

INDIA'S REFUGEE POLICY: ISSUES AND CONCERNS

Written by *Dr. Yeshwant Naik*

Postdoctoral Fellow

INTRODUCTION

The Global refugee regime has its origins in the Inter-War years. “In the aftermath of the First World War, the League of Nations High Commissioner for Refugees (LNHCR) did not represent a formal treaty-based regime but tried to develop ad hoc solutions to human displacement.¹ In contrast, the post-Second World War era has led to the development of a formal, treaty-based regime with a surveillance mechanism. The contemporary regime is based on, the 1951 Convention on the Status of Refugees, which defines who qualifies as a refugee and the rights to which refugees are entitled.² According to the 1951 Convention, refugees are persons who, “owing to a well-founded fear of persecution on the grounds of race, religion, nationality, or membership of a social group or political opinion, are outside the country of their nationality”. They are people who flee their country because of human rights abuses or conflict. They are therefore in need of what is referred to as ‘international protection’. Given that their own state is unable or unwilling to ensure their access to their basic rights, they need to seek them from another state or from the wider international community.³ The preamble of the 1951 Refugee Convention puts emphasis on international cooperation to provide base for an effective refugee regime. The Convention encompasses the rules, norms, principles, and decision-making procedures that govern states’ responses to refugees. It also defines who is a

¹ Skran, C. *Refugees in Inter-war Europe: The Emergence of a Regime*, pp. 21-35.

² *Ibid.*

³ “The Global Humanitarian Regime: Priorities and Prospects for Reform, Council on Foreign Relations’ (CFR) International Institutions and Global Governance, workshop, March 2016, p.5 http://www.cfr.org/content/publications/attachments/Workshop_Report_IIGG_Humanitarian_OR.pdf (accessed on November 29, 2018); Goodwin-Gill, G and McAdam, J (2007) *The Refugee in International Law*, Oxford: Oxford University Press; Feller, E, Türk, V and Nicholson, F (eds) (2001) *Refugee Protection in International Law*, Cambridge: Cambridge University Press.

refugee and rights thereto.⁴ Article 35 of the 1951 Convention gives UNHCR⁵ an explicit mandate to monitor implementation of the Convention.”⁶ However, the growing prominence of economic and survival migrants has driven a debate about whether the 1951 Convention should be reopened and renegotiated.⁷ Perhaps that has driven a call to “rethink” the definition of refugee.

GLOBAL REFUGEE REGIME

It has been reported by the UNHCR that 86 percent of the world refugees are in developing regions.⁸ There are several reasons which deprive refugees from seeking their basic rights. Countries like India have less capacity to accommodate asylum seekers or refugees due to lack of space or financial instability followed by political reluctance. Lack of resources, fear of crimes, public policy and order are among other reasons, as is an increasing dissatisfaction with the level of burden-sharing with the richer states of the world. They argue that they receive disproportionate support to overcome the extra expenditure associated with the presence of large amounts of refugees.⁹ Hence, the existing regime, although effective, falls short in terms of fulfilment of norms related to burden-sharing and rights of refugees. The norms are still weak and discretionary.¹⁰ The existing global regime imposes larger responsibility on the neighboring states than on those far off. Currently countries like Australia, U.K. are more inclined towards extending protection to those who are within their proximity. To the contrary, they also argue that protection should be provided in the country of origin.¹¹ To this effect, the U.K. has openly declared its wish towards sustainable migration. Also, currently, with a larger number of Syrian people seeking protection, the existing refugee regime has given a new twist

⁴ Betts, A. “The Normative Terrain of the Global Refugee Regime,” <https://www.ethicsandinternationalaffairs.org/2015/the-normative-terrain-of-the-global-refugee-regime/#fn-9725-2> (accessed on November 27, 2018); Loescher, G. 2001. *The UNHCR and World Politics: A Perilous Path* New York: Oxford University Press; Betts, A, Loescher, G. and Milner, J. 2012. *UNHCR: The Politics and Practice of Refugee Protection*, Abingdon, U.K.: Routledge.

⁵ United Nations High Commissioner for Refugees.

⁶ Betts, A. “International Cooperation in the Global Refugee Regime,” GEG Working Paper Nov. 2008/44, p.3. op. cit.

⁷ *Supra* note 3.

⁸ UNHCR, *Global Trends Report: Forced Displacement in 2014*, June 18, 2015.

⁹ Schultz, M.A. “The Global Refugee Regime in International or World Society? An English School Perspective on the Global Management of Refugees,” p. 65, <https://core.ac.uk/download/pdf/43029289.pdf> (accessed on December 5, 2018).

¹⁰ *Ibid*, see Betts, A. 2009. *Protection by Persuasion: International Cooperation in the Refugee Regime*, pp. 1-52.

¹¹ Betts, A. “The Normative Terrain of the Global Refugee Regime,” op. cit.

to the very definition of ‘refugee’. Several European countries are closing their borders to refugees by making asylum conditional.

More than a million migrants and refugees crossed into Europe in 2015.¹² In the first nine months of 2015 alone, refugee influx raised net immigration to Germany to the record level of more than one million. More than half of the asylum seekers came from Syria, Albania, Serbia, Afghanistan and Iraq.¹³ Among the developed countries, Germany serves as a good illustration for initiating a pro-refugee campaign.¹⁴ In spite of the anti-asylum mobilizations by the right wing populist movement “Pegida”, there are several instances wherein civil society groups extended support to asylum-seekers.¹⁵ The right to political asylum in Germany is based on Article 16 of the German Basic Law (Art. 16 Grundgesetz (GG)).¹⁶ The admission procedure for asylum seekers is governed by the Asylum Procedure Act (Asylverfahrensgesetz).

REFUGEE POLICY IN INDIA

Indian Law does not define the term ‘refugee’, and yet it is a country having a long practice of welcoming refugees from all over the world. The Parsis were the first to enter India around the 10th century A.D. to escape Arab persecution in Persia which began in the 7th century. For the same reason, Syrian Christians and Jews took refuge in India.¹⁷ On the other hand, among developing countries, India serves as a good illustration for not initiating a pro-refugee campaign. It has not signed the 1951 Refugee Convention and the 1967 Protocol relating to the status of refugees. There are refugees coming from China, Myanmar, Burma, Bhutan, Nepal, Afghanistan, Iran, Iraq, Bangladesh and Sri Lanka. The World Refugee Survey 2009, conducted by the U.S. Committee for Refugees and Immigrants, revealed that there are nearly 411,000

¹² <https://webcache.googleusercontent.com/search?q=cache:d5q-LggjABoJ:https://en.jrs.net/assets/Publications/File/Legal%2520Rights%2520of%2520Refugees%2520in%2520India.pdf+%&cd=5&hl=en&ct=clnk&gl=de> (accessed on December 5, 2018).

¹³ Folkerts-Landau, D. “Influx of refugees: An opportunity for Germany,” https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD000000000441803/Influx_of_refugees%3A_An_opportunity_for_Germany.PDF (accessed on December 3, 2018)

¹⁴ *Ibid*, see Korsgaard, C. *Self-Constitution: Agency, Identity, and Integrity*, New York: Oxford University Press, 2009.

¹⁵ Laubenthal, B. “Refugees welcome? Federalism and asylum policies in Germany,” http://fieri.it/wp-content/uploads/2015/09/laubenthal_wp_asylum_final_03.09.2015.pdf (accessed on December 3, 2018)

¹⁶ *Ibid*.

¹⁷ See Houtsma, M.T. 1936. *First Encyclopaedia of Islam 1913-1936*, E.J.Brill's, First (9 Vols.)

refugees in India, out of which the largest number are from Tibet.¹⁸ As per the UNHRC, persons of concern as of January 2014 are 197,850.¹⁹ It has been reported that in the State of Tamil Nadu, there are 66,509 Sri Lankan refugees living in 110 camps and 2 special camps.²⁰ Until today, India has dealt with the issue of ‘refugees’ only on a bilateral basis. India does offer defacto protection to refugees. Refugees are treated as ‘foreigners’ and are extended protection under the existing Indian laws, which are otherwise also applicable to all foreigners. There are no special legislations dealing exclusively with the needs of refugees, but some provisions²¹ of the Indian Constitution are equally applicable even to refugees. Additionally, proposed bills for refugees’ protection were drafted in 1997,²² 2006,²³ and 2015²⁴, but the Indian government rejected these bills on grounds of national security.

In India, refugees are governed by the Foreigners Act, 1946; Foreigners Order, 1948; Passport Act, 1967 etc. In addition, the Criminal Procedure Code, 1973; Indian Penal Code, 1860; Indian Evidence Act, 1872 are also applicable. Special laws to deal with refugees have been used primarily by various State Governments.²⁵ India is accountable to abide by the principle of non-refoulment, the principle being a significant part of customary international law. This principle is binding on every state irrespective of whether or not that state has ratified the 1951 Convention or its 1967 Protocol. The accountability is stronger due to India’s commitment as a signatory to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention against Torture elaborately emphasises on the adherence for respect towards customary international law and also to the principle of non-refoulment.²⁶

¹⁸ Bhalla, N. “ANALYSIS-Lack of India refugee law leaves many in limbo.” <http://news.trust.org/item/20100325172400-d70r9> (accessed on December 5, 2018)

¹⁹ Available at <https://webcache.googleusercontent.com/search?q=cache:d5q-LggjABoJ:https://en.jrs.net/assets/Publications/File/Legal%2520Rights%2520of%2520Refugees%2520in%2520India.pdf+&cd=5&hl=en&ct=clnk&gl=de> (accessed on December 5, 2018).

²⁰ *Ibid.*

²¹ Articles 14, 21, 22(1), 22(2) and 25(1).

²² In 1997 India drafted a model refugee policy under the guidance of Justice P. N. Bhagwati, the former Chief Justice of India, but it was not enacted.

²³ Refugees and Asylum Seekers Protection Bill, 2006 <https://notacoda.files.wordpress.com/2014/08/refugees-and-asylum-seekers-protection-bill-2006.pdf> (accessed on November 30, 2018)

²⁴ The Asylum Bill, 2015 <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3088LS.pdf> (accessed on November 29, 2018)

²⁵ Special measures to respond to refugee influxes were most extensive in the aftermath of the Partition of India in 1947, the Tibetan influx in 1959 and the Bangladeshi mass influx in 1971. See, Rajeev Dhavan, *Refugee Law and Policy in India* (New Delhi: PILSARC, 2004).

²⁶ Sen, S. “Understanding India’s refusal to accede to the 1951 Refugee Convention: context and critique.” op. cit. <https://refugeereview2.wordpress.com/opinion-pieces/understanding-indias-refusal-to-accede-to-the-1951->

JUDICIAL STAND

Furthermore, Courts have also provided a certain measure of socio-economic protection in special circumstances.²⁷ Courts have enjoined deportation proceedings and ordered the release of individual refugees in order to provide an opportunity to approach the UNHCR for refugee status determination or to allow resettlement to take place.²⁸ Besides, India has signed a number of international conventions that impinge upon its obligations towards refugees. These include the Universal Declaration of Human Rights, 1948; the International Convention on Civil and Political Rights, 1966; the International Convention on Economic, Social and Cultural Rights, 1966; the International Convention on the Elimination of all Forms of Racial Discrimination, 1966; the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and, the Convention for the Elimination of all Forms of Discrimination Against Women, 1979.²⁹ All these legislations do make provisions for the rights and protection of refugees. However, the absence of any specific legislations concerning, explains the apathy towards refugees.

The judiciary has somehow acknowledged the existence of refugees and their rights in India, but the absence of uniform law on refugee protection has obstructed the UNHCR to set up refugee processing centers in India, hence the Commissioner's role in India is highly restricted.

The possible reasons as to why India's accession to the 1951 Refugee Convention has never come about could be inclusive of social, economic, political and cultural factors. In the words of Myron Weiner, "borders in the South Asian region are highly permeable and that each South Asian state lacks the political, administrative or military capacity to enforce rules with regard to population entry. That the cross border movements of people in South Asia are known to affect political stability, international relations and internal security, and not simply the

refugee-convention-context-and-critique-by-sreya-sen/ (accessed on December 2, 2018)

²⁷ See, Digvijay Mote (unreported) WA 354/1994, Karnataka High Court, as cited in Acharya, B. "The Law, Policy, and Practice of Refugee Protection in India," <https://notacoda.files.wordpress.com/2014/08/acharya-the-law-policy-and-practice-of-refugee-protection-in-india.pdf> (accessed December 5, 2018).

²⁸ See Malvika Karlekar (unreported) WP 583/1992, Supreme Court; Bogyi (unreported) WP 1847/1989; Khy Toon (unreported) WP 525/1990, (both Guwahati High Court); Shah Gazai (unreported) WP 499/1996, Punjab & Haryana High Court; Ktaer Abbas Habib Al Qutaifi 1999 Cri LJ 919 (Gujarat High Court) at paras 18–20; Lailoma Wafa (unreported) WP 312/1998 (Delhi High Court) as cited in Acharya, B. "The Law, Policy, and Practice of Refugee Protection in India," op. cit.

²⁹ Sen, S. opt. cit.; Ananthachari, T. "Refugees in India: Legal Framework, Law Enforcement and Security." <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (accessed on November 30, 2018)

provision of services to new arrivals or the composition and structure of the labor market. He also opines that it is possible that refugee flows would result in or be seen as effecting change in the religious or linguistic composition within the receiving area of the country.”³⁰

However, B.S Chimni has made a defensible argument that India should always refrain from acceding to the 1951 Convention, as it is violated by nations in the Global North in both the letter as well as the spirit of the law. According to B.S. Chimni, India along with other South Asian nations should argue that accession to the Convention be conditional.³¹

CONCLUSION

It cannot be denied that in the absence of a specific refugee law, the question as to who is a refugee becomes more complex. But at the same time, the Indian refugee problem needs to be understood in the context of South Asia’s unstable geopolitics and its volatile ethnicities.³² Nevertheless, the NHRC is persistently insisting the Indian Government to abide by the international law obligations pertaining to the protection of refugees and asylum seekers.³³

Over the years, India has managed its migration flows by deciding to deal with the refugee problem through administrative policy rather than as a legal requirement. There is a need for a legal framework. Enacting a uniform legislation with a rights-based approach could serve the purpose. This problem has also to do with the security of the nation. Hence, it is high time that the Government of India realise the importance of the implementation of a national legal frame work for refugees.

³⁰ Weiner, M. “Rejected Peoples and Unwanted Migrants in South Asia,” In *Economic and Political Weekly*, 34th ed., Vol. 28, pp. 1737-46.

³¹ Chimni B.S. “Status of Refugees in India: Strategic Ambiguity,” In *SamaddarRanabir Ed. Refugees and the State: Practices of Asylum and Care in India, 1947-2000*, pp. 444-445.

³² Acharya, B. “The Law Policy and Practice of Refugee Policy in India,” op. cit.

³³ Tenth Annual Report of the National Human Rights Commission, 2002-2003 at paras. 5.20-5.21 as cited in Acharya, B. *The Law Policy and Practice of Refugee Policy in India*, op. cit.