

The Role of International Law in Defining the Protection of Refugees in India

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India has not acceded to either the 1951 Refugee Convention or its 1967 Protocol. The admission and protection of refugees in India continues to be controlled by the 1946 Foreigners Act, which gives the state sweeping powers to detain and expel all foreigners in India. India is bound by a wide range of general human rights and customary norms that combine to produce a broad norm prohibiting forced return (*refoulement*). Yet, no provision is made in the domestic law of India to protect displaced persons from *refoulement*. Efforts to introduce a comprehensive refugee law that would provide for such protections have been consistently defeated following objections from the Indian security and intelligence agencies.

In this paper, I consider the current position of India in light of its domestic legal regime, its membership of the UNHCR Executive Committee (ExCom), and the limitations it continues to impose as a matter of policy on UNHCR operations in the country. I describe the standards applied in the admission and protection of refugees in India, with a particular focus on Tibetan and Sri Lankan refugees. While Indian admission and protection policies have often been quite generous, they are also obviously unequal, with standards among refugee communities varying widely according to ethnicity, country of origin, and date of arrival. I explain the international standards that control in this matter and, in particular, argue that both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention against Torture (CAT) each carry obligations of non-*refoulement* for India. This is in addition to the well-established obligations of non-*refoulement* imposed by the International Covenant on Civil and Political rights (ICCPR) and the Convention on the Rights of the Child (CRC).

Finally, I argue that the various norms relevant to the issue of non-*refoulement* in both the refugee law and human rights context, although superficially disparate, have now largely converged. As such, a standard rule can now be construed that forbids India from returning individuals to situations where there is a real risk of serious human rights violations. This norm is non-derogable and can be properly evaluated only with respect to the seriousness of any potential violation, and not the category of the rights concerned.

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1. Introduction: The Ambiguous Position of India

The Republic of India maintains a deeply ambiguous position with respect to the protection of refugees and asylum-seekers. India has not yet signed or ratified either the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter 1951 Geneva Convention, 1951 Convention or Refugee Convention)¹ or its 1967 Protocol.² Moreover, and despite very significant numbers of displaced persons entering India since independence, no provision is made in the domestic law of India for refugees or asylum-seekers. The 1946 Foreigners Act defines a “foreigner” as anyone who is “not a citizen of India”³ and makes sweeping provision for orders restricting their entry,⁴ exit,⁵ place of residence within India,⁶ and personal associations,⁷ as well as ultimately, for their arrest and detention.⁸ The Citizenship

¹ See *Convention relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOLINE&mtdsg_no=V~2&chapter=5&Temp=mt dsg2&lang=en (last visited Feb. 17, 2015) for a current list of signatories and parties to the 1951 Geneva Convention Relating to the Status of Refugees.

² See *Protocol relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ShowMTDSDetails.aspx?src=UNTSOLINE&tabid=2&mtdsg_no=V-5&chapter=5&lang=en#Participants (last visited Feb. 17, 2015) for a current list of signatories and parties to the 1967 Protocol Relating to the Status of Refugees.

³ Foreigners Act, No. 31 of 1946, § 2(a), INDIA CODE (2014) [hereinafter Foreigners Act], *available at* <http://indiacode.nic.in>.

⁴ *Id.* § 3(1)(a); Foreigners Order, 1948, No. 9/9/46-Political (EW), Gazette of India, pt. I, sec. 1, at 198, § 3(1)(a) (Feb. 14, 1948) [hereinafter Foreigners Order].

⁵ Foreigners Act, *supra* note 3, § 3(2)(b); Foreigners Order, *supra* note 4, § 5(1)(a).

⁶ Foreigners Act, *supra* note 3, § 3(2)(e)(i); Foreigners Order, *supra* note 4, § 11; *cf.* Convention relating to the Status of Refugees, arts. 26, 31(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

⁷ Foreigners Act, *supra* note 3, § 3(1)(e)(ii).

⁸ Foreigners Act, *supra* note 3, § 3(1)(g).

Act 1955 (as amended) defines all foreigners who enter India without valid travel documents as “illegal migrants.”⁹

Neither Act provides for the entry or non-refoulement of asylum-seekers or refugees. For the purposes of Indian law, asylum-seekers are merely one variety of foreigner and subject to the same sweeping powers regulating their entry and removal from the country. Moreover, and despite acceding to membership of the UNHCR Executive Committee (ExCom) in 1995, India has almost entirely restricted UNHCR operations in the country to their main office in New Delhi. Asylum-seekers who wish to apply for refugee status from UNHCR pursuant to its own mandate (“mandate refugee status”) or material assistance must travel to New Delhi in order to contact UNHCR directly. This, in turn, has acted as a powerful incentive for refugees to relocate to New Delhi and so contributed to the growing population of urban refugees in the capital.¹⁰

It may appear, therefore, as if the entry and protection policies of India in respect to persons seeking international protection (both asylum-seekers and those seeking alternative forms of complementary or subsidiary protection) remain wholly discretionary. However, this paper will argue that, notwithstanding India’s continuing failure to accede to the principle international instruments for the protection of refugees (the 1951 Convention and its Protocol), it is now bound by a rich complex of international human rights norms that combine to significantly constrain its discretion with respect to the treatment of foreign nationals and, in particular, its obligations in respect of non-refoulement. These obligations begin with the widely accepted guarantees against refoulement found in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). Perhaps more surprisingly, these also include parallel guarantees against refoulement as found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the Convention against Torture (CAT). India has not yet ratified the CAT, and so remains as only a signatory to this treaty. I rely on Article 18 of the Vienna Convention on the Law of Treaties (VCLT) to argue that, given the central importance of the guarantee against refoulement to the object and purpose of the CAT, the prohibition of refoulement found in Article 3 of the CAT now binds India, notwithstanding its continuing failure to finally ratify this treaty.

While these norms may appear superficially disparate, this paper will argue that, in fact, they have now converged sufficiently in international practice to permit the construction of a single “standard” rule with respect to non-refoulement as it applies to India. This is of particular significance for India as, in its capacity as a member of the UNHCR’s Executive Committee (ExCom) since 1995, it has now joined statements that find the guarantee of non-refoulement to be a non-derogable or *jus cogens* norm. To the extent that these norms can be construed to ground a single or general rule against refoulement in the way that I suggest, it is

⁹ The Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, § 2(1)(b), 2004 (India) [hereinafter Citizenship Act]; cf. Refugee Convention, *supra* note 6, sec. 31(1).

¹⁰ U.N. High Comm’r for Refugees, Policy Dev. & Evaluation Serv., Destination Delhi: A Review of the Implementation of UNHCR’s Urban Refugee Policy in India’s Capital City, U.N. Doc. PDES/2013/09 (July 2013) (by MaryBeth Morand & Jeff Crisp), available at <http://www.unhcr.org/51f66e7d9.pdf>; WOMEN’S REFUGEE COMM’N, BRIGHT LIGHTS, BIG CITY: URBAN REFUGEES STRUGGLE TO MAKE A LIVING IN NEW DELHI (2011), available at <https://womensrefugeecommission.org/component/zdocs/document/733-bright-lights-big-city-urban-refugees-struggle-to-make-a-living-in-new-delhi>; Parveen Parmar, Emily Aaronson, Margeaux Fischer & Kelli N. O’Laughlin, *Burmese Refugee Experience Accessing Health Care in New Delhi: A Qualitative Study*, 33 REFUGEE SURV. Q. 1 (2014).

also a non-derogable one in both international practice and the now publicly stated view of the Indian state.

Insofar as this paper provides a revised account of the extent of the non-refoulement obligations in the ICESCR and (with respect to signatory states) the CAT, it builds on the emerging body of literature addressing the complementary¹¹ or subsidiary¹² protection of refugees. However, it also seeks to engage with the practical detail of the admission and protection regime for persons seeking international protection in India, and the manner in which international standards can be incorporated and relied on at Indian law. As such, it aims to provide something like a comprehensive account of the role of international law in defining and controlling the protection of foreign nationals in India. In doing so, it seeks to go beyond a discussion of the legal standards per se, and afford a clear and accessible reference point for those advocates engaged in protection work on behalf of foreign nationals in India, either informally as part of the UN and non-governmental community, or in the context of litigation on behalf of such claimants at the international and the domestic Indian level.

I begin in section two of this paper by setting out the broader context of refugee protection in India. This includes a brief discussion of the position at Indian constitutional law, the limitations imposed by the state on UNHCR operations in the country, and the significance of India's accession to ExCom membership. I continue in section three to more specifically consider the position of individual refugee groups, with particular attention to the evolving status of the two largest and politically most significant groups, Tibetans and Sri Lankan Tamils. While the admission and protection policies adopted by the Indian state in respect to each community have frequently been extremely generous, they have also been notably uneven, with the model and degree of protection afforded to refugees varying dramatically according to their ethnicity, country of origin, and date of entry into India.

Section four turns to a more general consideration of the position of refugees and other foreign nationals under international human rights law. I begin by explaining the most basic terms on which these conventions apply and note the obligation of states parties to secure the rights in the respective conventions to everyone in their territory or jurisdiction without discrimination. I discuss the degree to which these conventions apply in parallel with the Refugee Convention and note some key areas where foreign nationals are excluded from protection under these instruments.

¹¹ See, e.g., U.N. High Comm'r for Refugees, Policy Dev. & Evaluation Serv., *New Issues In Refugee Research*, Research Paper No. 238, *Filling the Protection Gap: Current Trends in Complementary Protection in Canada, Mexico and Australia* (May 2012) (by Nicole Dicker & Joanna Mansfield), *available at* <http://www.unhcr.org/4fc872719.pdf>; U.N. High Comm'r for Refugees, Dep't Of Int'l Prot., Prot. Policy & Legal Advice Section, *Legal And Protection Policy Research Series: Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, U.N. Doc. PPLA/2005/02 (June 2005) (by Ruma Mandal), *available at* <http://www.unhcr.org/435df0aa2.html>; JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* (2007).

¹² Council Directive 2004/83, of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 15, 2004 O.J. (L 304) 12, 19 (EC) [hereinafter *Qualification Directive*]; Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), art. 15, 2011 O.J. (L 337) 9, 18 (EU) [hereinafter *Qualification Directive Recast*].

Section five provides a detailed discussion of the terms of non-refoulement under international human rights law. I describe the breadth of this norm under the key conventions relevant to India and the now well-recognized prohibition of refoulement under the ICCPR and the CRC. However, I also argue that the prohibition of refoulement found in the CAT now applies with respect to India, despite India remaining only a signatory to the Convention, and that the ICESCR should now be read to impose an obligation of non-refoulement similar to the one found in the ICCPR. I conclude with a re-evaluation of the parallel norm of non-refoulement at customary international law and a new account of the position of the Indian state with respect to the non-derogability of this norm.

Finally, in section six, I argue that, as a result of the degree to which the concept of “persecution” in refugee law now relies on the corpus of international human rights law to define its content and terms, the various norms that provide for the right of non-refoulement in the refugee and human rights law context have now largely converged. On this basis, a new consolidated rule can be construed that forbids India from returning individuals to situations where there is a real risk of serious human rights violations. This norm is non-derogable and can be properly evaluated only with respect to the seriousness of any potential violation and not the category of the rights concerned. It is thus a qualitative, rather than a categorical, determination.

2. Refugees in Indian Law

While India has neither acceded to the 1951 Convention nor introduced a domestic regime for the protection of refugees, this is not to say that there have not been any attempts to revise Indian immigration law so as to make appropriate provision. In 1995, a drafting committee led by Justice P. N. Bhagwati, a former Chief Justice of the Indian Supreme Court, prepared a model law on asylum-seekers and refugees under the auspices of the Regional Consultations on Refugees and Migratory Movements in South Asia Initiative.¹³ The model law was substantially revised in 2006, as the Refugees and Asylum Seekers (Protection) Bill by the Public Interest Legal Support and Research Centre.¹⁴ While the definition of a refugee in the revised bill remained the same, the new draft dropped many of the rights included in Article 13 of the original model law in order to accommodate objections from the intelligence and security establishment.¹⁵ The rights dropped included the right of a refugee to choose their place of residence and to move freely within the country, the right to adequate housing, healthcare and primary education, and the right to freely access employment.¹⁶ However, these changes were insufficient to overcome the objections of the security establishment.¹⁷

¹³ *Model National Law on Refugees*, 1 ISIL Y.B. INT’L HUMANITARIAN & REFUGEE L. 295 (2001); ARJUN NAIR, IPCS RESEARCH PAPERS NO. 11, NATIONAL REFUGEE LAW FOR INDIA: BENEFITS AND ROADBLOCKS 1, 2 n.7 (2007), available at http://www.ipcs.org/pdf_file/issue/51462796IPCS-ResearchPaper11-ArjunNair.pdf.

¹⁴ Nita Bhalla, *Lack of India Refugee Law Leaves Many in Limbo*, THOMSON REUTERS FOUND. (Mar. 25, 2010, 17:24 GMT), <http://www.trust.org/item/20100325172400-d70r9/>.

¹⁵ *Home Ministry’s Refugee Bill Worries Security Agencies*, REDIFF NEWS (Oct. 19, 2009, 14:52 IST), <http://news.rediff.com/report/2009/oct/19/home-ministrys-refugee-bill-worries-security-agencies.htm>.

¹⁶ *Id.*

¹⁷ Bhalla, *supra* note 14 (“Rights campaigners have for over a decade lobbied for a domestic law and two bills have been drafted - in 1997 and then in 2006 - but New Delhi has stalled on approving either of these bills, mainly due to security concerns. Sharing a massive porous border with many hostile neighbours and consistently threatened by external militancy, India does not want to be tied down by any legal obligation that impinges upon its discretion to regulate the entry of foreigners into its territory.”); *Some Refugees are More Equal*, TELEGRAPH (Calcutta), Dec. 26, 2012,

Ultimately, neither bill was successful in obtaining the support of the Indian Cabinet and they were not introduced before Parliament.¹⁸

There is some scope for constitutional litigation on this issue. It is a well-established principle of Indian law that, in case of ambiguity or lacunae in the law, it is to be interpreted consistently with India's obligations at international law.¹⁹ As the Indian Supreme Court explained in *Tractor Export, Moscow v. M/S Tarapore & Co.*:

There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention.²⁰

In the case of *Louis De Raedt v. Union of India*, the Supreme Court again confirmed that Article 21 of the Indian Constitution,²¹ the right to the protection of life and liberty, applies to foreign nationals.²² The obvious next step for the court would be to find that this Article prohibits the removal of foreign nationals to situations in which their life or liberty would be threatened. This would be consistent with India's obligations at international law and faithful to the substance of the Article itself.

In partial reliance on De Raedt, the Supreme Court has subsequently been asked on at least two occasions to rule on the forced displacement of foreign nationals in India. In the case of *State of Arunachal Pradesh v. Khudiram Chakma*,²³ the state government of Arunachal Pradesh had ordered the forced relocation of a group of Chakma families that

http://www.telegraphindia.com/1121226/jsp/opinion/story_16361434.jsp ("Security forces argued that this would pose a danger to national security as India shares porous borders with neighbouring countries. 'This provision would have allowed illegal migrants to come to India under the garb of a refugee', says a Border Security Force official.")

¹⁸ Anna-Sophie Bentz, *Afghan Refugees in Indo-Afghan Relations*, 26 CAMBRIDGE REV. INT'L AFF. 374, 381 (2013); Partha S. Ghosh, *South Asia's Response to its Refugee Questions*, in POLITICS IN SOUTH ASIA: CULTURE RATIONALITY AND CONCEPTUAL FLOW 101, 119 (Siegfried O. Wolf, Jivanta Schöttli, Dominik Frommherz, Kai Fürsteberg, Marian Gallenkamp, Lion König & Markus Pauli eds., 2015); Vijay Prashad, *Uprooted and Lost on Strange Soil*, TELEGRAPH (Calcutta), May 1, 2014, http://www.telegraphindia.com/1140501/jsp/opinion/story_18290616.jsp; *State v. Chandra Kumar*, FIR No. 78/10, paras. 78–79 (Del. Dist. M.M.C. Sept. 20, 2011) (India), printed in REFUGEES AND THE LAW 525, 546 (Ragini Trakroo Zutshi, Jayshree Satpute & Md. Saood Tahir eds., 2d ed. 2011).

¹⁹ *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, (1984) 2 S.C.R. 664, 673–75 (India); *Tractor Exp., Moscow v. M/S Tarapore & Co.*, (1970) 3 S.C.R. 53, 64 (1969) (India); ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 142 (2011).

²⁰ *Tractor Exp.*, (1970) 3 S.C.R. at 64.

²¹ INDIA CONST. art. 21 ("Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.")

²² *Louis De Raedt v. Union Of India*, (1991) 3 S.C.R. 554, para. 13 (India) ("The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country as mentioned in Article 19(1)(e), which is applicable only to the citizens of this country."); *Hans Muller of Nuremburg v. Superintendent, Presidency Jail Calcutta*, (1955) 1 S.C.R. 1284, 1298 (India); B.S. Chimni, *The Legal Condition of Refugees in India*, 7 J. REFUGEE STUD. 378, 380 (1994).

²³ *State of Arunachal Pradesh v. Khudiram Chakma and Khudiram Chakma v. State of Arunachal*, (1994 Supp.) 1 S.C.C. 615 (1993) (India).

originated from the former East Pakistan (now Bangladesh)²⁴ and had settled within the so-called inner line, a “protected area” for purposes of the Foreigners (Protected Areas) Order 1958.²⁵ Their settlement in the area was deemed illegal and their claim to be citizens of India (and resulting entitlement to enhanced constitutional protection) was rejected.²⁶ As such, the court was unwilling to intervene to prevent their forced removal by the state government.²⁷

In the slightly later case of *National Human Rights Commission v. State Of Arunachal Pradesh & Others*, the Supreme Court was asked to make an order to protect the Article 21 rights of a large group (approximately 65,000) of Chakmas in Arunachal Pradesh.²⁸ They feared continuing violence and harassment led by a student group, the All Arunachal Pradesh Students Union, that sought the expulsion of all “foreigners” from the state.²⁹ While the court made an order for their physical protection, it is notable that this was made with respect to a non-state actor, and not directed toward the state (either Arunachal Pradesh or the Union of India itself).³⁰ While the court also ordered the State of Arunachal Pradesh to refrain from removing any of the individuals concerned, this was done on the understanding that they were in the process of applying for Indian citizenship.³¹ The order itself was limited to the period “while the application of any individual Chakma is pending consideration.”³²

It is unclear from the facts of each case whether the Chakma facing removal from their homes in Arunachal Pradesh would have ultimately faced removal from India. Nevertheless, in each case the Supreme Court had the opportunity to confirm that Article 21 of the Indian Constitution granted a right against forced removal in situations where an individual’s life or freedom would be threatened, and signally failed to do so. As such, the position in Indian law with respect to the protection of foreigners from forced displacement remains very largely as was described by the court in the 1955 case of *Hans Muller Of Nuremburg v. Superintendent, Presidency Jail Calcutta and Others*:

²⁴ Sabyasachi Basu Ray Chaudhury, *Uprooted Twice: Refugees from the Chittagong Hill Tracts*, in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000, at 249 (Ranabir Samaddar ed., 2003) [hereinafter REFUGEES AND THE STATE].

²⁵ Foreigners (Protected Areas) Order, 1958, G.S.R. 713, Gazette of India, pt. II, sec. 3, subsec. i, at 657 (Aug. 23, 1958).

²⁶ *Chakma*, (1994 Supp.) 1 S.C.C. 615, para. 63 (“Insofar as the appellants and the Chakmas were residing in Miao Sub-Division of Tirap District in Arunachal Pradesh long before 1985 they cannot be regarded as citizens of India. We find it difficult to appreciate the argument of Mr. Gobinda Mukhoty, learned counsel, that the accident of the appellants living in Arunachal Pradesh should not deprive them of citizenship. In this connection, it is worthwhile to note that Section 6-A of the Citizenship Act came to be incorporated by Amending Act as a result of Assam Accord. If law lays down certain conditions for acquiring citizenship, we cannot disregard the law...”).

²⁷ *Chakma*, (1994 Supp.) 1 S.C.C. 615, para. 74 (“Even then what is that is sought to be done to the appellants? They are asked to settle in Maitripur and Gautampur villages from Miao. Certainly settling the Chakmas in a particular place is a matter of policy. This Court cannot enter into the wisdom of such a policy, in view of what has been stated above, Arunachal Pradesh is strategically important with Bhutan in the West, Tibet and China in the North and North-East, Burma (Myanmar) in the East.”).

²⁸ Nat’l Human Rights Comm’n v. State Of Arunachal Pradesh, (1996) 1 S.C.C. 742 (India).

²⁹ *Id.*, paras. 3–6.

³⁰ *Id.* para. 21(3) (“The quit notices and ultimatums issued by the AAPSU and any other group which tantamount to threats to the life and liberty of each and every Chakma should be dealt with by the first respondent in accordance with law;”).

³¹ *Id.* para. 21(5) (“While the application of any individual Chakma is pending consideration, the first respondent shall not evict or remove the person concerned from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf;”).

³² *Id.*

The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.³³

2.1 Limitations on UNHCR Operations in India

Given the absence of a domestic legal regime for the protection of refugees, it might be expected that the government would encourage the United Nations High Commissioner for Refugees (UNHCR) to extend their own operations throughout the country. In fact, the government has been unwilling to settle a co-operation agreement with UNHCR.³⁴ Without a country agreement or memorandum of understanding with the government of India, UNHCR has no formal status in the country and continues to operate under the auspices of the United Nations Development Programme (UNDP).³⁵ In practice, UNHCR operations are restricted by the government, which generally only permits UNHCR to provide assistance to asylum-seekers and refugees from non-contiguous states.³⁶

UNHCR is permitted to maintain an office in New Delhi (styled a Mission rather than, as one might expect, a Branch Office) and a small Field Office in Chennai in Tamil Nadu state. The office in New Delhi is permitted to conduct refugee status determination (RSD) pursuant to the terms of the UNHCR statute for those asylum-seekers who are able to reach New Delhi.³⁷ Those determined to be refugees by UNHCR pursuant to the terms of its statute are referred to as “mandate refugees.”³⁸ However, UNHCR is forbidden from extending protection services to displaced persons resident outside of New Delhi. In particular, it is not permitted direct access to the Burmese Chin displaced persons in Mizoram state, to the numerous camps hosting Sri Lankans in Tamil Nadu, or to any of the Tibetan settlements spread throughout the country.³⁹ As such, the UNHCR Field Office in Chennai is limited to providing repatriation assistance to Tamils it is able to interview outside of the camps and it relies on other NGOs/civil society organizations to inform it about conditions in the camps themselves.⁴⁰

2.2 ExCom Membership

³³ *Hans Muller*, (1955) 1 S.C.R. at 1298.

³⁴ U.N. HIGH COMM’R FOR REFUGEES, COUNTRY OPERATIONS PLAN: INDIA 2006, *available at* <http://www.unhcr.org/4332c6232.html>; U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: INDIA 31 (2014), *available at* <http://www.state.gov/documents/organization/220604.pdf>. For an example of the UNHCR co-operation agreement, see U.N. High Comm’r for Refugees, Model UNHCR Co-operation Agreement: Agreement Between The Office of the United Nations High Commissioner for Refugees and the Government of ____, U.N. Doc. Rev. MNW 24/10/01 (2009), *available at* <http://www.refworld.org/docid/3ae6b31b27.html>.

³⁵ See U.N. HIGH COMM’R FOR REFUGEES, *supra* note 34; U.S. DEP’T OF STATE, *supra* note 34, at 30.

³⁶ U.S. DEP’T OF STATE, *supra* note 34, at 27.

³⁷ Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 46 (Dec. 14, 1950) [hereinafter UNHCR Statute].

³⁸ See REFUGEES AND THE LAW, *supra* note 18, at 56–58, for a clear introduction to the position of mandate refugees in India.

³⁹ U.S. DEP’T OF STATE, *supra* note 34, at 30.

⁴⁰ See *Sri Lanka Minister Promises to Prioritize Tamil Repatriation in 2014*, IRIN (Aug. 19, 2013), <http://www.irinnews.org/report/98601/sri-lanka-minister-promises-to-prioritize-tamil-repatriation-in-2014>; U.N. HIGH COMM’R FOR REFUGEES, HELPING SRI LANKAN REFUGEES COME HOME (2013), *available at* <http://unhcr.lk/wp-content/uploads/2014/03/HELPING-SRI-LANKAN-REFUGEES-Leaflet.pdf>.

In light of the continuing restrictions on UNHCR operations in the country it may be surprising to learn that, in fact, India has been a member of the Executive Committee of the High Commissioner's Programme (ExCom) since 1995.⁴¹ ExCom was established in 1959 at the request of a UN General Assembly⁴² and by a resolution of the UN Economic and Social Council (ECOSOC).⁴³ The UNHCR statute requires it to follow the policy directives of the General Assembly or ECOSOC.⁴⁴ ExCom does not replace the authority of the General Assembly or ECOSOC but, rather, has its own quite specific executive and advisory responsibilities.⁴⁵

It has been controversial among some lawyers whether the Conclusions of ExCom are binding on UNHCR without the further endorsement of the General Assembly.⁴⁶ However, the UNHCR statute, itself a General Assembly Resolution, makes explicit the High Commissioner's obligation to "follow policy directives given him by the General Assembly or the Economic and Social Council."⁴⁷ ECOSOC, in its Resolution 672 (XXV), instructs ExCom to "[d]etermine the general policies under which the High Commissioner shall plan, develop and administer the programmes and projects required."⁴⁸ The use of what seems plainly mandatory language by ECOSOC with respect to ExCom's duties, combined with its mandate in the UNHCR statute to make policy directives, and the High Commissioner's obligation to follow such directives, leaves little room for doubt that the conclusions of ExCom are binding on the High Commissioner.⁴⁹ In short, the General Assembly has obliged the High Commissioner to follow the policy directives of ECOSOC, which, in turn, has instructed ExCom to determine such policies. Moreover, UNHCR itself has consistently accepted the binding nature of ExCom conclusions.⁵⁰

Membership in ExCom is not the equivalent of a de facto acceptance of the obligations of the 1951 Geneva Convention or its 1967 Protocol, and India has continued to act contrary to the standards of the 1951 Convention since its accession to membership in 1995.⁵¹ Nevertheless, ExCom plays a significant role in setting UNHCR policy and, by extension, standards for international protection. It is difficult to interpret participation as a member of ExCom in the deliberation and agreement of such standards as anything other

⁴¹ UNHCR maintains a list of ExCom members organised by date of admission. *See ExCom Membership by Admission of Members*, UNHCR, <http://www.unhcr.org/40112e984.html> (last visited Feb. 17, 2015).

⁴² G.A. Res. 1166 (XII), ¶ 5, U.N. Doc. A/RES/1166 (XII) (Nov. 26, 1957).

⁴³ Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, E.S.C. Res. 672 (XXV), ¶ 1(a), E/RES/672 (Apr. 30, 1958); GIL LOESCHER, ALEXANDER BETTS & JAMES MILNER, *THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY* 76–79 (2008).

⁴⁴ UNHCR Statute, *supra* note 37, art. 3.

⁴⁵ CORINNE LEWIS, *UNHCR AND INTERNATIONAL REFUGEE LAW: FROM TREATIES TO INNOVATION* 51–54 (2012); Michael Barutciski, *The Limits to the UNHCR's Supervisory Role*, in *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW* 59, 70–72 (James C. Simeon ed., 2013).

⁴⁶ LOUISE W. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972*, VOL. I at 92 (1975).

⁴⁷ UNHCR Statute, *supra* note 37, art. 3.

⁴⁸ E.S.C. Res. E/RES/672 (XXV), *supra* note 43, ¶ 2(a).

⁴⁹ Jerry Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT'L J. REFUGEE L. 285, 298–99 (1989).

⁵⁰ LEWIS, *supra* note 45, at 53.

⁵¹ For discussion of the problem of ExCom member states acting contrary to the 1951 Geneva Convention and its implications for the development of protection policy, see LOESCHER, BETTS & MILNER, *supra* note 43, at 110; Martin Jones, *The Governance Question: The UNHCR, the Refugee Convention and the International Refugee Regime*, in *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW*, *supra* note 45, at 75, 83.

than the member state's endorsement of the standards that result. Moreover, the key criterion for membership of ExCom is "a demonstrated interest in, and devotion to, the solution of the refugee problem."⁵² By acceding to membership of ExCom, India has made a powerful and quite public commitment to the development and propagation of improved standards for international protection.

3. Admission and Protection Policies

There is no question that India's admission and protection policies since independence have been, on the whole, extremely generous.⁵³ It currently hosts a considerable population of refugees and other displaced persons.⁵⁴ As of January 2014, UNHCR estimated that there were a total of 197,850 refugees in the country.⁵⁵ This number should include what the government estimates to be more than 100,000 ethnic Tamil Sri Lankans in the southern state of Tamil Nadu, with 68,000 living in the 112 government-run camps and a further 32,000 living outside of the camps in the surrounding area.⁵⁶ The actual UNHCR estimate of ethnic Tamil Sri Lankans in Tamil Nadu is the considerably lower number of 65,674.⁵⁷ Given the very slow pace of repatriation to Sri Lanka, however, UNHCR's own numbers in this case seem unrealistically low.⁵⁸ As UNHCR is unable to access the camps in Tamil Nadu directly, and so has been unable to register the refugees there, the government's own numbers as to Sri Lankan Tamil refugees in India are to be preferred.

⁵² G.A. Res. 1166 (XII), *supra* note 42, ¶ 5.

⁵³ See generally REFUGEES AND THE STATE, *supra* note 24.

⁵⁴ For the most up-to-date numbers in respect of refugees and asylum-seekers in India, see the UNHCR India website, which provides a regularly updated "statistical snapshot," see *UNHCR – India*, UNCHR, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4876d6> (last visited Feb. 17, 2015).

⁵⁵ U.N. HIGH COMM'R FOR REFUGEES, INDIA FACT SHEET: MARCH 2014 (2014) [hereinafter UNHCR INDIA FACT SHEET U.N. HIGH COMM'R FOR REFUGEES, INDIA FACT SHEET: SEPTEMBER 2014 (2014) [hereinafter UNHCR INDIA FACT SHEET], available at <http://www.unhcr.org/50001ec69.html>. The usage of the term "refugee" here might seem peculiar in the absence of a provision for refugee status at Indian domestic law, and given the continuing failure of India to accede to the 1951 Geneva Convention or the 1967 Protocol. However, the use of this term by UNHCR in the present context includes both "persons recognized as refugees under the 1951 UN Convention/1967 Protocol, the 1969 OAU Convention, in accordance with the UNHCR Statute, persons granted a complementary form of protection and those granted temporary protection," and persons in a "refugee-like situation" whose status has not yet been determined. U.N. HIGH COMM'R FOR REFUGEES, UNHCR GLOBAL TRENDS 2012: DISPLACEMENT: THE NEW 21ST CENTURY CHALLENGE 1, 37, 46 (2012), available at http://www.unhcr.org.uk/fileadmin/user_upload/pdf/UNHCR_Global_Trends_2012.pdf. "This sub-category is descriptive in nature and includes groups of people who are outside their country or territory of origin, and who face protection risks similar to refugees, but for whom refugee status has not been ascertained, for practical or other reasons." *Id.* at 37, 46.

⁵⁶ *Sri Lanka Minister Promises to Prioritize Tamil Repatriation in 2014*, *supra* note 40.

⁵⁷ UNHCR INDIA FACT SHEET, *supra* note 55.

⁵⁸ *Refugees in India Reluctant to Return*, IRIN (Sept. 4, 2012), <http://www.irinnews.org/report/96233/sri-lanka-refugees-in-india-reluctant-to-return> ("Since the end of the war, little more than 5,000 Sri Lankans have returned under a UNHCR-facilitated voluntary repatriation programme, mostly to Trincomalee, Mannar, Vavuniya and Jaffna districts. In 2011, 1,728 Sri Lankan refugees returned with UNHCR's help after the agency stepped up its assistance package to returnees. However, the numbers are low. In fact, the number of Sri Lankan refugees returning home with UNHCR's help declined during the first half of 2012 compared with the same period in 2011."); *Tamil Refugees Slowly Return from India*, IRIN (Jan. 11, 2012), www.irinnews.org/report/94622/sri-lanka-tamil-refugees-slowly-return-from-india.

A further 109,015 Tibetan refugees have now settled in a variety of locations around India,⁵⁹ often on land ceded to them for this purpose by state authorities and administered through independent settlement corporations.⁶⁰ This figure is included in the overall UNHCR estimate of 197,850 refugees in the country.⁶¹ It is estimated that a further 100,000 Burmese refugees of Chin ethnicity have now crossed into Mizoram State from Myanmar.⁶² Although UNHCR is unable to access Mizoram directly, approximately 13,860 Chin Burmese have now travelled to New Delhi to seek refugee status from the UNHCR office there.⁶³ Of these, approximately 11,500 have now received mandate refugee status.⁶⁴ These, in turn, must be distinguished from the Burmese Rohingya, of whom UNHCR in New Delhi has now registered some 5,500 as asylum-seekers.⁶⁵ In 2012, Burmese Rohingya became eligible for Indian long-stay visas in India on the basis of their registration as asylum-seekers with UNHCR.⁶⁶ A further 1,430 asylum-seekers and 11,650 mandate refugees from a wide range of countries are registered with UNHCR in New Delhi, of which the largest numbers, after the Burmese Chin, are from Afghanistan and Somalia.⁶⁷

While reports of border closures, push-backs, and arbitrary removals from Indian territory are easy to find,⁶⁸ it is generally accepted that India has, on the whole, an admirable

⁵⁹ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: INDIA 30 (2013) [hereinafter 2012 INDIA HUMAN RIGHTS REPORT], available at <http://www.state.gov/documents/organization/204611.pdf>. A list of the main Tibetan settlements in India is maintained by the Central Tibetan Relief Committee. See *List of Tibetan Settlements in India*, CENT. TIBETAN ADMIN., <http://www.centaltibetanreliefcommittee.org/settlements/india/settlements-in-india.html> (last visited Feb. 17, 2015).

⁶⁰ Jayanta Kuma Ray & Kingshuck Chatterjee, *Immigrant Communities*, in HISTORY OF SCIENCE, PHILOSOPHY AND CULTURE IN INDIAN CIVILIZATION VOLUME X PART 6: ASPECTS OF INDIA'S INTERNATIONAL RELATIONS 1700 TO 2000: SOUTH ASIA AND THE WORLD 59, 88 (D.P. Chattopadhyaya & Jayanta Kumar Ray eds., 2007).

⁶¹ UNHCR INDIA FACT SHEET, *supra* note 55.

⁶² HUMAN RIGHTS WATCH, "WE ARE LIKE FORGOTTEN PEOPLE": THE CHIN PEOPLE OF BURMA: UNSAFE IN BURMA, UNPROTECTED IN INDIA 16–17 (2009), available at http://www.hrw.org/sites/default/files/reports/burma0109web_0.pdf.

⁶³ UNHCR INDIA FACT SHEET, *supra* note 55 (reaching the total of 13,860 by adding together the 2,349 Burmese asylum-seekers and 11,511 Burmese individuals recognized by the UNHCR as refugees). See also *Bleak Prospects for Chin Refugees in India*, IRIN (June 21, 2012), <http://www.irinnews.org/report/95699/myanmar-bleak-prospects-for-chin-refugees-in-india>.

⁶⁴ UNHCR INDIA FACT SHEET, *supra* note 55.

⁶⁵ M.A.R. Fareed, *Rohingya Exiles Struggle to Survive in India*, AL JAZEERA (Jan 6, 2014, 16:30 GMT), <http://www.aljazeera.com/indepth/features/2014/01/rohingya-exiles-struggle-survive-india-201416143243337187.html> ("According to the UN refugee agency there are about 5,500 Rohingya refugees and asylum-seekers from Myanmar registered in India spread across the states of Andhra Pradesh, Delhi, Jammu, Haryana, Rajasthan and Uttar Pradesh.").

⁶⁶ Murali Krishnan, *India Issues Visas to Myanmar's Rohingyas*, DEUTSCHE WELLE (May 21, 2012), <http://www.dw.de/india-issues-visas-to-myanmars-rohingyas/a-15965846>; *Stateless Burmese Rohingyas Lament India 'Hardships'*, BBC NEWS (May 17, 2012), <http://www.bbc.co.uk/news/18082296>.

⁶⁷ UNHCR INDIA FACT SHEET, *supra* note 55 (reaching the total of 1,430 asylum-seekers by adding together all Non-Burmese asylum-seekers—1,163 Afghani and 267 other/miscellaneous individuals—and reaching the total of 11,650 mandate refugees by adding together all Non-Burmese individuals recognized by the UNHCR as refugees—10,389 Afghani refugees, 728 Somali refugees, and 533 other/miscellaneous individuals).

⁶⁸ Suryatapa Bhattacharya, *Myanmar Refugees Exploited in India Given New Hope*, THE NATIONAL (June 21, 2012), <http://www.thenational.ae/news/world/south-asia/myanmar-refugees-exploited-in-india-given-new-hope> ("Ms Sawmte, 30, is, also from the Chin tribe of Myanmar, previously known as Burma. She came to India in 2007 to escape persecution. 'From time to time there is something that is called 'push back,' she said. 'The local government in those areas will come around, round up the refugees, put them in trucks and send them back to Burma.'"); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 288 n.54 (2005).

record with respect to the admission and protection of refugees.⁶⁹ Since 2012, India has begun to issue long-term visas to those recognised as mandate refugees, which should grant authorization to work and permit access to publicly-funded higher/tertiary education.⁷⁰ In the absence of a legally enforceable right to refugee status in the domestic law of the state, however, such provision can only ever amount to a “regime of charity.”⁷¹ In a modern administrative state only a “regime of rights . . . allows refugees to live and reconstruct their lives in dignity.”⁷² The Indian courts have, on occasion, made orders to prevent acts of refoulement.⁷³ However, as explained by former Chief Justice Verma, “most often these are ad hoc orders. And an ad hoc order certainly does not advance the law. It does not form part of the law, and it certainly does not make the area clear.”⁷⁴

3.1 Admission of Tamil Refugees

Of particular interest in the context of refugee admission are the Indian government’s long-standing policies with respect to protection of Tamil refugees from Sri Lanka.⁷⁵ Tamil refugees have fled to India continually (albeit in a series of marked waves following periods of deterioration in security conditions in Sri Lanka)⁷⁶ since the beginning of the Sri Lankan civil war in 1983.⁷⁷ It is notable that, in contradistinction to “evacuees” from East Pakistan/Bangladesh, Sri Lankan arrivals were registered as “refugees” by the Indian authorities and initially given access to public health and education services on an equal footing with Indian nationals.⁷⁸

The position of Tamil refugees in India changed dramatically following the 1991 assassination of Rajiv Gandhi in Sriperumbudur by Thenmozhi “Gayatri” Rajaratnam (தேன்மொழி "காயத்திரி" ராசரத்தினம்), a Tamil suicide bomber with strong links to

⁶⁹ B.S. Chimni, *Status of Refugees in India: Strategic Ambiguity*, in REFUGEES AND THE STATE, *supra* note 24, at 443, 447; Smriti Kak Ramachandran, *India’s Refugee Policy is an Example for the Rest of the World to Follow*, THE HINDU (Jan. 4, 2013, 1:39 IST), <http://www.thehindu.com/opinion/interview/indias-refugee-policy-is-an-example-for-the-rest-of-the-world-to-follow/article4269430.ece>.

⁷⁰ U.S. DEP’T OF STATE, *supra* note 34, at 32; *see* UNHCR INDIA FACT SHEET, *supra* note 55.

⁷¹ *See* Chimni, *supra* note 69, at 447, for the distinction between “regime of charity” and “regime of rights.”

⁷² *Id.*

⁷³ *See, e.g.*, *Bogyi v. Union of India*, Civil Rule No. 1847/89 (Gauhati High Ct. Nov. 17, 1989) (India); *Siddique v. Gov’t of India*,

MANU/DE/1165/1998 (Manupatra), [1998] 47 Del. R.J. 74 (Madras High Ct., 1998) (India); *Mohamadi v. Union of India*, Criminal Writ Petition No. 7504/1994 (Bombay High Ct., 1994) (India); REFUGEES AND THE LAW, *supra* note 38, at 111–13.

⁷⁴ J.S. Verma, *Inaugural Address*, in NHCR AND SAARCLAW SEMINAR REPORT: REFUGEES IN THE SAARC REGION: BUILDING A LEGAL FRAMEWORK 13–18 (1997), *quoted in* HATHAWAY, *supra* note 68, at 364.

⁷⁵ *See generally* NAVINE MURSHID, THE POLITICS OF REFUGEES IN SOUTH ASIA: IDENTITY, RESISTANCE, MANIPULATION 78–82 (2014).

⁷⁶ *Tamil Refugees Slowly Return from India*, IRIN (Jan. 11, 2012), <http://www.irinnews.org/report/94622/sri-lanka-tamil-refugees-slowly-return-from-india> (“There have been four major outflows of Sri Lankan refugees to India and other countries; the first in 1983, then between 1989 and 1992. The third outflow was between 1995 and 1999 and the last between 2006 and 2009.”).

⁷⁷ Deborah Winslow & Michael D. Woost, *Articulations of Economy and Ethnic Conflict in Sri Lanka*, in ECONOMY, CULTURE, AND CIVIL WAR IN SRI LANKA 1, 5 (Deborah Winslow & Michael D. Woost, eds., 2004).

⁷⁸ Paula Banerjee, *Dislocating Women and Making the Nation*, in THE FLEEING PEOPLE OF SOUTH ASIA: SELECTIONS FROM REFUGEE WATCH 320, 322 (Sibaji Pratim Basu ed., 2008); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2008: INDIA 31 (2009), *available at* <http://www.state.gov/j/drl/rls/hrrpt/2008/sca/119134.htm>.

the Liberation Tigers of Tamil Eelam (LTTE).⁷⁹ The Indian intelligence service had provided training and material assistance to the LTTE throughout the 1980s.⁸⁰ The deployment of the Indian Peace-Keeping Force (IPKF) to Sri Lanka in 1987 and their subsequent involvement in actions taken in suppression of the LTTE led to increasing hostility between the LTTE and the Indian government.⁸¹ By the time the IPKF was withdrawn in 1990, having failed to disarm either side to the conflict, the Indian intelligence service had lost whatever control they once had over the LTTE.⁸²

The assassination of Gandhi led to a rise in nationalist sentiment across India and an increase in discrimination against Tamils in the country.⁸³ This, combined with a wide-spread concern in the government with rising levels of Tamil militancy, led to a change in control and assistance policies with respect to Tamil refugees. Refugee camps were relocated, social and economic services significantly restricted, and special camps for suspected militants established.⁸⁴ While the national government did not act to finally prevent the admission of Tamil refugees,⁸⁵ in 1992 it introduced a policy of voluntary repatriation, which, in

⁷⁹ V.G. JULIE RAJAN, *WOMEN SUICIDE BOMBERS: NARRATIVES OF VIOLENCE* 84 (2011); Susan Howard, *The Spoiler and the Reconciler: Buddhism and the Peace Process in Sri Lanka*, in *BETWEEN TERROR AND TOLERANCE: RELIGIOUS LEADERS, CONFLICT, AND PEACEMAKING* 183, 186 (Timothy D. Sisk ed., 2011).

⁸⁰ ROHAN GUNARATNA, *INDIAN INTERVENTION IN SRI LANKA: THE ROLE OF INDIA'S INTELLIGENCE AGENCIES* 237 (1993).

⁸¹ HILAIRE MCCOUBREY & JUSTIN MORRIS, *REGIONAL PEACEKEEPING IN THE POST-COLD WAR ERA* 204–05 (2000); S.I. Keethaponcalan, *Trajectories of Security Sector Governance in Sri Lanka*, in *PEACEBUILDING AND SECURITY SECTOR GOVERNANCE IN ASIA* 125, 138 (Yuki Uesugi ed., 2014); Chris Smith, *South Asia's Enduring War*, in *CREATING PEACE IN SRI LANKA: CIVIL WAR AND RECONSTRUCTION* 17, 24–25 (Robert I. Rotberg ed., 1999);

P.A. GHOSH, *ETHNIC CONFLICT IN SRI LANKA AND ROLE OF INDIAN PEACE KEEPING FORCE (IPKF)* 96–97 (1999).

⁸² MURSHID, *supra* note 75, at 80.

⁸³ Bernard E. Weinraub, *Fear Grips Sri Lankans in South India*, N.Y. TIMES (May 31, 1991), <http://www.nytimes.com/1991/05/31/world/fear-grips-sri-lankans-in-south-india.html>; MURSHID, *supra* note 75, at 80.

⁸⁴ Demelza Jones, “*Our Kith and Kin*”? : *Sri Lankan Tamil Refugees and the Ethnonationalist Parties of Tamil Nadu*, 18 NATIONALISM & ETHNIC POL. 431, 441 (2012) (“Under the AIADMK administration restrictive measures were imposed to negate the perceived threat posed by the refugees and to encourage their repatriation: Child refugees’ access to education was rescinded, international NGOs were barred from accessing the refugee camps, high-security ‘special camps’ (de facto prisons where human rights abuses were allegedly rife) were introduced for those refugees suspected of militant involvement, and a large-scale repatriation program was initiated.”); HUMAN RIGHTS LAW NETWORK, *REPORT OF REFUGEE POPULATIONS IN INDIA 7* (2007), *available at* http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf (“Refugees living within the government camps are housed in warehouses or in temporary shelters and are subject to an evening curfew at 7 p.m. Each adult refugee receives a small monthly stipend. Though not officially permitted to work in India, the refugees worked as unskilled labour in the informal sector to supplement their incomes. The Indian Government provides basic medical care and education for school-age Sri Lankan children as well as subsidized food grain for the camps’ inhabitants. Despite these provisions, conditions in the camps are generally poor with insufficient health and sanitary facilities available for the refugee population.”); *Sri Lanka Refugees in India Reluctant to Return*, IRIN (Sept. 4, 2012), <http://www.irinnews.org/report/96233/sri-lanka-refugees-in-india-reluctant-to-return> (“According to aid workers, living conditions in the government-run refugee camps vary from poor to adequate. Some live in thatched huts, others in small cement block houses; water and sanitation are problematic in the more remote camps. Refugees apply for day release to access free health and education facilities, and informal jobs outside of the camps also allow refugees to supplement a monthly government grant of US \$38 per family (two adults and one child).”); MURSHID, *supra* note 75, at 80.

⁸⁵ There have been intermittent reports of Sri Lankan Tamils being pressured to return to Sri Lanka. See HATHAWAY, *supra* note 68, at 288; Chimni, *supra* note 22, at 384–85 (“[T]here was undeniably some pressure from the Indian government to return. Government dole was apparently stopped. An October 1987 statement of the Indian government ordered all Tamil refugees living outside the camps, about 95,000, to report immediately to the office of the District Collector. Those who failed to register by December 31, 1987 were be treated as

cooperation with UNHCR, ultimately resulted in the repatriation of some 31,062 refugees (from an overall caseload in 1991 of 54,199) to Sri Lanka.⁸⁶ This program was discontinued in 1995 following an upsurge in violence in Sri Lanka (the Third Eelam War), and a resulting increase in the number of Sri Lankans returning to India seeking protection.⁸⁷ For those that remain, their displacement in India has now been sufficiently protracted so as to produce a significant population of second- and third-generation Tamil refugees. It is commonly estimated that over half the refugees currently in the camps in Tamil Nadu were born in India.⁸⁸ This has led to calls by some Indian politicians for Sri Lankan refugees to be granted Indian citizenship.⁸⁹ The High Court of Madras has now issued notices to both state and central governments challenging the continuing denial of citizenship to Tamil refugees in India.⁹⁰

3.2 Admission of Tibetan Refugees

Indian policies for the admission and protection of Tibetans have proved remarkably similar to those adopted with respect to Sri Lankan Tamils. It is not immediately obvious, in the absence of domestic legislation regulating the terms of refugee status in India, why this might be the case. There are no clear ethnic affinities between Tibetans and Indians akin to those shared between Tamils in Sri Lanka and Southern India. Nor did India have strategic commitments in Tibet like those pursued by the Indian government in Sri Lanka throughout the 1980s.

The border between India and China remains disputed.⁹¹ China claims more than 90,000 square kilometres of Arunachal Pradesh, while India claims approximately 38,000 square kilometres of the Aksai Chin plateau.⁹² The disputed territories all lie on the border between India and China/Tibet, and it is plain that India has keen strategic interests in this

illegal aliens and proceeded against in accordance with the terms of the Registration of Foreigners Act, whose penalties included deportation.”).

⁸⁶ Sarbani Sen, *Paradoxes of the International Regime of Care: the Role of UNHCR in India*, in REFUGEES AND THE STATE, *supra* note 24, at 396, 423.

⁸⁷ *Id.* (“Between 1992 and 1995, out of a total of 54,199 refugees, a total of 31,062 refugees returned to Sri Lanka with the assistance of the Indian Government, after the UNHCR had verified the voluntary character of the repatriation. The repatriation operation was suspended in September 1995 due to the escalation of the conflict in northern Sri Lanka, which triggered a reverse flow of refugees into India in search of safety and security.”); SUMITA DAS, REFUGEE MANAGEMENT: SRI LANKAN REFUGEES IN TAMIL NADU, 1983-2000, at 50 (2005).

⁸⁸ *Sri Lanka Refugees in India Reluctant to Return*, IRIN (Sept. 4, 2012), <http://www.irinnews.org/report/96233/sri-lanka-refugees-in-india-reluctant-to-return>.

⁸⁹ Samanth Subramanian, *Sri Lankan Tamil Refugees 'Should be Given Indian Citizenship'*, THE NATIONAL (May 30, 2013), <http://www.thenational.ae/news/world/south-asia/sri-lankan-tamil-refugees-should-be-given-indian-citizenship>.

⁹⁰ A. Subramani, *PIL Demanding Indian Citizenship for Sri Lankan Refugees*, TIMES OF INDIA (Oct. 9, 2013, 7:27 PM IST), <http://timesofindia.indiatimes.com/india/PIL-demanding-Indian-citizenship-for-Sri-Lankan-refugees/articleshow/23825282.cms>.

⁹¹ Gardiner Harris & Edward Wong, *Where China Meets India in a High-Altitude Desert, Push Comes to Shove*, N.Y. TIMES (May 2, 2013), <http://www.nytimes.com/2013/05/03/world/asia/where-china-meets-india-push-comes-to-shove.html>.

⁹² Krishna N. Das & Adam Jourdan, *China, India Spar over Disputed Border*, REUTERS (Nov. 30, 2013, 8:27 AM EST), <http://www.reuters.com/article/2013/11/30/us-india-china-border-idUSBRE9AT06A20131130> (“China lays claim to more than 90,000 sq km (35,000 sq miles) disputed by New Delhi in the eastern sector of the Himalayas, while India says China occupies 38,000 square km of its territory on the Aksai Chin plateau in the west.”).

area.⁹³ However, it is difficult to see how India's continuing support for Tibetan exiles serves to facilitate its own territorial claims. In fact, India's decision to grant asylum to the Dalai Lama in 1959 significantly increased tensions between India and China, and almost certainly contributed to the causes of the 1962 Sino-Indian War.⁹⁴ The long-standing presence of the Tibetan government-in-exile, the Central Tibetan Administration (CTA), in India is a continuing source of acrimony between the two states and presents a clear challenge to the maintenance of good relations with China.⁹⁵

This apparently quite generous position vis-à-vis Tibetan refugees is particularly intriguing given what has, in the past, been quite pragmatic and even hard-nosed language adopted by the Indian leadership in respect of this issue. Immediately after the 1959 Tibetan uprising, then-Prime Minister Jawaharlal Nehru stated that India's policy with regards to the admission and protection of Tibetans would be governed by three factors: the preservation of the security of India, India's wish to maintain good relations with China, and its sympathy for the people of Tibet.⁹⁶ Nevertheless, and despite the obvious challenge the presence of Tibetan refugees in India presents to relations with China, at no time has India acted to expel Tibetan refugees or to close their borders to new arrivals from Tibet.⁹⁷

Like Sri Lankan Tamils, the Indian government considers Tibetans in settlements and refugee camps throughout the country to be refugees.⁹⁸ The Indian government previously issued entering Tibetans with a Registration Certificate (RC).⁹⁹ This is a legal document issued pursuant to the Registration of Foreigners Act 1939¹⁰⁰ and SRO (Statutory Rules and Orders) 1108 of 1950 "Regulating Entry of Tibetan Nationals into India."¹⁰¹ While not explicit in the terms of the order or on the face of the document itself, in practice, the RC serves as a de facto residence permit. It entitles Tibetan refugees to rights similar to those of an Indian national, save for the right to vote or obtain employment in Indian government offices.¹⁰² This includes the right to work, to start businesses, and to travel abroad and return to India.¹⁰³

⁹³ Vijay Kapur, *India's Himalayan Frontier: Strategic Challenges and Opportunities in the Twenty-First Century*, in HIMALAYAN FRONTIERS OF INDIA: HISTORICAL, GEO-POLITICAL AND STRATEGIC PERSPECTIVES 46, 51–54 (K. Warikoo ed., 2009); M.L. SALI, INDIA-CHINA BORDER DISPUTE: A CASE STUDY OF THE EASTERN SECTOR 60–62 (1998); Roberts Stewart-Ingersoll & Derrick V. Frazier, *Geopolitics for India*, in HANDBOOK OF INDIA'S INTERNATIONAL RELATIONS 35, 38 (David Scott ed., 2011).

⁹⁴ V. N. KHANNA, FOREIGN POLICY OF INDIA 332 (6th ed. 2007); AMARDEEP ATHWAL, CHINA-INDIA RELATIONS: CONTEMPORARY DYNAMICS 21–22 (2008).

⁹⁵ Gyaneshwar Chaturvedi, *Indian Visions*, in EXILE AS CHALLENGE: THE TIBETAN DIASPORA 75, 85 (Dagmar Bernstorff & Hubertus von Welck eds., 2004); REETIKA SHARMA RAMVIR GORIA & VIVEK MISHRA, INDIA AND THE DYNAMICS OF WORLD POLITICS 1.130 (2011).

⁹⁶ Dawa Norbu, *The Settlements: Participation and Integration*, in EXILE AS CHALLENGE: THE TIBETAN DIASPORA, *supra* note 95, at 175, 192.

⁹⁷ Chimni, *supra* note 22, at 381 ("Even though India did not support the independence or autonomy of Tibet, and the continued presence of the Dalai Lama and his followers has always been a thorn in the side of Indian-Chinese relations, it has scrupulously respected the principle of *non-refoulement*.").

⁹⁸ Sam Blay, *Regional Developments: Asia*, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 145, 176 (Andreas Zimmerman ed., 2011).

⁹⁹ See Regulating Entry of Tibetan Nationals into India, 1950, S.R.O. 1108, Gazette of India, pt. II, sec. 3, at 1110 (Dec 26, 1950) [hereinafter S.R.O. 1108], for the text of the Registration Certificate. See JULIA HESS, IMMIGRANT AMBASSADORS: CITIZENSHIP AND BELONGING IN THE TIBETAN DIASPORA 87 (2009) for sample photos of a registration certificate that has been issued.

¹⁰⁰ See Registration of Foreigners Act, Act No. 16 of 1939, art. 3, INDIA CODE (2014), available at <http://indiacode.nic.in>; Foreigners Act, *supra* note 3, art 3.

¹⁰¹ See S.R.O. 1108, *supra* note 99; REFUGEES AND THE LAW, *supra* note 38, at 59.

¹⁰² 'Responses to Information Requests ZZZ103171.E: China/India: Residency rights of Tibetans residing in India; requirements for Tibetans to obtain and retain permanent residence in India, IMMIGR. & REFUGEE

As of 1994, however, certificates are no longer being issued to so-called newcomers, that is, those Tibetans who entered after 1979 when the border between India and China became rather more open following the end of the Cultural Revolution.¹⁰⁴ The government appears to make an exception for children born in India to Tibetans who entered prior to 1979, to whom it continues to issue RCs.¹⁰⁵ Although Sino-Indian relations improved considerably after 1976, when diplomatic relations were resumed between the two countries,¹⁰⁶ access to the RCs does not seem to have been restricted at the behest of the Chinese government. This is, rather, the result of an informal agreement between the Indian authorities and the Tibetan CTA to encourage newly-arrived Tibetans to return to Tibet. This serves to preserve the demographic basis for an autonomous Tibet¹⁰⁷ while gradually reducing those Tibetans officially registered in India as refugees, thereby minimizing an important and continuing source of tension with China.¹⁰⁸ There is, in this respect, a convenient overlap between the interests of the Indian government and the CTA with regard to the management of newly-arrived Tibetans.

As with the Sri Lankan Tamil population, there have been increasing calls for Tibetans long resident in India to be granted citizenship.¹⁰⁹ This campaign culminated in the 2010 judgment of the Delhi High Court in *Namgyal Dolkar v. Ministry of External Affairs*.¹¹⁰ This case concerned an appeal by Ms. Namgyal Dolkar Lhagyari, an ethnic Tibetan born in India in 1986, against a decision of the Indian Ministry of External Affairs to deny her application for an Indian passport on the grounds that she was not a citizen of India.¹¹¹ In their judgment, the High Court confirmed that the entitlement to citizenship *jus soli* pursuant to Section 3(1)(a) of the 1955 Citizenship Act¹¹² extended to individuals of Tibetan extraction. The court quashed the earlier administrative order rejecting Ms. Lhagyari's application for an Indian passport and confirmed her Indian citizenship by declaration.¹¹³ The court was plain in its judgment that its interpretation of Section 3(1)(a) did not displace the policy decision of the Ministry of Home Affairs not to grant citizenship by naturalization

BOARD CAN. (July 7, 2009), <http://irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=452443> [hereinafter *Residency Rights of Tibetans*].

¹⁰³ Chimni, *supra* note 22, at 393; J.N. Saxena, *The Legal Status of Refugees: Indian Position*, 26 INDIAN J. INT'L L. 501, 504 (1986).

¹⁰⁴ TIBET JUSTICE CTR., TIBET'S STATELESS NATIONALS II: TIBETAN REFUGEES IN INDIA 44–45 (2011), available at <http://www.tibetjustice.org/reports/stateless-nationals-ii/stateless-nationals-ii.pdf> (“India first issued RCs en masse in 1959, following the Lhasa Uprising, to the thousands of Tibetans who followed the Dalai Lama into exile. This policy continued until 1979, when India ceased issuing RCs to new arrivals—in theory, because India no longer considered these Tibetans to be ‘refugees’ even in the colloquial sense.”); HESS, *supra* note 99, at 86.

¹⁰⁵ *Residency Rights of Tibetans*, *supra* note 102.

¹⁰⁶ N. JAYAPALAN, FOREIGN POLICY OF INDIA 218 (2000).

¹⁰⁷ HESS, *supra* note 99, at 86.

¹⁰⁸ HESS, *supra* note 99, at 88.

¹⁰⁹ Alkesh Sharma, *Tibetans want Indian Citizenship, Voting Rights*, TIMES OF INDIA (Sept. 28, 2012), <http://timesofindia.indiatimes.com/india/Tibetans-want-Indian-citizenship-voting-rights/articleshow/16583618.cms>.

¹¹⁰ *See Dolkar v. Ministry of External Affairs*, Civil Writ Petition No. 12179/2009 (Delhi High Ct. Dec. 22, 2010) (India) [hereinafter *Dolkar Writ Petition*].

¹¹¹ *Id.* para. 1.

¹¹² Citizenship Act, *supra* note 9, sec. 3(1)(a) (“Citizenship by birth: (1) Except as provided in sub-section (2), every person born in India (a) on or after the 26th day of January 1950, but before the 1st day of July, 1987; shall be a citizen of India by birth.”).

¹¹³ *Dolkar Writ Petition*, *supra* note 110, para. 32.

pursuant to Section 6(1) of the same Act to Tibetans who entered India after March 1959.¹¹⁴ More recently, the government appears to have endorsed a right of naturalization for all Tibetans in India.¹¹⁵

3.3 Multiple Classes and Qualities of Protection

The resulting picture of refugee admission and protection practices in India is complex, inconsistent, and, at times, a rather confusing one. In the absence of a settled domestic regime for protecting refugees or determining their status, the standards of protection for displaced persons entering India vary wildly depending on their country of origin, their place of entry and settlement in India, and their date of arrival in the country. Asylum-seekers from Afghanistan, Somalia and Myanmar (both Chin and Rohingya) rely almost solely on UNHCR for both legal status and material assistance.¹¹⁶ Those that wish to seek the assistance of UNHCR must specifically travel to New Delhi in order to contact the office there, as the state continues to prevent the agency from operating in most parts of the country outside of the capital. In contrast, both Sri Lankan Tamils and Tibetans have long been considered refugees by the Indian state.¹¹⁷ However, the available protection regime will vary considerably even among these comparatively privileged populations.

A few examples will suffice to make the more general point. Tibetans arriving prior to 1962 were given access to land by the Indian government, typically by way of a long renewable lease, in order to establish agricultural settlements.¹¹⁸ Tibetans arriving prior to 1979 and their children received a government Registration Certificate.¹¹⁹ Possession of this certificate entitles these families to social assistance, including access to medical and educational facilities, on an equal basis with Indian nationals.¹²⁰ While the recent case of *Namgyal Dolkar v. Ministry of External Affairs*,¹²¹ discussed in section 3.2 above, establishes the right of ethnic Tibetans born in India to Indian citizenship, by operation of Section 3(1)(a) of the 1955 Citizenship Act¹²² this is restricted to those born between 1950 and 1987.¹²³

Taking only the example of the protection regime for Tibetans in India, it is evident that there are numerous and quite varied classes of protection available within only this one refugee population. In this case, the key criterion for determining the standard of protection

¹¹⁴ *Id.* para. 29.

¹¹⁵ *India-Born Tibetans Can Apply for Citizenship Says Law and Justice Minister*, VOICE AM. (Feb. 17, 2014), <http://www.voatibetanenglish.com/content/india-born-tibetans-can-apply-for-citizenship-says-law-and-justice-minister/1852853.html> (“The Union Law and Justice Minister, Mr. Kapil Sibal, who also hold telecommunication ministry declared that India-born Tibetans can apply for Indian citizenship at a religious gathering held at Ladakh Boudh Vihar on February 16, 2014. ‘The government of India have given you not just the right to vote but the right to citizenship. And therefore now you can register yourself as citizens of this country and get all the schemes that are operating for every other citizen of this country,’ said Kapil Sibal after the end of the religious discourse given by Gyalwang Drukpa Rinpoche.”).

¹¹⁶ See generally HUMAN RIGHTS LAW NETWORK, *supra* note 84.

¹¹⁷ See *supra* Parts 3.1, 3.2.

¹¹⁸ TUNGA TARODI, INST. FOR SOC. & ECON. CHANGE, TIBETANS IN BYLAKUPPE: POLITICAL AND LEGAL STATUS AND SETTLEMENT EXPERIENCES 7 (2011); HESS, *supra* note 99, at 38.

¹¹⁹ TIBET JUSTICE CTR., *supra* note 104, at 44–45; HESS, *supra* note 99, at 86.

¹²⁰ See *Residency Rights of Tibetans*, *supra* note 102; Chimni, *supra* note 22, at 393; Saxena, *supra* note 103, at 504; see also *supra* text accompanying notes 102–103.

¹²¹ Dolkar Writ Petition, *supra* note 110.

¹²² Citizenship Act, *supra* note 9, sec. 3(1)(a) (“Citizenship by birth: (1) Except as provided in sub-section (2), every person born in India (a) on or after the 26th day of January 1950, but before the 1st day of July, 1987; shall be a citizen of India by birth.”).

¹²³ Citizenship Act, *supra* note 9, sec. 3(1)(a).

available, in addition to country of origin, is chronology. The entitlements associated with refugee status for Tibetans diminish sharply the later in time one has arrived in the country. Refugees arriving prior to 1962 were given access to land, social provision on an equal footing with Indian nationals, and the right for their children born in the country to obtain Indian citizenship.¹²⁴ Those arriving after 1962 but before 1979 received equal access to social provision and the right for their children (if born prior to 1987) to obtain citizenship.¹²⁵ Those arriving after 1979 receive only a right for their children (if born prior to 1987) to obtain citizenship, while those arriving after 1987 receive only their bare refugee status and minimal social support.¹²⁶

4. The Relevance of International Human Rights Law

This inconsistency is the result of a domestic refugee policy that is based neither on equality of treatment nor legal principle, but on the shifting exigencies of domestic political opinion and foreign policy.¹²⁷ The result is a sometimes generous but ultimately inconsistent and discriminatory policy that trims refugee policy according to the political interests of the Indian government, rather than the most urgent protection needs of asylum-seekers and refugees. This is not to say, however, that India has untrammelled discretion with respect to their admission and protection policies. While India has not yet acceded to the 1951 Geneva Convention, it has entered into a series of international agreements, which I will argue now very significantly constrains its discretion with respect to the admission and treatment of foreign nationals. Chief amongst these is the complex of instruments that now form the corpus of international human rights law. India has now signed or ratified the International Covenant on Civil and Political Rights (ICCPR),¹²⁸ the International Covenant on Economic Social and Cultural Rights (ICESCR),¹²⁹ the Convention on the Rights of the Child (CRC),¹³⁰ and the Convention against Torture (CAT).¹³¹ Each of these treaties, properly constructed,

¹²⁴ See TARODI, *supra* note 118, at 7; HESS, *supra* note 99, at 38; *Residency Rights of Tibetans*, *supra* note 102; Chimni, *supra* note 22, at 393; Saxena, *supra* note 103, at 504; Citizenship Act, *supra* note 9, sec. 3(1)(a).

¹²⁵ See *Residency Rights of Tibetans*, *supra* note 102; Chimni, *supra* note 22, at 393; Saxena, *supra* note 103, at 504; Citizenship Act, *supra* note 9, sec. 3(1)(a).

¹²⁶ TARODI, *supra* note 118, at 6 (citations omitted) (“Those refugees who came to India during the 1980s were issued RCs, but the Tibetans who came after 1987 have not been issued RCs by the Indian government. Different reasons have been attributed, such as withdrawal of UNHCR assistance in the 1970s, increasing burden of the refugees and improvement in Indo-China relations. Whatever the reasons, the fact is that for those refugees who have come after the 1980s, no financial assistance is provided by the Government of India and only a few have been issued RCs. This practise of the Indian government only highlights the discrepancies in the treatment of refugees arriving at different periods.”); Citizenship Act, *supra* note 9, sec. 3(1)(a).

¹²⁷ H. Knox Thames, *India’s Failure to Adequately Protect Refugees*, HUM. RTS. BRIEF, Fall 1999, at 20, 21 (“India bases its treatment of various refugee groups on political grounds, resulting in an unstable and ever changing domestic policy. India grants privileges to certain refugee groups based on bilateral and multilateral political relations with other states, as well as domestic political opinion.”).

¹²⁸ See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 17, 2015).

¹²⁹ See *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Feb. 17, 2015).

¹³⁰ See *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Feb. 17, 2015).

¹³¹ See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Feb. 17, 2015).

contains important protections for the rights of asylum-seekers and refugees, and, in particular, the right of non-refoulement.¹³²

Unlike the 1951 Convention itself, these treaties are principally concerned with the rights of individuals who continue to reside in their country of citizenship.¹³³ As such, they do not explicitly address concerns particular to refugees and asylum-seekers, such as access to accelerated naturalization procedures and the need for travel and identity documents.¹³⁴ It is plain, however, that the rights they contain are not restricted to state party nationals. Each convention contains an express guarantee of non-discrimination that requires states parties to ensure the rights they contain to "all individuals within its territory and subject to its jurisdiction . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹³⁵ The Human Rights Committee has confirmed that, "the general rule is that each one of the rights of the [the ICCPR] must be guaranteed without discrimination between citizens and aliens."¹³⁶ It is now well established that this guarantee includes refugees and asylum-seekers. As explained by the Human Rights Committee in their General Comment 31:

The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.¹³⁷

It is important to appreciate, however, that non-discrimination guarantees of this type are only relevant to the rights contained in the same treaties. They do not guarantee non-discrimination in respect of benefits or entitlements outside these specific treaty regimes. The principle of non-discrimination is somewhat enhanced by the rather more general right of equal protection found in Article 26 of the ICCPR. This right guarantees that, "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law,"¹³⁸ and, to this end, it obliges states to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property,

¹³² Richard Plender & Nuala Mole, *Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 81, 81–86 (Frances Nicholson & Patrick Twomey eds., 1999).

¹³³ HATHAWAY, *supra* note 68, at 121.

¹³⁴ *Id.*

¹³⁵ International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13; African (Banjul) Charter on Human and Peoples' Rights art. 2, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 222 [hereinafter ECHR].

¹³⁶ U.N. Secretariat, *General Comment 15: Twenty-seventh session, 1986: The position of aliens under the Covenant*, in Compilation Of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies, at 18, para. 2, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) [hereinafter Compilation Of General Comments 1994].

¹³⁷ U.N. Human Rights Comm., General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter General Comment 31].

¹³⁸ ICCPR, *supra* note 135, art. 26.

birth or other status.”¹³⁹ This guarantee is not limited to the rights contained in the ICCPR, but operates to “prohibit discrimination in law or in fact in any field regulated and protected by public authorities.”¹⁴⁰

It would be a mistake, however, to interpret the Article 26 right as a simple guarantee of equal protection or, indeed, substantive equality. It is a rather more specific entitlement to equal interpretation and application of the laws. It is, in effect, a guarantee of non-arbitrariness.¹⁴¹ The test applied by the Human Rights Committee is not simply equal treatment, but whether any differential treatment by the state is “reasonable and objective” in the circumstances. As the Committee explained in *Broeks v. Netherlands*, “[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26.”¹⁴² As such, the test is closely related to the so-called rational basis or ordinary scrutiny test used by the US Supreme Court when applying the equal protection clause of the Fourteenth Amendment¹⁴³ to non-suspect classifications.¹⁴⁴

While the degree to which the Committee will permit classifications on the basis of citizenship remains unclear,¹⁴⁵ in practice, the application of this standard has been highly deferential.¹⁴⁶ In the view of Hathaway, “the Committee has too frequently been prepared to recognize differentiation on the basis of certain categories, including non-citizenship, as

¹³⁹ *Id.*

¹⁴⁰ U.N. Secretariat, *General Comment 18: Non-discrimination (Thirty-seventh session, 1989)*, in *Compilation Of General Comments 1994*, *supra* note 136, at 26, para. 12. U.N. Human Rights Comm., Commc’n No. 677/1996 *Teesdale v. Trinidad & Tobago*, para. 9.8, U.N. Doc. CCPR/C/74/D/677/1996 (Apr. 15, 2002) (“The Committee recalls its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities.”); U.N. Human Rights Comm., Commc’n No. 484/1991 *Pepels v. Netherlands*, para. 7.2, U.N. Doc. CCPR/C/51/D/484/1991 (July 19, 1994); U.N. Human Rights Comm., Commc’n No. 454/1991 *Pons v. Spain*, para. 9.3, U.N. Doc. CCPR/C/55/D/454/1991 (Dec. 29, 1990).

¹⁴¹ WALTER KÄLIN & JÖRG KÜNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 346 (2009).

¹⁴² U.N. Human Rights Comm., Commc’n No. 172/1984 *Broeks v. Netherlands*, para. 13, U.N. Doc. CCPR/C/29/D/172/1984 (Apr. 9, 1987) [hereinafter *Broeks v. Netherlands*]. *See also* U.N. Human Rights Comm., Commc’n No. 658/1995 *van Oord v. Netherlands*, para. 8.5, U.N. Doc. CCPR/C/60/D/658/1995 (Aug. 14, 1997) [hereinafter *van Oord v. Netherlands*]; U.N. Human Rights Comm., Commc’n No. 666/1995 *Foin v. France*, para. 10.3, U.N. Doc. CCPR/C/67/D/666/1995 (Nov. 9, 1999); U.N. Human Rights Comm., Commc’n No. 694/1996 *Waldman v. Canada*, para. 10.4, U.N. Doc. CCPR/C/67/D/694/1996 (Nov. 5, 1999) [hereinafter *Waldman v. Canada*]; U.N. Human Rights Comm., Commc’n No. 854/1999 *Wackenheim v. France*, para. 7.4, U.N. Doc. CCPR/C/67/D/854/1999 (July 26, 2002).

¹⁴³ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁴⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”); OTIS STEPHENS, JR. & JOHN SCHEB II, *AMERICAN CONSTITUTIONAL LAW: CIVIL RIGHTS AND LIBERTIES* 483 (5th ed. 2012) (“Under this deferential approach, the burden is on the party challenging the statute to show that (1) the purpose of the challenged discrimination is an illegitimate state objective and (2) the means employed by the state are not rationally related to the achievement of its objective.”).

¹⁴⁵ HATHAWAY, *supra* note 68, at 131.

¹⁴⁶ *Id.* at 129.

presumptively reasonable.”¹⁴⁷ Indeed, it seems that the treaty drafters expressly anticipated at least some degree of differentiation on the basis of citizenship. While the drafting committee rejected an early proposal to restrict the operation of Article 26 to citizens,¹⁴⁸ their agreement on this point seems to have been premised on the assumption that discrimination between citizens and aliens would sometimes be justified.¹⁴⁹

4.1 Article 5 and Inclusive Effect

Even if India were eventually to accede to the 1951 Convention, it would be quite wrong to regard the normative regimes established by the 1951 Convention and the wide range of instruments that now comprise international human rights law as exclusive to one another. Article 5 of that Convention expressly preserves the effect of other “rights and benefits granted by a Contracting State to refugees apart from this Convention.”¹⁵⁰ Its effect, in short, is to keep the 1951 Convention regime as a body of minimum rights.¹⁵¹ Nothing in it should be read to take away or derogate from any further or better rights that may accrue to the refugee under alternative regimes, regardless of whether these are international or domestic in origin.¹⁵²

The travaux préparatoires of the 1951 Convention indicate that Article 5 was included to preserve the more generous practices that had been voluntarily adopted by some states prior to the settlement of the Convention itself.¹⁵³ There is nothing to indicate that the drafters had anticipated the degree to which such rights would develop under the operation of modern international human rights law.¹⁵⁴ However, the 1951 Convention was only the second human rights treaty to be adopted by the United Nations,¹⁵⁵ and it would be anachronistic to expect that its provisions explicitly anticipated the development of the law in this area. It would be equally misguided to restrict the operation of this Article only to those rights and benefits that accrued prior to 1951. The ordinary meaning of this Article is to preserve all “rights and benefits granted by a Contracting State,” and this certainly includes those rights relevant to refugees and asylum-seekers at contemporary international law.¹⁵⁶ This is

¹⁴⁷ *Id.* at 129–30.

¹⁴⁸ U.N. GAOR, 16th Sess., 1102d mtg. at 207, para. 48, U.N. Doc. A/C.3/SR.1102 (Nov. 13, 1961).

¹⁴⁹ See U.N. GAOR, 16th Sess., 1098th mtg. at 189, paras. 10, 55, U.N. Doc. A/C.3/SR.1098 (Nov. 9, 1961); U.N. GAOR, 16th Sess., 1099th mtg. at 193, paras. 18, 26, 31, U.N. Doc. A/C.3/SR.1099 (Nov. 10, 1961); U.N. GAOR, 16th Sess., 1100th mtg. at 197, para. 10, U.N. Doc. A/C.3/SR.1100 (Nov. 10, 1961); U.N. GAOR, 16th Sess., 1101st mtg. at 201, paras. 40, 43, 53, U.N. Doc. A/C.3/SR.1101 (Nov. 13, 1961); U.N. GAOR, 16th Sess., 1102d mtg. at 207, paras. 17, 24, 27, 29, 51, U.N. Doc. A/C.3/SR.1102 (Nov. 13, 1961).

¹⁵⁰ Refugee Convention, *supra* note 6, art. 5 (“Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”).

¹⁵¹ NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION 19 (1955).

¹⁵² Achilles Skordas, *Article 5 1951 Convention*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 669, 673 (Andreas Zimmerman ed., 2011).

¹⁵³ PAUL WEIS, *THE REFUGEE CONVENTION 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS* 37 (1995); Alice Edwards, *International Refugee Law*, in *INTERNATIONAL HUMAN RIGHTS LAW* 513, 523 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2d ed. 2014).

¹⁵⁴ HATHAWAY, *supra* note 68, at 110; Skordas, *supra* note 152, at 676.

¹⁵⁵ HATHAWAY, *supra* note 68, at 119. The 1951 Convention was preceded by the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. *Id.* at 119 n.183.

¹⁵⁶ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). Article 31 of the VCLT is generally accepted as being declaratory of customary international law. See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in *REFUGEE PROTECTION IN INTERNATIONAL*

particularly true in light of the object and purpose of the treaty, which, as explained in its preambulatory clause, is “to assure refugees the widest possible exercise of these fundamental rights and freedoms.”¹⁵⁷

4.2 Key Exceptions to Human Rights Protection for Aliens

There are, of course, some clear exceptions to the protection of aliens under international human rights law. The operation of Article 25 of the ICCPR, which guarantees the right to take part in the conduct of public affairs, to vote and run for election, and to enter the public service, is expressly restricted to citizens only.¹⁵⁸ Rather more seriously, in time of public emergency states parties are empowered by Article 4 of the ICCPR to withdraw all but the most fundamental rights from aliens within its jurisdiction.¹⁵⁹ The Article itself states that such measures must not “involve discrimination.”¹⁶⁰ However, the ground of national origin, which appears in the general Article 2 guarantee against non-discrimination, is omitted from the list of grounds relevant to the operation of Article 4 emergency derogations.¹⁶¹

The exception with perhaps the greatest significance for the Indian state is found in Article 2(3) of the ICESCR. The ICESCR contains a general guarantee of non-discrimination in terms that are virtually identical to those found in Article 2 of the ICCPR.¹⁶² However, Article 2(3) contains an express exception to this for developing countries who may “determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”¹⁶³ There is no one definition of the term “developing

LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 103 ¶ 40 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) [hereinafter REFUGEE PROTECTION IN INTERNATIONAL LAW]; Edwards, *supra* note 153, at 523.

¹⁵⁷ Refugee Convention, *supra* note 6, pmb1.

¹⁵⁸ ICCPR, *supra* note 135, art. 25 (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”).

¹⁵⁹ *Id.* art. 4 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision; 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”).

¹⁶⁰ *Id.*

¹⁶¹ U.N. Special Rapporteur on the Rights of Non-Citizens, *Preliminary report on Prevention Of Discrimination And Protection of Indigenous Peoples and Minorities*, Comm’n on Human Rights, para. 37, U.N. Doc. E/CN.4/Sub.2/2001/20 (June 6, 2001) (by David Weissbrodt) (“This omission, according to the travaux préparatoires, was intentional because the drafters of the Covenant understood that States may, in time of national emergency, have to discriminate against non-citizens within their territory.”).

¹⁶² ICESCR, *supra* note 135, art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁶³ ICESCR, *supra* note 135, art. 2(3); see HATHAWAY, *supra* note 68, at 122.

country,¹⁶⁴ and the term itself has come under significant criticism in recent years.¹⁶⁵ The World Bank, however, continues to classify India as a developing country with a “lower middle income economy,”¹⁶⁶ and India continues to be classified as a developing country by most states with “high income economies” for the purposes of international aid.¹⁶⁷ As such, it is reasonably plain that this exception will continue to be relevant to India for at least the immediate future.

5. The Expanding Breadth of Non-Refoulement

The practical effect of the human rights treaty regimes to which India is a signatory or party will, to a large extent, depend on the precise contours of the various domestic protection regimes as they already apply in India, and the manner in which norms at the international and domestic level interact on a case-by-case basis. Of fundamental importance, however, to all persons displaced to India is the basic principle of non-refoulement.¹⁶⁸ The centrality of this principle for the protection of refugees and asylum-seekers has been repeatedly affirmed by the UNHCR ExCom,¹⁶⁹ the UN General Assembly,¹⁷⁰ the most learned writers in this field,¹⁷¹ and, recently, all states parties to the 1951 Geneva Convention and its 1967

¹⁶⁴ Kevin Kennedy, *Special and Differential treatment of Developing Countries*, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, VOLUME 1, 1523, 1526 (Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer, eds., 2005) (“Although no formal definition of the term ‘developing country’ has ever been adopted by the GATT Contracting Parties or the WTO Members, GATT Article XVIII:1 contains a rough definition of a developing country as one whose economy ‘can only support low standards of living and [is] in the early stages of development.’ The WTO divides its membership into three groups: developing countries, developing countries, and least developed countries. The difference between a developed country and a developing country traditionally has been a matter of self-selection.”); ELENA FIERRO, EU’S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE 255 (2003) (“[T]here are no clear definitions in Community law as what constitutes a developed or a developing country . . .”).

¹⁶⁵ See, e.g., ROBERT BEAGLEHOLE & RUTH BONITA, PUBLIC HEALTH AT THE CROSSROADS: ACHIEVEMENTS AND PROSPECTS 6 (2d ed. 2004); JONATHAN E. SANFORD & ANJULA SANDHU, DEVELOPING COUNTRIES: DEFINITIONS, CONCEPTS AND COMPARISONS 8–10 (2003).

¹⁶⁶ The World Bank maintains a list of Country and Lending Groups organized by region and classification. See *Country and Lending Groups*, WORLD BANK, <http://data.worldbank.org/about/country-classifications/country-and-lending-groups> (last visited Feb. 17, 2015).

¹⁶⁷ See, e.g., *List of Developing Countries as Declared by the Minister for Foreign Affairs*, AUSTL. GOV’T DEP’T FOREIGN AFF. & TRADE, <http://dfat.gov.au/about-us/publications/Pages/list-of-developing-countries-as-declared-by-the-minister-for-foreign-affairs.aspx> (last updated Feb. 17, 2015).

¹⁶⁸ For a detailed discussion of this principle in the context of both the 1951 Refugee Convention and at general human rights law, see GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 201–354 (3d ed. 2007); HATHAWAY, *supra* note 68, at 278–369.

¹⁶⁹ See, e.g., No. 17 (XXXI) Problems Of Extradition Affecting Refugees (1980), in CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES: 1975-2009 (CONCLUSION NO. 1-109) at 22, para. (b) (United Nations High Comm’r for Refugees, ed., 2009) [hereinafter EXCOM CONCLUSIONS], available at <http://www.refworld.org/pdfid/4b28bf1f2.pdf>; No. 65 (XLII) General (1991), in EXCOM CONCLUSIONS, *supra*, at 87, para. (c); No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, *supra*, at 115, para. (j); No. 42 (XXXVII) Accession to International Instruments and their Implementation (1986), in EXCOM CONCLUSIONS, *supra*, at 55, para. (c).

¹⁷⁰ See, e.g., G.A. Res. 48/116, para. 3, U.N. Doc. A/RES/48/116 (Mar. 24, 1994); G.A. Res. 49/169, para. 4, U.N. Doc. A/RES/49/169 (Feb. 24, 1995); G.A. Res. 50/152, para. 3, U.N. Doc. A/RES/50/152 (Feb. 9, 1996); G.A. Res. 51/75, para. 3, U.N. Doc. A/RES/51/75 (Feb. 12, 1997).

¹⁷¹ Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, in HUMAN RIGHTS AND IMMIGRATION 29 (Ruth Rubio-Marín ed., 2014); Lauterpacht & Bethlehem, *supra* note 156, paras. 51–53; HATHAWAY, *supra* note 68, at 279.

Protocol.¹⁷² Before any other rights can become relevant, refugees and asylum-seekers must be granted admission to the territory of an asylum state and be assured of their right to remain there.¹⁷³ As an injunction framed in “negative terms,”¹⁷⁴ the right of non-refoulement cannot provide a right of entry per se.¹⁷⁵ However, as admission to the territory of the asylum State will, in practice, often be the only way to avoid returning an asylum-seeker to a country where they have reason to fear serious mistreatment, it will frequently amount to a de facto right of admission.¹⁷⁶

Any discussion of the principle of non-refoulement under international law must begin with Article 33 of the 1951 Convention.¹⁷⁷ It is now plain, however, that this principle has expanded significantly beyond the terms of the Refugee Convention itself to draw on elements of international and regional human rights law and customary international law.¹⁷⁸ This is of particular importance where individuals seeking protection fall outside the refugee definition in Article 1A(2) of the 1951 Geneva Convention and so are unable to avail themselves of the right of non-refoulement in Article 33. Where, for example, the persecution they fear is not for one of the five Convention grounds (race, religion, nationality, political opinion or particular social group), a claimant will lack the so-called persecution nexus essential to making out a claim to refugee status under the Convention.¹⁷⁹ As such, they would be unable to avail themselves of protection from refoulement under Article 33. This would be so, regardless of whether they continue to have a well-founded fear of persecution for other, non-Convention grounds. In this case, protection from refoulement under general international law or complementary protection will be the key device for ensuring their safety.¹⁸⁰ Insofar as the various elements of complementary protection provide protection

¹⁷² Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Statuses of Refugees, Dec. 12-13, 2001, pmb1. para. 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002).

¹⁷³ HATHAWAY, *supra* note 68, at 279.

¹⁷⁴ *M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131, para. 39, 199 ALR 290, 75 ALD 360 (Austl.).

¹⁷⁵ Lauterpacht & Bethlehem, *supra* note 156, para 76; U.N. Econ. & Soc. Council, Ad Hoc Committee on Refugees and Stateless Persons, 2d Sess., 40th mtg. at 33, U.N. Doc. E/AC.32/SR.40 (Sept. 27, 1950) (Statement of Mr. Weis of the International Refugee Organisation) (“Mr. WEIS (International Refugee Organization) wished to add to the remarks of the representative of Israel only that article 28 meant exactly what it said. It imposed a negative duty forbidding the expulsion of any refugee to certain territories but did not impose the obligation to allow a refugee to take up residence.”). For a searching and authoritative analysis of the question of whether the principle of non-refoulement implies a right of admission, see THOMAS GAMMELTOFT-HANSEN ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 47–59 (2011).

¹⁷⁶ I borrow this language from James C. Hathaway, *Refugees and Asylum*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 177, 193 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath eds., 2012).

¹⁷⁷ Refugee Convention, *supra* note 6, art. 33 (“1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or free-dom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”).

¹⁷⁸ See generally MCADAM, *supra* note 11. See Michelle Foster, *Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law*, 2009 N.Z. L. REV. 257, 267–78 (2009) [hereinafter Foster NZLR], for a very helpful discussion of the basis for the extension of this concept, for which she finds there is “surprisingly little clarity.”

¹⁷⁹ Andreas Zimmerman & Claudia Mahler, *Article 1A*, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 281, 374, para. 2 (Zimmerman ed., 2011); James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT’L L. 207, 208 (2002).

¹⁸⁰ GOODWIN-GILL & MCADAM, *supra* note 168, at 285 (“The term ‘complementary protection’ describes States’ protection obligations arising from international legal instruments and custom that complement – or

from refoulement outside the 1951 Geneva Convention, this should also be the first point of reference for the protection of forced migrants in states, like India, that are not yet parties to the Refugee Convention.

5.1 Non-Refoulement under the ICCPR

The ICCPR, to which India has been a party since 1979,¹⁸¹ contains absolute and non-derogable guarantees against the arbitrary deprivation of life¹⁸² and torture or cruel, inhuman or degrading treatment.¹⁸³ Although the ICCPR does not have an express guarantee against refoulement akin to Article 33 of the 1951 Geneva Convention or Article 3 of the CAT, the Human Rights Committee has subsequently found a right of non-refoulement to be implicit in its provisions¹⁸⁴ where individuals face a “real risk”¹⁸⁵ of their rights under the ICCPR being violated upon return to another country.¹⁸⁶ The vast majority of claims in respect of forced removal have been brought under Articles 6 and 7 of the Convention¹⁸⁷ and, initially, the jurisprudence of the Committee was only concerned with preventing forced removals in respect of these grounds.¹⁸⁸ However, the Committee now seems to have accepted as a matter of principle that removal to a situation where there is a real risk that any of the rights in the ICCPR will be violated will amount to refoulement for the purposes of the Convention. As the Committee explained in the case of *ARJ v. Australia*:

If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.¹⁸⁹

In their most recent General Comment on this issue, the Committee concluded that

supplement – the 1951 Refugee Convention. It is, in effect a shorthand term for the widened scope of non-refoulement under international law.”).

¹⁸¹ See *International Covenant on Civil and Political Rights*, *supra* note 128, for a current list of signatories and parties to the ICCPR.

¹⁸² ICCPR, *supra* note 135, art. 6(1) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”).

¹⁸³ *Id.* art. 7. (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

¹⁸⁴ U.N. Human Rights Comm., General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 13, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008) (“The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol”).

¹⁸⁵ For the test of “real risk,” see U.N. Human Rights Comm., Commc’n No. 706/1996 G.T. v. Australia, para. 8.1, U.N. Doc. CCPR/C/61/D/706/1996 (Dec. 4, 1997); *See generally* PS (Sri Lanka) v. Sec’y of State for the Home Dep’t, [2008] EWCA (Civ) 1213, [2008] All E.R. (D) 64 (Nov) (Eng.).

¹⁸⁶ GOODWIN-GILL & MCADAM, *supra* note 168, at 306.

¹⁸⁷ *Id.* at 308.

¹⁸⁸ U.N. Secretariat, *General Comment 20: Article 7 (Forty-fourth session, 1992)*, in *Compilation Of General Comments 1994*, *supra* note 136, at 30, para 9 [hereinafter *General Comment 20*] (“In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.”).

¹⁸⁹ U.N. Human Rights Comm., Commc’n No. 692/1996 A.R.J. v. Australia, para. 6.9, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997); U.N. Secretariat, *General Comment 15: Twenty-seventh session, 1986: The position of aliens under the Covenant*, in *Compilation Of General Comments 1994*, *supra* note 136, at 18, para. 5.

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹⁹⁰

It is significant to note that Articles 6 and 7 are included here only as two examples (“such as”) of possible violations and not as a complete list of potential grounds. In consequence, states parties now have a basic obligation of due diligence to ensure that individuals facing removal from their territory will not be subject to a violation of their rights under the ICCPR as a whole.¹⁹¹

5.2 Non-Refoulement under the ICESCR

The ICESCR, to which India has been party since 1979,¹⁹² is frequently dismissed as a source of protection from refoulement,¹⁹³ in large part due to the progressive nature of its enforcement as described in Article 2(1) of the Convention:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁹⁴

There is no question that the novelty of the formulation in Article 2(1) has attracted the bulk of scholarly attention. Nevertheless, undue attention to the progressive nature of implementation under the ICESCR has served to confuse the true nature of state obligations under the Covenant. Properly understood, the Covenant has numerous elements that are immediately binding on states, that are justiciable in a similar manner and to the same degree as provisions of the ICCPR, and that impose obligations of non-refoulement on the same terms.¹⁹⁵ Indeed, there are a number of provisions in the Covenant which are drafted so as to be immediately binding on states in their own terms and do not admit of progressive implementation.¹⁹⁶ These include the obligation to ensure equality between men and

¹⁹⁰ General Comment 31, *supra* note 137, para. 12 (emphasis added).

¹⁹¹ U.N. Human Rights Comm., Comm’n No. 1051/2002 *Ahani v. Canada*, para. 10.7, U.N. Doc. CCPR/C/80/D/1051/2002 (June 15, 2004).

¹⁹² For a current list of signatories and parties to the ICESCR, see *International Covenant on Economic, Social and Cultural Rights*, *supra* note 129.

¹⁹³ GOODWIN-GILL & MCADAM, *supra* note 168, at 314 (“[T]he 1966 International Covenant on Economic, social and Cultural Rights (ICESCR66) is not readily enforceable either domestically or at the international level, in part due to the process of progressive realisation.”); MCADAM, *supra* note 11, at 164; HATHAWAY, *supra* note 68, at 123.

¹⁹⁴ ICESCR, *supra* note 135, art. 2(1).

¹⁹⁵ *Foster NZLR*, *supra* note 178, at 278–85.

¹⁹⁶ *Id.* at 279.

women,¹⁹⁷ including equal pay,¹⁹⁸ the right to form trade unions and to take collective action,¹⁹⁹ the protection of children from exploitation,²⁰⁰ free primary education,²⁰¹ and the freedom of parents to choose their preferred model of education for their children.²⁰²

Moreover, it is plain that the enforcement provisions of the Covenant are themselves drafted so as to impose immediate obligations on states. While Article 2(1) commits states to “achieving progressively” the rights in the Convention, it also requires states to “take steps” to begin doing so immediately upon their accession to the Convention.²⁰³ As explained by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 3:

while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.²⁰⁴

¹⁹⁷ ICESCR, *supra* note 135, art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”).

¹⁹⁸ ICESCR, *supra* note 135, art. 7(a)(i) (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”).

¹⁹⁹ *Id.* art. 8(1) (“The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.”).

²⁰⁰ *Id.* art. 10(3) (“The States Parties to the present Covenant recognize that: 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”).

²⁰¹ *Id.* art. 13(2) (“The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all.”).

²⁰² *Id.* art. 13(3) (“The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.”).

²⁰³ Saul, Kinley and Mowbray describe this as “the Covenant’s foundational obligation.” BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 137 (2014).

²⁰⁴ U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, in U.N. ESCOR, 5th Sess., Supp. No. 3, at 83, para. 2, U.N. Doc. E/C.12/1990/8 (1991) [hereinafter *General Comment 3*].

The Committee has made clear that “even where the available resources are demonstrably inadequate,”²⁰⁵ the states party has an immediate obligation to evaluate the current extent of provision and to both plan and implement sensible programs aimed at their substantive fulfilment.²⁰⁶ The “progressive” nature of this obligation carries with it a strong presumption against backward or regressive measures.²⁰⁷

In addition, the Committee has now made clear that states parties have an immediate obligation to ensure the provision of a “minimum core” of each Convention right.²⁰⁸ As it explains in its General Comment 3,

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party . . . If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.²⁰⁹

The immediate obligation of minimum core provision relates to the overall fulfilment of each right to at least a minimal level, regardless of the various and contingent state duties this might entail.²¹⁰ Moreover, underlying every right is a three-part typology of state duties: to respect, protect, and fulfil each right.²¹¹ This typology is now widely accepted throughout the UN human rights machinery as an essential analytical framework through which the human

²⁰⁵ *Id.* para. 11.

²⁰⁶ *Id.* (“[T]he obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”); SAUL, KINLEY & MOWBRAY, *supra* note 203, at 166.

²⁰⁷ *General Comment 3*, *supra* note 204, para. 9; SAUL, KINLEY & MOWBRAY, *supra* note 203, at 151; Foster NZLR, *supra* note 178, at 280.

²⁰⁸ See generally CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Audrey Chapman & Sage Russell, eds., 2002). For a critical discussion of this concept and a comparison between it and the so-called “minimum threshold” requirement, see MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ASSESSING THE ECONOMIC DEFICIT 21–28 (2004).

²⁰⁹ *General Comment 3*, *supra* note 204, para 10.

²¹⁰ For Katharine Young’s elegant (albeit otherwise critical) summary, see KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 67–68 (2012) (“The focus on a minimum core trades rights inflation for rights ambition, channeling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those individuals outside their territorial reach.”).

²¹¹ U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (“The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to *fulfil* contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.”); U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment 12 (Twentieth session, 1999): The right to adequate food (art. 11)*, paras. 14–20, U.N. Doc. E/C.12/1999/5 (May 12, 1999); U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, paras. 17–29, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); U.N. Comm. on Econ., Soc. & Cultural Rights, *General comment No. 18 (2005): The right to work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, para. 22, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 173 (2007).

rights obligations of states can be identified and described.²¹² The most basic duty of “respect” is an immediate obligation on states to refrain from interfering with access to social provision.²¹³ As such, there is an immediate duty on states (“to respect”) that applies in regard to every element of the ICESCR, even those that are subject to progressive implementation.

Finally, all rights contained in the Covenant are subject to an immediate obligation of non-discrimination.²¹⁴ Craven has described this principle as the “dominant single theme of the Covenant,”²¹⁵ and it is true to say that elements of it are woven throughout its preamble and substantive articles.²¹⁶ However, this principle finds its most distinctive expression in Article 2(2), which introduces an independent right of non-discrimination.²¹⁷ Following the entry into force of the Optional Protocol to the ICESCR on 5 May 2013, complaints can now be made directly with respect to violations of this Article.²¹⁸ The Committee has not yet issued any decisions pursuant to complaints made under the new Optional Protocol. However, the issue of discrimination with respect to access to social provision has already been extensively litigated at the international level,²¹⁹ with the guarantee against non-discrimination in Article 26 of the ICCPR in particular providing a platform for such claims before the Human Rights Committee.²²⁰

While Article 2(1) of the Covenant is most readily associated with the principle of progressive realization, the frequent and undue focus on this principle alone has done a disservice to the underlying complexity and practical relevance of the Covenant as a

²¹² ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A LEGAL RESOURCE GUIDE, at xx (Scott Leckie & Anne Gallagher eds., 2006); Inter-Comm. Technical Working Grp., Report on Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents, para. 8, U.N. Doc. HRI/MC/2006/3 (May 10, 2006); Walter Kälin, *Examination of State Reports*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 16, 37 (Helen Keller & Geir Ulfstein, eds., 2012).

²¹³ ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, *supra* note 212, at xx (“The obligation to *respect* economic, social and cultural rights constitutes what is essentially a negative duty on the parts of the States to neither impede nor restrict the exercise of these rights. As a consequence of this obligation, rights which are currently enjoyed cannot be arbitrarily revoked in law, principle or practice.”). For a detailed discussion of the various typologies of state duties and their meaning, see M. MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 157–247 (2003); IDA ELISABETH KOCH, HUMAN RIGHTS AS INDIVIDUAL RIGHTS: THE PROTECTION OF SOCIO-ECONOMIC DEMANDS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13–29 (2009).

²¹⁴ ICESCR, *supra* note 135, art. 2(2); U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13 (Twenty-first session, 1999) The right to education (article 13 of the Covenant), para. 31, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) (“The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”); Foster NZLR, *supra* note 178, at 279–80; SAUL, KINLEY & MOWBRAY, *supra* note 203, at 174–213.

²¹⁵ MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 153–54 (1995).

²¹⁶ ICESCR, *supra* note 135, pmb. (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;”). See *also id.* arts. 3, 7, 13.

²¹⁷ *Id.* art. 2(2).

²¹⁸ For a very clear account of the Optional Protocol procedures, see BART WERNAART, THE ENFORCEABILITY OF THE HUMAN RIGHT TO ADEQUATE FOOD: A COMPARATIVE STUDY 96 (2013).

²¹⁹ SAUL, KINLEY & MOWBRAY, *supra* note 203, at 176.

²²⁰ See *Broeks v. Netherlands*, *supra* note 142; *van Oord v. Netherlands*, *supra* note 142; U.N. Human Rights Comm., *Comm’n No. 395/1990 Sprenger v. Netherlands*, U.N. Doc. CCPR/C/44/D/395/1990 (Feb. 8, 1990); *Waldman v. Canada*, *supra* note 142; SAUL, KINLEY & MOWBRAY, *supra* note 203, at 176.

whole.²²¹ Properly constructed, the ICESCR contains multiple obligations that are both readily enforceable and justiciable on terms similar to the ICCPR.²²² In itself, this should not come as a surprise. The equal and indivisible nature of all human rights has long been acknowledged in international law.²²³ The implications for the protection of refugees and asylum-seekers are, nevertheless, striking. Although, in contrast to the Human Rights Committee,²²⁴ the Committee on Economic, Social and Cultural Rights has not yet addressed the issue of refoulement, there is every reason in both principle and law to assume and expect them to infer an obligation of non-refoulement from the ICESCR on similar terms.

5.3 Non-Refoulement under the CRC

The position is considerably more straightforward under the CRC, to which India has been a party since 1992.²²⁵ The enforcement of the rights found in the CRC is not subject to progressive realization,²²⁶ and the Committee on the Rights of the Child has now issued authoritative guidance with respect to the principle of non-refoulement as it applies to the Convention.²²⁷ As the Committee explains in its General Comment 6,

States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.²²⁸

²²¹ U.N. Secretariat, *General Comment 9: Nineteenth session (1998): The domestic application of the Covenant*, in *Compilation of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies*, at 54, para. 10, U.N. Doc. HRI/GEN/1/Rev.1 (May 12, 2003) [hereinafter *Compilation of General Comments 2003*] (“In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation.”).

²²² See *id.* See also SAUL, KINLEY & MOWBRAY, *supra* note 203, at 164; Foster NZLR, *supra* note 178, at 281.

²²³ World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 35, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”). For a clear account of the numerous antecedents leading up to this conclusive statement, see KOCH, *supra* note 213, at 1–5.

²²⁴ *General Comment 20*, *supra* note 188, para. 12.

²²⁵ See *Convention on the Rights of the Child*, *supra* note 130.

²²⁶ CRC, *supra* note 135, art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”). It should be noted, however, that certain discrete obligations that require specific and direct state provision are limited “in accordance with national conditions and within their means.” See, e.g., *id.* art. 27(3).

²²⁷ U.N. Comm. on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter *General Comment 6*]. For a comprehensive explanation of the Committee's guidance in respect to non-refoulement, see Alice Farmer, *A Commentary on the Committee on the Rights of the Child's Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights*, 80 *FORDHAM L. REV.* 39 (2011).

²²⁸ General Comment 6, *supra* note 227, para. 27 (emphasis added).

It is significant that, while the comment singles out Articles 6²²⁹ and 37²³⁰ as examples of harm that would attract protection from refoulement, the terms of this guarantee as expressed here are “by no means limited to” these particular rights. The Convention itself is notable for embracing the breadth of civil and political, and social and economic rights on equal terms.²³¹ So, and to take the example used by the Committee, while Article 6(1) of the CRC guarantees the right to life in terms that are quite similar to Article 6 of the ICCPR, it goes considerably further in Article 6(2) by obliging states parties to “ensure to the maximum extent possible the survival and development of the child.”²³²

It is plain, therefore, that protection from refoulement under the CRC relates to the entirety of the Convention.²³³ Any forced return of a child to another country where, for example, they will be unable to access healthcare services²³⁴ or primary education,²³⁵ be subject to forced recruitment,²³⁶ or go without state protection from sexual abuse,²³⁷ may amount to an unlawful refoulement in violation of the Convention. The breadth of the rights concerned are reflected in the terms of the non-refoulement guarantee as described in General Comment 6. As the Committee explains,

The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.²³⁸

It is notable that the Committee emphasizes the “particularly serious consequences” to children of denying them access to nutrition and healthcare. This is significant for the right of non-refoulement in a wide variety of contexts, as it always requires states to assess the seriousness of any potential violation alongside the likelihood of its occurrence.²³⁹ The violation of some rights, such as the right to life, will, by their very nature, always rise to the

²²⁹ CRC, *supra* note 135, art. 6 (“1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”).

²³⁰ *Id.* art. 37 (“States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”).

²³¹ HERDÍS THORGEIRSDÓTTIR, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ARTICLE 13: THE RIGHT TO FREEDOM OF EXPRESSION 18 (A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde & Bruce Abramson, eds., 2006) (“The CRC’s uniqueness stems from the fact that it is the first legally binding international instrument to incorporate the full range of human rights (children’s civil and political rights as well as their economic, social and cultural rights), thus giving all rights equal emphasis.”).

²³² CRC, *supra* note 135, art. 6(2).

²³³ Farmer, *supra* note 227, at 41.

²³⁴ CRC, *supra* note 135, art. 24; U.N. Comm. on the Rights of the Child, General Comment No. 7 (2005): Implementing child rights in early childhood, para. 27, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

²³⁵ CRC, *supra* note 135, art. 28; U.N. Comm. on the Rights of the Child, General Comment No. 1 (2001): Article 29 (1): The Aims Of Education, para. 2, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001).

²³⁶ CRC, *supra* note 135, art. 38; SONJA C. GROVER, CHILD SOLDIER VICTIMS OF GENOCIDAL FORCIBLE TRANSFER: EXONERATING CHILD SOLDIERS CHARGED WITH GRAVE CONFLICT-RELATED INTERNATIONAL CRIMES 10–20 (2012).

²³⁷ CRC, *supra* note 135, art. 34. *See generally* Vitit Muntarbhorn, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ARTICLE 34: SEXUAL EXPLOITATION AND SEXUAL ABUSE OF CHILDREN (A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde & Bruce Abramson, eds., 2007).

²³⁸ General Comment 6, *supra* note 227, para. 27.

²³⁹ R v. Immigration Appeal Tribunal *ex parte* Shah, and Islam v. Sec’y of State for the Home Dep’t, [1999] 2 A.C. 629 (H.L.) 655 (Lord Hoffmann) (appeal taken from Eng.).

relevant level of seriousness. Others, such as the rights to education or healthcare, will inevitably admit of a much broader spectrum of potential violations. The emphasis of the Committee on the particularly serious consequences of violations for children “establishes a much lower threshold at which failure to fulfil economic and social rights can play a factor in triggering protection through non-refoulement provisions.”²⁴⁰

Finally, it should be emphasized that there is no equivalent in the CRC to the exception for developing countries found in Article 2(3) of the ICESCR.²⁴¹ As such, India is bound by the provisions of the Convention on the same terms and to the same degree as all other states parties. It is notable that the Indian Supreme Court has already acted to ensure primary education to the age of fourteen,²⁴² to prevent children from working in hazardous industries,²⁴³ and to regulate inter-country adoption.²⁴⁴

5.4 Non-Refoulement under the CAT

As distinct from the ICCPR and the CRC, to which a right of non-refoulement has been implied by their respective committees, the Convention against Torture (CAT) contains an express prohibition of refoulement in its Article 3.²⁴⁵ It thus forms a parallel with the right of non-refoulement as found in Article 33 of the 1951 Geneva Convention, with the very significant difference that the guarantee in Article 3 of the CAT, unlike Article 33, is an absolute right unconstrained by exclusion provisions like those found in the Refugee Convention.²⁴⁶

However, while the guarantees found in the ICCPR and CRC now relate to all rights found in each convention, the express guarantee in Article 3 relates only to torture as defined

²⁴⁰ Farmer, *supra* note 227, at 42. This is consistent with the approach of the European Court of Human Rights (ECtHR), which has emphasised that any assessment of severity for the purposes of meeting the minimum threshold requirement for a violation of Article 3 of the European Convention on Human Rights (ECHR) must take into account the full circumstances of any case, including the age, sex and health of the victim and the mental and physical effect of any violations. *See Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) para. 162 (1978); *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, para. 100.

²⁴¹ *See supra* note 163 and accompanying text.

²⁴² *Krishnan v. State of Andhra Pradesh*, (1993) 1 S.C.R. 594 (India); *Jain v. State of Karnataka*, (1992) 3 S.C.R. 658 (India).

²⁴³ *Labourers Working on Salal Hydro Project v. State of Jammu & Kashmir*, (1983) 2 S.C.R. 473 (India); *Mehta v. State of Tamil Nadu*, (1990) 2 S.C.R. Supp. 518 (India); *Morcha v. Union Of India*, (1984) 2 S.C.R. 67 (India).

²⁴⁴ *Pandey v. Union of India*, (1984) 2 S.C.R. 795 (India). For a useful summary of developments in this area see ARAMJIT S. JASWAL & NISHITHA JASWAL, *HUMAN RIGHTS AND THE LAW* 163–80 (1996).

²⁴⁵ CAT, *supra* note 135, art. 3 (“(1) No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture; (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights *cf.* American Convention on Human Rights art. 22(8), Nov. 21, 1969, 1144 U.N.T.S. 123. For the most authoritative and complete analysis of this article, see MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 126–228 (2008).

²⁴⁶ U.N. Comm. Against Torture, Comm’n No. 39/1996 *Tapia Paez v. Sweden*, para 14.5, U.N. Doc CAT/C/18/D/39/1996 (Apr. 28, 1997); *cf.* Refugee Convention, *supra* note 6, arts. 1(D)–(F.), 33(2); Bonny Ibhawoh, *Defining Persecution and Protection: The Cultural Relativism Debate and the Rights of Refugees*, in *PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES, AND HUMAN RIGHTS* 61, 296 n.49 (Niklaus Steiner, Mark Gibney & Gil Loescher, eds., 2003).

in Article 1(1)²⁴⁷ of the CAT.²⁴⁸ As such, and unlike the rather more general guarantees against serious mistreatment found in, for example, Article 7 of the ICCPR²⁴⁹ or Article 3 of the European Convention on Human Rights (ECHR),²⁵⁰ the guarantee found in Article 3 of the CAT is circumscribed in a number of quite specific ways. The operation of this Article is limited to preventing removal to a jurisdiction where there are “substantial grounds for believing”²⁵¹ that an individual will fear “severe pain or suffering”²⁵² that is “intentionally inflicted” for such purposes as “obtaining from him . . . information or a confession” or “intimidating or coercing him,”²⁵³ and where the mistreatment is inflicted “by . . . or with the consent or acquiescence of a public official.”²⁵⁴

Despite what might, at first blush, seem an unduly restrictive nature of this definition, the Article 3 guarantee has played a significant role in the development of the right against non-refoulement.²⁵⁵ The great majority of the individual cases dealt with by the Committee against Torture now address claims made pursuant to Article 3,²⁵⁶ and the Committee has upheld such claims and acted to prevent the removal of the individuals concerned on numerous occasions.²⁵⁷

²⁴⁷ CAT, *supra* note 135, art. 1(1) (“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

²⁴⁸ U.N. Secretariat, *General Comment No. 1: Sixteenth session (1996): Implementation of article 3 of the Convention in the context of article 22*, in *Compilation Of General Comments 2003*, *supra* note 221, at 279, para. 1 [hereinafter *General Comment 1*] (“Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.”).

²⁴⁹ ICCPR, *supra* note 135, art. 7.

²⁵⁰ ECHR, *supra* note 135, art. 3.

²⁵¹ *General Comment 1*, *supra* note 248, para 1.

²⁵² For discussion of the meaning and significance of “severe pain and suffering” in Article 1(1) of the CAT as compared with other international instruments, see MICHELLE FARRELL, *THE PROHIBITION OF TORTURE IN EXCEPTIONAL CIRCUMSTANCES* 68–81 (2013).

²⁵³ For a useful overview of the role that the “purposes” test plays in distinguishing torture from “inhuman or degrading treatment or punishment,” see *id.* at 4–6..

²⁵⁴ CAT, *supra* note 135, art. 1(1). In exceptional cases the Committee Against Torture has been willing to characterise some non-state actors as “other persons acting in an official capacity” for the purposes of the Article 1(1) definition, see U.N. Comm. Against Torture, *Comm’n No. 120/1998 Sadiq Shek Elmi v. Australia*, para. 5.2, U.N. Doc CAT/C/22/D/120/1998 (Nov 17, 1998). For a useful discussion of this question and the development of the associated case-law, see ALICE EDWARDS, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW* 245–50 (2011).

²⁵⁵ Roland Bank, *Country Oriented Procedures Under the Convention Against Torture: the Future of UN Human Rights Treaty Monitoring*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 145, 146 (Philip Alston & James Crawford, eds., 2000). For the most complete account of the role and operation of refoulement under the terms of the Convention as interpreted and applied by the Committee see CORNELIS WOLFRAM WOUTERS, *INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT* 425–534 (2009).

²⁵⁶ For a detailed statistical breakdown, see NOWAK & MCARTHUR, *supra* note 245, at 158–61; NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 167 (3d ed. 2009).

²⁵⁷ See, e.g., U.N. Comm. Against Torture, *Comm’n No. 13/1993 Mutombo v. Switzerland*, para. 9.4, U.N. Doc. CAT/C/12/D/13/1993 (Apr. 27, 1994); U.N. Comm. Against Torture, *Comm’n No. 39/1996 Tapia Paez v. Sweden*, para 14.5, U.N. Doc CAT/C/18/D/39/1996 (Apr. 28, 1997); U.N. Committee Against Torture *Comm’n No. 233/2003 Agiza v. Sweden*, para. 13.8, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005). See also NOWAK & MCARTHUR, *supra* note 245 (listing some 25 cases where violations of Article 3 were found by

5.4.1 The Continuing Relevance of the CAT to India

Despite becoming a signatory in 1997, India has not yet acceded to the CAT.²⁵⁸ It may be tempting to conclude, therefore, that the CAT remains irrelevant to India for the purposes of international law. This conclusion would be premature. Article 18 of the Vienna Convention on the Law of Treaties provides that:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;²⁵⁹

Although fourteen years have now elapsed since India became a signatory to the convention, it continues to actively debate ratification.²⁶⁰ As recently as 2010, a bill was introduced to the Lok Sabha (the lower house of the Indian Parliament) for the purpose of ratifying the convention.²⁶¹ Although passage of the bill seems to have been delayed indefinitely following its referral to a Select Committee of the Rajya Sabha (the upper house of the Indian Parliament) for revision,²⁶² it is plain that India has not yet “made its intention clear not to become a party to the treaty.” As such, India remains obliged not to act in a manner that would “defeat the object and purpose” of the CAT.

It is important not to exaggerate the effect of Article 18. It is obviously wrong to suggest, for example, that by virtue of Article 18 a signatory is bound to comply with a treaty in the same way as a state party.²⁶³ The effect of such an interpretation would be to render the act of ratification itself redundant and Article 28 of the Convention meaningless.²⁶⁴ Nor does the mere act of signing a treaty with a “simple signature”²⁶⁵ oblige a state eventually to ratify it.²⁶⁶ There is virtually no state practice on the implementation of Article 18,²⁶⁷ and the

the Committee from 115 such claims found admissible to 2006). *See also* RODLEY & POLLARD, *supra* note 256, at 167.

²⁵⁸ *See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra* note 131.

²⁵⁹ VCLT, *supra* note 156, art. 18.

²⁶⁰ *India Should Ratify UN Convention against Torture*, THE HINDU (Feb. 17, 2013 14:41 IST), <http://www.thehindu.com/news/cities/Madurai/india-should-ratify-un-convention-againsttorture/article4424781.ece>.

²⁶¹ *Cabinet Clears Anti-Torture Bill*, TIMES OF INDIA (Apr. 9, 2010 2:48 AM), <http://timesofindia.indiatimes.com/india/Cabinet-clears-anti-torture-bill/articleshow/5776064.cms>.

²⁶² *Law Minister Unaware of the Status of Anti-torture Bill*, THE HINDU (June 27, 2012), <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/law-minister-unaware-of-the-status-of-antitorture-bill/article3574994.ece>.

²⁶³ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 117 (2d ed. 2007).

²⁶⁴ VCLT, *supra* note 156, art. 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”).

²⁶⁵ On the difference and significance of “simple” versus “definitive” signature, see Curtis A. Bradley, *Treaty Signature*, in OXFORD GUIDE TO TREATIES 208, 208–09 (Duncan B. Hollis, ed. 2012); AUST, *supra* note 263, at 96–97.

²⁶⁶ AUST, *supra* note 263, at 106; ARNOLD DUNCAN MCNAIR, LAW OF TREATIES 133–35 (2d ed. 1961); *Text with Comment: Article 8: No Obligation to Ratify*, 29 AM. J. INT’L L. 769, 770 (Supp. 1935). (“[M]odern writers are practically unanimous in holding that there is no legal obligation to ratify a treaty which has been signed on its behalf”).

process of assessing the object and purpose of a treaty brings with it an “inevitable margin of subjectivity”²⁶⁸ that makes it difficult to assess the boundaries of state obligation with any degree of certainty.

Nevertheless, it would be equally wrong to dismiss the effect of Article 18 altogether. The obligation of states not to act to defeat the object and purpose of a treaty once they have signed it is a basic corollary of the obligation to act in good faith (*pacta sunt servanda*).²⁶⁹ It appears to have been the view of the International Law Commission that the obligation in Article 18 was, at the time the Vienna Convention was drafted, already an element of international custom. As the Commission explained in its Commentary to the Draft Articles on the Law of Treaties, “an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted.”²⁷⁰ While the position prior to the Vienna Convention remains controversial among some writers,²⁷¹ it is now widely accepted that this rule crystallized into a rule of customary international law following its incorporation into Article 18.²⁷² The limited state practice following the adoption of the Vienna Convention appears to support this view.²⁷³

Moreover, there is now a very considerable degree of consensus among writers on the meaning of the rule in Article 18.²⁷⁴ Most writers agree that, while Article 18 does not require signatories to refrain from all conduct that would be prohibited by the treaty once in force, it does require states to refrain from conduct that would frustrate the basic premises of the treaty.²⁷⁵ As Aust explains,

²⁶⁷ AUST, *supra* note 263, at 118; Bradley, *supra* note 265, at 213; Paolo Palchetti, *Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 25, 26 (Enzo Cannizzaro ed., 2011).

²⁶⁸ Palchetti, *supra* note 267, at 36.

²⁶⁹ U.N. Charter art. 2, para. 2; VCLT, *supra* note 156, arts. 26, 31; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT’L L. 775, 784 (1959); Tariq Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT’L L. 443, 451–70 (1981); Michel Virally, *Good Faith in Public International Law*, 77 AM. J. INT’L L. 130, 132 (1983).

²⁷⁰ *Reports of the Commission to the General Assembly: Report of the International Law Commission on the work of its eighteenth session*, [1966] 2 Y.B. Int’l L. Comm’n 172, 202, U.N. Doc. A/CN.4/SER.A/1966/Add.1; Palchetti, *supra* note 267, at 25.

²⁷¹ For arguments that Article 18 did not form part of international custom prior to its inclusion in the VCLT, see SHABTAI ROSENNE, *DEVELOPMENT IN THE LAW OF TREATIES 1945-1986*, at 149 (1989); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 39–40 (2d ed. 1984); Bradley, *supra* note 265, at 212.

²⁷² Bradley, *supra* note 265, at 212–13; Palchetti, *supra* note 267, at 26; MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 252 (2009); Laurence Boisson de Chazournes, Anne Marie La Rosa & Makane Moïse Mbengue, *Article 18*, in *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 382–83 (Olivier Corten & Pierre Klein eds., 2011).

²⁷³ Letter from John R. Bolton, Under Secretary of State for Arms Control, to Kofi Annan, U.N. Secretary General (May 6, 2002), available at <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>; Palchetti, *supra* note 267, at 26. For U.S. state practice suggesting that Article 18 reflects customary international law, see Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 Harv. INT’L L.J. 307, 315 n.36 (2007).

²⁷⁴ AUST, *supra* note 263, at 118.

²⁷⁵ Bradley, *supra* note 265, at 215 (“[T]he signing obligation appears to have been designed to ensure that one of the signatory parties, typically in a bilateral arrangement, does not change the status quo in a way that substantially reduces either its ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty.”); AUST, *supra* note 263, at 119 (“The state must therefore not do anything which would prevent it being able fully to comply with the treaty once it has entered into

if the treaty obligations are premised on the status quo at the time of signature, doing something before entry into force which alters the status quo in a way which would prevent the state from performing the treaty would be a breach of the article.²⁷⁶

Common examples of such conduct include: a state acting to destroy or alienate unique items of property or land prior to a treaty that requires its exchange or return entering into force; destruction or obstruction of a navigable waterway prior to a treaty entering into force that grant rights of navigation to the other party; and the dramatic increase of tariffs, armaments or fortifications prior to a treaty entering into force that would require their reduction by a set proportion.²⁷⁷ In each case, the actions of the state do not simply violate the convention, but serve to undermine the basis on which the parties reached an agreement.

For example, in the oft-cited case of *Megalidis v. Turkey*,²⁷⁸ the Turkish-Greek Mixed Arbitral Tribunal found invalid the seizure of a Greek national's property by the Turkish authorities in advance of the Treaty of Lausanne entering into force.²⁷⁹ It is not simply that this would be a violation of the treaty once in force, but that it would "impair the operation of its clauses,"²⁸⁰ the most important of which were concerned with partitioning and re-allocating land from the Anatolian and East Thracian parts of the former Ottoman Empire.²⁸¹ By seizing land in advance, the Turkish authorities had acted to undermine the basis on which the new land settlement had been agreed. Returns that would amount to a violation of Article 3 of the CAT, were it in force, are directly analogous with these paradigmatic cases. Removing someone from the jurisdiction of a signatory state serves to put them beyond the protection of the eventual treaty regime. Doing so disrupts the status quo on which the terms of the treaty itself were settled, in much the same way as the destruction or alienation of unique property or land serves to undermine the basis on which a treaty concerned with their allocation was settled. Individuals are no more fungible than cultural property or land, and their losses, as a result of the pain and humiliation they experience through torture, are no more easily restored. In each case, the subject of the treaty's intended governance is removed from the jurisdiction of the signatory state in a way that means the terms of the treaty, as understood at the time of its settlement, can no longer be entirely fulfilled.

While the identification of the "object and purpose" of a treaty continues to be a source of rich scholarly debate,²⁸² its challenges should also not be over-stated. The International Law Commission has now given substantive guidance as to the interpretation of the object and purpose of a treaty in its 2011 Guide to Practice on Reservations to Treaties.²⁸³

force."); VILLIGER, *supra* note 272, at 249 ("A State's act will defeat the treaty's object and purpose if it renders meaningless subsequent performance of the treaty, and its rules.").

²⁷⁶ AUST, *supra* note 263, at 119.

²⁷⁷ AUST, *supra* note 263, at 119; Bradley, *supra* note 265, at 215.

²⁷⁸ *Megalidis v. Turkey*, 5 Ann. Dig. 395 (Turkish-Greek Mixed Arb. Trib. 1928).

²⁷⁹ *Id.* at 396.

²⁸⁰ HANS KELSEN, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 329 n.30 (1952).

²⁸¹ *THE EUROPEAN POWERS IN THE FIRST WORLD WAR: AN ENCYCLOPEDIA* 421 (Spencer C. Tucker ed., 2013).

²⁸² See, e.g., Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FIN. Y.B. INT'L L. 138 (1997); David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565 (2010).

²⁸³ Rep. of the Int'l Law Comm'n, 59th Sess., May 5–June 5, July 10–Aug. 10, 2007, 77, U.N. Doc. A/62/10; GAOR, 62d Sess., Supp No. 10 (2007) ("The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of

In the present instance, given the specific and clearly stated purpose of the Convention as expressed in its title and preamble,²⁸⁴ and the express nature of the injunction in Article 3, it would seem difficult to conclude otherwise than that the obligation of non-return is an essential object and purpose of the Convention.

There is one potential objection to this approach that should be aired before proceeding further. It might be suggested that the relevant status quo as it relates to signatories to the Convention is not concerned with the presence or absence of individuals to be protected by the resulting treaty regime, but with the policies of the signatory state. The argument would be that as long as the policies themselves have not changed, then the signatory state has not acted in a manner contrary to the object and purposes of the Convention. It is true that the CAT is unlike a traditional human rights treaty in that it is principally concerned with changes to state policy as it relates to, for example, the prevention of torture²⁸⁵ and the criminalization of associated conduct.²⁸⁶ Nevertheless, the Convention itself is not solely concerned with common state policy. It contains important individual rights, and this is in keeping with its stated aims.²⁸⁷ The presence of the Article 3 right of non-return and the resulting determination of individual claims before the Committee Against Torture is the best possible evidence of this.²⁸⁸

5.5 Non-Refoulement at Customary Law

It is now widely accepted that running alongside the obligations under the conventions already discussed is a broad customary norm of non-refoulement.²⁸⁹ In consequence, even those states that have not yet acceded to a convention that contains a

the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.”).

²⁸⁴ See, e.g., CAT, *supra* note 135, pmb. (“Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”).

²⁸⁵ *Id.* art. 2.

²⁸⁶ *Id.* art. 4.

²⁸⁷ *Id.* arts. 12–15.

²⁸⁸ See *supra* text accompanying note 257.

²⁸⁹ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Dec. 12-13, 2001, pmb. para. 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) (“Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.”); No. 6 (XXVIII) Non-Refoulement (1977), in EXCOM CONCLUSIONS, *supra* note 169, at 7, para. (a); No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large Scale Influx (1981), in EXCOM CONCLUSIONS, *supra* note 169, at 28, para. II.(A)(2); No. 25 (XXXIII) General (1982), in EXCOM CONCLUSIONS, *supra* note 169, at 33, para. (b); No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, *supra* note 169, at 115, para. (j); No. 81 (XLVIII) General (1997), in EXCOM CONCLUSIONS, *supra* note 169, at 121, para. (i); *Summary Conclusions: The Principle of Non-refoulement, Expert Roundtable, Cambridge, July 2001*, in REFUGEE PROTECTION IN INTERNATIONAL LAW, *supra* note 156, at 178; Lauterpacht & Bethlehem, *supra* note 156, at 147; GOODWIN-GILL & MCADAM, *supra* note 168, at 354 (“[T]hough a minority of commentators continue to deny the existence of non-refoulement as a principle of customary international law, the general consensus is that it has now attained that status. It encompasses non-refoulement to persecution, based on article 33 of the 1951 Convention, and also to torture or cruel, inhuman or degrading treatment or punishment.”); ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 347 (2010); Nils Coleman, *Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law*, 5 EUR. J. MIGRATION & L. 23 (2003). For a clear summary account of UNHCR’s role in developing the principle of non-refoulement as a principle of customary international law, see CORINNE LEWIS, UNHCR AND INTERNATIONAL REFUGEE LAW 124–25 (2012). For a vigorous dissent from the majority position, see James C. Hathaway, *Leveraging Asylum*, 45 TEX. INT’L L.J. 503, 506 (2010).

prohibition of refoulement are bound by this rule.²⁹⁰ However, a customary norm will also continue to bind states even after they have acceded to a treaty that reflects, either in whole or in part, the substance of that norm.²⁹¹ In this case, the conventional and customary norms run parallel to one another and, assuming they are not inconsistent,²⁹² may be applied in the alternative.²⁹³ Inevitably, the two categories of norms will be closely related, with the conventional norms serving as good evidence of the *opinio juris* of states and, as such, playing a key role in the later crystallization of related customary norms.²⁹⁴

The most authoritative and widely cited study on this point is the opinion prepared by Lauterpacht and Bethlehem as part of the 2001 UNHCR Global Consultations.²⁹⁵ Lauterpacht and Bethlehem concluded that “170 of the 189 members of the UN, or around 90 per cent of the membership, are party to one or more conventions which include non-refoulement as an essential component.”²⁹⁶ It is significant that these calculations include the wide variety of conventions, such as the ICCPR, the CAT, the European Convention on Human Rights,²⁹⁷ the Organization of African Unity (OAU) Refugee Convention,²⁹⁸ the American Convention on Human Rights,²⁹⁹ and the Banjul Charter³⁰⁰ that make provision for non-refoulement (either expressly or as interpreted) outside the strict definition of a refugee in the 1951 Refugee Convention, and with respect to torture and threats to life.³⁰¹ As such, Lauterpacht and Bethlehem distinguish between the customary norm against refoulement as it applies in the refugee context³⁰² and as it applies in the human rights context more generally.³⁰³ They conclude that in the refugee context, the customary norm against refoulement prohibits return where there is a real chance of persecution, torture or cruel, inhuman, or degrading treatment or punishment, or a threat to life, physical integrity, or liberty.³⁰⁴ The prohibition of refoulement is subject to exceptions on grounds of national security and public safety akin to

²⁹⁰ LEWIS, *supra* note 289, at 125.

²⁹¹ VCLT, *supra* note 156, art. 38 (“Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”).

²⁹² *Id.* art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

²⁹³ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, ¶ 73 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 174–79 (July 27); North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶¶ 64, 70–74 (Feb. 20).

²⁹⁴ North Sea Continental Shelf Cases, 1969 I.C.J. 3, ¶¶ 70–71; Nicaragua v. U.S., 1986 I.C.J. 14, ¶ 183; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed. 2008).

²⁹⁵ See Lauterpacht & Bethlehem, *supra* note 156, at 147; Geoff Gilbert, *Human Rights, Refugees and Other Displaced Persons in International Law*, in *HIERARCHY IN INTERNATIONAL LAW* 185 (Erika De Wet & Jure Vidmar eds., 2012) (“Lauterpacht and Bethlehem have conclusively shown that non-refoulement is a norm of customary international law.”).

²⁹⁶ Lauterpacht & Bethlehem, *supra* note 156, at 147.

²⁹⁷ See ECHR, *supra* note 135; Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) para. 88 (1989); Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) para. 69 (1991); Vilvarajah v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) paras. 102–03 (1991); Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, paras. 73–74, 79–81 (1996).

²⁹⁸ Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

²⁹⁹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

³⁰⁰ Banjul Charter, *supra* note 135.

³⁰¹ There is good reason to think that torture and threats to life can be resolved into the more general heading of persecution. Torture will always amount to persecution. See GOODWIN-GILL & MCADAM, *supra* note 168, at 303; JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 109 (1991); cf. Exec. Comm., Note on International Protection, para. 6, U.N. Doc. EC/48/SC/CRP.27 (May 25, 1998).

³⁰² Lauterpacht & Bethlehem, *supra* note 156, paras. 218–19

³⁰³ *Id.* paras. 220–52.

³⁰⁴ *Id.* para. 218(b).

those found in Article 33(2) of the Refugee Convention, save where there is risk of persecution that equates to or is of equal seriousness with torture or cruel, inhuman, or degrading treatment or punishment.³⁰⁵ Moreover, as the prohibition against torture is consistently framed in concert with the injunction against cruel, inhuman, or degrading treatment or punishment,³⁰⁶ all of these elements should be incorporated into a single prohibition at customary law.³⁰⁷

In the human rights context, the customary prohibition against return is limited to situations where there is a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.³⁰⁸ The customary prohibition of return to situations where there is a real risk of torture (whether in the refugee or general human rights context) is non-derogable and does not admit of exceptions. This is consistent with both conventional practice and the jurisprudence of the European Court of Human Rights (ECtHR) and the HRC.³⁰⁹ In parallel with the right of non-refoulement as found in the ICCPR, the ICESCR, the CRC, and the CAT, the customary norm as it relates to aliens generally (and not specifically those individuals seeking or having obtained refugee status) does not require a causal nexus to be established between the ill-treatment feared and a particular Convention ground, such as race or religion.³¹⁰

In respect to this final category, however, the analysis of Lauterpacht and Bethlehem now appears unduly conservative. Human rights law as it relates to the prohibition of refoulement has moved on considerably since Lauterpacht and Bethlehem finalized their opinion in 2001. Notably, the Human Rights Committee in their General Comment 31 of 2004 made it clear that the prohibition of forced removal is relevant to all rights in the Covenant where there is a risk of “irreparable harm.”³¹¹ Equally, the Committee on the Rights of Child in their General Comment 6 of 2005 has now made plain their view that return should be prohibited wherever there is a violation of a convention right that presents a “real risk of irreparable harm,” rather than in respect to any one particular right or category of rights.³¹² Other key international human rights bodies, such as the ECtHR, have now made orders prohibiting forced removal where the violation concerns apparently derogable rights, such as the right to a fair trial,³¹³ the right to liberty and security,³¹⁴ and the right to respect

³⁰⁵ *Id.* para. 218(d).

³⁰⁶ *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 5, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ICCPR, *supra* note 135, art. 6; CRC, *supra* note 135, art. 37(a); ACHR, *supra* note 299, art. 5(2); Banjul Charter, *supra* note 135, art. 5; ECHR, *supra* note 135, art. 3.

³⁰⁷ Lauterpacht & Bethlehem, *supra* note 156, para. 223 (“[T]he evidence points overwhelmingly to a broad formulation of the prohibition as including torture or cruel, inhuman or degrading treatment or punishment. With the exception of the Torture Convention, these elements all appear in human rights instruments of both a binding and a non-binding nature as features of a single prohibition.”).

³⁰⁸ Lauterpacht & Bethlehem, *supra* note 156, para. 251(b).

³⁰⁹ ICCPR, *supra* note 135, arts. 4(2), 5(1); *General Comment 20*, *supra* note 188, para. 3; U.N. Human Rights Comm., *General Comment 24: General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994); ECHR, *supra* note 135, arts. 15(2), 17; *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, para. 79 (1996); ACHR, *supra* note 299, art. 27; CAT, *supra* note 135, art. 2(2). The Banjul Charter makes no provision for derogations. *See generally* Banjul Charter, *supra* note 135.

³¹⁰ *See supra* note 176 and accompanying text.

³¹¹ *General Comment 31*, *supra* note 137, para. 12.

³¹² *General Comment 6*, *supra* note 227, para. 27.

³¹³ *Othman (Abu Qatada) v. The United Kingdom*, 2012-I Eur. Ct. H.R. 159; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 113 (1989) (“The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally

for private and family life.³¹⁵ Perhaps most importantly, the Vienna Declaration and Programme of Action (VDPA), agreed by 171 states at the 1993 World Conference on Human Rights,³¹⁶ has made clear that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.³¹⁷

If we are to take seriously the injunction in the VDPA to treat all human rights as “universal,” “indivisible,” and “equal,” it seems manifestly incorrect to enforce one category of rights differently and with greater vigor than others. In the refugee context, the right of non-refoulement is a specific and individual right grounded in Article 33 of the Refugee Convention.³¹⁸ By contrast, the right of non-refoulement as it appears in the human rights context, with the unique exception of Article 3 of the CAT, has been read into the conventions as a technique of enforcement.³¹⁹ In the general human rights context, it is wrong as a matter of principle and inconsistent with current state practice to restrict the customary norm prohibiting refoulement to situations of torture alone.

The relevant test in such cases is not categorical but qualitative and depends on an evaluation of the seriousness of the feared violation in each case. While torture or the arbitrary deprivation of life may serve as the paradigmatic examples of violations that rise to the requisite level of seriousness, it is inappropriate to restrict the operation of the customary norm to these rights alone. As such, the conclusions of *Lauterpacht* and *Bethlehem* should now be amended. In the general human rights context, return is prohibited where there is a real risk of a violation of human rights of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned.

be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of fair trial in the requesting country.”); U.N. Comm. Against Torture, Commc’n No. 219/2002 G.K. v. Switzerland, U.N. Doc. CAT/C/30/D/219/2002 (May 15, 2003).

³¹⁴ *Othman (Abu Qatada)*, 2012-I Eur. Ct. H.R. 159, paras. 232–33 (“The Court also considers that it would be illogical if an applicant who faced imprisonment in a receiving State after a flagrantly unfair trial could rely on Article 6 to prevent his expulsion to that State but an applicant who faced imprisonment without any trial whatsoever could not rely on Article 5 to prevent his expulsion. Equally, there may well be a situation where an applicant has already been convicted in the receiving State after a flagrantly unfair trial and is to be extradited to that State to serve a sentence of imprisonment. If there were no possibility of those criminal proceedings being reopened on his return, he could not rely on Article 6 because he would not be at risk of a further flagrant denial of justice. It would be unreasonable if that applicant could not then rely on Article 5 to prevent his extradition The Court therefore considers that, despite the doubts it expressed in *Tomic*, it is possible for Article 5 to apply in an expulsion case. Hence, the Court considers that a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article.”).

³¹⁵ *Üner v. Netherlands*, 2006-XII Eur. Ct. H.R. 129; *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119; *Beldjoudi v. France*, 234-A Eur. Ct. H.R. (ser. A) (1992); *Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301; AGNÈS HURWITZ, *THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES* 189 (2009); Richard McKee, *Definite Article: Application of Article 8 in Removal Cases*, IMMIGR. L. DIG., Spring 2008, at 14.

³¹⁶ Fleur van Leeuwen, *Women’s Rights are Human Rights!: The Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights*, in *WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW* 242, 250 (Anne Hellum & Henriette Sinding Aasen eds., 2013); JULIE A. MERTUS, *THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA*, 12 (2d ed. 2009).

³¹⁷ World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 35, U.N. Doc. A/CONF.157/23 (July 12, 1993).

³¹⁸ Refugee Convention, *supra* note 6, art. 33.

³¹⁹ See *supra* Parts 5.1, 5.2, 5.3.

5.6 Non-Refoulement as a Jus Cogens Norm

The breadth of the customary norm prohibiting refoulement in the human rights context is particularly significant as there is now substantial state practice in support of it as a jus cogens norm.³²⁰ If it is a norm jus cogens, then the right of non-refoulement, in addition to being generally applicable as a norm of customary international law, is also now a supervening norm of international law from which no derogation is permitted.³²¹ However, this claim remains controversial, and it has not yet achieved widespread acceptance among academic writers.³²² The progress of this claim is closely related to the evolving status of human rights norms generally and,³²³ in particular, the prohibition of torture, which is now well established as a norm jus cogens.³²⁴ As explained by Orakhelashvili:

The peremptory character of this principle [non-refoulement] is reinforced by its inseparable link with the observance of basic human rights such as the right to life, freedom from torture and non-discrimination.³²⁵

³²⁰ No. 6 (XXVIII) Non-Refoulement (1977), in EXCOM CONCLUSIONS, *supra* note 169, at 7, para. (a); No. 22 (XXXII) Protection of Asylum-Seekers in Situations of Large Scale Influx (1981), in EXCOM CONCLUSIONS, *supra* note 169, at 28, para. II.(A)(2); No. 25 (XXXIII) General (1982), in EXCOM CONCLUSIONS, *supra* note 169, at 33, para. (b); No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, *supra* note 169, at 115, para. (j); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama para. 5, Nov. 22, 1984, *reprinted in* Inter-Am. Comm'n on Human Rights, Annual Report Of The Inter-American Commission On Human Rights 1984-1985, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 190 (1985); Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533 (2001); Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1 (2008); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 55 (2006).

³²¹ VCLT, *supra* note 156, art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”); HATHAWAY, *supra* note 68, at 28; BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 243–260 (2010); BROWNLIE, *supra* note 294, at 594–97. A helpfully user friendly definition can be found in Rozaki. CHRISTOS L. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES 2 (1976) (“There are general rules of law which exclude the conclusion of particular contractual arrangements conflicting with them by actually prohibiting derogation from their content and by threatening with invalidity any attempt of violation of that prohibition. These rules are usually called jus cogens.”).

³²² Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT'L J. REFUGEE L. 373, 389–90 (2008); Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-refoulement*, 15 INT'L J. REFUGEE L. 5, 7 (2003).

³²³ Farmer, *supra* note 320, at 27.

³²⁴ Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 I.C.J. 422, ¶ 99 (July 20) (“In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens). That prohibition is grounded in a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.”); Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, ¶ 61; Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, paras. 155–57 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Erica de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97 (2004).

³²⁵ ORAKHELASHVILI, *supra* note 320, at 55; Farmer, *supra* note 320, at 2, 27.

Milanovic, in contrast, has warned against the temptation to make an overly neat association between these two norms. As he explains:

that the prohibition of torture and (possibly also) inhuman treatment is *jus cogens* does not automatically entail that the non-refoulement obligation arising from this prohibition is also *jus cogens*.³²⁶

A great deal turns on the precise nature of the relationship between the right of non-refoulement and the underlying human rights norm referred to by both Orakhelashvili and Milanovic. While Orakhelashvili refers to the norms as being “inseparably linked” and Milanovic talks about one “arising from” the other, neither phrase is particularly revealing as to the exact nature of the relationship each writer wants to convey. If the right of non-refoulement is merely a procedural corollary of a more general human rights norm, as Milanovic seems to suggest, then he is correct in saying that there is no particular reason why the status of a particular human right as a norm *jus cogens* should include or extend to the corollary right of non-refoulement. Another alternative, rather more consistent with the interpretation of Orakhelashvili, is that there is a *de facto* relationship between the two norms. It might be that as a purely practical matter an act of refoulement will frequently, or even inevitably, amount to a violation of the prohibition against torture.

Neither alternative adequately or fully reflects the role that the norm of non-refoulement plays with respect to, in particular, the right against torture. In state practice,³²⁷ and as applied by key international institutions,³²⁸ the prohibition of refoulement is not merely a corollary or adjunct to the right against torture but, rather, is an essential aspect of the norm itself.³²⁹ It is easy to overlook this point because of the way in which the right of non-refoulement has now been expanded to address other substantive rights. As already discussed, both General Comment 31 of the HRC³³⁰ and General Comment 6 of the Committee on the Rights of the Child³³¹ relate the obligation of non-refoulement to the wide range of rights contained in those conventions. This is a positive and progressive development of the law in this area. Nevertheless, this should not distract from the particular

³²⁶ MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* 104 n.224 (2011).

³²⁷ Lauterpacht & Bethlehem, *supra* note 156, para. 230 (“Article 3 of that Convention prohibits refoulement where there are substantial grounds for believing that a person would be in danger of being subjected to torture. At present, as a matter of conventional law, this binds over 120 States. The express stipulation of this obligation attests to its central importance within the scheme of the prohibition of torture.”).

³²⁸ *General Comment 20*, *supra* note 188, para. 9; U.N. Human Rights Comm., Commc’n No. 539/1993 *Cox v. Canada*, para. 16.1, U.N. Doc. CCPR/C/52/D/539/1993 (Dec. 9, 1994) (“[I]f a State party to the Covenant takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person’s rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”); U.N. Human Rights Comm., Commc’n No. 469/1991 *Ng v. Canada*, para. 16.4, U.N. Doc. CCPR/C/49/D/469/1991 (Jan. 7, 1994); U.N. Human Rights Comm., Commc’n No. 706/1996 *G.T. v. Australia*, para. 8.1, U.N. Doc. CCPR/C/61/D/706/1996 (Dec. 4, 1997); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 88 (1989); *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831 (1996); *Ahmed v. Austria*, 1996-VI Eur. Ct. H.R. 2195; *T.I. v. United Kingdom*, 2000-III Eur. Ct. H. R. 435.

³²⁹ U.N. Human Rights Comm., Commc’n No. 470/1991 *Kindler v. Canada*, para. 13.2, U.N. Doc. CCPR/C/48/D/470/1991 (Nov. 11, 1993) (“If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”); *General Comment 20*, *supra* note 188, para 9; Lauterpacht & Bethlehem, *supra* note 156, paras. 230–37.

³³⁰ General Comment 31, *supra* note 137, para. 12.

³³¹ General Comment 6, *supra* note 227, para. 27.

and distinctive importance of this norm with respect to the rights against torture and the arbitrary deprivation of life.

It is notable that, even in their most recent general comments on non-refoulement, the HRC and the Committee on the Rights of the Child rely on torture and the arbitrary deprivation of life as their paradigmatic examples of rights whose violation implies an obligation of non-return. A similar point could be made with respect to the ECHR. The jurisprudence of the ECtHR, while certainly not restricted to making orders prohibiting return on grounds of torture alone,³³² has been particularly concerned with returns in violation of this right.³³³ Of potentially greatest importance is the CAT itself, which in its Article 3 uniquely features an explicit and non-derogable right of non-return to situations of torture.³³⁴ In each case, the right against refoulement originated and continues to operate largely in relation to the right against torture.

Milanovic is correct to say that the prohibition of torture as a *jus cogens* norm does not “automatically” create any further obligation of non-refoulement arising from it as a *jus cogens* norm. However, this mischaracterises the relationship between the two norms. The norm of non-refoulement is not merely related to (either “linked” or “arising from”) the prohibition of torture, but is part and parcel of it. If the prohibition of refoulement is sufficiently grounded in state practice and *opinio juris* so as to rise to the level of a customary international norm, then it must also be a *jus cogens* norm by virtue of its inclusion as an aspect (what I have referred to above as a “technique of enforcement”) of the more general *jus cogens* norm against torture. The alternative is to characterize non-refoulement as a stand-alone right that is related only to the general legal obligations of States parties, rather than any one particular right. This is consistent with the expanding breadth of non-refoulement under both the ICCPR and the CRC and is a helpful way of conceptualizing the interaction of this right with the other elements of each convention. However, to characterise non-refoulement with respect to the general obligations of states only and to ignore its particular associations with the right against torture is ahistorical and ignores the most important steps of its development as a right apart from the Refugee Convention itself.

5.6.1 The Position of the Indian State

The question of whether non-refoulement rises to the level of a *jus cogens* norm in the refugee context is comparatively straight-forward as it applies to India, as the government has now made clear its own position in respect of this issue. In 1996, UNHCR ExCom concluded that, “the principle of non-refoulement is not subject to derogation.”³³⁵ This is particularly significant as India became a member of ExCom in 1995 and so was a member of the committee during the time that this conclusion was discussed and agreed.³³⁶

ExCom conclusions are adopted by consensus,³³⁷ and during the process leading up to their adoption member states of the committee have the opportunity to express any

³³² See *supra* notes 313–315 and accompanying text.

³³³ See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) para. 88 (1989); *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831 (1996); *Ahmed v. Austria*, 1996-VI Eur. Ct. H.R. 2195; *T.I. v. United Kingdom*, 2000-III Eur. Ct. H. R. 435.

³³⁴ CAT, *supra* note 135, art. 3(1).

³³⁵ No. 79 (XLVII) General (1996), in EXCOM CONCLUSIONS, *supra* note 169, at 115, para. (j).

³³⁶ See *ExCom Membership by Admission of Members*, *supra* note 41.

³³⁷ HURWITZ, *supra* note 315, at 253.

reservations in respect of their content.³³⁸ As such, the conclusions, as eventually adopted, can be fairly said to express the settled views of the member States. It is plain, therefore, that India has now accepted non-refoulement as a customary norm *jus cogens*. Even if India had sought to repudiate the substance of Conclusion 79 in the past, more than 18 years have now elapsed since its adoption. It would be remarkable if India sought to disavow their agreement at this very late stage, particularly following a period in which the norm itself has grown increasingly entrenched and, indeed, India has not indicated any desire to do so.

Moreover, even in the absence of India's own express view with respect to this matter, there is now very considerable state practice in support of this proposition.³³⁹ As such, it is now perfectly correct to interpret India's obligations of non-refoulement with respect to situations of persecution; torture or cruel, inhuman or degrading treatment or punishment; or a threat to life, physical integrity or liberty as a peremptory norm of international law.³⁴⁰ While the question of the *jus cogens* status of non-refoulement remains controversial, such an interpretation is consistent with India's own view of its obligations on this point.

6. The Convergence between Human Rights and Refugee Law

As a result of the number and variety of standards that now apply in respect of non-refoulement in the refugee and human rights contexts, it may appear as if the law in this area has now become unduly fragmented. In fact, the expanding breadth of non-refoulement within international human rights law is far better understood as a mark of convergence between human rights and refugee law proper. This is because of the way in which persecution has come to be defined for purposes of international refugee law.

As is frequently noted, the concept of persecution is not defined in the 1951 Convention itself.³⁴¹ Indeed, it seems likely that the drafters of the Convention intentionally left this term undefined, so as to allow for greater flexibility in its application.³⁴² Nevertheless, there is now very considerable state practice (and, within Western Europe and North America, virtual consensus³⁴³) in support of defining persecution with respect to violations of international human rights law.³⁴⁴ In the neat formula of Zimmerman and Mahler, persecution is "the severe violation of human rights accompanied by a failure of the State to protect the individual."³⁴⁵ While it remains true to say that there is "no universally

³³⁸ U.N. High Comm'r for Refugees, London UNHCR response to the DCA Consultation Paper: Asylum and Immigration Tribunal – The Legal Aid Arrangements for Onward Appeals 1 n.1 (Dec. 2004), http://www.unhcr.org.uk/fileadmin/user_upload/docs/UNHCR_response_to_the_DCA_consultation_paper.pdf.

³³⁹ See *supra* note 315 and accompanying text.

³⁴⁰ VCLT, *supra* note 156, art. 53.

³⁴¹ Zimmerman & Mahler, *supra* note 179, at 345; Claudena M. Skran, *The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problem*, 4 J. POL'Y HIST. (Special Issue) 8, 21 (1992); HEMME BATTJES, EUROPEAN ASYLUM LAW AND INTERNATIONAL LAW 231 (2006).

³⁴² Cornelis Wouters, *International Refugee and Human Rights Law: Partners in Ensuring International Protection and Asylum*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 231, 235 (Scott Sheeran & Sir Nigel Rodley eds., 2013); DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 171 (3d ed. 1999).

³⁴³ FOSTER, *supra* note 211, at 31 n.14.; MARK SYMES, CASELAW ON THE REFUGEE CONVENTION: THE UNITED KINGDOM'S INTERPRETATION IN THE LIGHT OF INTERNATIONAL AUTHORITIES 70 (2000).

³⁴⁴ R v. Sec'y of State for the Home Dep't *ex parte* Sivakumaran, [1988] A.C. 958 (H.L.) (Lord Goff) (appeal taken from Eng.); Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (Can.); HATHAWAY, *supra* note 301, at 150–51; VIGDIS VEVSTAD, REFUGEE PROTECTION: A EUROPEAN CHALLENGE 68 (1998).

³⁴⁵ Zimmerman & Mahler, *supra* note 179, at 345.

accepted definition of persecution,³⁴⁶ it is now plain that the so-called human rights approach is the altogether dominant one.³⁴⁷

Until now I have followed Lauterpacht and Bethlehem in discussing the norm of non-refoulement quite separately between the refugee law and human rights contexts. In fact, however, there is now considerable overlap between these two bodies of law. In Lauterpacht and Bethlehem's account, the norm, as it relates to refugee law, prohibits forced return to situations where there is a real risk of persecution, torture or cruel, inhuman, or degrading treatment or punishment, or a threat to life, physical integrity or liberty.³⁴⁸ As is now clear, however, the concept of persecution itself should be principally defined in reference to the broad corpus of international human rights law.³⁴⁹ As a result, violations of general human rights norms, assuming they rise to the requisite level of severity, will ground claims of non-refoulement in both the human rights and refugee law contexts. The essential difference is that, in the latter context, claims in respect of non-refoulement based on violations of general human rights must pass through the additional gateway of first being recognized as persecution, while in a human rights-specific forum, like the ECtHR or the HRC, they can be pled directly.

It is certainly possible to describe the principles underlying the concept of persecution in general terms.³⁵⁰ Nevertheless, only a well-developed body of law can provide individual decision makers with the clarity they need to make consistent decisions with respect to refugee status and the operation of the norm prohibiting non-refoulement. Moreover, the very wide-ranging acceptance of international human norms provides a basis on which consensus can be reached as to the meaning of persecution, even in those jurisdictions, like India, that have so far been hesitant to engage with the developing state of refugee law around the world. As Storey explains:

The human rights approach is the only one that affords a real possibility of achieving a common international understanding and so avoids the evidently unsatisfactory scenario whereby decision-makers in one country can say persecution means one thing and their counterparts in another country can say it means another. Only a human rights approach—or more broadly an international law approach—affords decision-makers a tangible way of showing that their decisions are based on objective criteria.³⁵¹

Despite these attractions, the human rights approach has not been wholly uncontroversial. It has faced persistent criticism on the grounds that it unduly restricts the meaning of persecution and, in particular, fails to properly accommodate claims based on discriminatory or cumulative grounds that would not obviously amount to violations of

³⁴⁶ U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) [hereinafter RSD Handbook].

³⁴⁷ Hugo Storey, *Persecution: Towards a Working Definition*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 459, 465, 468 (Vincent Chetail & Céline Bauloz eds., 2014).

³⁴⁸ Lauterpacht & Bethlehem, *supra* note 156, para 218(b).

³⁴⁹ DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 176 (Thomson West 2011) (1991); JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 185, 196 (Cambridge Univ. Press 2014) (1991); A. Fischer-Lescano, T. Löhr & T. Tohipur, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, 21 INT'L J. REFUGEE L. 256, 259 (2009).

³⁵⁰ RSD Handbook, *supra* note 346, paras. 51–53.

³⁵¹ Storey, *supra* note 347, at 468.

human rights.³⁵² While the UNHCR Refugee Status Determination (RSD) Handbook itself defines persecution with respect to “serious violations of human rights,”³⁵³ it also makes provision for “other prejudicial actions or threats”³⁵⁴ and “various measures not in themselves amounting to persecution (e.g., discrimination in different forms).”³⁵⁵ Read in context, these further references are plainly intended to extend the definition of persecution beyond violations of human rights per se.

However, human rights law has evolved considerably since the RSD Handbook was drafted in 1979, and it now comfortably accommodates claims made on cumulative grounds.³⁵⁶ It is notable that the first attempt to codify the meaning of persecution at the international level, the European Union Qualification Directive, makes specific provision for acts of persecution where these are “an accumulation of various measures.”³⁵⁷ Article 9(1)a of the Directive does refer to persecution as “a severe violation of basic human rights, in particular the rights from which derogation cannot be made.”³⁵⁸ However, it is now apparent that the Court of Justice of the European Union (CJEU) regards the reference in 9(1)a to non-derogable rights as non-exhaustive.³⁵⁹ It is relevant as an example against which the severity of the measures feared upon return are to be evaluated. It does not operate to restrict the grounds of a claim to refugee status (and, by extension, non-return) to violations of only those rights in the ECHR that are non-derogable pursuant to Article 15(2) of the Convention.³⁶⁰ While violations of the non-derogable rights defined in Article 15(2) will

³⁵² See, e.g., MCADAM, *supra* note 11, at 62; Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in REFUGEE PROTECTION IN INTERNATIONAL LAW, *supra* note 156, at 46, 50.

³⁵³ RSD Handbook, *supra* note 346, para 51.

³⁵⁴ *Id.* para. 52.

³⁵⁵ *Id.* para. 53.

³⁵⁶ See NA. v. United Kingdom, App. No. 25904/07, Eur. Ct. H.R. para. 120 (2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87458>. See generally R.J. v. France, App. No.10466/11, Eur. Ct. H.R. (2013), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126363>.

³⁵⁷ Qualification Directive, *supra* note 12, art.9(1)b; Qualification Directive Recast, *supra* note 12, art. 9(1)b.

³⁵⁸ Qualification Directive, *supra* note 12, Art 9(1) (“1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must: (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).”).

³⁵⁹ See Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, *Salahadin Abdulla v. Germany*, 2010 E.C.R. I-1532, para. 63 (“Article 9 of the Directive defines the elements which make it possible to regard acts as constituting persecution. In that regard, Article 9(1) states that the relevant facts must be ‘sufficiently serious’ by their nature or repetition as to constitute a ‘severe violation of basic human rights’ or be an accumulation of various measures which is ‘sufficiently severe’ as to affect an individual in a manner similar to a ‘severe violation of basic human rights’.”); *Y & Z*, 2012 E.C.R. para. 62, (“For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with the ‘core areas’ (‘forum internum’) of the basic right to freedom of religion, which do not include religious activities in public (‘forum externum’), from acts which do not affect those purported ‘core areas.’”); EEVA NYKÄNEN, *FRAGMENTED STATE POWER AND FORCED MIGRATION: A STUDY ON NON-STATE ACTORS IN REFUGEE LAW* 100 (2012).

³⁶⁰ *Salahadin Abdulla*, 2010 E.C.R. at I-1555, para. 63 (“Article 9 of the Directive defines the elements which make it possible to regard acts as constituting persecution. In that regard, Article 9(1) states that the relevant facts must be ‘sufficiently serious’ by their nature or repetition as to constitute a ‘severe violation of basic human rights’ or be an accumulation of various measures which is ‘sufficiently severe’ as to affect an individual in a manner similar to a ‘severe violation of basic human rights’.”); *Joined Cases C-71/11 & C-99/11, Germany v. Y & Z*, 2012 E.C.R. para. 62, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0071> (“For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is

always be of sufficient seriousness to rise to the level of persecution within the meaning of Article 9 of the EU Qualification Directive, the severity of other violations must be evaluated according to the individual circumstances of each case.³⁶¹ In this respect, the approach of the Directive closely parallels the approach of the HRC and the Committee on the Rights of the Child with respect to those violations of each convention that will ground claims to non-refoulement.

7. Conclusion: the Significance for Indian Law

As should now be evident, even in the absence of accession to the Refugee Convention, India's treatment of refugees and asylum-seekers on its territory and/or in its jurisdiction is now very significantly constrained by its obligations at international law. The non-refoulement obligation found in Article 33 of the 1951 Convention has been supplemented by a wide range of complementary instruments that impose their own obligations of non-return. While the CAT is unique in containing an express and non-derogable obligation of non-return, a similar right has now been read into the ICCPR and the CRC by their respective supervising committees.³⁶² Both the HRC and the Committee on the Rights of the Child have now made plain that the right of non-refoulement as found in the ICCPR and the CRC relates to the breadth of rights in each convention, and not merely a subset of core or non-derogable rights.³⁶³

In addition, there is now very considerable state practice in support of a customary norm of non-refoulement in the refugee context where there is a real risk of persecution, torture or cruel, inhuman or degrading treatment or punishment, or a threat to life, physical integrity or liberty. This is joined to a parallel norm in the human rights context which, properly constructed, prohibits return to situations where there is a real risk of a violation of human rights reaching a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. It is almost certainly the case that the prohibition of return to situations of torture is now itself a norm *jus cogens*, in large part due to its relationship to the more general norm prohibiting torture.³⁶⁴ In its capacity as a member of ExCom, the Indian state itself has acknowledged the non-derogable nature of the norm prohibiting refoulement in the refugee context.

While superficially disparate, the norms prohibiting refoulement in the refugee and general human rights contexts collapse into one another by operation of the now-expanded definition of persecution. The concept of persecution in the refugee context is properly

unnecessary to distinguish acts that interfere with the 'core areas' ('forum internum') of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported 'core areas'."); NYKÄNEN, *supra* note 359, at 100.

³⁶¹ U.N. High Comm'r for Refugees, UNHCR Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive, para. 4.1.2 (June 17, 2011), *available at* <http://www.refworld.org/docid/4dfb7a082.html> ("Any violation of an absolute right would constitute persecution. Absolute rights are those that cannot be restricted for such reasons as public safety, order, health, or morals or the fundamental rights and freedoms of others, or derogated from in times of public emergency threatening the life of the nation. Nonetheless, the derogability of rights cannot be determinative, as the same right can be non-derogable under one international or regional instrument and derogable under another. A case in point is the right to freedom of religion. Serious breaches of other (non-absolute) human rights would also be considered persecution, when the violation is sufficiently serious by its nature or repetition.").

³⁶² *See supra* Parts 5.1, 5.3.

³⁶³ *General Comment 20*, *supra* note 188, para. 9; *General Comment 6*, *supra* note 227, para. 27.

³⁶⁴ *See supra* Part 5.6.

interpreted as a serious violation of human rights in the absence of effective state protection. As a result, a violation of sufficient seriousness to ground a claim of non-return in the human rights context (that is, a violation of human rights that is serious to a degree akin to torture or cruel, inhuman or degrading treatment or punishment), will also ground a claim to non-refoulement in the refugee context. The increasing convergence of the norms with respect to non-refoulement is particularly significant in the Indian context as, in the absence of a functioning national refugee regime, classifying individuals for purposes of each category of norms inevitably would prove challenging. The determinations made by UNHCR in New Delhi cannot serve as an effective guide in this matter, given the degree to which their access to refugee populations around the country is limited by the national government.³⁶⁵ The categories adopted by the state itself remain manifestly inconsistent and do not yet reflect either a coherent or principled account of the realistic protection needs of individuals displaced to India.³⁶⁶

A general rule can be formulated on this basis: India is prohibited from removing, rejecting, or otherwise returning individuals to situations where there is a real risk of a violation of human rights rising to a level of seriousness akin (but not limited) to torture or cruel, inhuman or degrading treatment or punishment and, in particular, where the violation feared will cause irreparable harm to the individual concerned. This reflects the position at both conventional and customary international law as it relates to India. The seriousness of the feared violation is to be assessed on an individual basis taking into account all of the circumstances relevant to each case, including the cumulative or discriminatory effect of the relevant violations. Relevant circumstances include the age, sex, and health of the victim, and the particular mental and physical effects of the violations on them. Violations of non-derogable rights will always be of sufficient seriousness to ground a claim of non-return.

There is a particular irony here. As discussed in section 2 of this paper, India has so far failed either to accede to the 1951 Refugee Convention or to introduce a compatible domestic regime. In large part, this is the result of persistent objections from the Indian security and intelligence community.³⁶⁷ There is no question that India faces a complex security situation, and the concerns raised by these elements of the state are not trivial.³⁶⁸ Nevertheless, the Refugee Convention is an extremely nuanced document that takes great pains to balance the protection needs of individuals fleeing persecution, and the legitimate national security concerns and public safety interests of states. It provides for the exclusion from refugee status of individuals for whom there are “serious reasons” for considering that they are guilty of serious criminal offences under domestic and international law,³⁶⁹ and to remove protection from refoulement for those individuals that pose a serious threat to the receiving state.³⁷⁰ Moreover, the protection it grants from refoulement is dependent on the highly circumscribed refugee definition in the Convention itself, which requires, among several other elements, that any feared persecution relate to one of the five Convention grounds (race, religion, political opinion, particular social ground or nationality).³⁷¹

³⁶⁵ See *supra* Part 2.1.

³⁶⁶ See *supra* Part 3.3.

³⁶⁷ See *supra* note 13 and accompanying text.

³⁶⁸ For an overview of the numerous and varied security threats facing the Indian state, see INDIA'S NATIONAL SECURITY: A READER (Kanti P. Bajpai & Harsh V. Pant eds., 2013).

³⁶⁹ Refugee Convention, *supra* note 6, art. 1(F.); RSD Handbook, *supra* note 346, paras. 146–63.

³⁷⁰ Refugee Convention, *supra* note 6, art. 33(2).

³⁷¹ Refugee Convention, *supra* note 6, art.1(A.)(2.).

At the same time, India has, through its own state practice in accession to more general human rights conventions like the ICCPR, the ICESCR, and the CRC, in becoming a signatory to CAT, and in its role as a member of the UNHCR ExCom, contributed importantly to the development of a far more sweeping and unconditional norm of non-refoulement. This is now binding on India as a matter of both customary and conventional international law. As such, the ongoing national security debate with respect to accession now seems both at odds with the core of Indian state practice and otiose to India's legal obligations. This is not to suggest, however, that the clock, as it pertains to the protection of displaced persons, can be turned back. Even if India should now accede to the Refugee Convention, it would continue to be bound by what I have suggested are substantially broader obligations in respect of non-refoulement at general human rights law. It does mean that continuing objections to the introduction of a domestic legal regime on the basis of concerns for national security or public safety are now redundant.

Of course, the right of non-refoulement itself, while central to the protection of refugees and other displaced persons, is not the sum total of rights to which they are entitled. While space does not permit a detailed examination of the complex of rights available to forced migrants at international human rights law, or their effect on current protection standards, certainly it begins with the right of non-discrimination.³⁷² At present, however, the various different communities of refugees and forced migrants in India receive dramatically unequal treatment. While Tibetan refugees arriving prior to 1979 are registered by the state as refugees and granted access to public services on virtually equal footing with Indian nationals,³⁷³ ethnic Chin refugees in Mizoram State are virtually ignored by Indian authorities.³⁷⁴ As national authorities continue to forbid UNHCR to operate in Mizoram state, Chin refugees seeking mandate refugee status and material assistance are forced to travel to the main UNHCR office in New Delhi. This, in turn, contributes to the rapidly growing population of urban refugees in the capital.³⁷⁵

In the absence of a national refugee status determination system that is sensibly resourced and enshrined in law, India is unable to undertake the type of inquiries necessary to establish the protection needs of entering migrants. Neither is it able to take advantage of the status determination process to undertake related security and exclusion inquiries on a systematic basis. As a result, India simply lacks the type and quality of information it needs to control its borders and to comply with its own obligations at international law. Without a comprehensive legal regime for the determination and protection of refugees and other forced migrants, entry and protection in India is left as a tool of political exigency rather than a principled act of state. However generous, it remains a regime of charity rather than one of rights and is inconsistent with respect for the dignity of those individuals it seeks to assist.

³⁷² See *supra* Part 4.

³⁷³ See *supra* Part 3.2.

³⁷⁴ MATTHEW WILCH, JENNY YANG & ZO TUM HMUNG, SEEKING REFUGE: THE CHIN PEOPLE IN MIZORAM STATE, INDIA 82 (2011), <http://media.virbcdn.com/files/b3/FileItem-222256-SeekingRefugeTheChinPeopleinMizoramStateIndia1211pdf22912.pdf> (“Chins have no legal status and no legal standing to protect themselves; they are not officially included in the food safety net program that India provides for the poor; and they are not recognized or responded to as refugees who have additional vulnerabilities beyond poverty.”).

³⁷⁵ *Bleak Prospects for Chin Refugees in India*, IRIN (June 21, 2012), <http://www.irinnews.org/report/95699/myanmar-bleak-prospects-for-chin-refugees-in-india> (“UNHCR says there are more than 10,000 Chins in New Delhi, of whom nearly 7,000 are recognized as refugees, and fewer than 600 were resettled from New Delhi in 2011, mostly to the United States.”).

India will remain bound by its obligations with respect to non-refoulement, regardless of what legal reforms it undertakes (or fails to undertake) at the domestic level. However, only a comprehensive national regime in line with the terms of the 1951 Refugee Convention and the current demands of international human rights law will allow it to admit and protect forced migrants in a manner consistent with its own international obligations, and to a standard that reflects its apparent commitment, as a member of UNHCR's ExCom, to the protection of refugees.