

## The Non-Ratification of the 1951 *Convention on Refugees*: An Indian Paradoxical Approach to Human Rights

Indira Boutier

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Article abstract

The following paper explores the position of India on refugees and its resistance to signing the 1951 *Convention Relating to the Status of Refugees*. It first revisits the colonial frame in which a refugee policy was thrust upon the country. Secondly, it analyzes the geopolitical and internal constraints that determined India's approach to the refugee question in the 1950s. Finally, it focuses on the current moment to discuss the implications of the recent amendment of the *Citizenship Act* for refugees in India. Such a long-term approach can open the door to a process of accommodation both by international organizations and by national governments around some universal humanitarian principles that must govern refugee policies. States remain sovereign in their international commitments. They choose to ratify a treaty or not, and to denounce it or not. In addition, human rights institutions are regularly criticized and attacked by States while their legitimacy is often questioned. It is this sovereign freedom of each State, which makes this matter difficult to grasp. We believe that understanding the factors influencing States in their choices is particularly crucial in this period of instability in international relations.

# THE NON-RATIFICATION OF THE 1951 *CONVENTION ON REFUGEES*: AN INDIAN PARADOXICAL APPROACH TO HUMAN RIGHTS

*Indira Boutier\**

The following paper explores the position of India on refugees and its resistance to signing the 1951 *Convention Relating to the Status of Refugees*. It first revisits the colonial frame in which a refugee policy was thrust upon the country. Secondly, it analyzes the geopolitical and internal constraints that determined India's approach to the refugee question in the 1950s. Finally, it focuses on the current moment to discuss the implications of the recent amendment of the *Citizenship Act* for refugees in India. Such a long-term approach can open the door to a process of accommodation both by international organizations and by national governments around some universal humanitarian principles that must govern refugee policies. States remain sovereign in their international commitments. They choose to ratify a treaty or not, and to denounce it or not. In addition, human rights institutions are regularly criticized and attacked by States while their legitimacy is often questioned. It is this sovereign freedom of each State, which makes this matter difficult to grasp. We believe that understanding the factors influencing States in their choices is particularly crucial in this period of instability in international relations.

L'article qui suit explore la position de l'Inde sur la question des réfugiés et sa résistance à signer la *Convention de 1951 relative au statut des réfugiés*. Il revisite tout d'abord le cadre colonial dans lequel une politique des réfugiés a été imposée. Ensuite, il analyse les contraintes géopolitiques et internes qui ont déterminé l'approche indienne à la question des réfugiés dans les années 1950. Enfin, l'article met en lumière l'impact, sur les réfugiés, de l'amendement de 2019 à la *Loi sur la citoyenneté* en Inde. Les États restent souverains dans leurs engagements internationaux. Ils choisissent de ratifier ou non un traité, de le dénoncer ou non. De plus, les critiques et attaques régulières à l'encontre des institutions des droits humains par les États entraînent une remise en question de ces mêmes institutions et de leur légitimité. C'est cette liberté souveraine de chaque État qui rend cette question difficile à appréhender. La compréhension des facteurs qui influencent les États dans leurs choix est particulièrement cruciale en cette période d'instabilité des relations internationales.

El siguiente artículo explora la posición de la India sobre los refugiados y su resistencia a firmar la *Convención sobre el Estatuto de los Refugiados* de 1951. En primer lugar, revisa el marco colonial en el que se impuso al país una política de refugiados. En segundo lugar, analiza los condicionantes geopolíticos e internos que determinaron el enfoque de la India sobre la cuestión de los refugiados en la década de 1950. Por último, se centra en el momento actual para evidenciar las implicaciones de la reciente modificación de la *Ley de Ciudadanía* para los refugiados en la India. Los Estados siguen siendo soberanos en sus compromisos internacionales. Deciden ratificar un tratado o no, y denunciarlo o no. Además, las instituciones de derechos humanos son criticadas y atacadas regularmente por los Estados, mientras que su legitimidad es a menudo cuestionada. Es esta libertad soberana de cada Estado la que hace que éste asunto sea difícil de entender. Creemos que comprender los factores que influyen en las decisiones de los Estados es especialmente crucial en este periodo de inestabilidad en las relaciones internacionales.

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\* Indira Boutier is an MPhil student at the Institute of Commonwealth Studies. She has done a Master in Action and Humanitarian Law at Aix-Marseille University. Her current research deals with minorities in South Asia. In parallel, she is a Case Manager at the Doctoral Clinic in International Human Rights Law, Aix Global Justice.

Today, India has 195,891 refugees on its territory.<sup>1</sup> However, to this date, India has neither signed the 1951 *Convention Relating to the Status of Refugees*,<sup>2</sup> nor the *Protocol Relating to the Status of Refugees* of 1967.<sup>3</sup> Yet, it is a signatory to other international and regional treaties and conventions relating to universal human rights and refugees such as the *United Nations Declaration of Territorial Asylum* (1967),<sup>4</sup> the *Universal Declaration of Human Rights* (1948),<sup>5</sup> and the *International Covenant on Civil and Political Rights* (1966).<sup>6</sup> It is also a member of the Executive Committee (ExCom) of the United Nations High Commissioner for Refugees (UNHCR), which approves and supervises the material assistance programmes of the UNHCR. Yet, India does this without actually supporting or acknowledging the role of the UNHCR on its own territory. Such a position, reaffirmed in the recent Rohingya refugee crisis, throws light both on the Indian legal regime for refugees and its refusal of interference from international organizations in this internal matter. In this specific case, promoting peace and regulating international relations have clashed consistently with the principle of state sovereignty.

This is a persistently paradoxical situation for India: on the one hand, this decolonized nation confirmed its recognition of the main principles of universal human rights in its *Constitution*; on the other hand, it refused to be a signatory on the question of refugees. Since 1947, India equally failed to institute a domestic legislation on the issue. Indian refugees are treated under the category of aliens and together with asylum seekers are at the mercy of political and administrative authorities. People considered by international law as refugees can continue to be prosecuted in a discretionary way for violating India's *Foreigners Act*, 1946. Introduced under British rule, this *Act* gives the "Central Government may by<sup>7</sup> order make provision, either generally or with respect to all foreigners or with respect to any particular provision or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into [India]..."<sup>8</sup>

What are the reasons that would drive a democratic country, which had to deal with a major influx of refugees, to not sign and ratify the 1951 *Convention*? Does the State's attitude towards the *Convention* impact its treatment of refugees?

Taking these two questions as its point of departure, the paper will analyze the consistent official positions adopted despite changing international legal regimes. Thus,

<sup>1</sup> UNHCR, "India" (last visited 20 November 2020), online: *Global Focus: UNHCR Operations Worldwide* <reporting.unhcr.org/node/10314?y=2020#year>.

<sup>2</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*1951 Refugee Convention*].

<sup>3</sup> *Protocol relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>4</sup> *United Nations Declaration of Territorial Asylum*, GA Res 2312, UNGAOR, 22nd Sess, Supp No 16, UN Doc A/6716 (1967) 81.

<sup>5</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

<sup>6</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 19 May 1976).

<sup>7</sup> Subs. By Act 38 of 1947, s.2, for "British India".

<sup>8</sup> *The Foreigners Act 1946* (Imperial Legislative Assembly - India) [*Foreigners Act 1946*].

three moments are examined here to grasp the legal characteristics of the Indian policy relating to refugees.

The first significant piece of legislation dealing with refugees flowed from European policy following World War I. As part of the British Empire, India had played an important role in the war effort, contributing 1.4 million soldiers, and 146.2 million pounds sterling by the end of 1919-20.<sup>9</sup> Hence it was automatically integrated within the international legal regimes and newly formed organizations. On the whole, India's position until 1947 was determined by its project to become an independent Nation.

The second moment relates to the Partition of the former British colonial empire into two countries, India and Pakistan, which produced a massive movement of refugees, and led India to adopt an internal policy on the question of refugees. This was closely tied to India's position to protect its citizens after Partition, but also its situation as an emerging power contesting international law elaborated without its consultation. As a founding member of the non-aligned movement in 1955, India shared the determination of formerly colonized countries of the "Third World" to become active producers themselves of international policies and principles and not simply accept the conventions and principles imposed by western countries. India's actual resistance follows these positions elaborated in response to earlier historical situations and political conjunctures: its deep-seated regional geopolitical insecurities continue to influence its refusal to ratify systematically international conventions that appear as threats to its national sovereignty and security.

Finally, the third moment studies the recent decision to amend the *Citizenship Act* that has made the refugee policy critical not only to India's internal and international political discourse but to its future position in South Asia.

This paper proposes a long-term historical analysis of India's positions on the question of refugees starting from its foundational traumatic experience of sheltering refugees in 1947 to its present determination to chart its own policy and understanding of international human rights laws and principles.

## **I. The European Roots of an International Refugee Legal Regime**

### **A. Post World War I**

A brief recall of the European experience of wars, genocides and emergence of new States following the break-up of major empires is necessary to contextualize the elaboration of an international *Convention* on refugees. Despite significant population displacements in Europe over the centuries, confusion persisted between refugees and

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<sup>9</sup> DeWitt C Ellinwood & SD Pradhan, *India and World War I* (New Delhi: Manohar, 1978).

stateless people even amongst jurists till the end of the 19th century.<sup>10</sup> In 1933, Russian socialist Marc Vichniac, author of *The Legal Status of Jews in Russia* (1905) in a paper on the international status of stateless destined to *The Hague Academy of International Law* was using the word stateless and refugee interchangeably.<sup>11</sup> Hannah Arendt in the 1950s took up the same idea, underlining how the merging of these two separate notions reflected a situation in which refugees are all stateless.<sup>12</sup>

If the First World War triggered mass movements aggravated by border realignments, the Second World War placed the refugee question squarely as a problem to be resolved by the international community. The League of Nations (LN) established a case-by-case policy before establishing a High Commissioner for Refugees in 1921, to make their views prevail, if necessary, against the will of States. From 1945 onwards, bilateral diplomacy ceded to a multilateral, permanent diplomacy, reinforced by the growing force of transnational structures.<sup>13</sup>

Whilst at one level, the refugee question appeared as a humanitarian issue, on the other, from the perspective of States called upon to shelter large numbers of refugees, it also presented a source of destabilization and therefore a matter of States' internal politics, closely linked to trans-regional stakes. This led to a definition of refugees anchored within States' geopolitical or domestic frames. New States constituting themselves on religious foundations after World War I were more likely to ignore the humanitarian angle in favour of their national, territorial interests. An illustration of this practice was offered by French policy in defense of the Christians in 1916. France created the French Armenian Legion on the suggestion of diplomat-lawyer Georges Picot to evict Turks from Cilicia,<sup>14</sup> in pursuit of its political and military strategy to consolidate its mandate in the Middle East. Assistance given was far from being apolitical or nobly humanitarian. On the contrary, it masked a policy to further France's own interests.

Dzonivar Kévonian pointed out how institutional, and international discourse following the two Great Wars led to considering refugees not individually but collectively according to membership of a religious community or nation.<sup>15</sup> From the situation in the Middle East during and at the end of World War I, this tendency has continued, down to contemporary India. India's position today in considering refugees as a collective group whose religious identity is a significant determining aspect of their status reflects an adherence to a factor that has historical roots in international precedents even if in principle it should not be decisive from a legal point of view.

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<sup>10</sup> Michael R Marrus, *Les exclus: les réfugiés européens au XXe siècle* (France: Calmann-Lévy, 1986) at 16.

<sup>11</sup> Marc Vichniac, *Le statut international des apatrides*, Collected Courses (Hague Academy of International Law, 1933) vol 43.

<sup>12</sup> Hannah Arendt, *L'impérialisme*, translated by Martine Leiris, revized edition, Quarto collection (Paris: Gallimard, 2002) at 575 and 579.

<sup>13</sup> Philip Sands, *From Nuremberg to the Hague*, (Cambridge: Cambridge University Press, 2009).

<sup>14</sup> Claire Mouradian, "La diplomatie des 'petites nations': 1913-1923, une décennie de (vaines) tentatives pour résoudre la question arménienne" (2015) 202 *Rev Histoire Shoah* 373 at 494.

<sup>15</sup> Dzonivar Kévonian, "Question des réfugiés, droits de l'homme: éléments d'une convergence pendant l'entre-deux-guerres" (2003) 72 *Matériaux pour l'histoire de notre temps* 40 at 41.

## B. Fallout of European Refugee Legislation on Colonial India

As shown in the above section, the first articulation of an international regulation of refugees was born from major upheavals in Europe and the redrawing of new frontiers within that continent. A notable landmark in the creation of international precedents was the Nansen passport introduced in 1921.<sup>16</sup> Delivered by host countries, it gave individuals who were neither recognized nor protected by their home country a minimum of judicial existence. Despite its limitation—it ceased to be valid if the holder re-entered his country—and absence of extended obligations for States, it was a step towards an international regulation of refugees.<sup>17</sup> However, it was initially available only to Russian refugees (July 5, 1922), though later extended to Armenians from May 31, 1924 onwards.<sup>18</sup> In the *Arrangement of May 12, 1926 Relating to the issue of identity certificates to Russian and Armenian refugees*, a very limited definition of the term was given: the status of refugee being granted only to Armenians or Russians:

Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality; Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.<sup>19</sup>

Such a legal approach born of European upheavals to the notion of refugee underscores the partial and limited answers given by the international community. Firstly, it put the problem of refugees in an exclusively European time frame. Secondly, it only made recommendations (for eg. concerning the agreement of 1928).<sup>20</sup> Thus, States retained the liberty to decide if they wanted to give a legal reality to the LN's recommendations. These measures confirmed the notion of refugees as categorically collective, sectoral and occasional<sup>21</sup> in the approaches of States and the international community. Indeed, until 1967, the definition of refugee retained this *ad hoc* aspect, limiting refugee status to “events occurring before January 1st 1951.”<sup>22</sup>

As far as India's position was concerned, the Great War dramatically transformed its status in the international arena, making it an original member of the

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<sup>16</sup> Egidio Reale, *Le problème des passeports*, Collected Courses (Hague Academy of International Law, 1938) vol 50; John C Torpey, *The Invention of the Passport. Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2018).

<sup>17</sup> Reale, *supra* note 16 at 145.

<sup>18</sup> *Arrangement of May 31, 1924 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, League of Nations document CL 72.

<sup>19</sup> *Arrangement of 12 May 1926 Relating to Issue of Identity Certificates to Russian and Armenian Refugees* LXXXIX LNTS 2004.

<sup>20</sup> *Arrangement of 30 June 1928 Relating to the Legal Status of Russian and Armenian Refugees* LXXXIX LNTS 2005.

<sup>21</sup> Danièle Lochak, “What is a Refugee? The Political Construction of a Legal Category” (2013) 144 *Pouvoirs* 33.

<sup>22</sup> *1951 Refugee Convention*, *supra* note 2, art 1(A)2.

LN, and a major co-operative actor in the League's work. This, despite its status of colony in the British Empire and its lack of political autonomy.<sup>23</sup>

Its position as the only colony out of 31 original members<sup>24</sup>, and its role in the LN after 1926 illustrated its symbolically distinct identity and position in the British Empire. But in reality, India was effectively controlled by Britain. Its representative was the Secretary of State of India, who, until 1929 remained a Britisher designated by the British government in India. In addition to this representative, one delegate was always a ruling prince, also nominated by the British government. Thus, Indian national opinion opposed the LN because it considered that (i) India's membership was a "camouflage" of absolute British control over its internal affairs;<sup>25</sup> and (ii) an instrument of "perpetual dominance"<sup>26</sup> in the shape of imperialism. Despite British control over Indian delegates to the LN, India refused to sign any refugee agreements in the LN, from 1926 to 1946, considering the matter subordinate to its priority struggle for independence. This position of refusing to sign agreements was possible due to the position of the British government, since 1926,<sup>27</sup> which could not sign for India without prior consultation and agreement of the colony. Meanwhile, Great Britain ratified the 1933 *Convention*<sup>28</sup>—the first binding multilateral instrument, though not applicable worldwide—to give legal protections to refugees, and then also signed the 1938 *Convention on Refugees*.<sup>29</sup>

### C. Jewish and Polish Refugees in India Under British Rule

At the same time, India was impacted by the question of refugees in the early 1930s. It received Jewish refugees fleeing from Nazi persecution in its territory. In the early 1930s, European Jews approached the All Indian Congress Committee (AICC) for avenues of employment in India. Jawaharlal Nehru—then president of the Congress, later first prime minister of India from 1947 to 1964—considered that Jewish refugees could help in India's national construction. Indeed, Nehru played a key role in promoting this policy between 1933 and 1942 and pushed for the reception of European Jews by the Indian provinces. In his letter to the Bengali nationalist leader Subhash Chandra Bose in 1939, he stressed that refugees would be skilled, temporary working force on low salaries.<sup>30</sup>

<sup>23</sup> Lanka Sundaram, "The International Status of India" (1930) 9:4 *J of the Royal Institute of Intl Affairs* 452 at 454-56.

<sup>24</sup> Dina Nath Verma, *India and the League of Nations*, (Patna, India: Bharati Bhawan, 1968) at 21.

<sup>25</sup> See M. Asaf Ali's intervention in India, *Legislative Assembly Debates in India* (1936), vol I at 895-96.

<sup>26</sup> Jawaharlal Nehru, *Glimpses of World History* (New York: John Day Company, 1942) at 707.

<sup>27</sup> *Report of the Inter-Imperial Relations Committee of the Imperial Conference*, Cmd 2768, 1926 at 13-30.

<sup>28</sup> *Convention Relating to the International Status of Refugees*, 28 October 1933, CLIX LNTS 3663.

<sup>29</sup> *Convention Concerning the Status of Refugees coming from Germany*, 10 February 1938, CXCII LNTS 4461.

<sup>30</sup> Maria Framke, "India: A Safe Haven for Jewish Refugees? Exploring the Entangled Web of Indian Anti-Fascism, Anti-Colonialism and Humanitarian Solidarity in the Inter-War Period" (Paper delivered at the Conference In Global Transit: on Jewish Migrants from Hitler's Europe in Asia, Africa, and Beyond delivered at Max Weber Stiftung India Branch Office at Loreto College, Kolkata, India, 2018).

However, despite Nehru's willingness to welcome Jewish refugees in India, a strong opposition emerged inside the National Congress Party and equally in British government circles. Whilst Congress was largely indifferent to the Holocaust, Great Britain hardened its criteria for immigration. Thus, in 1937, it required Jewish refugees to have 50£ in a foreign bank, in disregard of German law that prohibited Jews from possessing foreign currencies. When war broke out, German Jewish refugees were declared "enemy aliens", which in customary international law defines citizens of any foreign nation staying in a country with which their country is at war and who are liable to be apprehended, restrained, secured and removed. Nehru's humanitarian, albeit national approach to Jewish refugees was interrupted when the entire Congress Working Committee was arrested and imprisoned by the British government in 1962 under the *Defence of India Rules*<sup>31</sup> for resisting participation in the War.<sup>32</sup> This put a temporary end to any serious international participation or intervention by Indian nationalist organizations (the Working Committee, the All India Congress Committee and the four Provincial Congress Committees) on the question of refugees. A significant consequence was to leave the field open to British re-intervention on refugees.

Nonetheless, Polish Jewish refugees did arrive in India, even if the government of India argued against it on different pretexts: difficult weather conditions, inappropriate for European children, the infiltration of espionage agents along with these children, the threat of war reaching India, etc.<sup>33</sup> Having fled the Nazi regime for the Soviet Union, Jewish refugees were sent on to the Middle East and finally arrived in India at the beginning of the 1940s.<sup>34</sup> It was two princely States who took charge of these "new refugees", notably Maharaja Jam Saheb Digvijasinhi, ruler of the State of Nawanagar (Gujarat), representative of the princes in London and of the Indian corps in the British imperial war cabinet. The second camp was set up by the Maharaja of Kolhapur (Bombay Presidency). They were initially maintained by charitable funds raised in India by the princes,<sup>35</sup> not by British contributions. Thus, the Indian public contributed six lakh rupees for the maintenance of Polish refugees.<sup>36</sup>

Two main refugee camps were set up in India, one in Balachadi (in Nawanagar State) and another in Valivade (Kolhapur) in 1943. The success of Nawanagar led the British Government of India to accept not only children but also women, and elderly men who were financially supported by the Polish Government in exile. The Valivade camp was financed by the Polish government in exile through His Majesty's

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<sup>31</sup> *Defence of India Rules 1962* (India).

<sup>32</sup> Delhi (India: Union Territory), *Report on the Administration of the Delhi Province*, (Government of India Central Publication Branch 1930) at 19.

<sup>33</sup> Anuradha Bhattacharjee, "Polish Refugees in India, During and After the Second World War" (2013) 34:2 *Sarmatian Rev* 1743.

<sup>34</sup> Telegram dated 17 November 1942 from Bullard, Teheran to Consul General Meshed, repeated to Government of India, NAI, EAD 276-X/42/Secret.

<sup>35</sup> Bhattacharjee, *supra* note 33.

<sup>36</sup> Cipher telegram for GOI- EAD to S of s, India, dated 1 July 1947, British Library, IOR, L/P&J/8/415, f. 260.



Government.<sup>37</sup> However, in 1943 when the British government ceased to recognize the Polish government in exile in London, the camp was financed by the United Nations Refugee Repatriation Agency, even while being administered by British Authorities.

Other transit camps were established in Karachi for Polish refugees. Refugees from Karachi were directed to other camps in British East Africa (Uganda, Kenya) or Mexico. From the second camp, they were sent to Valivade. When the Valivade Camp closed in March 1948, its residents moved to the United Kingdom under the Polish Resettlement Scheme in India. Others were sent to Australia as displaced persons.

India's position until 1947 on the notion and place of "refugee", thus located it principally within the frame of its own project and struggle for the nation. It viewed Jewish and Polish refugees from this perspective, rather than from the angle of the legal regimes conceived and elaborated by international organizations or from the humanitarian perspective. However, princely rulers retained a certain autonomy in this field and acted according to their own humanitarian impulses.

## II. Post 1947 : National vs. Universal Perspective

### A. A New Independent Legal System

The Indian subcontinent's partition in 1947 creating the two independent nations of Pakistan and India triggered the displacement of around 14 million people. Negotiations between the British, the two major political parties, the Indian National Congress and the Muslim League, led to the creation of two Nation-States in 1947: (i) India; and (ii) Pakistan.<sup>38</sup> The Muslim League's determination to found their own nation based on a Muslim religious identity<sup>39</sup> and the Indian National Congress' insistence on defining India as a multi-religious nation, comprising a majority Hindu population but equally Muslims, Sikhs, Christians, Parsis or Jains, would colour India's subsequent positions on the matter of refugee's and its position on religious identities in India. On the morrow of partition, as Britain withdrew, Pakistan and India were free to elaborate their independent policies regarding refugees. The violent context that saw the birth of these two nations did not promote significant collaboration and convergence of a policy regarding refugees.<sup>40</sup> Both countries elaborated approaches in response to their own domestic pressures and contingencies.

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<sup>37</sup> Mark Edele, Sheila Fitzpatrick & Atina Grossmann, ed, *Shelter from the Holocaust: Rethinking Jewish survival in the Soviet Union* (Detroit: Wayne State University Press, 2017) at 194.

<sup>38</sup> The province Bengal, separated from India during Partition, became "East Bengal" also known as "East Pakistan. In 1971, East Bengal/East Pakistan became a sovereign State: Bangladesh.

<sup>39</sup> Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge: Cambridge University Press, 1995) 13-14; Sunil Khilnani, *The Idea of India*, reprint (New York: Farrar, Straus and Giroux, 1999).

<sup>40</sup> Ritu Menon, "Cartographies of nations and identities: a post-partition predicament" (1999) 1:2 *Interventions* 157.

The traumatic event of Partition, in South Asian history played a critical role in shaping India's judicial regimes and approach to international accords. Partition and its accompanying communal riots provoked the flight of 4,7 million Hindus and Sikhs who fled West Punjab, now Pakistan. In parallel, 2,5 million Hindus fled East Pakistan in the direction of West Bengal, Assam and Tripura. Approximately 1,25 million refugees were sheltering in 160 camps across India: more than 720 000 were in 85 camps in East Punjab and 150 000 in New Delhi itself.<sup>41</sup> The largest camp in East-Punjab, Kurukshetra, housed a quarter of a million refugees; from mid-October to end November 1947, the camp grew ten times in size.<sup>42</sup> Some camps continued to exist till the 1950s.

However, while Partition can be considered a unique phenomenon, its ground reality affected the partitioned States of northwestern and eastern India in a very different manner, especially on humanitarian levels. This was due in large part to the differences in treatment of the refugees by the Indian State.<sup>43</sup> Partly because the refugee movement from East Bengal was more drawn-out and less dramatic in 1947. But also because of strong Punjabi, Sikh political and moral pressure on the government. Sikh political parties felt betrayed and wronged by India for the loss of their State. And the very scale of Punjabi refugees placed the Indian State before an unprecedented humanitarian crisis. It has been argued that refugees in the northwestern regions received more attention and aid from the new Indian State than refugees from Eastern Bengal.<sup>44</sup>

The violence of riots during Partition led the Indian government to position itself in the role of protector of its citizens. This, to a large extent, was used to justify and morally legitimize its future positions on refugees and international human rights that would be deemed contradictory by Occidental countries.

While ten expert committees were set up to deal with the administrative aspects,<sup>45</sup> at this time of power transfer and division of resources, no committee was created to deal with migration issues.

## **B. The Colonial Legal Heritage**

One of the colonial laws independent India inherited and retained was the *Foreigners Act*, 1946. Adopted by the British government in the aftermath of the Second World War, Act No. 31 of 1946, the *Foreigners Act* granted powers to the

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<sup>41</sup> Ministry of Information and Broadcasting, Government of India, *Millions on the Move: The Aftermath of Partition* (New Delhi: Publications Division, 1948) at 11.

<sup>42</sup> Yasmin Khan, *The Great Partition: The Making of India and Pakistan* (New Haven: Yale University Press, 2017) at 163.

<sup>43</sup> Joya Chatterji, *Bengal divided: Hindu Communalism and Partition, 1932-1947* (Cambridge: Cambridge University Press, 1994).

<sup>44</sup> Prafulla K Chakrabarty, *The Marginal Men: The Refugees and the Left Political Syndrome in West Bengal*, reprint (Calcutta: Naya Udyog, 1999) at 280-90.

<sup>45</sup> Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India* (New Delhi: Penguin Books India, 1998) at 75.

Interim Government of India<sup>46</sup> in matters relating to foreigners in India. It took over the definition given in the *Registration of Foreigners Act, 1939* and established a negative definition of “foreigner” in Article 2: “‘foreigner’ means a person who is not a citizen of India”.<sup>47</sup> No distinction is made between refugees and foreigners under the *Foreigners Act, 1939*; the State is, according to Article 3(1),<sup>48</sup> responsible for regulating the entry, presence and departure of foreigners. As foreigners, individuals are subjected to restrictions affecting property ownership, employment rights, freedom of movement and freedom of speech and assembly.

After Partition, India maintained the 1946 Foreigners Act. Yet, it was forced to recognize the refugee as a new category in light of the situation. Five Indian States introduced a refugee act: Haryana,<sup>49</sup> Himachal Pradesh,<sup>50</sup> Madhya Pradesh,<sup>51</sup> Maharashtra,<sup>52</sup> and Punjab.<sup>53</sup> A variety of definitions were proposed in order to register the new migrants, rehabilitate them and compensate them for their loss of land, jobs, homes, not to mention family members. The accent was on the cause of flight, mainly Partition: ‘refugee’ means a person domiciled or ordinarily resident in, or owning property in, or who carried on business with the territories now comprised in Pakistan”<sup>54</sup> on the time of flight and the cause, notably, fear for one’s life

and who has, since the first day of March, 1947 left or been made to leave his place of residence or has abandoned or been made to abandon his property or business in the said territories on account of civil disturbances or the fear of such disturbances or the partition of the country.<sup>55</sup>

Agricultural activity came in for a special reference:

“refugee” means a land-holder in the territories now comprised in the Province of {Punjab in Pakistan}, or who or whose ancestor migrated as a colonist {from the undivided Punjab} since 1901, to the Provinces of North-

<sup>46</sup> Known as the Provisional Government, it was formed on September 2, 1946. With the liberation by the British of the political participants of the “Quit India Movement”, the Indian National Congress and the Muslim League participated in elections for a Constituent Assembly. It remained until August 15, 1947, the date of India’s independence and Pakistan creation; See: Great Britain: Foreign and Commonwealth Office, *Transfer of Power in India, 1942-47: The Interim Government, July 3-Nov.1, 1946* (Stationery Office Books 1979).

<sup>47</sup> *Registration of Foreigners Act 1939* (India), art 2 [*Registration Act*].

<sup>48</sup> “The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.” [emphasis added]; *Foreigners Act 1946, supra* note 8.

<sup>49</sup> *The East Punjab Refugees (Registration of Claims) Act 1948* (India); *The East Punjab Refugees (Registration of Land Claims) Act 1948* (India); *The East Punjab Refugees Rehabilitation (Buildings and Building Site) Act 1948* (India); *The East Punjab Refugees Rehabilitation (House Building Loans) Act 1948* (India); *The East Punjab Refugees Rehabilitation (Loans and Grant) Act 1948* (India).

<sup>50</sup> *Ibid.*

<sup>51</sup> *The Madhya Pradesh Refugees Registration and Movement Act 1947* (India); *The Madhya Pradesh Refugees Rehabilitation (Loan) Act 1949* (India) [*Madhya Pradesh Rehabilitation*].

<sup>52</sup> *The Bombay Refugees Act 1948* (India).

<sup>53</sup> *Registration Act, supra* note 47, art 2(d).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

West Frontier Province, Sind or Baluchistan or to any State adjacent to any aforesaid Provinces and acceding to \*\*\*\* Pakistan”.<sup>56</sup>

A reference to the need for registration was included:

“...who has been registered in accordance with section 3 of the *Central Provinces and Berar Refugees Registration {and Movement} Act, 1947*, {and includes a displaced person}”.<sup>57</sup>

These definitions made the refugee status dependent upon a timeline (March 1, 1947) and laid down the conditions that created refugees (violence, civil disobedience, dispossession of land) because of new territorial boundaries. At the same time, the term only concerned “refugees from Partition,” moreover from Western Punjab, neglecting the situation of refugees who had come from East Bengal.

### C. Debating legal status for refugees

As independent India confronted the sudden influx of refugees; the notion inevitable thrust itself into debates on the conditions and requirements of citizenship and moved to the centre of the discussions in the Constituent Assembly. Granting West Punjab refugees’ citizenship had become a moral urgency in the light of their traumatic experience and losses. But the matter of Indians abroad, across the British empire (Burma, Sri Lanka, Fiji...) also had to be kept in mind.<sup>58</sup> As those countries defined their own citizenship laws, many Indians were reduced to either statelessness or secondary citizens, in short, they fell into a state of refugeehood. The notion of refugee was thus closely linked to the statute of citizenship on the morrow of Partition. While no definition was given of “refugee”, one element showed up throughout the debates: refugees in India were individuals who had fled in the context of Partition due to conditions of fear for their lives and insecurity. The Constituent Assembly gave Parliament the right to deal with citizenship, naturalization and refugees.

Article 5 (right to citizenship),<sup>59</sup> adopted by the Assembly on August 12, 1949 included rights of persons who migrated from Pakistan to India during partition (article 6),<sup>60</sup> and article 7 which regulated citizenship claims of persons who migrated to Pakistan.<sup>61</sup> Two elements stand out in this debate: (i) the refugee question came to be inevitably linked with religious identity; and (ii) the delicate matter of who could claim compensation for loss of agricultural land and the even more thorny issue of evacuee property. These aspects were of crucial interest to the Hindu, Punjabi and Sikh lobbies in the Assembly who spoke for their communities’ losses in the recent violence. At the same time, less orthodox groups, led by Nehru, Ambedkar argued for the State’s commitment to secularism (equal respect of all religions), and the need to incorporate

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Madhya Pradesh Rehabilitation*, *supra* note 51, art 2(g).

<sup>58</sup> India, Constituent Assembly Debates (August 11, 1949), vol IX, Part I [Assembly Debates]

<sup>59</sup> *Constitution of India* (India), 26 January 1950, arts 5-7 [*Constitution of India*].

<sup>60</sup> *Ibid.*, art 6.

<sup>61</sup> *Ibid.*, art 7.

more universal humane international principles of equity and justice while deciding the laws of citizenship and clarifying the status of refugees.

Thus, Sardar Bhopinder Singh Man, member of the Assembly from East Punjab and a Sikh, argued against the Drafting Committee's proposal laying down July 19, 1948 as the prescription date to grant Indian citizenship. He wished that any person who had fled riots in Pakistan because of Partition and had come over to India before the establishment of the *Constitution* should be automatically granted Indian citizenship. On the contrary, after the adoption of the *Constitution*, the person had to go to a registering authority and prove a six months domicile in India to be able to claim Indian citizenship.<sup>62</sup>

#### D. Refugees and the *Indian Constitution*

Adopted on November 26, 1949 and effective from January 26, 1950, the *Bhāratīya Saṃvidhāna (Constitution of India)* did not use the word refugee. India has no specific domestic legislation which protects refugees and regulates their entry or status. Refugees in India are considered as aliens. This notion of *alien* appears in the *Constitution of India* (Article 22 paragraph 3 and Entry 17, List I, Schedule 7),<sup>63</sup> the *Indian Civil Procedure Code* (Section 83)<sup>64</sup> and in the *Indian Citizenship Act, 1955* (Section 3(2)(b)).<sup>65</sup>

In fact, the *Constitution of India* guarantees fundamental rights to everyone on its territory including individuals without Indian citizenship. Thus, despite the absence of national legislation, the *Indian Constitution* guarantees rights to refugees such as: right to equality (Article 14),<sup>66</sup> right to life and personal liberty (Article 21),<sup>67</sup> right to protection under arbitrary arrest (Article 22),<sup>68</sup> right to protection in respect of conviction for offences (Article 20),<sup>69</sup> freedom of conscience and free profession, practice and propagation of religion (Article 25) and the right to approach Supreme Court for enforcement of Fundamental Rights (Article 32(1)).<sup>70</sup>

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<sup>62</sup> *Kulathil Mammu vs. The State of Kerala*, 1966 AIR 1614 (Supreme Court of India).

<sup>63</sup> *Constitution of India*, *supra* note 59, art 22 at para 3(a).

<sup>64</sup> *Code of Civil Procedure* 1908 (India), section 83.

<sup>65</sup> *Citizenship Act* 1955 (India), section 3 (2(b)).

<sup>66</sup> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>67</sup> No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>68</sup> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

<sup>69</sup> (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (2) No person shall be prosecuted and punished for the same offence more than once. (3) No person accused of any offence shall be compelled to be a witness against himself.

<sup>70</sup> The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

One exception occurs in Article 22(3)(a), which establishes protection against arrest and detention in certain cases: this does not apply to “*enemy alien*”.

In the absence of national legislation, the Supreme Court’s rulings have proved critical in protecting refugees’ rights in India. In *National Human Rights Commission vs. State of Arunachal Pradesh & Anr (1996)*,<sup>71</sup> the Supreme Court referred to the decision of its Court in *Louis De Raedt vs. Union of India*,<sup>72</sup> and the *Khudiram Chakma* case,<sup>73</sup> which ruled that refugees are entitled to protection under Article 21 of the *Indian Constitution*. In its ruling (*NHRC vs. State of Arunachal Pradesh*), the Supreme Court recalled the constitutionally entrenched rights of every human being, Indian citizens or *aliens*. Therefore, every person is entitled to equality before the law and equal protection of the laws and right to life and liberty. In addition, it underlined the State Government’s obligations to protect individuals’ life and liberty, otherwise it fails to respect the *Constitution* and statutory obligations. State Governments, thus, have to respect legal obligations to safeguard the life, health and well-being of refugees (in this case Chakmas residing in the State of Arunachal Pradesh) and refugees’ applications for citizenship should be forwarded to the concerned authorities and not withheld.

Article 21 of the *Indian Constitution* remains fundamental for refugees. In reality, it imposes certain constraints: any action of the State which deprives an alien of his or her life and personal liberty without proper procedure established by law would fall foul of it, and such action would certainly include the *refoulement* of refugees.

The interpretation of constitutional provisions remains largely in the hands of executive powers. On the ground, in State governments, implementation of policies lies in the hands of bureaucrats and government officers. If recourse to the judicial institutions such as High Courts and Supreme Courts remains a possibility for refugees, the difficulties and labyrinth procedures make it often inaccessible.

### III. Eurocentrism and Refugees in 1951

#### A. The 1951 *Convention* and its Refusal

The 1951 *Convention*’s purpose is to establish a system of international protection for persons in need of it. It gives the status of “*refugee*” to a person who has lost the protection of their State of origin or their nationality. According to Article 1, the *Convention* applies to any person who has been considered as a refugee under the League of Nations Arrangements of May 12, 1926 and June 30, 1928, the *Conventions*

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<sup>71</sup> *NHRC v Arunachal Pradesh*, 1996 SCC (1) 742 (India, Supreme Court) [*NHRC*].

<sup>72</sup> *De Raedt v India*, 1991 3 SCC 554 (India, Supreme Court) [*De Raedt*].

<sup>73</sup> *Arunachal Pradesh v Chakma*, 1994 Sup (1) SCC 615 (India, Supreme Court). [*Chakma*].

of October 28, 1933 and February 10, 1938, the *Protocol of September 14, 1939* or the *Constitution of the Refugee Organization*.<sup>74</sup>

The *Convention's* provisions apply only to events occurring before January 1, 1951 to persons caught in situations where they

fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>75</sup>

While the 1951 *Convention* delimited refugees' situation prior to 1951, the continuance of armed conflict and persecutions led to the *Protocol* of 1967, which obliterated all spatial and temporal limits.

According to this *Convention*, refugees are to have the same treatment as nationals regarding basic rights such as freedom of religion, access to courts, possession of property and elementary education.

India faced and still faces criticism and pressure to ratify the 1951 *Convention* and the 1967 *Protocol*. Despite this international pressure, the country continues to be a non-signatory and to justify its position.

India's representative explained that his country, while agreeing with the substance of the French delegation's draft Preamble, did not agree that a Preamble should contain ideas which went beyond the terms of the *Convention*. He thought that, in its incomplete state, with the fifth paragraph left out of consideration, it would make peculiar reading, and that the Belgian representative's original proposal, consisting of the first three paragraphs of the French delegation's draft Preamble and the final paragraph of the original draft Preamble, would have been preferable.<sup>76</sup>

[India's representative noted that the intention of] revising the preamble was apparently to refer, first, to refugees outside the categories laid down in the draft *Convention*, and, secondly, to governments not parties to the *Convention*. In effect, an appeal was made to all governments to accord the same treatment to all refugees, in order to reduce the burden on contracting governments whose geographical situation meant that the greater part of the responsibility fell on them.<sup>77</sup>

[India's representative] declared that when the amendment to the Preamble proposed by the French representative was put to vote, he would abstain, because he was opposed to inserting a clause which went beyond

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<sup>74</sup> 1951 *Refugee Convention*, *supra* note 2, art 1.

<sup>75</sup> *Ibid.*

<sup>76</sup> UN High Commissioner for Refugees, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, at 22.

<sup>77</sup> *Ibid.*, at 18.

the scope of the definition or which was not normally considered proper in such a Preamble.<sup>78</sup>

Instead of amending the Preamble to the draft *Convention*, [it would be preferable] to draw up a resolution for the Council to be submitted later to the General Assembly. [India pointed] out the desirability of all contracting governments according similar treatment to refugees excluded from the categories laid down by the *Convention*, and of all non-contracting governments according such treatment to refugees within those categories.

India thus signed none of these legal texts.

It deemed the *Convention* eurocentric and further feared that policies towards refugees theoretically driven by humanist concerns would open the door to possibilities of occidental intervention in its territory.<sup>79</sup> Article 35 of the *Convention* (cooperation of the national authorities with the United Nations) supports this aspect of external intervention, and as a "Southern" State, India, in light of its recent experience of colonisation, apprehended that its sovereignty could be threatened by an international intervention. Ratifying the *Convention* would lead to a restriction on some of its sovereign rights and impose mandatory cooperation with the United Nations High Commissioner for Refugees. Furthermore, the Indian government believed that migration was a matter of bilateral and not multilateral relations. This belief resulted in different agreements with neighbouring countries such as Sri Lanka<sup>80</sup>, Bhutan<sup>81</sup> and Nepal<sup>82</sup>.

On a national level, historic tensions between the different communities, in particular Hindu and Muslim communities before and since the Partition, led the government to look at individuals not as human cases but according to their possible impact in maintaining a domestic demographic balance between the various communities, and religion or linguistic groups. In 1971 for instance, the arrival of Bangladeshi refugees in West Bengal and then in the North-Eastern States of Tripura, Assam, Meghalaya, created discontent amongst indigenous peoples who feared they would be reduced to minorities in their own homeland. While India and its neighbouring countries have porous borders, India also fears uncontrolled infiltration of terrorists and criminals leading to internal insecurity.

India remains one of the few liberal democracies who have not signed the international *Convention* leave their homes under harrowing conditions. The UNHCR won't officially say why, but the reasons are chiefly security-related. The easy argument is that it already hosts refugees, doesn't even take UN money to look after the refugees, therefore signing another convention would be merely a cosmetic exercise.

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<sup>78</sup> *Ibid*, at 27.

<sup>79</sup> Centre for Equity Studies and Rosa Luxemburg-Stiftung, "Towards an Ethical Refugee Policy" (delivered at the Annexe of the India International Centre, Delhi, February 5, 2020).

<sup>80</sup> *Sirima-Shastri Pact* (1964) and *Sirima-Gandhi Pact* (1974).

<sup>81</sup> *Treaty of Friendship between India and Bhutan* (1949).

<sup>82</sup> *Treaty of Peace and Friendship* (1950).



During the 54th session of the Executive Committee Meeting of the UNHCR in 2003, India's representative explained one of the reasons for its refusal to sign the *Convention*. For India, the foremost reason surrounds the definition of "refugee" in the *Convention* which fails to recognize the fundamental actors responsible for creating refugee movements.<sup>83</sup>

Secondly, while the *Convention* lists the persecution of individuals as one of the characteristics of refugees, it forgets to add loss of livelihood as a reason to this displacement. In 1971, with the partition of West-Pakistan, individuals were not considered refugees but seen as fleeing the destruction of their fields.

India's refusal to be a signatory of the 1951 Convention was on grounds that it was eurocentric, and its principles embedded in Cold War-era politics while its own policies towards refugees were presented as being driven by humanism. Further, it feared imprecise legal responsibility for the vast number of persons seeking shelter. The Ministry of External Affairs has stated that it "considers the 1951 Convention and 1967 Protocol, a partial regime for refugee protection drafted in a Euro-centric context."<sup>84</sup> It does not adequately address situations faced by developing countries as it is designed primarily to deal with individual cases and not with situations of mass influx.<sup>85</sup> It is argued that the *Convention* is being undermined by the very states which framed the *Convention*.

A third reason is that India retains a degree of skepticism about the UNHCR. This apparently flows from the Bangladesh war of 1971. At the time, UNHCR helped devise India's administrative response to the 9.8 million Hindu refugees who poured in from Bangladesh. It also helped to mobilize huge international finances to pay for Indian bills and helped facilitate the repatriation of the refugees. But India was far from pleased by a visit to Bangladesh (then East Pakistan) by the UNHCR high commissioner, Sadruddin Agha Khan, on the invitation of Pakistani president Yahya Khan. This was seen as an endorsement of Pakistani propaganda that its eastern territory was normal.

## B. National Laws

India is home to diverse groups of refugees, ranging from Buddhist Chakmas from the Chittagong Hill Tracts of Bangladesh, to Bhutanese from Nepal, Muslim Rohingyas from Myanmar and small populations from Somalia, Sudan and other sub-Saharan African countries. According to the UNHCR, there were 204,600 refugees, asylum seekers and "others of concern" in India in 2011.<sup>86</sup> They were made up of

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<sup>83</sup> Damini Sharma, "Why India Did Not Sign the 1951 Refugee Convention", HG.org, online: <<https://www.hg.org/legal-articles/why-india-did-not-sign-the-1951-refugee-convention-41414>>.

<sup>84</sup> Bimal N Patel, *The State Practice of India and the Development of International Law* (Leiden: Brill Nijhoff, 2016) at 136.

<sup>85</sup> *Ibid*; UN Division, Ministry of External Affairs, Refugees (NO. UI/1515/9/99).

<sup>86</sup> Dipankar De Sarkar, "Why India won't sign Refugee Treaty", *Mint*, September 11, 2015, online: <<https://www.livemint.com/Opinion/bePZQScFlq1wEWv9Tqt4QO/Why-India-wont-sign-Refugee-Treaty.html>>.

13,200 people from Afghanistan, 16,300 from Myanmar, 2,100 from various other countries and the two older populations of around 100,000 Tibetans and 73,000 Sri Lankan Tamils.<sup>87</sup> The UNHCR financially assisted 31,600 of them.<sup>88</sup>

Despite welcoming these refugees, India has continued to apply the outdated colonial *Foreigners Act* (1946), which does not contain the term “refugee” and allows the term foreigner to cover aliens temporarily or permanently residing in the country. This deprives refugees of privileges available under the 1951 *Convention*. As no distinction is made between refugees and foreigners, refugees run a risk of being arrested by immigration authorities and prosecuted if they enter India or are arrested in India without valid passports or travel documents.

Article 3, subsection 2, clause (e) of the *Foreigners Act*,<sup>89</sup> contains a list of nine orders embodying government regulations on rights and freedoms that the *Convention* guarantees. For example, India can require foreigners to reside in mandated areas, thereby barring their right of movement across the country, providing India the ability to confine foreigners to refugee camps and conduct periodic camp inspections.

The case of Tibetan refugees illustrates this situation. Despite their privileged refugee status, without a “refugee” designation, Tibetans in India are considered as *aliens* under domestic law. The first wave of Tibetans who arrived with the Dalai Lama in 1950 acquired legal asylum, were given land—although Indian law prohibits *aliens* from purchasing land—, housing and automatically received Registration Certificates (RC). Contrary to other refugees coming from Afghanistan or West Bengal, Tibetan refugee camps were built on land given by the Central State or Regional States between 1960 and 1965.<sup>90</sup> The RC allows Tibetan refugees “the right to enjoy all the privileges enjoyed by any Indian citizen except the right to vote and work in Indian government offices.”<sup>91</sup> Without a RC, Tibetans “are vulnerable to harassment by the police, arrest, detention, extortion, fines and threatened or actual deportation.”<sup>92</sup> Tibetans who possess RCs remain subject to the discretion of the Indian authorities. Despite the help of the government in developing settlements, schools, and medical facilities, Tibetans lack a definite legal status, and remain ineligible for naturalization.<sup>93</sup> This situation allows India to expel Tibetans from its territory, in violation of the *jus cogens* principle of non-*refoulement*.

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Foreigners Act 1946, supra* note 8, art 3, subsection 2, clause (e).

<sup>90</sup> Anne-Sophie Bentz, “La diaspora tibétaine en Inde: succès et limite d’un modèle?” (2010) 1:141 *Relations internationales* 111 at 114.

<sup>91</sup> Canada: Immigration and Refugee Board of Canada, “China/India: Residency rights of Tibetans residing in India; requirements for Tibetans to obtain and retain permanent residence in India” (7 July 2009), online: *Refworld* <[www.refworld.org/docid/4a7040b81c.html](http://www.refworld.org/docid/4a7040b81c.html)>.

<sup>92</sup> Tibet Justice Center, “Tibet’s Stateless Nationals III: The Status of Tibetan Refugees in India” (June 2016), online (pdf): *Tibet Justice* <[www.bu.edu/law/files/2016/09/Tibets-Stateless-Nationals-II-FINAL-report.pdf](http://www.bu.edu/law/files/2016/09/Tibets-Stateless-Nationals-II-FINAL-report.pdf)> at 47-48.

<sup>93</sup> *Ibid* at 36.

### C. Questioning National Policy on the 1951 *Convention*

Thus far, India's policy on refugees has always been piecemeal, and *ad hoc*, from the large-scale arrival of Hindu refugees at the time of Partition in 1947 onwards. While its legal framework has no uniform law to deal with its refugee population, it has claimed to apply a refugee policy in respect of the core principles of international treaties and to be a generous host despite not being a signatory to the 1951 *Convention*. The 1966 *Bangkok Principles*, readopted in 2001, gave a wider definition to the status of refugees.<sup>94</sup> Article 4 established minimum standards of treatment of refugees. India recognized two groups of refugees, the first from neighbouring countries who could get direct assistance from the Indian government, and the second from non-neighbouring countries who received documents of refugee status from the UNHCR office in New Delhi. These two groups had different documents.

Demands for a revision of India's refugee policy have though not gained new strength since the 1990s. In 1997 the National Human Rights Commission (NHRC) initiated a dialogue with the Ministry of External Affairs requesting a fresh examination of the possibility of India becoming party to the 1951 *Convention* and the 1967 *Protocol* on the subject.<sup>95</sup>

In 1997, a commission chaired by Justice P. N. Bhagwati proposed a bill on a uniform national law on refugees. It was never tabled in Parliament, but defined the term "refugee" as:

any person who is outside his/her country of origin and is unable or unwilling to return to and is unable or unwilling to avail himself/herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a particular social group or political opinion...owing to external aggression, occupation, foreign domination, serious violation of human rights or events seriously disrupting public order in either part or whole of his/her Country.<sup>96</sup>

The NHRC urged the promulgation of a national law or at least, amendments. In 1997, an eminent group of persons in India came up with a model law for refugees.<sup>97</sup> The bill went up to the Law Minister without any results. Private member bills have also been proposed. A recent public debate organized in February 2020 at Delhi argued that India now needed to sign the 1951 *Convention* and adopt a more transparent, ethical refugee policy.<sup>98</sup>

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<sup>94</sup> *Bangkok Principles on the Status and Treatment of Refugees*, Asian-African Legal Consultative Organization (AALCO), 31 December 1966.

<sup>95</sup> Rajeev Dhavan, "On the Model Law for Refugees: A Response to the National Human Rights Commission (NHRC)," *NHRC Annual Reports 1997-1998, 1999-2000* (New Delhi: PILSARC, 2003).

<sup>96</sup> Drafted under the auspices of the Regional Consultations on Refugees and Migratory Movements in South Asia initiative in 1995.

<sup>97</sup> Arun Sagar, Farrah Amed, "The Model Law for Refugees: An Important Step Forward?" (2005) 17 *Student Bar Review* 73 at 91.

<sup>98</sup> Prashant Bhushan, Roshni Shanker, K.P. Fabian, Navsharan Singh and Harsh Mander, *Towards An Ethical Refugee Policy in India* (India International Center, 5 February 2020).

Arguments advanced in favour of a national law underlined that it would help avoid frictions between the host country and the country of origin of the regions, and make for better acceptance of the country's approach to refugees by other states as a peaceful, humanitarian and legal action under a judicial system rather than a hostile political gesture. Without any law or protocol, the Indian government has full autonomy to decide which rights and freedoms should be conferred upon which groups. Even favoured communities like the Tibetan refugees have suffered due to lack of a firm policy. In 1991, when Chinese Premier Li Peng visited New Delhi, certain Tibetan refugee camp leaders and activists were arrested, and most Tibetan settlements and community organizations were put under surveillance. This highlighted the drawbacks of *ad hoc* administration of the question.

India's systematic refusal to bow on this subject is that its *ad hoc* administrative decisions can be taken on political and security considerations and on the basis of its bilateral relations with the country of origin of the refugees in question, rather than broad universal human rights principles that would constrict its freedom of action or even harm its national interests. Since India has different treaties with its neighbouring countries, a uniform law to deal with the refugee groups would not be politically or practically viable. Security considerations and vulnerability to cross-border infiltration due to the porous nature of its borders are two high priorities that influence India's approach to the *Refugee Convention*. Thus, while India affirms the principle of non-*refoulement*, which is integral to any law on refugees, it refuses to accept international conventions on refugees. For instance, the Supreme Court and the High Court of Gujarat have ruled on the principle of non-*refoulement*, although in principle, national courts enforce principles of international custom that do not conflict with national law.<sup>99</sup> In 1996, the Supreme Court ruled<sup>100</sup> that non-*refoulement* is more than customary international law. It has constitutional status as a component of the *Indian Constitution's* guarantee of the right to life (Article 21 of the *Constitution*). The High Court of Gujarat in 1999 followed the Supreme Court by explicitly holding that Article 21 of the *Indian Constitution* guarantees non-*refoulement*.<sup>101</sup> However, refugees still remain vulnerable to the risk of apprehension, detention and prosecution for the violation of the *Foreigners Act*, 1946 and the *Foreigners Order*, 1948. In the 1991 ruling the Indian Supreme Court held that the government's right to deport is absolute: "the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the *Constitution* fettering this discretion [...] the executive Government has unrestricted right to expel a foreigner."<sup>102</sup>

Article 51(C) of the *Constitution* mandates that the "state shall endeavour to foster respect for international law and treaty obligations in the dealings of organized

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<sup>99</sup> *Civil Rights Vigilance v India*, AIR 1983 Kant 85 at para 18: "[...]the government of India's obligation under Gleneagles Accord and obligations attached to its membership of the United Nations cannot be enforced at the instance of citizens or associations of such citizens of this country or associations of such citizens, by courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation."

<sup>100</sup> *NHRC*, *supra* note 71.

<sup>101</sup> *Al Qutaifi v India*, 1999 CRL.L.J. 919 (Gujarat High Court).

<sup>102</sup> *De Raedt*, *supra* note 72 at para 13.

people with one another.”<sup>103</sup> The *Indian Constitution* envisages the state as working within the framework of international law. But critics point out that India as a member of the UN cannot ignore its core vision of non-discrimination in this matter.

However, the recent adoption by Parliament of the *Citizenship Amendment Act*<sup>104</sup> that excludes Muslim refugees from Pakistan, Bangladesh and Afghanistan, who entered the country before December 31, 2014 from the benefits of the *Act*, implies an abandon on this prevailing *ad hoc* system that governs the status of refugees. It deviates from the provisions of the 1951 *Refugee Convention* that embraces all persecuted minorities on grounds of race, religion, nationality, membership of a particular social group or political opinion, sexual orientation or gender identity. It thus violates the guarantees of equality and non-discrimination encoded in core human rights treaties by specifically listing six religious communities for protection (in this case Hindus, Sikhs, Jains, Buddhists, Christians, Parsis). Such a marked departure from the country’s constitutional provisions safeguarding its secular character and international conventions draws attention to the dangers of being a non-signatory of the 1951 *Convention*. The hitherto large internal consensus on India’s independent stance on the 1951 *Convention* has given way to doubts and debates.

The solution to treat refugees with dignity in India is to either ratify the 1951 *Convention* and incorporate it into domestic law or enact a uniform legislation specifically for refugees so that it is not left to the discretion of the executive and the judiciary to decide their fate and consequently, to governments in power. As long as refugees offer potential captive vote banks to political parties, it is in the interest of the central government or state parties to remain unaccountable to any international requirements about their treatment. The absence of both a national refugee law or adherence to international conventions allow discriminations, restrictions and unequal treatment of the refugee population.

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The examination of the above case shows that countries that are not signatories of international conventions need not forcibly be integrated in the categories of rogue states or authoritarian regimes that disregard universal legal principles or indulgent violation of human rights. Non-ratification of international treaties can be seen as a continuity of a long-lasting conflict between western hegemony and developing countries’ resistance. However, this case study highlights how national positions even though still reflecting concerns about eurocentrism do not revolve uniquely around this dimension. While legal movements are still focusing on this aspect, reducing States’ policies to their colonial pasts neglects the weight of core current issues.

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<sup>103</sup> *Constitution of India*, *supra* note 59, art 51(c).

<sup>104</sup> *Citizenship (Amendment) Act 2019* (India).

India's security concerns and traditional apprehensions of international intervention in domestic matters in the light of its colonial experience and its post-independence territorial conflicts with its neighbours makes it extremely wary of engaging both in an international convention on the question of refugees or even devising a national law on refugees. It is chary of taking on the commitments such a signature would entail, and the reduction in its margin of freedom in dealing with the refugee question in response to its own domestic needs and stakes. At the same time, India's stance on this matter reflects its territorial insecurities and anxieties, and raises questions about its commitment both to its democratic foundational principles and its claims to being one of the leading global powers today.