-territorially, including at borders.³⁰ Similarly, the UK Court of Appeal in *R*

²⁵ Declaration on Territorial Asylum, 1967.

²⁶ Alice Edwards, ‘Human Rights, Refugees and the Right to enjoy Asylum’ 17 *IJRL* 293 (2005).

²⁷ Teresa, (n 12) 874

²⁸ *Ibid*

²⁹ *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993).

³⁰ I/A Court H.R., *Haitian case* Judgement of 13 March, 1997, Series No. C, No. 96.

*(European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*³¹ held that non-refoulement prohibits not only expulsion from within a territory but also rejection that forces individuals to remain on the persecuting side of a frontier. Drafting history also supports this view as the original text of Article 33, inspired by the 1933 Refugee Convention, included both “expulsion” and “non-admittance to the frontier,” and although the explicit right to asylum was omitted from the final text, many states (including the US, France, and Israel) supported its implicit inclusion.³²

The customary nature of the principle is reinforced by its recognition beyond the Refugee Convention. The CAT extends the prohibition of refoulement to any person regardless of refugee status, without geographical limitations, thereby widening its scope³³ whereas the Refugee Convention applied only to persons determined to become refugees. However, the ExCom has observed that a person need not officially become a refugee for the application of the Refugee Convention.³⁴ Though not binding, the pronouncements of ExCom carry disproportionate weight in formation of custom.³⁵

While it is suggested that the non-refoulement under CAT would include any state action, including rejection at the border, the distinction between returning someone who is already in the host territory and preventing a person from entering such territory is immaterial.³⁶ The committee on CAT had observed that the state has the responsibility to take all measures to prohibit return or expulsion if the danger of torture exists,³⁷ leading to the admission of people into the territory at least as a temporary refuge,³⁸ implying an obligation on states to allow aliens into their territory.

The ExCom has further underlined that non-refoulement must be observed “both at the border and within the territory of a state,” recommending that frontier authorities not reject asylum-seekers without referral to a central authority. These pronouncements, while formally

³¹ *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2004] UKHL 55

³² Thomas, (n 1) 49

³³ Boed, (n 9) 17

³⁴ UNHCR ExCom Conclusion No. 82 (XLVIII), 12A (A/52/12/Add.1), para (i), d(i) (1997); UNHCR, UN doc. A/AC.96/882 (1997), para. 17

³⁵ Jean Allain ‘The Jus Cogens Nature of Non-Refoulement’ 13(4) IJRL 539 (2002)

³⁶ Boed, (n 9) 16

³⁷ *SeidMortesaAemei v Switzerland*, CAT/C/18/D/34/1995 (1997) para. 11

³⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 Dec. 1984) 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified by 24 I.L.M. 535 (1985), entered into force 26 June 1987, art. 3; David Weissbrodt & Isabel Hortreiter, ‘The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties’ 5 *BUFF. HUM. Rts. L. REV.* 1 (1999)

non-binding, are highly influential in the formation of customary law and reflect the consensus of the international community on the content of non-refoulement.³⁹ Regional agreements like the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee, and the Cartagena Declaration include the non-rejection of frontier within the principle of non-refoulement.⁴⁰ Thereby, assisting in determining whether state practice treats non-rejection at frontiers within the duty of non-refoulement as a customary international law principle.

Commentators believe that although Article 33 of the Refugee Convention through declarations and state practice, prohibits the rejection of refugees at frontiers, the international community as a whole does not accept the same. States have always tried to protect their sovereignty and have rejected provisions of conventions that put an obligation on them to grant asylum. However, state practice of recognising that non-refoulement applies to the moment at which refugees present themselves for entry within the state or at borders and letting them stay within the country pending a solution, proves otherwise.⁴¹

The duty of non-refoulement even in sense of limited obligation has been seen as coming too close to the duty to grant asylum, not recognised by the international law regime. Yet, the state practice has not been consistent, witnessing frequent violations of international law that is to be discussed in Part III.

C. Customary International Law Obliging Asylum

Customary International Law, a major source of public international law is established by state practice and *opinio juris sivenecessitatis*, the former being the consistent practice of states and the latter their subjective beliefs that it is their obligation to act in a certain way.⁴² As discussed in Section A, the right to asylum has historically developed alongside the principle of non-refoulement, which functions as a practical limitation on state discretion. In

³⁹ Goodwin, (n 43) 476; Human Rights Committee, General Comment No. 1 (Thirteenth session, 1981); Preamble of UNHCR ExCom Conclusion No. 108, A/AC.96/1063 (2008); UNHCR ExCom Conclusion 15 (XXX), 12A A/34/12/Add.1 (1979) para (j).

⁴⁰ Convention Governing specific aspects of Refugee problems in Africa, (10 Sept. 1969) 1001 U.N.T.S. 45 entered into force 20 June 1974, art. II (1); The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America, (22 Nov. 1984) art. 5

⁴¹ Guy S. Goodwin-Gill, Jane McAdam et al., 'The Refugee in International Law' (4th edn, 2021) 470

⁴² *North Sea Continental Shelf, Germany v Denmark*, Judgment, I.C.J. Rep 3. 1969 (February 20)

this sense, the two concepts are deeply interconnected: while asylum remains formally within the domain of state sovereignty, the duty of non-refoulement (and its corollary of non-rejection at frontiers, as shown in Section B) restricts that sovereignty in practice.

According to the UNHCR, “if a state acts in a way incompatible with a recognised rule but defends its conduct by appealing to justifications contained within the rule, the significance of that attitude is to confirm the rule rather than weaken the same” showing acceptance of the rule as a norm of international law.⁴³ Similarly, Costello and Foster opined that “what is significant in this context is not whether there is state practice that is inconsistent with the putative norm, but rather the reaction of both international community and the offending state in question to such action”.⁴⁴ It has also been observed that ‘the actual practice of the persistent objector’ is seldom sufficient to protect a dissenting state from the compulsory effect of some rules’ particularly when the rest of the international community is largely in agreement about the binding nature of the rule in question.⁴⁵

The widespread direct or indirect inclusion of the duty of non-refoulement in more than 90% of conventions, both multilateral and regional, suggests that it has become a part of customary international law.⁴⁶ As discussed in section A, the convergent practice of American, African, and European instruments providing the right to asylum⁴⁷ suggests state practice (for which universal consistency is not a requirement⁴⁸) and *opinio juris* might be forming as those instruments sought to define and develop the right to asylum provided in UDHR, further to illustrate how asylum and non-refoulement are increasingly understood as two sides of the same legal coin.⁴⁹

On the contrary, the principle of non-refoulement is argued to not reach the standard of customary international law. It is due to the reason that there exists no consistent state

⁴³ UNHCR Refugee Policy and Practice, *The Principle of Non-Refoulement as a Norm of Customary International Law*, (1994), <<https://www.refworld.org/docid/437b6db64.html>> accessed 14 October 2022; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Judgement, I.C.J. 14. 1986 (27 June)

⁴⁴ Cathryn Costello and Michelle Foster, ‘Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’ in Heijer, van der Wilt (eds) *Netherlands Yearbook of International Law* 273 (2015).

⁴⁵ Pierre-Marie Dupuy, ‘Formation of Customary International Law and General Principles’ in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007)

⁴⁶ Thomas, (n 1) 88

⁴⁷ Convention Governing specific aspects of Refugee problems in Africa, (10 Sept. 1969) 1001 U.N.T.S. 45 entered into force 20 June 1974; African Charter on Human and Peoples’ Rights, (27 Jun. 1981) 1982 21 ILM 58 entered into force 21 October 1986; American Convention on Human Rights, (22 Nov. 1969) 1144 U.N.T.S. 123 entered into force 18 July 1978; Charter of Fundamental Rights of the European Union (26 Oct. 2012)

⁴⁸ *North Sea Continental Shelf, Germany v Denmark*, Judgment, I.C.J. Rep 3. 1969 (February 20)

⁴⁹ Teresa, (n 12)

practice as most nations in Asia, including India and the Middle East, have refused to formally bind themselves to avoid refoulement, owing to which non-refoulement still remains a stark reality for the refugees.⁵⁰ Critics argue that just because “most states have accepted some kind of non-refoulement obligation, applying in at least some cases and contexts”⁵¹ it cannot be said that a universally applicable obligation of non-refoulement is owed to the refugees by the states not a party to the Refugee Convention or the Protocol. Further, the nature of non-refoulement relied upon across the nations is variable displaying no basis for a common *opinio juris*.

While identifying state practice, it is important to note that states like Tanzania, Germany, the USA, the UK, Canada, and Nepal assimilate the application of refugee status determination into an application for asylum, granting the same, and making them refugees. By contrast, states like Poland, Cuba, Mexico, Italy, France, Haiti, etc., mention explicitly in their municipal law the determination of refugees, and for them, asylum is a right.⁵² Therefore, the wide range of convergent state practices and *opinio juris* indicates the existence of a right to receive asylum.

States in their practice have recognised that non-refoulement applies to the moment at which asylum seekers present themselves for entry, either within a state or at its border.⁵³ As Noll has put it, non-refoulement is a right to transgress an administrative border, while Hathway describes it as a de facto duty on states to admit refugees at least until their claim is examined.⁵⁴ Thus, as highlighted in section B, the duty of non-refoulement encompasses non-rejection at the frontier, as protection begins with the ability of the refugee to secure admission to the territory.⁵⁵

Moreover, the UN, through the UNHCR and UNGA has contributed significantly to the formation of *opinio juris* by urging states not to “jeopardise the institution of asylum” through practices of rejection, push-backs, or forcible returns. The High Commissioner has consistently noted that “rejection at frontiers, interception, push-off and forcible return of asylum-seekers act as a threat to non-refoulement,”⁵⁶ thereby emphasising that the non-

⁵⁰ Hathway, (n 33) 365

⁵¹ *Ibid*

⁵² Goodwin, (n 43)

⁵³ *Ibid* 470

⁵⁴ *Ibid* 471

⁵⁵ *Ibid* 469

⁵⁶ A/AC.96/815 (UNHCR, 44th session, document no.1)

rejection obligation is integral to the principle itself. This, in turn, reinforces the argument developed in Section B that non-rejection at the frontier is no longer merely an aspirational standard but a binding rule of Customary International Law.

1. Relationship Between IHRL and IRL

The principle of non-refoulement is rooted in both IRL and IHRL. As much of the literature has shown, IHRL provides broader protection than IRL. Under instruments such as the ICCPR, CAT, and regional treaties (e.g: ECHR, ACHR⁵⁷), non-refoulement is absolute and non-derogable, particularly where risks of torture, inhuman, or degrading treatment are at stake.⁵⁸ By contrast, under the Refugee Convention, non-refoulement may be derogated from on grounds of national security or public safety.

This narrowing of scope in IRL highlights two important points for present purposes. First, it underscores that while asylum formally remains at the discretion of states, the duty of non-refoulement effectively curtails that discretion by requiring at least temporary admission until claims are assessed. As Hathaway describes, non-refoulement is “the right to asylum couched in negative terms,” since protection against refoulement cannot be guaranteed without permitting access to territory.⁵⁹ Similarly, Goodwin-Gill emphasises that although asylum and non-refoulement are conceptually distinct, the latter implies the former in practice.⁶⁰ The Inter-American Court on Human Rights (‘IACtHR’) has also underscored this point, holding that asylum seekers cannot be refused entry at the border regardless of their legal status and recognising that the human rights character is implicit within the refugee protection.⁶¹

Second, this asymmetry between IHRL and IRL strengthens the argument that a customary right to asylum is emerging. If the broader human rights principle of non-refoulement is accepted as binding even outside the Refugee Convention, then the narrower IRL regime must be read together with it. On this view, the right to seek asylum and the duty not to refoule converge in practice. Thereby, the prohibition of rejection at the frontier becomes a necessary condition for ensuring protection.

⁵⁷ American Convention on Human Rights, (22 Nov. 1969) 1144 U.N.T.S. 123 *entered into force* 18 July 1978 art. 22, para 8

⁵⁸ *Soering v. United Kingdom*, 98 ILR 270, para. 88; *Chahal v United Kingdom*, (1996) 23 EHRR 413, para. 80

⁵⁹ Hathaway, (n 33) 301

⁶⁰ Goodwin, (n 43); Salvatore Fabio Nicolosi, ‘Re-Conceptualizing the Right to Seek and Obtain Asylum in International Law’ 4 INT’IHUM. Rts. L. REV. 313 (2015)

⁶¹ I/A Court H.R. *Pacheco Tineo case*, judgement of November 25, 2013, Series C, No. 272.

While state practice is not uniform, the convergence of treaty provisions, ExCom conclusions, regional instruments, and domestic laws indicate a clear consensus affirming that non-refoulement in the refugee context has crystallised as a rule of customary international law binding on all states including those not party to the Refugee Convention.

Even if derogation of a customary principle is permissible, it can be done through the enactment of conflicting laws or through treaties already in place. It cannot be done in the form of a complete closure of borders, as the assessment of refugee status needs to be done on an individuated basis,⁶² a right guaranteed by the right to seek asylum and the prohibition of collective expulsion under regional human rights treaties.⁶³

Hence, the overwhelming view is that the principle of non-refoulement has attained the status of customary international law.⁶⁴

III. SOUTH ASIAN LENS AND OBLIGATION TO BE A PART OF RESPONSIBILITY SHARING

Non-signatory states to the Refugee Convention, though not obliged to protect refugees, are obligated under customary international law to uphold the principle of non-refoulement. As established in the previous section, non-refoulement including rejection at frontiers has crystallised into customary international law binding on all states irrespective of ratification. This directly implicates states such as India.

The Refugee Convention has 149 member states and 44 are not party to the core IRL instruments.⁶⁵ Non-signatory states comprise of the nations from the Middle East, South and South East Asia that justify their non-accession to the Refugee Convention with reference to their limited involvement in its drafting and its Eurocentric mandate derived from a highly selective definition of international burden-sharing that promotes and suits European interests.⁶⁶ The imbalance between the rights and obligations of source and receiving countries further contributes to the inadequately institutionalised international burden sharing.

⁶² Setu Gupta, 'Non-Refoulement during a Pandemic- with a contextual analysis of border closures imposed by the EU, The US and India' *ILI Law Review* 81 (2022)

⁶³ Vincent, (n 80) 212

⁶⁴ Hathway (n 33); Bethlehem (n 30); Costello and Foster (n 64)

⁶⁵ *Ibid*

⁶⁶ Sumit Sen, 'The Refugee Convention and Practice in South Asia: A Marriage of Inconvenience?' in *The Refugee Convention at Fifty: A View from Forced Migration Studies* (2003)

As Hathway argues, the Refugee Convention failed to propose a universal application and could not reflect a reality beyond Europe, dismissing global refugee problems. India's refusal to ratify it, as Oberoi argues,⁶⁷ is due to the perception that the UNHCR was an instrument of the Cold War and consequently not relevant to the Indian subcontinent.⁶⁸

Yet, despite this formal non-ratification of the convention, states such as India have engaged substantively with the international refugee protection regime. They have been part of many ministerial meetings of UNHCR focused on strengthening the implementation of the Convention, have participated in the negotiations for the adoption of the New York Declaration for Refugees and Migrants, Global Compact on Refugees in 2018 and have asserted that the refugee protection principles be acknowledged.⁶⁹ In furtherance of the same, the presence of UNHCR, carrying out operations in the non-signatory states, creates relevant state practice and in turn, leads to the emergence of *opinio juris*.⁷⁰ The UNHCR approaches the non-signatory states for cooperation through a bilateral Memorandum of Understanding in order to protect core principles of IRL. For example, UNHCR entered into an MOU with Jordan in 1998 binding it to the convention's definition of 'refugees' and international obligations of non-refoulement.⁷¹

India's own record provides strong evidence of recognition of these obligations in practice. For instance, India has admitted large refugee populations during the Indo-China War, the Tibetan crisis, Bangladesh's war of independence, the Sri Lankan crisis, the Soviet invasion of Afghanistan, and, recently, the Rohingyas from Myanmar.⁷² While India has also been accused of breaching international norms by deporting refugees and creating 'non-entrée' zones⁷³, such practices only underline the point made earlier, that violations do not negate

⁶⁷ Pia Oberoi, 'South Asia and the Creation of the International Refugee Regime' 19(5) *Canada's Journal on Refugees* (2001)

⁶⁸ Maja Janmyr, 'The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda' 33 (2) *International Journal of Refugee Law* 188, 199 (2021)

⁶⁹ *Ibid* 212

⁷⁰ Guy S Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' 69 *International & Comparative Law Quarterly* 1, 40 (2020)

⁷¹ Ghida Frangieh, 'Relations Between UNHCR and Arab Governments: Memoranda of understanding in Lebanon and Jordan' (*LSE Middle East Centre Blog*, 6 September 2016) <<https://blogs.lse.ac.uk/mec/2016/09/23/relations-between-unhcr-and-arab-governments-memoranda-of-understanding-in-lebanon-and-jordan/>> accessed 6 December 2022

⁷² 'India's Refugee saga from 1947-2017' (*Livemint*, 9 January 2018)

<<https://www.livemint.com/Sundayapp/clQnX60MIR2LhCitpMmMWO/Indias-refugee-saga-from-1947-to-2017.html>> accessed 7 October 2022

⁷³ Megha Purohit and Mayank Purohit, 'An Analysis of Non-refoulement in Indian Legal Framework' 2 *Jamia Law Journal* (2017)

the existence of the rule when states continue to justify or contest such acts in terms of the rule itself.

Bangladesh, being a non-signatory to the IRL instruments, is influenced by them, as evidenced by its Supreme Court's observation that the "Convention had become a part of customary international law which is binding on all countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the convention or not."⁷⁴

Accordingly, India though a non-signatory to the Refugee Convention remains bound under customary international law to respect the principle of non-refoulement including non-rejection at frontiers. At the same time, the Indian example illustrates a broader structural problem. While non-refoulement obligations are widely acknowledged, they have not been matched by a corresponding framework of equitable responsibility-sharing. This asymmetry has left frontline states to bear disproportionate burdens in responding to large-scale displacement, a gap that international law has only partially addressed. The following section examines this dimension by discussing states' duty of responsibility-sharing and the pursuit of durable solutions for the global refugee regime.

A. States' duty of Responsibility-Sharing and Durable Solutions for the Refugee Crisis

As state-parties to UDHR and other human rights instruments have to accept refugees, they avoid it by either simply denying admission or rejecting entry through legal methods. Historically there have been numerous instances, such as Guinea's refusal of hundreds of refugees fleeing the conflict in Sierra Leone and Greece's turning away ethnic Albanians seeking asylum at the border on the ground of 'not been informed of the influx'. Even France and the UK in 2002 cooperated to build a double fence around the French railway terminal to avoid entry of refugees into the UK.⁷⁵

Apart from directly denying entry, states also use legal manoeuvres to reject refugees on their territory in order to escape formal liability.⁷⁶ The classic method of non-entrée is the imposition of visa requirements on refugee-producing countries, enforced by sanctions

⁷⁴*Refugee and Migratory Movements Research Unit (RMMRU) v. Government of Bangladesh*, W.P. No 10504 of 2016, Bangladesh: S.C. 31 May 2017; M Sanjeeb Hossain, 'Bangladesh's Judicial Encounter with the 1951 Refugee Convention' 67 *Forced Migration Review* (2021)

⁷⁵ Hathway, (n 33) 226

⁷⁶*Ibid*

against any carrier that transports anyone without a visa, with countries like Canada and New Zealand terming it as “better placed to manage the risk”.⁷⁷

The second mechanism of non-entrée is a mode of deportation arising from concepts like ‘first country of arrival’ also known as the ‘safe third country’.⁷⁸ It is a procedural mechanism for shuttling refugees to other states⁷⁹ said to have primary responsibility on states that have already provided asylum or states through which the intended refugees had passed en route.⁸⁰

Another mechanism of non-entrée followed widely by states is the labelling of countries or their populations as ‘not at a risk’ to avoid granting them refugee status. This concept has been used by countries to avoid the influx of refugees by proclaiming a list of countries as ‘safe country of origin’. Similarly, the designation of certain parts of the state’s airports as ‘international zone’ has become a trend as neither domestic law nor international law tends to apply in such areas.⁸¹ Countries like France have expelled people seeking refugee status just on this ground without even examining their need for protection.⁸²

Nonetheless, these measures of avoiding refugees by states just divert them to other destinations, prompting them to resort to clandestine forms of movement. An imbalance arises, since states close to the refugee origin state receive more refugees than states that are farther, leading to political instability as refugees prefer to go to states that have an existing community of refugees of the same nationality.⁸³ Hence, responsibility-sharing is important because the financial costs of hosting refugees are massive for a country to handle alone.

The concept of international burden-sharing aims at protecting refugees and promoting durable solutions to work on the imbalance in the states. Noll identifies three categories of responsibility and burden sharing namely, 1) harmonised norms or laws; 2) financial contributions; and 3) physical responsibility-sharing based on the rationale that common laws act as an incentive for poor people for equitable distribution of refugees, sharing money helps

⁷⁷ *Ibid* 291

⁷⁸ *Ibid* 296

⁷⁹ Goodwin, (n 43)

⁸⁰ Press release, JRS Dispatches No. 182, (15 November 2005)

⁸¹ Hathway, (n 33)

⁸² *Ibid* 298

⁸³ Susan F. Martin, ‘Rochelle Davis et.al, International Responsibility-Sharing for Refugees’ 11(1) *Geopolitics, History and International Relations* 59, 64 (2019)

in better management of refugees and ‘sharing people’ helps in building trust amongst states for equitable burden-sharing.⁸⁴

Yet, the idea of burden-sharing has many challenges for it to become a successful reality for the world in tackling the refugee crisis. The first challenge is states’ reluctance in adhering to burden-sharing methods due to state sovereignty. Secondly, states are more inclined towards burden-shifting than burden-sharing to escape from their responsibility to accept refugees. So, states with greater resources and political power shift responsibility to weaker nations.⁸⁵

Thirdly, as responsibility-sharing entails the voluntary involvement of states rather than a binding requirement, the national interests of states are often prioritised, leaving the issue of refugees to other states unless they have some benefit. Fourthly, the dynamic nature of refugee law creating more ‘refugees’ poses a problem for states, leading to the shifting of refugees to ‘safe third countries’ to reduce the excessive burden. The fifth complication is the formulation of criteria or a straitjacket formula for responsibility-sharing. As every situation is unique, disagreements concerning benefits and burdens would arise between states, worsening international relations.⁸⁶

Therefore, the key tools in effective burden sharing, apart from funding, require the involvement of public and private authorities along with humanitarian assistance. It requires states’ institutional capacities to be strengthened by the UN, its organizations, and other international and national organisations in cooperation with states. Further, national arrangements by state, public-private partnerships, and new institutional arrangements involving universities, academic alliances, and research institutions for the welfare of refugees have to be carried out to ensure the protection of their human rights.⁸⁷

1. Durable Solutions

IRL and IHRL support the concept of durable solutions indirectly under Article 14 (1) of UDHR.⁸⁸ Article 34 of the Refugee Convention encourages the local integration of refugees

⁸⁴ Madeline Garlick, ‘The Sharing of responsibilities for the international protection of refugees’ in Cathryn Costello, Michelle Foster, Jane McAdam (eds), *The Oxford Handbook on International Refugee Law*, 468 (OUP 2021); Gregor Noll, ‘Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market for Deflection’ (Kluwer 2000)

⁸⁵*Ibid* 65

⁸⁶*Ibid* 67

⁸⁷ UN, ‘Global Compact on Refugees’ 19 (2018) <<https://www.unhcr.org/5c658aed4.pdf>> accessed 6 December 2022

⁸⁸ Universal Declaration on Human Rights, 10 Dec. 1948, U.N.G.A. Res 217 A(III), art. 14(1)

by states to protect their basic human rights.⁸⁹ The UNHCR with its objective to find a long-term durable solution promotes the conventional methods i.e. voluntary repatriation, local integration, and resettlement of refugees.

The UNHCR plays an important role in facilitating the adoption of durable solutions by states by taking on livelihood projects. This is done by making the refugees 'self-reliant' economically and socially by granting them access to education, vocational training, accommodation, and other such social services.⁹⁰ The UNHCR, with the help of NGOs and other international organisations, works for the successful voluntary repatriation of refugees to their original country by collecting data on the situation of the state, and helping with documentation, legal requirements and financial support. It has carried out many such successful repatriation projects with the cooperation of the national governments such as working to repatriate Mauritanian refugees from Senegal, Afghan refugees from neighbouring countries, and Sri Lankan refugees from India in 2010.⁹¹

However, the obstacle with repatriation as a durable solution is that these states are often insecure with poor infrastructure and limited socio-absorptive capacity, wherein poverty may prevent a sustainable return and make the reintegration of returnees problematic. Further, the UNHCR views it as a timeless solution although refugees whose return is promoted are second, third, and perhaps fourth-generation refugees with tenuous links to the nominal country of origin.⁹² So, voluntary repatriation should not be considered dogmatically as the passage of time needs to serve as a bar, encouraging other suitable solutions for the refugees concerned. Nevertheless, voluntary repatriation remains the preferred solution to value individual choice, as a refugee is the best judge of when and whether to go back.⁹³

Local integration is a durable solution wherein refugees become full members of the host community by receiving citizenship of the country of exile. The idea of solving refugee crises by making them citizens is problematic as states would have to recognise new claims over limited resources, leading to political instability in the country. Unless a relationship exists between the host community and the refugees, local integration is difficult for sustainable survival. The UNHCR has put in efforts to integrate assistance to both refugees and their

⁸⁹ Convention relating to the Status of Stateless Persons (28 July, 1951) 360 U.N.T.S. 137, *entered into force* 22 April 1954, art. 34

⁹⁰ UNHCR, 'Solutions for Refugees' <<https://www.unhcr.org/50a4c17f9.pdf>> accessed 18 November 2022.

⁹¹ *Ibid*

⁹² Marjoleine Zieck, 'Reimagining Voluntary Repatriation', in Cathryn Costello, Michelle Foster, Jane McAdam (eds), *The Oxford Handbook on International Refugee Law* 1071 (OUP 2021)

⁹³ Goodwin, (n 43) 940

hosts, for instance, by introducing a Self-Reliance Strategy for refugees in Uganda wherein refugees were given plots of land to farm with an expectation of making them self-reliant and reducing the burden on the host state⁹⁴. Similarly, the Burundi Naturalisation project of 2008 was introduced by the Government of Tanzania, providing the refugees with an option to either become a citizen of the country or return home.⁹⁵

Further, resettlement as a durable solution is offered to a limited number of refugees, selected on the basis of humanitarian needs.⁹⁶ States assert control over the selection and admission of refugees for the advancement of humanitarian goals, requiring coordination of the international community for resettling refugees under certain agreements often premised on providing financial and other assistance to the third country for improving the condition of refugees. Many such projects have been undertaken by national governments in coordination with the UNHCR to resettle the refugees in a third country wherein refoulement had to be prevented along with an assurance of their safety.⁹⁷

Resettlement has been a meaningful form of burden sharing but is highly dependent on the integration of the refugees who are resettled and the appropriate implementation of the integration programmes. It also includes figuring out alternative pathways recognising the needs of refugees and admitting them, for instance, the Canadian approach of privately sponsoring refugees on an individual level, that has been appreciated for being the first of a kind in the resettlement of refugees in their country.⁹⁸

Therefore, the unity of states across the world is required to achieve the desired target while adopting these modes of durable solutions. But these solutions have their own set of challenges as they are based on ‘fixing’ people in places rather than identifying the root cause of the inefficiency of the solutions.⁹⁹

UNHCR plays an important role in overcoming the major hurdles in implementation of the durable solutions, i.e., state sovereignty and inequitable distribution. As mentioned earlier, though granting asylum is a discretionary exercise of state sovereignty that is diluted by

⁹⁴ Luch Hovil, ‘Local Integration’ in Elena, Gil Loescher, Katy Long (eds), *The Oxford Handbook on Refugees and Forced Migration Studies* 492 (2014)

⁹⁵ Solutions, (n 145) 196

⁹⁶ Katy long, ‘Rethinking Durable Solutions’ in, Cathryn Costello, Michelle Foster, Jane McAdam (eds), *The Oxford Handbook on International Refugee Law* 465, 468 (OUP 2021)

⁹⁷ Solutions, (n 145) 199

⁹⁸ Jessie Thomson, ‘The Role of Resettlement in Refugee Responsibility Sharing’ *CIGI*, (2017) <<https://www.unhcr.org/595e2af77.pdf>> accessed 6 December 2022

⁹⁹ Katy Long, (n 151)146

IHRL obligations, burden-sharing is not a legal obligation, rather a discretionary policy option for the states.¹⁰⁰ Yet, the Refugee Convention in its preamble urges states to cooperate in order to alleviate the ‘unduly heavy burdens,’ which was strengthened by the 2002 declaration that affirmed the commitment of State Parties to the Convention.¹⁰¹ Therefore, the UNHCR with its persuasive and collaborative efforts at international and national levels, involves host and receiving countries to help to deal with the refugee crisis.¹⁰²

In India, the UNHCR, Government of India, NITI Aayog and other UN agencies work together to ensure humanitarian assistance to the refugees and asylum-seekers. Regardless of the fact that India has not ratified the Refugee Convention, India in coordination with UNHCR has been able to protect rights of refugees by providing them access to health services, education and protection against violence.¹⁰³ Many entrepreneurship and skill development programmes have also been conducted to enable refugees to rebuild their lives and make them self-reliant. As of October 2023, Sri Lankans are the largest group of refugees registered in India.¹⁰⁴

In accordance with UNHCR objectives, India has assisted in durable solutions and has been able to resettle refugees in third countries like Canada, Australia and USA and has also helped refugees in the process of voluntary repatriation and local integration.¹⁰⁵ Yet, there is a need to speed up local integration and resettlement procedures by India as many refugees such as the Sri Lankan Tamil refugees still continue to live in camps and around 34,135 of them are living as non-camp refugees in Tamil Nadu.¹⁰⁶

Further, according to the Global Compact Refugees (GCR)¹⁰⁷ adopted by the UNGA, steps such as the introduction of Global Refugee Forum at ministerial level, increased focus on National arrangements, regional and subregional mechanisms along with tools such as

¹⁰⁰ Dr. Meltem Ineli Ciger, ‘Is Resettlement Still a Durable Solution? An Analysis in the Light of the Proposal for a Regulation Establishing a Union Resettlement Framework’, *European Journal of Migration and Law* 27, 32 (2022)

¹⁰¹ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 2002

¹⁰² UNHCR ExCom Conclusion No. 22, Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981), para IV (1)

¹⁰³ ‘*Supporting Refugees in India*’ (2022), <<https://reporting.unhcr.org/india-year-end-report>> accessed 8 January 2023

¹⁰⁴ ‘*India: Factsheet*’ (2023) <<https://reporting.unhcr.org/india-factsheet-6656>> accessed 8 January 2023

¹⁰⁵ *ibid*

¹⁰⁶ ‘After 40 years, Sri Lankan Tamil refugees in India need durable solutions’, <<https://jrs.net/wp-content/uploads/2023/07/Tamil-Refugees-in-India-40-Years-after.pdf>> accessed 17 January 2024

¹⁰⁷ ‘*Global Compact on Refugees*’, (2018) <<https://globalcompactrefugees.org/sites/default/files/2019-12/Global%20compact%20on%20refugees%20EN.pdf>> accessed 31 May 2023

effective funding, multi-stakeholder and partnership approach that involves, local actors, civil societies, NGOs, public-private partnerships and so on to operationalise arrangements would assist in achieving more equitable burden-sharing responsibility with host countries and communities.¹⁰⁸

The situation post GCR shows an increase in refugees needing international protection with 10 million new refugees in 2021-2022 alone.¹⁰⁹ The largest ten countries hosting 55% of the world's refugee population mostly were classified as low-middle-income countries, except Germany and Poland.¹¹⁰ However, there has been considerable improvement in refugees' access to employment opportunities and participation in social and economic life of host countries.¹¹¹ Further, out of 99 countries covering 32 million refugees, 67% of them had full access in law and labour market compared to only 11.2 million refugees according to the GCR.¹¹² In addition to this, there has been an increase in opting for durable solutions such as resettlement by 2023, making it as the fundamental protection tool to respond to the needs of vulnerable refugees.¹¹³

As 80% of the world's refugee population is hosted by countries that represent only 19% of the world's income, there is a need to ease pressure on the host countries and strengthen equitable burden and responsibility sharing worldwide. Hence, increasing financial support from the international community, prioritising durable solutions, promoting self-reliance among refugees and providing resources to rebuild lives of refugees has to continue as addressed in the GCR.¹¹⁴

Therefore, through the combined efforts of nations, UNHCR and other stakeholders, the inequitable distribution of refugees, sovereignty of state and other hurdles are dealt with by the international community owing to their obligations under IHRL and IRL.

IV. INDIAN SCENARIO IN DEALING WITH REFUGEES

India does not explicitly recognise the duty of non-refoulement under its constitutional regime but as a part of the international community, it does adhere to the principles of

¹⁰⁸ *ibid*

¹⁰⁹ *Global Compact on Refugees Indicator Report, (2023)* <<https://www.unhcr.org/media/2023-global-compact-refugees-indicator-report>> accessed on 8 January 2024

¹¹⁰ *ibid*

¹¹¹ *ibid*

¹¹² *ibid*

¹¹³ *ibid* 60

¹¹⁴ *Ibid* 63

international law to a great extent. The fundamental rights applicable to foreigners, such as Article 21 of the Constitution and national legislations such as Passport (Entry into India) Act, 1920, Passport Act, 1967, Registration of Foreigners Act, 1939 and Foreigners Act, 1946 are applicable to the refugees once they enter Indian territory.¹¹⁵

India has not ratified the Refugee Convention but still is bound by customary international law inclusive of the principle of non-refoulement through Bangkok Principles¹¹⁶, ICCPR¹¹⁷, and the UDHR.¹¹⁸ The cause behind the non-ratification of the 1951 convention was its Eurocentric mandate, as it focused on Europeans who fled their countries prior to January 1, 1951, resulting in India's refusal to participate in its benevolent objectives. It is also because of the Convention's temporal proximity to India's independence, in which India had gone through a partition wherein millions of people were displaced.¹¹⁹ So, it prioritised the responsibility of its own country's refugees rather than other nations' at that crucial period.¹²⁰

Despite the 1967 protocol addressing the concern of Eurocentricism to an extent, the UNHCR could not persuade the South Asian states to ratify the Convention. It was because the issues of developing countries such as the lack of requisite bureaucratic structures to conform to the procedural requirements of the Refugee Convention and sufficient resources to deal with situations of mass influx were ignored by the 1967 protocol.¹²¹

Nevertheless, as India holds a strategic geopolitical position in South Asia, it acts as a home to millions of refugees.¹²² In recent years, South Asia has experienced new drivers of migration precipitating new refugee flows from countries such as Pakistan, Myanmar, Afghanistan and Sri Lanka. As India has been a refugee receiving country¹²³ it has accepted asylum applications of Afghans since the withdrawal of USA, Sri Lankans escaping the

¹¹⁵ R. Mukund, 'India: Refugees and the U.N. Refugee Convention, 1951' 5 *INT'L J.L. MGMT. & HUMAN.* (2022)

¹¹⁶ Bangkok Principles on Status and Treatment of Refugees, (24 June 2001), art. 3

¹¹⁷ International Covenant on Civil and Political Rights, (16 Dec. 1966) 999 U.N.T.S. 171 *entered into force* 23 Mar. 1976, art. 7

¹¹⁸ Universal Declaration on Human Rights, (10 Dec. 1948), U.N.G.A. Res 217 A(III) (1948) art. 14

¹¹⁹ Sara E. Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (MartinusNijhoff Publishers 2008) 43

¹²⁰ *Ibid*

¹²¹ *Ibid*

¹²² Mahika Khosla, 'The Geopolitics of India's Refugee Policy' (*South Asian Voices*, 22 September 2022) <<https://southasianvoices.org/the-geopolitics-of-indias-refugee-policy/>> accessed 3 November 2022

¹²³ Louie Albert, Stan Fernandes et. al., 'Asia Refugees: In South Asia: Issues and Concerns' <https://www.comillas.edu/documentos/centros/iuem/Migratory_Flows_at_the_borders_of_our_world/12_Asia_Refugees.pdf> accessed 18 October 2022

economic collapse of the country and has also granted asylum to communities such as Rohingyas fleeing persecution.¹²⁴

A. Judicial Interpretation of International Law

The constitution of India under Article 51(c) enjoins the state to “foster respect for international law and treaty obligations”. Article 246 discusses about distribution of legislative powers wherein the entry 14 in the Union List deals with entering into treaties, conventions and implementing the same. Article 253 provides for such implementation by endowing parliament with the powers to make laws for implementation of agreements, treaties, conventions etc.¹²⁵

In *Maghan bhai case*¹²⁶, the SC explained the relationship between Articles 51 and 253 stating that as long as rights of citizens are not affected, implementation of international law is within the competence of Executive and no legislative measure is required to give effect to agreement or treaties. Hence, a joint reading of Articles 73, 246, 253 and 51, suggests that the executive power of the union government is co-extensive with the legislative power in matter of entering into and implementation of treaties.¹²⁷ So, unless the parliament enacts a law based on treaty or any international convention, it cannot be implemented.¹²⁸

Previously, the SC in cases such as *Jolly George v. Bank of Cochin*¹²⁹, *State of West Bengal v. Kesoram Industries*¹³⁰ observed the doctrine of dualism and held that treaty entered into cannot become a law unless parliament passes a law as required by Article 253, demonstrating Indian approach towards dualism. But, the constitutional courts in practice have shifted from a dualist to monist position wherein the rules of international law are incorporated upon ratification of an international treaty or convention.¹³¹

¹²⁴ Mahika, (n 177)

¹²⁵ Constitution of India, 1950, art. No. 253

¹²⁶ *Maganbhai Ishwarbhai Patel v. Union of India and Another*, AIR 1969 SC 783 or (1970) 3 SCC 400; *Union of India v. Azadi Bachao Andolan*, AIR 2004 SC 1107

¹²⁷ Vivek Sehrawat, Implementation of International Law in Indian Legal System, 31 (1) Florida Journal of International Law, 1, 108

¹²⁸ *ibid*

¹²⁹ *Jolly George v. Bank of Cochin*, 1980 AIR 470, 1980 SCR (2) 913

¹³⁰ *State of West Bengal v. Kesoram Industries*, (2004) 10 SCC 201

¹³¹ *Visakha v. State of Rajasthan* AIR 1997 SC 3011; *Shatrughan Chauhan v. UOI*, (2014) 3 SCC I; *Vellore Citizens Welfare Forum v. UOI*, AIR 1996 SC 2715 or (1996) 5 SCC 647; *National Legal Services Authority v. UOI*, 2014 INSC 275; *Gramophone Company of India v. Birendra Bahadur Pandey*, AIR 1984 SC 667.

India has ratified UDHR and ICCPR and is a signatory to CAT and International Convention on Protection of All Persons Against Enforced Disappearance (ICPPED). These instruments articulate protection of refugees such as Article 14¹³² of UDHR and Article 7¹³³ of ICCPR, casting a duty on India to abide by the non-refoulement principle. Though India is home to millions of refugees across borders, they are mostly based on bilateral agreements between their origin countries. In contrast, in 1989 when the Myanmar conflict started, many nationals sought refuge in India, and the Indian government accepted all of them adhering to international norms.¹³⁴

Yet, the law on whether non-refoulement principle can be read as a part of life and liberty clause of the constitution has been inconsistent. The Delhi High Court in *Anand Swaroop Verma v. UOI*¹³⁵ refused to interpret the principle of non-refoulement as a part of Article 21 of the constitution and held that the procedure under Indian law applicable to foreigners can only be applied to the refugees.

On the other hand, in various cases, Indian courts have abided by the principle of non-refoulement. For instance, in *Ktaer Abbas Habib Al Qutaifi v. Union of India*,¹³⁶ the Gujarat High Court disallowed the deportation of two Iraqi nationals and upheld the duty of non-refoulement by interpreting it as a part of life and liberty clause of the constitution of India, relying on international instruments like Article 33 of the Refugee Convention and the CAT. Similarly, the Bombay High Court protected Iranian petitioners from being deported as they were recognised as refugees by the UNHCR.¹³⁷ A single bench of the Delhi High Court in *Dongh Lian Kham v. UOI* also held that “principle of non-refoulement is required to be read taken as part of Article 21 but it must not be at the expense of national security.”¹³⁸

But it is to be noted that in *Al Qutaifi case*, the court’s usage of Refugee Convention in order to interpret Article 21 is rife with difficulties because India is not a party to the said convention and its use for constitutional interpretation goes against settled and binding precedents.¹³⁹ Even in *Dongh Lian case* the court did not offer any analysis for supporting the

¹³² Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948), art. 14

¹³³ International Covenant on Civil and Political Rights, (16 Dec. 1966) 999 U.N.T.S. 171 entered into force 23 Mar. 1976, art. 7

¹³⁴ Mukund, (n 170)

¹³⁵ *Anand Swaroop Verma v. UOI*, 65 DRJ 186 (Delhi H.C. 2002).

¹³⁶ *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1999 Cri U 919, para. 3

¹³⁷ *Syed Ata Mohammadi v. Union of India*, A.D. 1458 out of 1994 H.C. Bom, 1994

¹³⁸ *Dongh Lian Kham v. UOI*, 226 DLT 208 (Delhi High Court 2016)

¹³⁹ Khagesh Gautam, ‘The Use of International Law in Constitutional Interpretation in the Supreme Court of India’ 55 *Stan J Int’l L*.27 (2019)

holding of the principle of non-refoulement under Article 21 of the Indian Constitution and did not refer to *Anand Swaroop case* which was decided by a division bench of the same court.¹⁴⁰

Hence, a plethora of unanswered questions had to be decided by the Supreme Court in *Mohammad Salimullah v. UOI*,¹⁴¹ wherein the Jammu and Kashmir police had detained around 170 Rohingyas in preparation for deportation to Myanmar. The petitioners had contended that it amounted to breach of India's obligations under international law, specifically the principle of non-refoulement. But the Court allowed the deportation of the Rohingyas, stating that right to not be deported came under the ambit of the right to reside or settle in any part of Indian territory under Article 19(1)(e) and not Articles 14 and 21. It observed that India was not a party to the Refugee Convention and hence it is not bound by non-refoulement principle.

It failed to deal with judgments of *Al Qutaifi*¹⁴² and *Dongh Lian*¹⁴³ and discuss the interrelationship between Articles 14, 19 and 21 of the constitution. It also did not sufficiently engage with its own jurisprudence on international law as an aid to constitutional interpretation. It did not examine the incorporation of non-refoulement principle as a rule of customary international law which was clearly contended by the petitioners.¹⁴⁴

Hence, due to lack of a national legal framework for protection of asylum-seekers and refugees, legal protection has remained a chimera for most of the refugee communities residing in India with their survival being at stake.

B. The Need for a National Legislation in India

India deals with refugees through its legislations; Passport (Entry into India) Act, 1920, Passport Act, 1967, Registration of Foreigners Act, 1939, Foreigners Act, 1946 and the Foreigners Order, 1948. Refugees entering the Indian territory are given valid passports once the criteria of 'public interest' is fulfilled under the Passports Act, 1967.¹⁴⁵ The issue with the existing law is that they make no distinction between genuine refugees and foreigners,

¹⁴⁰ *Ibid*; *Anand Swaroop Verma v. UOI*, 65 DRJ 186 (Delhi H.C. 2002).

¹⁴¹ *Mohammad Salimullah v. Union of India*, WP (Civil) No. 793 of 2017

¹⁴² *Ktaer Abbas Habib Al Qutaifi v. Union of India* 1999 Cri U 919, para. 3

¹⁴³ *Dongh Lian Kham v. UOI*, 226 DLT 208 (Delhi H.C. 2016)

¹⁴⁴ Katrik, (n 188) 123

¹⁴⁵ Mukund (n 170)

increasing the risk of the arbitrary arrest of refugees by immigration authorities leading to illegal deportation.¹⁴⁶

Under these Acts, the government establishes its authority to either grant or refuse refugees as a sovereign state.¹⁴⁷ However, the Foreigners Act, 1946 has been criticised as providing the authorities under it an unlimited power to arrest and detain any foreigner if the provisions of the Act are violated. For example, in the case of Sri Lankan Tamil refugees entering India illegally, the government allowed them to stay despite their lack of travel documents but, later prosecuted them for illegal entry/overstay, calling for the interference of the National Human Rights Commission ('NHRC').¹⁴⁸ .

Therefore, the lack of a structural mechanism to provide relief to refugees and acknowledge them as distressed is unavailable under existing legislation, giving the Indian government the right to deport any foreigner at any time according to its discretion.

Regardless of the pivotal role played by the judiciary in encouraging humanitarian assistance, there have been cases where India has violated the principle of non-refoulement. It has been criticised to have used modes of non-entrée such as 'international zones' to escape responsibility.¹⁴⁹ Recently, the Supreme Court had surprisingly affirmed the deportation of close to two hundred Rohingya refugees on the grounds of illegal entry, observing that the 'right to not be deported' was ancillary to citizenship and cannot be claimed by refugees. It also noted that as India was not a signatory to the Refugee Convention, it was not bound to comply with Article 51(c) of the Indian constitution.¹⁵⁰

These decisions have been condemned internationally, including by the UN Special Rapporteur on Racism as a "flagrant denial of their [the Rohingya refugees'] right to protection," violating the customary international legal principle of non-refoulement.¹⁵¹ This

¹⁴⁶*Ibid*; Mahika, (n 177)

¹⁴⁷ Noti. 9/9/46, Foreigners Act, 1946, Ministry of Home Affairs, Foreigners order, 1948 No. 9/9/46-Political (EW), New Delhi, 10 February 1946.

¹⁴⁸ Meghana Senthil Kumar, 'The 'Crimmigration' of Sri Lankan Tamil Refugees in India' (*Oxford Human Rights Hub*) <<https://ohrh.law.ox.ac.uk/the-crimmigration-of-sri-lankan-tamil-refugees-in-india/>> accessed 4 November 2022

¹⁴⁹ Megha Purohit & Mayank Purohit, 'An Analysis of Non-Refoulement in Indian Legal Framework' 2 *Jamia Law Journal* 167, 177 (2017)

¹⁵⁰ *Mohammed Salimullah and Anr v. Union of India and Ors*, W.P. (C) no. 793 of 2017; 'Rohingya shall not be deported until procedure is followed: Supreme Court' (*The Hindu*, 8 April 2021) <<https://www.thehindu.com/news/national/rohingyas-shall-not-be-deported-until-procedure-is-followed-supreme-court/article34272232.ece>> accessed 6 December 2022

¹⁵¹ 'UN human rights expert alarmed by India move to deport Rohingya men' (*UNHCR*, 2 October, 2018) <<https://www.ohchr.org/en/press-releases/2018/10/un-human-rights-expert-alarmed-india-move-deport-rohingya-men?LangID=E&NewsID=23674>> accessed 19 October 2022

underscores the inadequacy of relying on ad-hoc judicial remedies in the absence of a comprehensive statutory framework.

Arguments against a uniform refugee law often centre on security considerations and sovereignty. Policymakers cite India's geopolitical influence and its vulnerability to cross-border infiltration and the difficulty of distinguishing refugees from irregular migrants as obstacles to the formation of a national refugee law, as it would threaten India's social, economic, and political stability.¹⁵² There is also concern that codification might incentivise further migration and disrupt the socio-economic stability of the nation.¹⁵³ However, these claims warrant scrutiny. Such arguments often serve as a convenient rationale for avoiding international responsibilities by framing refugee protection as a threat to domestic order. Moreover, they obscure the fact that a well-designed refugee law could actually strengthen, rather than weaken, national security by providing transparent procedures for status determination and reducing reliance on arbitrary executive discretion.

On the other hand, supporters of the enactment of a national refugee law argue that any person guilty of a crime against peace, a war crime, a serious non-political crime, or a crime against humanity would not be accorded the status of refugee under the Model Refugee Law. Even the enactment of a national law would help in determining the refugee status based on agreed standards, protection, and treatment through a proper procedure that would in turn help in better classification of aliens and result in the construction of a better security database, reducing the current problem of security on large scale.¹⁵⁴ Proponents argue that the enactment of such a legislation would reinforce India's humanitarian traditions and mitigate diplomatic friction with refugee-origin states by presenting refugee protection as a legal obligation rather than a political gesture.¹⁵⁵

Nevertheless, efforts were put by NHRC and private members to propose model laws and bills. For the first time, a model national law prescribing specific rights and duties of refugees and asylum-seekers, named Refugees and Asylum Seekers Protection Act, 2000, was drafted by the eminent persons group seeking incorporation of the existing policies on refugees, constitutional obligations, and India's international obligations.¹⁵⁶ The bill recognised the

¹⁵²*Ibid* 10

¹⁵³ *Ibid*

¹⁵⁴*Ibid*

¹⁵⁵ *Ibid*

¹⁵⁶ 'Tharoor introduces bill in LS seeking establishment of system to protect refugees and asylum-seekers' (*The New Indian Express*, 4 February 2022) <<https://www.newindianexpress.com/nation/2022/feb/04/tharoor->

principle of non-refoulement but not as an absolute right, carving out the exception of a person been convicted of a war crime, crime against peace or crime against humanity. Similarly, the National Asylum Bill, the Asylum Bill, and the Protection of Refugees and Asylum Seekers Bill were introduced in Lok Sabha in 2015 recognising the principle of non-refoulement.¹⁵⁷ These draft legislations also sought to “end a system of ambiguity and arbitrariness which results in injustice to a highly vulnerable populace”¹⁵⁸ but could not see the light of becoming the law.

Hence, the fact remains that India does not have a robust legal framework guaranteeing the security of the lives of the refugees. The government has been hesitant to move forward with the law as the influx of migrants in India is managed based on bilateral relations with refugee-originating countries, making it difficult and impractical for a uniform law to deal with all refugee groups.¹⁵⁹

To fill the gaps in the existing policies on refugees, the Citizenship Amendment Act, 2019 (‘CAA’) was formulated for humanitarian concerns. While the CAA sought to regularise the status of certain religious minorities from neighbouring countries, its exclusion of Muslim groups such as the Rohingyas, Ahmadiyyas, and Hazaras under the definition of ‘illegal immigrants’ has been widely criticised as discriminatory. By privileging particular religious groups and excluding others, the Act entrenches arbitrariness and undermines India’s constitutional commitments to equality and secularism.¹⁶⁰

Though the government claims that CAA is “actually a reinstatement of Indian ideals of secularism” and “reaffirms India’s faith and commitment to secularism,”¹⁶¹ the Act, by excluding Muslim minorities, speaks otherwise. It illustrates the risks of selective politicised refugee governance in the absence of a uniform framework.

introduces-bill-in-ls-seeking-establishment-of-system-to-protect-refugees--asylum-seekers-2415395.html>
accessed 22 November 2022

¹⁵⁷ Shuvro Prosun Sarker, *Visualisation of a Refugee Law for India’ in Refugee Law in India: The Road from Ambiguity to Protection* (Springer Nature 2017) 167

¹⁵⁸ Asylum Bill, 2015, Bill No. 334 of 2015; ‘Tharoor introduces bill in LS seeking establishment of system to protect refugees and asylum-seekers’ (*The Print*, 4 February 2022) <<https://theprint.in/india/tharoor-introduces-bill-in-ls-seeking-establishment-of-system-to-protect-refugees-asylum-seekers/821827/>> accessed 3 December 2022

¹⁵⁹ Arjun Nair, ‘National Refugee Law for India: Benefits and Roadblocks’, IPCS (2007) <<https://www.files.ethz.ch/isn/129030/RP11-ArjunNair.pdf>> accessed 6 December 2022

¹⁶⁰ ‘The Citizenship (Amendment) Bill, 2019’ (*PRS Legislative Research*) <<https://prsindia.org/billtrack/the-citizenship-amendment-bill-2019>> accessed 16 November 2022; M. Mohsin Alam Bhatt and Aashish Yadav, ‘On the verge: Revocation and denial of citizenship in India’ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=387600> accessed 7 January 2024

¹⁶¹ Union of India Preliminary Counter Aff., Submission in the matter of Indian Union of Muslim League v. Union of India, Writ Petition (C) No. 1470, at 97, para. 41 (2019)

The CAA was heavily criticised on grounds of discrimination based on religion and also because it does not provide a valid reason for the limitation of migrants only from the mentioned countries. The exclusion of persecuted Muslim groups such as Ahmadiyyas, Rohingyas, Hazaras and Shias from the CAA shows that the Act does not recognise persecution of Muslim minorities by Muslim nations.

The Act purports to operate on the presupposition that all and only such states with established religions persecute minorities, hence its exclusion of Sri Lanka and Myanmar.¹⁶² Though the Statement of Objects and Reasons of the Bill states that the Act is meant to protect religious minorities who were victims of persecution, the law nowhere mentions 'religious persecution'.¹⁶³ As India hosts a significant number of refugees from Myanmar, Sri Lanka, Tibet such as the Rohingyas¹⁶⁴ and Tibetan Buddhists such as the Dalai Lama, protecting them from religious persecution, it cannot be entirely believed that it could act on such a presupposition.

Nevertheless, 140 applications, along with the UN High Commissioner for Human Rights' intervention application challenging the constitutionality of the CAA based on Article 14 and 21 are pending before the SC, claiming it as breaching constitutional protections protecting secularism and equal freedom of conscience and religion.¹⁶⁵

Thus, the current existing laws and policies in India are inadequate to deal with refugee crises. India is deemed as a 'safe haven' for refugees, and its reliance on the archaic Foreigners Act, 1946, and discriminatory CAA puts it at odds with its global image.¹⁶⁶ The debate over a national refugee law illustrates how states invoke domestic concerns, security, migration management, and political stability to justify the avoidance of international responsibilities. A critical evaluation of these claims suggests that enacting a uniform refugee law would not only align India with its international obligations but also provide a more coherent, secure, and rights-respecting framework for managing refugee inflows.

¹⁶² Farrah Ahmed, Constitutional parasitism, camouflage, and pretense: Shaping citizenship through subterfuge, 21 (1), *International Journal of Constitutional Law* 285, 302 (OUP 2023)

¹⁶³ Niraja Gopal Jayal, 'Reinventing the Republic: Faith and Citizenship in India' *Studies in Indian Politics* 1, 8 (2022)

¹⁶⁴ U.N. High. Comm'r for Refugees, Fact Sheet: India 1 (Jan. 31, 2020), <https://reporting.unhcr.org/sites/default/files/UNHCR%20India%20factsheet%20-%20January%202020.pdf>.

¹⁶⁵ Farrah, (n 223) 288

¹⁶⁶ Mahika, (n 177)

C. Suggestions for India

As the rejection at frontiers forms a part of the duty of non-refoulement which is a customary international law right under IHRL, non-signatories to the Refugee Convention also have to abide by the same. India is a signatory to the major human rights instruments such as UDHR that provide for ‘right to grant asylum’ indicating that an asylum-seeker cannot be rejected at the frontiers by a state according to the non-refoulement principle under the ICCPR and UDHR.

In addition to this, member states of the Refugee Convention have adopted the same into their national laws while adhering to their international obligations for better protection of refugees. For instance, in countries like Canada, the Immigration and Refugee Protection Act provides for a pre-removal risk assessment for the asylum seekers to determine ‘if any person would be subjected to danger of torture, risk to their life or risk of cruel and unusual treatment or punishment if returned to their home country’ after which, they are given the status of protected person allowing them to stay in the country.¹⁶⁷ Even in the USA, credible fear and reasonable fear screening processes are done to the asylum seekers of under an expedited asylum process to determine if any immediate protection is necessary, even if their refugee status applications are denied.¹⁶⁸

Similarly, in the UK the asylum process consists of a screening done to identify if persecution exists for the claim to be considered, but the claim might not be considered if such asylum seeker travelled to the UK through a ‘safe third country’.¹⁶⁹ Further in Australia, asylum seekers who do not meet the criteria of a refugee but face significant human rights abuses will be assessed by the authorities to determine if he meets the complementary protection criteria under IHRL to grant him a protection visa.¹⁷⁰

Hence, the Indian government can take inspiration from the national laws of signatories to the Refugee Convention, and actively take initiatives to conform to the IRL and IHRL while

¹⁶⁷ ‘Claiming asylum in Canada-what happens?’ (*Government of Canada*)

<https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html> accessed 13 June 2023

¹⁶⁸ ‘Asylum in the United States’ (*American Immigration Council*, August, 2022)

<https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_0.pdf> accessed 14 June 2023

¹⁶⁹ ‘Claim Asylum in the UK’ <<https://www.gov.uk/claim-asylum/after-your-screening>> accessed June 14 2023

¹⁷⁰ ‘Asylum Seekers and Refugees’ (*Australian Human Rights Commission*) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/asylum-seekers-and-refugees>> accessed June 14 2023

forming a new legislation to intake refugees and protect them.¹⁷¹ The duty of non-refoulement has to be adhered to on a humanitarian basis as well as the international legal obligation affixed to it. The Indian government can consider undertaking efforts to take the following steps:

1. Enact proper national legislation that abides by Indian constitutional law and customary international law. It should elaborate on the legal framework for refugees along with the distinction between foreigners and refugees to render it compliant with existing law.
2. The assistance of bodies like UNHCR, Amnesty International at the international level, and National Human Rights Commission at the national level can be taken to revise draft model laws on asylum and formulate a robust legal framework for refugees in India.
3. The law must introduce a regulatory framework which would help asylum seekers to get temporary protection in the state while the application for refugee status is pending or is subject to be denied and the procedure must be in conformation with the IRL including the non-refoulement principle.
4. The Indian government should formulate institutional bodies for the proper data collection on refugees and enable the implementation of durable solutions such as local integration, resettlement, and voluntary repatriation efficiently.

¹⁷¹ Executive Committee of the High Commissioner's Programme, Conclusion No. 6 (XXVIII) (1977) para. c

V. CONCLUSION

The IHRL and IRL are intertwined to an extent obliging the states to admit refugees into their territories at least temporarily to enhance the objectives of the IRL. The duty of non-refoulement, a part of customary international law, encompasses the right to grant asylum wherein states, though economically weak, have an obligation to admit the refugees into their state and comply with the provisions of International human rights conventions and IRL due to its binding nature.

Therefore, the right to grant asylum is a part of duty of non-refoulement, making it obligatory on states to not reject refugees. Further, as India has not ratified the Refugee Convention, it becomes pertinent for it considering its geopolitical position and its intention to accept refugees through CAA, to enact uniform refugee legislation adhering to the IRL for maintaining consistency with the principles of international law. It requires taking a step ahead to protect the refugees by establishing centers, and institutional bodies through a new enactment authorising the government to adhere to international norms.