

India's Relationship to the Global Refugee Regime: a legal and
historical analysis of the conceptualization of refugeehood

by

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Abstract

Amidst the myriad viewpoints and perspectives that animate discussions on forced migration, the greatest challenge for academics and policymakers, continues to be the relevance and applicability of pre-existing international frameworks that were established to afford protection to people of concern, and the broader implications such challenges have on the global refugee regime. My doctoral dissertation is a study of some of the gaps associated with the global refugee regime and the historical development of refugee protection India, which remains minimally researched. The project identifies India as an alternate location of practice with respect to refugee protection. The dissertation also studies the notion of ‘resistance’ with respect to India’s relationship to international refugee law mechanisms by pitting it against the existing global narrative of ‘deviance’ that has often been attached to states that are non-signatories of the *1951 Convention Relating to the Status of Refugees* and its *1967 Protocol*. With the help of this study, my project will present the first steps towards a new place for discourse on forced migration research. With the help of detailed archival analysis, the thesis examines the subcontinent’s practice of refugee protection that deviates from Eurocentric norms. The archival analysis demonstrates that several groups of people have sought refuge in India and the practice of extending sanctuary to such groups has essentially reconstructed refugeehood in India. The thesis provides first steps towards a cross-sectional model of refugee and forced migration research, which makes it crucial to not only move from the rudimentary definitions of a refugee, but also to identify alternate locations of practice. In summary, the thesis is a combination of exploring the ‘cacophony of definitions’ of refugeehood in India and an examination of look at how the refugee label has evolved over a period of time. Given India’s disillusionment with the international refugee framework, the thesis explores the ‘general perceptions and views’ on refugeehood that

have existed historically. Finally, the thesis explores how all of this has manifested into a form of *ad-hoc* 'practice' of refugee protection and find out whether it has been used consistently or in an interest-based and privileged manner.

In the memory of Dr. Gopalan Shastri my late grandfather (     )

His love and grace have guided me through the vicissitudes of my academic journey. He has laid a pathway for my pursuits, and his legacy is what I hope to embody in this journey.

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gregariousness, his perspectives and perceptions on my academic work helped me think better. As a philosopher, Prof. Drydyk helped me incorporate ideas that I had overlooked and helped me broaden my thinking. Prof. Drydyk and I were also members of the Carleton University's Graduate Faculty Board. Those meetings were an opportunity for me to interact with him in a capacity that was different from the usual.

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Prologue

I am a fragment of the empire!

The study of contemporary refugee rights has mostly revolved around increasing its relevance to Eurocentric institutional mechanisms that were constructed post-WWII. Therefore, researching refugee law or rights of refugees and displaced persons has remained preoccupied with integrating discourses of Eurocentrism more coherently into other contexts and regions of the world. My thesis argues that this approach limits the scope of refugee law and refugee studies. It makes a strong argument to bring in alternate locations of practice, absent historical contexts, and critiques, as integral parts of the discipline.

I approach this project from the convergence of many distinct identities I occupy. I am an Indian-origin Canadian resident, and an emerging scholar studying refugee rights in the Global North attempting to integrate alternate locations of practice within current Eurocentric frameworks. As a former practitioner in the Office of the United Nations High Commissioner for Refugees in a Global South context and having acquired my education from Western knowledge systems and sources (and continue to do so), I am uniquely positioned as an emerging scholar of refugee law ‘*studying*’ the Global South. These identities that I embody compel me to confront certain questions about researching refugee law of the Global South while being present in the Global North. It is through these questions that my thesis seeks to intervene in the literature in order to address three key concerns:

- If refugee law is to be truly universal, then there is a need to engage seriously with the histories and critiques of this regime from the Global South.
- It is also equally necessary to articulate and highlight “nonconventional” histories of a conventional area like refugee law.

- This, in turn, will highlight the discourses absent from the field of refugee law.

I begin from the premise that the global refugee regime was established and implemented by states in the Global North, in response to the displacement that occurred in the aftermath of the Second World War in Europe. Refugee studies literature has predominantly reflected a Eurocentric gaze which fails to capture the unique nature of forced displacement in contexts like South Asia. The 1947 Partition of India, which marked the formal end to colonialism in the subcontinent, led to widespread displacement and violence, that has yet to be fully captured by the grandiose principles of the global refugee regime. Therefore, in an attempt to demonstrate the importance of understanding forced displacement in South Asia, this thesis approaches refugee law from the lens of postcolonial theory, critical race theory, and Third World Approaches to International Law.

The Eurocentrism in international institutions is deeply entrenched; there is a need to decolonize the discipline of refugee studies by incorporating a plurality of perspectives with respect to what constitutes a response to mobility as opposed to the assumed sense of universality of the refugee regime. Therefore, an important challenge in this project is to engage in a more comprehensive approach to researching refugee studies and to enable constructive discussions that draw several perspectives together so as to provide a more far-reaching understanding of the global refugee regime. Such an understanding is a step in the right direction in overcoming hegemonic approaches and in mitigating significant gaps in historical narratives and discourses in this field of research.

The complex history of the Partition of India captures the depth of dispossession and disenfranchisement of South Asians amidst incomprehensible bureaucratic and physical violence that was the result of cartographic divisions mapped on to people. Zamindar explains, “a Partition Council began exacting the task of counting and dividing the vast machinery of colonial statecraft

into two – everything from tables and chairs, weather instruments and military hardware, to railway engineers and office clerks”.¹ In a retelling of a story of a subaltern military officer Ghulam Ali, who was one of the millions dispossessed by both India and Pakistan as a result of this violent form of ‘decolonization’, Zamindar’s narrative is chilling and subjective. Ghulam Ali, who had chosen to serve in the Indian army was prevented from returning to his familial home in Lucknow due to violence that broke out amid the partition. As a result, he was forced to work in the Pakistan Army. However, the Pakistan Army discharged him on the grounds that he had opted to serve in the Indian army. When he attempted to return to India, the officers at the check post did not recognize him as an Indian and he was arrested and sent back to Pakistan on the grounds that he was Pakistani.² The story of Ghulam Ali is one among many which evidenced the impact of the Partition of India. The partition was not only a process of creating artificial international boundaries but also shows the extent to which it impacted populations on either side of the border. As Zamindar demonstrates, “[i]f lives can unfold, they can also unravel.”³ Zamindar argues that Ghulam Ali’s story invokes and captures the quintessential nature “of all the aporias of belonging in a cartography of nation-states. Where is India? Where is Pakistan? Who is Indian? Who is Pakistani?”⁴ Modern South Asian states were not only built at the expense of such postcolonial anxieties but were also premised on European worldviews that led to unstable political boundaries in the region. The status quo and the future of these postcolonial states lay in the displacements that were manifestations of the Partition of India.

¹ Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2010) 1.

² *ibid* 2.

³ *ibid*.

⁴ *ibid*.

Nation-building projects after the formal end of colonialism were not seamless. As Zamindar lays out, “[it] was through the making of refugees as a governmental category, through refugee rehabilitation as a tool of planning, that the new nations and the borders between them were made, and people, including families, were divided.”⁵ The history of this lengthy and contested process created new geopolitical crises that were superimposed upon people bound within these lands; this led to massive displacement of Hindus and Sikhs to India and Muslims to Pakistan.⁶ This process of territorial reorganization was a bureaucratic mode of control that created new categories of disenfranchised peoples. Muslims boarded trains in Delhi bound for Pakistan, not to migrate but in search of refuge. With Hindus and Sikhs being forced out of Punjab into India, the needs of these two sets of refugees were pitted against one another.⁷

This dispossession of millions in the subcontinent was unsurprising. Entrenched within the creation of postcolonial national boundaries is the “ambition of achieving a homogenous and unified sovereign entity”.⁸ The transformation of colonial administrations, into postcolonial states, which forms a large part of my analysis, is rationalized based on Eurocentric international law principles of “territorial integrity, sovereign equality, and non-interference in internal affairs” that led to the demarcation of political and territorial boundaries.⁹ My critique is that it is within this hegemonic legal framework that arbitrary borders were drawn in the Indian subcontinent in 1947. The phrase arbitrary borders will appear in the rest of the thesis quite frequently. By characterizing borders as arbitrary I suggest that the mode by which they were drawn did not consider the traditional social and political realities that pre-existed European contact, and more importantly

⁵ *ibid* 3.

⁶ *ibid* 7.

⁷ *ibid*.

⁸ Mohammad Shahabuddin, ‘Minorities & Postcolonial States’ (2020) 18 *TWAIL Review: Reflections* 1, 4.

⁹ *ibid*.

did not reflect existing ethno-confessional relations, traditional notions of territory, or land-use practices. Such divisions were carried out at the expense of those who were colonized, without any regard to ethnic composition, which eventually came to define the states of India and Pakistan. The drawing of these boundaries cannot be construed as inconsequential given that the “minority problem is [...] embedded in the very process of creation of the postcolonial ‘national’ state through the operation of international law”.¹⁰

The colonized world has been compelled to inherit colonially installed borders, which has resulted in the division of a cohesive group of populations across newly created states. As Okafor points out, in the case of Africa, “the moment of independence was also a moment of crisis because the post-colonial state was a direct successor and inheritor of the colonial state”.¹¹ The problematic impacts of international law on state legitimacy are evident from the need to homogenize populations in order to maintain sovereign and territorial integrity.¹² The European imagination fails to capture the legitimate groups that pre-existed colonially administered borders. As Chatterjee argues, states also have an impact on dichotomizing their inhabitants into citizens and populations. While the concept of being a citizen is predicated on the participation in the sovereignty and legitimacy of a state, populations are classifiable and identifiable based on arbitrary “empirical or behavioral criteria”.¹³ Tracking from Chatterjee’s argument, populations in the Indian subcontinent, after 1947, also became subjects and targets of governmental policies that have obfuscated the indelible impacts of forcible homogenization of populations into arbitrarily created political units.¹⁴

¹⁰ *ibid.*

¹¹ Obiora Chinedu Okafor, ‘After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa’ (2000) 41 *Harvard International Law Journal* 503, 513.

¹² *ibid.* 521.

¹³ Partha Chatterjee, *The Politics of the Governed* (Columbia University Press, 2004) 34.

¹⁴ *ibid.*

While refugee movements were ubiquitous in the West during the 1940s during WWII, simultaneously, the Partition of India was a part of this global transition, which induced migration across newly created borders.¹⁵ Forced displacement was one of the defining features of such transition globally.¹⁶ This was clear from postwar disenfranchisement and violent modes of decolonization during which the threat of violence and persecution was on the rise, and transfer of entire populations became quite commonplace. Khan points out that such transfers did not occur in a vacuum as a precedent was set by the Treaty of Lausanne of 1923 following the First World War that formally agreed the exchange of Muslims from Greece and Orthodox Christians from Anatolia, that also defined the borders of the Turkish Republic.¹⁷ Khan argues that this created a sense of legitimacy to approve population exchange to remedy complex problems emerging from the existence of minorities in multiethnic and socially diverse empires.¹⁸ The Partition of India was a failed attempt at achieving ethnoreligious homogeneity which was accompanied by incomprehensible violence and chaos.

These arguments demonstrate that the inadequacy and Eurocentrism inherent in international refugee protection frameworks forced “Indian and Pakistani refugees [to become] almost entirely reliant on themselves”.¹⁹ With minimal support from the international community to the unique circumstances that led to displacement in the region, both states were left to their own devices to find solutions to issues concerning refugee protection.²⁰ As will be evident throughout the thesis, the definition of a refugee in international protection frameworks was so constrained that it had ignored the maladies of South Asians, and the subcontinent was effectively

¹⁵ Yasmin Khan, *The Great Partition: The Making of India and Pakistan* (Yale University Press 2017) xxi.

¹⁶ *ibid.*

¹⁷ *ibid* xxii.

¹⁸ *ibid.*

¹⁹ *ibid* xxiii

²⁰ *ibid.*

left out of the purview of the refugee regime. Such conditions were created courtesy of the resistance to the proposals made by the representatives of these newly independent states, in which they expressed the need to consider the unique experiences of displacement in the subcontinent that resulted from the creation of new borders and fissures amongst South Asians.

The effects of the Partition of India are far-reaching and have continued to define the experiences of modern-day South Asia. Even though the crisis was created by the end of formal colonialism and the subcontinent was left to fend for itself, “extraordinary interventions” had to be made by both India and Pakistan to resolve the crisis of 1947.²¹ This has become foundational in understanding Indian or Pakistani personhood since nation-states began to claim some people as their own as a result of such assistance and interventions. New notions of identity, nationhood, and citizenship were formed, thus creating a “redemptive and undeniably nationalistic element, despite all tragedy” of the partition.²² However, as Khan points out, regional myopia that has dominated the understanding of the Partition of India has often reinforced the legitimacy of artificial borders and has led to subversive notions of citizenship. The partition risks being viewed as an exceptional circumstance that induced massive mobility across such borders. Such understandings further place the history of modern-day South Asia beyond the means of comparative accounts, thereby silencing the post-partition woes of many who not only continue to feel its effects but also fail to include this event within the narrative of global order.²³

While my objective in this project is not to subsume the subcontinent’s colonial and postcolonial refugee history into European or western histories, it is significant to note that this narrative of exclusivity has largely left out questions on what constitutes forced displacement or

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

who can be identified as a refugee in South Asia. The Partition of India induced one of the largest displacements in the 20th century and was comparable to the events of post-WWII Europe.²⁴ Yet the events of the partition failed to make an impact on the establishment of the international protection framework that characterized refugeehood based on strict characteristics that were uniquely European and excluded the experiences of the subcontinent. The subcontinent's experience of displacements "has largely gone unexamined because of its peripheral location to postwar international order".²⁵ In addition to this, the region's historiographies have "seamlessly bound refugees into the two new nations".²⁶

Having situated the foundations of my project, the rest of this thesis will specifically examine the relationship between India and the global refugee regime. The project considers the traditional representation of India as a deviant state in the global refugee regime due to its opposition to the *1951 Convention Relating to the Status of Refugees* since its negotiation. Given the history of South Asian states' extraordinary interventions and contemporary *ad-hoc* refugee protection measures, I argue that the governance of refugees in India meets and often exceeds the standards detailed in the *1951 Convention*. I argue that the construction of India as deviant within the regime is a manifestation of the Eurocentrism of the regime and a product of legal orientalism. My doctoral project emerges from, among other factors of my identity, my lived experiences, and understanding of South Asian history. Those who had firsthand experiences of the malaises of the partition are long gone, and the current generation of people have effectively become "custodians of such collective memory" that have been deeply etched in the identity and ethos of subcontinental being.²⁷ The memories of the partition, though not mainstream, serve to signify the development

²⁴ Zamindar (n 1) 6.

²⁵ *ibid* 7.

²⁶ *ibid*.

²⁷ Khan (n 15) xxv.

of modern-day South Asia and also “humanize and pluralize Partition stories” – characteristics that escaped British imagination and colonial historiographies which projected distorted tropes that served to demonize the subaltern other and further their own political goals.²⁸ I believe that I too have that responsibility to not only articulate such memories through academic interventions, but also provide a new understanding of refugee history that rejects colonial influences. Though my project does highlight some of the historical circumstances that have continually led to the marginalization of South Asian experiences of refugeehood, the core of my project is to write into international refugee law the defiant modes of international protection that resist and challenge the Eurocentric and hegemonic norms that project a false sense of universality with respect to their application. Future chapters will show the significance of resistance to international law norms that have developed at the expense of the suppression of states in the Global South.

In addition to my lived experience in India, my research is informed by my experience as a former practitioner and a functionary of the Office of the United High Commissioner for Refugees (UNHCR), where I spent a year as a Refugee Status Determination Associate in the New Delhi office. Notwithstanding the UNHCR’s role in the stewardship and development of international refugee protection mechanisms, the institution’s enormity and grandiose vision made me realize that I was a functionary of Eurocentric norms. With more recent ‘refugee crises’, the international community is hyperaware of the ineffectiveness of institutions and protection mechanisms. The more I worked with refugees to employ my efforts to find durable solutions, the clearer it was that the pre-existing global refugee regime was not as universal as it claimed to be. The reason for such disillusionment is what I envisage capturing in my doctoral work. I aim to highlight the role that India has played in developing refugee protection standards amidst the

²⁸ *ibid.*

perpetual relegation by the global refugee regime of their experiences of forced mobility in the region.

While it is not common for people to talk about displacement in South Asia, Zamindar's elucidation demonstrates that modern-day South Asia was built through forced mobility and colonial violence.²⁹ Therefore, it is safe to assume that refugeehood is an integral part of South Asia's history. However, such historical circumstances have failed to capture the imagination of the early drafters of refugee protection norms, which has resulted in the perpetual marginalization of the subcontinent's struggle with forced migration issues. The ubiquity of forced migration and international refugee law has raised conundrums on the applicability of frameworks such as the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol*, and the extent to which they are able to achieve inclusive international protection standards. By looking at periods of historical forced migration into India, and with a specific focus on the partition, my project is an evaluation of 'refugee history from below', i.e., perspectives from the Third World, more specifically South Asia. I aim to illustrate the subaltern treatment of mobility and refugees in India as a result of hegemonic and Eurocentric structures that have often dominated discussions around forced displacement. This will enable further critiques on the Eurocentric nature of the global refugee regime and highlight the *ad-hoc* and alternate mechanisms that have been developed in the subcontinent to respond to forced displacement.

²⁹ Zamindar (n 1) 3.

Introductionⁱ

The scope of this project: South Asia's experience with refugeehood

Since the Partition of India in 1947, South Asia has witnessed periods of mass movement.³⁰ Yet, since none of the states in South Asia are parties to the *1951 Convention Relating to the Status of Refugees* or its *1967 Protocol*, this history is not always accounted for in the international refugee law scholarship. In seeking to redress this gap, this project articulates some of the ongoing challenges in the region, and with a specific focus on India, demonstrates the lacunae that persist with respect to conceptualizing displacement there. It specifically examines protection mechanisms that have been established in India as ad hoc alternatives to hegemonic protection norms, given the lack of a formal institutional approach. The project also provides some insights into whether a consistent and comprehensive national approach to refugee protection can be identified based on past practices. As will be evident throughout, a framework for refugee protection in India can be conceived largely through state practice and through bilateral agreements with other states in the region.³¹ The significance of such agreements in the region was in fact conceived by the South Asian Association for Regional Cooperation (SAARC) which construed refugee movement as a matter of bilateral or trilateral relations, as they regarded international agreements as constricting states' freedom of action.³² This chapter sets the stage for the rest of the thesis by providing some background of the region, a brief overview of refugee movements there, and some discussion of the 'Eurocentrism' of the global refugee regime that led to the establishment of a *de facto* framework of subcontinental defiance. It then briefly examines

³⁰ Pia Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (Oxford University Press 2006).

³¹ Jay Ramasubramanyam, 'Regional Refugee Regimes: South Asia', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 407.

³² Myron Weiner, 'Rejected Peoples and Unwanted Migrants in South Asia' (1993) 28 *Economic and Political Weekly* 1737, 1745.

UNHCR's operational presence in South Asia and its impact on refugee protection. Finally, it considers how national constitutional provisions have been interpreted in a way that provides some protection to refugees.

The Partition of India, Cartographic Divisions, and the Refugee Regime

This practice of sidelining was clear during the initial days of the *Convention's* establishment, which was characterized by the drafters' lack of recognition of displaced populations in South Asia as groups in need of international protection amid a violent form of decolonization – the Partition of India of 1947.³³ The formal end to colonialism in India resulted in the establishment of new international borders, which resulted in violence and mass displacement, and simultaneously marked the early stages of the modern international refugee regime's institutionalization. Amid the crisis of displacement that had reached a breaking point by the end of the Partition of India in 1947, South Asia was warned of the “marginal impact its unprecedented refugee crisis was having on the world stage”.³⁴ This unfortunate warning sign has evolved into a perpetual disillusionment with the global refugee regime in the region, which has manifested into alternate refugee protection mechanisms. The Partition of India, which divided British India into India and Pakistan, constituted a violent end to formal colonialism in South Asia and resulted in mass displacement across newly created international borders—Hindus and Sikhs to India, and Muslims to Pakistan.³⁵ Both states faced tremendous challenges in responding to the protection needs of the displaced, which led to ‘extraordinary interventions’³⁶ and the groups being pitted against one another.³⁷ This coincided with the early deliberations for a post-war international refugee treaty. Reflecting on these deliberations during a visit to Europe in 1946, India's Defence

³³ Oberoi (n 30)

³⁴ *ibid* 19.

³⁵ Zamindar (n 1).

³⁶ Khan (n 15) xxiii.

³⁷ Zamindar (n 1).

Minister, VK Krishna Menon, stated that “[the] outstanding and overall impression left on my mind are very limited reference to our internal problems and difficulties”,³⁸ a matter that colored both India and Pakistan’s engagement with the formal drafting process of the *Refugee Convention*.³⁹

After the partition, India and Pakistan attempted to engage constructively with the formal drafting process of what was to become the *Refugee Convention*.⁴⁰ A UN General Assembly resolution adopted in January 1946 stated that the “main task concerning displaced persons [was] to encourage and assist in every way possible their early return to their countries of origin”.⁴¹ At the 77th meeting of the Third Committee on Social, Humanitarian and Cultural Questions, the representative from Pakistan drew attention to that resolution and stated that “[to] avoid disturbing friendly relations between nations, refugees should not be settled in a region in which the majority of the inhabitants were opposed to such resettlement”.⁴² The representative noted that the resolution provided that states should be willing to encourage and assist in every possible way the early return of persons of concern to their country of nationality or habitual residence. However, given the unique circumstances of the Partition of India, which created new borders along ethno-religious lines, the idea of returning people to their place of habitual residence or country of nationality could not be considered.⁴³ At a subsequent Economic and Social Council (ECOSOC) meeting in 1949, India sought to recognize its efforts in assisting refugees during the Second World

³⁸ Government of India, External Affairs Department, *Report by V. K. Krishna Menon on Visits to Various European Capitals* (Government of India Press 1946) 41 cited in Oberoi (n 30) 18.

³⁹ Ramasubramanyam (n 31) 408.

⁴⁰ Pia Oberoi, ‘South Asia and the Creation of the International Refugee Regime’ (2001) 19(5) *Refuge* 36, 38.

⁴¹ ‘The Question of Refugees, UNGA res 8(I) (29 January 1946). See also Constitution of the International Refugee Organization (adopted 15 December 1946, entered into force 20 August 1948) 18 UNTS 3.

⁴² Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Seventh Meeting held at Lake Success, New York (6 November 1947), UN doc AC.3/SR.77, 189 (statement of Mrs. Hussain).

⁴³ Ramasubramanyam (n 31) 409.

War. However, from 1947 onwards it had been faced with its own refugee problem, post-partition, and “had been unable to give anything more than moral support to the International Refugee Organization”.⁴⁴ The Indian representative pointed out that this ‘was not from lack of sympathy with its aims, but from lack of resources’.⁴⁵

Despite their initial reluctance, India and Pakistan continued to engage with the formal drafting process of the *Refugee Convention*. However, both states expressed concerns on various issues, most importantly the definition of a refugee.⁴⁶ Noting the option contained in article 1B of the *Convention* to limit the definition to people displaced on account of “events occurring in Europe before 1 January 1951”, the representative from Pakistan “was of the opinion that the definition ... should not be limited by any territorial boundaries”, and furthermore expressed the hope “that the scope of the definition would be extended by the General Assembly so as to cover unfortunate people both inside and outside the boundaries of Europe”.⁴⁷ In separate meetings of the Third Committee, India and Pakistan’s permanent representatives to the United Nations requested that the *Convention* address racial and religious discrimination directed towards some refugees.⁴⁸ They also expressly requested that displacement resulting from the partition be addressed. However, they were met with resistance, resulting in their disillusionment with both

⁴⁴ Economic and Social Council, Summary Record of the Ninth Session, Three Hundred and Twenty-Sixth Meeting (6 August 1949) UN doc E/SR.326, 628 (statement of Mr. Desai).

⁴⁵ *ibid.*

⁴⁶ Ramasubramanyam (n 31) 409.

⁴⁷ Economic and Social Council, Summary Record of the Eleventh Session, Four Hundred and Sixth Meeting (11 August 1950) UN doc E/SR.406, 278 (statement of Mr. Amin).

⁴⁸ Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York (7 November 1947) UN doc AC.3/SR.79, 200 (statement of Mr. Sen). See also Third Committee (n 42) 189 (statement of Mrs. Hussain).

the *Convention* and UNHCR's mandate.⁴⁹ India stated that the 'objections raised confirmed [their] belief that fundamental differences existed'.⁵⁰

The myth of difference

Finally, it is critical to note that refugee movements within South Asia post-partition resulted both from the direct involvement of western colonial powers, "who were also among the founding members of the international refugee regime",⁵¹ and Britain's sudden withdrawal from the subcontinent, which was coupled with the creation of new international borders resulting in internal strife.⁵² In addition to this, South Asian states' disengagement with the global refugee regime can be viewed from the lens of the 'myth of difference'. This notion contributed to an understanding that "the nature and character of refugee flows in the Third World were ... radically different from refugee flows in Europe since the end of the First World War".⁵³ As such, there was "an image of a "normal" refugee" who could be identified as "white, male and anti-communist—which clashed sharply with individuals fleeing the Third World".⁵⁴ The myth of difference also contributed to a skewed interpretation of the root causes of refugee flow that laid the blame solely on postcolonial states without taking into account the impact that external factors such as colonialism had on such instabilities.⁵⁵ This resulted in international refugee law's focus on exile as the basis for protection from persecution. However, as seen from the discussions on the negotiation process of the *Refugee Convention*, the constraints placed on the basis for international

⁴⁹ Oberoi (n 40) 42.

⁵⁰ Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Eightieth Meeting held at Lake Success, New York (7 November 1947) UN doc AC.3/SR.80, 211 (statement of Mr. Sen).

⁵¹ Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?' (1994) 47 *Journal of International Affairs* 351, 360.

⁵² Ramasubramanyam (n 31) 410.

⁵³ BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350, 351.

⁵⁴ *ibid.*

⁵⁵ *Ibid.*

protection made the framework unsuitable for refugees from the Third World.⁵⁶ This resulted in the Third World not only developing a different conceptualization of refugeehood but also established *ad-hoc* protection norms. This view of forced migration was “premised on the idea that Western conceptions overlooked the role that colonialism played in creating instability and postcolonial anxieties for individuals”.⁵⁷ The goalpost for refugee protection was manipulated by “former colonial powers, [who] simply adjusted the rules of the [refugee] regime to fit the new situation, while sidestepping potential political conflicts of interest.”⁵⁸ It was clear that specific refugee situations that did not fit within the constrained notions of forced displacement from a Eurocentric perspective were left outside the purview of the global refugee regime.⁵⁹

From the League of Nations to the United Nations – India’s experience with refugee protection

India’s involvement with refugee protection predated post-partition displacement and the establishment of formal international refugee protection frameworks. In fact, in a 1920 series, Shapurji Hodiwalla provides an overview of Parsis in Ancient India and their position in Indian society.⁶⁰ Hodiwalla argues that stone inscriptions from Western India indicate references to Pārasikas who were of Persian origin.⁶¹ Parsi refugees are known to have arrived in the Indian subcontinent in 716 A.D. on the island of Diu.⁶² Several records as quoted by Hodiwalla show that the kings of Western India during the time, allowed the Parsis to live in the subcontinent permanently.⁶³ India’s experience with providing sanctuary to Parsis who fled religious persecution from Iran, even before the formalization of refugee protection norms under

⁵⁶ Ibid.

⁵⁷ Ramasubramanyam (n 31) 411.

⁵⁸ Loescher (n 51) 358.

⁵⁹ *ibid.*

⁶⁰ Shapurji Kavasji Hodiwalla, *Parsis of Ancient India* (Sanj Vartaman Press 1920).

⁶¹ *ibid* 40.

⁶² *ibid* 34.

⁶³ *ibid* 41.

international law, shows that responding to forced displacement is not an unfamiliar experience for the subcontinent.

As a founding member of the League of Nations,⁶⁴ India had provided assistance, sanctuary, and identity certificates to Russian refugees⁶⁵ and refugees from the Saar.⁶⁶ As part of efforts to settle Jewish refugees in India, a Jewish colony was created in the suburbs of Delhi to aid those expelled from Germany.⁶⁷ India's engagement in these processes was with mixed sentiments. In fact, some Indian nationalist leaders declared that "the League of Nations was a fraud and was meant for the perpetuation of imperialism",⁶⁸ while a member of India's Council of State, Phiroz Sethna, argued that "India cannot take her rightful place in international affairs unless she has her right place as a nation".⁶⁹ India subsequently became a full member of the United Nations while it was still under British rule.⁷⁰

The myth of difference, in addition to historically constrained notions of persecution, was foundational in conceptualizing specific practices of international protection in India and by extension South Asia.⁷¹ Both India and Pakistan were compelled to contend with millions who

⁶⁴ See Lanka Sundaram, 'The International Status of India' (1930) 9(4) *Journal of the Royal Institute of International Affairs* 452, 455.

⁶⁵ File No.: C1435/331/Rr.401/001/9/33, Distribution of Nansen Stamp – India (30 May 1928). [League of Nations Archives, Geneva]. This file contains a series of memoranda, and correspondence that took place between representatives of the Economic and Overseas Department of the India Office and the Nansen International Office for Refugees, on Russian Refugees in India.

⁶⁶ Dossier No 20A/22493/19255, 20 February 1936 (League of Nations Archives, Geneva). At the Imperial War Conference of 1917, India was granted special representation on an equal footing with the self-governing dominions and played an important role in various international conferences. See Sundaram (n 64) 454.

⁶⁷ Letter from Indian civil servant Badri Prasad Mital to The Right Honourable Edward Fredrick Lindley Wood, Baron Irwin of Kirby Underdale on the 'Proposed Settlement of Jewish Refugees in India' (16 January 1939), in Settlement of Jewish Refugees in India, FO 371/24098/1737, Registry No W 1737/1737/48 (National Archives, London). The request was forwarded by A Dibdin, Esq, India Office to AWG Randall, Esq, Foreign Office (Document No P & J 671/39 in the same file, dated 17 February 1939). The request was subsequently approved by the latter without objection on 23 February 1939, as per a handwritten note in the same document.

⁶⁸ R P Anand, 'The Formation of International Organizations and India: A Historical Study' (2010) 23 *Leiden Journal of International Law* 5, 12.

⁶⁹ *ibid* 13.

⁷⁰ *ibid* 17.

⁷¹ Lucy Mayblin, *Asylum After Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield International 2018) 30.

were dispossessed as a result of the partition. As seen earlier, the subcontinent was also confronted with new geopolitical realities and faced enormous challenges that came with nation-building. And despite their repeated attempts to draw attention to the protection concerns of those displaced as a result of the abrupt and violent end to formal colonialism, the scope of the *Refugee Convention* was not formally broadened.⁷² As a result, South Asian States had to re-examine their role in refugee protection and develop mechanisms that were more aligned with their regional concerns, and practices that were more pertinent to the specific needs of the displaced people they hosted.⁷³

The 1951 *Convention* Relating to the Status of Refugees and the 1967 Protocol to the *Convention* are often presented as the foundational legal system for refugee protection. The *Convention* provides a legal framework and general guiding principles to states on hosting refugees and providing sanctuary to those fleeing specific grounds of persecution. Though several states have signed and ratified the *Convention*, many other states have hosted refugees and provided them with sanctuary for decades without ratifying the *Convention* or the Protocol. As will be evident later on in the thesis, this has led to a general tendency to term non-signatory states as deviant with respect to international refugee protection. India is one such state. It should be noted, that despite such characterizations historically, India is not new to hosting refugees on their territory.

In subsequent chapters, I will demonstrate that India had extended protection to many refugees in the aftermath of the First World War, while it was still a British Dominion by being an active member of the League of Nations. Following the end of formal colonialism, India's disillusionment with the 1951 *Convention* was evident from its unwillingness to ratify it. Despite the initial enthusiasm with which India carried out its interactions in the Conference of

⁷² Ramasubramanyam (n 31) 411.

⁷³ *ibid.*

Plenipotentiaries that discussed the establishment of the 1951 *Refugee Convention*, resistance to the *Convention's* constrained principles became clearer. By examining India's practice of extending protection to those who have been displaced from the 1920s, I will attempt to outline whether or not there is coherence in the conceptualization of refugeehood. My research specifically examines the relationship between India and the global refugee regime. Given India is a non-signatory state to the 1951 *Convention Relating to the Status of Refugees* my research also critically takes up India's representation as a deviant state within the refugee regime. Through detailed mixed-methods research, I argue that the governance of refugees in India has met and continues to meet and often exceeds the standards detailed in the 1951 *Convention*, while India remains an active participant in the governance of the refugee regime at a global level. In contrast, I suggest that the construction of India as deviant within the regime is a manifestation of the Eurocentrism of the regime and a product of legal orientalism. Given the challenges associated with governance and public policy responses to refugees and forced displacement across Asia, and other regions of the global South, this deep research experience and practical understanding of the issue will be a tremendous asset addition to forced migration research. My work on India and South Asian states within the global refugee regime, and the 'exceptionalism' of such states, will make an important contribution to the ongoing discussions on the refugee regime.

Evolution of the Concept of Refugee post-partition

Despite the 1967 Protocol removing the temporal and spatial constraints, South Asian states remained disillusioned with the *Refugee Convention's* core objectives. Perhaps, for this reason, states in the region have instead chosen to regard refugee protection as matters between states and have reasserted their position that the *Convention* and Protocol fail to capture the experiences of displacement in the region by not ratifying these instruments. These interventions

included, but were not limited to, the implementation of a unique legal and operational concept of refugeehood in some states which allowed for the right of people to escape ethnoreligious violence.⁷⁴ Pakistan, for instance, included *muhajir* or refugee as a category in its 1951 census. *Muhajirs* were those who had moved to Pakistan as ‘a result of Partition or fear of disturbances connected therewith.’⁷⁵ The newly formed government of Pakistan provided them settlement in urban areas in the province of Sindh. The term *muhajir* has a rich and powerful pedigree in Islamic jurisprudence and state practice, and as Rahman shows, it was generally used to identify “Muslim refugees who came to settle in the urban areas of Sindh province”.⁷⁶ The *muhajir* identity is not inconsequential to the Pakistani political system, as their political representation was increased in a “newly established Constituent Assembly”.⁷⁷ Similarly, India and Pakistan signed the 1950 Nehru-Liaquat Pact whereby the two governments agreed to protect people who had been displaced as a result of violence along religious lines.⁷⁸ The pact also guaranteed minorities “complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country, and freedom of occupation, speech and worship, subject to law and morality”.⁷⁹

South Asian states’ responses to mass exodus since the Partition of India show that, in essence, they adhered to the core principle of *non-refoulement* in article 33 of the *Convention*.⁸⁰ A number of *ad-hoc* mechanisms have been developed to provide sanctuary, material assistance, and

⁷⁴ Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press 1989) 132.

⁷⁵ *ibid.*

⁷⁶ Javid Rehman, *The Weaknesses in the International Protection of Minority Rights* (Martinus Nijhoff 2000) 215.

⁷⁷ *ibid.*

⁷⁸ Agreement between the Governments of India and Pakistan regarding Security and Rights of Minorities (adopted 8 April 1950) 1 India Bilateral Treaties and Agreements 243 (Nehru-Liaquat Agreement) <<https://mea.gov.in/Portal/LegalTreatiesDoc/PA50B1228.pdf>> accessed 30 April 2020.

⁷⁹ *ibid* para A.

⁸⁰ Veerabhadran Vijayakumar, ‘A Critical Analysis of Refugee Protection in South Asia’ (2001) 19(2) *Refugee* 10.

protection to refugees. Tibetan, Sri Lankan, and Bangladeshi refugees in India, Afghan refugees in Pakistan, Bhutanese refugees in Nepal, and Rohingya refugees in Bangladesh have all been provided either temporary sanctuary or long-term protection.⁸¹

Relationship with UNHCR

Over time, states in the region have worked closely with UNHCR to extend protection to refugees, including by permitting UNHCR to operate in their territories and by actively participating in the deliberations of its Executive Committee (ExCom)⁸². In some cases, on account of the absence of a formal legal framework governing the treatment of refugees and the lack of an administrative framework to determine refugee status, UNHCR undertakes refugee status determination for mandate refugees.⁸³ For instance, in India, UNHCR is actively engaged in protection activities including the registration of asylum seekers, refugee status determination, and the provision of documentation facilitating their right to stay in India without the risk of deportation or detention.⁸⁴ It conducts refugee status determination for certain groups of refugees, whereas others, such as Tibetan and Sri Lankan refugees, are assisted directly by the Indian government. This is an example of how in India, different refugee groups enjoy disparate treatment.⁸⁵ At other times, there is a joint approach involving both the state and UNHCR. For instance, the reception and settlement of Tibetan refugees in Nepal and India have been facilitated by the Central Tibetan Administration (Tibet's government in exile), in collaboration with the

⁸¹ *ibid* 9.

⁸² Vijaykumar (n 80) 9.

⁸³ Sarbari Sen, 'Paradoxes of the International Regime of Care: The Role of the UNHCR in India' in Ranabir Samaddar (ed), *Refugees and State: Practices of Asylum and Care in India 1947–2000* (Sage 2003) 404.

⁸⁴ UNHCR, 'Factsheet India' (February 2016) <<https://www.unhcr.org/en-au/protection/operations/50001ec69/india-fact-sheet.html>> accessed 30 April 2020.

⁸⁵ Sen (n 83) 405.

governments of India and Nepal.⁸⁶ In 1989, Nepal signed a Gentleman's Agreement with UNHCR which allowed UNHCR to manage and issue identity certificates to all new Tibetan arrivals.⁸⁷

In yet other cases, UNHCR has undertaken refugee status determination at the insistence of the judiciary.⁸⁸ For instance, in *Bogyi v Union of India*, the High Court of Assam stayed the deportation order of an asylum seeker from Burma and directed the UNHCR office in New Delhi to consider his application for political asylum.⁸⁹ Similarly, in *Malavika Karlekar v Union of India*, the Supreme Court of India stayed the deportation of 21 Burmese Nationals from the Andaman Islands, pending their refugee status determination by UNHCR.⁹⁰

India's adherence to the spirit of international refugee protection norms is also evident from its membership in ExCom. Sen suggests that India's involvement since it joined the ExCom in 1995 can be attributed to its desire in obtaining successive terms on the UN Security Council: being seen as an active participant in a multilateral body like UNHCR may better its chances.⁹¹ Sen also argues that given Pakistan's membership of ExCom, India may be concerned that it might agitate against India's national interests.⁹² Chimni notes that despite India's membership of ExCom, the government has neither taken steps to ratify the *Refugee Convention* nor to pass comprehensive national legislation on refugee protection in India.⁹³ However, Chimni suggests that if India were to adopt national legislation on refugee protection, this could strengthen its reputation within ExCom and be interpreted as a sign that India takes its membership (and refugee

⁸⁶ Vijaykumar (n 80) 11.

⁸⁷ For a detailed explanation of the origin and nature of the Gentleman's Agreement, see *Tibet's Stateless Nationals: Tibetan Refugees in Nepal* (Tibet Justice Center 2002) 88–104.

<www.tibetjustice.org/reports/nepal.pdf> accessed 27 April 2020.

⁸⁸ Vijaykumar (n 80) 10.

⁸⁹ *Bogyi v Union of India*, Civil Rule No 1847/89, 17 November 1989 (Gauhati High Court, India).

⁹⁰ *Malavika Karlekar v Union of India*, Writ Petition (Criminal) No 583 of 1992, 25 September 1992 (Supreme Court of India).

⁹¹ Sen (n 83) 401.

⁹² *ibid.*

⁹³ BS Chimni, 'Status of Refugees in India: Strategic Ambiguity' in Samaddar (ed) (n 83) 459.

law) seriously. He argues that by neither passing national legislation nor signing the *Convention*, India's involvement in ExCom hints at opportunism.⁹⁴ The argument I make in this thesis deviates from Chimni's contention. I argue that India's participation in international refugee protection cannot be measured by its adherence to and ratification of the *Refugee Convention* or the Protocol; instead, India's practice of extending protection to displaced peoples within its borders has often exceeded the constrained notions as exemplified in the *Convention* or the Protocol. This is in light of the *Convention* drafters' unwillingness and resistance to the demands made by India to expand the definition of a refugee and has allowed for more dynamic approaches to refugee protection.

Regional Initiatives

Given the scale of refugee movements in the subcontinent since the Partition of India, challenges have remained in developing nuanced individualized refugee status determination procedures. As outlined below, states in the region have engaged in coordinated efforts to respond to refugee movements throughout the last few decades. In many cases, states have engaged in group determination procedures "whenever numbers [have made] individual status determination impossible".⁹⁵ There have been several regional initiatives to respond to displacement, some resulting in the adoption of principles or guidelines (albeit not legally binding). These processes show that states in the region are committed to the core objectives of the refugee regime, even if they continue to refuse to ratify the *Convention* or Protocol.

Asian-African Legal Consultative Organization (AALCO)

The AALCO, an intergovernmental consultation group comprising 47 member states in Asia and Africa, adopted the Bangkok Principles on Status and Treatment of Refugees in 1966.⁹⁶

⁹⁴ *ibid* 465–66.

⁹⁵ Marjoleine Zieck, 'The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises' (2008) 20 *International Journal of Refugee Law* 253, 254.

⁹⁶ Asian-African Legal Consultative Organization (AALCO), 'Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees ("Bangkok Principles")' (24 June 2001) <www.refworld.org/docid/3de5f2d52.html> accessed 22 April 2020.

Although the principles are not binding, they have provided important guidance on protection norms. This is particularly important in a region that, unlike many others, does not have extensive binding treaties or frameworks on refugee protection. The principles have been modified over time to reflect the experiences of refugees and were revised in 2001 to reflect an expanded refugee definition which included persecution based on color, ethnic origin, and gender.⁹⁷

Informal Consultations on Refugee and Migratory Movements

The Informal Consultations on Refugee and Migratory Movements in South Asia were series of meetings initiated by the former UN High Commissioner for Refugees, Sadako Ogata, in 1994, to discuss strategies and common approaches for strengthening refugee protection and finding durable solutions. An Eminent Persons Group (EPG) was established with representatives from Bangladesh, India, Nepal, Pakistan, and Sri Lanka. The core objective of the consultations was to find ways to reconcile the narrowness of states' power-political interests with their humanitarian and international law responsibilities.⁹⁸ The meetings were undertaken with the aim of developing "a South Asian perspective on the pathways that would lead to a lasting solution".⁹⁹ At the Fourth Informal Consultation, the need for a regional normative framework covering refugees, stateless persons, and the internally displaced was articulated.¹⁰⁰ The Seventh Informal Regional Consultation of the EPG, held in New Delhi in December 2002, concluded with the need for a declaration that would serve as a platform for reinforcing refugee protection principles, reiterate the need for states to enact national refugee legislation, and provide a harmonized approach to refugee protection for the region. Accordingly, the South Asia Declaration on

⁹⁷ Andreas Zimmermann and Claudia Mahler, 'Article 1A, Para 2' in Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press 2011) 319.

⁹⁸ Pia Oberoi, 'Regional Initiatives on Refugee Protection in South Asia' (1999) 11 *International Journal of Refugee Law* 193, 197.

⁹⁹ *ibid.*

¹⁰⁰ Chowdhury Abrar, 'Legal Protection of Refugees in South Asia' (1999) 10 *Forced Migration Review* 21, 22.

Refugees was adopted by the EPG in January 2004¹⁰¹ (although there is no evidence that it is being applied in South Asian states). A further significant outcome of the consultations was the idea that such meetings enhanced the potential significance for the future direction of refugee policy in the region.¹⁰²

Asia Pacific Consultation on Refugee Rights (APCRR) and the Asia Pacific Refugee Rights Network (APRRN)

Regional initiatives have also been initiated by APRRN, which undertakes consultations on refugee rights on a biannual basis under the auspices of APCRR. The APCRR has positioned itself as a regional network that “capitalizes on the diversity of its members and the resources within the network to promote collaboration”.¹⁰³ Its biannual consultations provide a platform to explore innovative solutions to advance refugee rights and protection in the region. At its 2018 meeting, its South Asia working group identified the need for networking and collaboration with other organizations and agencies to better create viable solutions for refugee protection in the region.¹⁰⁴ The group also discussed the formation of a Rohingya Working Group and suggested a “comprehensive mapping exercise of Rohingya people in their respective countries”.¹⁰⁵ The prospect of a Rohingya Working Group was followed by the Indian government’s decision to begin the deportation and forced repatriation of Rohingya refugees. In August 2017, the government directed Indian authorities to identify ‘illegal immigrants’, including the Rohingya,

¹⁰¹ The South Asia Declaration on Refugees (adopted January 2004) https://shodhganga.inflibnet.ac.in/bitstream/10603/28291/17/17_appendices.pdf (accessed 22 April 2020).

¹⁰² Oberoi (n 98) 198.

¹⁰³ Asia Pacific Refugee Rights Network, ‘Report on the 7th Asia Pacific Consultation on Refugee Rights’ (Asia Pacific Consultation on Refugee Rights, Bangkok, 23–25 October 2019) <<http://aprrn.info/wp-content/uploads/2019/09/APCRR7-Report-.pdf>> accessed 12 February 2020.

¹⁰⁴ *ibid* 53.

¹⁰⁵ *ibid*.

and to deport them.¹⁰⁶ A petition was filed in the Supreme Court to stop this,¹⁰⁷ and an *amicus curia* brief by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E Tendayi Achiume, directed the court's attention to India's obligations under international law precluding such removals.¹⁰⁸ However, in light of India's anti-Muslim and anti-refugee sentiments, Achiume pointed out that this deportation order would violate India's obligations to international human rights treaties. More importantly, India would violate the principle of *non-refoulement* and that such "evaluations [should be] free from racial discrimination and that racial inequalities in these decisions do not arise directly or indirectly".¹⁰⁹

South Asia Forum for Human Rights (SAFHR)

The SAFHR is a regional network that focuses on democracy, peace, human rights, and forced migration, among other topics. It organized a regional consultation titled 'Refugees and Forced Migration: Need for National Laws and Regional Co-operation' in New Delhi in 1998.¹¹⁰ Its concluding recommendations recognized the importance of developing a working definition of 'refugee', while simultaneously acknowledging that 'in the light of the South Asian experience ... the definition of refugees incorporated in the UN instruments was no longer relevant as it was

¹⁰⁶ Krishna N Das and Sankeev Miglani, 'India Says to Deport all Rohingya Regardless of UN Registration', Reuters (14 August 2017) <<https://www.reuters.com/article/us-myanmar-rohingya-india-idUSKCN1AU0UC>> accessed 27 April 2020.

¹⁰⁷ *Mohammad Salimullah v Union of India*, Writ Petition (C) No 79 of 2017, 30 August 2017 (Supreme Court of India).

¹⁰⁸ Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Legal Opinion on India's Obligations under International Law to Not Deport Rohingyas' (12 July 2019) <<https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/AmicusBrieftoIndianSupremeCourt.pdf>> accessed 27 April 2020.

¹⁰⁹ *ibid* 18.

¹¹⁰ South Asia Forum for Human Rights, South Asian Regional Consultation on Refugees and Forced Migration; need for a national laws and regional co-operation, New Delhi, 1998.

(http://www.safhr.org/index.php?option=com_content&view=article&id=129:south-asian-regional-consultation-on-refugees-and-forced-migration-need-for-a-national-laws-and-regional-co-operation-new-delhi-1998&catid=38:programme-activities&Itemid=80) [accessed on December 14, 2020].

based on a rather narrow set of political criteria.¹¹¹ However, the consultation was also of the view that state practice in South Asia already reflected a wider definition and reinforced respect for the principle of *non-refoulement*.¹¹² The SAFHR has been involved in other activities and workshops on refugee protection. In 2003, it initiated a pilot survey on documentation and reporting on non-registered Bhutanese refugees in Nepal. The objective of this study was to analyze the overall situation of refugees in Nepal and highlight the protection issues they have faced.¹¹³ In recent years, the SAFHR has refocused its attention on the specific issues of Rohingya refugees in the subcontinent. In collaboration with the Asia Rohingya Rights Coalition (ARRC), the SAFHR has proposed initiatives for broad-based civil society-led consensus on dealing with the Rohingya refugee crisis, and to undertake concrete interventions to better engage stakeholders in addressing some critical challenges with respect to Rohingya refugee rights.¹¹⁴

Summary

While the regional initiatives above have not resulted in binding legal frameworks, they have helped to provide clarity on some of the core objectives of the global refugee regime by reaffirming the principles outlined in various international frameworks.¹¹⁵ By bringing states together, they have helped to address ‘convergent expectations’ with respect to refugee protection.¹¹⁶ While this may not seem like a high bar, it must be understood within the historical context of displacement in the region. These regional initiatives should therefore not be viewed as

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ South Asia Forum for Human Rights, Survey of Unrecognised Bhutanese Refugees in Nepal, 2003. (http://www.safhr.org/index.php?option=com_content&view=article&id=130:survey-of-unrecognised-bhutanese-refugees-in-nepal&catid=38:programme-activities&Itemid=80) [accessed on December 14, 2020].

¹¹⁴ South Asia Forum for Human Rights, A regional Multi-Stakeholder Initiative on Rohingya Crisis of Statelessness: Strengthening Democratic Forces in Myanmar and Safe and Dignified Return, 2017. (http://www.safhr.org/index.php?option=com_content&view=article&id=355:a-regional-multi-stakeholder-initiative-on-rohingya-crisis-of-statelessness-strengthening-democratic-forces-in-myanmar-and-safe-and-dignified-return-&catid=38:programme-activities&Itemid=80) [accessed on February 12, 2020].

¹¹⁵ Oberoi (n 98) 194.

¹¹⁶ *ibid.*

inconsistent with the international protection regime, but rather as steps in the right direction, given the region's tumultuous history.

State Practice: India

In addition to regional initiatives, individual states in the region have responded to mass refugee movements from neighboring states and beyond. While India has provided protection to different groups of refugees over time, its practice has not been consistent. As this section explains, while Tibetan refugees were provided with material assistance, land, residence permits, and even settlement areas, for instance, Sri Lankan Tamil refugees and Chakma refugees were settled in camps, with many subsequently repatriated. Following these sub-sections, each case will be dealt with and illustrated separately as a part of other substantive chapters.

Tibetan Refugees in India

Soon after the arrival of the Dalai Lama in 1959, India formally granted him asylum—and by extension, to any Tibetan fleeing violence. This policy was initially a response to public opinion and a feeling of kinship.¹¹⁷ Subsequently, India initiated relief efforts to assist Tibetan refugees. At the peak of the Tibetan refugee movements into India in 1961, the Lok Kalyan Samiti (a Delhi-based NGO) and the Central Relief Committee for Tibetan Refugees were involved in providing aid.¹¹⁸ The Indian government also welcomed aid from voluntary organizations, and the Central Relief Committee was responsible for receiving and coordinating it.¹¹⁹ In addition to international aid, the Indian government provided Tibetan refugees with 'subsistence money, land to settle, and administrative support upon arrival'.¹²⁰ They were also issued with Indian Registration Certificates

¹¹⁷ Oberoi (n 30) 84.

¹¹⁸ Interoffice Memorandum from Gilbert Jaeger to the High Commissioner on 'Tibetan Refugees in India – Visit of Shri PN Sharma' (6 November 1961), in Tibetan Refugees in India, File No 11/1-15/0/IND/TIB (UNHCR Archives, Geneva).

¹¹⁹ Letter from Kalyan Singh Gupta, General Secretary, The Central Relief Committee (India) to Gilbert Jaeger, Deputy Director Office of the High Commissioner for Refugees (25 January 1962), in Tibetan Refugees in India, File No 11/1-15/0/IND/TIB, Reference No 16(62)-9030 (UNHCR Archives, Geneva).

¹²⁰ Oberoi (n 30) 95.

on a *prima facie* basis, which they could use as an identity document as well as a residence permit.¹²¹

Bangladeshi Refugees in India

India and Pakistan went to war in 1971 over the right of East Pakistan to secede. These geopolitical instabilities were manifestations of postcolonial nation-building and the politics of newfound nationalism.¹²² This prompted a mass forced migration into the neighbouring Indian states of West Bengal, Tripura, Meghalaya, and Assam. As Luthra explained at the time, in “the brief span of seven months upto [sic] the end of October 1971, the influx from East Bengal has been of the order of 9.5 million”.¹²³ India’s position on ensuring the provision of relief for millions of refugees from East Pakistan also reinforced the idea that refugees were “a matter of bilateral not multilateral relations and that international agreements could constrict their freedom of action”.¹²⁴ In August 1973, India and Pakistan signed the Delhi Agreement which outlined the repatriation of Bengalis from Pakistan to Bangladesh, and the repatriation of non-Bengalis from Bangladesh to Pakistan.¹²⁵ India’s Ministry of External Affairs was steadfast in preventing refugees from returning given that the change in regime in East Pakistan (which was now Bangladesh) had not been particularly hospitable to those who had fled deteriorating conditions.¹²⁶ The image of a refugee was one who had the right to asylum and sanctuary solely due to the circumstances of flight, and whose ability to seek protection was not to be constrained by the restrictive elements of the *Refugee Convention*.¹²⁷

¹²¹ *ibid.*

¹²² *ibid* 104.

¹²³ PN Luthra, ‘Problem of Refugees from East Bengal’ (1971) 50 *Economic and Political Weekly* 2467.

¹²⁴ Weiner (n 32) 1745.

¹²⁵ India-Pakistan: Agreement on Repatriation of Prisoners of War (adopted 28 August 1973) 12 *ILM* 1080 (1973) (Delhi Agreement).

¹²⁶ Oberoi (n 30) 119.

¹²⁷ *ibid* 135.

Sri Lankan Refugees in India

In 1983, soon after the anti-Tamil riots in Sri Lanka, several thousand refugees arrived in India.¹²⁸ By the mid-1980s, many Sri Lankan refugees were living in government-assisted refugee camps, most of which were situated in the southern Indian state of Tamil Nadu. While India's response to the exodus of Tamil refugees was positive initially, over time their presence began to be viewed as a threat to national security. This was the result of the assassination in 1991 of the former Prime Minister of India, Rajiv Gandhi. The state government of Tamil Nadu had imposed rigid restrictions on the movement of Sri Lankan Tamil refugees after the assassination and had also initiated repatriation procedures. Tamil refugees began to be repatriated to temporary transit camps in Sri Lanka. The program was suspended after concerns were raised about their security. This led to UNHCR establishing an office in the southern Indian city of Madras (Chennai), based on a memorandum of understanding between the Indian government and UNHCR.¹²⁹ Today, there are still more than 62,000 Tamil refugees living in 107 camps in Tamil Nadu, and around 37,000 refugees living outside the camps.¹³⁰ India has instituted a policy to grant them residence visas and work permits. However, little has been done to enable them to apply for citizenship and many continue to live in a state of limbo.¹³¹

Constitutional Provisions and Case Law

Jurisprudential developments in India have also contributed to refugee protection, often drawing on constitutional law, but at times also on international legal principles. For instance, the case of *Khudiram Chakma v State of Arunachal Pradesh*¹³² emerged from a petition filed by Chakmas, a group that sought refuge in India from Bangladesh in 1964, in response to their forced

¹²⁸ BS Chimni, 'The Legal Conditions of Refugees in India' (1994) 7 *Journal of Refugee Studies* 378, 383.

¹²⁹ *ibid* 387.

¹³⁰ Amaya Silvela, 'Sri Lankan Tamil Refugees in India: Return or Integration?' (2019) 62 *Forced Migration Review* 13.

¹³¹ *ibid*.

¹³² *State of Arunachal Pradesh v Khudiram Chakma*, 1994 AIR 1461 (Supreme Court of India).

repatriation. Under a scheme established in 1966, the Chakmas were resettled to the present-day Indian state of Arunachal Pradesh. However, a few years later, local villagers complained that the Chakmas were encroaching into their lands and dealing in arms and ammunition. An inquiry resulted in the Chakmas being moved back to Bangladesh. The Supreme Court of India considered article 14 of the UDHR and Article 13 of the ICCPR in holding that Chakma refugees who had escaped persecution in Bangladesh could not be forcibly sent back, on account of the ongoing threats they might face. The court further held that this could result in the deprivation of their right to life under article 21 of the Constitution of India.¹³³

This approach was reinforced in the case of *National Human Rights Commission (NHRC) v State of Arunachal Pradesh*.¹³⁴ This emerged from a public interest petition, filed by the NHRC, which sought to enforce the provisions of article 21 of the Constitution (concerning the right to life and personal liberty). The court stated that the Constitution “confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws”.¹³⁵ It held that India “is bound to protect the life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons ... to threaten the Chakmas to leave”, noting also that the state’s institutions must take steps to “carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the state without being inhibited by local politics”.¹³⁶

The case of *Ktaer Abbas Habib Al Qutaifi v Union of India* originated from a special civil application to the High Court of Gujarat, which sought direction to release two Iraqi asylum

¹³³ *ibid.*

¹³⁴ *National Human Rights Commission v State of Arunachal Pradesh*, 1996 SCC (1) 742 (Supreme Court of India).

¹³⁵ *ibid.*

¹³⁶ *ibid* para 20.

seekers from detention in the western Indian state of Gujarat.¹³⁷ The petitioners sought a stay of deportation, based on the principle of *non-refoulement*, and release from detention. The court noted the Supreme Court’s ruling in *NHRC* that the Constitution guarantees certain fundamental human rights to non-citizens,¹³⁸ and held that “[the principle of non-refoulement] prevents expulsion [sic] of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.¹³⁹ The court further stated that this aligned with “Article 21 of the Constitution, so long as the presence of refugee [sic] is not prejudicial to the law and order and security of India. All member nations of the United Nation [sic] including our country are expected to respect for international treaties and conventions concerning Humanitarian law”.¹⁴⁰

Deviance v. Resistance

By virtue of non-ratification to the *Refugee Convention* and its Protocol, India’s efforts with refugee protection have been viewed as tenuous. However, it is evident that India’s efforts with respect to hosting and protecting refugees, though not formally codified, have been in alignment with the core objectives of customary international law and protection standards of the global refugee regime. There have been calls for India to develop a comprehensive domestic refugee law while bearing in mind its commitments and obligations to customary international law.¹⁴¹ However, as noted earlier, while India adopting a comprehensive national refugee law may strengthen its reputation in the global refugee regime¹⁴², its efforts at refugee protection have been

¹³⁷ *Ktaer Abbas Habib Al Qutaifi v Union of India*, 1999 CRI LJ 919 (Gujarat High Court, India).

¹³⁸ *ibid* para 10.

¹³⁹ *ibid* para 18.

¹⁴⁰ *ibid*.

¹⁴¹ Saurabh Bhattacharjee, ‘India Needs a Refugee Law’ (2008) 43 *Economic and Political Weekly* 71.

¹⁴² *Chimni* (n 93) 459.

unique and reflect the circumstances of forced displacement in the subcontinent. Seeking validation and strength from other parties in the international arena also goes against the spirit of India's resistance to the Eurocentric *Convention*, since its negotiation and formalization. It is also significant to note that India's practice of extending protection to displaced peoples has not only exceeded the constrained notions of the *Convention* or the Protocol but has also been dynamic in nature. India's practice of refugee protection can be characterized by constant change; as will be evident throughout, the practice has often evolved to reflect the specific circumstances of persecution and displacement of the group seeking protection, while upholding the core precepts of international refugee law. India's approach to refugee protection practices in response to various groups of displaced populations, while progressively different, is not inconsequential, as they demonstrate clear resistance to hegemony.

Some scholars have argued that India's refugee protection norms are incomplete. For instance, Bhattacharjee argues that "Indian law and practice provides a distorted and incomplete protection to refugees [and] fails to recognize them as a distinct category of persons".¹⁴³ This points to a prevailing assumption that India has failed in its commitments to human rights standards and has denied basic protection to a large number of refugees. Contrary to this belief, disillusionment with the *Convention* has not resulted in India absolving itself of its responsibilities towards the principles of *non-refoulement* and other refugee protection standards.¹⁴⁴ As will be evident, a more pragmatic approach to India's disillusionment with the international frameworks like the *Convention* and the *Protocol* provides a more comprehensive view of some of the regional or national developments on refugee protection that run parallel to the international framework. This points to resistance rather than deviance. India has shown moments of non-cooperation to the

¹⁴³ *ibid* 75.

¹⁴⁴ *ibid*.

global refugee regime that has resulted in *ad-hoc* interventions to refugee protection. For instance, in the 1960s, when Tibetan refugees arrived in India, the then Prime Minister of India Jawaharlal Nehru, declined the assistance of the Office of the United Nations High Commissioner for Refugees on the basis that India's treatment of Tibetan refugees would be internationally inspected and scrutinized. Non-cooperation was demonstrable from India's rejection of a proposal to have a UNHCR representative present in the country to oversee the operations of resettling Tibetan refugees. A deep sense of paternalism and colonial characterization of the conditions of refugees in India is also obvious from another Interoffice Memorandum between the UNHCR Representative from London and the UNHCR Geneva.¹⁴⁵ This particular memorandum refers to the visit of Lady Alexandra Metcalfe (daughter of a former Viceroy of India, Lord Curzon) to India to inspect the status of Tibetan refugees. References were being made not only to the "deplorable conditions of Indian citizens" but also of India's "apathy towards Tibetan refugees".¹⁴⁶

Outline

Amidst the myriad viewpoints and perspectives that animate discussions on forced migration, the greatest challenge for academics and policymakers, continues to be the relevance and applicability of pre-existing international frameworks that were established to afford protection to people of concern, and the broader implications such challenges have on the global refugee regime. My doctoral dissertation is a study of some of the gaps associated with the applicability of the *Refugee Convention* and its historical developments in the global south, many of which remain minimally researched. The project identifies alternate locations of practice with

¹⁴⁵ Interoffice Memorandum from the Representative of UNHCR, London to the High Commissioner for Refugees, Geneva 'Tibetan Refugees', (8 January 1963); File No.: G.XV.1.15/46 - 4/11 [Official Records].

¹⁴⁶ *ibid.*

respect to refugee protection. More specifically, as previously mentioned, I view the context of ‘resistance’ with respect to India’s relationship to international refugee law mechanisms by pitting it against the existing global narrative of ‘deviance’ that has often been attached to states that have not acceded to the ‘conventional’ and ‘Eurocentric’ notions of refugee protection such as the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol*. My doctoral project forms an interesting part of discussions on the asymmetries of power, knowledge production, and legitimacy of norms. With the help of this study, my project will present the first steps towards a new place for discourse on forced migration research. It will also examine the subcontinent’s practice of refugee protection that deviates from Eurocentric norms. Such an examination will enable the development of an argument in favour of a dissenting view of refugee protection, considering the international refugee framework’s imprecision and exclusionary origins.

Considering the issue of forced migration in the Indian context presents a unique academic exercise. Complexities continue to persist with respect to defining refugeehood in India. The contextual specificities in India and the long history of India as a node of global cultural exchange presents challenges in comprehensively characterizing forced displacement. As the analysis of my qualitative data will demonstrate later on in my thesis, several groups of people have sought refuge in India and the practice of extending sanctuary to such groups has essentially reconstructed refugeehood in India. In addition to the constraints and imprecision inherent in the international refugee regime, conceptualizing refugeehood in countries that do not possess a national asylum law is more complex. In this thesis, I will provide some first steps towards a cross-sectional model of refugee and forced migration research, which makes it crucial for me to not only move from the rudimentary definitions of a refugee but also makes it equally important to identify alternate locations of practice, like that of India. In summary, my project is a combination of exploring the

‘cacophony of definitions’ of refugeehood in India and look at how the refugee label has evolved, been constructed, and deployed over a period of time. Given India’s disillusionment with the international refugee framework, I will explore the ‘general perceptions and views’ on refugeehood that have existed historically, and India’s relationship to institutions such as the Office of the United Nations High Commissioner for Refugees. Finally, I will explore how all of this has manifested into a form of ‘practice’ of refugee protection and find out whether it has been used consistently or in an interest-based and privileged manner.

The need for international protection of refugees and South Asian states’ willingness to extend such protection, independent of international intervention, is something that has not been explored in detail. Narratives on India’s non-accession to international conventions of refugee protection have often played into the notion of ‘subcontinental defiance’ of the global refugee regime. However, my project aims to mark a departure from that narrative, in order to construct a better understanding of forced displacement in India. I will explore the two contrasting tracks between (a) India’s (and the rest of South Asia’s) conceptualization of refugeehood and (b) the actual practices, mechanisms, and *ad-hoc* means of extending protection or providing refuge to those in need. My research also envisages capturing the story of UNHCR’s operation in India and how the organization’s role has been impacted by domestic policies on sanctuary and protection. Despite India’s non-accession to international refugee law instruments, the state has continued to provide protection in a way that is different from western notions. It is also clear that a defiant or alternate voice has existed on the world stage for the last seven decades, which emerges from challenges to the ‘meaning of practice’ of refugee protection and its foundation on grandiose international frameworks. My doctoral project will articulate this defiant voice and arrive at a coherent argument on the construction of refugeehood in India.

Some Research Questions

As will be evident from the rest of the project, India's approach to refugee protection takes the form of a challenge to the international *Refugee Convention*. However, there is a lack of scholarly nuance and clarity on who has received sanctuary in the region. The focus of my doctoral dissertation will be on India since the state has acted as the regional hegemon for many years in South Asia. The sheer size and population of India make it the most prominent geopolitical force in the region. Therefore, the research questions at the core of the project are as follows:

- The first question is descriptive: How has India conceptualized refugeehood since the interwar period independent of the global refugee regime?
- The second question is evaluative: Has this construction been consistent or inconsistent?
- The third question is explanatory: What assumptions or understandings have guided the construction of the subject of refugees in India that is defiant to Eurocentric constructions under the global refugee regime?
- The fourth question relates to the broader significance: What does the trajectory of the construction of the refugee subject in India reveal about notions of refugee protection in South Asia more generally in relation to the global refugee regime today?

The rationale for my proposed questions is based on South Asian states', more specifically India's historical reception to several waves of refugees. These questions also emerge from the historical circumstances with respect to the development of the global refugee regime. Two points of discussion emerge while examining the rationale of my research questions. While the purpose of the refugee regime was to protect those, who were disenfranchised after WWII, the regime has fallen short of expanding beyond its initial conceptualizations to be applicable in other parts of the world. Secondly, a regional bias can also be attributed to the narrowness with which the initial refugee regime was established, which has resulted in contextual specificities being overlooked.

Consequently, though a comprehensive system of refugee law has not been developed in India, *ad-hoc* mechanisms and jurisprudential developments have certainly been critical in accommodating involuntary migrants into the country.

Thesis outline

In the next chapter of the thesis, I will undertake a detailed review of the methodology which will centre the core aspects of TWAIL and qualitative archival research to inform my arguments in this thesis. Some core elements of jurisprudential developments will also be analyzed which would explain the choice to use the methodological strands. My dissertation relies heavily on archival data. By analyzing these documents that I collected, I will provide a detailed outline of the codes that can be associated with each piece of archival data and then group them into coherent conceptual underpinnings. I will then explore and demonstrate how such conceptual underpinnings are sustainable in the context of my doctoral project. Following this, a detailed literature review will be undertaken. The focus will be on four different strands of literature namely Third-World Approaches to International Law (TWAIL), international refugee law, postcolonial theory, and the legitimacy of states and South Asian geopolitics.

While the majority of the thesis will focus on India's post-partition refugee protection practices, it is equally critical to ground some of India's practices under the British Raj. As a founding member of the League of Nations, India had a role to play in the Nansen International Refugee Office, which provided sanctuary and travel documents to those who were displaced. This analysis will also include some broader conceptualizations of refugee protection within the League of Nations; James Hathaway's foundational work on international refugee law would be particularly critical. With the archival data available from the International Refugee Office, which was established under the auspices of the League of Nations, I will provide a detailed analysis on the grounds under which 'sanctuary' was afforded to those who came to India 'fleeing' deprivation

and other crises resulting from war, famine, religious persecution, and violence. This analysis is significant for one another reason; not only will I categorize the grounds under which sanctuary was afforded to those who sought it in India, but I will also problematize ‘persecution’ and ‘protection’ during the interwar period and what constituted ‘practice’ of affording ‘sanctuary’ or ‘asylum’ in India. Based on the analysis undertaken earlier, I will continue to map the conceptualization of forced migration in India. As a part of my archival and historical collection research, in addition to League of Nations data, I have also obtained information as to how refugeehood has transformed since the Partition of India in 1947.

The thesis will then move on to outline some of the post-WWII developments under the auspices of the UN Charter, such as the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol* with the help of Jane McAdam and Guy Goodwin-Gill’s work on international refugee law. Within these discussions would be India’s engagement with the development of the *Refugee Convention* and subsequently its engagement with the Office of United Nations High Commissioner of Refugees (UNHCR). This will involve examining some challenges that the global refugee regime presents for states in the Global South. The end to formal colonialism in the subcontinent resulted in the creation of arbitrary borders that created new nation-states along ethnoreligious lines. Refugee movements in the region cannot be viewed devoid of this context. Therefore, a chapter will be dedicated to examining how state creation in the region manifested in refugee generation. With the help of work undertaken by Luis Eslava, Sundhya Pahuja, Obiora Okafor, Partha Chatterjee, B.S Chimni, and Mohammad Shahabuddin on postcolonial states and South Asian geopolitics, I will analyze the problematic notions of colonially installed borders and their impact on constrained notions of forced displacement and refugeehood.

The arguments will segue into analyzing moments of resistance to international law from the global south, as expressed by Balakrishnan Rajagopal and Rob Knox. I will begin by examining the importance of understanding hegemony in international law and articulate how counter-hegemony to international refugee law mechanisms are projected by states like India through scholarly work. Teemu Ruskola's work on Legal Orientalism will also help in the analysis of the inequality inherent in the implementation of international law norms. The resistance to international refugee law norms has often been expressed by states like India, not only by non-ratification, but also with the help of developing a unique notion of refugeehood. One of the key aspects of this project is to map the lifecycle of a refugee in India. Given that the seeds of mass displacement were laid as a result of the Partition of India, it is critical to balance the analysis to show India's resistance to hegemony while remaining true to the precepts of international refugee law. The lifecycle analysis will involve a detailed examination of India's refugee protection practice by looking at case studies as mentioned earlier.

With the help of postcolonial scholarship and subaltern studies, I will present some historiographies on how refugeehood was constructed in South Asia. Ranajit Guha, Gyanendra Pandey, and Asoke Sen, are some of the scholars who will be consulted for this exercise. Along with an overview of the global refugee regime, some of the gaps in the global refugee regime, its ongoing challenges, and the lacunae in protection mechanisms will be presented. This will present some analysis on how postcolonial India has viewed forced migration, independent of the global refugee regime.

The thesis will contextualize some of these discussions with the help of periods of mass refugee movements to India. I will look at how has the concept of refugeehood been constructed after 1947 based on an analysis of the Tibetan displacement, the population shifts amid the

communal disturbances in East Pakistan in the 1960s, the displacement of Bangladeshi refugees after the Liberation War of the 1970s, and the Sri Lankan Tamil refugee movements amidst the Sri Lankan Civil War in the 1980s and the 1990s. A significant part of my thesis is to organically develop an analysis on the evolution of refugeehood and practice of asylum over the years amidst new challenges in the South Asia. I will also outline the legitimacy of such practices within the principles of international law and India's ongoing relationship with the global refugee regime. Finally, *ad-hoc* mechanisms have been established to protect several waves of refugees and migrants throughout contested periods in history. I will provide a detailed account of these mechanisms and their effectiveness along with some future scope for research in the area.

Overview of the methodological approaches

This chapter will outline my methodological approach and my justification for the chosen approach. The dissertation relies heavily on archival data, and this chapter will provide some initial analysis of the archival data that I collected. With the help of this analysis, the chapter will provide a detailed outline of the codes that can be associated with each piece of archival data and then group them into coherent conceptual underpinnings. This chapter will then explore and demonstrate how such conceptual underpinnings are sustainable in the context of my doctoral project. In addition to this, the chapter will also outline the rationale for adopting the lens of TWAIL to inform my research.

The Methodological Outline

One of the major pieces of the strand of literature on which I rely is Third World Approaches to International Law (TWAIL) since it bears a great deal of significance in informing my doctoral research. I approach this methodological overview with the preconceived notion that TWAIL cannot be divorced from the inquiry into understanding alternate non-European notions of refugee protection. Having demonstrated the entrenched Eurocentricity that dominates discussions on international refugee protection, and the ingrained hegemony in international refugee law, it is critical to embark on a methodological inquiry that diverges from normative and predominant notions. More significantly, it is also critical that this methodological inquiry articulates resistance inherent in non-European postulations of refugeehood and refugee protection practice. Moreover, this overview also intends on providing some embryonic points of discussion on the asymmetries of power, knowledge production, and legitimacy of norms concerning the

discipline of international refugee law and will present the rationale to embark on some first steps towards a new place for discourse on migration research.

Subcontinental resistance and anti-colonial challenge: Rationalizing TWAIL approach

For decades, TWAIL has provided an effective account of resistance to colonial legacies that have been weaved into the international legal discipline. One such example is the origin of ‘subcontinental defiance’ that arose from the concerns that were presented by newly independent India and Pakistan, during the formalization and negotiation process of the *1951 Refugee Convention*. The Partition of India was an event that required a unique approach to refugee protection, given that dispossession and displacement in the region were the result of colonial violence and imposed cartographic divisions on the people. During the formalization process of the *Convention*, the representatives from South Asian states were unconvinced that the provisions for refugee protection that were being deliberated upon, were effective in protecting partition refugees. As mentioned earlier, in some initial meetings of the Conference of Plenipotentiaries, both India and Pakistan were striving to provide clarity on the categories of refugees who were seeking protection from persecution. However, despite such efforts, the many who were displaced were left outside the purview of the pursuant *Convention*.¹⁴⁷ This was also evident from deliberations carried out on the proposed *Refugee Convention*. As Mayblin argues, the British Government was reluctant to include colonized peoples under the rubric of the *Convention*.¹⁴⁸ This was also an antithetical development to the core objectives of the supposed universality of the *Convention* and particularly demoralizing for the newly independent states in the subcontinent. When the Partition of India had created a refugee problem of its own, newly independent states in

¹⁴⁷ UNGA, Official Records of the Third Committee, Fourth Session, 260th Meeting, 11 November 1949, 128.

¹⁴⁸ Lucy Mayblin, ‘Colonialism, Decolonisation, and the Right to Be Human: Britain and the 1951 Geneva Convention on the Status of Refugees’ (September 2014) 27 *Journal of Historical Sociology* 423, 433.

the region had to cope with the instability and massive displacement across newly created borders on their own without international assistance.

Widespread resistance and anti-colonial challenges emerged from South Asian states when the colonial application clause was proposed by the British Government and other settler states. The clause was the lynchpin to push for an imposed universal application of the *Refugee Convention*. As per the colonial clause in Article 40 of the *Convention*, “a contracting State also may... declare that [the] *Convention* shall extend to all or any of the territories for the international relations of which it is responsible.”¹⁴⁹ The resistance to adding the colonial clause to the *Refugee Convention* was evident from the concerns expressed by some of the representatives who were present at various meetings throughout the deliberations process of the *Convention*. More importantly, the Indian delegation had strongly opposed the application of the colonial clause to the *Refugee Convention*. The delegation wanted an acknowledgement of the human rights abuses that had taken place in the former colonies. They argued that the *Convention* should especially be applied “in the colonies [...] since it was there that violations of human rights were unfortunately most frequent”.¹⁵⁰ One other concern was expressed by the representative from Pakistan, who pushed for a more inclusive definition of a refugee. By pointing to the constrained definition of a refugee, the Pakistani delegate demanded that the UN consider hostilities in other parts of the world besides the Second World War. The revision to the refugee definition was also suggested on the grounds that Pakistan had been compelled to host millions of refugees in the aftermath of the partition.¹⁵¹ However, these concerns were overlooked and did not make an impact on the drafters decision to leave the definition of refugee unchanged. From these discussions, it is evident

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid* 434.

¹⁵¹ *ibid* 435.

that the establishment of the *Refugee Convention* was done with one region in mind which was Europe. The limitations of the *Refugee Convention* were clear from the approach that refugee protection crises in one part of the world were enough to push for its universal application without considering subjective experiences of those who experienced circumstances that were quite different from those outlined in the *Convention*.¹⁵² As a result, South Asian states had to re-examine their role in refugee protection and develop mechanisms that were resistant to the hegemonic influences of the *Refugee Convention*. The articulation of such resistance rationalizes the adoption of TWAIL as a line of inquiry and as a methodological lens.

Limitations of TWAIL

As the review of TWAIL literature will show in the next chapter, the discipline has certainly offered some very effective approaches to understanding resistance to hegemony as expressed by states in the global south. However, some limitations of TWAIL impact the ability to cogently apply the core thesis of the discipline within this research project. Like many other scholars, I also approach this lens with caution. TWAIL can be a tool of liberation or emancipation from the Eurocentric trappings; however, there is also a risk of it serving as a polemic tool of dogmatic conformity and sycophancy. Therefore, by using TWAIL as a lens for discussions on hegemony inherent in international refugee law mechanisms, I do not intend to romanticize what the discipline has to offer. Instead, I approach this with pragmatism. As al Attar argues, “despite the forcefulness of TWAIL critiques, European International Law remains as predatory and partial as it was when first established”.¹⁵³ He attributes the minimal success of TWAIL in actualizing its vision not only to the first-world states’ inability to forego the privileges of that hegemonic

¹⁵² UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951*, A/CONF.2/SR.19.

¹⁵³ Mohsen al Attar, ‘Teacher Don’t Teach Me Nonsense: Subverting Eurocentricity in International Legal Pedagogy’ in Antony Anghie et al (eds), *The TWAIL Reader* (Edward Elgar 2020) (*Forthcoming*).

international legal structures offer, but also to the inherent naïveté of TWAIL scholarship that believes that highlighting such biases could precipitate reform.¹⁵⁴ However, al Attar argues that the perniciousness of Eurocentrism is evident from every facet of international law, which has manifested into TWAIL’s inability to effectively destabilize “orthodoxy in international law”.¹⁵⁵ The constant belligerence unleashed by First World states over states in the Global South also serves as a reminder that international law works inherently to the benefit of more powerful states in the world.¹⁵⁶ For instance, as discussed in the previous sections, the definition of refugeehood overlooked the subcontinental experiences of displacement, the notion of colonially administered cartographic divisions that resulted in involuntary migration across newly created borders, and colonial violence as a form of persecution. TWAIL certainly centres its critiques on such hegemonic and Eurocentric approaches of the international legal discipline. However, what I strive for here is not to project TWAIL as the sole instrument of objection to the genesis of mainstream international law, but to balance its application by highlighting some limitations. Therefore, though TWAIL will remain as the primary frame of reference for this project, it will also be robustly supported by other strands of literature such as the impacts of postcolonial nation-building on colonized populations, postcolonial theory and critical race theory, and archival data that demonstrate strong resistance to Eurocentric norms. My project derives its strength from multiple frames of reference that would enable clear articulation of India’s experiences with forced migration. The current literature on forced migration studies in the South Asian context remains myopic as demands for states like India to ratify the 1951 *Convention* continue to be made. While there is value in this, this project argues that practices of refugee protection often inform us more

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

about the efforts that are being made to comply with the core tenets of international refugee law, and the *Convention* or comprehensive national refugee law is likely to limit the abilities for the state to make adequate provisions for refugee protection. More importantly, as will be evident from the rest of the project, India's refugee protection practice reflects a great deal of dynamism as it has been adaptable to the groups seeking protection from persecution.

TWAIL and its significance as a methodological lens

Despite the limitations listed above, TWAIL provides this research project with the ability to undertake discussions on the importance of looking beyond Western notions of refugee protection. As Parmar argues "TWAIL holds immense potential for formulating alternative international legal theories" by articulating the resistance of third world peoples, the colonial histories that foreground the development of the discipline and practice of international law, and some critical approaches that decenter the narrative on several subsets of the international law.¹⁵⁷ Parmar's arguments go further in also realizing that such potential cannot be advanced "unless the search for alternative epistemologies also becomes an integral part of TWAIL".¹⁵⁸ My objective for this chapter and the rest of the project is to provide steps in the right direction to further strengthen this potential offered by TWAIL at least in the field of international refugee law. The alternative epistemologies that Parmar refers to can be conceptualized in the field of international refugee law by not only recounting the absent discourses on forced migration from the perspective of the subcontinent but also by mapping the lifecycle of the concept of refugeehood from the region's experiences. As mentioned earlier and will be evident throughout, the alternative to hegemonic international refugee law will also be conceptualized by identifying moments of forced

¹⁵⁷ Pooja Parmar, 'TWAIL: An Epistemological Inquiry' (2008) 10 *International Community Law Review* 363-370.

¹⁵⁸ *ibid.*

migration in the region and mapping alternate locations of practice that are more representative of subcontinental experiences of displacement.

Approaching the methodological inquiry from a TWAIL lens offers me a set of tools with which I can strengthen my research. The literature review will provide a detailed overview of the discipline and will reconceptualize the narrative of refugee protection outside the European lens. While the ideal aim would be to bring discussions on alternate locations of the practice of refugee protection at par with Eurocentric conceptualization, it is more pertinent to present findings on new locations for discourse on refugee experiences that are non-European. With the help of a TWAIL lens, I will set out to articulate the subaltern treatment of mobility and refugees in India as a result of hegemonic and Eurocentric structures that have often dominated discussions around forced displacement. The significance of such non-European experiences is “central to TWAIL as an academic movement”.¹⁵⁹ I believe that this methodological lens in particular would be critical in drawing “attention to the untold stories of international law” and provide first steps towards decolonizing refugee research and “setting ‘subjugated knowledges’ free”.¹⁶⁰

The recognition of TWAIL as a methodological lens will concretize the backbone of my doctoral project – identifying alternate locations of practice concerning refugee protection. While using TWAIL as a methodology has its challenges, it can be broken down by demonstrating the global inequality inherent in the application and implementation of international law. Using Otto’s arguments on the tensions that arise from the pre-existing “emancipatory ideas of democracy and the state-based structure of the international community, [...] emerge the possibilities for reshaping the processes by which international law is formulated.”¹⁶¹ Otto’s work explores the possibility of

¹⁵⁹ *ibid* 364.

¹⁶⁰ *ibid*.

¹⁶¹ Dianne Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference.’ (1996) 5 *Social & Legal Studies* 337, 338.

viewing the third world states and third world peoples within the purview of current precepts of international law, given the discipline's predominant European or western gaze. Otto's view of the subaltern is equally critical in centering the third world within the discussions of international law. Given the ongoing marginalization of states in the global south within the context of international law principles, the objective is to examine how these states make themselves heard within the international context.¹⁶² Another important piece is also examining the distinguishing factors between the voice of the Indian state versus the Indian people using TWAIL as a methodological lens. There is value in looking at it as it represents a departure from the predominant narrative. This is true with the way forced migration is conceptualized in South Asia. As will be highlighted in the literature review, the purpose of articulating the significant contributions to the body of knowledge from the global south is sparked by the formation of new nation-states in South Asia, and the imposing role of European knowledge systems in understanding refugeehood and international protection regimes. The silencing of marginalized voices based on South Asian experiences triggers the need for strategies to challenge the "exclusionary devices" of European knowledge production.¹⁶³ As much as TWAIL will be used as a lens for my methodological inquiry, it is equally important to note that it also provides a set of tools that can highlight my approach and will help me choose the case studies for this project.

Archival records and their significance as a methodological lens

The role of "unobtrusive measures" in research is also critical in my methodological lens.¹⁶⁴ Although qualitative research is dominated by the role of participant observation, or field research methods, unobtrusive and nonreactive techniques are equally valuable in providing access

¹⁶² *ibid* 338.

¹⁶³ *ibid*.

¹⁶⁴ Bruce L. Berg, *Qualitative Research Methods for the Social Sciences* (7th edn, Allyn & Bacon 2009) 268.

to information that are otherwise not reachable by other means.¹⁶⁵ The role of archives in my research covers this aspect of unobtrusive research. As Berg argues, unobtrusive strategies are indications of “human traces”, and in my particular project official documentation such as archival records form the backbone of this approach. While archival research may be open to some bias, they are significant indications as to “what people leave as traces of themselves [and] may speak more eloquently and truthfully about their lives than the account they themselves might offer” and other indicators of ideological leanings.¹⁶⁶

The role of such human traces that are visible through archival data also points to arguments on how difference can be understood by actively employing subalternity to challenge European knowledge bases. As mentioned before, scholarship and subjective accounts of refugee protection have originated from Europe or North America and have failed to incorporate the subjective experiences of forced displacement outside of Europe. Therefore, archival records play a crucial role in understanding the repercussions that the Partition of India had on contemporary experiences of displacement, identity, citizenship, and nationhood. The records not only preserve the collective memory of those who have passed and had subjective experiences of displacement throughout history but also provide guiding pathways to create interruptions in hegemonic narratives around the displacement in the subcontinent. I justify archival research by relying on the important role that unobtrusive measures play and also by positioning myself as a custodian of lived and collective memory as articulated in these archives.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid* 269.

Centrality of TWAIL in resistance to Eurocentric refugee protection norms

TWAIL has certainly proven to be an appropriate crucible for theoretical musings which identify structures that are inherently disadvantageous to the welfare of Third World states and peoples. This emerges from B.S Chimni's criticisms of TWAIL, the very discipline and scholarship he helped propel; he argues that "[u]nfortunately, TWAIL [...] has never been able to effectively critique neo-liberal international law or project an alternative vision of international law."¹⁶⁷ However, this argument questions the efficacy of TWAIL and "bemoans the collective failure of Third World to articulate an alternative to the mainstream international legal regime."¹⁶⁸ As Al Attar and Miller argue, despite decades of TWAIL scholarship that proposed to "redress the historical biases that [...] undermine Third World well-being", power imbalances continue to persist.¹⁶⁹ For instance, as mentioned throughout this project, this is evident from the lacunae that exist in contextualizing forced migration in South Asia. The newly independent states in the region were compelled to establish reactionary or *ad-hoc* measures to protect forced migrants. This echoes Al Attar and Miller's counter-argument to Chimni's prevailing view of Third World states' inability to articulate a cohesive counter-vision to structural imbalances. Al Attar and Miller argue that the clarity in this vision is not for the states' lack of trying but the "result of forceful counter-challenges waged by First World actors, unmoved by the Third World plight".¹⁷⁰

Given that TWAIL forms one of the key foundations of my methodological inquiry, it is critical to bolster arguments that justify the use of this lens to further inform discussions on forced

¹⁶⁷ Bhupinder Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie, Bhupinder Chimni, Karin Mickelson, and Obiora C. Okafor, (eds), *The Third World and International Order: Law, Politics, Globalization* (Martinus Nijhoff 2003) 48.

¹⁶⁸ Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: The Bolivarian Reconstruction' (2010) 31 *Third World Quarterly* 347, 348.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

migration in the subcontinent. Based on Okafor's arguments, TWAIL scholarship is critical in its foundation on "logical reasoning, and on the testability of the propositions that it makes".¹⁷¹ This key feature sustains it as a form of approach to any project that attempts to articulate historically marginalized voices and resistance to Eurocentrism. The aforementioned propositions are based on thorough research with relevant empirical evidence, that provides scholars with the opportunity to rely on TWAIL as a systematic approach. Observing TWAIL as "a school of thought that has made important contributions to the science of method in international legal studies", further offers very significant contributions to the discipline.¹⁷² While pointing to a rather tokenized "inclusion of a chapter on TWAIL in the leading book on the methods of international law", the significance of this approach is further bolstered based on some critical work "on centering the Third World" as opposed to merely the West.¹⁷³ As will be demonstrated in the next chapter, the importance of resistance within the predominant principles of international law and other approaches that challenge Eurocentricity, "allow TWAILers (and their intellectual allies) to more effectively write the Third World into international legal history".¹⁷⁴ This particular doctoral project on India's relationship with the global refugee regime would add to the already rich repertoire of critical work and analysis, that, as Okafor argues, has the potential to "alter many of the doctored pictures of international law and institutions", and articulate the alternate location of practice in international refugee law by problematizing the western "[domination] of international legal imagination".¹⁷⁵

Using TWAIL as a lens to locate lacunae in conceptualizing a global phenomenon like forced displacement, with subcontinental subjectivities, could be questioned, given the extent to

¹⁷¹ Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, Or both?' (2008) 10 *International Community Law Review* 371, 374.

¹⁷² *ibid* 377.

¹⁷³ *ibid*.

¹⁷⁴ *ibid*.

¹⁷⁵ *ibid*.

which the discipline has been viewed as nihilistic, and complexities remain “as to whether TWAIL scholarship offers logical and testable arguments, propositions and theses”.¹⁷⁶ To this, I argue that TWAIL certainly offers some key conceptualizations that push back against the inherent colonial legacies of international law and the ongoing hegemony in its application in the global south. One example of such arguments has been presented by Makau Mutua in his groundbreaking work. Mutua’s scathing critique of the universality of the human rights corpus is presented with the “Savage-Victim-Savior” metaphor.¹⁷⁷ He argues that hegemonic institutions such as the United Nations, Western states, international non-governmental organizations (INGOs), and senior Western academics have been instrumental in constructing a three-dimensional prism that pits savages on the one hand with victims and saviors on the other, thereby rendering the human rights corpus “unidirectional and predictable”.¹⁷⁸

Mutua’s thesis offers more testable arguments for TWAIL’s validity as a methodological lens. By evoking images of barbarism, Mutua argues that the human rights corpus has been successful in creating unique illustrations for the three-dimensional metaphor. The first dimension of the prism depicts the savage as abominable. In this case, the state is viewed “as the operational instrument of savagery”.¹⁷⁹ The redemption from savagery is “solely dependent on [state] submission to human rights norms”, which then creates a difference between a good state and an evil state; the “good” state internalizes, human rights, and “the “evil” state, on the other hand, expresses itself through an illiberal, anti-democratic, or other authoritarian culture”.¹⁸⁰

¹⁷⁶ *ibid.*

¹⁷⁷ Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201.

¹⁷⁸ *ibid* 202.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid* 203.

The second dimension of the metaphor is that of the victim – “the one who has been violated by the savage”.¹⁸¹ The victim is often depicted as powerless and innocent, and the state’s (which is the savage) offensive actions have rendered them into a state of vulnerability. While dealing with the notion of the victim, Mutua argues that human rights discourse is anti-catastrophic and reconstructive as evidenced by human rights documents and human rights reports prepared by various Intergovernmental Organizations (INGOs).¹⁸² The reports tend to embody “these two mutually reinforcing strategies”.¹⁸³ For instance, a 2017 report by Human Rights Watch ominously titled “*I Won’t Be A Doctor, and One Day You’ll Be Sick*” catalogues the horrible catastrophes that have proven to be barriers to access education for Afghan women and girls.¹⁸⁴ In fact, another post on Human Rights Watch’s website visually depicts Afghan women as victims cowering for shelter from ‘savages’ who are depicted as soldiers of a ‘failed’ Afghan state, and other Afghan men who present threats of kidnapping, violence, and assault.¹⁸⁵ The video presents the Afghan state as primitive and offensive in its approach, and fails to mention the atrocities committed as a result of the US invasion of Afghanistan.¹⁸⁶ This is similar to what Gayatri Spivak captures in her work, ‘*Can the Subaltern Speak?*’, as “white men saving brown women from brown men” while analyzing the British abolition of widow sacrifice in India, which was done to save these women

¹⁸¹ *ibid.*

¹⁸² *ibid.* 204.

¹⁸³ *ibid.*

¹⁸⁴ Human Rights Watch, “*I Won’t Be A Doctor, and One Day You’ll Be Sick*” - *Girls’ Access to Education in Afghanistan*, 17 October 2017. Available at: <https://www.hrw.org/report/2017/10/17/i-wont-be-doctor-and-one-day-youll-be-sick/girls-access-education-afghanistan>

¹⁸⁵ Heather Barr, “*Losing the war for Girl’s Education in Afghanistan*”, 17 October 2017. Available at: <https://www.hrw.org/video-photos/interactive/2017/10/17/war-girls-education>

¹⁸⁶ *ibid.*

from oppression.¹⁸⁷ Mutua argues that each of these human rights reports tends to carry “a diagnostic epilogue and recommended therapies and remedies.”¹⁸⁸

The third dimension of the prism is the savior. The savior is depicted by Mutua as the agent “who protects, vindicates, civilizes, restrains, and safeguards” the victims from the savages.¹⁸⁹ Institutions like Human Rights Watch and Amnesty International act as the safeguard against tyranny unleashed by the savage state. Mutua argues that these institutions are steeped in “a set of culturally based norms and practices that inhere in liberal thought and philosophy”.¹⁹⁰ These institutions have essentially internalized a human rights corpus that “falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions.”¹⁹¹ Mutua’s scathing indictment of the human rights corpus is clear from the lack of acknowledgement and recognition of human rights movements before the end of the Second World War.¹⁹² Anti-slavery campaigns such as the Slave Rebellion in Haiti, several anti-colonial struggles across the global south such as the rebellion of 1857 in South Asia, and the “pioneering work of many non-Western activists and other human rights heroes are not acknowledged by the contemporary human rights movement.”¹⁹³ The systematic relegation of these historically important struggles, combined with the post-WWII norms that are deeply entrenched in Eurocentric ideals have been successful in overlooking and rejecting the unique experiences of colonized populations in the construction of the human rights corpus. The metaphor as presented by Mutua reinforces the Eurocentric ideal of the human rights corpus, thereby leaving

¹⁸⁷ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999).

¹⁸⁸ Mutua (n 177) 204.

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² *ibid* 205.

¹⁹³ *ibid.*

people in the global south or “savage cultures and peoples [...] as being outside the human rights orbit”.¹⁹⁴

Mutua’s critiques on Eurocentrism of the human rights corpus points towards the availability of testable arguments and propositions on a TWAIL based approach to a project that aims to critique the contemporary applicability of international law. It also simultaneously articulates the need to examine the role that resistance to Eurocentrism plays in understanding the role of the global south states within the international law regime. However, as Okafor points out, TWAIL’s applicability remains contentious since questions remain as to whether the approach “articulates a unified or general framework for analyzing, critiquing, and re-constructing international law and institutions”.¹⁹⁵ A departure from viewing TWAIL as a monolithic methodological approach provides a greater impetus for broader discussions around its applicability. Given that TWAIL is an evolving discipline, the lack of homogeneity, and the presence of complexity and internal diversity in its proposals to challenge hegemony are not fallacies. Like any other methodological approach or discipline, TWAIL does not proclaim itself to be impervious from internal contestations. Therefore, as Okafor argues, as long as TWAIL shows a level of consistency on “broadly unifying intellectual idea or set of ideas”, minor differences “should not be mistaken for incoherence”.¹⁹⁶ Such arguments lend themselves to discussions on the validity of TWAIL as a methodological lens or approach. Okafor argues that given that TWAIL scholarship constitutes a “system of ideas explaining something” and can also provide “predictive, logical, and testable” arguments¹⁹⁷, which justifies TWAIL’s applicability in this particular project.

¹⁹⁴ *ibid.*

¹⁹⁵ Okafor (n 171) 375.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

Regional specificity or third-world perspectives?

Given this project's focus on the subcontinent, it is convenient to adopt TWAIL as a lens to engage in critical discussions on the applicability of "international law's doctrines, operative logics and normative commitments and assumptions" in the region.¹⁹⁸ However, the rationale to adopt TWAIL is not purely based on the region specificity of my project, but as Gathii argues, "it is a locus of enunciation of international law from third world perspectives."¹⁹⁹ It is of great significance in this particular project to move beyond 'third world' as a geographical space and adopt TWAIL to critique the assumed sense of universality inherent in international law principles. Rather than using TWAIL merely as a crucible to entertain discussions on the fraught applicability of international refugee law in the global south, I am using TWAIL scholars' clearly laid out denunciations of Eurocentricity in international legal scholarship and practice to articulate the ongoing marginalization of the subcontinent in this field.²⁰⁰ Given the extent to which colonial confrontations affected the modern-day development of international law, TWAIL's articulation of the global south's subordination by hegemonic western states, works to my project's advantage. As accounted for earlier, "Eurocentric accounts of international law [have failed] to account for the history of subordinated groups within it".²⁰¹ This is particularly prominent in the exclusionary notions articulated in a newly established international *Refugee Convention* in 1951. The *1951 Convention Relating to the Status of Refugees*, sidelined post-partition experiences of those who were disenfranchised, and led newly independent states in the subcontinent to devise extraordinary

¹⁹⁸ James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey Dunoff and Mark Pollack (eds), *International Legal Theory: Foundations and Frontiers*, Cambridge University Press (2022) (forthcoming).

¹⁹⁹ *ibid* 2.

²⁰⁰ *ibid*.

²⁰¹ *ibid*.

interventions to manage massive displacement across arbitrarily drawn cartographic divisions as a mark of the formal end to colonialism in the region.

As the literature will elucidate, TWAIL has been instrumental in creating interruptions in conversations concerning international law's applicability. For instance, though international law has been viewed favorably by TWAIL scholars concerning its "ideals of self-determination, sovereign equality, justice and human rights", the crux of the scholarship has been to project the idea that international law "doctrines have often operated as carryovers or legacies of colonial-era imperialism".²⁰² The rationale for adopting TWAIL in this particular project is predicated on the notion that challenges remain with respect to international refugee law's application, since its genesis was centered around European experiences and conceptualizations of refugeehood and displacement. What I set out to do with TWAIL-based methodological inquiry is to articulate the significance of the subcontinent's role in altering the definitions of refugeehood and engaging in active resistance to hegemonic norms. Rather than subsuming the experiences of dispossession and disenfranchisement of those displaced in the subcontinent, I set out to use TWAIL to provide a more balanced approach to international legal scholarship that emphasizes the unique role of third world perspectives. In this case, I closely examine India's role in developing the global refugee regime. Therefore, despite some of its limitations, TWAIL provides me with the ability to articulate, what Rajagopal characterizes as counter-hegemonic tools, to challenge and counteract some of the normative sources of international law that have consistently overlooked states in the global south.²⁰³

²⁰² *ibid* 3.

²⁰³ Balakrishnan Rajagopal, 'Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy' in Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, 2008) 64.

Reproduction of inequality: an ever-changing goalpost for third world states

In addition to the importance of third world perspectives, as Gathii argues, TWAIL is “also a system that entrenches formal inequality that produces international economic and political hierarchy and domination, of the rich industrialized economies over poorer ones”.²⁰⁴ In this way, it is critical to analyze how international law mechanisms such as the *Refugee Convention* have created constrained notions of refugeehood derived from European experiences of displacement. Principles of refugee protection as enumerated in the *1951 Convention* and the *1967 Protocol* have underplayed non-European experiences. Gathii argues that non-European states “are burdened with an unequal membership in the international legal order” in addition to an imposed system of rules derived from European legal traditions.²⁰⁵ Given the extent to which a sense of ongoing superiority is maintained and reproduced by Western states, it is important to question whether international law’s instruments such as the *Refugee Convention* have the “capacity to do good through ideals such as humanitarianism, human rights, peace and self-determination”.²⁰⁶

In this regard, Gathii points to the importance of the origin of states as constituting a significant part of TWAIL scholarship.²⁰⁷ As mentioned earlier, the 1947 Partition of India formally concluded the colonial conquests of the British in the subcontinent and led to the creation of an arbitrary border between India and a newly created state of Pakistan. Far more pernicious was the colonial regime that preceded the Partition of India and the division of populations along ethnoreligious lines. As Goswami argues, “the colonial regime was the locus of a spectacular restructuring of politico-economic, administrative, and military structures”.²⁰⁸ It brought with it,

²⁰⁴ Gathii (n 198) 12.

²⁰⁵ *ibid* 13.

²⁰⁶ *ibid*.

²⁰⁷ *ibid* 16.

²⁰⁸ Manu Goswami, *Producing India: From Colonial Economy to National Space* (University of Chicago Press 2004) 31.

rampant transformations in understanding the modalities of state power and an extreme application of an oppressive force of the colonists by way of their authoritative presence across the geographical space of the subcontinent.²⁰⁹ The British colonial conquest in India was instrumental in the territorial consolidation of the subcontinent through the monopolization of regulatory powers implemented through a centralized apparatus of complex hierarchical bureaucracy.²¹⁰ Goswami argues that though colonial institutions in the subcontinent forged a level of homogeneity with respect to practices and socio-spatial relations, it was contradicted by internal differentiation and fragmentation.²¹¹ The fragmentation was rooted in the colonial administration that followed the 1857 rebellion against the British. The post-1857 colonial regime “sought to transform the geographical space of colonial India” purely into a commodified space.²¹²

Goswami argues that the colonial regime post-1857 transformed India to build a unique modern state in which the colonial practices occupied centerstage which promised to benefit the subjects within it. This was considered to be an attempt to diverge from previous administrations such as the Mughal empire for instance.²¹³ The colonial state, therefore, with its authoritative presence extended its oppressive rule over the subcontinental space and society, recreated institutions, and diluted previously held legal and political traditions. The newly established state structures under the colonial regime occupied a more privileged space in the subcontinent.²¹⁴ The entrenchment of colonial statecraft led to the ease with which the Partition of India could be accomplished as a convenient end to formal colonialism. This resulted in the imposition of a state structure with arbitrary cartographic divisions that had cascading repercussions on people. Rather

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

²¹¹ *ibid* 33.

²¹² *ibid* 45.

²¹³ *ibid* 46.

²¹⁴ *ibid.*

than allowing for an organic evolution of political development to be accomplished as per the terms set out by the people of the subcontinent, the newly independent states of India and Pakistan were burdened with an unstable geopolitical condition. Therefore, displacement and dispossession within the subcontinent cannot be viewed in isolation. The lack of acknowledgement of colonial violence meted out to the people of the subcontinent and the colonial ethos that created unstable state structures in the region are certainly critical elements to be analyzed while discussing forced migration.

The significance of historical analysis in TWAIL

The outline of this project as set out earlier is to understand the contemporary nature of refugeehood in India, bearing in mind the global refugee regime's marginalization of subjective experiences of those displaced within the subcontinent. Grounding this based on historical circumstances of disenfranchisement is critical. As Gathii argues, "a commitment to history as a gateway to understand the untold truths and social functions of international law" is one of the major elements of TWAIL approaches.²¹⁵ As presented in the previous chapter, the range of TWAIL scholarship that was reviewed shows the importance of colonial expansion in understanding the Eurocentricity of international law. As Anghie argues with the "emergence of colonial territories into sovereign states", their involvement and challenges to the predominant system were viewed as disruptions to the pre-existing global legal order.²¹⁶ International law's genesis was undoubtedly in Europe; the newly independent states were then viewed as outsiders who had to be begrudgingly accommodated within the system. The history of the colonial statecraft in the subcontinent and the entrenchment of such legacies were instrumental factors in carrying

²¹⁵ Gathii (n 198) 22.

²¹⁶ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2004) 35.

forward such hegemonic traditions “under the guise of universality [and] sought to incorporate non-European peoples in what was invariably a process of subordinating, colonizing and pillaging non-European peoples and their wealth.”²¹⁷

TWAIL and the assertion of asymmetry

The final strand to rationalize TWAIL as a methodological approach is about analyzing the postcolonial nature of the institutions that have reproduced the asymmetry that existed during formal colonialism. Eslava and Pahuja argue along similar lines as Okafor and contend that despite the absence of a single unifying theoretical strand, TWAIL is significant as “a political grouping or strategic engagement with international law, defined by a commonality of concerns.”²¹⁸ As detailed earlier, these concerns emerge from those “sites and subjects” that have often been at the receiving end of international law’s hegemonic principles. Material consequences of colonialism have often been overlooked within the discipline of international law and TWAIL aims to engage with those specific elements.²¹⁹ As mentioned in an earlier section, these material consequences have emerged from the rapid and unmitigated expansion of European powers in the global south. However, Eslava and Pahuja argue that “TWAIL can more accurately be defined as being concerned with the impact of international law on ‘the governed’ no matter where they are spatially located” given that colonial conquests across the world have been instrumental in pulverizing, restructuring, and recreating, the identities of colonial sites and subjects across the globe.²²⁰ Therefore, though my project’s focus is on India, it is critical to note that TWAIL’s significance is in its engagement with the postcolonial nature of international law and aims to articulate and

²¹⁷ Gathii (n 198) 22.

²¹⁸ Luis Eslava and Sundhya Pahuja, ‘Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law’ (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America – Verfassung und Recht in Übersee (VRÜ)* 195, 196

²¹⁹ *ibid.*

²²⁰ *ibid* 198.

potentially mitigate the ongoing legal, historical, political, and social asymmetries “that were inaugurated in the process of colonization”.²²¹

Eslava and Pahuja further argue that TWAIL perspectives critically view the “traces left by classical imperialism and its variants, on the social, political and economic relations of the world.”²²² These traces have often translated into practices that continue to reinforce the asymmetries of power given the inherent hegemony in the application of international law principles. However, hegemony cannot be viewed in isolation and must be analyzed along with stances of resistance and counter-hegemony. For instance, the emancipatory appeal of the global refugee regime, since its establishment has not been inclusive of the experiences of non-European states or subjects. India’s *ad-hoc* and reactive responses to various refugee movements indicate such resistance.

Therefore, it is critical to tie resistance to the notion of methodological reorientation as expressed by Eslava and Pahuja. They argue that international law acquires an effective presence in every facet of everyday life through administrative procedures, the constitution of particular bodies (refugees for instance), objects, and enclosure of spaces.²²³ The spatiotemporal nature of international law’s applicability is clear as it has been instrumental in constituting and reconstituting new modalities of power. With this in mind, I am inclined to accept Eslava and Pahuja’s invitation to engage international law, its norms and institutions based on the material conditions of life.²²⁴ This is particularly relevant with respect to this project given that it explores the applicability of the global refugee regime on the heels of displacement, dispossession, and disenfranchisement in the subcontinent that occurred throughout its colonial history and after the

²²¹ *ibid* 199.

²²² *ibid*.

²²³ *ibid* 214.

²²⁴ *ibid*.

formal end to colonialism. Forced migration is one of the repercussions of geopolitical instability, cartographic divisions, and the mapping of new identities on the former colonial subjects of the region.

Eslava and Pahuja argue that international law gains its power and legitimacy by “erecting a discursive, normative and institutional distance from particular national realities”, which holds particularly true for the subcontinent.²²⁵ For instance, refugee situations in the states of the Global South were the result of either the direct involvement of Western colonial powers or were created by their interests, “who were also among the founding members of the international refugee regime”.²²⁶ Loescher argues that “former colonial powers, simply adjusted the rules of the [refugee] regime to fit the new situation, while sidestepping potential political conflicts of interest.”²²⁷ It was clear that specific refugee situations that did not fit within the constrained notions of forced displacement from a Eurocentric perspective were left outside the purview of the global refugee regime.²²⁸

Eslava and Pahuja’s methodological proposal also highlights that, given the extensive nature of spatial divides and scales of governance in states of the global south, “international law cannot be conceptualized within terms of a restricted body of norms, or situated only in bureaucratic and institutional environments beyond daily life. Instead, international law should be understood as a field of material practice”.²²⁹ There is value in approaching a project on international law this way as it ensures that the assumed sense of universality of international law and homogeneity of experiences do not get reinforced. TWAIL as a methodological lens creates

²²⁵ *ibid* 215.

²²⁶ Gil Loescher, ‘The International Refugee Regime: Stretched to the Limit?’ (1994) 47 *Journal of International Affairs* 351, 358.

²²⁷ *ibid*.

²²⁸ *ibid*.

²²⁹ Eslava and Pahuja (n 218) 217.

space for discussions on the varied nature of experiences of people in the global south. This can be done by viewing the application of international law beyond the normative confines as expressed through hegemonic principles.

The methodological reorientation as proposed by Eslava and Pahuja provides another rationale for the use of TWAIL in this project. TWAIL could be used to “build explicitly on the legal-ethnographic method currently being applied to explicitly international sites and artefacts such as international criminal courtrooms or international NGOs”.²³⁰ My project sets out to blend this methodological approach with an analysis of archival records obtained from the UNHCR, the League of Nations, and the India Records Office, to highlight the significance of India’s refugee protection initiatives reflect resistance to hegemony. TWAIL as a methodological approach along with the use of archival records is effective in not only providing a glimpse of how refugeehood has evolved, but also in highlighting issues that continue to persist in the global refugee regime that overlooks the unique nature of displacement in the subcontinent. The legal-ethnographic aspect of this project is covered with the help of the examination of the history of the UNHCR’s operation in India, along with the *ad-hoc* alternatives for refugee protection proposed, established, and implemented by the state that resists hegemonic norms as detailed in the *Refugee Convention*.

The significance of archival records

Berg identifies that archival records can be divided into public archival records and private archival records.²³¹ Given that the sources of my archival data were publicly available, my reliance would be on the former. Four broad categories of public archival records can be identified, namely commercial media accounts, actuarial records, and official documentary records.²³² The archival

²³⁰ *ibid* 220.

²³¹ Berg (n 164) 271.

²³² *ibid* 272.

records that I have collected relate to official documentary records sourced from the League of Nations office in Geneva, the Office of the United Nations High Commissioner for Refugees in Geneva, the India Records Office in the British Library in London, UK, and finally the National Archives of the United Kingdom, in Surrey, United Kingdom. A majority of these records consist of internally generated government agency reports, letters and communiqué between government officials and the United Nations, and several sources of internal memoranda.²³³ These official documentary records are particularly useful in engaging in a content analysis of how refugeehood was a contested element throughout the subcontinent's history. The analysis of specific internal memoranda, official documents, and government reports concerning specific groups of refugee arrivals in India, has the potential to provide me with information on how resistance to hegemonic norms of refugee protection was articulated. As Berg shows, not all research questions can be answered purely with the help of archival records.²³⁴ Therefore, the archival information I have collected provides some important information on refugeehood in India.

Historiography

As mentioned throughout the last few chapters, historical analysis forms a critical part of my project, and it involves merely looking at the facts from the past. As Berg argues, historiography involves linking together old pieces of information found in documents and articulate the importance of the event in question.²³⁵ Therefore, with respect to my project, I will attempt to map the evolving notions of refugeehood with the help of the archival information I have at my disposal. This mapping exercise will then help me choose specific case studies to chart a detailed analysis on whether or not refugeehood was conceptualized coherently throughout

²³³ *ibid* 276.

²³⁴ *ibid*.

²³⁵ *ibid* 296.

history. These documents will also provide me with insights into how India historically has responded to various events of forced migration in the subcontinent. In effect, as Berg demonstrates, “the process of historiography does not occur in a theoretical vacuum but examines the social contours of history”.²³⁶ Additionally, my project will also examine the political and legal contours of the history of forced migration in the region.

Case studies

Berg defines case study method as an attempt to systematically investigate an event or a set of related events with the specific aim of describing and explaining this phenomenon. My case study method involves the selection of specific events of forced migration into India. I will begin with a short analysis on the periods of forced migration before the Partition of India of 1947 for which I have archival data at my disposal from the League of Nations. Subsequently, my case studies will involve an analysis of the Tibetan refugee movements into India, The Bangladeshi refugee movements, and the Sri Lankan refugees in India. A detailed examination of each of these cases will provide me with the ability to engage in an analysis of alternatives to hegemonic refugee protection practices. This approach will also reflect the realities of refugeehood in India.

Choice of case studies

Despite India not becoming a party to the *1951 Refugee Convention*, or the *1967 Protocol*, it is significant to note that *ad-hoc* mechanisms have been developed to providing some form of sanctuary, material assistance, and protection to refugees. Their implementation demonstrates that non-signatory states like India emphasize “the need for international protection” as opposed to the definition of refugeehood.²³⁷ This is often established by reinforcing principles of customary international law. Most notable in South Asian practice is the inviolability of *non-refoulement*, “to

²³⁶ *ibid* 297.

²³⁷ Marjoleine Zieck, ‘The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises’ (2008) 20 *International Journal of Refugee Law* 253, 254.

secure the protection of refugees”.²³⁸ In essence, India has adhered to the overall objectives of international refugee law without explicit accession to refugee law instruments.²³⁹ With the help of such *ad-hoc* refugee protection norms, India has responded to mass exoduses across the borders since the Partition of India. Tibetan, Sri Lankan, and Bangladeshi refugees, have all been provided sanctuary, material assistance, or long-term protection.²⁴⁰ The choice of these case studies can be justified by the notion that with such measures, India has led the way in ensuring that refugee protection mechanisms need not necessarily be dictated based on constrained and restrictive notions as expressed in the *Refugee Convention*.

India has worked closely with the UNHCR and other organizations to provide sanctuary and material assistance to refugees. In some cases, refugee status determination is mandated by the UNHCR. In certain other cases, an approach that is jointly established by the state and the UNHCR has been implemented, and or determination has been mandated by the UNHCR at the instance of the Indian judiciary.²⁴¹ A more detailed analysis of these mechanisms will be undertaken in a later chapter. This dynamic approach not only subverts standardized notions of refugeehood as detailed in the *Convention*, but also demonstrates the rejection of normativity with which refugees were being characterized under an assumed sense of universality that was projected by a Eurocentric refugee regime. The dynamism and the urgency with which India as a newly independent state had to respond to mass exoduses is an indication that India has adhered to the spirit of international refugee law mechanisms while simultaneously pushing back against acceding to it. This spirit was reinforced in the South Asia Forum for Human Rights’ regional consultation titled “Refugees and Forced Migration: Need for National Laws and Regional Co-

²³⁸ *ibid.*

²³⁹ Veerabhadran Vijayakumar, ‘A Critical Analysis of Refugee Protection in South Asia’ (2001) 19(2) *Refugee* 10.

²⁴⁰ *ibid* 9.

²⁴¹ *ibid* 10.

operation” organized in New Delhi in 1998.²⁴² The recommendations at the end of the consultation acknowledged that “in the light of the South Asian experience, [...] the definition of refugees incorporated in the UN instruments was no longer relevant as it was based on a rather narrow set of political criteria.”²⁴³ The consultation was also of the view that state practice in South Asia was already a reflection of a wider definitional criteria of refugeehood and has reinforced their respect for the principle of *non-refoulement*.²⁴⁴

India’s refugee protection regime, though arbitrary in many cases, shows signs of coherence with respect to adherence to customary international law and the principle of *non-refoulement*. The subcontinent’s experience of displacements “has largely gone unexamined because of its peripheral location to postwar international order”.²⁴⁵ However, it is significant to note that states like India have, in most cases, afforded temporary or permanent sanctuary to several groups of refugees over the years despite not being parties to international refugee protection frameworks and being left out of comparative refugee experiences. The history of lengthy and contested processes created new states and geopolitical crises that were superimposed upon people bound within these lands. The resulting violence due to postcolonial state-building, need for the assertion of sovereignty, additional international pressures, and aporias of belonging in a cartography of nation-states were significant factors in understanding displacement in the region. While the objective of this project is not to subsume the subcontinent’s colonial and postcolonial refugee history into European or western histories, it is critical to capture these

²⁴² South Asia Forum for Human Rights, South Asian Regional Consultation on Refugees and Forced Migration; need for a national laws and regional co-operation, New Delhi, 1998. (http://www.safhr.org/index.php?option=com_content&view=article&id=129:south-asian-regional-consultation-on-refugees-and-forced-migration-need-for-a-national-laws-and-regional-co-operation-new-delhi-1998&catid=38:programme-activities&Itemid=80) [accessed on February 12, 2020].

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ Zamindar (n 1) 7.

histories with the help of the case studies I have chosen, in an attempt to mitigate the narrative of exclusivity that has existed within refugee studies.

Literature review

Having set the stage for this doctoral project with the help of an overview and some methodological approaches, this chapter will serve as a review of different strands of literature that will inform my research. This chapter forms the backbone of the thesis based on some of the pre-existing scholarly interventions on four strands of Third World Approaches to International Law (TWAIL), the impact of postcolonial state-building on populations, and postcolonial theory and critical race theory. These three strands of literature will then be tied to the rudiments of the global refugee regime and the critiques associated with it. The literature review will provide a strong foundation for the critiques that are to follow based on the archival research I undertook. Having laid out the methodological framework, the literature review will help with providing greater nuance to the core objectives of the project.

Beginning with a review of TWAIL literature, I will demonstrate that the Eurocentricity of international refugee law is deeply entrenched. With the help of arguments advanced by Teemu Ruskola on Legal Orientalism coupled with the work of Balakrishnan Rajagopal, Anthony Anghie, and Bhupinder Singh Chimni, on Third-World Approaches to International Law, I will narrow the scope of my analysis to specifically view some challenges that the global refugee regime presents for states like India. I will argue that the core tenets of international refugee law also present challenges to the grandiose vision of international refugee protection. I will argue that TWAIL provides an appropriate crucible to argue that international refugee law does not represent subcontinental subjectivities of forced displacement as it omits colonial violence as a factor of displacement from its purview. This has also been established earlier with references to the challenges presented by both India and Pakistan in a series of ECOSOC meetings between 1949 and 1951 that formalized the *1951 Convention Relating to the Status of Refugees*. The deeply

embedded constraints and limitations placed on refugee protection have been articulated by scholars like Jane McAdam and Guy Goodwin-Gill who argue that the current refugee regime “imperfectly [covers] what ought to be a situation of exception” and continues to be an incomplete legal framework.²⁴⁶ Though there have been several critiques to the inherent issues of the *Convention* that articulate the absent discourses of those displaced in the global south, this project’s uniqueness lies in its ability to present strong subcontinental or South Asian critiques to the global refugee regime.

The review will then engage in an examination of the second strand of literature on international refugee law. As the earlier sections of the thesis demonstrate, with the formal end to colonialism in South Asia came the formalization of the *1951 Convention Relating to the Status of Refugees*. Significant foundational work on international refugee law as undertaken by Jane McAdam and Guy Goodwin-Gill, and James Hathaway will be reviewed to evaluate the developments of contemporary refugee protection norms. The review of international refugee law literature will also aid in the need for a critical rewriting of the literature on international refugee law. By centering the colonial legacies of these frameworks, I will examine the role of South Asian states in the development of the global refugee regime, by bringing elements of TWAIL into the fold. A critical evaluation of foundational international refugee law literature will lay bare the argument that the development of contemporary instruments of international refugee protection left out several states in the global south. This will also demonstrate that *ad-hoc* refugee protection mechanisms in India developed as a result of a universal definition of refugeehood that overlooked the impacts of colonialism on forced displacement.

²⁴⁶ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford University Press 2007) 1.

The examination of refugeehood in India cannot be viewed in isolation as it is of importance to tie the developments in refugee law with geopolitics and states. As will be evident later on in the thesis, the effectiveness of refugee protection norms, international refugee law mechanisms, and the UNHCR's operations relies on states. Therefore, states have a massive influence on the application of refugee protection norms. Having established that states in the subcontinent, more specifically, India's experiences with forced displacement was left outside the purview of the *Refugee Convention*, it is critical to examine postcolonial nation-building and their significance on refugee law's development in the region. Using the literature by Mohammad Shahabuddin, Obiora Okafor, B.S. Chimni, and Partha Chatterjee, I will elucidate India's relationship to the global refugee regime and the extent to which TWAIL and other strands of literature could be used to characterize the need for *ad-hoc* refugee protection mechanisms to develop. Since geopolitics forms a significant part of this thesis, a chapter will be dedicated to analyzing colonial boundary-making in the subcontinent.

As mentioned in the introductory chapter, my doctoral dissertation serves to articulate refugee law and history from below. In the context of this analysis, Lucy Mayblin's work on *Asylum after Empire* would be appropriate. Her work problematizes asylum policies globally and calls for an inclusion of colonial histories within their understanding. I will articulate the existence of alternate legal conceptions of refugeehood and present some first steps on how states like India have operated amidst international pressure to comply with the principles of the global refugee regime, while simultaneously dealing with postcolonial nation-building. With an analysis of the Partition of India, and other critical moments in colonial history I will provide some insights on India's position within international law prescriptions. This context along with the history of forced migration in the subcontinent provides the foundation to understand who the subject of

refugeehood has been and how has that (not) changed after the ‘Independence of India’ in 1947. With the help of this review, I will weave in the colonial history, and the legal construction of a refugee and examine the rationalizations on why India has been constructed as a transgressor. The final strand of literature will be the analysis of the work undertaken by scholars of subaltern studies, which would be particularly helpful in understanding the colonial construction of personhood and identity. This will entail an examination of the work undertaken by Vazira Zamindar, and Yasmin Khan, whose work in combination with Pia Oberoi’s work, brings greater focus to understand the contemporary sense of forced migration studies in India.

Legal Orientalism

The concept of Legal Orientalism is particularly noteworthy in understanding how the international community perceived dispossession and displacement under the precepts of international law. With one of the major objectives of this chapter being a clear articulation of the Eurocentrism inherent in international law principles in general and the global refugee regime in particular, legal orientalism’s foundation aids in understanding that international refugee law was developed at the behest of states in Europe and North America. This resulted in a heavily constrained definition of refugeehood and has manifested in entrenched institutionalization of norms that largely left out experiences of colonial displacements. The development of contemporary instruments of refugee protection along the lines of Eurocentric norms is not unexpected. Global refugee frameworks that pre-existed the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol*, under the League of Nations or even prior were established when many states in the global south were still under colonial rule.

For instance, in the early part of the 20th century, international law transitioned from merely being a law between states to becoming increasingly concerned about individuals. This transition

was marked by the need to protect three categories of people: indigenous peoples on colonial territories, minority peoples in the new national states, and labour classes in western Europe and North America. However, this transition was also marked by the need to engage in colonial questions.²⁴⁷ As Lauterpacht demonstrates, international law could not be viewed without paying attention to the influence asserted by states like Great Britain and its attitude towards territorial claims specifically in states of the global south.²⁴⁸ Colonial influences are clear from the way authority was declared on any territory through occupation. Any number of treaties that were supposedly emancipatory or humanitarian, that were designed with the interests of protecting certain classes of people as mentioned above, were built through disingenuous means.²⁴⁹ Therefore, contemporary frameworks of refugee protection follow this rich tradition of colonialism. They practically repurposed the core objectives of these Eurocentric norms and mandated states to operate according to them, failing which such states have been viewed as transgressors in the international community.

As mentioned earlier in the introduction, the narratives on India's relationship to an international legal framework like that of the global refugee regime have often been viewed as a form of 'subcontinental resistance' to hegemony. This then begs the question whether 'Indian exceptionalism' with respect to the global refugee regime could be viewed as a defiant or a deviant position. The critique on narratives around India's relationship to the global refugee regime lends itself to broader examination through the lens of Teemu Ruskola's work on Legal Orientalism. Ruskola's work outlines some larger narratives on what is and what is not law, and who are and

²⁴⁷ Hersch Lauterpacht, 'International Law and Colonial Questions, 1870-1914' in Elihu Lauterpacht (ed), *International Law, Being the Collected Papers of Hersch Lauterpacht* vol. 2 (Cambridge University Press, 1975) 95 at 101.

²⁴⁸ *ibid* 109.

²⁴⁹ *ibid* 111.

are not its proper subjects. Ruskola in his work provides an understanding of legal orientalism by defining the ‘other’ under the gaze of the western legal prescriptions.²⁵⁰ The arguments begin with a claim that a radically determinate categorization has also been imposed upon the ‘orient’ denoting it as an entity of European imagination. This is clear from South Asia’s territorial realignments after the Partition of 1947. Drawing from Özsü’s work, while examining the management of minorities in the 19th century, territorial alignments have the potential to leave “one or another community [...] on the wrong side of the border.”²⁵¹ This is precisely what happened in the subcontinent, in an attempt to curate homogenous political units founded on ethnoreligious similarities. Ruskola’s work on legal orientalism provides an analytical basis for the arguments pertaining to this project on Eurocentrism inherent in the global refugee regime and India’s marginalization in the establishment of the framework. An analysis of the concept of Legal Orientalism will help disentangle the issues around India’s relationship to the global refugee regime and attempt to integrate the idea of ‘radical determination’ of India under the global refugee regime’s prescriptions.

Ruskola’s work elucidates “law as a structure of political imagination” and as “a distinctive manner of imagining the real”.²⁵² This is particularly relevant to the case of India’s relationship with the global refugee regime. Although Ruskola’s focus is generally on the China-US relationship with respect to legal prescriptions, his argument could be extended to apply to other contexts. Ruskola makes references to Edward Said’s work on Orientalism and emphasizes the “extent to which the identity of the colonial and postcolonial West as being a rhetorical

²⁵⁰ Teemu Ruskola, *Legal Orientalism* (Harvard University Press, 2013).

²⁵¹ Umut Özsü, *Formalizing Displacement: International Law and Population Transfers* (Oxford University Press 2015) 22.

²⁵² Ruskola (n 250) 2.

achievement”.²⁵³ Said’s work critically views the position of the West’s “imperial gestures” in characterizing the “Orient” as a passive object. The same argument can be extended to legal prescriptions wherein an international legal framework such as the refugee regime was imposed upon the global south as being universal without regard for the subjective experiences of colonization and other forms of deprivation that resulted in dispossession.

Ruskola’s work on legal orientalism has implications on the way the global refugee regime’s universality, more specifically the *1951 Refugee Convention* and the *1967 Protocol*, has been promulgated as establishing foundational legal understandings of international protection of refugees. UNHCR was established as the gatekeeper and guardian of international refugee law since the end of the Second World War and was also to uphold the principles as outlined in the *1951 Convention Relating to the Status of Refugees*. However, given the complexity of the UNHCR’s relationship with its constituent parent bodies such as the UN General Assembly and Economic and Social Council, in recent years, states have questioned the mandate of the agency. The International Court of Justice’s *Reparations Case*, has often provided a justification for the UNHCR’s operation and an “entitlement to exercise protection on the basis of universal jurisdiction”.²⁵⁴ Goodwin-Gill and McAdam argue that the UNHCR’s legitimacy and its central role in affording international protection to refugees, is reinforced through state practice and acquiescence to the principles of the *Convention*.²⁵⁵ However, it is critical to view state acquiescence to such principles, as Ruskola argues, by “locating them within a particular history of the universal”.²⁵⁶ As territorial realignments became the order of the day, with the end to formal colonialism in the subcontinent, it is equally important to note that acquiescence to principles of

²⁵³ *ibid* 4.

²⁵⁴ Goodwin-Gill and McAdam (n 246) 431.

²⁵⁵ *ibid*.

²⁵⁶ Ruskola (n 250) 19.

international law that were created at the expense of colonial subjects, was paramount in ensuring the dominance of the so-called great powers of Europe.²⁵⁷ This resulted in the forcible universal application of these Eurocentric norms on South Asian states, including international refugee law principles. Additionally, Ruskola in his work has critically evaluated the “historical determination of what counts as universal”.²⁵⁸ With respect to the global refugee regime, its grandiose aspirations of universalism present an illusory picture of accessible protection and humanitarianism in the context of the global south, given the historical marginalization of these states in establishing those principles. The “unequal global distribution of universality”²⁵⁹ is a critical piece in this doctoral project. Such an evaluation articulates the Eurocentrism inherent in the global refugee regime and opens doors for a subjective evaluation of defiant mechanisms and locations of practice associated with refugee protection that has existed in states like India for many years. The vilification of states that have defied the global refugee regime but valorizing those that have not, is associated with hegemonic liberal notions of refugee protection. It is critical to note that this valorization emerges from a form of “jurisdictional imperialism” that is characterized by influences of “extraterritorial empire”.²⁶⁰

The legal orientalist discourse when applied to mainstream international law traditions point to hegemonic influence on “peripheral states” that, as Anthea Roberts argues, “may experience localized globalism whereby local conditions are restructured in response to global influences”.²⁶¹ Similarly, legal principles such as international refugee law have emerged from larger international law frameworks and institutions are undoubtedly Eurocentric in their approach.

²⁵⁷ Özsu (n 251).

²⁵⁸ Ruskola (n 250).

²⁵⁹ *ibid* 20.

²⁶⁰ *ibid*.

²⁶¹ Anthea Roberts, *Is International Law International?* (Oxford University Press 2017) 9.

They have often placed those in the global south as objects waiting to be emancipated by advanced legal traditions and be “swept into the global mainstream of political and economic development” as a part of colonial and imperialist expansion. Ruskola explains that such legal traditions have the potential to characterize those in the global south as “witless myrmidons living under [its] tyranny”.²⁶² Therefore, a comparative enquiry of legal traditions that have emerged in the global south founded on a strong sense of resistance to Eurocentrism, is critical in this dissertation. In essence, my work takes a postcolonial approach to forced migration research.

Ruskola’s work points to an example of the colonial administration of British India, which is appropriate in the context of this analysis. Ruskola points to the British search for indigenous Hindu law.²⁶³ The search for an ‘Ancient Indian Constitution’ resulted in the imposition of English common law traditions in India. However, the quest for an ancient Hindu civil law was rationalized based on finding out more about public and private rights that affected the ownership and transmission of property.²⁶⁴ Ruskola argues that the discourse on orientalism “entails the projection onto the oriental other of the kinds of things that we are not, including lawlessness”.²⁶⁵ To assume that the British had higher and more advanced legal traditions while those in India did not, led to an imposition of British common law traditions onto Indian subjects that continues today. This form of imposition has been reproduced in international law traditions. Eurocentric frameworks and conventions have perpetuated an illusory sense of superiority and universality that have developed from an entrenched sense of dominance of European states and continues to characterize non-conformist states as transgressors.

²⁶² *ibid* 23.

²⁶³ *ibid* 33.

²⁶⁴ *ibid*.

²⁶⁵ *ibid* 40.

Western states have always enjoyed this sense of dominance through this presumed superiority, enabling them to suggest other nations are like-minded when it comes to the international legal order.²⁶⁶ They have not only been successful in maintaining the status quo of imbalance inherent in international law but have also been instrumental in establishing the rules governing that legal order. This perpetuates the West's practice and tendency to use global legal institutions to continuously persecute and demonize the global South.²⁶⁷ At the heart of this lies international law's deep connections to structures of power and inequality. However, international legal order remains a contested space in which states like India continue to challenge this sense of hegemony through their acts of defiance and resistance. As will be evident from the review of TWAIL literature in the next section, there is a great deal of value in articulating these defiant notions by centering the global south. This will help contextualize the rationale for the development of *ad-hoc* and parallel mechanisms towards protecting refugees.²⁶⁸

A review of TWAIL literature

Jan Hendrik Willem Verzijl in his 1957 article wrote:

“[n]ow there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, is not only the product of the conscious activity of the European mind, but has also drawn its vital essence

²⁶⁶ Helyeh Doutaghi and Jay Ramasubramanyam. 2019. By not investigating the U.S. for war crimes, the International Criminal Court shows colonialism still thrives in international law, Opinion Post – The Conversation (<https://theconversation.com/by-not-investigating-the-u-s-for-war-crimes-the-international-criminal-court-shows-colonialism-still-thrives-in-international-law-115269>).

²⁶⁷ *ibid.*

²⁶⁸ *ibid.*

*from a common source of European beliefs, and in both of these aspects it is mainly of Western European origin”.*²⁶⁹

This quote sets the tone for discussions on the relationship between imperialism and international law. As Antony Anghie argues, “international law regards colonialism and non-European societies and their practices as peripheral to the discipline because international law was a creation of Europe”.²⁷⁰ This sense is reflected clearly in several frameworks of international law, more specifically international refugee law, as mentioned earlier and India’s sidelining during the formalization process of the *1951 Convention*. This goes to the heart of what Anghie describes; “[c]olonialism [is] far from being peripheral to the discipline of international law [as it] is central to its formation”.²⁷¹ Anghie explains that while universal natural law, which forms the foundation of international law, bound both Europeans and non-Europeans under the same legal traditions, positivist jurists devised doctrines founded on “explicitly racial and cultural criteria to decree certain states [and peoples] as civilized.”²⁷² During such a process, non-European societies were sidelined and expelled from the realm of international law since they were considered as being devoid of any cognizable legal personality. Such societies, in the eyes of the Europeans, were incapable of raising any objections to dispossession and disenfranchisement which were integral parts of conquest and exploitation.²⁷³ Therefore, it is easy to recognize the systematic process by which colonialism managed to define and subsume personhood and identity of colonial subjects within the bounds of European experience, which then enabled the entrenchment of a deeply

²⁶⁹ J. H. W. Verzijl, *Western European Influence on the Foundation of International Law*. (1957). 1 *David Davies Memorial Institute of International Studies. Annual Memorial Lecture*, 137.

²⁷⁰ Antony Anghie, ‘The Evolution of International Law: colonial and postcolonial realities’ in Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, 2008) 35.

²⁷¹ *ibid* 38.

²⁷² *ibid* 41.

²⁷³ *ibid*.

flawed system of international legal order that continues to advance the interests of hegemonic states in the Global North.²⁷⁴

A note on hegemony

Before detailing the TWAIL's contribution to this project, it is critical to examine the concept of hegemony. Resistance to hegemonic norms of international law and more specifically international refugee law is extensively presented in this project. However, rather than simply citing the term, as has been done extensively in international legal scholarship, it is significant to subject it to some examination and analysis. More importantly, this exercise is critical as it will help to articulate what hegemony represents in the context of international refugee law, and how have modes of resistance to it manifested in *ad-hoc* mechanisms of refugee protection in the subcontinent. While my attempt in this section is not to remedy the dearth of sustained investigation of hegemony, but to present some merits and limits of the term hegemony with the help of some literature in this area.

As noted from earlier discussions on the formalization process of the *Refugee Convention*, concerns expressed by states like India with respect to constrained notions on refugeehood, were disregarded. They were prohibited from being able to present definitions that would be truly inclusive and would simultaneously take into account colonial wrongs that led to widespread displacement in the region. With the drafters' preoccupation with myopic Eurocentric notions of refugeehood, a set of refugee protection principles was put in place that was coercively applied to states in the global south irrespective of their colonial histories with the help of the colonial clause as mentioned earlier. This is an indication of the entrenched asymmetries that currently exist in international relations. The recognition of such asymmetries led to the UN General Assembly

²⁷⁴ *ibid.*

adopting a Resolution in 1979 that condemned “hegemonism in all its manifestations”.²⁷⁵ The Resolution outlined states’ responsibility to refrain from forms of coercion as outlined above. It also defined hegemonies as “a manifestation of the policy of a state, or a group of states, to control, dominate and subjugate, politically, economically, ideologically or militarily, other states, peoples or regions of the world”.²⁷⁶ This is particularly evident from those states that were subjected to rampant imperialist and colonial expansion, that sought to increase European states’ spheres of influence and “perpetuate unequal relations and privileges acquired by force” that have then manifested into “policy and practice of hegemonism”.²⁷⁷ Territorial realignments after the end of formal colonialism have also culminated in hegemony being pursued as a way to create dominance, and in some cases use the threat of force, foreign domination, and intervention to advance western superiority over peripheral states in the global south. Finally, the Resolution recognized that hegemonism was used as a tool to limit the autonomy and self-determination of newly independent states and created pressures to toe the line of Eurocentrism. This has been the case with international law’s applicability in states in the global south. As Anghie demonstrates international legal doctrines that were developed to manage contact and interactions between European and non-European peoples, had a well-established sense of hegemony and exploitation.²⁷⁸ Not only was commercial exploitation that enabled the acquisition of sovereignty over non-European peoples central to such doctrines, but Europeans were successful in implementing principles that legitimized the civilizing mission.²⁷⁹ Hegemony was also an integral facet of colonialism that has

²⁷⁵ UN General Assembly, *Inadmissibility of the policy of hegemonism in international relations.*, 14 December 1979, A/RES/34/103.

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

²⁷⁸ Anghie (n 270) 40.

²⁷⁹ *ibid.*

not only shaped the doctrines of international law that continue to favour states in the Global North, but was designed with the very purpose of suppressing the Third-World.²⁸⁰

Despite the UNGA Resolution of 1979 outlining the integral aspects of hegemony and condemned states for engaging in such coercive tactics, Knox argues that this was the result of a false sense of “confidence in the ability of international law to combat ‘hegemony’”.²⁸¹ Recent iterations of this term have been associated with the concern for the opposite. In recent years international law’s inability in overcoming hegemony or restraining powerful western states from their hegemonic approach has garnered attention from TWAIL scholarship. By referring to the so-called War on Terror, Knox argues that international law has been manipulated and used as a tool to advance the interests of western states. Determinations of legality and legitimacy have often been recalibrated by states like the US, which is making successful inroads into remaking the core objectives of international law to fit with their interests.²⁸²

While international frameworks are based on the idea of equality of states, and having noted that bodies of international law have also condemned hegemonism, this equality can be questioned given that inequalities in power continue to persist. As Vagts argues, though the prevailing belief of western states is that “no law graces the hegemon” with immense power, “historical record shows that it can be convenient for the hegemon to have a framework of international law principles that can be suitably adapted to their interests”.²⁸³ When representatives of western states like the US call into question the legitimacy of international judicial bodies like

²⁸⁰ *ibid* 44.

²⁸¹ Robert Knox, ‘Hegemony’ in Jean D’Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2019) 328.

²⁸² *ibid*.

²⁸³ Detlev F. Vagts, ‘Hegemonic International Law’, (2001) 95 *The American Journal of International Law* 843, 845.

the International Criminal Court²⁸⁴, is rooted in “setting aside the norm of nonintervention into internal affairs of states” and attempt to engage in unilateral intervention.²⁸⁵ This also implies that the US is able to act outside the norms of traditional international legal framework that creates a notion of hegemonic international law.²⁸⁶ Therefore, it can be surmised that hegemonic international law essentially creates and “preserves the widest field of action for the hegemon while limiting the freedom of others.”²⁸⁷ Much of the literature examining hegemonic international law is concerned with analyzing the unilateral manifestations such as violation of non-intervention norms, questioning the legitimacy of bodies of international law, or non-participation in treaties. For instance, as Alvarez points out, the vagueness and indeterminacy of hegemonic international law principles benefits and privileges the hegemon.²⁸⁸ While there is recognition that the US has often used international organizations to assert greater influence over international law processes, Alvarez argues that hegemonic rule of collective processes of international law such as the UN Security Council, is often overlooked.²⁸⁹ My argument however deviates from these notions. While scholars like Alvarez and Vagts argue that non-participation or non-compliance in international treaties can point to hegemony, I choose to argue that states in the global south have engaged in such actions as forms of resistance. This is particularly evident from India’s role in developing *ad-hoc* parallel mechanisms of international refugee protection that deviate from the *Convention’s* constrained mechanisms. The abovementioned argument on hegemony also fails to capture the asymmetry inherent in the development of international law. However, Knox argues that there is

²⁸⁴ See., Doughty and Ramasubramanyam (n 266). John Bolton in a speech in September 2018 delegitimized the role of the ICC and said that “the U.S. will take any means necessary” to overcome “unjust prosecution by this illegitimate Court.”

²⁸⁵ Vagts (n 283).

²⁸⁶ *ibid.*

²⁸⁷ Knox (n 281) 345.

²⁸⁸ José Alvarez, ‘Hegemonic International Law Revisited’, (2003) 97 *The American Journal of International Law* 873.

²⁸⁹ *ibid* 873.

a failure to acknowledge and recognize hegemony inherent in international law because it is “disinclined to grant formal recognition to structures of superiority” and “is dependent upon powerful states for its enforcement.”²⁹⁰

The hegemonic international legal order is reproduced through a paradoxical relationship between states, and international law and international institutions. As Knox argues, while international law and institutions serve to constrain the hegemonic power of powerful states, their importance in upholding hegemony cannot be understated. Knox argues that states simultaneously need international law and institutions to provide them with legitimacy “to justify their dominance and thus reduce enforcement costs”.²⁹¹ In principle, international law is committed to treating all states equally. However, in the same vein, dominant states that hold hegemonic power are the ones that control the functions of international law.²⁹² Therefore, it is evident that the conventional image and perceptions of international law are challenged by the existence of hegemony. Along these lines, Simpson argues that in the system of international law “some states are placed in the category of exceedingly cruel enemies (outlaws) while others forms an elite group of nations acting with public authorisation through legalised hegemony (Great Powers)”, which he terms as “legalised hegemony”.²⁹³ He argues that “hierarchy [...] signifies the presence of a formal status of differentiation among actors in a decentralized system of authority and law”.²⁹⁴ This is often signified by the “gradations of power held by each actor in this system”.²⁹⁵ Simpson’s argument on the distinction between hierarchy and hegemony is particularly significant in the context of my doctoral project. He identifies hierarchy as structuring principles that permit Great Powers to order

²⁹⁰ *ibid* 346.

²⁹¹ *ibid* 347.

²⁹² *ibid*.

²⁹³ Gerry Simpson, *Great Powers and Outlaw States, Unequal Sovereigns in the International Legal Order*, (Cambridge: Cambridge University Press, 2004) 6.

²⁹⁴ *ibid* 64.

²⁹⁵ *ibid*.

the international system to their benefit and create certain universal standards and norms that serve to exclude or marginalize the so-called outlaw states. Hegemony on the other hand is the ability of these Great Powers or hegemons to stabilize international order through the assurances expressed by them or based on their ability to “anchor the international political economy”.²⁹⁶ Simpson defines the term legalised hegemony as “the existence within an international society of a powerful elite of states whose superior status is recognized by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality”.²⁹⁷ Therefore, it is evident from the current scholarship on hegemonic international law that international legal doctrines have existed as systems that are heavily imposed upon postcolonial states and other states on the margins in the Global South. Hence, it is significant to note that such an imposition has been instrumentalized through legalised hegemony, that has led to resistance.

Colonialism and Third Worldism in conceptualizing international law

Though events like the Partition of India and other violent forms of decolonization may have ended the more ‘formal system of colonialism’, Third-World states have continued to be subordinated and suppressed with international law’s hegemonic approach.²⁹⁸ This form of neo-colonialism is the result of economic dependency created by the West and the rules of international legal order that continues to place the Global South on the fringes. Anghie pushes back against the notion of universality of international law and views this as the “consequence of imperial expansion which took place at the end of the nineteenth century”.²⁹⁹ Positivism took precedence over naturalism which then underpinned the core principles of international law. As will be evident

²⁹⁶ *ibid* 66.

²⁹⁷ *ibid* 68.

²⁹⁸ Anghie (n 270) 45.

²⁹⁹ Anghie (n 216) 32.

from the next section, such principles were founded on the notion of the primacy of the state and continue to operate as the basis of the international legal system.³⁰⁰ The critical piece that outlines Anghie's critique is the dissonance between the identity of postcolonial states and colonialism, also a thread that I will pick up in the next section. Anghie demonstrates that positivism was significant in developing techniques by which colonial confrontation could further the "expansion of European Empires" with the help of an imposed system of legal methodologies, that continues to dispossess those in the Global South.³⁰¹ By problematizing the positivist tradition Anghie argues that the colonial confrontation was "between a sovereign European state and a non-European state" that was considered to be devoid of sovereignty under this tradition, and that such a confrontation imposed a set of rules and methodologies that frame the international legal discipline and universalizes positivism.³⁰² The consequence is that hegemonic European sovereigns were able to wield their power over the so-called non-sovereign non-European states that were unable to "assert any legal opposition", thereby reinforcing the power of the West against the rest.³⁰³

Finally, international law frameworks like the *1951 Refugee Convention* can be viewed as exclusionary from Anghie's lens. He argues that with the "emergence of colonial territories into sovereign states", their involvement and challenges to the predominant system were viewed as disruptions to the pre-existing global legal order.³⁰⁴ International law, which was undoubtedly European, began to view newly independent states as outsiders which had to be accommodated within the system and attempted to subsume the subjectivities of non-European states within European experiences. The lack of reflexivity is clear from the establishment of the *Refugee*

³⁰⁰ *ibid* 33.

³⁰¹ *ibid*.

³⁰² *ibid* 34.

³⁰³ *ibid*.

³⁰⁴ *ibid* 35.

Convention as a European solution to a European problem – a notion that was clear from the British proposal to implement the colonial clause which excluded specific colonial experiences.³⁰⁵ While the *Convention* deemed those disenfranchised post-WWII in Europe as worthy of protection, postcolonial anxieties that led to mass displacement across newly created international borders in the subcontinent, failed to feature within this framework. This reluctance to include colonized peoples under the rubric of the *Convention*, was an antithetical development to the core objectives of its supposed universality and particularly demoralizing for the newly independent states in the subcontinent.³⁰⁶ This captures the notion that non-European states and their issues were viewed as ‘peripheral to international law’.³⁰⁷ Larger European states continue to find ways to exclude and marginalize states in the Global South with the help of the international law that the former created.

International law’s institutionalized colonial ethos has been highlighted by several scholars. For instance, Falk et.al. question the role of international law by highlighting the notion that mainstream scholarship on the subject has failed to include perspectives that continue to obscure and subvert the role of the Global South.³⁰⁸ They argue that many within the South and the rest of the world have viewed the Third World as an object of regulation and repression, that have continued to ignore local legal traditions. Much like Roberts’ argument on localized globalism, in which local traditions are restructured in response to hegemony³⁰⁹, Falk et.al argue that international law has been instrumental in homogenizing all legal traditions which tend to subsume the legal identities of those in the global south.³¹⁰ The question, therefore remains, whether international law has helped with the greater well-being of those in the South. The simple

³⁰⁵ See., Mayblin n (148) 433.

³⁰⁶ *ibid.*

³⁰⁷ Anghie (n 270) 35.

³⁰⁸ Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens, *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 1.

³⁰⁹ Roberts (n 261).

³¹⁰ Falk et.al. (n 308).

answer is no, given that colonial history has been quite instrumental in shaping power relations that continue to produce adverse outcomes for those in the global south.³¹¹

Civilizational perspectives of international law

Racialization and civilizational arguments are integral in the development of international law. As Koskenniemi argues, international law was developed in relation to the cultural processes of Europe – a process of civilization. This led to the belief that other non-European were “half-civilized or savage”.³¹² This notion lends itself to arguments on the applicability of international law outside the realm of European consciousness. Koskenniemi argues that since international law is the fruit of European civilization, it can automatically not be applied in other nations of the world that do not possess European traditions.³¹³ However, the putative universalism of international law was possible through territorial realignments that were seen as a fitting end to formal colonialism. The civilizational process was, in essence, completed by way of an imposed system of hegemonic international law in formerly colonized states. As the next section will show, the identity of postcolonial states was determined by colonially instituted borders that led to the contentious applicability of international legal doctrines. The civilizational aspect of international law gains greater currency from Aimé Césaire’s arguments. While he agrees that different civilizations coming in contact with each other provides the oxygen for their survival, he also argues that European contact with the Third World was marred by violence and domination.³¹⁴ Though Europe could be considered as being the “locus of all ideas and the receptacle of all philosophies”, he asks the question – “has colonization really placed civilizations in contact? Was

³¹¹ *ibid.*

³¹² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, (Cambridge University Press 2008) 73.

³¹³ *ibid.*

³¹⁴ Aimé Césaire, *Discourse on Colonialism*, (New York: Monthly Review Press, 2000) 33.

this the best way to establishing contact?”³¹⁵ Rhetorical as these questions may be, Césaire argues that colonization drew up colonial statutes in the form of civilizing the savage. More than what it created it destroyed the civilizations that pre-existed colonial contact.³¹⁶ The notion of security and rule of law was created at the expense of forced labor, slavery, intimidation, theft, and pillaging. Césaire terms colonization as “thingification”³¹⁷ whereby relations of domination and subordination were pervasive, and institutions that reflected the essence of local cultures were trampled and reconstituted to reflect Eurocentric value systems³¹⁸ – a “localized globalism”.³¹⁹

A finer point on the civilizational and transcivilizational aspects of international law is provided by B.S. Chimni and Ōnuma Yasuaki. Chimni debunks the commonly understood broad and universal ideas of civilization by presenting an argument that regions like Asia possess “a mosaic of divergent cultures and political regime types, historical estrangements, shifting power balances, and rapid economic change”.³²⁰ While civilization may be defined based on historical sedimentations and may be a reflection of various historical trajectories, Chimni argues that “different civilizations manage their own complexity and multiplicity in different ways—prompting them to resort to differentiated cosmologies, ontologies, and epistemologies.”³²¹ This is what I hope to capture in this project; while international refugee law provides a convenient crucible and framework to understand refugee protection norms, resistance to the said norms manifested in South Asian practice, that ran parallel but remained true to the core objectives of the framework. Therefore, while Asia has had extensive external relations that would be akin to

³¹⁵ *ibid.*

³¹⁶ *ibid* 35.

³¹⁷ *ibid* 42.

³¹⁸ *ibid* 43.

³¹⁹ Roberts (n 261).

³²⁰ B.S. Chimni, ‘Is there an Asian approach to International Law?: Questions, Theses, and Reflections’, (2008) 14 *Asian Yearbook of International Law* 249, 251.

³²¹ *ibid* 253.

Césaire’s notion of civilizational contact on its own terms, “centuries of cultural and economic exchange” were disrupted by colonization and forced imposition of European power in the region.³²² As Chimni argues, the process of colonization and western impact on political, economic, social, and legal institutions in the region was pervasive. Hence, it would be difficult to imagine an Asian civilization without accounting for external influences of other civilizations and heterogeneity. Chimni argues that “a simplistic portrayal of an Asian civilization (as of any other civilization) risks the trap of essentialism”.³²³ However, having said that, a transcivilizational approach to international law is not impossible. For instance, as will be evident throughout this project, South Asia’s practice of refugee protection for the last few decades has shown that *ad-hoc* mechanisms have proven to be just as effective. Taking the specific example of India, it is critical to disentangle a probable ‘Indian approach to international law’. While I argue that practice often points towards a specific form of approach to international law, it is also critical to recognize that a simplistic explanation to an Indian approach may limit international law’s conceptualizations and practices, that have grown out of resistance to hegemony in the region. Despite establishing the idea that international legal doctrines grew out of European imaginations, it is also equally critical to note a purely western thought is non-existent as it has also been tainted by influence from other civilizations of the world.³²⁴ Bearing this in mind, a uniquely non-western approach is also difficult to capture, and a “postcolonial revenge that calls for the rejection of all western thought is debilitating”.³²⁵ Chimni argues that though it is difficult to step outside of the domain of ‘western approaches’ after the colonial era, it is possible to conceive of non-western practices.

³²² *ibid* 251.

³²³ *ibid* 253.

³²⁴ *ibid* 254.

³²⁵ *ibid* 255.

Despite these practices not being purely non-western are still non-western, nevertheless.³²⁶ This is precisely the line of argument that I adopt throughout my thesis. While India has developed *ad-hoc* practices of refugee protection, given their non-conformist stance to instruments of international refugee law such as the *Convention* and the *Protocol*, the core objectives and the spirit of international refugee law remain untainted. Therefore, the practices of refugee protection may not be purely non-western but are non-western nevertheless since they respond to the specific needs of various groups of displaced populations differently as opposed to adopting a standardized notion of refugeehood.

In order to break out of singular civilizational trapping, Ōnuma Yasuaki proposes the need for a transcivilizational approach to international law. The transcivilizational approach enables a more robust line of thinking about international law whereby the existence of a plurality of civilizations throughout history is recognized, which could, in turn, contribute to a more inclusive and evaluative framework.³²⁷ The transcivilizational framework, Ōnuma argues, does not negate those civilizations that were “minor” throughout history, but allows for the inclusion of cultures, political systems, and historical that emerge from intracivilizational diversity.³²⁸ Ōnuma also cautions against a monolithic view of civilization, as human beings do not belong to a particular civilization or culture.³²⁹ Therefore, rather than gravitating towards a sense of civilizational determinism, Ōnuma argues for the need to reconceptualize the concept of civilization.³³⁰ This emerges more profoundly while examining the foundation of international law. From the late 19th to the early 20th centuries, international law was often defined as the law amongst ‘civilized

³²⁶ *ibid.*

³²⁷ Yasuaki Ōnuma, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (Leiden: Martinus Nijhoff 2010) 60.

³²⁸ *ibid.* 83.

³²⁹ *ibid.*

³³⁰ *ibid.* 84.

nations.’³³¹ As mentioned in the earlier sections, international law’s validity was reinforced by the existence of the sovereign states system which was heavily Eurocentric in nature. Ōnuma argues that international law’s definition as being law between civilized nations, other non-European civilizations did not feature within this discourse. By pointing to Article 38 of the Statute of the ICJ, Ōnuma argues that when this particular provision was adopted in 1919, the term civilization implied European civilization.³³² Conceptualizing international law within the terms of transcivilizational approach entails supplementing and modifying transnational perspectives that have the potential to enable a better understanding of complex ideas of contemporary international law.³³³

In recognizing this, Chimni argues for the need to understand not only Asia’s contribution to the development of international law, but also the mounting anti-colonial resistance that was undertaken by the formerly colonized states. This is a thread I will pick up while discussing resistance and counter-hegemony. Chimni argues that in the context of international law “the recognition of the historical contribution of Asia to [its] doctrines and rules” is critical.³³⁴ Despite there being several areas of international law where rules were observed before colonization, the “Asian contribution to international law has rarely been acknowledged”.³³⁵ As for refugee protection norms, more specifically international refugee law, South Asia’s engagement has been thwarted by the lack of acknowledgement and inclusion of the region’s unique circumstances and civilizational diversity. Chimni argues that, unlike Africa that saw their regional refugee instrument (*1969 OAU Convention*) as a struggle against colonialism, Asia did not relate to the

³³¹ *ibid*

³³² *ibid* 85.

³³³ *ibid*.

³³⁴ B.S. Chimni, ‘Is there an Asian approach to International Law?’ at 260.

³³⁵ *ibid* 261.

need for a regional refugee regime with the cause of decolonization.³³⁶ Despite India's ostensible exceptionalism with respect to international refugee law, providing sanctuary to many groups of refugees has been integral in practice. As has been mentioned earlier, despite states in South Asia not acceding to the *Refugee Convention* or Protocol, they have played host to millions of refugees throughout history. Chimni argues that this exceptionalism can be attributed to lack of cognizance of concerns raised by South Asian states in the early days of the formalization process of the *Convention*; the "civilizational explanation for Asian exceptionalism is that there has been a long tradition in different cultures of Asia of offering safe haven to persons fleeing threats to their life and freedom".³³⁷ In conceptualizing the civilizational aspect of international law, Chimni argues that the collective struggle of people of the third world needs to be recognized in addition to "the contribution of Asian states to the evolution and growth of international law".³³⁸ Resistance to mainstream international law has also been articulated by TWAIL scholarship, which provides clarity on Asian approaches and Asian practice of international law. These approaches emerged from a profound commitment to anti-racism, anti-imperialism, and anti-colonialism, which has also been enunciated by TWAIL. This is where the next section on resistance begins.

The role of resistance in international law

Bandung and Beyond

Resistance to international law can be captured by several efforts undertaken by states in the global south to forge an alliance against imperialism and colonialism. Of these, the 1955 Bandung Conference is particularly influential in articulating resistance to the pre-existing Eurocentric international legal order that emerged from imperial tendencies. A review of the comprehensive work undertaken by TWAIL scholars on Bandung and its impact on international

³³⁶ *ibid* 263.

³³⁷ *ibid*.

³³⁸ *ibid* 264.

law doctrines of the global south is beyond the scope of this project. However, a brief examination of some of the discussions undertaken in Bandung points to India's need to remain defiant to the global legal order and more importantly, provide a rationale that led to the development of *ad-hoc* principles in response to hegemonic instruments like the *Refugee Convention*. Based on some of the core objectives of antecedent movements, such as the "1927 Brussels gathering of the League against Imperialism",³³⁹ the 1955 Bandung Conference in Indonesia brought to fruition a celebratory moment of "the demise of formal colonialism".³⁴⁰ By identifying convergent experiences of colonialism, Asian and African leaders "established anti-imperial principles"³⁴¹ with a vision and a pledge to create an alternative dimension to pre-existing world order. Apart from marking the end of formal colonialism, the Conference's vision emerged from the collective "challenges of grappling with the legacies of European imperialism".³⁴² The Bandung Conference inspired the need for practical changes that emerged out of the irreversible impact colonialism had on the African and Asian communities' history and struggles for justice. The Conference envisioned the need for unique experiences of colonialism to be captured in the social, legal, and political institutions of postcolonial states. This struggle also highlighted the need for a new international law.³⁴³

While referring to the 1955 Bandung Conference, Prashad contends that "[u]nity for the people of the Third World came from a political position against colonialism and imperialism, not from any intrinsic cultural or racial commonalities", though racialism that was rooted in the legacies of colonialism did play a role in the proceedings.³⁴⁴ Along these lines, the Bandung

³³⁹ Vijay Prashad, *The Darker Nations: A People's History of the Third World* (The New Press 2007) 32.

³⁴⁰ *ibid.*

³⁴¹ Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) iii.

³⁴² *ibid.* 3.

³⁴³ *ibid.*

³⁴⁴ Prashad (n 339) 34.

Conference brought together formerly colonized and newly sovereign nations in Asia and Africa and highlighted the nationalist movements that fought against colonialism in each of these nations. As the closing statement of the conference highlighted, these nationalist movements were a form of reinvigoration of the identity of states in these regions that were suppressed by colonial powers. As Prashad demonstrates, these movements were a response to “relatively common social conditions of [these] colonized states”.³⁴⁵ More importantly, the Conference recognized that though formal colonialism may have ended, imperialism still lingered in the form of economic and intellectual control. International law was not impervious to such pernicious influences. Therefore, the Conference provided an opportunity for the Third World to stand against imperialism by envisioning a new international legal order.

The 1955 Bandung Conference can be viewed as a moment of resistance from the lens of what Pankaj Mishra terms as the “intellectual and political awakening of Asia and its emergence from the ruins of both Asian and European empires”.³⁴⁶ In this regard, Bandung created institutional initiatives such as the Non-Aligned Movement (NAM) that sought to reshape international legal order and provide more strength to independence movements in other countries that were still under the influence of colonialism.³⁴⁷ The final communiqué originated from the notion that “Asia and Africa have been the cradle of great religions and civilisations which have enriched other cultures and civilisations”.³⁴⁸ By developing shared objectives based on postcolonial solidarity, that decentered “Europe as the organizing geopolitical and cultural fulcrum

³⁴⁵ Prashad (n 339) 32.

³⁴⁶ Pankaj Mishra, *From the Ruins of the Empire: The Revolt Against the West and the Remaking of Asia* (Toronto: Doubleday Canada 2012) 8.

³⁴⁷ Eslava et. al. (n 341341) 6.

³⁴⁸ Asian-African Conference, *Selected Documents of the Bandung Conference; Texts of Selected Speeches and Final Communiqué of the Asian-African Conference, Bandung, Indonesia, April 18-24, 1955*. (New York: Institute of Pacific Relations, 1955).

of the world”³⁴⁹, the premise of this communiqué points to cooperation among multiple civilizations, which links back to Onuma’s argument on the need for transcivilizational perspectives. As Eslava et.al. argue, though ambiguous and legally non-binding, the Bandung Conference’s final communiqué repositioned postcolonial nations as truer subjects of international legal order. The Spirit of Bandung thus “empowered people in the colonized world to assert their own place in the world on their own terms”.³⁵⁰

At the risk of romanticizing the power of Bandung’s role in reshaping international legal order, it is critical to examine the Conference’s role in building anticolonial solidarity and resistance with international law. Bandung’s crowning achievement was the formal recognition of imperialist tendencies baked within international legal doctrines and the need to reposition the significant role that states in the global south play in developing international legal order.³⁵¹ Despite its performative and legally non-binding characteristics, Bandung’s role in preserving the need for resistance in international law cannot be overlooked. Rather than viewing the Conference in isolation, it is critical to view this in the context of other counter-hegemonic advancements throughout history before and after. Resistance is also a critical facet captured in TWAIL scholarship. Similarly, tangible steps of resistance have been made by postcolonial states in multilateral negotiations such as, India and Pakistan’s engagement in the formalization process of the *Refugee Convention* as mentioned earlier in the thesis. As Eslava et.al., argue, Bandung’s impact cannot be understated as its response to imperialism, international law and resistance can be captured by a whole gamut of advancements made in institutional and conceptual formations, national and regional narratives, social movements to old and new forms of resistance and

³⁴⁹ Eslava et. al. (n 341341) 6.

³⁵⁰ Eslava et. al. (n 341341) 6.

³⁵¹ *ibid* 13.

oppression, and state practices and alternative conceptualizations of the world and international law.³⁵² A small element of this resistance is what I will capture in my work with the help of identifying *ad-hoc* refugee protection practices in developing an alternative epistemology of international refugee law from subcontinental perspectives.

Undoubtedly, Bandung's role in advancing alternative epistemologies is remarkable. Eslava et.al argue that international law "has always been laden with myths".³⁵³ Much like Anghie and Falk et.al., who critique the Westphalian foundations of international law, Eslava et.al also argue that the myths associated with Westphalian traditions have led to deeply hegemonic and ideological frameworks. The two European conferences that led to the signing of the Treaty of Westphalia marked the emergence of modern international law. With this, autonomous political units and states were viewed as crucibles of secularism. International order began to be defined based on "a horizontal system characterized by the coexistence of multiplicity of territorially autonomous entities."³⁵⁴ It is this system that serves as a foundational myth to explain how modern states and international law came to be considered as rational, modern, and universal. Concrete institutional formations such as Conventions and international organizations that are associated with Westphalian traditions tend to be instrumental in guiding mainstream international law narratives.³⁵⁵ Eslava et.al. demonstrate that if we were to assume that Westphalian traditions define the institutionalization of international law, then Bandung can be viewed as an antidote to such Eurocentric traditions based on the counterpoints that were presented in the 1955 Conference. Bandung is in essence an expression of what Nesiah and others define as a culmination of the

³⁵² *ibid.*

³⁵³ *ibid* 15.

³⁵⁴ *ibid.*

³⁵⁵ *ibid.*

“vexed relationship with Westphalia”.³⁵⁶ As states in the global south began critically grappling with their colonial and postcolonial experiences, there was an increasing need to “enhance our appreciation and the use of international law, particularly as it relates to North-South relations in our unequal world”.³⁵⁷ With Westphalian traditions of international law assumed as dominant, alternative epistemologies have often not had their place in writings, traditions, and practice. Bandung thereby presented the first steps in making demands for a new form of international legal order. While Bandung’s final communiqué was legally non-binding, it represents a moment when counter-hegemonic interventions were made in the field of international law at a multilateral level. Bandung provided a window into the international legal order’s deep-rooted colonial legacies, while simultaneously marking a moment of struggle to build a truly inclusive international legal order in a postcolonial world. I argue here that international refugee law’s exclusionary overtones are no less linked to international law’s deep-rooted deficiencies that failed to account for colonial violence in its development. Eslava et.al. argue that Bandung’s role was to reinforce the idea that given the inextricability of racism and inequality in international law and the “genealogy of the nation-state”, there is a need to develop an alternative that would account for absent discourses.³⁵⁸ The nefariousness of the system of nation-states and mainstream notions of international law is intensified when we account for regional or national practice. As mentioned earlier, the *Refugee Convention*’s applicability is at odds with the experiences of India’s experiences with displacement after 1947.

Therefore, Bandung, in addition to capturing a more critical world legal history, was also a statement on anti-racism, anti-colonialism, and anti-imperialism.³⁵⁹ As opposed to an

³⁵⁶ *ibid* 16.

³⁵⁷ *ibid*.

³⁵⁸ *ibid* 17.

³⁵⁹ *ibid*.

examination of Bandung's role in the history of resistance to international law, the analysis helps situate this project in the context of regional practices of international refugee law. Bandung's salience lays in its ability to provide a firm grounding to reimagine a new international legal order based on the postcolonial realities of states in the global south. In this particular project, Bandung provides an interlude to gauge India's postcolonial nation-building exercise and practice of international refugee law that were impacted by some of the objectives that were formulated in the 1955 Conference. Bandung marked a moment of open defiance to mainstream international law but did not cover certain areas of international legal doctrines, namely international refugee law. Therefore, there is value in analyzing its role in this particular project by examining some archival records on refugee protection in India. With Bandung bringing concepts of equality and anticolonialism concretely into international law, it certainly has the potential to impact practices such as refugee protection mechanisms in many states of the global south including India.

TWAIL scholarship and resistance

Having established the role of postcolonial states in envisioning an alternative international legal order, it is equally important to highlight the role of TWAIL scholarship in articulating this resistance. Falk et.al. point out that the role of resistance in shaping international law doctrines and institutions, and the need to recognize its role are equally critical while discussing TWAIL.³⁶⁰ This notion is reinforced by Upendra Baxi in his account of TWAIL. He argues that the "Third World emerges through practices of resistance and struggle" by those under the yoke of coloniality; he further argues that such practices "offer the best possible readings of the critique" of the false universalism of international law practices.³⁶¹ My project, for instance, sets out to analyze the

³⁶⁰ Falk et.al. (n 308) 4.

³⁶¹ Upendra Baxi, 'What may the 'Third-World' expect from International Law?' in Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, 2008) 10.

defiant role India has played in developing alternate locations and mechanisms of practice, and subverting the hegemonic prescriptions that mandate specific standards for refugee protection. Standards set by mainstream international refugee law instruments such as the *Convention*, have not been representative of the Indian experience; hence resistance to such mechanisms are significant in this discussion. Therefore, as Falk et.al argue, “normative implications of taking the resistance of ‘Other’, ‘subaltern’ seriously, are significant” in discussions on TWAIL.³⁶² Analogous to Ōnuma and Chimni’s arguments on transcivilizational perspectives, Baxi argues that “Third Worldism offers histories of mentalities of self-determination and self-governance based on the insistence of the recognition of radical cultural and civilizational plurality and diversity”.³⁶³

Baxi demonstrates that Third Worldism also offers some critical modes of reading the historical practices of resistance. Such “lenses complicate the readings of normative” international law principles and “pose some profound challenges to the legalized hegemony of the Great Powers in relation to their other” or outlaw states.³⁶⁴ Baxi picks the example of one of the most prominent environmental judgements – the Ogoniland Case (*Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria (2001) AHRLR 60 (ACHPR 2001)*). The case involves issues raised by the Ogoni people alleging that, irresponsible oil development practices in the Ogoni region by the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC) caused environmental degradation and health problems. The African Commission on Human and Peoples’ Rights ruled in favour of the Ogoni people and concluded that such practices violated satisfactory living conditions and led to harmful physical and moral health. Baxi argues that such cases present people’s resistance to “corporate Neanderthalism”,

³⁶² Falk et.al. (n 308) 4.

³⁶³ Baxi (n 361).

³⁶⁴ *ibid* 11.

inherent in hegemonic practices of an imposed notion of capitalism by the global north on the people of the global south.³⁶⁵ Baxi notes that such practices of resistance continue to contribute to the perception that sites of international are spaces for endless negotiation for the people of the global south.³⁶⁶

Finally, Baxi notes the extent to which states in the Third World have contributed to the making of international law. He argues that the Third World has emerged to “reinscribe its peoples as inaugural actors on a world historic scene” and has challenged the ‘authorship’ of international norms, standards, and values that have enjoyed Eurocentric predominance.³⁶⁷ This is evident from the discussions undertaken at the 1955 Conference in Bandung, in addition to practices of international law in states in the global south that were recalibrated to reflect the subjective realities of colonialism’s impact. Baxi demonstrates that amidst such contestations emerge a set of normative expectations from contemporary international law that could potentially serve towards the well-being of the people in the Third World. Of the long list of expectations, two of them are most critical within the context of this project. One of them concerns redressing the production of new forms of human rightlessness created “by the regimes of stateless peoples”.³⁶⁸ This particular aspect embodies the policies and practices of violent exclusion of multiculturalism. Another one of Baxi’s expectations outlines equal respect for microscopic minorities and the forgotten peoples such as those living on the margins of society.³⁶⁹ These two expectations are particularly relevant to my project given that the dissonance between Eurocentric practices of international refugee protection and those in global south states like that of India, continue to raise conundrums. My

³⁶⁵ *ibid.*

³⁶⁶ *ibid.*

³⁶⁷ *ibid* 15.

³⁶⁸ *ibid* 18.

³⁶⁹ *ibid.*

project sets out to redress some of those conundrums by arguing that alternate locations of practice that resist Eurocentric and hegemonic international law frameworks have contributed towards the development of a more comprehensive system of international legal order.

Tools of counterhegemony and resistance

With respect to TWAIL, the most critical element pertaining to my project is the element of resistance against hegemonic principles of international law from the global south, or what Rajagopal characterizes as a counter-hegemonic tool.³⁷⁰ Rajagopal argues that there is still some “potential for making international law into a counter-hegemonic tool” that can counteract some of the normative sources of international law that have overlooked states in the global south.³⁷¹ Rajagopal’s argument on counter-hegemony certainly strikes a chord with discussions on India’s relationship to the global refugee regime. As mentioned earlier, and as the rest of my dissertation will demonstrate, India has developed systems of protection for refugees that are independent of some of these Eurocentric norms. Based on the case studies, it will become evident that a counter-hegemonic system of international refugee law has always existed on the world stage. However, such practices have failed to be viewed as legitimate due to their defiance to constrained norms as set out in the *Refugee Convention* and the Protocol. Despite its inability to capture the attention of scholars of mainstream international law, Rajagopal argues that at the very least it is possible for counter-hegemonic international law to co-exist alongside hegemonic international law.³⁷²

The assumed universality of international law principles is also testable by examining the hegemony inherent in the human rights corpus. Related to Mutua’s arguments, Rajagopal contends that human rights norms suffer from hegemonic trappings. For instance, though the 1948 Universal

³⁷⁰ Balakrishnan Rajagopal, ‘Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy’ in Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, 2008) 64.

³⁷¹ *ibid.*

³⁷² *ibid.*

Declaration of Human Rights (UDHR) ushered in a new dawn of human rights discourse that was post-imperialist in nature, it failed to view the significance of “ugly colonial politics of pre-1948”.³⁷³ Rajagopal argues that the UDHR or international human rights movement, “effectively superseded the old international law of colonialism”.³⁷⁴ He further demonstrates that, “the UDHR did not apply directly to the colonial areas [which were] subjected to intense manoeuvring by Britain” to circumvent its application in former colonial states.³⁷⁵ Similarly, the United Nations Commission on Human Rights took into account the significance of anti-colonial struggles until many Third World states came on board in 1967.³⁷⁶ Such hegemonic systems were formulaic and extremely commonplace during the early days of post-WWII development of international law mechanisms. The language of international law was founded on the realities of the European experience and did not account for the oppression faced by states in the global south. Rajagopal’s model for a counter-hegemonic tool to thrive is to begin by fundamentally rethinking the normative traditions that have led to the current language of international law.³⁷⁷ He argues for alternatives including the growth of regional practices and systems, which could counter-balance the hegemony inherent in international law. Therefore, acknowledging the asymmetries that have led to the marginalization of states in the global south is a step towards recognizing the inequalities, which were done by events like Bandung. It is equally critical to acknowledge and ascribe value to the non-normative systems and mechanisms of international law that have been in operation for several decades in the global south, that have also contributed to the development of this subject area.³⁷⁸

³⁷³ *ibid* 65.

³⁷⁴ *ibid*.

³⁷⁵ *ibid*.

³⁷⁶ *ibid*.

³⁷⁷ *ibid* 76.

³⁷⁸ *ibid*.

The significance of Third World Approaches to International Law lies in its ability to articulate resistance to hegemonic frameworks that currently exist. Therefore, while discussing alternate locations of practice or defiance within the practice of international law, as my project does, it is critical to consider the importance of resistance. B.S. Chimni argues that while TWAIL provides some critical interventions to critique age-old Eurocentric ideologies, the approach has not been effective enough to provide a holistic view of the regressive role of international law. He further points out that it is imperative to find “means to globalize the sources of critical knowledge and address the material and ethical concerns of third world peoples”.³⁷⁹ Within this discussion, the resistance inherent in challenging hegemonic international law norms is critical to articulate. The element of resistance is integral from the standpoint of TWAIL and forms a critical piece of discussions on international law in general. Chimni argues that alliances need to be struck with other critics of international law such as feminist and third world scholarship to disentangle the questions on exclusion by international law.³⁸⁰ Alternatives to mainstream and hegemonic sources of international law are therefore possible with the help of a collaborative approach. There is a dire need to reconstruct the norms of international law that have for long been unable to address the concerns of marginalized and oppressed groups in postcolonial states in the Global South.³⁸¹

Notions on third world resistance to international law mechanisms and international institutions are critical to be integrated within the understanding of global legal order. Rajagopal argues that social movements from the Third World have been instrumental in propelling the expansion of international institutions, and Third World masses and states have been “central to

³⁷⁹ Bhupinder Chimni, ‘Third World Approaches to International Law: A Manifesto’ in Antony Anghie, Bhupinder Chimni, Karin Mickelson, and Obiora C. Okafor, (eds.), *The Third World and International Order: Law, Politics, Globalization*. (Martinus Nijhoff 2003) 48.

³⁸⁰ *ibid* 67.

³⁸¹ *ibid*.

the expansion of the domain of the “international” itself”.³⁸² One of the elements of resistance that Rajagopal highlights, is particularly significant within the context of this project. He argues that a reassessment of the relationship between resistance and institutional change can serve to lessen some of the bias in international law against popular resistance as such. Rajagopal argues that it is important to “de-elitize international law by writing resistance into it to make it recognize subaltern voices.”³⁸³ The need for international law to take Third World resistance into account also emerges from its need to recognize a plethora of “extra-institutional forms of resistance generated in the Third World” that have remained invisible within mainstream narratives.³⁸⁴ This is particularly relevant with respect to India’s relationship with the global refugee regime. With the help of arguments as put forth by scholars like Chimni and Rajagopal with regards to third world resistance to international law, the upcoming chapters will lay out the pushback articulated by states like India against hegemonic international refugee law mechanisms. Such challenges have not only emerged from the historical biases directed against the subcontinent by the early drafters of the *Refugee Convention*, but also from the need to reform the system from within by adopting *ad-hoc* alternatives to the prevailing practice of refugee protection that was inclusive of subcontinental refugee experiences, while remaining true to the spirit of the global refugee regime’s objectives.

Imprecision of the Global Refugee Regime

The previous section segues into examining the imprecision inherent in the global refugee regime. Here, I refer specifically to the myopia of the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol*. The international community’s efforts in post-WWII repatriation of European refugees and forced migrants was marked by the United Nations proposing “the

³⁸² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003) 43.

³⁸³ *ibid* 45.

³⁸⁴ *ibid* 46.

assimilation of all stateless persons including refugees under a new international regime”.³⁸⁵ Despite political antagonism that proved to be obstacles to effectively actualize a holistic vision of refugee protection, the United Nations High Commissioner for Refugees (UNHCR) was established and an effective international refugee protection instrument was proposed i.e., the *1951 Convention Relating to the Status of Refugees*.³⁸⁶ The *Convention* is viewed as the cornerstone in refugee protection norms and was also an attempt to codify legally binding international refugee protection mechanisms. Given that the *Convention* was built on the heels of post-WWII disenfranchisement in Europe, the definition of a refugee was constrained temporally and geographically.³⁸⁷ This meant that the *Convention* applied only to those who were fleeing specific circumstances, during specific periods in history, in Europe.³⁸⁸ The *1967 Protocol Relating to the Status of Refugees* abolished the temporal and geographical restrictions so as to allow for a more universal application of the *1951 Convention’s* norms.³⁸⁹ Over the years, a growing body of academic literature and judicial interventions have interrogated normative characterizations of forced displacement, which has led to problematizing pre-existing narratives on the issue of forced migration. The previous section demonstrated the inordinate preoccupation with Eurocentrism inherent in the development of international law principles. Hence, refugee protection norms that grew out of the need to protect those who were disenfranchised due to the war were bound to have

³⁸⁵ James Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press 2005) 91.

³⁸⁶ *ibid.*

³⁸⁷ *ibid.* 96.

³⁸⁸ Article 1(A) (2) of the *Refugee Convention* read:

For the purposes of the present Convention, the term “refugee” shall apply to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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.

³⁸⁹ Protocol Relating to the Status of Refugees, 606 UNTS 8791, done Jan. 31, 1967, entered into force Oct. 4, 1967 (Refugee Protocol).

similar legacies. The constraints and limitations placed on refugee protection have been discussed by scholars like Jane McAdam and Guy Goodwin-Gill. They argue that the current refugee regime “imperfectly [covers] what ought to be a situation of exception” and continues to be an incomplete legal framework.³⁹⁰

Throughout the rest of the project, I will organically examine issues of the refugee label and the characterization of refugeehood within an imprecise refugee regime. However, with the help of a brief overview of the history of international refugee law, I will foreground some of the other discussions that will follow.

The refugee framework was established in light of conflicts and upheavals faced by the international community, which caused mass migration and disenfranchisement. The League of Nations established a system of “residual protection” which was created in an attempt to protect those who were disenfranchised and were not safeguarded by their respective national governments post-WWI.³⁹¹ This was designed to extend the same benefits that regular citizens of a state received. As James Hathaway points out, the system of protection was imprecise and did not clearly set up specific responsibilities for states. The initial perception of refugee protection, as a temporary mechanism also added to the imprecision.³⁹² Further Hathaway’s analysis focuses on the European context. However, the League of Nations established protection mechanisms for refugees in response to WWI, without considering mobility resulting from conflicts and colonial violence in other parts of the world. This is one of the aspects that clearly shows the Eurocentric nature of the early versions of the refugee regime. Since most nations around the world, more

³⁹⁰ Goodwin-Gill and McAdam (n 246) 1.

³⁹¹ Hathaway (n 385) 83.

³⁹² *ibid* 86.

specifically in the Global South, were still under colonial rule, they had little to no role to play in developing these protection mechanisms.

Hathaway points out that the current system of refugee protection “rejects the goal of comprehensive protection for all involuntary migrants”.³⁹³ The responsibility of states to step in to protect those involuntary migrants is limited. Additionally, Hathaway argues that the assistance provided to refugees is done so without taking into account their subjective experiences, due to the standardized characterization of a refugee.³⁹⁴ Hathaway also points out that current refugee law only takes into account the asylum states’ well-being and is the result of an uneasy “compromise between the sovereign, prerogative of states to control immigration and the reality of coerced movements of persons at risk”, which results in a weak framework and a “narrow scope of legal protection”, as it fails to meet the needs of forced migrants.³⁹⁵

Gil Loescher in his work also points to the shortcomings and limitations of the current refugee protection framework. By problematizing the current characterization of refugees, Loescher argues that a majority of forced or involuntary migrants today are fleeing circumstances other than those outlined in the *1951 Refugee Convention*.³⁹⁶ State incompetence and failure are more prominent circumstances as opposed to state persecution. By pointing to the example of the decade-long economic and political disarray in Zimbabwe in the early 2000s, Loescher argues that only a small minority of those who fled the country were doing so due to individualized persecution.³⁹⁷ He points to normative gaps in the current framework of refugee protection by arguing that widespread human rights deprivations, state fragility, and environmental distresses

³⁹³ James C. Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harvard International Law Journal* 129, 132.

³⁹⁴ *ibid.*

³⁹⁵ *ibid* 133.

³⁹⁶ Gil Loescher, ‘Human Rights and Forced Migration’ in Michael E. Goodhart, *Human Rights: Politics and Practice*. (3rd edn, Oxford University Press 2016).

³⁹⁷ *ibid.*

have also caused displacement in recent years. Loescher calls for a better understanding of human mobility to better afford protection for those facing such crises.³⁹⁸

These shortcomings together with the rigidity with which principles of refugee protection are applied today, were to be expected, considering the loose institutionalization of early principles of refugee protection. Despite the 1933 League of Nations Intergovernmental Commission declaring that “the desirability of a convention aiming at securing a more stable legal status for refugees [should be] unanimously recognized”³⁹⁹, which led to the establishment of the *1933 Convention relating to the International Status of Refugees*, it turned out to be a virtual mechanism that states subverted and were unwilling to commit to.⁴⁰⁰ Successive mechanisms such as the *1936 Provisional Arrangement concerning the Status of Refugees*, still did not guarantee clarity in refugee rights, and were equally unsuccessful. Consistent failure to codify refugee rights led to an assumption by the League of Nations that states would be more willing to adhere to such obligations if they were able to renounce them quickly.⁴⁰¹ The League of Nations then established the *1938 Convention concerning the Status of Refugees*, which outlined the distribution of refugees across the world and also gave states the ability to renounce their obligations towards persons of concern.⁴⁰² However, this was once again unsuccessful.

Hathaway points out that the *1938 Convention* offered states the flexibility to accede to the *Convention* without being bound by the notice period which was mandatory before the state would renounce its obligations. However, despite this only three states acceded to the *Convention*.⁴⁰³ Hathaway argues that despite their failure, these early conventions and frameworks of refugee

³⁹⁸ *ibid.*

³⁹⁹ Hathaway (n 385) 87.

⁴⁰⁰ *ibid.*

⁴⁰¹ *ibid.* 89.

⁴⁰² *ibid.* 90.

⁴⁰³ *ibid.*

rights paved way for more institutionalized and structural instruments that were designed to protect refugees. Codification of refugee rights, according to Hathaway, began with the freely accepted international supervision of national compliance with refugee rights, and eventually transformed into shared objectives of states through cooperation.⁴⁰⁴ However, lacunae have persisted in the modern refugee regime as well. Based on arguments advanced by scholars like Hathaway, and Goodwin-Gill and McAdam, the current refugee framework continues to represent an incomplete and imprecise regime. However, the regime's reliance on state sovereignty is also a colossal drawback in its ability to universally apply refugee protection norms. As Stephen Krasner points out, "[r]egimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations".⁴⁰⁵ With respect to the international refugee regime, principles of state behavior are outlined in the *1951 Refugee Convention* and the *1967 Protocol*, in addition to several regional mechanisms. Krasner characterizes norms as "standards of behavior defined in terms of rights and obligations"⁴⁰⁶; in the *Refugee Convention*, the norms can be defined by the protection and humanitarian assistance afforded to refugees and forced migrants. Rules, which can be identified by "specific prescriptions or proscriptions for action", are also clearly outlined in the refugee frameworks.⁴⁰⁷ However, decision-making procedures have always been in the interests of the asylum state, as Hathaway argues.⁴⁰⁸ Since sovereign prerogative takes precedence over extending protection to involuntary migrants, the prevailing practices, as outlined in the international refugee regime, continue to be imprecise.⁴⁰⁹

⁴⁰⁴ *ibid.*

⁴⁰⁵ Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organization* 186.

⁴⁰⁶ *ibid.*

⁴⁰⁷ *ibid.*

⁴⁰⁸ Hathaway (n 385) 83.

⁴⁰⁹ *ibid.*

Krasner refers to “collective choice” outlined in regimes. However, it can be argued that this is an idealistic notion of any given regime, and more specifically the refugee regime.⁴¹⁰ Given the supremacy of state interests and sovereign prerogative, more specifically in the context of the refugee regime, it is safe to say that the choice to afford protection to involuntary migrants cannot be considered as being collective. It is however noteworthy, as will become clearer throughout the project, that states in the subcontinent have historically emphasized more on the response to forced migration and refugee movements as opposed to preserving their sovereign prerogative to reject relief and rehabilitation. However, this approach has changed over the years with political changes and distortions that emerge from authoritarian governments. South Asia in the last few decades has seen periods of mass exoduses. The lack of support from the international community, has led to a regional disdain for the refugee regime, and states in the region had to devise extraordinary and ingenious responses to displacement. Krasner’s “collective choice” is therefore appropriate in South Asia, given their shared experiences with violent colonialism and the relatively convergent state practice to refugee protection.

The refugee regime and race

The imprecision of the *Refugee Convention* is also reinforced in its racialization. The sections earlier briefly outlined the notion of ‘myth of difference’ as noted by Chimni while referring to the selective nature of refugee protection extended to a ‘normal refugee’.⁴¹¹ The refugee regime’s concomitant myopia in characterizing refugeehood was instrumental in skewed interpretations of persecution. Besides constrained refugee protection norms, such characterizations also institutionalized a rather racialized refugee regime. As Kyriakides et.al.

⁴¹⁰ Krasner (n 405).

⁴¹¹ BS Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11 *Journal of Refugee Studies* 350.

argue, constructions of refugeehood that manifest in extending protection to those who are displaced are rooted in “Western assumptions of what a refugee is”.⁴¹² They further demonstrate that such assumptions lead to the implementation of an exclusionary refugee protection instrument that tends to invalidate the concerns of refugees from the Global South or East.⁴¹³ This reinforces the normative understanding of refugeehood, and the argument advanced by Chimni. The normativity associated with such assumptions also reinforces the saviour complex inherent in the human rights corpus as outlined by Mutua in his influential work.⁴¹⁴ Aside from being compelled to fit a normative set of expectations, refugees are also expected to traverse an unforgiving terrain of conditional existence that is validated solely through policy prescriptions and representations by media. Kyriakides et.al. argue that racialization and refuge overlap through the construction of a victim, a refugee or a forced non-Western object devoid of context or socio-cultural history, that waits “to be rescued by the benevolent West”.⁴¹⁵ Given the centrality of racialization and the colonial legacies associated with the development of international law and international institutions, referring to international refugee law instruments such as the *Convention* and the Protocol as the Global Refugee Regime is a misnomer. As Kyriakides et.al. argue, this “unwittingly falls into the trap of missing the centrality of racialization as an embedded system of oppression in the West.”⁴¹⁶

Like Kyriakides et.al., E. Tendayi Achiume demonstrates that though, international refugee law with the help of the definition of a refugee in the *Convention*, “responds to racial

⁴¹² Christopher Kyriakides, Dina Taha, Carlo Handy Charles, and Rodolfo D. Torres, ‘Introduction: The Racialized Refugee Regime’ (2019) 35(1) *Refugee* 3, 4.

⁴¹³ *ibid* 5.

⁴¹⁴ Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201.

⁴¹⁵ Kyriakides (n 412) 5.

⁴¹⁶ *ibid*.

discrimination as a cause of refugee displacement”, there have been exclusions from protection.⁴¹⁷ This is evident from the selective acceptance of refugees from the global south. Countries in the west, according to Achiume, are preoccupied with the regional containment of global south refugees. Though race in the grounds of persecution would warrant refugee protection, Achiume argues that the *Refugee Convention* on its own is unclear on what prohibited racial discrimination entails.⁴¹⁸ Though there are other international instruments that supplement this gap, the ostensible universality of the *Convention* is belied by the fact that there exists a “comparatively liberal test for establishing racial persecution”.⁴¹⁹ Such ambivalence has led to a difference in the way forced migration has been perceived in the Third World. The regional containment of global south refugees also gravitates towards laying the blame of disproportionate refugee flows on postcolonial states.⁴²⁰ Though racial discrimination has been included as grounds for persecution, the structure upon which the instrument of refugee protection is built is racialized. This is evident from the inherent underestimation of the role that colonialism played in displacement. As mentioned throughout, such a disparate perception of groups of refugees originating from the Global South is not new given the exclusion of such narratives during the establishment of the *Convention*.⁴²¹ The global refugee regime’s imprecision can also be attributed to the racialized and colonial origins of the idea of ‘human’, an idea that I examine further in the next chapter.⁴²² As Mayblin argues, the myth of difference, in addition to historically constrained notions of persecution were foundational in conceptualizing specific practices of international protection; this points to the “hegemonic epistemology of colonial modernity [...] as the most adequate framework within which one might

⁴¹⁷ E. Tendayi Achiume, ‘Race, Refugees, and International Law’, in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 43.

⁴¹⁸ *ibid.*

⁴¹⁹ *ibid.*

⁴²⁰ *ibid.*

⁴²¹ *ibid.*

⁴²² Mayblin (n 71) 30.

begin to understand the exclusionary politics of asylum today.”⁴²³ The inadequacy of integrating postcolonial anxieties, and theories of race and racism within the historical development of the global refugee regime, has been instrumental in the “exclusionary politics of asylum today.”⁴²⁴ Therefore, such inadequacies and lacunae are essential to understanding the imprecision inherent in international refugee law instruments.

⁴²³ *ibid.*

⁴²⁴ *ibid.*

Subcontinental geopolitics and critique of the nation-state

India's evolution from a colonial dominion to a sovereign state was not seamless. In fact, an overview of the Partition of India earlier demonstrated the crises that foregrounded the creation of new international borders. Eurocentric rationality that often characterizes geopolitics, more specifically in the subcontinent, is not universal. Territorialization of the subcontinent after the end of formal colonialism in 1947 was a forcible imposition. The hegemonic paradigms that characterize the system of states have also failed to capture the realities of postcolonial geopolitics of the subcontinent. As mentioned earlier, the colonial imposition of arbitrary international borders left the newly independent states in the region to confront a crisis of displacement. However, while simultaneously asserting their sovereignty both India and Pakistan fashioned a form of resistance to international law norms that would be reflective of this assertion, an element that will be examined later in this thesis. The Westphalian system of states views every member in the international arena through a lens of homogeneity. However, it is critical to articulate the subcontinent's significance by viewing the international space as heterogenous and unstable.⁴²⁵ It will become evident that the fragmentation and reorganization of the subcontinent's territories and communities, impacted India's engagement with international refugee law. This emerges from the compulsion of states in the subcontinent to be a part of the new international order, while making an attempt at gaining some level of legitimacy, and simultaneously navigating their complex histories and diverse domestic/local identities. Hence, there is a need to examine the subcontinent's geopolitics to gain a better understanding of the machinations of India's engagement with international refugee law.

⁴²⁵ Itty Abraham, *How India Became Territorial: Foreign Policy, Diaspora, Geopolitics* (Stanford, California: Stanford University Press, 2014), 3

The analysis of forced displacement in the subcontinent will not be complete without a clear contextualization of nation-states in the region and their postcolonial identity. With the 1947 Partition of India marking the moment of geopolitical reorganization, examining the issues associated with the paramountcy of nation-state in international law becomes all the more significant in the context of this project. As Crawford argues, “problems of definition, and of application of the definition of statehood thus occupy an important place in the structure of international law”.⁴²⁶ However, discourses on contemporary statehood conjure up Eurocentric notions that fail to capture the true nature of postcolonial state-building and reorganization of territories in massive geographical regions like the subcontinent. The impact of this territorial realignment and reorganization on the subcontinent’s populations has never been fully captured by international law. As Shahabuddin argues, the creation of such cartographic divisions is closely intertwined with the operation of international law and “is intrinsically connected to the suppression of ethnic minorities”.⁴²⁷ With the efficacy of international law deeply rooted in the existence of strict autonomous political units, with specific characteristics, the continuation of colonial boundaries in postcolonial states, has given rise to internal obscurities and catastrophes that have disproportionately impacted local populations. Colonial influences that resulted in arbitrary cartographic divisions did not capture the uniqueness of the subcontinent’s populations. Therefore, discussions on geopolitics of the subcontinent cannot overlook the role played by colonial histories in the region, which have had an impact on population movements and displacement in the region.

⁴²⁶ James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press 1979) vii.

⁴²⁷ Mohammad Shahabuddin, ‘Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar’ (2019) 9 *Asian Journal of International Law* 334.

The critique of the nation-state is significant in this project, given that the imperial projects of international law were universalized through this actor.⁴²⁸ As Anghie argues, “international law, authored by the West, had established the doctrine that only “civilized states” were sovereign”.⁴²⁹ This doctrine did not regard postcolonial states in the global south on equal terms, thereby excluding them altogether from the making of international law.⁴³⁰ There is an inherent ‘civilizing gaze’⁴³¹ that has often defined the reality of geopolitics in the subcontinent that fails to capture the veracities of barbarism, violence, and colonial conquests. Therefore, there was a need to develop alternative strategies to be accepted in the international system. A counterbalancing Third World vision to sovereignty was propounded by world leaders during Bandung. The concept of Panchsheel was based on the “Five Principles of Coexistence” namely mutual respect for sovereignty and territorial integrity, nonaggression, non-interference in internal affairs, equality and mutual benefit, and peaceful coexistence.⁴³² These principles were first referred to by the first Indian Prime Minister, Jawaharlal Nehru. Even though many of these principles were already enshrined in the UN Charter, Anghie argues that “representatives at Bandung were not especially concerned about the originality or derivation of the principles they were asserting”.⁴³³ Their emphasis on sovereignty and non-intervention emerged from their colonial pasts, and led to the belief that such “principles could be used to articulate a new vision of international relations and reform international law.”⁴³⁴

⁴²⁸ Falk et.al. (n 308) 4.

⁴²⁹ Antony Anghie, ‘Bandung and the Origins of Third World Sovereignty’ in Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) 536.

⁴³⁰ *ibid* 537.

⁴³¹ Seif da’Na Khoury and Laura Khoury, ‘Geopolitics of Knowledge: Constructing An Indigenous Sociology From The South’ (2013) 39 *International Review of Modern Sociology* 1.

⁴³² Anghie (n 429) 537

⁴³³ *ibid* 539.

⁴³⁴ *ibid*.

This ostensibly new vision, however, led to the internalization of such principles, that were rooted in the western concept of sovereignty that has manifested in internal distortions by favouring religious and ethnic majorities. As Eslava et.al. argue, this echoed western conceptions of nation-states that favoured majorities over others.⁴³⁵ As the core objectives of Bandung highlighted, postcolonial states had a moral imperative to make demands for egalitarianism and full recognition. From Bandung, also emerged postcolonial states' need to resist imperialism while simultaneously being compelled to adopt western notions of sovereignty. However, this assertion of autonomy meant that anti-imperial solidarity among states in the global south was often associated with postcolonial nation-building, which often led to "internal political distortions and excesses".⁴³⁶ In an attempt to achieve equality and justice, the identity of many postcolonial states including the ones in South Asia after the Partition of India has often been characterized based on "national majorities joined by ethnic or cultural minorities".⁴³⁷

While at Bandung, Afro-Asian states did propose alternate visions to the western concept of sovereignty. Though concepts like Panchsheel may have presented a vision that summarily rejected western interference, overstating its significance can be risky. The concepts rooted in Afro-Asian solidarity that were proposed by Third World states at the 1955 Conference run the risk of being romanticized. As Özsu argues, the clarion call for South-South cooperation was "the notion of solidarity [...] to which Bandung has been linked".⁴³⁸ This notion was also subject to conceptual and practical muddiness as states valorized "competing development and state-building initiatives without binding states to concrete, genuinely revolutionary programs of action".⁴³⁹

⁴³⁵ Eslava et.al. (n 341) 26.

⁴³⁶ *ibid.*

⁴³⁷ Abraham (n 425) 69.

⁴³⁸ Umut Özsu, "Let Us First of All Have unity Among Us": Bandung, International Law, and the Empty Politics of Solidarity' in Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) 295.

⁴³⁹ *ibid.*

Özsu's incisive critique of Afro-Asian solidarity is a note of caution. Earlier in my analysis, I make references to the role of the 1955 Bandung Conference role in advancing an alternative to western hegemony through Third-World solidarity. However, Özsu cautions against romanticizing the role that solidarity played in the proceedings, as it was "fundamentally symbolic rather than substantive [in] character".⁴⁴⁰ Özsu argues that within the context of Bandung, "solidarity was valuable precisely because it enabled representatives of states with widely differing legal systems, economic regimes, and ideological commitments to coalesce around a common discourse of opposition to colonialism and imperialism".⁴⁴¹ Therefore, though Bandung may have served its purpose for being the first meeting of its kind after the formal end to colonialism in forging a form of Third World alliance, as Özsu argues, "it was certainly not without its share of disagreement" as it relied on a "highly amorphous solidarist discourse".⁴⁴² My intent is not to understate the value of such an emerging Third-World alliance, as it does provide some level of intellectual and academic fodder for discussions on counterhegemony and anti-colonialism. However, it is, in fact, crucial to provide a fuller picture of the tenuous nature of third-world critiques of the postcolonial nation-state. As Özsu demonstrates in his analysis there was no intent to form a regional bloc as the Final Communiqué of the conference fell short of "criticizing the postwar class compromise". Instead, the members supported the establishment of financial institutions and recognized the urgency to promote economic development in the Asian-African region.⁴⁴³ Moreover, every state present at the 1955 Conference brought its own ideological underpinnings to the table which made consensus difficult to accomplish.⁴⁴⁴

⁴⁴⁰ *ibid.*

⁴⁴¹ *ibid* 301.

⁴⁴² *ibid* 302.

⁴⁴³ *ibid* 300.

⁴⁴⁴ Asian-African Conference Final Communiqué n (348).

Colonial legacies, postcolonial statehood, and international law

Even prior to Bandung, states like India and Pakistan were faced with a daunting challenge to gain international recognition. Being new entrants to the postwar international system of states, India and Pakistan's challenges were further exacerbated by the lack of historical precedent and experience with regard to nation-building.⁴⁴⁵ Moreover, with draconian geopolitical reorganization afoot, many in the region faced disenfranchisement and dispossession along ethnoreligious lines. The reorganization of the subcontinent also resulted in the creation of new identities, and new conceptualizations of citizenship and nationhood. Therefore, it is of utmost significance to examine the role of colonialism and the ensuing territorial reorganization in the subcontinent in order to understand how international law was reshaped in the region.

Said defined colonialism as “the implanting of settlements on distant territory”, and imperialism as the “practice, the theory and the attitudes of a dominating metropolitan centre ruling a distant territory”.⁴⁴⁶ As for the subcontinent, it is significant to note that both colonialism and imperialism have dominated its histories, and have led to the region's contemporary sovereign identities, i.e., the subcontinent cannot be viewed devoid of such histories. Colonialism, for Said, was almost always a consequence of imperialism. The ongoing presumption that still governs international relations is that imperialism ended with the formal end to colonialism. This is further reinforced by the fact that international law “recognises formally equal and independent states, whilst at the same time the system of independent states is often traced back to 1648 and the Treaty of Westphalia”.⁴⁴⁷ However, this putative equality and recognition tend to overlook centuries of European colonial rule and forced imposition of international borders in regions like the

⁴⁴⁵ Abraham (n 425) 107.

⁴⁴⁶ Edward W. Said, *Culture and Imperialism* (New York: Knopf 1993) 8.

⁴⁴⁷ David Slater, ‘The Imperial Present and the Geopolitics of Power’ (2010) 1 *Geopolitica(s)* 191, 193.

subcontinent. This is also evident from the fact that both imperialism and colonialism have not purely been acts of accumulation and acquisition, but were also processes that have supported and imposed Eurocentric “ideological formations that include notions that territories and people require and beseech domination”.⁴⁴⁸ Based on Said’s arguments, the notion of territorial boundaries and sovereignty can also be viewed as a culture of subordination in which the imperial power imposes and “projects a narrative of supremacy, which includes the notion that the imperialized society” has resulted in the creation of borders, subregional identities, and ethnoreligious divisions.⁴⁴⁹

With Eurocentrism’s continued influence on discussions concerning statehood and geopolitics, narratives vis-à-vis international law are bound to be impacted by hegemony. In addition to this, resistance to such hegemonic norms from postcolonial states is often viewed as a derogation. For instance, as Pahuja and Eslava argue, the authority of international law and their operation is dependent on the twin myths that “states are independent juridical institutional formations that come into being once they are formed in “fact” and which are only later “recognized” as a matter of international law; and second, that sovereign states come before a law that they have consensually created”.⁴⁵⁰ With this emerges the idea that states “create the law and obey or disobey it”,⁴⁵¹ which is fictional. As Eslava and Pahuja argue, this myth is rooted in the idea that nation-states came first and international law second. However, state-making and reorganization of territorial boundaries is a project of international law.

⁴⁴⁸ Said (n 446).

⁴⁴⁹ Slater (n 447) 197.

⁴⁵⁰ Sundhya Pahuja and Luis Eslava, ‘The State in International Law: A reading from the Global South’ (2020) 11 *Humanity: An International Journal of Human Rights and Humanitarianism* 118.

⁴⁵¹ *ibid*

The assumed universality of international law principles is based on the idea that all states are equal. However, this sense of egalitarianism was putative at best, and any effort to loop states in the global south within the ambit of mainstream international law was a perfunctory attempt at providing an equal voice to all states in the international system. As Shahabuddin argues, international law, rather than being a solution to issues emerging from human rights deprivation has paradoxically facilitated disastrous conditions for many minorities.⁴⁵² The construction of postcolonial statehood under international law precepts has been instrumental in the crises that occurred in the subcontinent. More specifically, the instabilities in newly independent South Asian states were the product of the creation of new territorial entities under the guise of decolonization. The creation of arbitrary borders, that manifested in massive displacement, was not fully accounted for in the core objectives of international refugee law. For instance, the newly developed postwar refugee regime did not account for displacement resulting from colonial violence and forcibly installed cartographic divisions. This is not anomalous given the implicit nature of international law principles. As Anghie argues, the unevenness inherent in the international system of states determined who could participate in the making of international law. As a result, there was a need to “embrace and [adopt...] the Western concept of the nation-state that was a prerequisite for becoming a sovereign state”.⁴⁵³ Political entities in the global south, especially the ones in the subcontinent, therefore, had to set aside their own complex characteristics and were “compelled to adopt a Western concept of ‘statehood’ – which embodies specific ideas of territory, the nation, and ethnicity – in order to win recognition”.⁴⁵⁴ Forced territorial reorganizations of this nature coupled with the internalized need to gain recognition at an international level led to “ongoing

⁴⁵² Shahabuddin (n 427) 335.

⁴⁵³ Anghie (n 429) 544.

⁴⁵⁴ Shahabuddin (n 427) 335.

ethnic tensions and, in some cases, long and devastating civil wars.”⁴⁵⁵ In the case of the subcontinent, this resulted in violence, displacement, and reckless killings of millions. Such obscurities are reflected in other non-European entities as well. Writing from the perspective of the Ottoman Empire, Özsu argues that the modern European state system reflected the need to intensify the integration of extra-European possessions and predicated their membership in the modern European state system on following the core principles of European public law.⁴⁵⁶

Therefore, while international law’s objectives were to create a global utopia through the application of universal international legal doctrines, their failings are apparent in the lack of acknowledgement of the instabilities that manifested from the remaking of states in the global south. Neither has the resistance advanced by them adequately accommodated. For instance, this is reflected in the international community’s perception of India within the context of the global refugee regime as it has been characterized as an outcast due to its unwillingness to ratify the *Convention Relating to the Status of Refugees*. This perception also fails to account for the efforts undertaken by India and other non-signatory states in the region to reconstruct refugee protection mechanisms to build a *de facto* regime founded on post-partition experiences. However, given that former European colonial powers helped construct the rudiments of mainstream international law, they continue to hold greater levels of power in the international arena. There exists a great deal of uneasiness courtesy of European states to allow for a new form of international legal order to be accommodated that would be more inclusive of the experiences of postcolonial states. This uneasiness emerges from the fear that it may disrupt a carefully crafted unequal space for engagement at the international level, in which western states continue to hold power.⁴⁵⁷

⁴⁵⁵ Anghie (n 429) 544.

⁴⁵⁶ Özsu (n 251) 26.

⁴⁵⁷ Abraham (n 425) 3.

Uti possidetis and colonial boundary-making

Shahabuddin argues that the diverging forces of nationalism that “served as the vehicle of liberation movements against colonial rule” and liberal universalism that promoted certain crucial values such as fundamental human rights, at a global scale, appeared to be operating within arbitrarily drawn borders by colonial powers.⁴⁵⁸ The inheritance of such borders by postcolonial states also brought with it “international legal norms and associated rules crafted by Europe”.⁴⁵⁹ The difficulties of postcolonial statehood have been most notable in Africa, where boundaries were drawn with no regard for political and social realities on the ground. As Okafor argues, in the case of Mozambique for instance, the phrase “kill the tribe to build a nation” has come to represent a rather “inordinate preoccupation with homogenization of socio-cultural differences”.⁴⁶⁰ However, this does not absolve colonial influences of its pernicious impacts on creating instabilities in the global south. Okafor argues that such tendencies from former nationalist leaders, to build a homogenous territory, emerged not from blind acquiescence to the western nation-state model, but from “pragmatism and survival instinct” despite understanding its limitations.⁴⁶¹ Similar problems, however, accompanied the independence of Asian countries from colonial rule. By drawing on the Rohingya crisis in Myanmar, Shahabuddin argues that “international law has contributed to the formation of postcolonial statehood” that has further deepened the atrocities faced by this minority group.⁴⁶² However, the rigidity associated with colonially installed borders is rooted in the “legal principle of *uti possidetis* which dictates that colonial borders must be respected”.⁴⁶³ Shaw demonstrates that this principle “is concerned with the territorial aspect of the move to

⁴⁵⁸ Shahabuddin (n 427) 336.

⁴⁵⁹ *ibid.*

⁴⁶⁰ Obiora Chinedu Okafor, ‘After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa’ (2000) 41 *Harvard International Law Journal* 503, 513.

⁴⁶¹ *ibid* 514.

⁴⁶² Shahabuddin (n 427) 336.

⁴⁶³ *ibid*

independence [and] is [...] one aspect of the process of creation of statehood.”⁴⁶⁴ As much as the principle of *uti possidetis* is a transnational mechanism which entails “transmission of sovereignty from a previous sovereign authority to the new state”, Shaw interrogates its applicability with “regard to the phenomenon of decolonization.”⁴⁶⁵ Shahabuddin argues that the legal status of *uti possidetis* is questionable within international law given that it fails to settle boundary disputes among postcolonial states and instead possesses the potential for “disorder” to emanate from its characteristic arbitrariness.⁴⁶⁶ The internalization and inheritance of colonial boundaries undermine the “legitimate right to self-determination of numerous ethnic minorities in postcolonial states and often results in violent ethnic conflicts” which was the case during the Partition of India.⁴⁶⁷ While it is outside the purview of this particular project, it is critical to note that *uti possidetis* is a Eurocentric principle and its forced applicability in South Asia has continued to preserve insecure postcolonial states. This has resulted in internal excesses and distortions that have disproportionately impacted ethnic minorities in the process of creating a skewed notion of nationality and citizenship.

The previous chapter on TWAIL methodology, highlighted some of the limits of its adoption as the sole call to action and articulation of resistance to international law both in the context of this project and in practice. However, its applicability has limitations since this research project still operates from the standpoint of an entrenched system of nation-states. Therefore, there is a critical need to examine the trappings of postcolonial nation-building exercises in the subcontinent and the impact it has had on the applicability of international law in the region. For instance, as Al Attar argues, “[f]or TWAIL, the presumptive legitimacy of nation-states [...], the

⁴⁶⁴ Malcolm Shaw, ‘Peoples, Territorialism, and Boundaries’ (1997) 3 *EJIL* 478, 495.

⁴⁶⁵ *ibid*

⁴⁶⁶ Shahabuddin (n 427) 337.

⁴⁶⁷ *ibid*

lack of legal responsibility for historical wrongs, the doctrine of *uti possidetis*, and the rationality of European subjectivity as universal objectivity” are self-evident trappings of international law.⁴⁶⁸ These elements are particularly significant in the context of this project. The imposed sense of universality that is inherent in the application of international law and more specifically international refugee protection frameworks also meant that the subcontinent was compelled to accept a colonially reimagined, and restructured system of nation-states, that would subsequently result in mass exoduses that required an urgent response. As mentioned earlier, arbitrary borders were drawn in the Indian subcontinent in 1947 that resulted in massive displacement, and many were forcibly homogenized into arbitrarily created political units.⁴⁶⁹ Within these discussions, the doctrine of *uti possidetis* is particularly fraught in the subcontinent. As Shaw argues, a new state comes into existence once it complies with the criteria of statehood (a permanent population, a defined territory, a government, and the capacity to enter into relations with other states).⁴⁷⁰ However, as much as India has agreed to the overall objectives of statehood, the fragmentation of the subcontinent into smaller states was the manifestation of years of colonially created divisions. The Radcliffe Line that cuts through the border of India and Pakistan was “etched upon pre-drawn colonial boundaries”.⁴⁷¹ By depicting the Partition of India as a locally administered process, and a judicially determined settlement, the British managed to subvert the impact years of colonialism had on these fragmentations.⁴⁷²

⁴⁶⁸ Al Attar (n 153).

⁴⁶⁹ Partha Chatterjee, *The Politics of the Governed* (Columbia University Press 2004) 34.

⁴⁷⁰ Shaw (n 464) 491.

⁴⁷¹ Vanshaj R. Jain, ‘Frozen frontier: uti possidetis and the decolonization of South Asia’, *Working Paper Series 130*. (October 2019). Refugee Studies Centre, Oxford (<https://www.rsc.ox.ac.uk/publications/frozen-frontier-uti-possidetis-and-the-decolonization-of-south-asia>).

⁴⁷² *ibid*.

The territorial independence of any state is a matter of domestic law.⁴⁷³ However, the Partition of India was done with the help of the Indian Independence Act of 1947 that was drafted by the British Government. The rigidity of the Act's provisions is a reflection of the forced imposition of *uti possidetis*. The Act not only created a legal binding on India and Pakistan to adhere to these borders, but also left the new leaders with very few options to redraw the border.⁴⁷⁴ The end of formal colonialism in the subcontinent was done swiftly in the bureaucratic interests of the former colonists and failed to capture the implications that colonial violence had upon the Indian polity. And added to this uncertainty was the imposition of the colonial clause in the *Refugee Convention*, which was an indication that European subjectivity was considered enough to account for the experiences of subcontinental dispossession and displacement which aligns with al-Attar's argument on presumptive legitimacy of European subjectivity as universal objectivity. Territorial boundaries and sovereignty are concepts that are relatively new in the region's history. As Abraham argues, newly independent states were compelled to force their way into the international system given their historical impoverishment as this was the only way to access capital, loans, and technology, while simultaneously initiating attempts to balance the scales of an unjust world order.⁴⁷⁵ Equally critical to note is the notion that while territorial boundaries and sovereignty are significant while conceptualizing geopolitics at an international level, embedded within these boundaries are boundless histories, identities, and struggles against violent colonialism as opposed to instinctive acquiescence to such impositions. This point is demonstrated by Abraham in his work who argues that it is difficult to imagine territorialization within the subcontinent without taking into account past colonial possession and control.⁴⁷⁶

⁴⁷³ Shaw (n 464).

⁴⁷⁴ Indian Independence Act, 1947 (http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf).

⁴⁷⁵ *ibid* 2

⁴⁷⁶ Abraham (n 425) 20.

It is also critical to note that dominant conceptions of territorial sovereignty are inadequate without the requisite historical context. An exploration of state-making and restructuring of territories in the region is necessary to understand the full impact on populations. As Abraham argues, territorialization can be better understood as a practice that seeks control and define space.⁴⁷⁷ This leads us to understand territory as uneven, ambiguous, divided, and hierarchical. It is also equally critical to make a connection to how newly independent states of India and Pakistan engaged with the development of multilateral instruments like the *Refugee Convention*. Simultaneously, cartographic divisions, besides defining space based on colonial epistemologies, created massive displacement. Therefore, it was in the interest of both India and Pakistan to contribute to the development of a refugee protection framework that is reflective of such territorialization of the subcontinent. As Abraham argues, state territorial practice is concerned primarily with stabilizing the fluidity through boundary-making. This level of rigor inherent in defined boundaries results in engagement with international law that manifests in hierarchies and unevenness across borders. This is evident from the power imbalance at an international level wherein western states continue to dominate discussions on international law.⁴⁷⁸

This power imbalance is not incidental, Benton argues, as “colonial powers found reasons to create semiautonomous spaces that were legally and politically [different]”.⁴⁷⁹ The colonists also imposed patterns, practices, and political geographies that were “uneven, disaggregated, and oddly shaped”.⁴⁸⁰ In the subcontinent, this manifested in mass forced displacement, ethnoreligious violence, and identity crises for many. Other processes led to rationalizing the subcontinental space

⁴⁷⁷ *ibid* 21.

⁴⁷⁸ *ibid*.

⁴⁷⁹ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2010) 2.

⁴⁸⁰ *ibid*.

based on European notions of statehood and sovereignty. As Benton argues knowledge production on the subcontinent was also rooted in Eurocentrism whereby colonists “adapted old strategies and created new ways of describing territory as differentiated, fragmented, and uneven”.⁴⁸¹ As a later chapter will demonstrate, in the subcontinent this led to Europeans ascribing specific definitional criteria of refugeehood to exclude those displaced as a result of territorial reorganization from any form of international protection. Such a discourse as Benton argues, “about subjecthood (and, later, citizenship) and divided sovereignty, provided part of the framework for describing legally uneven imperial territories”.⁴⁸²

Within the narrative of geopolitical reorganization is also the idea of an anti-colonialist imagination of the territory which alludes to the inherent forcefulness in Eurocentric impositions of borders, the outcome of which is a territory that exhibits violent hierarchy.⁴⁸³ Though the territorialization of the Indian subcontinent after the formal end to colonialism in 1947, tells the story of the preservation of sub-regional identities and spaces, the subcontinent at an international level has been conceived as homogenous, that “highlights the dichotomy between the all-encompassing global and the local”.⁴⁸⁴ In this way, this putative perception of homogeneity contributes to two elements with regards to conceptualizing forced migration in the subcontinent. Firstly, the displacement that occurred during the partition was characterized as a seamless exchange of populations⁴⁸⁵ between two newly independent states, rather than an event of forced migration, and therefore did not entitle those who were dispossessed with ‘international protection’. Secondly, while conceptualizing refugee protection the drafters failed to capture

⁴⁸¹ *ibid.*

⁴⁸² *Ibid* 29.

⁴⁸³ Abraham (n 425) 21.

⁴⁸⁴ Kumar Naresh, ‘Discourse between Geopolitics, Globalisation and Regional identities in India: An Analysis’, *Khoj: An International Peer Reviewed Journal of Geography* (June 19, 2018)

⁴⁸⁵ Khan (n 15) 156.

colonial violence and colonial inheritance of cartographic divisions within the ambit of persecutory factors.⁴⁸⁶ This manifested into myopic definitions of refugeehood and obscurely Eurocentric principles of refugee protection that were embedded within international frameworks such as the *Refugee Convention*.

The last few sections point to the fact that states in the subcontinent straddle a delicate duality with respect to their allegiance to international law principles. Though resistance has been adequately captured in TWAIL literature and critical international law scholarship, practice in postcolonial states often reflects the simultaneous existence of allegiance and resistance to international law principles. Specifically, states in the subcontinent have been compelled to operate within constrained structures of international law and international relations. Both India and Pakistan, despite expressing concerns, have performatively engaged with mainstream international law norms that legitimize their existence in the international system, even if it is at the expense of their own interests. Such engagement with international law brings with it the need to assert sovereignty over their territory, which are critical elements in the discussion on geopolitics. However, this form of engagement not only internalizes western notions of sovereignty but also tends to obliterate and reconfigure the significance of territorial integrity of these states.⁴⁸⁷

The geopolitical significance of South Asia is dependent on its geography and its history. The complexity of South Asia's postcolonial cartography, the history that preceded the region's reimagination into new nation-states, and decades of geopolitical renegotiation between these states, cannot be viewed in isolation.⁴⁸⁸ As Shivashankar Menon argues, South Asia's cross-border

⁴⁸⁶ Aristide R. Zolberg, 'The Formation of New States as a Refugee-Generating Process' (1983) 467 *The Annals of the American Academy of Political and Social Science* 24, 35.

⁴⁸⁷ *ibid.*

⁴⁸⁸ Shivashankar Menon, "Brace Yourself, South Asia's Geopolitics Is Becoming More Complex, Less Stable", *Brookings*, (<https://www.brookings.edu/opinions/brace-yourself-south-asias-geopolitics-is-becoming-more-complex-less-stable/>), June 8, 2017. Accessed on: [April 3, 2020].

ethnicities, and deep religious and strong cultural affinities across state boundaries are closely linked to the identity of South Asians.⁴⁸⁹ The Partition of India of 1947 is a relatively recent phenomenon that marked the formal end to colonialism in the subcontinent. Therefore, state boundaries in South Asia are new and recently defined.⁴⁹⁰ However, the ethnicities, languages, religions, and cultures are ancient. It is significant to note that there is “a shared history of openness to each other” within the region.⁴⁹¹ Despite this openness, and the affinities in the subcontinent far outweighing the differences, it is inescapable that geopolitical reorganization on Eurocentric terms has had an impact on South Asian identity. South Asia provides a fertile ground for an examination of identity formation, refugee-generation, and nationhood due to the fact that national identity in respective nation-states within the subcontinent has involved a constant process of forming, revising, and reimagining. Such processes in South Asia have been inherently geographical. Geopolitical relationships from cross-border conflicts, to shared resources, between various states in the region have been shaped by identity politics and territory. Therefore, as Dodds argues, “state territories remain important in defining national identities”.⁴⁹² As mentioned earlier, South Asian states share both affinities and differences. As Menon argues, “this affinity across formal state boundaries is one reason why nationalism is high but nationhood everywhere in South Asia is still a work in progress”.⁴⁹³ Needless to say that the conundrum associated with nationhood and the pernicious impacts of religious nationalism did not emerge in a vacuum. With a need to participate effectively in international relations, states in the subcontinent had to submit to the whims of their colonial legacies that manifested in contentious international borders along ethnoreligious lines.

⁴⁸⁹ *ibid.*

⁴⁹⁰ *ibid.*

⁴⁹¹ *ibid.*

⁴⁹² Klaus Dodds, *Geopolitics: A Very Short Introduction* (Second edition, Oxford University Press, 2014) 83.

⁴⁹³ Menon (n 488).

While the Partition of India has been subject to frequent academic interrogation through various pieces of literature, it has simultaneously also been viewed as a monolithic event in history without much attention within the rhetoric of geopolitics and displacement. Dominant narratives on world history, state-building, and identity have placed the history of modern-day South Asia beyond the means of comparative accounts of geopolitics. Viewing this geopolitical reimagination of the subcontinent as a part of the formal end to colonialism, risks silencing the post-partition woes of many who continue to feel its effects. Such narratives also fail to include this event within the narrative of global order.⁴⁹⁴

Territorial reorganization and impact on populations

The intricacies of reimagining contemporary South Asian identity are deeply intertwined with the cartographic divisions that led to the massive displacement of Hindus and Sikhs to India and Muslims to Pakistan.⁴⁹⁵ The geopolitical triad as identified by Tripathi and Chaturvedi entails keywords that appropriately capture the territorial reorganization's impact on local populations – “bordering, ordering, and othering”.⁴⁹⁶ By examining the implications of the Partition of India on the subcontinent, Tripathi and Chaturvedi argue that while cultural, kinship, and social relationships between various groups of South Asians are palpable, which are also evident from interaction within the diaspora, they are not reflected in state-to-state relations between states like India and Pakistan. This has manifested in a perverse sense of nationalism and identity in the region.⁴⁹⁷ It is also equally critical to view the postcolonial geography of the Indian subcontinent in the context of identity building. As Ashutosh argues, subaltern geopolitical configurations were

⁴⁹⁴ Khan (n 15) xxiii.

⁴⁹⁵ *ibid* 7.

⁴⁹⁶ Dhananjay Tripathi and Sanjay Chaturvedi, ‘South Asia: Boundaries, Borders and Beyond’ (2020) 35 *Journal of Borderlands Studies* 173.

⁴⁹⁷ *ibid*.

animated by the Partition of India and the displacement that followed.⁴⁹⁸ The significance of cartography on South Asian or subcontinental identity is also examined by Sankaran Krishna in his work. Krishna uses the term cartography to analyze the representational practices that have been deeply entrenched in an attempt to create a unique history, identity, and trajectory of a nation-state like India or Pakistan.⁴⁹⁹ As Krishna shows, “under such a definition, cartography becomes nothing less than the social and political production of nationality itself”.⁵⁰⁰

Examining the impact of the contemporary manifestations of South Asian nationhood on defining identity and citizenship are significant elements of discussions on geopolitics that are often overlooked. As Krishna argues, a postcolonial society like India continues to experience anxieties around national identity. There have been historical accounts of an attempt at ethnoreligious homogeneity of the respective states of India and Pakistan.⁵⁰¹ However, the sustainability and survival of nation-state projects like India or Pakistan hinge on their ability to assert some markers of identity such as religion or culture.⁵⁰² However, as critical as such markers are, the extreme securitization and militarization reveal the ubiquity of violence that accompanies both within and beyond these boundaries.⁵⁰³ While former diplomats like Menon argue that cultural affinities outweigh the differences, Tripathi and Chaturvedi highlight the fact that though cultural moorings bind South Asian states together, a negation of socio-cultural linkages has often resulted in regional disintegration which is evident from cross-border instabilities.⁵⁰⁴

⁴⁹⁸ Ishan Ashutosh, ‘Postcolonial Geographies and Colonialism’s Mutations: The Geo-graphing of South Asia’ (2019) 14(2) *Geography Compass*.

⁴⁹⁹ Sankaran Krishna, ‘Cartographic Anxiety: Mapping the Body Politic in India’ (1994) 19 *Alternatives: Global, Local, Political* 507.

⁵⁰⁰ *ibid* 508.

⁵⁰¹ *ibid* 517.

⁵⁰² *ibid*.

⁵⁰³ *ibid*.

⁵⁰⁴ Tripathi and Chaturvedi (n 496) 174.

The understanding of borders and borderlands in South Asia can also be perceived from the analysis undertaken by Emmanuel Brunet-Jailly. Brunet-Jailly highlights that borders are established through “complex social processes and one cannot overlook the tug of war between the notion of agency and structural processes”.⁵⁰⁵ This is particularly evident in the Indo-Pakistan relationship. As Tripathi and Chaturvedi argue, India and Pakistan continue to “grapple with the unfinished task of welding together post-colonial and post-partition states into contemporary nation-states.”⁵⁰⁶ Given that the building of contemporary nation-states was rooted in the formal end to colonialism, the ongoing process of othering and nationalism has manifested into ongoing cross-border disputes and have dictated bilateral and multilateral relations in the subcontinent.⁵⁰⁷ The contemporary project of building nation-states in the subcontinent has encountered repeated challenges and failures. This can be attributed to what Ashutosh defines as “imaginative geographies”.⁵⁰⁸ The artificial and speedy process that arbitrarily divided the large subcontinental landmass has exposed some very fundamental problems of belonging, identity, and citizenship. As Ashutosh argues, though the resistance movements against colonialism may have seen some success, the struggle remains over asserting national communities in the region.⁵⁰⁹ Multiple overlapping identities being subjected to separation and hierarchy by the colonial project and their beneficiaries have left an indelible mark on the subcontinent by drawing the lines that divided it into the national borders of India and (East and West) Pakistan.⁵¹⁰ As Ashutosh points out that the role of resistance and struggles against colonialism is belied the continued search for freedom and belonging “onto the cumbersome contours of the postcolonial state”.⁵¹¹ The nation-state project

⁵⁰⁵ Emmanuel Brunet-Jailly, ‘Theorizing Borders: An Interdisciplinary Perspective’ (2005) 10 *Geopolitics* 633, 643.

⁵⁰⁶ Tripathi and Chaturvedi (n 496) 178.

⁵⁰⁷ *ibid.*

⁵⁰⁸ Ashutosh (n 498) 4.

⁵⁰⁹ *ibid.* 5.

⁵¹⁰ *ibid.*

⁵¹¹ *ibid.* 6.

has failed due to the replication of “colonial mappings of essentialized communal division and factionalism”.⁵¹² Needless to say, postcolonial geopolitics in the region have exposed the fault lines that have continued to reinforce imaginative geographies of national community, identity, and territory. Many of these have unfortunately manifested into draconian domestic policies in a failed attempt to achieve ethnoreligious homogeneity. The imaginative geographies have continued to create arbitrary convergences that reproduce exclusionary notions of identity and nationhood. South Asian borders and borderlands essentially “express the limits of national belonging and the disjuncture between citizenship and territory.”⁵¹³ All this captures the essence of colonially induced disenfranchisement, dispossession, and displacement, and also points to the flaws with the nation-state model in the subcontinent.

State-making as a refugee-generating process

The final element of the critique of the nation-state is associated with state-creation or territorial reorganization as a refugee-generating process. It has been well established that colonial boundary-making in the subcontinent has had impacts on populations and identity. By placing a much finer point on the impact that state-creation has on displacement, Zolberg argues that one of the most prominent factors under which factors of persecution emerge is through the transformation of empires into nation-states.⁵¹⁴ In the case of the Partition of India, this process of transformation was imposed and forced. As Zamindar argues, the process of this long process of partition entailed the division, categorization, and regulation of people, places, and institutions, from which “emerged the “undefined”, the “stateless”, and a landscape of divided families.”⁵¹⁵ Zamindar’s argument is a scathing indictment of the system of nation-states which was reinforced

⁵¹² *ibid.*

⁵¹³ *ibid.*

⁵¹⁴ Zolberg (n 486) 24.

⁵¹⁵ Zamindar (n 1) 226.

decades earlier by Hannah Arendt. Arendt laid particular emphasis on the framework of nation-states for rendering individuals stateless and reinforced the notion that the existence of inalienable rights of individuals was predicated on the existence of nation-states. While the Western doctrine of human rights guarantees rights to everyone, its efficacy like other international instruments is predicated on the existence of nation-states. And since state sovereignty applies within the confines of a jurisdiction within a nation-state's borders, the rights of individuals do not exist outside these borders according to Arendt. The concept of nation-state implicitly decrees that individuals within the state borders are able to access any of their basic human rights only if they are citizens of the state. In this way, it is surmised that individuals are not born with inalienable rights but are born with inalienable rights guaranteed by their nationality.⁵¹⁶

Based on this, Zolberg argues that implied within the system of nation-states is the idea that only nationals could be citizens and can enjoy the full protection of legal and other institutions of the state.⁵¹⁷ Anyone who was outside the purview of the system of nation-states was hence left stateless and rightless. The notion of rightlessness is hence represented by the loss of formal membership in a political community. In addition to this, states also have the capacity to deny and restrict membership to certain groups of people. Considering this principle, nation-states can deny citizenship to certain groups of people or turn away refugees from their borders. The nation-state's right to such measures is implicitly authorized by the principles of sovereignty, though such measures are not authorized by any form of legislative mechanism, either at the state level or at an international level.⁵¹⁸ Therefore, as Arendt argues, "the clearer the proof, of [nation-states'] inability to treat stateless people, the more difficult it is for states to resist the temptation to deprive

⁵¹⁶ Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 1951) 288.

⁵¹⁷ Zolberg (n 486) 28.

⁵¹⁸ Bridget Cotter, 'Hannah Arendt and "the Right to Have Rights"' in Anthony F. Lang, Jr. and John Williams (eds), *Hannah Arendt and International Relations* (Palgrave Macmillan 2005) 98.

all citizens of legal status and rule them with an omnipotent police.”⁵¹⁹ In the throes of the crisis that emerged from the Partition of India, denationalization also became an integral part of capturing the essence of this newly found independence from colonialism. However, the disorderly nature of colonial boundary-making coupled with the ambiguities associated with the identity of those displaced also underscores the failure of the system of nation-states in the subcontinent. Displacement, division, and categorization along ethnoreligious lines became the markers of the contingent conditions that led to disorderliness associated with the drawing of an international boundary in the subcontinent. Hidden in these realities are the interconnected legal, social, and political struggles for clarity on how colonial inquisition, invasion, and the subsequent state-making along Eurocentric lines can be a form of persecution – something that has never been accounted for in refugee protection norms.

Contrary to the belief that nation-states could guarantee inalienable rights to citizens of a given nation, Zolberg argues that political transformations and the creation of nation-states are not benevolent processes.⁵²⁰ Zolberg critiques Arendt’s preoccupation with the political rights of citizens by arguing that the creation of nation-states also entails social and cultural processes. In the case of the partition, the ethnoreligious heterogeneity was not taken into account, and the intention was to achieve two nation-states that possess ethnoreligious homogeneity. Therefore, as Zolberg argues, “the formation of nation-states out of the debris of empires usually also entails the abolition of an *ancien régime*, a partial thoroughgoing revolution, in the course of which entire social strata may come to be viewed as obstacles in the same sense as cultural minorities.”⁵²¹ Using Arendt’s framework of state creation, Zolberg argues that though there may be specific persecutory

⁵¹⁹ Arendt (n 516) 290.

⁵²⁰ Zolberg (n 486) 30.

⁵²¹ *ibid.*

factors that lead to refugee flows, it is significant to understand that they are associated with the transformation of empires into smaller states. Triggered by a change in circumstances, such as in the subcontinent where the partition marked the end of British colonialism, Zolberg argues that victim groups begin to emerge. With such tensions underscoring the creation of new international boundaries, as with the subcontinent, conflicts begin to arise which may then exacerbate generalized chaos and conditions that generate refugee flows across states. As Tripathi and Chaturvedi argue, the creation of colonial boundaries in the subcontinent was a “hegemonizing and homogenizing process of othering in both its material and discursive manifestations” that have dictated identity, nationhood, and citizenship.⁵²² As Tripathi and Chaturvedi argue the “nation-building projects of [the subcontinent] continue to generate practices of inclusion and exclusion and are sustained discursively through flagging differences [...] that are religious in nature”.⁵²³ As a result of this transformation from empire to nation-states, the identity of the populations in the subcontinent was in flux as colonial boundaries etched upon them new modes of identities and citizenship. Zolberg argues that patterns of territorial reorganization led to greater chaos in the global south. While cultural diversity can help in greater political management there is a greater imperative placed on this particular element with respect to the system of nation-states.⁵²⁴ As a result, the system of nation-states insists upon relatively autonomous socio-cultural communities. This means that “in order for a nation to come into being the population must be transformed into individuals who share a common nationality.”⁵²⁵ This form of territorial reorganization in the subcontinent resulted in the disbandment of old solidarities between different populations that resisted the colonial rule and had forced systems imposed upon the local populations which were

⁵²² Tripathi and Chaturvedi (n 496) 178.

⁵²³ *ibid*

⁵²⁴ Zolberg (n 486) 36.

⁵²⁵ *ibid*

deeply divided.⁵²⁶ With scarce resources and knowledge on state-building, the subcontinent was left to its own devices to build a community from the remnants of colonial traumas and violence. The project of nation-building had to be expedient and pragmatic in the subcontinent, given the multifarious forces that pushed these newly independent states to assert a renewed sense of nationalism, while simultaneously asserting their place in the international community of states. The blueprints left behind by the British were internalized and eventually led to massive displacement across newly created international borders. The end to formal colonialism may have created new pathways for progress in the subcontinent. However, colonial boundary-making was inextricably linked to differences and divisions, and the conditions for ‘refugee-generation’ were inescapable in the context of the subcontinent during the partition.

Subalternity and personhood

Having examined the impact of colonialism on the creation of nation-states, and the cascading effect on identity, it is critical to also examine how colonialism shaped understandings of personhood – more importantly subaltern personhood. By examining the relationship between coloniality and the hierarchical ordering of the world’s populations, one can understand how asylum seekers were characterized and continue to be so based on myopic definitions of personhood and humanity. Asoke Sen defines the term subaltern as “the people that is subordinate in terms of class, caste, age, gender and office, or in any other way”.⁵²⁷ Sen elucidates that for colonial India, personhood was curated by the imposition of an economic and political system through imperialism. Such systems lacked any nuance or capacity for integration into pre-existing local systems of governance and economy.⁵²⁸ This resulted in the lack of self-sufficiency for those

⁵²⁶ *ibid* 37.

⁵²⁷ Asok Sen, ‘Subaltern Studies: Capital, Class and Community’ in Ranajit Guha, *Subaltern Studies: Writings on South Asian History and Society (Volume 5) Subaltern Studies* (1987) 203.

⁵²⁸ *ibid* 206.

who were colonized and were at the receiving end of “hybrid modes of exploitation”.⁵²⁹ As mentioned earlier, South Asian personhood was reconstructed by the British, courtesy of the cartographic divisions that resulted in two postcolonial states of India and Pakistan. The creation of international borders, the impacts of which were mapped on to people in an attempt to establish ethnoreligious homogeneity in India and Pakistan, was the colonial *coup de grace* that left both states with the remnants of such divisions. This is evocative of Mayblin’s arguments on how these changes underscore the putative transition from pre-modernity to modernity with both temporal and geographical dimensions.⁵³⁰ Mayblin contends that this transition is a manifestation of colonialism whereby the temporal dimension is a rupture that points to an event or a series of events that led the pre-modern system to transform into an ostensible system of modernity.⁵³¹ The geographical dimension is rooted in differences that grew out of the European assumption that many places are either democratic and liberal, and many others that do not possess European characteristics or extra-European are undemocratic and illiberal.⁵³² This meant that transforming the colonial state into postcolonial political units with European characteristics, was the manifestation of the Partition of India, which was engineered to provide a potential pathway to modernity. Modernity is rooted in specific characteristics of European history that point to the idea that Western societies are civilized while the rest of the world is either pre-modern or traditional.⁵³³ Such assumptions reaffirm the arguments made by scholars like Mutua, Ōnuma, Césaire, and Chimni, to name a few, who argue that colonialism creates an impression that modernity is the ultimate characteristic that societies must strive to achieve, and civilizational dialogue is centered

⁵²⁹ *ibid* 207.

⁵³⁰ Mayblin (n 71) 38.

⁵³¹ *ibid*.

⁵³² *ibid*.

⁵³³ *ibid*.

in Europe. This decontextualizes many of the other colonial experiences and oppression faced by countries in the global south, and more importantly overlooks the pre-colonial history of these places.

The impact of such assumptions has led to the institutionalization of racism and hierarchies, that also characterized 'human' in specific terms. Without going into great detail, it is significant to foreground personhood so as to gain a better understanding of the exclusionary notions of the global refugee regime. For instance, Gyanendra Pandey argues that communal strife or conflict between people of different religious persuasions, was represented as one of the most distinctive features of Indian society, by the British colonial regime in India.⁵³⁴ The British were instrumental in not only constructing this narrative but also being able to produce a historical reading of such events that overlooked the political and subjective experiences of the people of India, based on their identity. Pandey argues that "the communal riot narrative was perhaps the most important colonialist statement on the nature of politics in this society" and it had become dominant in the reading of Indian history.⁵³⁵ Pandey shows that this historical reconstruction was marked by its ability to provide an examination of communalism in terms of the European experience in addition to dispossessing Indians' sense of autonomy or agency. The British Government in India decided to draw up statistical data to substantiate this communalism without providing any contextual basis for identification along religious or ethnic lines.⁵³⁶ This is deeply rooted in the binary of the modern versus the pre-modern, whereby Europeans positioned themselves as civilizational superiors. In addition to justifying the brutality of colonialism, this also provided a fertile ground to view the

⁵³⁴ Gyanendra Pandey, 'The Colonial Construction of 'Communalism': British Writings on Banaras in the Nineteenth Century' in Ranajit Guha, *Subaltern Studies: Writings on South Asian History and Society* (Volume 6). *Subaltern Studies* (1989) 132.

⁵³⁵ *ibid.*

⁵³⁶ *ibid.*

world in civilizational terms that continue to define international relations today. Mayblin argues that “within this frame, racism [...] flourished” and also allowed for groups of people to be “hierarchically ordered”.⁵³⁷ She further argues that “coloniality allows for a tacit understanding of the hierarchical ordering of human bodies that some are more worthy of respect, labour rights, migration rights, access to healthcare and education than others”.⁵³⁸ Rooted within these narratives is the dualism of the ostensible universality of human rights and the ‘third-world other’ who is excluded from accessing these rights – more specifically the right to asylum. Therefore, it is critical to examine how the characterization of refugeehood is underpinned by coloniality and hierarchy. As Mayblin argues, having demonstrated that coloniality is deeply intertwined with the understanding of European modernity, central to this is the contemporary contempt towards those seeking asylum.⁵³⁹ This frame of understanding lends itself to discussions on epistemic violence whereby, the asylum seeker is designated as “infrahuman”, and “as distant [and] less valuable”, whereas the British citizen is civilized.⁵⁴⁰ This raises questions on how the notion of ‘human’ was designated “through the lens of coloniality and modernity.”⁵⁴¹

The idea of ‘human’ is rooted in European modernity and was always designated based on specific descriptors. The descriptors allowed for the brutalization of people of color across the world through slavery and indentured servitude. As Mutua argues, human rights norms are a continuation of the European colonial project that cast people in the global south as savages and outside the orbit of this corpus.⁵⁴² Mayblin’s arguments reaffirm Mutua’s that universal human equality is aspirational purely because human rights norms are exclusionary and did not originally

⁵³⁷ Mayblin (n 71) 39.

⁵³⁸ *ibid.*

⁵³⁹ *ibid* 40.

⁵⁴⁰ *ibid.*

⁵⁴¹ *ibid.*

⁵⁴² Mutua (n 177).

apply to everybody.⁵⁴³ The putative notion of universal human equality is also belied by the “multiple schemas” designed to classify human beings along a specific hierarchy based on physical characteristics that were seemingly based on science.⁵⁴⁴ Civilizational inferiority was also deeply intertwined with the lower degrees of humanity attached to people as a part of the colonial enterprise. As Mignolo argues, human dignity was placed beyond the reach of indigenous peoples or those who were enslaved as a result of the lower degrees of humanity attached to them. He argues that by placing these groups of people on the margins, the colonists decided that “[t]he figure of the indigenous, unlike that of the refugee, was supposed to be educated, managed, and either included or totally excluded from the human community.”⁵⁴⁵ As earlier sections have shown, this process of dehumanization “reproduced itself in the colonial experiences after the nineteenth century in Asia and Africa, and in the internal colonialism of nation-builders in Latin America.”⁵⁴⁶ Therefore, as Mignolo argues, “the figure of the colonized did not qualify for the “right of the man and of the citizen” and was therefore not extended to people who were enslaved and were placed into indentured servitude.⁵⁴⁷ The characterization of ‘human’ or ‘person’ is centered around “European colonial activities and philosophies”, thereby giving rise to the notion that this is not a universal concept but is instead contingent on racial othering of colonized peoples of the world.⁵⁴⁸

Having demonstrated that personhood was associated with the notion of subalternity, it is critical to show how this was implemented in practice in the subcontinent. This can then aid in a better understanding of the exclusionary notions of the *Refugee Convention* whereby subcontinental displacement was not viewed within its purview since territories in the region were

⁵⁴³ Mayblin (n 71) 40.

⁵⁴⁴ *ibid* 41.

⁵⁴⁵ Walter D. Mignolo, *The Darker Side of Western Modernity: Global Futures and Decolonial Options* (Duke University Press 2011) 239.

⁵⁴⁶ *ibid*.

⁵⁴⁷ *ibid*.

⁵⁴⁸ Mayblin (n 71) 42.

subjected to arbitrary reorganization as a part of the process of ‘decolonization’. Mignolo’s arguments on the need for regulation and management of colonized peoples provide evidence to support Gyanendra Pandey’s analysis on personhood in the context of the subcontinent. Pandey draws on the example of the District Gazetteer of Banaras that compiled the list of disturbances that occurred between Hindus and Muslims in the city throughout the 19th century. The entry reads that religious antagonism between the two groups resulted in frequent riots between them. He demonstrates that the British account of these riots was to show the indiscriminate level of violence between the two groups.⁵⁴⁹ The Gazetteer reports that the British had intervened to restore peace by stationing troops in the city of Banaras in a bid to repress the popular disorder.⁵⁵⁰ Pandey argues that a distilled account of the riots was to demonstrate that the British had played a part in “civilizing” the city. But such accounts had other major impacts including the assessment of the constitutional and political condition of India in the 1920s and 1930s.⁵⁵¹ Colonial accounts of communal violence between the Hindus and the Muslims were curated to create a narrative of fanaticism and irrationality devoid of other significant contextual elements such as the dangers of the colonial state. The narrative also drove home the point of the perverted nature of the Indian population, by highlighting and stamping the fundamental antagonism between these two groups of people. This proved to be convenient for the British, as Pandey argues, since the colonial obsession with ethnic and doctrinal signs for identifying rival crowds was one of the purposes of recording these accounts.⁵⁵² This is a testament to how South Asian personhood was reduced to being understood as primitive, pre-political, and proto-historic. Characterization of Indian polity

⁵⁴⁹ Pandey (n 534) 135.

⁵⁵⁰ *ibid* 136.

⁵⁵¹ *ibid*.

⁵⁵² *ibid* 147.

as an element that needs regulation and management, was systematic that resulted in a perpetual sense of disenfranchisement even after the end of the British Empire in India.

Pandey also discusses the paradox of violence that occurred during the Partition of India. Inasmuch as scholars have acknowledged the massive violence that surrounded or even constituted the Partition of India, the history of such violence has scarcely been addressed. Providing an overview of the history of partition violence could clarify issues around the colonial narrative that was created to characterize South Asians.⁵⁵³ Pandey argues that recent research on colonial India underlined the distinction between the violence of the state and the violence of the people as was represented by British colonial historiography. He notes that the former was considered to be more carefully organized, controlled and legitimate while the latter was characterized as uncontrolled, chaotic and excessive.⁵⁵⁴ However, the role of the state in perpetrating or instigating such violence was more invisible in colonial historiography. This was an intentional doing as colonial historiography of India presented its people as being predisposed to compulsive, pointless and destructive violence based on religious persuasions. Unfortunately, modern-day representations of communal strife and violence have continued with the legacy of colonial narrative, by reducing people to rabbles, mobs, and ‘uncivilized’ masses.⁵⁵⁵ Pandey’s emphasis on explaining partition violence or any violence that occurred before the cartographic divisions are, in part, to move beyond what could be considered as “transitional dysfunctions” or “aberrational interruptions”.⁵⁵⁶ British colonial historiography has been instrumental in characterizing such moments of violence as representing collective madness of pre-political and proto-historic people, who had suspended

⁵⁵³ Gyanendra Pandey, ‘The Prose of Otherness’ in Ranajit Guha, *Subaltern Studies: Writings on South Asian History and Society* (Volume 8). *Subaltern Studies* (1994) 189.

⁵⁵⁴ *ibid* 191.

⁵⁵⁵ *ibid*.

⁵⁵⁶ *ibid* 192.

their rationality and reason that governs ‘normal’ behavior. Pandey argues that purely identifying violence as a reflection of ongoing processes or aberrational interruptions can result in normalizing it and could potentially reduce history to a generalized account of the triumphant march towards modernity and progress.⁵⁵⁷ I would take this argument a step further to say that representations of violence by the British was divorced from contexts such as the colonial state’s involvement in such chaos, and contributed to the view that South Asians were non-autonomous peoples with no legal or political personality which was evident from years of colonial oppression.

Pandey argues that colonial historical writings had very little to do with India whose subjects were subsumed by the British Raj. What we notice is an assimilation of Indian history onto that of Great Britain’s thereby dispossessing and negating any historical identity that could be projected by Indians.⁵⁵⁸ As mentioned earlier, Pandey argues that British colonial historiography was instrumental in creating a notion of personhood that represented Indians as the primitive other and regarded their history to be marred by violence. This narrative not only reinforced the false narrative that mass violence was prevalent in societies with backward, ill-educated, and insufficiently enlightened people⁵⁵⁹, but also absolved the colonial state as being instrumental in instigating such violence. As Pandey argues, “[a] litany of Orientalist pronouncements restate[d] the opposition between Us and Them” and strengthened arguments that Hindus and Muslims were essentially violent communities, who were predisposed to becoming riotous until they were “disarmed, civilized, and disciplined through western education”.⁵⁶⁰ This points to the epistemic violence implicit in understanding incivility, pre-modernity, and the

⁵⁵⁷ *ibid.*

⁵⁵⁸ *ibid* 193.

⁵⁵⁹ *ibid* 195.

⁵⁶⁰ *ibid* 197.

supposed lack of progress that afflicts the colonized peoples as opposed to the civilizational European superiors.⁵⁶¹

One final element on the aspect of personhood as being intricately connected to statehood would be significant in adding context to the sections on international law. Pandey argues that the development of the Indian nation often neglects the point that it was not fully constituted from the start. Like any postcolonial state, the development of Indian statehood was founded through a long process of contest, resistance, and struggle.⁵⁶² The identity of the postcolonial states of India and Pakistan was forged by the events during the Partition of India. However, colonial historiography does not adequately capture the role that colonial interventions played in such events. Based on Pandey's arguments, it can be deduced that the events that led up to the development of these postcolonial states, such as the Partition of India and the involvement of the British Raj, also failed to capture the imagination of early European international law experts. Early drafters of frameworks that serve as the backbone of international law, overlooked the subjective experiences of South Asians. This has resulted in the establishment of an exclusive international law framework that provides inadequate remedies for postcolonial states like India and provides lip service to current issues like forced migration. This has been well-established not only in the previous chapters of this dissertation but has also been examined thoroughly throughout. The analysis on subcontinental geopolitics along with the analysis of subaltern personhood has provided us with a framework to understand the pitfalls of refugee protection norms beyond just the normative framework of human rights and begins with the very idea of 'humanity'.

⁵⁶¹ Rolando Vázquez, 'Translation as Erasure: Thoughts on Modernity's Epistemic Violence' (2011) 24 *Journal of Historical Sociology* 27, 28 in Mayblin (n 71) 40.

⁵⁶² Pandey (n 553) 194.

India's role in the League of Nations and the League Against Imperialism

The central premise of this chapter is to demonstrate that India's engagement with international refugee law frameworks, did not emerge in a vacuum, but is instead colored by resistance to early Eurocentric forces that often dominate discussions on forced displacement. This chapter is particularly significant for two reasons. While contextualizing India's early experiences with respect to refugee protection initiatives, the chapter simultaneously demonstrates how India's anomalous international identity prior to 1947 influenced its interaction with international law mechanisms. This chapter analyzes four elements. By outlining India's status under the League of Nations and the dualism that existed in its status both as a British Dominion and as a sovereign state, the chapter examines India's role in advancing the rhetoric on counter-hegemony. Drawing on some of the core objectives of the 1927 League Against Imperialism Conference, the chapter also outlines India's role in resistance against the colonial and imperial atrocities, and the impact it had on engagement with international law. Finally, the chapter also maps the early history of international refugee law and India's unique approach to it which will be done with the help of archival data.

The purpose of this chapter is to foreground India's refugee protection practice by highlighting some of the initiatives that were undertaken to provide 'sanctuary' prior to the formal end of colonialism in the subcontinent. By examining some of these practices, the chapter will enable a better understanding of how India's refugee protection practices have evolved over time. With a specific focus on the League of Nations' refugee protection initiatives, this chapter will examine specific events of displacement, and analyze India's role in providing sanctuary to many of these refugees. Based on specific arrangements for refugee protection as mandated under the

auspices of the League of Nations this chapter will also look at India's interaction with international refugee law mechanisms. The chapter will also provide an overview of India's position in the League and its relationship to the formation of future international mechanisms to provide refugee protection. The chapter will begin with an overview of India's anomalous international identity while under British rule. It will then lay out some critical notions of India's relationship with the League of Nations and provide some thoughts on the state's pseudo-sovereign identity. By looking at the discussions that were undertaken at the 1927 Brussels Conference, the chapter will also analyze India's role in counter-hegemony. The chapter will also outline a short history of early refugee law principles under the League's auspices. By outlining some of the major refugee movements during this time, the chapter will look at India's response to the same and the practices that led up to India's complex interactions with the establishment of the *Refugee Convention (travaux préparatoires)*.

India's complex interactions with the international system, in general, can be characterized based on the anomalous identity it enjoyed while being present as a British Dominion. While India was still a part of the British Empire, its special position was conceded during the Imperial War Conference in 1917. Resolution IX that was passed at the conclusion of the conference stated that:

“...while a re-adjustment of Empire constitutional relations would have to wait until after the War, the Conference desired to place on record its view that such re-adjustment should fully recognize Dominion autonomy together with the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial

*concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.”*⁵⁶³

Based on India’s anomalous identity and its initial interactions with the precepts of international law, it is critical to examine its identity as a ‘state’ before the formal end of colonialism in the subcontinent. Poulouse illustrates that, though protected and semi-sovereign states were able to be parties to the treaties under the League of Nations, there were limitations on the modalities of this position.⁵⁶⁴ The British government was successful in gaining separate representation for its dominions including India. However, this resulted in a rather anomalous situation for India which manifested in its inability to control its own domestic affairs while simultaneously enjoying recognition as a sovereign entity by the international community.⁵⁶⁵ India’s relationship with the League of Nations, given the former’s anomalous and semi-sovereign identity, had some implications on implementing the principles of the treaties established under the League.

India’s anomalous identity

Writing in 1930, Lanka Sundaram explains that a novel procedure was introduced to create a special international status for India.⁵⁶⁶ During the negotiations of the Peace Treaty of Versailles, Indian representatives were appointed as plenipotentiaries to participate in the conference. India’s conspicuous participation in the First World War led the British government to rethink the former’s

⁵⁶³ R. MacG. Dawson, ‘The Imperial Conference’ (1937) 3 *Canadian Journal of Economics and Political Science* 26.

⁵⁶⁴ T. T. Poulouse, ‘India as an Anomalous International Person (1919-1947)’ (1970) 44 *British Yearbook of International Law* 201.

⁵⁶⁵ Ram Prakash Anand, ‘The Formation of International Organizations and India: A Historical Study’ (2010) 23 *Leiden Journal of International Law* 5.

⁵⁶⁶ Lanka Sundaram, ‘The International Status of India.’ (1930) 9 *Journal of the Royal Institute of International Affairs* 452.

position in the international arena.⁵⁶⁷ As mentioned earlier, the Imperial War Conference of 1917 paved the way for India to be recognized as having an adequate voice to offer in the “regulation of the foreign policy and foreign relations of the Empire.”⁵⁶⁸ India was afforded special representation on an equal footing with the self-governing Dominions and the plenipotentiaries played an important role in various international conferences. With the signing of the Treaty of Versailles, India became an original member of the League of Nations. As Sundaram points out, this position was paradoxical in nature given that India enjoyed the sovereign rights on an equal footing with other Dominions but had yet to reach full autonomy with respect to internal affairs.⁵⁶⁹ India’s strong relationship to the development of international law norms pre-existed its ability to autonomously control domestic affairs. For instance, as Sundaram demonstrates, India’s position as an original member of the League of Nations meant that representatives and plenipotentiaries were present at the annual sessions of the League Assembly and International Labour Conference. India also enjoyed the active participation of representatives in various non-League conferences. But India’s most important engagement was with the Hague Conference on the Codification of International Law in 1930 that was spearheaded by the League of Nations.⁵⁷⁰ By this time India had secured representation on several permanent international law-making bodies. The representatives who were sent to these annual meetings were also Indian nationals, and as Sundaram argues, provided them with the opportunity to gain experience in international affairs.⁵⁷¹ However, this participation was fraught given the ambiguous nature of India’s legal status; this meant that India had to balance the duality that came with its status as a British Dominion but

⁵⁶⁷ *ibid* 454.

⁵⁶⁸ *ibid*.

⁵⁶⁹ *ibid* 455.

⁵⁷⁰ *ibid* 457.

⁵⁷¹ *ibid*.

simultaneously as a participant in the League. India's position as the only non-self-governing member of the League of Nations based on Resolution IX raised questions on its international status and its ability to assert a fully international status. As Legg argues, there has also been an "extensive rethinking of imperial power" and its influence on India's status before the end of formal colonialism.⁵⁷² As mentioned earlier, sovereignty plays a critical role in any state's ability to assert its authority as an international member in any multilateral organization; it was no different with respect to India's ability to assert its position in the League. However, as Legg argues, India's sovereign identity during this time was not static, and was subject to imperial influence. India's sovereignty was dependent on colonial influences that were frequently reshaped and violated, while the domination at their core could be exposed by the politics of "anti-colonial nationalism" that led to where we might look for it.⁵⁷³ India's position in the League and its simultaneous struggle for recognition as an independent nation is best captured by this quote – "[t]he battle for empire has seen military and economic [strength] challenged by the power of discourse, identity, and representation, then by disciplinary power, biopolitics, and embodiment, and, latterly, by increased attention to sovereignty."⁵⁷⁴

India and the League of Nations: How did it function as an anomalous international entity?

India's participation in the League of Nations' meetings and other conferences at an international level provided it with an opportunity to express concerns and issues on matters that affected the state directly. The domestic affairs of India were still controlled by imperial interests. However, despite domestic affairs of India being outside the purview of consideration for the

⁵⁷² Stephen Legg, 'An international anomaly? Sovereignty, the League of Nations and India's princely geographies' (2014) 43 *Journal of Historical Geography* 96, 97.

⁵⁷³ *ibid.*

⁵⁷⁴ See: Miles Ogborn, 'Review: Lauren Benton, A search for sovereignty: law and geography in European empires, 1400-1900', (2012) 117 *American Historical Review* 814. [quoted in Legg (n 572) 97.]

League, the representatives and national delegates were known to co-opt the visibility they had in the League as an international platform to express national aspirations.⁵⁷⁵ India made an impression at an international level which was evident from the 1927 appointment of Sir Atul Chatterjee as the President of the International Labour Conference. Sundaram demonstrates that India's interaction with the League demonstrates its active cooperation with international affairs.⁵⁷⁶ Though under the auspices of the British Empire, India was able to establish itself as a state that was willing to undertake prompt action based on the Conventions that it ratified. But Sundaram argues, that India's ratification and implementation of such Conventions was not the result of unthinking acquiescence to the League but was the result of considerable contributions that the state made in accomplishing action on such international instruments. For instance, India's strong leadership in the League was evident from the action that was undertaken in relation to the development of industrial and social legislation that affected the status of workers across the world but more significantly Indian workers.⁵⁷⁷ Sundaram also demonstrates that Indian delegates in international conferences voted separately from the Dominions, though efforts were made to bring them to unanimously agree on some issues. Though India was able to assert its position in the League on some issues, which pushed back against a tacit unanimity, it was equally clear that India's interests were bound up by the British Empire's influence.⁵⁷⁸ However, India's international relations were bound up by colonial interests which was evident from the general principle. The general principle outlined that, "[t]he Paramount Power has the right to exercise some of the attributes of sovereignty on behalf of the states and, in respect of those attributes, H.M.

⁵⁷⁵ Sundaram (n 566) 458.

⁵⁷⁶ *ibid* 459.

⁵⁷⁷ *ibid*.

⁵⁷⁸ *ibid*.

Government can automatically bind the states absolutely and by its own authority.”⁵⁷⁹ While India was able to assert its position on matters of foreign policy that brought other states in close contact, the duality in its identity as both a British Dominion and as an international member was up for question. For instance, in matters of domestic implication, the British Government managed to influence and effectively push India into adopting a position favourable to the Empire.

This anomalous position is also analyzed in great detail by R.P. Anand. Given that British subordination of India was complete, despite India’s position as a founding member of the League, systematic attempts by the British authorities prevented India from responsible participation in world affairs.⁵⁸⁰ India’s anomalous position was a test for international law’s malleability while dealing with states that did not enjoy absolute autonomy in their internal affairs but were afforded a position of authority at an international level. This position was tenuous given that the British Empire subsumed smaller Indian Princely states within its domain thereby resulting in a loss of identity. Given that a “fully sovereign state [...] is a normal subject of international law”, and enjoys the right to conclude treaties, and the right to membership of international organizations, among other things, India’s anomalous status brought these issues into question.⁵⁸¹ The Princely states of India were protectorates of the British Empire and did not enjoy the same kind of international personality as other sovereign states did. Therefore, as Poulouse argues, such states are designated as “vassal States [and] the Indian Princely States under the Paramountcy of the British Crown provided the best example of vassal States.”⁵⁸² This anomaly is also reinforced in Oppenheim’s analysis. He explained that,

⁵⁷⁹ *ibid* at 464.

⁵⁸⁰ Anand (n 565) 7.

⁵⁸¹ Poulouse (n 564) 202.

⁵⁸² *ibid*.

*“The position of India as subject of international law was for a time anomalous. She became a member of the League of Nations; she was invited to the San Francisco Conference of the United Nations . . . She exercised the treaty-making power in her own right. However, so long as the control of her internal and external relations rested ultimately with the British Government and Parliament, she could not be regarded as a sovereign state and a normal subject of international law. In 1947, she became a fully self-governing Dominion and independent state.”*⁵⁸³

From the discussions on India’s international status during this time, it is evident that an entrenched sense of colonial power was at play, that restricted India’s interactions with the League of Nations, and by extension international law principles. This also demonstrates the extent to which India’s fraught relationship with many organizations like the League was attributed to Eurocentric and hegemonic precepts that reinforced the power of imperialism under international law. India’s disillusionment with international law principles is not new, and there is evidence to show that this was the case even prior to the end of formal colonialism. The tenuous nature of India’s relationship to international organizations like the League of Nations was also tested by the expression of opposition by some Indian nationalist leaders. India’s ability and freedom to make decisions on policy matters were affected by the domineering effect of the British Empire. This led many Indian leaders to call for India’s withdrawal “because the League of Nations was a fraud and was meant for the perpetuation of imperialism”.⁵⁸⁴ India’s representation in the League of Nations gave some opposition members domestically an opportunity to demand self-governance. Though the mandate of the League prevented it from weighing in on matters of a

⁵⁸³ Lassa Francis Lawrence Oppenheim, *International Law*, ed. H. Lauterpacht (1955), 209. [quoted in Anand (n 565) 9].

⁵⁸⁴ Anand (n 565) 12.

domestic nature, India's leadership and resistance to the British Empire's heavy influence were noteworthy. Though India signed on to treaties under the League of Nations and managed to obtain membership in other international bodies like the Permanent Court of International Justice, its credentials as a fully functioning member of the international community were questioned.⁵⁸⁵ Anand demonstrates the opposition that laid bare India's feeble presence by pointing to a comment by Phiroz Sethna, an Indian member of the Council of State in India. Sethna argued that "India cannot take her rightful place in international affairs unless she has her right place as a nation".⁵⁸⁶ India's representatives were also nominated by the British government which further led to questions on the actual strength of India's position in the League. Anand also argues that, "[t]he so-called 'representatives of India' [...] had 'always been the nominated tools and mouthpieces, megaphones and microphones of the British Government.'"⁵⁸⁷ Therefore, from the foregoing discussions it is evident that though India was appointed as a member of the League of Nations based on the principle of sovereign equality, its ability to conduct itself as a fully sovereign member was severely curbed and only led to the British gaining more weight in the League.⁵⁸⁸ Thus began India's tenuous relationship to the precepts of the League and therefore leads to questioning the ostensible sovereign equality in multilateral organizations.

Racial hierarchy in the League of Nations

Entrenched within internationalism and the League of Nations is racial hierarchies. As a context to the next chapter, which outlines the evolution of the refugee regime, it is critical to articulate how racial hierarchies were central to the history of asylum. By establishing frameworks for refugee protection that were restrictive in nature, the drafters and states that were at the helm

⁵⁸⁵ *ibid.*

⁵⁸⁶ *ibid* 13.

⁵⁸⁷ *ibid.*

⁵⁸⁸ *ibid* 15.

had implicitly declared that certain forms of disenfranchisement as experienced by those in formerly colonized states were tolerable while those in Europe had to be dealt with swiftly by restoring some form of state protection. However, these frameworks did not emerge in a vacuum as proposals that were made by Japan to include racial equality within the Covenant of the League of Nations were rejected by the British Empire and the United States.⁵⁸⁹ The colonial and white supremacist order underpinned the resistance from western powers in allowing for racial equality to be featured actively within the proceedings of the League of Nations. Mayblin argues that “it was not so much ‘race’, the relations between ‘races’ or physical or mental difference that are at stake at combating racial hierarchy but the motivations of racists and the obstacles they impose.”⁵⁹⁰ Despite India’s key role in the League of Nations as a founder member, it was evident that membership in the League of Nations had no bearing on India’s ability to actualize its vision of internationalism free of the Empire’s influence, given the absence of official recognition of race equality.⁵⁹¹ Though India was also an active participant of the League Against Imperialism and was, in fact, a leading proponent of the need for racial equality in international fora like the League of Nations, much of India’s ability to actualize this vision came towards the end of formal colonialism in the subcontinent in 1947. The lack of recognition of race equality had impacts on other elements of international relations. Access to human rights and refugee protection was predicated on the colonial mindset and based on the countries of origin of those who were disenfranchised. As will be evident from the analysis of the refugee regime’s evolution, colonially derived conceptions of human hierarchy had an impact on their established and by extension contemporary notions of refugee protection. A note on racial inequality in international relations,

⁵⁸⁹ Mayblin (n 71) 90.

⁵⁹⁰ *ibid.*

⁵⁹¹ *ibid* 95.

internationalism, and organizational setup, is hence of utmost importance to be articulated since it allows for a better contextualization of the imprecision in contemporary international frameworks of refugee protection.

India and the League Against Imperialism

A critical notion that this project articulates is the absent discourses on refugee protection norms, by historicizing the development of counter-hegemonic and anti-colonial approaches to international law and international relations. However, it is significant to note that subcontinental counter-hegemony did not develop in a vacuum, but instead existed even under British rule. Anti-colonial and nationalist movements domestically worked in tandem with efforts at a global level, that amplified the suppressed voices of those who were colonized. This is true of many other states in the global south that were resisting imperialism and colonialism. As mentioned above, though India was a founding member of the League of Nations, the Paris Peace Conference that established the League was not inclined to provide states like India full autonomy at an international level. As Prashad demonstrates, “[t]he interests of the colonized had to be curtailed”⁵⁹²; the form of self-determination that was afforded to states like India “did not mean the end to colonialism, but [...] meant paternalistic imperialism”.⁵⁹³ Article 22 of the Covenant of the League of Nations went so far as to say that the colonies and territories are “inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world”.⁵⁹⁴ Given such presumptions, the League Against Imperialism (LAI) acted as a form of “direct attack on the League of Nations’ preservation of imperialism in its mandate system.”⁵⁹⁵ As significant as it is to analyze Indian anti-imperialism and anti-colonial nationalism after 1947, India’s role in

⁵⁹² Prashad (n 339) 21.

⁵⁹³ *ibid.*

⁵⁹⁴ ‘The Covenant of the League of Nations’, (1920) 1 *League of Nations Official Journal* 3, 9.

⁵⁹⁵ Prashad (n 339) 21.

the LAI is equally important to articulate its counterhegemonic approaches to international law. As Michele Louro argues, “[Indian] nationalism and internationalism were not mutually exclusive but overlapped and informed one another.”⁵⁹⁶ In this way, access to international platforms like the League of Nations proved to be a medium to engage with other anti-imperialist leaders thereby forging a strong nationalist movement at home that would campaign against the restrictions of the colonial state. Subaltern studies literature reviewed earlier shows that anti-colonial nationalism was established with the interests of the national dimensions of the subcontinent in mind. However, it can also be qualified that Indian nationalism transcended the borders of South Asia and developed greater strength through its relationship with other anti-imperialist leaders elsewhere in the world and articulating these demands at the League.⁵⁹⁷

The League Against Imperialism was preceded by the Brussels Congress Against Colonial Oppression and Imperialism (Brussels Congress hereinafter), which “was a powerful and inclusive moment of anti-imperialist activism”.⁵⁹⁸ The brutality of colonial aggression throughout the third world had been festering and the Brussels Congress provided a platform for intercolonial solidarity across ideological, political, and geographical boundaries.⁵⁹⁹ By grounding some of India’s efforts at advancing anti-imperialism and anti-colonialism at a domestic level, and efforts at establishing global solidarity with the LAI, this section will help to understand India’s engagement with international law norms and more specifically international refugee law.

As noted earlier in the project, the 1955 Bandung Conference was a celebratory moment of the defeat of imperialism. However, it did not emerge in a vacuum, as it was the culmination of

⁵⁹⁶ Michele L. Luoro, ‘India and the League Against Imperialism: A Special “Blend” of Nationalism and Internationalism’ in Ali Raza, Franziska Roy, and Benjamin Zachariah (eds.), *The Internationalist Moment: South Asia, Worlds, and World Views, 1917-1939* (Sage Publications 2015) 24.

⁵⁹⁷ *ibid.*

⁵⁹⁸ Michele L. Luoro, *Comrades Against Imperialism: Nehru, India, and Interwar Internationalism* (Cambridge University Press 2018) 19.

⁵⁹⁹ *ibid.* 20.

the efforts undertaken by the League Against Imperialism that paved way for a robust anti-imperialist movement.⁶⁰⁰ The Brussels Congress laid the foundation for the League Against Imperialism as it marked a pivotal moment of “anti-imperialist comradeship” and demonstrated the need for a “special “blend” of nationalism and internationalism” in order to advance the resistance against colonial aggression.⁶⁰¹ The LAI’s credibility and strength lay in its ability to establish solidarity across geographical and political borders. Irrespective of the distinctiveness of colonial aggression unleashed by European powers across the peoples of the third world, leaders strived to “build a collective antiimperialist resistance and to blend national and international projects”.⁶⁰² Though the pathways to achieve this differed, the soul of this anti-imperialist stance was the presence of an alternative discourse of internationalism and a network of leaders who were able to “internationalize the colonial question”.⁶⁰³ Much like Bandung that celebrated the success of anti-imperialist movements that preceded it, the Brussels Congress and the LAI constituted a vision that would reimagine “the world from an anti-imperialist lens”.⁶⁰⁴ With the Empire positioning itself as the guiding force of civilization, this anti-imperialist worldview not only necessitated a rejection of this notion of European superiority⁶⁰⁵ but also needed to “influence the approach of Asian peoples, states and scholars to international law”.⁶⁰⁶ With racism, civilizing missions, and imperial histories underpinning the imaginary savagery of the peoples of the third world, the LAI had to strive to achieve its agenda of emancipating the colonized populations of the world. As Luoro demonstrates, the manifesto of the LAI co-opted one of the foundational aspects of the civilizing mission to justify the need for emancipating the oppressed. One of the

⁶⁰⁰ Prashad (n 339) 32.

⁶⁰¹ Luoro (n 598) 42.

⁶⁰² *ibid* 42.

⁶⁰³ *ibid* 43.

⁶⁰⁴ *ibid*.

⁶⁰⁵ *ibid*.

⁶⁰⁶ Chimni (n 320) 253.

central pillars of this manifesto read, “[t]he emancipation of the oppressed colonial peoples, vassals and those subjugated by violence, will not diminish the great accomplishments and possibilities of the material and spiritual culture of mankind but will increase them on a scale never yet experienced”.⁶⁰⁷ The Brussels Congress and the LAI ushered in a new era of anti-imperialist thought and solidarity beyond borders. These two movements not only provided a firm footing for domestic anti-colonial movements in the subcontinent and elsewhere, but they also “rejected the “civilizing mission” evoked by European colonial regimes” and strongly resisted the Eurocentric notions of civilization, international law, and international relations, which “bolstered a new vision for internationalism based on anti-imperialism”.⁶⁰⁸

A more detailed discussion on India’s engagement with the LAI warrants a more exhaustive and meticulous study of this subject matter, which is outside the purview of this project. However, the League Against Imperialism was a clarion call to reimagine a more inclusive, less Eurocentric manner of internationalist thought, that also accounts for the experiences of the colonized peoples of the world. As Prashad demonstrates, the legacy of the LAI remains ambiguous as the agents of the Empire and imperialist powers realized the dangers inherent in allowing for a strong anti-imperialist solidarity movement to thrive and succeed. This danger manifested in the arrest of many anti-imperialist activists upon their return home where the “colonial overlord[s] still bore jurisdiction”.⁶⁰⁹ This bears another reminder of the success or the lack thereof of anti-imperialist or third-world solidarity movements. Actualizing the vision of anti-imperialism continues to be aspirational simply due to the forcefulness of Eurocentrism and the Empire’s inability to forego the privileges that hegemonic structures offer.⁶¹⁰ While the legacy of

⁶⁰⁷ *ibid* 44.

⁶⁰⁸ *ibid* 22.

⁶⁰⁹ Prashad (n 339) 29.

⁶¹⁰ Al Attar (n 153).

such anti-imperialist movements may have been minimal or ambiguous as Prashad argues, it is significant to note that they were successful in highlighting the biases in internationalism and more specifically in international law. This has paved way for counterhegemonic and subversive practices of international law to be established and implemented, while remaining true to its core objectives. For instance, *ad-hoc* and more inclusive refugee protection norms in the subcontinent have served as steps in the right direction and have functioned as one of the legacies of early anti-imperialist movements.

The early days of international refugee law: 1920-1947

Having laid out India's involvement with anti-imperialist internationalism, it is critical to sharpen the focus by viewing its refugee protection practice in the early years of international refugee law. While much of the literature on the colonial roots of the global refugee regime is focused on contemporary norms of protection such as the *1951 Convention* and the *1967 Protocol*, there is an absence of detailed critical analyses on the frameworks of refugee protection that preceded post-WWII mechanisms. Therefore, demonstrating India's approach to refugee protection before independence serves to map its resistance to contemporary refugee protection norms and its non-signatory stance to the *1951 Convention* and the *1967 Protocol* – an element that will be elaborated upon in subsequent chapters. Mapping the early days of international refugee law also serves to demonstrate that contemporary principles of international refugee law, which possess a putative universal character, were built upon pre-existing norms that relegated the role that colonized states played in their development. Contemporary norms of refugee protection also took a life of their own in the subcontinent, which manifested in *ad-hoc* practices after the Partition of India. More importantly, as has been demonstrated throughout, the framework of refugee protection falls short of being able to truly respond to every scenario of displacement in the subcontinent, many of which were the result of colonial oppression and cartographic divisions imposed as a form of decolonization. Concerns expressed by states in the subcontinent were often overlooked and international refugee law was not developed collaboratively with the consent of formerly colonized states, the now postcolonial states. Therefore, in order to remain true to the objectives of international cooperation and refugee protection, states like India were compelled to participate in Eurocentric practices of refugee protection but did so in their own way. With mainstream international refugee law never being able to provide solace to those displaced, India

had to develop refugee protection practices of its own modeled on some of the core objectives of refugee protection after the end of formal colonialism.

Locating India in the early days of international refugee law

International refugee law literature is replete with expositions on the history of how a refugee came to be defined. As Goodwin-Gill argues, such discussions are so ubiquitous that nothing new is likely to emerge.⁶¹¹ However, the history of international refugee law, though heavily examined in literature, has failed to account for regional specificities and the impact of colonialism on displacement itself. Goodwin-Gill argues that “[i]nternational refugee law evolved within the politics of confrontation”, and as a form of international cooperation that included the voices of individuals and international institutions, “who acted as advocates and interlocutors with governments”.⁶¹² However, these voices were almost always that of Europeans’ and exclusionary in nature; these voices failed to account for alternative epistemologies of refugee protection that co-existed with hegemonic practices. This is evidenced by the space that formerly colonized states like India occupied in the early days of internationalism in organizations like the League of Nations, which was both contentious and performative in nature, purely because the standards were set by European states. In fact, India’s sovereign identity was subsumed within the British Empire’s, despite the ostensible founder member status the former possessed.⁶¹³ India was also placed in a position of a double-bind; while the League Against Imperialism pushed back on

⁶¹¹ Guy Goodwin-Gill, ‘A Short History of International Refugee Law: The Early Years’, in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 24.

⁶¹² *ibid.*

⁶¹³ See: ‘Original Members Who Have Ratified the Treaty of Peace’, (1920) 1 *League of Nations Official Journal* 12. The original members who ratified the Peace Treaty were Belgium, Bolivia, Brazil, British Empire (Canada, Australia, South Africa, New Zealand, India), France, Guatemala, Italy, Japan, Poland, Peru, Siam, Czecho-Slovakia, and Uruguay.

Eurocentrism and hegemony, India was also unable to forsake its responsibility towards early international law frameworks and by extension refugee protection principles as a member of the League of Nations. Therefore, the history of international refugee law is incomplete without a closer look at the role non-European states played in refugee protection and critically examining the voices that were wilfully marginalized and erased. Despite the optimism with which early refugee law principles were established, they constituted a myopic sense of international cooperation that left out the concerns of many states in the global south.

As the rest of the chapter will demonstrate, India's response to the displacement of Armenians and Russians in the early 20th Century, Polish refugees in years leading up to the Partition in 1947, and other groups of refugees that sought refuge prior to the formalization of the *1951 Refugee Convention* cannot go unnoticed and should be included in the history of international refugee law. The archival data available from the League of Nations and National Archives of the United Kingdom will bear witness to and provide a detailed analysis on the grounds under which 'sanctuary' was afforded to those who came to India fleeing deprivation and other crises resulting from war, famine, religious persecution and violence. This intervention in refugee law history is significant for one other reason. It serves as an outline to conceptualize ideas of 'persecution' and 'protection' during the pre-1947 period in the subcontinent and what constituted 'practice' of affording 'sanctuary' or 'asylum'. An analysis of India's refugee protection regime as mandated by the League of Nations will set the scene for analysis that will be undertaken later in the thesis. This provides an angle to show that India's forced migration practice grew out of responding to crises that were crippling Europe and North America, and not within the subcontinent.

The previous chapter outlined some discussions on India's position as a member of the League of Nations and its role in advancing the rhetoric of anti-imperialist internationalism through the League Against Imperialism. India was a signatory⁶¹⁴ to the Covenant of the League of Nations, which did not clearly outline any responsibility towards the protection of refugees. However, the Covenant left some scope for matters of international concern to be brought forward in order to be acted upon or resolve. As Goodwin-Gill demonstrates, three issues were of international concern. Prisoners of War remained in exile years after the conclusion of the war, the threat of public health issues and epidemics, and "the anomalous situation of refugees without the protection of their country of origin or nationality".⁶¹⁵ Despite India's anomalous identity in the League of Nations while simultaneously facing oppression and subordination at the hands of the British Empire, its cooperation in responding to refugee crises after the First World War is particularly noteworthy. The practice that was adopted during this time, albeit under the British Empire, could animate discussions on how refugee protection mechanisms evolved after India's independence and the establishment of the 1951 *Convention*. Comprehensive work on the analysis of refugeehood between 1920 and 1950 has been undertaken by scholars like Walter Adams, Louise Holborn, and James Hathaway. Drawing on these interventions coupled with archival records I will analyze India's interaction with the evolving refugee protection frameworks.

Evolution of Refugeehood: interwar years to the early post-WWII years

The evolving nature of refugeehood was marked by the changing circumstances of refugee movements and other instabilities around and after the First World War. The end of hostilities coupled with the social and political reorganization of Europe resulted in massive displacement.

⁶¹⁴ *ibid.*

⁶¹⁵ Goodwin-Gill (n 611).

Other matters of international concern such as famine and epidemics, in addition to exiled prisoners of war and refugees, led the League of Nations to respond collaboratively with the International Committee of the Red Cross, Red Cross Societies, and other voluntary organizations.⁶¹⁶ Despite the ambiguity of the Covenant of the League of Nations with respect to refugee protection, there was a sense of urgency to respond to displacement resulting from upheavals and instabilities. One of the League of Nations' objectives was to build itself into an organization that embodied humanitarianism and international conciliation.⁶¹⁷ This led to the development of some guiding principles of refugee protection that served as a blueprint upon which more contemporary instruments of international refugee law were established. However, the current model of refugee protection, despite its limitations evolved over a period of time.

Prior to the formalization and establishment of the *1951 Refugee Convention*, international legal mechanisms pertaining to refugee protection alluded to three distinct trends in understanding refugeehood – juridical, social, and individualist. These three trends are predominant between 1920 and 1950.⁶¹⁸ The juridical approach to refugeehood was conceptualized based on persons who were effectively deprived of the formal protection of their government. The juridical status associated with refugee protection during this time was to restore formal *de jure* state protection to those who were disenfranchised and allow for the international movement of those who were unable to migrate since no nation was willing to assume responsibility for their protection.⁶¹⁹ After the mid-1930s, there was a departure from the restoration of *de jure* protection to a social understanding of refugeehood that encompassed more broad-based forms of disenfranchisement.

⁶¹⁶ *ibid.*

⁶¹⁷ Louise Holborn, 'The League of Nations and the Refugee Problem.' (1939) 203 *The Annals of the American Academy of Political and Social Science* 124.

⁶¹⁸ James Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33 *The International and Comparative Law Quarterly* 348, 350.

⁶¹⁹ *ibid.*

The social approach to refugeehood was predominant between 1935 and 1939 which was focused on ensuring that those who were helpless casualties of broad-based social or political occurrences could receive protection from such circumstances.⁶²⁰ The late 1930s marked the end of group disenfranchisement as the foundation of refugee protection and the beginning of an individualist approach that focused on specific grounds of persecution and individual relationship to the state, which were precursors to contemporary refugee protection norms. The individualist terms of refugeehood were based on perceived injustice or fundamental incompatibility with the home state. Refugee status was determined based on an individual's fear of the authorities of a state who have rendered their stay intolerable. These three modes of conceptualizing refugeehood provided pathways to better understand refugee protection and allowed authorities to relax restrictions.⁶²¹ While much of the literature on the history of international refugee law maps the evolution from 1920 to 1950, the next chapter will demonstrate that this history diverges from 1947. A critical evaluation of the refugee regime's evolution will reveal that efforts to reshape the post-WWII refugee framework failed to account for displacement resulting from colonially installed cartographic divisions in the subcontinent.

Juridical Perspective

The League of Nations' challenges entailed responding to massive refugee movements in addition to defining refugeehood. With the Russian Revolution displacing millions in 1917, many of whom were fleeing destruction, economic instability, and famine, such devastating conditions brought with it a need to conceptualize refugeehood. As Hathaway writes, "the juridical phenomenon of refugeehood" was based on the idea that members of certain groups or individuals lacked the ability for international movement and "have been effectively deprived of formal

⁶²⁰ *ibid* 361.

⁶²¹ *ibid* 370.

protection of their government”.⁶²² The displacement of Russian refugees also manifested into many countries’ disinclination to admit them, which led to some steps of international scope to be established in order to afford some measure of protection to refugees. In a letter to the Council of the League of Nations, the then President of the International Committee of the Red Cross Gustave Ador urged the Council to not only appoint a High Commissioner for Russian Refugees, but also characterized the relief work for Russian Refugees as an “obligation of international justice”.⁶²³ The High Commissioner had the task of considering three main aspects of refugeehood: the definition of the legal status of refugees, their repatriation to Russia and their emigration to other countries, and the coordination of various material relief efforts.⁶²⁴ In September 1921, Fridtjof Nansen was appointed the High Commissioner for Refugees.⁶²⁵ With the hostilities of the First World War, weakening state institutions and other infrastructure in states that were receiving these refugees, the technical organs of the League of Nations, namely International Labour Office, the International Emigration Commission, and the Permanent Commission on Passports, Transit and Communications, were called upon to respond to the crisis. The League of Nations was viewed as the only organization with the capacity to respond to such crises rather than organizations with an exclusively humanitarian mandate.⁶²⁶

Many Russian refugees lost their nationality after five years of their exodus and living abroad without the authorization of the Soviet Government. Following this, the League adopted a measure to provide them with identity certificates and travel documents.⁶²⁷ The League of Nations Governmental Conference on Identity Papers for Russian refugees, which was convened in August

⁶²² *ibid* 349.

⁶²³ See: Annex I ‘The Question of the Russian Refugees’ (1921) 2 *League of Nations Official Journal* 225, 227.

⁶²⁴ Holborn (n 617) 125.

⁶²⁵ *ibid*.

⁶²⁶ *ibid* 124.

⁶²⁷ Arrangement with respect to the Issue of Certificates of Identity to Russian Refugees, signed at Geneva, July 5, 1922. League of Nations, Treaty Series, Vol. XXX, No. 855, pp. 238-242.

1921, recognized the need for special provisions to be made for “the egress of Russian refugees from the countries where they had congregated and their ingress to the States that were willing to receive them”⁶²⁸ as outlined in a 1922 memorandum. Many Armenians were also being displaced around this time from north-east Turkey and faced persecution from the violence unleashed upon them by the Turkish government, due to the distinctive religious backgrounds of many.⁶²⁹ As a result, the League of Nations was called upon to extend the identity certificates program to Armenian refugees as well. Similar to the agreement established for Russian refugees, the Council of the League of Nations at its September 1923 meeting drew attention to the situation of Armenian refugees who were also facing disenfranchisement and extended this program.⁶³⁰ Many refugee movements during this time were the result of discriminatory policies based on religion, economic or political insecurity, and anti-Semitism, in addition to forcible expulsion which resulted in the loss of nationality. This led to the juridical understanding of refugee protection that was founded on restoring the *de jure* deprivation of state protection.⁶³¹ Responding to such refugee movements, the League of Nations drafted a series of arrangements. Supplementing the 1922 and 1924 arrangements was the arrangement of May 12, 1926, relating to the issuance of identity certificates.⁶³² The arrangement defined Russian refugees as “[a]ny 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” and Armenian refugees as “[a]ny 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

⁶²⁸ Papers of Identity: Memorandum by the High Commissioner for Russian Refugees, Document No C.L. 79 (b) 1922, 20 July 1922 (League of Nations Archives, Geneva).

⁶²⁹ Hathaway (n 618) 352.

⁶³⁰ Document No C.L. 72 1924, 10 June 1924 (League of Nations Archives, Geneva).

⁶³¹ Hathaway (n 618) 360.

⁶³² Arrangement relating to Issue of Identity Certificates to Russian and Armenian Refugees, signed at Geneva, May 12, 1926, League of Nations, Treaty Series Vol. LXXXIX, 1929, Nos. 2004, pp. 48-52.

acquired another nationality.”⁶³³ Subsequently, the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees was established which was unaltered in terms of its definitions of Russian and Armenian refugees.⁶³⁴

With increasing numbers of refugees seeking protection, the League of Nations recognized a need for a more robust framework to extend assistance to those displaced. This resulted in the *1933 Convention Relating to the International Status of Refugees* which imposed a series of obligations on signatory states. The 1933 *Convention* had the definitions of the 1926 and 1928 arrangements incorporated within it. This new framework provided refugees with the ability to seek protection from asylum states. The contracting states were responsible for issuing identity certificates and also provide them with a few welfare and social benefits. As mentioned earlier in this thesis, despite the 1933 League of Nations Intergovernmental Commission declaring that “the desirability of a convention [was aimed] at securing a more stable legal status for refugees”⁶³⁵, the *1933 Convention relating to the International Status of Refugees* turned out to be a virtual mechanism that states subverted and were unwilling to commit to.⁶³⁶

Social Perspective

After 1935, the social understanding of refugeehood became more prevalent with specific political upheavals that led to forced migration which was a manifestation of the development of new refugee protection provisions under the auspices of the League of Nations.⁶³⁷ Such an approach to refugeehood was based on assessing broad-based social or political occurrences that led to displacement and led the League of Nations to expand its mandate to protect those who had

⁶³³ *ibid.*

⁶³⁴ Arrangement relating to the Legal Status of Russian and Armenian Refugees, signed at Geneva, June 30, 1928, League of Nations, Treaty Series Vol. LXXXIX, 1929 No. 2005, pp. 55-61.

⁶³⁵ Hathaway (n 385) 87.

⁶³⁶ *ibid.*

⁶³⁷ Hathaway (n 618) 360.

lost effective protection of their home state.⁶³⁸ Hathaway argues that the difference between the juridical and social conceptualizations of refugeehood was that the former was based on the consequences associated with losing formal protection of the state; “involuntary migrants who continued to benefit from the formal legal protection in their country of origin [...] were ineligible for international assistance” irrespective of the extent of protection they could receive.⁶³⁹ However, on the other hand, refugeehood based on social phenomena were a departure from a strict application of the juridical understanding and was instead rooted in the notion that some groups were so “adversely affected by a particular social or political event” that it resulted in their inability to enjoy effective national protection.⁶⁴⁰ Therefore, this system was different in a way that it was not based on a united common status concerning the international legal system.⁶⁴¹ The social approach to refugee protection was in essence to encompass those who lost both *de facto* and *de jure* international legal protection.⁶⁴²

After the establishment of this new framework a social approach to refugeehood was adopted which essentially considered specific political and social events that resulted in the loss of protection for many who were directly affected by them. The response to the Saar refugee crisis was a sign of the reconceptualization of refugeehood to include social concepts of the circumstances of forced migration.⁶⁴³ The displacement was the result of a plebiscite of January 1935 that resulted in an overwhelming majority voting for the Saar territory to rejoin Germany.⁶⁴⁴ Until this time, Saar was under British and French occupation based on a League of Nations

⁶³⁸ *ibid* 349.

⁶³⁹ *ibid* 367.

⁶⁴⁰ *ibid* 360.

⁶⁴¹ *ibid*.

⁶⁴² *ibid*.

⁶⁴³ *ibid* 368.

⁶⁴⁴ League of Nations, Fifth Meeting of the 84th Session of the Council (17 January 1935); 16 *League of Nations Official Journal* 132.

mandate. Those who voted against this plebiscite were forced to flee the territory. They were politically opposed to the German government and its practices of suppressing religious freedoms. This resulted in the plan for the issue of a certificate of identity to refugees from the Saar on May 24, 1935.⁶⁴⁵ As mentioned earlier, successive mechanisms of refugee protection despite the move to the social understanding of refugeehood, still did not guarantee clarity in refugee rights. The compliance to these frameworks was still left up to states and sovereign rights often trumped refugee rights. However, despite the loose institutionalization of these early conventions, codification of refugee rights transformed with the entrenchment of freely accepted international supervision of national compliance with refugee rights, which eventually transformed into shared objectives of states through cooperation.⁶⁴⁶ However, as mentioned throughout, lacunae have persisted in the modern refugee regime as well due to the regime's reliance on state sovereignty. An analysis of case studies later in the thesis will provide a sharper articulation of the lacunae in the global refugee regime.

Individualist Perspective

Prior to the formal establishment of the 1951 *Refugee Convention*, the individualist approach to refugeehood was conceptualized. This was done by retreating from basing refugeehood on group disenfranchisement and reshaping the concept to include the fundamental incompatibility of an individual claiming protection with the government of their country of origin.⁶⁴⁷ The Intergovernmental Committee on Refugees (ICR) was “the first international body to recognize that persons still in their countries might qualify as refugees worthy of protection and assistance” due to specific grounds of persecution or disenfranchisement.⁶⁴⁸ Under the ICR the

⁶⁴⁵ Dossier No 20A/22493/19255, 30 July 1935 (League of Nations Archives, Geneva). See: Hathaway (n 618) 362.

⁶⁴⁶ Hathaway (n 385) 87.

⁶⁴⁷ Hathaway (n 618) 377.

⁶⁴⁸ *ibid* 371.

focus shifted to protect those who were fleeing their countries of origin due to their religious beliefs, political opinions, and “racial origin to evaluate the merits of the claims to refugee status”⁶⁴⁹, an element that was the precursor to contemporary norms of refugee protection as outlined the *1951 Convention* and *1967 Protocol*. As opposed to making references to *de jure* or *de facto* loss of protection as in previous refugee protection frameworks, under the ICR the focus shifted to more personalized and individualized notions of protection.⁶⁵⁰ Subsequently, the United Nations Relief and Rehabilitation Administration (UNRRA) was established, not as an organization to provide assistance to refugees, but as an organization set up by 44 governments to provide assistance to and repatriate those who had been displaced due to the Second World War. The scope of the UNRRA was therefore quite limited.

With the end of the Second World War, more contemporary refugee protection norms were established under the auspices of the International Refugee Organization (IRO). The IRO was tasked with resolving situations that could have a debilitating impact on the already weakened European infrastructure and to also “internationalize the refugee problem”.⁶⁵¹ The IRO allowed for the adoption of a refugee definition that was specifically based on persecution and fear of persecution on the grounds of race, religion, nationality or political opinion.⁶⁵² However, the Constitution of the IRO determined refugeehood based on very specific criteria that led to disenfranchisement as opposed to the previously adopted measures of refugee protection. According to the Constitution of the IRO, a refugee is an individual “who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had

⁶⁴⁹ *ibid.*

⁶⁵⁰ *ibid.*

⁶⁵¹ Gil Loescher, ‘The International Refugee Regime: Stretched to the Limit?’ (1994) 47 *Journal of International Affairs* 351, 356.

⁶⁵² *ibid.*

retained his nationality”, is a victim of “Nazi or fascist regimes or of regimes which took part on their side”, or was a Spanish Republican or a victims “of the Falangist regime in Spain”, or those “who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion”.⁶⁵³ The definition was established after opposition from several governments with very divergent views on understanding refugeehood. In addition to the ambiguity of the definition, the “IRO served the interests of occupied Germany and Western European countries which were concerned about hosting refugee populations”.⁶⁵⁴ These efforts were almost entirely spearheaded by the “principal architect of the postwar refugee regime, the United States”, which also exercised “exclusive control over [IRO’s] leadership”.⁶⁵⁵ However, as Hathaway demonstrates, by mid-1947 this definition constituted the universal “international standard”⁶⁵⁶ in understanding refugeehood and the IRO developed as a precursor to the UNHCR and the *1951 Convention*.

A need to rewrite the ‘Eurocentric’ evolution of the refugee regime

The legal framework for protecting refugees in the early years was based on principles outlined in ‘aliens law’ which recognized the “special vulnerabilities of people” outside their countries of origin.⁶⁵⁷ This enabled the establishment of mechanisms for state responsibility towards aliens. The League of Nations built on such achievements and strengthened these mechanisms through “collectivized surrogacy”, which constituted a shift from purely bilateral accountability to the international community as a whole engaged in refugee protection efforts.⁶⁵⁸

With the flight of Russian and Armenian refugees in the 1920s, and many other refugees in the

⁶⁵³ United Nations, ‘Constitution of the International Refugee Organization’ (15 December 1946) 18 United Nations Treaty Series 3, 13.

⁶⁵⁴ Loescher (n 651).

⁶⁵⁵ *ibid.*

⁶⁵⁶ Hathaway (n 618) 376.

⁶⁵⁷ Hathaway (n 385) 83.

⁶⁵⁸ *ibid.*

subsequent years, some states reinforced their borders and expressed disinclination towards hosting such refugees. This was somewhat mitigated by several mechanisms and treaties that were established. The earliest interventions of refugee protection conceptualized refugeehood as a condition in which an individual is unable to seek the protection of their own state and was deprived of its protection.⁶⁵⁹ The Minorities Treaties regime guaranteed minority groups with a range of “basic civil and political entitlements”.⁶⁶⁰ These treaties paved the way to address the plight of refugees. Many refugees were entitled to benefit from actions taken for them by a succession of League of Nations High Commissioners, such as the ability to obtain identity certificates and other forms of residual protection.⁶⁶¹

Three important critiques emerge from this. As demonstrated by the analysis on the evolution of the global refugee regime, refugeehood has been conceptualized, institutionalized, and predicated on the interests of Europeans and European states. Such conceptualizations have been actualized by several mechanisms that were implemented to protect those disenfranchised in Europe but did not account for disenfranchisement elsewhere in the world specifically in formerly colonized states. This preoccupation with European disenfranchisement leads to the second critique – the Eurocentrism endemic in international cooperation wherein the narrative of ‘international’ did not include the global south. As seen throughout, very little of the history and evolution of international refugee law includes perspectives from formerly colonized states. Frameworks that were developed in the early post-WWII years set an ostensibly universal standard for refugeehood. However, not all of those who had been disenfranchised had access to such protection.⁶⁶² Finally, the contestations and objections that have arisen over a period of time, in

⁶⁵⁹ *ibid* 84.

⁶⁶⁰ *ibid* 81.

⁶⁶¹ *ibid* 85.

⁶⁶² Mayblin (n 71) 113.

conceptualizing refugeehood, have also been specific to European objections as opposed to those that were advanced by states like India. A metric that Eurocentrism uses to extend refugee protection is based on the inherent idea that international refugee law is a European solution to a European problem, thereby placing displacement in the global south outside the purview of these frameworks.

The evolution of international refugee law is significant in articulating myopia associated with characterizing displacement and disenfranchisement on specific criteria from specific geographical locations. The salience of these refugee protection frameworks lay in the notion that the primary objective was to implement safeguards against atrocities that were committed in Europe. Much of the Third World was still firmly under colonial oppression and subordination when early mechanisms of refugee protection were being established. The result was optimistic, yet exclusionary, as frameworks of international cooperation and refugee protection failed to capture the true extent of the seemingly ostensible commitment to afford international protection to those who were disenfranchised. As Özsu argues, “the roots of minority protection are frequently traced back to the 1648 Treaty of Westphalia”⁶⁶³ and as mentioned earlier, institutional formations such as Conventions and international organizations that are associated with Westphalian traditions are instrumental in guiding mainstream international law narratives.⁶⁶⁴ Therefore, needless to say, entrenched within the literature and the history of international refugee law is a deep colonial mindset. As evident from the analysis earlier, much of the scholarship on the evolution of the international refugee regime focuses primarily on the “political landscape of Europe in the middle of the twentieth century and on European refugees”.⁶⁶⁵ The League of

⁶⁶³ Özsu (n 251) 22.

⁶⁶⁴ Eslava et. al. (n 341) 15.

⁶⁶⁵ Mayblin (n 71) 113.

Nations in its infinite power saw Russians and Armenians as disenfranchised peoples but overlooked the violence inflicted upon colonial peoples. Similarly, the UNRRA appropriately extended protection to those who were victimized by the hostilities of fascist regimes, but overlooked the violence and oppression inflicted upon peoples in the third world, many of whom were also displaced due to the creation of new international borders during the same time. The history and evolution of international refugee law fail to capture the phenomena associated with colonialism, and decolonization movements spearheaded by the global south, and their impact on reshaping the world order.⁶⁶⁶ Even more recent literature on the history of international refugee law, such as those presented by scholars like Guy Goodwin-Gill, omits the impact of colonialism in displacement and the role that formerly colonized states like India played in reshaping asylum policy. Such omission coupled with the entanglement of colonialism in the institutionalization of asylum policy, calls for a critical analysis of the global refugee regime.⁶⁶⁷

As highlighted throughout the thesis, there is a need to reconsider and rewrite the history of the refugee regime by centering the third world given that non-European asylum seekers and refugees have been denied adequate protection since the inception of refugee protection frameworks. As Mayblin argues, this punitive approach to refugee rights and curtailment of asylum seekers' rights, are not surprising given that it emerges from a long and consistent "unequal treatment" under the yoke of the Empire.⁶⁶⁸ As mentioned earlier, analyzing the institutionalization of human rights is not complete without understanding the "exclusions present at their founding"⁶⁶⁹ and understanding rights as "a part of the European colonial project wherein actors and those

⁶⁶⁶ *ibid* 114.

⁶⁶⁷ *ibid*.

⁶⁶⁸ *ibid*.

⁶⁶⁹ *ibid*.

seeking rights are cast in positions of superiority and subordination.⁶⁷⁰ As the subsequent chapters will highlight, such exclusions are so endemic to the system of rights and asylum policy that they have continued to influence contemporary provisions and conventions. Having set the analysis of refugee protection's exclusionary notions within the broader Eurocentric human rights framework, it is critical to also address the role that states like India played in simultaneously resisting and complying with "the legacies of colonial epistemologies" of the global refugee regime.⁶⁷¹ In the early years, India navigated a delicate duality of being a colonial dominion while simultaneously attempting to gain international recognition by partaking in the early instruments of international refugee law. As the archives will demonstrate, even as a colonial dominion India stood by its commitment to protecting refugees and made independent provisions to protect many who were displaced during the Second World War. However, after the Partition of India in 1947, though India expressed its commitment to refugee protection and was a willing participant in the formalization process of the *1951 Convention*, it altered its position to articulate some level of resistance to the narrowness with which the post-Second World War refugee rights regime was codified. Unexpected developments such as the sudden and massive displacement across newly created international borders in the subcontinent left the newly independent states in crisis. With the *1951 Convention* still heavily focused on redressing disenfranchisement in the European landscape, India's reluctance to partake in the formalization was justified given that this *Convention* did not include colonially induced displacement. From some of the first international legal frameworks established for refugee protection to the contemporary post-WWII instruments, the primary basis upon which asylum was afforded drew upon Eurocentric ideals of universality. An element that will be elaborated upon in the subsequent chapters will be independent India's

⁶⁷⁰ Mutua (n 177) 204.

⁶⁷¹ Mayblin (n 71) 114.

interaction with the IRO and the codification of the *1951 Convention*.⁶⁷² It will be evident that India had no intentions of forsaking international refugee law completely. But given its objections to the constrained standards upon which refugeehood was conceptualized, India was compelled to reconstitute the standards upon which protection was extended to those fleeing persecution, both within the subcontinent and abroad.

Refugees in India between 1922 and 1947

Drawing on India's response to early refugee movements while it was a colonial dominion will serve as a segue to the subsequent examination of India's counterhegemonic stance towards the refugee regime later on in the thesis. Several archival documents show India's willingness to cooperate with the arrangements to protect refugees in the early years of the interwar period. These arrangements took the form of issuing refugees with identification and travel documents with international acceptance known as the "Nansen Passport"⁶⁷³, though archival documents characterize them as 'identity documents'. Though the Nansen Passport was extended initially just to Russian refugees, "the demands of the refugee crisis in early interwar Europe led ineluctably to the extension of the Nansen passport to other groups".⁶⁷⁴ As the archives will show, Armenian refugees and many others who had found themselves in situations of statelessness stood to benefit from the Nansen Passport. While they initially proved to mitigate disenfranchisement of those who had been displaced, Torpey argues that the Nansen Passport had serious shortcomings such as no guarantee of readmission to those who had chosen to travel abroad from their country of refuge.⁶⁷⁵ In order to ameliorate this issue, an important addendum was made to the original arrangement

⁶⁷² *ibid* 115.

⁶⁷³ John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (2nd edn, Cambridge University Press 2018) 158.

⁶⁷⁴ *ibid*.

⁶⁷⁵ *ibid* 159.

that in 1926 mandated that a return visa be stamped on the identity certificate. States were reluctant to accept this new provision as it came “close to granting these refugees rights of access to territory that were now typically reserved for citizens” and led to very limited acceptance among states.⁶⁷⁶ As the archives will demonstrate, later on towards the late 1920s, the League of Nations’ Nansen Refugee Office, began to “perform certain consular functions on behalf of refugees, including certifying their identity and civil status, attesting to their character, and recommending them to government and educational authorities”.⁶⁷⁷ Despite the issues associated with the Nansen Passport system, it represented the beginning of modern refugee protection systems and resolved some of the issues associated with the regulation of movement across borders. More importantly, India’s role in participating in such arrangements of refugee protection cannot be understated as much of its refugee protection practice grew out of responding to forced displacement from Europe.

Russian and Armenian Refugees

The League of Nations Governmental Conference on Identity Papers for Russian refugees proposed an arrangement that was concluded on the 5th of July 1922.⁶⁷⁸ In response to the circular letter with reference to this arrangement, the Secretary of State for India sent a letter to the Secretary-General of the League of Nations informing him of a letter the former had received from the Government of India agreeing to comply with the arrangement of 1922.⁶⁷⁹ Other documents and correspondence point to the notion that the response to protecting Russian refugees was implemented as an intergovernmental effort. In response to India’s willingness and plan to furnish identity certificates to Russian refugees, the Secretary-General of the League of Nations expressed

⁶⁷⁶ *ibid.*

⁶⁷⁷ *ibid.*

⁶⁷⁸ Memorandum by the High Commissioner for Russian Refugees, Document No C.L. 79 (b). See: (n 628).

⁶⁷⁹ Document No.: E. & O. 2123/25 (16 April 1925). [League of Nations Archives, Geneva]. This document is a letter from Mr. Turner of the Economic and Overseas Department of the India Office in London to the *Secretary-General* of the League of Nations regarding the issue of identity certificates to Russian refugees.

his willingness to communicate this plan to other governments.⁶⁸⁰ Subsequently, the displacement of Armenian refugees resulted in the extension of the 1922 arrangement to Armenians as well. Among the 23 states that signed the 1926 arrangement relating to the issue of identity certificates to Russian and Armenian refugees was India⁶⁸¹, which had been issuing identity certificates even prior to this arrangement was implemented. In fact, even prior to the 1926 arrangement, in 1924, the Government of India had begun issuing identity certificates to Armenian refugees, as a letter from the representative for the Secretary of State of India to the Secretary-General of the League of Nations suggests. The letter indicates that the Government of India has no objection to adopting arrangements to issue identity certificates to Armenian Refugees.⁶⁸²

India's actions towards Armenian refugees were also confirmed by the Legislative Department of the Government of India. In a letter from W.T.M. Wright, the Joint Secretary of the Government of India's Legislative Department, to the Under Secretary-General of State for India in the Economic and Overseas Department of the India Office in London, Mr. Wright confirmed that the decision to issue Armenian refugees with identity certificates were undertaken unilaterally without convening a special meeting.⁶⁸³ India's response to Armenian refugees was met with appreciation by Dr. Nansen who was the then High Commissioner for Refugees of the League of Nations. In a letter in response to the adoption of the arrangements, the Secretary-General of the League of Nations confirmed the appreciation from Dr. Nansen to the Government of India's

⁶⁸⁰ Document No.: Rr 409/33/1 (8th May 1925). [League of Nations Archives, Geneva]. This document is a response to the letter above from the *Secretary-General* of the League of Nations to the Under *Secretary-General* of the State for India acknowledging the satisfactory action undertaken by the Government of India regarding the issue of identity certificates to Russian refugees and the former's willingness to communicate this other governments.

⁶⁸¹ League of Nations, 1926 Arrangement Relating to the Issue of Identity Certificates. See: (n 627).

⁶⁸² Document No.: E. & O. 3239/24 (29 August 1924). [League of Nations Archives, Geneva]. This document is a letter from the Government of India that was in reference to a circular letter No. C.L. 72.1924 from the *Secretary-General* of the League of Nations regarding the issue of identity certificates to Armenian refugees.

⁶⁸³ Document No.F.40/X/24-G (7 August 1924). [League of Nations Archives, Geneva].

actions.⁶⁸⁴ Subsequent to the 1926 Arrangement, India as a founding member of the League of Nations continued to provide assistance, sanctuary, and identity certificates to both Armenian and Russian refugees. In a letter on behalf of Dr. Nansen to the Secretary of the Indian Delegation to the Assembly of the League of Nations, the Government of India was lauded for its cooperation in issuing identity certificates to Armenian and Russian refugees.⁶⁸⁵ The League of Nations had requested annual reports from governments who were involved in issuing identity certificates. Several documents show India's involvement in ensuring the issue of identity certificates to both Russian and Armenian refugees, in addition to providing pathways for their travel to other parts of the world. A report for the year 1926-1927 shows that India had issued identity certificates to Russian refugees Mr. Z. Haldinoff who was a Buddhist priest in Gangtok, in the State of Sikkim on June 24th, 1927, and to Mir Haidar Hedja on March 13th, 1927, and Mr. V.V Fenin on July 13th, 1927, both of whom resided in Peshawar (British India, in Pakistan after 1947) and were both trade agents.⁶⁸⁶

While there is limited information available on the efforts undertaken by the Government of India with respect to protecting refugee groups between the late 1920s and early 1930s, documents indicate India's cooperation with refugee protection arrangements and reluctance to deport those who were residing in its territory. A 1932 letter from the Under-Secretary-General of the State for India to the Secretary-General of the League of Nations, states that the India Office

⁶⁸⁴ Document No.48/38294X/33218 (September 6, 1924). [League of Nations Archives, Geneva]. This document is a letter from the *Secretary-General* of the League of Nations to the Government of India in response to the abovementioned Document No.: E. & O. 3239/24 from August 29th.

⁶⁸⁵ Document No.: Rr 409/33/1 (14th September 1927). [League of Nations Archives, Geneva]. This document is a letter from the Assistant High Commissioner for Refugees of the League of Nations to the Secretary of the Indian Delegation to the Assembly of League of Nations acknowledging the satisfactory action undertaken by the Government of India regarding the issue of identity certificates to Armenian and Russian refugees.

⁶⁸⁶ Document No.: E. & O. 6480 (15 July 1927). [League of Nations Archives, Geneva]. This document is the 1927 annual report regarding identity certificates for Russian and Armenian refugees issued by the Government of India. As per the 1926 Arrangement as above, participating governments were urged to submit annual reports to the *Secretary-General* of the League of Nations.

in London had been attempting to find employment for a Russian refugee Boris George, albeit unsuccessfully.⁶⁸⁷ There are several pieces of correspondence concerning Boris George. One document details George's journey. He was found trudging along a railway line near Quetta (modern-day Pakistan, previously in British India), in 1931. When he was examined by authorities, he stated that he was from Riga (current-day Latvia), and he had escaped fearing the tyranny unleashed by the Bolsheviks who had executed George's parents.⁶⁸⁸ Though he was detained by Persian authorities after his escape, upon pleading he was sent to India to seek refuge there. Based on his lack of credentials and documentation, India considered him to be a *bona fide* refugee upon his arrival.⁶⁸⁹ In the same letter, the Government of India desired to deport George to Russia, due to his reliance on public funds. However, the Government simultaneously indicated their reluctance to do so, given the dire circumstances to which he would return.⁶⁹⁰

In another letter concerning Russian refugees in India, information about Ivan Ivanovich Milsaitar and Arseno Michaelovich Repeti was also enclosed, who were present in India and were also looking for employment. Later on, in the same year, a letter from the Secretary of Economic and Overseas Department of the India Office in London to the Secretary-General of the Nansen International Office for Refugees in Geneva indicated a change in tone. In this letter, India was reluctant to deport these refugees.⁶⁹¹ Milsaitar and Repeti had crossed into India from Afghanistan after escaping detention there, and for the fear of being sent back to the Soviet Union. The letter

⁶⁸⁷ Document No.:20 B. 17293/17293 (15 June 1932). [League of Nations Archives, Geneva].

⁶⁸⁸ Document No.: E. & O. 689/32 (19 February 1932). [League of Nations Archives, Geneva]. This document is a letter to the High Commissioner for Refugees of the League of Nations from the *Secretary-General* of the Economic and Overseas Department informing the former of the Boris George's situation in India and his journey from Riga to Quetta.

⁶⁸⁹ *ibid.*

⁶⁹⁰ *ibid.*

⁶⁹¹ Document No.: E. & O. 2896/32 (April 1932). [League of Nations Archives, Geneva]. This letter was from Mr. Turner, representative for the Secretary of Economic and Overseas Department to *Secretary-General* of the Nansen International Office for Refugees which details the stories of Milsaitar and Repeti.

also documents the respective journeys undertaken by Milsaitar and Repeti to India. Milsaitar was known to have been working in Bishkek, Kyrgyzstan (formerly Pishpek) as a mechanic in 1931.⁶⁹² As his contract expired, he attempted to find other employment but crossed into Afghanistan where he was apprehended by authorities. The authorities arrested Milsaitar in Mazar-i-Sharif where he stayed for 17 days. He was subsequently released and given 30 rupees to travel to Kabul where he was once again jailed for two months.⁶⁹³ He managed to escape, and after 10 days reached India, where he begged to not be deported to Russia. Repeti on the other hand was working on a Soviet farm in Ukraine. However, when the time came for him to serve in the Red Army he fled to Afghanistan where he was imprisoned in Kabul for a year.⁶⁹⁴ Milsaitar and Repeti are known to have escaped together to India. Repeti also begged the Indian government to not deport him to Russia or Afghanistan. The Indian government complied and was also willing to provide pathways for employment and other material assistance as per these archival records.⁶⁹⁵ This shows that though there was some inconsistency in refugee protection as in some cases India was more forthcoming with assistance and in certain other cases not.

Refugees in India in the 1930s and 1940s

Throughout the 1930s, India continued to abide by the obligations outlined in the various refugee protection arrangements that were established under the League of Nations. Archival records also show that India was cooperative with the arrangements and mandate of assistance to refugees from the Saar, though it was only a short-term period of displacement.⁶⁹⁶ Addressing the Secretary-General of the League of Nations, the Under Secretary of State for India, E.J. Turner, informs that India had agreed to the extension of the issue of certificates of identity to refugees

⁶⁹² *ibid.*

⁶⁹³ *ibid.*

⁶⁹⁴ *ibid.*

⁶⁹⁵ *ibid.*

⁶⁹⁶ Dossier No 20A/22493/19255, 20 February 1936 (League of Nations Archives, Geneva).

from the Saar.⁶⁹⁷ As mentioned above, refugees from Saar were displaced as a result of a referendum vote.⁶⁹⁸ Even prior to the establishment of contemporary refugee protection frameworks, India was a willing participant to provide sanctuary to many who were fleeing atrocities in Europe, and its role in refugee protection has been consistent despite being characterized as an outlier in international refugee law practice. This consistency will become evident as the lifecycle of a refugee in India is mapped.

Polish and Jewish refugees in India

Despite the tentativeness of the British authorities, the Government of India undertook initiatives to provide sanctuary to and protect Jewish and Polish refugees who began fleeing to safe havens from the late 1930s. For instance, in a letter to Edward Fredrick Lindley Wood (who was a former Viceroy of India) dated January 16, 1939, an Indian civil servant Badri Prasad Mittal had outlined a plan to establish a Jewish colony in the suburbs of Delhi and other parts of North India to aid those who were expelled from Germany.⁶⁹⁹ The plan outlines the allocation of forty lacs (four million) square yards of land in the suburbs of Delhi to establish a colony to house Jewish refugees.⁷⁰⁰ One of the most critical elements that this letter indicates of this proposal was that this is a purely Indian enterprise that would be done with the support of the British Government, given that this was a collaborative effort initiated by the Delhi Improvement Trust, the local Government, and the Government of India.⁷⁰¹ Additionally, about sixty lacs (six million)

⁶⁹⁷ Document No.: E. & O. 1018/36 (20 February 1936). [League of Nations Archives, Geneva]. This letter was addressed to the *Secretary-General* of the League of Nations by Mr. E.J. Turner who was the Under *Secretary-General* of State for India. The letter shows India's agreement to the memorandum from 30th July 1935 (Document No.: C.L. 120.1935.XII) to extending the Nansen Passport System to refugees from the Saar.

⁶⁹⁸ See (n 644). League of Nations, Fifth Meeting of the 84th Session of the Council (17 January 1935).

⁶⁹⁹ F.O. 371/24098/1737, Registry No.: W. 1737/1737/48 (National Archives, London). This dossier contains a letter from an Indian civil servant Badri Prasad Mital to The Right Honourable Edward Fredrick Lindley Wood, Baron Irwin of Kirby Underdale on the 'Proposed Settlement of Jewish Refugees in India' (16 January 1939), in Settlement of Jewish Refugees in India.

⁷⁰⁰ *ibid.*

⁷⁰¹ *ibid.*

square yards of land was also allocated in Delhi to set up factories, workshops, and mills to accommodate Jewish refugees' career prospects. Mr. Mital had requested Baron Wood, to put the former in touch with those who may be interested in the wellbeing of Jews who were expelled as a result of the Second World War.⁷⁰² Following this proposal, the India Office in London allowed for Mr. Mital's proposal to go ahead as he was assisted by the Coordinating Committee of Refugees.⁷⁰³

The most significant initiative undertaken by the Government of India during this time was providing sanctuary and protection to Polish refugees. A series of documents from 1943 indicate the Indian Government's cooperation and service to Polish refugees.⁷⁰⁴ On January 22, 1943, the Polish Ambassador to the United Kingdom M. Rucinski, had addressed a letter to A.E. Walker in the Foreign Office in London. The letter details the movement of several Polish refugees who were in Persia (present-day Iran), and were bound for East Africa. About 7,500 remaining refugees were bound for Southern Rhodesia, India, and Mexico. The Consul General in Bombay had accepted the accommodation of 5,000 Polish refugee children and their mothers.⁷⁰⁵ Upon the acceptance of this proposal a camp was being constructed to accommodate the arrival of the first batch of refugee children in the city of Kolhapur. The Government of India had agreed to accommodate Polish refugees until the end of the war and had also agreed to provide them with visas if they chose to

⁷⁰² *ibid.*

⁷⁰³ F.O. 371/24098/1737, Registry No.: W. 1737/1737/48 (National Archives, London). The aforementioned request was forwarded by A. Dibdin, Esq., of the India Office in London to A.W.G. Randall, Esq., Foreign Office in London (Document No.: P. & J. 671/39 in the same file, dated 17 February 1939). The request was subsequently approved by the latter without objection on 23 February 1939, as per a handwritten note in the same document.

⁷⁰⁴ Dossier No.: F.O.371; File No.: 1499; Registry No.: W/10037/1499/43; Document No.: 5361/43 (January to July 1943) (National Archives, London). This dossier contains a range of documents about the transport of Polish Refugees to India from various parts of the world including the steps undertaken by the Government of India to accommodate them.

⁷⁰⁵ Dossier No.: F.O.371; File No.: 1499; Registry No.: W/1499/1499/48; Document No.: 792/12 (January 22, 1943); (National Archives, London).

travel further to East Africa or other parts of the world.⁷⁰⁶ By April 1943 the camp accommodation for 5,000 Polish refugees was ready. About 11,000 Polish refugees who were moved on from Teheran and Mashhad were temporarily accommodated in transit camps in Karachi. Of those, a few were sent to Southern Rhodesia, East Africa, and Mexico, and others were accommodated in a newly constructed camp in Bombay.⁷⁰⁷

One of the most critical moments of humanitarian effort undertaken by the Government of India in protecting Polish refugees, was detailed in a report that was published in 1943. Pejoratively characterized as the Polish invasion of India, this report by Captain A.W.T. Webb details the arrangements that were made for several thousand Polish refugees by Digvijaysinhji Ranjitsinghji Jadeja who was the Maharaja Jam Sahib (ruling prince) of the western Indian kingdom of Nawanagar.⁷⁰⁸ India had agreed to receive several thousand Polish refugee children who had been orphaned during the typhus epidemic that spread during the Second World War in East Africa. India had set up camps “on the Deccan Plateau a few miles from the city of Kolhapur [in the present-day Indian state of Maharashtra] and on the site lent by the Kolhapur Darbar”.⁷⁰⁹ The camp area was 128 acres and the Indian government had spent 33 lakh rupees (3.3 million) on it. The second camp was located a few miles south of Jamnagar in the present-day Indian state of Gujarat in the town of Chela. Chela was the war-time home of 1000 Polish orphans who had been living

⁷⁰⁶ Registry No.: W/2699/1499/48; (February 25, 1943); (National Archives, London). This is a letter that outlines the Government of India’s plans to the Polish Ambassador to the UK Mr. Rucinski.

⁷⁰⁷ Registry No.: W/5347/1499/48; (April 5, 1943); (National Archives, London). This document is a telegram from A.W.G. Randall of the Foreign Office in London to the Minister of State in Cairo Mr. Gilchrist concerning the accommodation of Polish refugees in India.

⁷⁰⁸ Dossier No.: F.O.371; File No.: 1499; Registry No.: W/10037/1499/43; Document No.: 5361/43 (February to July 1943) (National Archives, London). This dossier contains a range of documents about the transport of Polish Refugees to India from various parts of the world including the steps undertaken by the Government of India to accommodate them. One particular extract from a report details the efforts of Jam Sahib Jadeja to accommodate Polish refugees.

⁷⁰⁹ File No.: 1499; Registry No.: W/10037/1499/43; Document No.: 5361/43 (10 July 1943) (National Archives, London). Attached along with a letter from Mr. R.N. Gilchrist of the India Office in London to A.W.G. Randall Esq. of the Foreign Office in London, was a detailed extract from the report prepared by Captain A.W.T. Webb, Home Department of the Government of India dated 20th May 1943.

in Isfahan in Persia.⁷¹⁰ Despite the vociferous opposition the camps accommodated 1000 refugees but did not allow children to live there. Given that the accommodation conditions in Chela were considered to be unsuitable for children, and after facing more opposition from the Polish Consul-General, Maharaja Jam Sahib decided to establish another camp north of the city of Jamnagar in a town called Balachadi. The documents also demonstrate the facilities that were made available for refugees from translation services to education, to healthcare facilities.⁷¹¹

A steady stream of refugees from Poland who were interned in other parts of the world began to arrive in India. The facilities that were established to accommodate these war-time refugees are known to have had a lasting impact on the Polish diaspora. In September 2006, one of India's leading newspapers ran an article titled 'Polish love story in Gujarat'. The article details the service rendered to Polish refugees by Jam Sahib Digvijaysinhji, many of whom fled forced labor camps, and other hostilities during the Second World War.⁷¹² Many of these refugees have since been resettled in different parts of the world. Close to home, a CBC article from November 2019 details the story of Karolina Rybka who now lives in Kelowna, British Columbia. Ms. Rybka lived in the Balachadi refugee camp and is quoted saying that the Maharaja saved her life and the lives of a thousand more Polish orphans.⁷¹³ It is noteworthy that all these camps were not built by the British government but were situated on sites that were loaned by the Rulers of Indian states like Jam Sahib.⁷¹⁴ There were several allegations made as to the unhealthy conditions of the camps,

⁷¹⁰ *ibid.*

⁷¹¹ *ibid.*

⁷¹² Raja Bose, "Polish love story in Gujarat", Times of India (September 17, 2006). <https://timesofindia.indiatimes.com/city/ahmedabad/Polish-love-story-in-Gujarat/articleshow/1998698.cms> (accessed January 22, 2021).

⁷¹³ Belle Puri, "'He saved our lives': B.C. woman among 1,000 Polish children adopted by Indian maharaja during WWII", CBC News (November 8, 2019). <https://www.cbc.ca/news/canada/british-columbia/polish-children-adopted-by-maharaja-1.5351763> (accessed January 22, 2021).

⁷¹⁴ Registry No.: W/14991/1499/48; Document No.: POL 7335/43 (26 October 1943) (National Archives, London). 'Disposal of Polish refugee camps in India'. This is a letter from the Joint Secretary of the Government of India Mr.

most of which were rebuffed by several periodical reports from the Home Secretary of India. The context under which the camps were operating is important to consider. Not only was India still firmly under British control, but around the same time, the Bengal Famine had gripped Eastern India. A series of deliberate policy failures and apathy towards the Indian population at the hands of British imperialists, was unsurprisingly the cause of the famine. As Sen argues, the evidence points to sheer neglect from His Majesty's Government, which inflicted grave harm on India's population. With over 2 million people estimated to have perished during the famine, Lord Wavell who was one of the Viceroy's of India had gone on record to declare that the famine was the result of the way "vital problems of India are being treated by His Majesty's Government with neglect, even sometimes with hostility and contempt".⁷¹⁵

A steady flow of Polish refugees into India between 1943 and 1946, necessitated a more centralized approach to the protection needs of many. With at least five camps set up across the western part of India to accommodate about 5,000 refugees, an organization was needed to best cater to the needs of those in need. A memorandum from September 1945 outlined the proposal for such an organization. The Government of India, addressing the Secretary of State for India in London, proposed the Central Polish Welfare Office in Bombay.⁷¹⁶ Between 1945 and 1946 the Welfare Bureau for Polish Refugees in India liaised with the Government of India to make arrangements for the emigration of Polish refugees to countries like Canada and Australia. Several letters between officials in the Government and the Foreign Office show the arrangements that were made for these refugees. One document was a letter between the Principal Refugee Officer

H.F. Frampton to A.W.G. Randall Esq. of the Foreign Office in London, detailing the arrangements to be made while disposing Polish refugee camps after resettlement.

⁷¹⁵ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Clarendon Press 1981) 79.

⁷¹⁶ Document No.: POL 9046/45 (28 September 1945) (National Archives, London). 'Treasury Interim Committee for Polish Affairs: Polish Refugees in India'. This document contains a Memorandum from the Government of India to the Secretary of State for India in London, detailing the proposal for a Welfare Bureau for Polish Refugees.

and Deputy Secretary of the Government of India and the Foreign Office about the possible resettlement of 250 Polish families to Canada.⁷¹⁷ With this proposal in motion, by mid-1946, issues surrounding the maintenance of Polish refugees by the Government of India became a question, given the undue burden that was placed on authorities. As only 12 Polish refugees had agreed to return to Poland and only 250 families were slated to be resettled to Canada once the Dominion confirmed it with His Majesty's government, the United Nations Relief and Rehabilitation Administration (UNRRA) had decided to take partial responsibility for Polish refugees in India.⁷¹⁸ However, this happened only upon the Government of India's initiative and application to His Majesty's Government to influence the UNRRA. Despite India's initial openness to hosting Polish refugees, the geopolitical circumstances began to shift. Deteriorating conditions in the camps coupled with multiple bureaucratic pressures faced from the Polish Consul-General and His Majesty's Government, and most importantly serious threats to the security and well-being of these refugees, led to a determined effort by the Government of India to arrange for their resettlement. A Cypher Telegram from May 23rd, 1946, indicates that the Government of India was to expect a series of widespread communal and political disturbances that may jeopardize the safety of refugees in camps. Given such impending developments, the Government of India had impressed upon His Majesty's Government the urgency with which the UNRRA should undertake the

⁷¹⁷ Document No.: POL 10909/45 (27 November 1945) (National Archives, London). This document is a letter from A.W.T. Webb who was the Principal Refugee Officer in India to Mr. R.N. Gilchrist, Esquire, at the India Office in London. The letter details the application presented by 250 Polish families from Kolhapur to emigrate to Canada. The application was made based on Winston Churchill's statement, that Dominions would work in tandem to find a new home for Polish refugees. The application that was presented to A.W.T. Webb on November 13th, 1945, was done by a Refugee Committee in the Polish camps in Kolhapur on behalf of the 250 families (Do. No.C-79/45).

⁷¹⁸ Registry No.: 289/289/48 (9 June 1946) (National Archives, London). This document is a letter from A.W.T. Webb who was the Principal Refugee Officer in India, to the Secretary to the Government of India. The letter with the subject title 'Maintenance of Evacuees accommodated in India' details that the UNRRA would be responsible for managing Polish refugees in India.

responsibility of finding other safe havens for these refugees.⁷¹⁹ By July 1946, it became clear that Polish refugees would not be evacuated until the end of that year. The UNRRA's relationship with the issue was also fraught. Though they had given assurances that the organization will take on the responsibility of Polish refugees, they denied any financial assistance to the Government of India.⁷²⁰ The following week, on 16th July 1946, disappointed by the UNRRA's decision to refuse financial assistance, R.N. Banerjee, the Secretary to the Government of India, had written to the Director-General of the UNRRA to receive an undertaking that any expenses incurred by the Government of India in the maintenance of Polish refugees will have to be reimbursed by His Majesty's Government, in addition to the expenses incurred to pay the salary of the Polish Liaison Officer who was appointed. It was estimated that it would cost £1,700,000 to resettle Polish refugees from British colonies to other parts of the world.⁷²¹

The bureaucratic tug of war continued to create more problems for the Government of India. The Chela camp that was constructed to accommodate Polish refugee children was done at the instance of the Polish Consul-General and His Majesty's Government. The Government of India recognized the humanitarian need and overlooked the expenses incurred in accommodating Polish refugees. In a letter to the Under Secretary of State for India, the Principal Refugee Officer Captain Webb argues that "the Government of India feels that they cannot accept liability for this camp without prejudicing the stand they have taken over the larger question of the cost of

⁷¹⁹ Document No.: POL 8526/46 (23 May 1946) (National Archives, London). This document is a Cypher Telegram from the Government of India's Commonwealth Relations Department to the Secretary of State for India in London, detailing the War Department's advice that Polish Refugees should be repatriated or resettled to other countries with the help of the UNRRA.

⁷²⁰ Document No.: POL 8862/46 (8 July 1946) (National Archives, London). This document is a letter from A.W.T. Webb who was the Principal Refugee Officer in India to Mr. R.N. Gilchrist, Esquire, at the India Office in London. The letter details the UNRRA's refusal to take full responsibility for Polish refugees in India. There was a proposal to appoint a Polish Liaison Officer which was agreeable to the Government of India.

⁷²¹ Document No.: POL 8118/46 M.1 (16 July 1946) (National Archives, London). This document is a letter from R.N. Banerjee Esquire who was the Secretary to the Government of India's Commonwealth Relations Department, to the Director-General of the UNRRA in London, detailing the aforementioned arrangements.

maintenance of Polish refugees in this country.”⁷²² He continues that, “the Government of India trusts that His Majesty’s Government would not press them to assume the responsibility for this particular item of expenditure.” This is one of the many documents that reveal the heavy financial burden that was placed on an already impoverished India that was simultaneously dealing with the manifestations of colonial oppression, apathy, and hostility such as the Bengal Famine and other forms of colonial tyranny. The context needs to be clarified; there was an implicit expectation that India’s ability to extend humanitarian assistance to European refugees should proceed without interruption notwithstanding the extreme violence inflicted upon its people by a European power. The extent of the burden placed on India during this time was enormous as it continued to navigate the delicate duality of being a colonial dominion and also a sovereign state in its own right. Mr. Banerjee’s requests to His Majesty’s Government and the UNRRA to relieve the financial burdens associated with the maintenance of Polish refugees were ignored. Captain Webb had sternly objected to His Majesty’s Government which had expressed its inability to remove all Polish refugees from India. Captain Webb in a letter to the India Office’s R.N. Gilchrist Esq., in August 1946, wrote that “there are today in India the gravest possibilities of widespread disorder and bloodshed. What those possibilities bespeak, while no secret to many of us with long Indian connections and experience, should at least, after the recent Calcutta riots, be clear to all except the purblind.”⁷²³ In this letter, he attempted to rationalize India’s inability to support Polish refugees, but also made it clear that his concern was only for Europeans in India. He writes, “the problem of self-protection has to be faced by every individual in the country, be he (sic.) Indian or

⁷²² Document No.: POL 8156/46 M.1 (30 April 1946) (National Archives, London). This document is a letter from A.W.T. Webb who was the Principal Refugee Officer in India to His Majesty’s Under Secretary of State for India in London providing the context of the Chela Polish refugee camp and the costs associated with its construction.

⁷²³ Document No.: POL 9973/46 (31 August 1946) (National Archives, London). This document is a letter from A.W.T. Webb who was the Principal Refugee Officer in India to Mr. R.N. Gilchrist, Esquire, at the India Office in London.

European. Here I am considering Europeans only.”⁷²⁴ He continues, with no choice left for refugees in India “if trouble comes, neither His Majesty’s Government nor the Government of India will be able to protect them”.⁷²⁵ Webb concludes his letter by arguing that it was in the best interests of the refugees to provide them clarity on the ground realities and get them out of the country at once.⁷²⁶ In response to Captain Webb’s letter, a British official Thelma T. Wells wrote a letter to Mr. Van Loo another British official, on 24th September 1946, excoriating the Government of India. Subsequent to the Indian Government’s request for assistance from His Majesty’s Government and the UNRRA, Wells writes “the attitude of the Indian Government is very unreasonable.”⁷²⁷ Wells in the letter also urges that, “one or other must surely pay [for the expenditures incurred in accommodating Polish refugees] and I can see no reason why we should relieve them of their financial responsibility.”⁷²⁸ Wells continues, “there is no reason why the Government of India should find it more difficult to conform to UNRRA rates than any of the other territories concerned.”⁷²⁹ Despite such criticisms, the Indian government complied with the overall objectives of refugee protection by keeping the camps open till all refugees were resettled to other parts of the world. By 1947, with the dissolution of British India in full swing, the camps began to be dissolved as well. As one letter from December 1947 from India Office’s R.N. Gilchrist to Foreign Office’s R.M.A. Hankey details, “the Refugee and Repatriation Office of the United Kingdom High Commissioner in India is now in a state of semi-dissolution and

⁷²⁴ *ibid.*

⁷²⁵ *ibid.*

⁷²⁶ *ibid.*

⁷²⁷ Document No.: OF. 91/4/46 (24 September 1946) (National Archives, London). This document is a letter from Thelma T. Wells an official of His Majesty’s Government to Mr. Van Loo Esq., Treasury Chambers.

⁷²⁸ *ibid.*

⁷²⁹ *ibid.*

arrangements are far advanced for the disposal of the Kolhapur camp.”⁷³⁰ By June 1948, all Polish refugees in India are known to have emigrated to other parts of the world including Canada and Australia, thus bringing an end to one of India’s biggest pre-independence refugee protection undertakings.⁷³¹

Short story of Greek Refugees in India

For a short period of time, a small number of Greek refugees, who were evacuated from several refugee camps in the Middle East, were accommodated in India along with many refugees from the Balkans. Documents show that a handful of Greek refugees were accommodated in a relief camp in the southern Indian city of Coimbatore. In the initial days, the Colonial Office and the Government of India had taken responsibility for the maintenance of Greek refugees. However, in January 1946, the UNRRA Greece Mission had agreed to arrange for the repatriation of these refugees to Greece. Documents indicate that only six Greek refugees were present in India. However, the expenditures incurred during their stay were to the tune of 43,864 rupees per month for all six refugees. By November 1946, all six Greek refugees are known to have been repatriated to Greece.⁷³²

Synthesis

The early days of international refugee law were not without their challenges. However, it is clear that despite India’s cooperation with frameworks that were established by western states, its current position in the global refugee regime as an outlier is an anomaly. India’s refugee

⁷³⁰ Document No.: POL 11807/47 (19 December 1947) (National Archives, London). This document is a letter from Mr. R.N. Gilchrist, Esquire, at the India Office in London to The Hon. R.M.A. Hankey, C.M.G., at the Foreign Office in London.

⁷³¹ Document No.: POL 11807/47 (5 December 1947) (National Archives, London). This was an extract of the report from the Principal Refugee Officer A.W.T. Webb along with the aforementioned letter, detailing that Polish refugees in India will effectively leave by June 1948.

⁷³² Dossier No.: F.O.371; File No.: 148; Registry No.: WR/148/48; Document No.: 10583/46 (January to November 1946) (National Archives, London). ‘Greek subjects evacuated to India’. This dossier contains a range of documents detailing the expenditures of the six Greek refugees and other letters and telegrams associated with the organization responsible for their well-being.

protection practice grew out of its role in accommodating thousands of war-time European refugees while simultaneously being at the receiving end of oppressive colonial policies. As Mayblin argues, “[t]hrough the British Empire used the rhetoric of equality between all imperial subjects, the reality was much more problematic.”⁷³³ The correspondences and memoranda that have been analyzed so far provide a window into the putative sense of equality as racial equality was never an international issue.⁷³⁴ In the context of the Second World War, the British Empire was able to wield its position as an emancipatory force for those who were dehumanized and disenfranchised in the course of the hostilities. However, the Empire failed to recognize its oppressive colonial policies that led to several tragedies across the subcontinent, in addition to the apathetic approach to British subjects in the region. While the Empire’s forces were ‘modernizing’ and ‘westernizing’ the subcontinent’s ‘savages’, they simultaneously functioned as an ostensible beacon of hope and protection from the violence and savagery faced by one group of Europeans at the hands of other Europeans. The institutional orders that existed in the subcontinent were built at the expense of colonial subjects whereby the pre-existing traditional institutions were effectively erased. The same Empire that had spent centuries denying the humanity of black and brown bodies was able to extend humanitarian protections to European refugees at the expense of those very brown bodies in the subcontinent. The cognitive dissonance at play has been captured not only in the archival documents but also in refugee scholarship’s inability to capture the role of the global south in shaping the refugee regime. This chapter captures the timeline between 1920 and 1946, which was a period of contestation, transnational anti-colonial and anti-imperialist resistance, and also reshaping of the world order, which also created displacements far away from Europe. As the earlier sections of the chapter argued, the founding of the right to asylum was entirely centered

⁷³³ Mayblin (n 71) 105.

⁷³⁴ *ibid.*

around the European political landscape and disenfranchisement of Europeans.⁷³⁵ This has provided a conveniently myopic narrative that negates the experiences of forced migrants in the global south. Given that European invasion in the subcontinent and other parts of the global south was founded on the denial of humanity to third-world peoples, it is unsurprising that contemporary frameworks of refugee protection remain incomplete in their application. The cognitive dissonance associated with European refugees accommodated in extra-European possessions of the Empire like the subcontinent is jarring. The Empire's oppressive policies in the subcontinent continued while the right to asylum for those fleeing European hostilities was recognized as significant. Therefore, the institutionalization of a 'liberal' international refugee protection system during a time when colonialism was still in its full force, belies the refugee regime's ability to present itself as a truly universal framework and calls for a reconsideration of its applicability. Aside from the historical gaps associated with the global refugee regime's development, "colonially derived conceptions of differential humanity are vital in understanding the history of the right to asylum".⁷³⁶ This reinforces the need to critique the exclusionary notions of refugeehood and the development of international refugee law. In the subcontinent, this critique is even more necessary given its firsthand experience with displacement resulting from colonially installed cartographic divisions and the *Refugee Convention's* inability to afford international protection to those who were displaced amid the Partition in 1947. As the next chapter will demonstrate, this critique includes moments of subcontinental resistance to the development of modern instruments of international refugee law, specifically during the formalization process of the *1951 Convention*, and the *ad-hoc* practice of refugee protection that followed. As the proceedings of the UN ECOSOC meetings will show, India's resistance came in the form of urging the international

⁷³⁵ *ibid* 113.

⁷³⁶ *ibid* 114.

community to agree to a broader definition of refugeehood and the need to recognize forced displacement in the region as a manifestation of colonial oppression.

India's post-Independence era and the global refugee regime

Contrary to the conventional history of the development of international refugee law, which maps contemporary refugee frameworks from 1920 to 1950, this chapter takes into account the end of formal colonialism in the subcontinent and the simultaneous development of the 1951 *Refugee Convention*. Conventional historiographies omit the role regions like the subcontinent played in the development of the *Refugee Convention*. While states in the region may not be signatories to the *Convention* or the Protocol, it is significant to note that the resistance presented by newly independent states during the formalization process of the *Convention*, provided grounds to understand its loose institutionalization, its Eurocentric approach, and its inability to account for displacement induced as a result of colonialism. Conventional history maps the development of international refugee law from 1920 to 1950 purely because, as demonstrated earlier, traditions of asylum-seeking have been heavily centered around the European political landscape. This has meant that the subcontinent's experience with displacement between 1947 and 1950, induced as a result of the sudden withdrawal of the British, was never accounted for in the history of international refugee law. As this chapter will demonstrate, this exclusionary historical narrative is the result of India's resistance during the formalization process of the *Convention* between 1946 and 1950, which has led to it being considered as an outlier in the global refugee regime. It will become clear throughout this chapter that the drafters' preoccupation with European disenfranchisement and the formerly colonized states' unwillingness to accord actions that comport with Eurocentric policies led to the marginalization of India and Pakistan in the global refugee regime's mandate. This chapter will address the gaps inherent in the current refugee framework and analyze the *ad-hoc* developments in practice to provide clarity on how they fit within the broader objectives of international refugee law.

The subcontinent's interactions with the refugee protection framework

After the formal end to colonialism in South Asia, India and Pakistan attempted to constructively interact with the international community to establish a robust legally binding refugee protection framework. Both states arrived at the United Nations on the heels of widespread violence and displacement resulting from the partition.⁷³⁷ However, by the time the final stages of the formalization process of the *Convention* began both India and Pakistan had withdrawn their representation.⁷³⁸ As the preceding chapters have outlined, this was the response to the emerging contours of the refugee regime that were overwhelmingly Eurocentric in their approach.⁷³⁹ The language that was used to characterize refugeehood and protection created an imperative that all forms of forced displacement warranted similar policy provisions irrespective of regional specificities. This assimilationist language with regards to refugeehood, was heavily decontextualized and was devoid of historical context. The newly created borders between India and Pakistan were not only fluid in nature but had also placed arbitrary characterizations of identity and nationhood. The discussions also had an inherent and implicit capacity to impose a Eurocentric gaze on subcontinental populations which were dehumanized for centuries prior to this moment in history. As the discussions on the formalization process will show, the language of the *Convention* did not adequately capture the forcefulness of borders in the region and erased the subjective experiences of those who had felt the impacts of the partition.

The unwillingness to include the circumstances of those who were being displaced within South Asia during the partition resulted in regional disillusionment with regards to the *Convention* and the mandate of the UNHCR.⁷⁴⁰ The international community's preoccupation with post-WWII

⁷³⁷ Oberoi (n 40).

⁷³⁸ Oberoi (n 30) 11.

⁷³⁹ *ibid* 12.

⁷⁴⁰ *ibid*.

displacement in Europe, was based on the argument that displacement in South Asia was not a refugee crisis but was an exchange of populations. The implication was that those who were relocated across the newly created international borders in South Asia did not in effect lose their citizenship like those who were displaced after WWII. This led to the belief by Western observers that those who were relocated across newly created international borders would enjoy the protection of new governments that were being instituted and did not require international protection.⁷⁴¹ As the chapter on subcontinental geopolitics outlined, such an observation is inaccurate and heavily decontextualized. The detailed analysis of postcolonial statehood in the subcontinent demonstrated that the Partition of India had been instrumental in the crises that ensued. The creation of new territorial entities under the guise of decolonization, was not only an effort to erase complex subcontinental identities and homogenize populations, but also manifested in massive displacement. This frame was never included in the discussions during the formalization process of the *Convention*. The core objectives of international refugee law are therefore built on constrained notions of international protection.

Travaux Préparatoires: subcontinent's engagement with the formalization process of the UNHCR and the Convention

The core objectives of the *Convention* afforded protection to those who were fleeing a well-founded fear of persecution.⁷⁴² Based on this rationale, those who were displaced in the subcontinent as a result of the creation of new international borders, had also “lost the effective protection of a state and would certainly have been able to prove a well-founded fear of persecution”.⁷⁴³ Mass displacement during the partition was marked by millions fleeing across newly created borders to save their lives from the murderous mobs engaging in physical

⁷⁴¹ Oberoi (n 30) 45.

⁷⁴² See: Article 1(A) (2) of the *Refugee Convention* (n 388).

⁷⁴³ Oberoi (n 30) 46.

violence.⁷⁴⁴ Despite India and Pakistan calling on the attention of the international community to the ongoing crisis in the region, many delegations declined to bring these mass numbers of forced migrants, within the confines of the developing framework.⁷⁴⁵ This was evident from some of the concerns raised by representatives from both India and Pakistan during the formalization process of the *Convention*. It should be noted that discussions on the establishment of a new Office of the United Nations High Commissioner for Refugees (UNHCR) and the *Convention Relating to the Status of Refugees* were held simultaneously. As the discussions will show, the establishment of the UNHCR preceded the *Convention*. In the early stages of the process, India had submitted a draft resolution to reconcile various points of view that emerged from the discussions on the *Convention* that were undertaken. The draft resolution drew attention to the principle that population movements should take place with the consent of the states directly concerned. The draft resolution sought to deem this proposition unrealistic and urged that this should be viewed in the context of the ongoing crisis of displacement between newly created international borders in the subcontinent.⁷⁴⁶ The Indian delegate Mr. Sen also pointed out that the draft resolution was a corrective measure to the United Kingdom resolution that had not taken into account the “General Assembly’s wish that displaced persons should be repatriated rather than accepted as immigrants”.⁷⁴⁷ The Indian resolution “included a paragraph condemning racial and religious discrimination”, which was sometimes made in favour of certain displaced persons, though under the Charter it should not exist.⁷⁴⁸ In a subsequent meeting, Mr. Sen was confronted by resistance

⁷⁴⁴ *ibid.*

⁷⁴⁵ *ibid.* 19.

⁷⁴⁶ Third Committee, Second Session, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York, Annex 12d, (6 November 1947) UN doc A/C.3/196.

⁷⁴⁷ Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York (7 November 1947) UN doc AC.3/SR.79, 200 (statement of Mr. Sen).

⁷⁴⁸ *ibid.*

from the rest of the international community that led to his contention that fundamental differences exist in the conceptualization of refugeehood.⁷⁴⁹

In meetings throughout the formalization process, both India and Pakistan had attempted to draw the attention of the international community to the millions of partition refugees. In a meeting in November 1949, the delegate from Pakistan Mr. Bokhari outlined that “the definition of the term “refugee” should be revised” and pointed out that in its current form it “only applied to victims of events which had occurred during the Second World War in Europe”.⁷⁵⁰ Mr. Bokhari also pointed out that after the end of the Second World War, many “other events had taken place in other parts of the world”, which also require attention from the United Nations.⁷⁵¹ The representative claimed that the United Nations should consider the definition to apply on a worldwide basis. Given that Pakistan had been “compelled to receive from 6 to 7 million refugees coming from various parts of India”, a more far-reaching approach to refugeehood would be ideal.⁷⁵² The Indian delegate Mr. Mujeeb added that India “had done its utmost” to assist 6,000 European refugees to settle in its territory after the Second World War.⁷⁵³ However, after the partition, it had to cope with its own refugee problem with millions dislocated across newly created international borders. Mr. Mujeeb hoped for an acknowledgement from the United Nations that “India was performing an international as well as a national duty by helping [partition refugees]”, and that it would be relieved of some of the responsibility regarding European refugees.⁷⁵⁴ His

⁷⁴⁹ Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Eightieth Meeting held at Lake Success, New York (7 November 1947) UN doc AC.3/SR.80, 211 (statement of Mr. Sen).

⁷⁵⁰ UN General Assembly, Fourth Session, Third Committee, Two Hundred and Fifty-Eighth Meeting (9 November 1949) UN Doc A/C.3/SR.258, 116 (statement of Mr. Bokhari).

⁷⁵¹ *ibid.*

⁷⁵² *ibid.*

⁷⁵³ Third Committee, Second Session, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York, Annex 12d, (6 November 1947) UN doc A/C.3/196.

⁷⁵³ UN General Assembly, Fourth Session, Third Committee, Two Hundred and Fifty-Ninth Meeting (10 November 1949) UN Doc A/C.3/SR.259, 123 (statement of Mr. Mujeeb).

⁷⁵⁴ *ibid.*

statements were to reaffirm those made by the representative from Pakistan Mr. Bokhari. In an earlier meeting in August 1949 in the Economic and Social Council, Mr. Desai, the representative from India had made a similar statement. He stated that, “until 1946, the [Indian] Government had done everything within its power to assist refugees. During the [Second World War] it had accepted over 6,000 European refugees, of whom 4,000 had now received permission to remain permanently”.⁷⁵⁵ This was evident from the previous chapter which demonstrated the actions that India had undertaken to provide sanctuary to refugees from Europe. However, from 1947 the Indian Government “had been faced with its own refugee problem, involving over five million people. It had so heavy a task to deal with that it had been unable to give anything more than moral support to the International Refugee Organization”.⁷⁵⁶

Another point of contention for both India and Pakistan was, the need to differentiate between international legal protection and material assistance for refugees as outlined by the proposed purposes of the UNHCR. The representatives from both countries had agreed that international legal protection remained the cornerstone of the global refugee regime. However, given the enormity of the chaos that the Partition of India had manifested, the representatives were of the opinion that provisions of international legal protection as guaranteed by the proposed *Refugee Convention* were weak without the guarantee of material assistance to these refugees. In an elaborate statement in response to some of the discussions on the UNHCR’s purpose, the Indian representative Mrs. Kripalani argued that despite the proposed High Commissioner’s Office possessing the functions of giving material and legal assistance to refugees, it was also “abundantly clear that the new international organization would not be in a position to undertake any greater

⁷⁵⁵ Economic and Social Council, Summary Record of the Ninth Session, Three Hundred and Twenty-Sixth Meeting (6 August 1949) UN doc E/SR.326, 628 (statement of Mr. Desai).

⁷⁵⁶ *ibid.*

responsibility”.⁷⁵⁷ The issue of financial implications was raised, and the Indian representative argued that merely establishing an administrative system to oversee the functioning of the High Commissioner’s Office would require \$750,000. Mrs. Kripalani contended that “it would be difficult for India to contribute to a budget to be used only for the legal protection of certain refugees when there were millions of refugees in dire need on its own territory”.⁷⁵⁸ She also presented a challenge that given the condition of the partition refugees, “statelessness was often a lesser hardship than lack of food, clothing, shelter and work”.⁷⁵⁹ While the UNHCR’s commitment to international protection of refugees was admirable, she demonstrated that “the Indian Government had had to create a central ministry for refugees as well as seven refugee ministries in the provinces or states” in order to provide assistance to partition refugees.⁷⁶⁰ The Government also had to established special camps and build townships with hospitals and schools for over 7 million refugees. The Government had also instituted loan programs to help refugees learn or practice a trade. She argued that all of this proved to be a heavy burden on national resources while simultaneously dealing with its own national crisis resulting from the sudden withdrawal of the British from the subcontinent.⁷⁶¹ Despite such difficulties, Mrs. Kripalani said that India did not intend on eluding its international responsibilities, and “it wished to take part in any humanitarian work undertaken by the United Nations”.⁷⁶² However, she believed that setting up an organization for the sole responsibility of providing legal protection to refugees was insignificant “at a time when [India’s] own refugees were dying of starvation”.⁷⁶³ By this time, seeing the mounting

⁷⁵⁷ UN General Assembly, Fourth Session, Third Committee, Two Hundred and Sixty-Third Meeting (15 November 1949) UN Doc A/C.3/SR.263, 143, para 55 (statement of Mrs. Kripalani).

⁷⁵⁸ *ibid* para 59.

⁷⁵⁹ *ibid* para 60.

⁷⁶⁰ *ibid*.

⁷⁶¹ *ibid*.

⁷⁶² *ibid* para 62.

⁷⁶³ *ibid*.

resistance against India's proposals and concerns, Mrs. Kripalani said that "[India] would be obliged to vote against all the resolutions submitted, and hoped that the stand it had taken would not be misinterpreted".⁷⁶⁴

India's position throughout the formalization process of the *Convention* and the establishment of the UNHCR was quite consistent. While demonstrating their cooperation to an international legal instrument's purpose, they also wanted their concerns to be heard. From Mrs. Kripalani's statement, it had also become evident that India was committed to its international humanitarian responsibilities towards protecting refugees. India's experience of resettling and providing protection to millions of partition refugees led them to mount a vocal resistance against "a partial regime in which their own concerns were sidelined if not neglected".⁷⁶⁵ The draft resolution on the establishment of the Office of the UN High Commissioner for Refugees was introduced in the Third Committee, with the hope that it would provide legal protection to refugees. Mrs. Kripalani had already declared that India would vote against any resolution that was presented. Pakistan's representative in the 264th meeting objected to the resolution "on the grounds that it gave no answers to the questions posed by the refugee problem".⁷⁶⁶ Pakistan voted against the resolution by stating that it was facing a vast refugee problem of its own and does not stand to benefit from the organization's existence.⁷⁶⁷ On December 3, 1949, The General Assembly Resolution 319 (IV) was presented which upon its approval would establish the Office of the United Nations High Commissioner for Refugees. Both India and Pakistan voted against this resolution.⁷⁶⁸ Subsequent to the establishment of the UNHCR, India continued to mount challenges

⁷⁶⁴ *ibid.*

⁷⁶⁵ Oberoi (n 30) 22.

⁷⁶⁶ UN General Assembly, Fourth Session, Third Committee, Two Hundred and Sixty-Fourth Meeting (15 November 1949) UN Doc A/C.3/SR.264, 146, para 10 (statement of Mr. Bokhari).

⁷⁶⁷ *ibid* para 59 (statement of Mr. Bokhari).

⁷⁶⁸ UN General Assembly, Fourth Session, (3 December 1949) UN Doc A/RES/319(IV).

against the *Convention*'s core precepts. In a meeting in December 1950, India's representative Mrs. Menon drew attention to the fact that despite the formalization process including several references to refugees in India and Pakistan, no efforts were made to include their concerns in the *Convention*'s core precepts.⁷⁶⁹ She argued that many refugees from Europe had been resettled to countries such as Australia purely because they happened to be Europeans.⁷⁷⁰ However, no funds or international aid had been requested for the millions of refugees in India and Pakistan. Mrs. Menon also urged the UN to help all afflicted people everywhere as "suffering knew no racial or political boundaries".⁷⁷¹ She repudiated the international community by arguing that "for the United Nations to attempt a partial remedy involving discrimination, whether accidental or deliberate, would be contrary to the great principles of the Charter [and that] the problem of refugees and displaced persons could be solved only if the countries which had the space and resources to absorb them did so without imposing artificial restrictions."⁷⁷²

From the preceding sections, it is evident that there was a systematic marginalization of the subcontinental voices in the formalization process of the *Convention* and the UNHCR. Western states dominated both the purpose of the Office of the UNHCR and the conceptualization of refugeehood, in addition to denying assistance to partition refugees. In fact, the strategic marginalization of the Indian subcontinent amid the scale of partition displacement was evident. In a private conversation with the Pakistani delegate Mr. Bokhari, the US delegate Phillip Burnett "explained that the extension of material aid to the Partition refugees under the mandate of the High Commissioner's Office would not be regarded favourably by the US since the problem was

⁷⁶⁹ UN General Assembly, Fifth Session, Third Committee, Three Hundred and Thirty-Second Meeting (1 December 1950) UN Doc A/C.3/SR.332, 377, para 23 (statement of Mrs. Menon).

⁷⁷⁰ *ibid* para 25.

⁷⁷¹ *ibid* para 26.

⁷⁷² *ibid*.

so enormous”.⁷⁷³ In addition to this, the formalization of the *Convention* “emerged from the American-led policy process of the UN”⁷⁷⁴; while the international community was focused on protecting those who had fled atrocities of the Second World War, the US was more concerned about refugees fleeing communist regimes during this time.⁷⁷⁵ For instance, the United Nations Korean Reconstruction Agency (UNKRA) was established under the auspices of the US influence on refugee protection efforts to those facing political repression in Communist regimes. The UNKRA “provided a service to the millions of people displaced by the Korean War and assisted South Korea to relocate refugees from Communist North Korea”.⁷⁷⁶ However, the Agency only benefited Korean refugees’ need for material assistance provided by the US, which Loescher argues, was “perceived to be integral to the anti-Communist war effort by the American forces”.⁷⁷⁷ It was also evident that “massive displacement of peoples in other regions of Asia” such as in the subcontinent did not create the need for such a large-scale international response and the maladies of subcontinental displacement were met with indifference from the international community.⁷⁷⁸ As observed throughout the formalization process, despite the appeals for material assistance made by the representatives of newly independent states of India and Pakistan, the Partition of India in 1947, did not feature within the priorities of refugee protection both under the auspices of the *1951 Convention* and under the UNHCR. Loescher argues that the parties that “drafted the *1951 Refugee Convention* purposely excluded refugees on the Indian subcontinent” since protecting these refugee populations was not viewed as important, thereby sidelining the “material needs of the displaced Hindu and Muslim communities”.⁷⁷⁹

⁷⁷³ Oberoi (n 30) 22.

⁷⁷⁴ Leon Gordenker, *Refugees in International Politics* (Croon Helm 1987) 29.

⁷⁷⁵ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 235.

⁷⁷⁶ *ibid* 57.

⁷⁷⁷ *ibid*.

⁷⁷⁸ *ibid*.

⁷⁷⁹ *ibid*.

It is significant to analyze the origins of the ‘subcontinental defiance’ that arose from the concerns that were presented by the representatives during the formalization process of the *Convention*. As mentioned in the earlier chapters, in addition to partition refugees being left outside the purview of the pursuant *Convention*⁷⁸⁰, displacement experienced by formerly colonized peoples was not included within the rubric of the *Convention*.⁷⁸¹ Mrs. Kripalani’s statements on the disillusionment with the *Convention* emerged from the application of the colonial clause which was proposed by the British Government and other settler states, as elaborated in one of the earlier chapters. The resistance to adding the colonial clause to the *Convention* was evident from the aforementioned concerns expressed throughout the formalization process. The Indian delegation wanted an acknowledgement of the human rights abuses that had taken place in the former colonies. They argued that the *Convention* should especially be applied “in the colonies [...] since it was there that violations of human rights were unfortunately most frequent”.⁷⁸² However, this resistance was to no avail.

India’s post-partition refugee protection efforts

India came away from the formalization process of the *Convention* with a sense of disillusionment with the refugee regime. Though India agreed with the overall objectives of the need for an international framework for refugee protection, the framework was unprepared to recognize the protection concerns of non-European refugees. Given the urgency of the circumstances of forced displacement in the subcontinent, India was compelled to reaffirm its non-signatory stance to the *Convention* and respond to massive refugee movements devoid of

⁷⁸⁰ UN General Assembly, Fourth Session, Third Committee, Two Hundred and Sixtieth Meeting (11 November 1949) UN Doc A/C.3/SR.260, 128 (statement of Mr. Bokhari).

⁷⁸¹ Mayblin (n 148) 433.

⁷⁸² *ibid.*

international influence. India's state practice has essentially revolved around three major prongs namely group determination, extending protection to politically sensitive subjects, and refugee protection with UNHCR's mandate.⁷⁸³

Contrasting narratives concerning Tibetan Refugees in India: Eurocentrism v. Counterhegemony

The arrival of Tibetan refugees was India's first experience with mass refugee movements after the partition. In April 1959, the Dalai Lama arrived in India and was subsequently granted political asylum.⁷⁸⁴ The massive displacement of Tibetans that followed was precipitated by the long-standing dispute over the status of Tibet that straddles the border between India and China.⁷⁸⁵ In an interview with Michael Brecher in 1968, years after the arrival of Tibetan refugees, V.K. Krishna Menon, a former principal aide to the Indian Prime Minister Jawaharlal Nehru, elaborated on India's intention to provide sanctuary to Dalai Lama. Menon said, "I would give asylum to anybody [...] but I would treat you as a political asylum seeker".⁷⁸⁶ Dalai Lama's provision of asylum was based on the political sensitivity of the Tibetan struggle in addition to India's commitment to customary international law. He continued that his government decided to provide asylum to Dalai Lama since he moved "of his own free will [...] to another country. Having moved, you don't hand him back, do you? It never occurred to us to do that. We didn't bring the Dalai Lama, we allowed him to come, and we sent out government officials to meet him."⁷⁸⁷

Soon after the arrival of the Dalai Lama in 1959, India formally extended protection to any Tibetan fleeing violence. The policy to grant asylum to all Tibetans fleeing violence was initially

⁷⁸³ Bhairav Acharya, 'The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals' (2016) 9 *National University Juridical Sciences Law Review* 173, 189.

⁷⁸⁴ The Guardian, Chinese say Dalai Lama is in India, April 3, 1959.

(<https://www.theguardian.com/world/2019/apr/03/chinese-say-dalai-lama-india-tibet-1959>)

⁷⁸⁵ Oberoi (n 30) 78.

⁷⁸⁶ Michael Brecher, *India and world politics: Krishna Menon's View of the World* (Oxford University Press 1968) 147.

⁷⁸⁷ *ibid.*

done in response to public opinion and a feeling of kinship, but subsequently was done in line with international norms.⁷⁸⁸ The Prime Minister had declared that this was done to ensure that India complied with international law and viewed the granting of asylum to Tibetans as a mark of respect for their autonomy.⁷⁸⁹ The Prime Minister of India Jawaharlal Nehru sent a memo to the International Commission of Jurists indicating that the Central Relief Committee for Tibetan Refugees (CRCT) had been established in New Delhi in order to provide material aid and assistance.⁷⁹⁰ This Committee was a subsidiary body of the Central Relief Committee (CRC), a large NGO that had been providing assistance and relief to partition refugees.⁷⁹¹ He had also appointed Mr. J.B. Kripalani to oversee operations and relief efforts to assist Tibetan refugees.⁷⁹² As a part of their initial efforts, the Indian government set up transit camps in the Northeastern and Eastern states of India, and subsequently afforded permanent settlement in other parts of India.⁷⁹³ Given that India came away from the formalization process of the *Convention* and the establishment of the UNHCR only less than a decade prior, the new Government was committed to building a system of its own.

In the early days of the Tibetan refugee movements into India, the High Commissioner for Refugees had offered assistance to the Government of India. A September 1959 Interoffice Memorandum addressed to the High Commissioner for Refugees in Geneva by the Representative of UNHCR in London, refers to the information received from the Chairman, Mr. Beaufort-Palmer and the Honorary Secretary, Mr. Napier Munn of the Tibet Society of the UK. Mr. Beaufort-Palmer

⁷⁸⁸ Oberoi (n 30) 84.

⁷⁸⁹ *ibid.*

⁷⁹⁰ Document No.: 15/72 (5 August 1959) (UNHCR Archives, Geneva). This document is a short note from the Prime Minister of India, Jawaharlal Nehru to the Secretary-General of the United Nations, Dag Hammarskjöld informing the latter of the Government of India's plan to provide assistance to Tibetan refugees.

⁷⁹¹ Oberoi (n 30) 87.

⁷⁹² Document No.: 15/72 (n 790).

⁷⁹³ BS Chimni, 'The Legal Conditions of Refugees in India' (1994) 7 *Journal of Refugee Studies* 378, 381.

and Mr. Napier Munn had informed the UNHCR Representative in London that, “[the] last reports received show that these refugees are living under very miserable circumstances and it appears that the directives given from the Central Government in New Delhi are not applied in a satisfactory way”.⁷⁹⁴ The UNHCR Representative in London was of the belief that “things might improve should international supervisions be arranged”.⁷⁹⁵ On September 7, 1959, the Indian Express in Bombay ran a newspaper article titled ‘Tibetan Refugees to be resettled without U.N. help’.⁷⁹⁶ The article read that “India will not seek the help of the United Nations High Commissioner for Refugees in resettling 12,000 Tibetan refugees who fled the country after the Chinese drive.”⁷⁹⁷ The newspaper report also read that the Indian government had “strongly denied” the report “alleging appalling conditions in Tibetan refugee camps”.⁷⁹⁸ The newspaper article also indicated that the Indian government had initiated the establishment of a work centre in the hill station of Dalhousie for 500 Tibetan refugees.⁷⁹⁹ A more official memorandum was issued on the matter of international supervision on September 25, 1959. The Representative of the UNHCR Branch for U.K., in London Paul Weis, had issued a memorandum to Geneva that in reference to the letter of September 4, “[the] Indian government has not requested any assistance from the UNHCR for Refugees from Tibet.”⁸⁰⁰

⁷⁹⁴ Document No.: G.XV.L.15/46; Geneva Chron. 353/59 (4 September 1959) (UNHCR Archives, Geneva). This document is an Interoffice Memorandum, from The Representative UNHCR, London to The High Commissioner for Refugees; Subject: Tibetan Refugees in India. The document concerns the international supervision of Indian response to the arrival of Tibetan refugees.

⁷⁹⁵ *ibid.*

⁷⁹⁶ Indian Express, Bombay (7 September 1959) – ‘Tibetan Refugees to be resettled without U.N. help’. This document is filed along with the set of documents in reference to Tibetan Refugees in India.

⁷⁹⁷ *ibid.*

⁷⁹⁸ *ibid.*

⁷⁹⁹ *ibid.*

⁸⁰⁰ Document No.: G.XV.15/72 (25 September 1959) (UNHCR Archives, Geneva). This document was a follow up to the Interoffice Memorandum from September 4; Subject: Tibetan Refugees in India from The Representative of UNHCR Branch Office for U.K., London.

Interlude: India's contentious relationship with the refugee regime and UNHCR

The discussions above demonstrate three aspects of India's contentious relationship with the global refugee regime: the ceaseless European intervention in subcontinental displacement, the presumption that refugees in the global south endure poor/miserable conditions, and counterhegemonic efforts by India while simultaneously remaining true to their international law commitments. India's disillusionment with the *Convention* and the UNHCR's mandate led the Government to devise mechanisms that would be reflective of the unique circumstances of displacement within the subcontinent, beginning with Tibetan refugees. The parameters of refugeehood and the purpose of the Office of the High Commissioner led to India's disengagement during the formalization process. However, European representatives of the UNHCR continued to engage in discussions on Tibetan refugees in India, which was founded on the assumption that refugees had been living in miserable conditions there. The Eurocentrism inherent in these discussions cannot go unnoticed. Europeans were unwilling to acknowledge that the chaotic conditions in the subcontinent were manifestations of years of colonial oppression followed by the sudden withdrawal of the British from the region. The establishment of the *Convention* and the UNHCR was done with the sole focus on Western asylum problems and consistently excluded refugeehood in the global south.⁸⁰¹ By continually placing the subcontinent on the margins of the global refugee regime, India believed that the Europeans had lost their privilege to comment on the conditions of refugees in the region, which led to their rejection of international intervention with respect to protecting Tibetan refugees. Despite gaining its independence in 1947, the above discussions reflect that European representatives did not allow independent India to enjoy its full sovereignty devoid of imperialist intervention. The discussions also reflect a paternalistic idea that the sovereignty of India was conditional and as a fledgling state would be unable to manage its

⁸⁰¹ Mayblin (n 71) 116.

internal affairs. These discussions also reveal that India's position in the margins of the global refugee regime was in the interests of former colonists who had devised the colonial clause in the *Convention*. The civilizational aspects of international law, that were analyzed in the literature review chapter, demonstrated that a uniquely subcontinental approach to refugee protection may be difficult to discern. However, the practices of refugee protection after the Partition of India can be perceived as a form of non-western practice. India's non-conformist stance to the *Convention* was evident from the *travaux préparatoires*. However, their unwavering commitment to the core objectives of international refugee law has led to the development of refugee protection practices that may not be purely non-western but are non-western nevertheless since they respond to the specific needs of various groups of displaced populations differently as opposed to adopting a conventional notion of refugeehood. However, from the judgments made by western observers on India's management of Tibetan refugees, it is evident that the legitimacy of subcontinental practices was recognized only if they mirrored what was outlined in the *Convention*. This also overlooks India's refugee protection practice in the interwar period and during the Second World War, though it was done under the auspices of the Empire. As was clear from discussions throughout the late 1940s and early 1950s, India was cooperative of a legal instrument that would be designed to protect refugees but wanted it to be a framework that would reflect all forms of forced displacement irrespective of geographical limitations.

India's tug of war with international agencies

By 1960, the number of Tibetan refugees in India increased to 20,000. A Danish scheme allowing students to undertake university studies in Denmark was launched. In October 1960, about 20 students from many refugee camps from India headed to Denmark for study.⁸⁰² India's

⁸⁰² Document No.: G.XV.15/72 (27 October 1960) (UNHCR Archives, Geneva). This was a letter concerning the arrival of Tibetan students from India to Denmark from Johan Henrik Fenneberg, Chairman of a UNHCR Special

efforts to support and resettle Tibetan refugees had taken a new direction in 1961 when the General Secretary of the Central Relief Committee (CRC), Mr. Kalyan Singh Gupta, wrote a letter to the Chairman and the Board of CRC informing that a social worker by the name of P.N. Sharma was to be designated to negotiate and receive aid for Tibetan refugees.⁸⁰³ During the peak of the Tibetan refugee movement to India, two organizations namely the Lok Kalyan Samiti and the Central Relief Committee for Tibetan Refugees which was a subsidiary body of the Central Relief Committee were providing aid and material assistance.⁸⁰⁴ In a 1961 letter, subsequent to P.N. Sharma's visit to Geneva Mr. Gilbert Jaeger, the Deputy Director of the UNHCR in Geneva wrote to Mr. Kalyan Singh Gupta, the General Secretary of the Central Relief Committee, suggesting the possibility of aid and material assistance being disbursed to the Government of India to assist with Tibetan refugees.⁸⁰⁵ By providing the example of the UNHCR's coordination efforts with the Nepalese government, Jaeger attempted to get India to implicitly or formally agree to aid Tibetan refugees.⁸⁰⁶ In response to this letter, in January 1962 Mr. Kalyan Singh Gupta, wrote to Mr. Gilbert Jaeger making it explicit that "it is not the Government of India's policy to accept aid for Tibetan refugees in India from the U.N. High Commissioner for Refugees as such."⁸⁰⁷

Committee in Denmark, to Gilbert Jaeger, Deputy Director of the United Nations Office of the High Commissioner for Refugees, Geneva.

⁸⁰³ Document No.: 15/72 (21 August 1961) (UNHCR Archives, Geneva). This was a letter from Kalyan Singh Gupta, General Secretary of the Central Relief Committee (India), to the board of the Committee informing them of the role of Mr. P.N. Sharma.

⁸⁰⁴ Document No.: 15/72 (6 November 1961). This is an Interoffice Memorandum, from Gilbert Jaeger to The High Commissioner on the subject of aid being delivered to Tibetan Refugees in India and an update on the visit of Shri P.N. Sharma. [Official Records].

⁸⁰⁵ Document No.: 15/72 (UNHCR Archives, Geneva) (14 November 1961). This is a letter from Gilbert Jaeger, Deputy Director Office of the High Commissioner for Refugees, Palais des Nations, Geneva to the General Secretary Central Relief Committee (India), Kalyan Singh Gupta, concerning the visit of P.N. Sharma and the possibility of delivering aid to Tibetan Refugees in India [Official Records].

⁸⁰⁶ *ibid.*

⁸⁰⁷ Document No.: 15/72 Ref. No.: 16(62)-9030 (25 January 1962) (UNHCR Archives, Geneva). This letter was a response to the above, from the General Secretary Central Relief Committee (India), Kalyan Singh Gupta, to Gilbert Jaeger, Deputy Director Office of the High Commissioner for Refugees, Palais des Nations, Geneva. [Official Records].

Nevertheless, Mr. Gupta also made note that the Government was “welcoming aid from voluntary organisations, be it foreign or Indian”, however, made it abundantly clear that the Central Relief Committee was the agency “responsible for receiving and coordinating all such aid.”⁸⁰⁸ Mr. Gupta asserted that such circumstances mandated that aid would be acceptable “provided these are made direct to the Central Relief Committee India, which is the operative agency”.⁸⁰⁹

The contentious relationship between the UNHCR and India continued throughout the year. Despite the Central Relief Committee requesting international aid only from voluntary agencies, the UNHCR insisted that they would be the agency disbursing these funds. These funds were also subject to India’s ability to furnish detailed plans of the projects that they had planned to establish for Tibetan refugees. A letter from the Chief of the Fundraising Section of the UNHCR in Geneva V.A.M. Beerman to Mr. Gupta reads, “we would need concrete projects on which we would base our appeals.”⁸¹⁰ Beerman continues that aid would be predicated on:

*“(a) a precise description of the operation envisaged, (b) an estimate of the actual cost of the operation, (c) the matching contribution which may be expected from which sources, (d) the estimated number of refugees to benefit from this operation, and (e) the names and addresses of the agencies who will implement each individual project”.*⁸¹¹

The inequitable conditions placed on India to receive aid is another example that demonstrates the disparity with respect to refugees in the global south. The reluctance to include the interests of refugees in the global south within the rubric of the global refugee regime falls short of its supposed universality as previous chapters have shown the swiftness with which

⁸⁰⁸ *ibid.*

⁸⁰⁹ *ibid.*

⁸¹⁰ Document No.: 15/72 (1 March 1962) (UNHCR Archives, Geneva). This was a letter from the Chief of the Fundraising Section of the UNHCR V.A.M. Beerman to the General Secretary Central Relief Committee (India), Kalyan Singh Gupta in response to January 25 correspondence. [Official Records].

⁸¹¹ *ibid.*

European refugees were provided with material assistance and aid. The relationship between the UNHCR and India came to a head in 1962 when Mr. Gupta informed a few stakeholders that India would welcome the assistance of the High Commissioner's Office in integrating Tibetan refugees and also resettlement. The caveat was that such assistance would be accepted only if it came through voluntary agencies and there is no indication that UNHCR was offering assistance to the Government of India".⁸¹² The Deputy High Commissioner for Refugees Mr. Jamieson pointed out that "if the information provided by Mr. Gupta's was indeed the attitude of the Government of India, it did not provide the kind of atmosphere UNHCR would wish."⁸¹³

With increasing numbers of Tibetans entering India, it was clear that a more permanent solution on providing sanctuary was imminent. The archives show a fact-finding mission report from June 1962 prepared by K.J. Peter, who was the Refugee Secretary of the National Councils of YMCAs in India. The visit to a Tibetan refugee camp in Bylakuppe, Mysore in southern India was spearheaded by the World Alliance of YMCAs.⁸¹⁴ The camp was set up on a 3500-acre area and the plan was to establish 6 villages to host 3000 refugees.⁸¹⁵ By the mid-1960s, the UNHCR was involved in overseeing the relief efforts for Tibetan refugees and funds were allocated through the High Commissioner's programme. The villages included housing, water supply, educational and health facilities. Given that Tibetans were traditionally "agricultural people", opportunities for them to cultivate land and sustain themselves through poultry and cattle farms were also provided. The villages also had cottage industries such as weaving and carpet making.⁸¹⁶ Finally, with

⁸¹² Document No.: 15/72 (1 June 1962) (UNHCR Archives, Geneva). Note for the File. This note concerns the meeting between Mr. Jean Chenard, a representative of the Standing Conference of Voluntary Agencies Working for Refugees and representatives from various voluntary agencies and representatives of the UNHCR working on various refugee issues across the world. [Official Records].

⁸¹³ *ibid.*

⁸¹⁴ World Alliance of YMCAs – Fact Finding Visit to the Tibetan Refugee Camp, Bylakuppe, Periapatna, Mysore by K.J. Peter, Refugee Secretary, National Council of YMCAs of India (June 14, 1962). [UNHCR Archives, Geneva].

⁸¹⁵ *ibid.*

⁸¹⁶ *ibid.*

respect to providing sanctuary for Tibetans, the Indian government provided refugees with “subsistence money, land to settler, and administrative support upon arrival.”⁸¹⁷ They were also issued with Indian Registration Certificates on a *prima facie* basis, which they could use as an identity document as well as a residence permit.⁸¹⁸ India’s experience with hosting and settling Tibetan refugees was their first foray into providing sanctuary to such a large group of persons of concern since 1947. The introduction of an international refugee framework into the equation certainly tested India’s ability to operate as a newly independent state albeit by resisting hegemony and Eurocentrism. India was still in the process of rebuilding after the partition but was certainly successful in providing sanctuary to several thousand refugees from Tibet.

UNHCR in India: the manifestation of British interventionist urge

The UNHCR’s continued investment in the issue of Tibetan refugees in India was evident from several memoranda and letters on this issue. The UNHCR’s urge to intervene continued and they used several sub-committees to receive information on the situation of Tibetan refugees in India. One Interoffice Memorandum prepared by UNHCR, as referred to earlier in this thesis, makes references to a January 1963 meeting of the Tibetan sub-committee of the Standing Conference of British Organisations for Aid to Refugees. At this meeting Lady Alexandra Metcalfe of Save the Children Fund (daughter of a former Viceroy of India, Lord Curzon) who had visited India to inspect the status of Tibetan refugees reported that they were living in “appalling poverty” and there was a “very great need to assist them”.⁸¹⁹ She also excoriated the Central Relief Committee and characterized it as “moribund”.⁸²⁰ She also said that the Government

⁸¹⁷ Oberoi (n 30) 95.

⁸¹⁸ *ibid.*

⁸¹⁹ Document No.: G.XV.1.15/46 - 4/11 (8 January 1963) (UNHCR Archives, Geneva). This is an Interoffice Memorandum from The Representative of UNHCR, London to The High Commissioner for Refugees, Geneva on the subject of Tibetan Refugees in India. [Official Records].

⁸²⁰ *ibid.*

of India was providing very little material aid to help the refugees. Lady Metcalfe also made references not only to the “deplorable conditions of Indian citizens” but also to India’s “apathy towards Tibetan refugees”.⁸²¹ She suggested the “need for stimulation and coordination of refugee relief activities, for which a UNHCR representative would [...] be the ideal solution”.⁸²² Lady Metcalfe is known to have pushed the Prime Minister of India Jawaharlal Nehru to accept UNHCR assistance. While he was inclined to initially agree with the proposition, he was wary of “international inspection” and adverse reporting to the General Assembly of “what India has so far done, or not done, for the Tibetans”.⁸²³ Resistance was demonstrable from India’s rejection of a proposal to have a UNHCR representative present in the country to oversee the operations of resettling Tibetan refugees. However, in light of the urgency of the need for assistance to Tibetan refugees, the sub-committee meeting, that did not include a single representative from India, introduced a proposal that would appoint a member of the Voluntary Agencies “to go to India and coordinate all the UK Voluntary Agency assistance to the Tibetans”.⁸²⁴ The proposal was also rather insidious in nature as the members in the meeting said, “in the first instance, in order to secure the agreement of the Indian Government, the Representative should be part of Save the Children Fund, the only foreign Agency with a large programme currently operating there.”⁸²⁵ The proposal was adopted, and the representative present at the meeting believed that “it is practically certain that the [Indian Government] will agree.”⁸²⁶ The sub-committee was to present this proposal to the Standing Conference. After this a formal request was to be made to the Indian Ministry of External Affairs, to approve the appointment of an extra representative of Save the

⁸²¹ *ibid.*

⁸²² *ibid.*

⁸²³ *ibid.*

⁸²⁴ *ibid.*

⁸²⁵ *ibid.*

⁸²⁶ *ibid.*

Children Fund. The members of the sub-committee were steadfast that this extra representative will coordinate all UK Voluntary Agencies working in India for Tibetan Refugees, and “should be of British or at any rate European nationality”.⁸²⁷

While the British colonists were never sensitive to the violence they inflicted through their imperialist expansion, at this point, it had become clear that they were never going to allow the states in the subcontinent to enjoy their independence from the stranglehold of their colonial past. Despite India’s repeated attempts to rebuff international assistance, the British continued to push forward with their interventionist urge. While their urge to assist refugees may have been valid, their aggressive humanitarianism centered British or European figureheads as the only ones with knowledge of humanitarian service. This approach was highly misplaced as it overlooks decades of India’s contributions to refugee assistance and aid. This was evident not only from the discussions during the formalization process of the *Convention*, but also with their plans to “quite unofficially [...] help [India] find a [UNHCR] representative” despite their repeated pushback on this matter.⁸²⁸ The British were unwilling to wait for “Mr. Nehru to see the light” in appointing a UNHCR representative and were willing to “press on ahead and appoint one of their to coordinate refugee voluntary activity in India.”⁸²⁹ Finally, the Interoffice Memorandum, despite acknowledging India’s unwillingness to receive UNHCR assistance, mentions that “UNHCR [would] once again approach the Indian Government urgently in order to try to reach a definite decision one way or the other”.⁸³⁰ By late January 1963, the Government of India relented and the Prime Minister Jawaharlal Nehru declared that he “had no objection at all to the H.C.R providing

⁸²⁷ *ibid.*

⁸²⁸ *ibid.*

⁸²⁹ *ibid.*

⁸³⁰ *ibid.*

assistance to Tibetan refugees”.⁸³¹ He went on to say that in the interests of some of his colleagues who had been taken up with the activities associated with refugee protection and had no time to themselves, “the Government of India would be very happy if a part of the burden is taken away from them”.⁸³² After a visit by Mr. Felix Schnyder, the High Commissioner for Refugees in Geneva, to India, between 16 July 1963 and 21 July 1963, he wrote a formal letter to His Excellency President of India S.V. Radhakrishnan and the Prime Minister of India Jawaharlal Nehru explaining the roles of the UNHCR.⁸³³ The highlight of this letter was that thus far the Office of High Commissioner had not presented the problems of Tibetan refugees to the General Assembly, and neither had it demonstrated the efforts India had undertaken in ensuring the safety of Tibetans. After Mr. Schnyder’s visit, it was clear that he planned on bringing the needs of refugees to the notice of interested governments across the world and also to philanthropic agencies. He assures in his letter that, “my Office, in its purely humanitarian work entrusted to it by the United Nations, is at your disposal to do anything it can usefully undertake to facilitate the solution of the problem”.⁸³⁴ This trend is prevalent in other South Asian states which have adopted a blended approach that does not give any single body full authority over refugee status determination or providing refugee protection.

Following this, the Indian delegation to the United Nations General Assembly had voted for the continuation of the Office of the UNHCR and India was paying its share of the costs. This led to the visit of the Director of Operations of the United Nations High Commissioner for

⁸³¹ Document No.: 15/72 (18 January 1963) (UNHCR Archives, Geneva). This is a letter from Mr. Talaulikar, a representative of the Government of India to Mr. Felix Schnyder, the High Commissioner for Refugees, Geneva on the subject of UNHCR’s intervention in the issue of Tibetan Refugees in India. [Official Records].

⁸³² *ibid.*

⁸³³ Document No.: 15/72/INDIA; 1/7/5/ INDIA; 27/3/13/INDIA (25 July 1963) (UNHCR Archives, Geneva). This is a letter from Mr. Felix Schnyder, the High Commissioner for Refugees, Geneva to Prime Minister of India, Jawaharlal Nehru on UNHCR’s offer to help Tibetan Refugees in India. [Official Records].

⁸³⁴ *ibid.*

Refugees, Thomas Jamieson to India for three weeks between October and November 1963 in order to oversee the operations associated with Tibetan Refugees. The report outlined the impressive efforts undertaken by the Indian government in providing aid and assistance to Tibetan refugees, thereby disproving the earlier comments on deplorable conditions.⁸³⁵ Subsequent reports by various voluntary agencies were along the same lines. However, by 1964, there were issues that aid was failing to reach Tibetan refugees. The Sunday Times on September 13, 1964, reported that hundreds of Tibetan refugees had died due to illness and starvation.⁸³⁶ It was alleged that aid sent to Bombay by British charities was not reaching the refugee villages and settlements due to distribution problems created by the Central Relief Committee (India). The complicated political situation had also led to some aid being lost.⁸³⁷ Soon after this report, British charities signed an agreement with the Indian government to “eliminate basic administrative muddle which caused losses and delays in many of the shipments of aid to Tibetan refugees”.⁸³⁸ A series of articles began to be published alleging mismanagement by India of material aid and supplies. The Sunday Times published a statement in response to these allegations by Olaf Caroe, who was the Chairman of the Tibetan sub-committee of the British Organisation for Aid to Refugees. In a statement to the Sunday Times, Caroe wrote, “Anthony Cowdy’s article on aid to Tibetan refugees is not in true perspective”.⁸³⁹ He continued that, “India is not alone in suffering from faults and failures in the administrative process, and no good is done by strident criticism from the righteous abroad”.⁸⁴⁰

⁸³⁵ Document No.: MHCR/307/63; GE.63-17399 (9 January 1964) (UNHCR Archives, Geneva). This is a detailed report prepared by Mr. Thomas Jamieson, the Director of Operations of the UN High Commissioner for Refugees, Geneva detailing his visit to India between October 18, 1963, and November 11, 1963. [Official Records].

⁸³⁶ Anthony Cowdy and John Barry, ‘Aid ‘failing to reach’ starving Tibetans’, Sunday Times (September 13, 1964). (UNHCR Archives, Geneva).

⁸³⁷ *ibid.*

⁸³⁸ John Barry, ‘Help for India to be licensed’, Sunday Times (September 20, 1964). (UNHCR Archives, Geneva).

⁸³⁹ Sir Olaf Caroe, ‘Protecting Refugee Aid: Positive Help’, Sunday Times (September 20, 1964). (UNHCR Archives, Geneva).

⁸⁴⁰ *ibid.*

On October 5, 1964, a scathing statement by Dr. Jivraj Narayan Mehta, the Indian High Commissioner to the United Kingdom, was published. He wrote a letter in which he said, “it is possible that there may have been some marginal losses in the transshipment of some gift parcels in the past; but this does not entitle your correspondents to contribute to a wholly alarmist, and in many respects, materially inaccurate report”.⁸⁴¹

Conditional legitimacy of India’s refugee protection practice

Though the relief and aid to Tibetan refugees initially began with India establishing camps and providing basic needs, the arrival of foreign agencies including the UNHCR made the settlement process more complex. However, archival records show that for the most part, India had undertaken efforts within its limited means as a newly independent state to provide aid and sanctuary to refugees. By the end of the 1960s, most Tibetan refugees began to be settled across India and were able to acquire Indian citizenship. Though the UNHCR provided de facto assistance to Tibetan refugees in conjunction with other NGOs in India, the Government had insisted that control remains solely with the state authorities. The opposing narratives presented throughout the process of settlement of Tibetans show that India’s efforts were not recognized as legitimate until international agencies became involved. In order to legitimize its position in the global refugee regime, India was compelled to justify its policy and relief efforts towards Tibetan refugees internationally. It was also quite clear that until foreign agencies and the UNHCR became involved actively from 1964, India’s capabilities were always questioned and scrutinized. Needless to say, India had more than proven its abilities with regards to refugee protection even before it gained independence and had dealt with partition refugees and Tibetan refugees. However, despite India remaining true to its international commitments towards refugees and towards international

⁸⁴¹ Dr. Jivraj Narayan Mehta, ‘India denies refugee aid ‘lost’’, Sunday Times (October 5, 1964). This was a letter in response to the September 13, 1964, article in the same newspaper. (UNHCR Archives, Geneva).

customary law, it had to allow for the intervention of UNHCR which had initially forsaken its responsibilities towards partition refugees and refugeehood in the subcontinent in general. While much of the Tibetan refugee problems were resolved as a result of India's magnanimity and abilities to forge alliances with national and international NGOs, and UNHCR, one thing was clear. If India's position in the global refugee regime was ambiguous in the late-1940s and the early-1950s, it had become clearer now. India could not legitimize its role in the development of international refugee law and protection norms without the intervention of UNHCR. The forceful nature of the India-UNHCR alliance was also jarring, as the tenor of this association was controlled entirely by the latter. Despite India's disillusionment with the international organization, UNHCR representatives had taken it upon themselves to dictate terms on refugee protection in the subcontinent, a region that had never had a fair consideration of its experiences with forced displacement. India was ultimately left feeling resentful after its experiences with the UNHCR which had decided to withdraw soon after the end of the Tibetan crisis in the 1970s.

Evacuees from East Pakistan: aporias of post-partition belonging continues

In January 1964, the Calcutta edition of *The Times* ran a story titled 'Hindus' plight in Pakistan: Pressure to admit refugees'. The report detailed that disturbances in East Pakistan had led to the death of many Hindus. Since 1959 minority communities were discouraged from crossing the border, and the Indian High Commission in Dacca was unwilling to issue them with migration certificates.⁸⁴² In fact, the communal situation began to deteriorate in East Pakistan in 1962. A confidential document drafted by the Commonwealth Relations Office (C.R.O) to Her Majesty's Government, outlines the outbreak of large-scale communal violence in which about 400 Hindus were killed in East Pakistan in April 1962 after an artifact was allegedly stolen by

⁸⁴² The Correspondent, 'Hindus' Plight in Pakistan: Pressure to admit Refugees', *The Times* (30th January 1964) Calcutta. (National Archives, London).

Hindus from a mosque.⁸⁴³ The C.R.O reported that in response, Indian authorities in the border states of Assam and Tripura decided to expel Muslims who were alleged to have crossed the border from Pakistan into India after 1947.⁸⁴⁴ Communal disturbances continued in the region and in yet another incident in 1964 about 200 Hindus were killed in the Khulna region of East Pakistan during a protest. Incidents in Narayanganj, Rajshahi, and Sylhet also caused the death of many Hindus from the academic and business communities. After these incidents, many thousands of refugees crossed into India from East Pakistan most of whom were Hindus and Christians.⁸⁴⁵ It was reported that in the early days of the refugee crisis about 200,000 people had crossed the border. During the publication of this particular document about 6,000 people had been killed in communal disturbances. The unfortunate result of many statements that were made by politicians on both sides of the border created an outcry among both communities.⁸⁴⁶ With the fate of about 50 million Muslims in India and 9 million Hindus in Pakistan at stake, it was of utmost importance to restore communal peace in the subcontinent. However, talks failed, and refugees continued to flow into Indian border states from East Pakistan.⁸⁴⁷

Another confidential report drafted in the early days of communal disturbances by the C.R.O., speculated on a series of elements concerning population movements between India and East Pakistan. The report contains a series of questions and answers provided based on the situation on the ground interspersed with perspectives held by the C.R.O.⁸⁴⁸ The C.R.O. reported that

⁸⁴³ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1 (National Archives, London). This was a Confidential Document drafted by the Commonwealth Relations Office addressed to Her Majesty's Government. The document titled 'Communal Situation in India and Pakistan', provided an outline of the ongoing cross-border unrest that was creating refugee situations. The date of drafting of this document is unknown.

⁸⁴⁴ *ibid.*

⁸⁴⁵ *ibid.*

⁸⁴⁶ *ibid.*

⁸⁴⁷ *ibid.*

⁸⁴⁸ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. (National Archives, London) (January 1964). This particular document is a confidential report titled "Population Movements between East Pakistan and India" that was

population pressures had existed for a very long time in East Pakistan and what had been happening was a “natural movement” between borders that had been taking place since the Partition of India.⁸⁴⁹ However, the Muslims who were sent to East Pakistan were characterized as “illegal immigrants”.⁸⁵⁰ The report claims that the communal riots of 1964 had reinforced the argument that Muslims were still travelling back to their original homeland of East Pakistan or West Pakistan. The report, unsurprisingly, did not take into account the impact cartographic divisions and colonization had on subcontinental geopolitics and displacement. In fact, by casting those who were sent back to East Pakistan as illegal immigrants the C.R.O. overlooked the liminal legal status that subcontinental populations possessed during the Partition of India and many years after 1947. South Asians traversed the ambiguous status between legality and illegality and the report overlooked a critical recognition of the role that the partition played in the construction of citizens, noncitizens and new subcontinental identities. The report also characterizes the substantial movement of Muslims to East Pakistan and Hindus to India as “voluntary” and attributed this phenomenon to the ongoing communal troubles without acknowledging that problems reached the point of crescendo after years of colonial intervention.⁸⁵¹ The Commonwealth Relations Office argued that the actual place of origin of those Muslims who were deported was open to dispute and also alleged that Indian authorities were not following any reliable methods in order to verify the place of origin of these Muslims.⁸⁵² In order to safeguard against abuses, the Indian Government set up judicial tribunals to scrutinize all deportation cases. The C.R.O. also alleged that the continued evictions of Muslims from India emphasize the “savage” nature of communal

drafted by the Commonwealth Relations Office concerning forcible evictions of Muslims from India to East Pakistan.

⁸⁴⁹ *ibid.*

⁸⁵⁰ *ibid.*

⁸⁵¹ *ibid.*

⁸⁵² *ibid.*

disturbances and threaten peaceful relations between the two states.⁸⁵³ The cognitive dissonance here is particularly revealing. The C.R.O swiftly characterized the deportations carried out by India as inhumane and unjust. However, a few years prior, the Partition of India that was engineered by the British and the chaotic population movements that ensued, were not characterized as such since it was done in the guise of ‘decolonization’. The report finally also mentions that it may be necessary for Indian authorities to broach the subject associated with the Kashmir dispute in order to ensure better relations between India and Pakistan.⁸⁵⁴

From communal disturbances to retaliation to rehabilitation: India’s ambiguous approach to cross-border movements

While the Tibetan refugee movements were still ongoing, these disturbances in East Pakistan began to create massive refugee movements into the Indian border states of West Bengal, Assam, and Tripura. On January 29, 1964, the Indian Minister for Home Affairs made a public statement in Calcutta regarding the conditions of minorities in East Pakistan. In his statement, the Minister mentions that minority communities have been seriously persecuted due to the inaction by Pakistan to protect them and that India cannot ignore the human considerations which are involved in the situation.⁸⁵⁵ The Government of India had taken a stance that despite “the unreasonable and unhelpful attitude of the Government of Pakistan” India may be persuaded to accept the responsibility to create better conditions for minorities from East Pakistan.⁸⁵⁶ The decision was made to grant migration certificates on compassionate grounds for those living in conditions of extreme peril and insecurity in East Pakistan. The Minister emphasized that “the

⁸⁵³ *ibid.*

⁸⁵⁴ *ibid.*

⁸⁵⁵ Dossier No.: D.O. 196/379; File No.: 2-SEA 65/105/1. A., (National Archives, London). Text of the Statement by the Minister of Home Affairs, Government of India, Made in Calcutta on January 29th, 1964.

⁸⁵⁶ *ibid.*

problem of refugees is undoubtedly a national problem but the practical limitations in this respectful of course have to be always kept in view”.⁸⁵⁷

The Minister of External Affairs on February 1, 1964, echoed these statements that the Government of India had already allowed for an unbiased flow of migrants and refugees who continued to cross over from East Pakistan due to the continuing insecurity to life and property.⁸⁵⁸ The rationale was that India had become accustomed to receiving thousands of refugees and migrants belonging to minority communities due to the discriminatory policies of the Government of Pakistan.⁸⁵⁹ The Government of Pakistan was aware of the widespread and serious disturbances that had occurred at various places in East Pakistan in January. Such incidents involved serious loss of life and wholesale destruction of property of the minority community that rendered over 80,000 people homeless destitute and made them seek refuge across the border.⁸⁶⁰ However, talks between the two governments had failed repeatedly which led to retaliatory actions against Muslims in India simultaneously as provisions were being made to resettle minority refugees from East Pakistan.

On February 9, 1964, the ‘Conference and Rehabilitation of Migrants’ was held in New Delhi to discuss the ongoing issues associated with refugees from East Pakistan.⁸⁶¹ The conference was attended by several Cabinet ministers of India and some Chief Ministers as well. It was agreed that “every effort would be made to rehabilitate people who had come to India because of the continuing insecurity of life and property in East Pakistan”.⁸⁶² The executive committee of the

⁸⁵⁷ *ibid.*

⁸⁵⁸ Dossier No.: D.O. 196/379; File No.: 2-SEA 65/105/1. A., (National Archives, London). Copy of the note No.P.(P.IV)283(11)/64, dated 1st February 1964, from the Ministry of External Affairs, Government of India, New Delhi, to the High Commission of Pakistan, New Delhi.

⁸⁵⁹ *ibid.*

⁸⁶⁰ *ibid.*

⁸⁶¹ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. Summary of the ‘Conference on Rehabilitation of Migrants’ held in New Delhi on February 9th, 1964.

⁸⁶² *ibid.*

Congress party in the Parliament expressed that refugees from East Pakistan were the responsibility of the entire country and everyone must share in the rehabilitation.⁸⁶³

On the 4th and 5th of March 1964, the Rajya Sabha (Upper House of the Indian Parliament) debated the situation of East Pakistan refugees in the border state of West Bengal. The Indian government in light of the recent exodus of Christians and Hindus from East Pakistan referred to the United Nations on the treatment of minorities in East Pakistan.⁸⁶⁴ The Indian Home Minister Mr. Nanda replied to the debate and stressed that this was a “human problem” and should be tackled on a non-partisan basis, without international intervention. Although India had so far allowed for all migrants to enter, it could not accept everybody from East Pakistan.⁸⁶⁵ After squeezing out most of the minorities, India was urging the Government of Pakistan to create conditions in which members of the minority communities would be able to live in peace and safety. Though India’s resources were limited they rehabilitated those people who had sought refuge.⁸⁶⁶ The Calcutta edition of the Times on 16th March 1964 reported that the Government of India had established impressive efforts in the border state of West Bengal to find homes for refugees from East Pakistan.⁸⁶⁷ The report went on to say that several people who had sought refuge from East Pakistan were rehabilitated in camps in India. In addition to the material aid that was provided to refugees by the Government, several relief organizations were working to provide hard rations to those displaced.⁸⁶⁸ There was also a lot of aid that was made available from European voluntary agencies and the Central Relief Committee of the Indian Government. The

⁸⁶³ *ibid.*

⁸⁶⁴ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. (National Archives, London) (Dispatched: 6 March 1964; Received 10 March 1964). This particular document is an Inward Telegram to the Commonwealth Relations Office that detailed the Rajya Sabha debate on ‘East Pakistan/West Bengal Refugees’.

⁸⁶⁵ *ibid.*

⁸⁶⁶ *ibid.*

⁸⁶⁷ The Correspondent, ‘Finding Homes for Refugees from East Pakistan: Impressive Efforts in West Bengal’, The Times (March 16, 1964). (National Archives, London).

⁸⁶⁸ *ibid.*

Refugee Services of the World Council of Churches had also made its efforts visible in ensuring the rehabilitation of these refugees.⁸⁶⁹ Around this time, the Minister of Works, Housing and Rehabilitation, Mr. Mehr Chand Khanna told the Rajya Sabha that Pakistan was in violation of the Nehru-Liaquat Pact, an agreement between India and Pakistan to protect people displaced as a result of violence along religious lines⁸⁷⁰ by disallowing minorities from selling their property in East Pakistan and had made a decision to migrate to India.⁸⁷¹ Mr. Khanna reinforced India's allegiance to the Pact. However, the response from Pakistan was that by deporting many Muslims to East Pakistan, India was also in violation of the Pact. Experts had feared that this situation appeared to be a repetition of the conditions that existed during the Partition of India in 1947.⁸⁷² There was a fear that an open-door policy and an easing of regulations controlling migration could result in an influx of 10 million people from East Pakistan as it would create heavy financial burdens.⁸⁷³

By mid-1964, it was well established that both India and Pakistan had exchanged statements accusing each other of brutal treatment of Muslims and Hindus respectively as evidenced by violence on both sides of the border. Several talks on issues of communal disturbances and the Kashmir dispute were carried out but had repeatedly resulted without a viable resolution. The New Delhi Conference on Minorities that was conducted on 9th April 1964, adopted resolutions to establish two committees that would look into “restoring communal harmony”, “movement of refugees”, and the problem of “illegal infiltrants” from East Pakistan

⁸⁶⁹ *ibid.*

⁸⁷⁰ Nehru-Liaquat Agreement (n 78).

⁸⁷¹ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. (National Archives, London) (13 March 1964). This is an extract from ‘Indigram’ No.42 that details the ‘Rehabilitation Minister’s Statement on Minorities’ in the Rajya Sabha.

⁸⁷² *ibid.*

⁸⁷³ S. Natarajan, ‘Problem of India’s Refugees’, *The New Commonwealth*, Bombay (March 19, 1964). (National Archives, London).

(which Pakistan wanted to characterize as the eviction of Indian Muslims).⁸⁷⁴ In restoring communal harmony, India had proposed to circulate newspapers of both countries across the subcontinent and also examine school syllabi in order to include lessons on positive communal relations.⁸⁷⁵ While some concrete actions were being attempted, retaliatory statements were also being made by both India and Pakistan which resulted in further communal unrest. In fact, the Financial Times reported that the appointment of a new Minister of Rehabilitation, Mr. Mahavir Tyagi, was an indication that there were serious concerns about peace between the two subcontinental states.⁸⁷⁶ This appointment had come at the heels of another failed meeting between the Ministers of Home Affairs of both countries. The policies that were being proposed, such as mass migration, was certain to be an economic disaster for India according to this report.⁸⁷⁷

Despite such chaotic conditions, between January and June 1964 over 450,000 refugees had arrived in India from East Pakistan and several Muslims from border states were asked to 'quit India'.⁸⁷⁸ Mr. Mahavir Tyagi, the Indian Minister for Rehabilitation, reported in the Rajya Sabha (India's Upper House) on June 6, 1964, that between the 1st of January and the 1st of June, 434,000 refugees had entered India of which 367,000 were Hindus, 47,000 were Christians and 20,000 were Buddhists.⁸⁷⁹ Camps were established away from border states in order to ease some of the tensions. One camp in Dandakaranya in the central-east part of India was overflowing which led

⁸⁷⁴ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. (National Archives, London) (9th April 1964). This in an extract from 'Indigram' No.54 that contains a short summary of the 'New Delhi Conference on Minorities'.

⁸⁷⁵ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. (National Archives, London) (13th April 1964). 'Indian Proposals for Promoting Communal Harmony'.

⁸⁷⁶ The Correspondent, 'The Hindu-Moslem Riots: Mass Migration is no solution', The Financial Times, Calcutta (April 22, 1964). (National Archives, London).

⁸⁷⁷ *ibid.*

⁸⁷⁸ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A., Document No.: PL.5/6/1 (National Archives, London) (13th June 1964). This dossier contains documents with regards to the early arrival of refugees to India from East Pakistan. This particular document is a letter that was sent to Guy Simmons, at the Commonwealth Relations Office by a Representative of the British High Commission in India, W.L. Allinson explaining the ongoing refugee situation.

⁸⁷⁹ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A. ((National Archives, London) Extract – Calcutta Monthly Report for May 1964. Original in File No.: 2-SEA 113/5/6.

to more camps being set up in western Madhya Pradesh, Bihar, the United Provinces, Maharashtra, Andhra Pradesh, Mysore, and Madras.⁸⁸⁰ The report presented by Mr. Tyagi in the Rajya Sabha indicates several refugee situations that India was compelled to handle at the border states simultaneously. The situation in rehabilitation camps was equally dire causing many refugees a great deal of distress. Mr. Tyagi reported that several refugees had refused to take on manual work and expected to keep receiving their doles.⁸⁸¹ The Minister also reported that many refugees had deserted several rehabilitation camps and wanted to return to the border states of India where they were not provided any relief, the rationale for which was not clear.

In addition to minority religious groups from East Pakistan who had sought refuge in India, the Garo and Chakma refugees had also entered the state of Assam fleeing persecution in East Pakistan.⁸⁸² They were moved away from the border areas and a few of them were settled in North East Frontier Agency (N.E.F.A) which later on became the Indian state of Arunachal Pradesh. There were serious difficulties that were present, dealing with the Chakma refugees who were about 13,000 in number at that time. The Minister also reported that almost 2,000 Muslims were removed from Jamshedpur and Bihar about 700 of whom were deported to East Pakistan, who were not infiltrators but had arrived after 1947.⁸⁸³ This was confirmed by British High Commission in Pakistan which had earlier in the month reported that given the heightened tensions between the two subcontinental states, India retaliated to violence against Hindus by forcibly evicting more than 1,425 steelworkers in Tata Steel plants in Tatanagar and Jamshedpur.⁸⁸⁴ Many

⁸⁸⁰ *ibid.*

⁸⁸¹ *ibid.*

⁸⁸² *ibid.*

⁸⁸³ *ibid.*

⁸⁸⁴ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A., Document No.: EXT. 5/6/21 (National Archives, London) (2nd June 1964). This particular document is a letter that was sent to Guy Simmons, at the Commonwealth Relations Office by a Representative of the British High Commission in Pakistan, R.G. Beer explaining the forcible evictions of Muslims from India to West and East Pakistan.

of these Indian Muslims were asked to board trains bound for Pakistan and were dropped off at the border of Lahore and Amritsar. However, Pakistanis had only allowed 800 of these evacuees into Pakistan and the rest were asked to camp at the border camp of Atari for not being able to prove Pakistani nationality.⁸⁸⁵ Another 2,000 Muslims were evicted from the Tin Plate Company of India situated in the Eastern Indian city of Rourkela and sent to East Pakistan. Almost all of these Muslims had been employed in these industries since the early days of the Partition of India in 1947. Many of these workers had families and children who were Indian citizens, which meant that families were torn apart in the process.⁸⁸⁶

Hindu Nationalism: continued impact of geopolitical shifts and colonial legacies

It is evident that geopolitical shifts that took place in 1947 in the subcontinent continued to manifest in disenfranchisement, ambiguous identities, and religious discrimination. For instance, a letter from June 1964 details a meeting held by the Akhil Bharatiya Hindu Mahasabha (The All-India Hindu Grand Assembly) which passed resolutions regarding minorities in Pakistan and India, and one relating to Kashmir. The resolutions go into great detail about the need to “liquidate Pakistan or to exchange population”.⁸⁸⁷ The arguments also proceeded to say that, “the presence of many of the Muslims, most of whom have their nearest and dearest relations and friends in Pakistan is a positive danger to the safety, integrity, and security of India.”⁸⁸⁸ While tangential, it is nonetheless crucial to note that the Hindu Mahasabha did not appear in a vacuum, as the conditions for its relevance in India was created almost six decades prior. In 1909, the Morley-Minto reforms took a momentous step of conceding separate electorates to Muslims, [...] which

⁸⁸⁵ *ibid.*

⁸⁸⁶ *ibid.*

⁸⁸⁷ Dossier No.: D.O. 196/379, File No.: 2-SEA 65/105/1. A., Document No.: PL.5/80/10 (National Archives, London) (10th June 1964). This particular document is another letter that was sent to Guy Simmons, at the Commonwealth Relations Office by a Representative of the British High Commission in India, W.L. Allinson explaining the intervention of the Hindu Mahasabha (All-India Hindu Assembly) in response to the arrival of refugees from East Pakistan.

⁸⁸⁸ *ibid.*

had opened new arenas of competition and community division yet negated popular representation in India”.⁸⁸⁹ In fact, there existed precursors to the prevalent Hindu nationalism in India today. The rationale for such fervent communitarian tendencies emerged more than a century ago, when the colonial state’s census enumeration that was introduced in 1871, gave importance to communities defined by religion and assessed by demographic weight.⁸⁹⁰ The census revealed a decline in the Hindu population between 1891 and 1911, which was an obvious cause for concern for many Hindus. The ‘declining Hindu scare’ was a manifestation of the census. However, what was less obvious was that numbers, demographic majorities and minorities were the root of the construction of the “Hindu communitarian narrative”, which exerted a profound impact on formulations of Hindu identity in various parts of India.⁸⁹¹ The grim picture that the census painted for the future of Hindus, which also included a narrative that Hindu communities would cease to exist in 700 years, triggered a narrative that there was a need for a movement that would safeguard their interests in colonial politics. A Hindu Sabha was formed in August 1906 by orthodox Hindu leaders focused on religious and social objectives.⁸⁹²

Such objectives manifested in discussions on the threat posed by Pakistan to India’s security. The document that was referred to earlier, also mentions arguments that were made on how “Pakistan is now the homeland for the Indian Muslims and Hindustan is the homeland for all Hindus”.⁸⁹³ The argument was that there can be no “emotional integration among such heterogenous elements in India.”⁸⁹⁴ The resolution also concluded that the “real solution of the

⁸⁸⁹ Prabhu Bapu, *Hindu Mahasabha in Colonial North India, 1915-1930: Constructing Nation and History* (Routledge 2013) 14.

⁸⁹⁰ *ibid* 15.

⁸⁹¹ *ibid*.

⁸⁹² *ibid* 16.

⁸⁹³ *Supra* (n 887).

⁸⁹⁴ *ibid*.

constant threat to our national security lies in the liquidation of this Islamic State [Pakistan]”.⁸⁹⁵ The detailed text of the resolutions was provided as attachments along with this letter. The sum and substance of the resolutions passed in this meeting were that according to the Hindu Mahasabha, it was imperative that the 9 million Hindus stuck in West and East Pakistan should be brought to India and rehabilitated.⁸⁹⁶ The Hindu Mahasabha reiterated its indignant commitment to protecting the Hindu identity of India and accused the Indian Government of being indifferent towards minority Hindus living in Pakistan. The Indian Government was well aware of the problems another population exchange could create, however, the Mahasabha was adamant that India’s perverse preoccupation with secularism was hurting Hindus elsewhere in the region.⁸⁹⁷ The Mahasabha also promised to launch a campaign to compel the government to take effective steps towards rehabilitating Hindus. Finally, the resolutions also reiterated that Jammu and Kashmir were an integral part of India, and the Government should not be in a position to compromise.⁸⁹⁸

The colonial government in India not only created the conditions for religious nationalism and divisions to thrive but it was also well established that they continued to intervene in subcontinental affairs years after the partition. For instance, while the 1964 crisis was ongoing, the British High Commission in India, in a letter, notified the Head of the Commonwealth Relations Office Miss Eleanor J. Emery of a meeting the High Commissioner had with the Indian Minister of Rehabilitation, Mr. Mahavir Tyagi. Mr. Tyagi estimated that by October 1964, about 693,000 refugees had fled persecution from East Pakistan of which about 260,000 had been resettled into camps and rehabilitation centres. He believed that the remainder had just “disappeared into the

⁸⁹⁵ *ibid.*

⁸⁹⁶ Text of the Resolutions passed at the All India Hindu Mahasabha’s 48th Session held between 15th and 17th May 1964 at Camp Sholapur (provided as attachments to the letter from W.L. Allinson to Guy Simmons).

⁸⁹⁷ *ibid.*

⁸⁹⁸ *ibid.*

general population” in the border states of West Bengal, Assam, and Tripura.⁸⁹⁹ However, despite having been familiar with the crisis that had been ongoing for several months, the narrative that the British High Commission built was that Mr. Tyagi “was clearly conscious of his own lack of knowledge about this particular matter”, and was looking for ideas from British authorities on how to help people who had fled insurgencies and persecution from East Pakistan.⁹⁰⁰ The letter requested the Commonwealth Relations Office and the Colonial Office for assistance to help prevent adverse situations for refugees who were still arriving in India. However, this letter also captures the depth of British cognitive dissonance in characterizing the issues of forced displacement. The Representative from the British High Commission T.J. O’Brien, who wrote this letter, characterized the ongoing refugee issues in a strongly Eurocentric view, without regard for how colonially imposed cartographic divisions and territorial reorganization of South Asia have manifested in refugee situations that have been continuing for close to two decades. He wrote, “the refugee problem cannot, of course, be satisfactorily dealt with in isolation from all other disputes that colour the Indo-Pakistan relations”.⁹⁰¹ O’Brien continued that root of the “communal problem needs to be emphasized over and over again” which has an intimate connection with Kashmir; he also emphasizes that, to Pakistan, the issue in Kashmir “is a clear-cut case of Hindus holding down Muslims against their will [and it] is against the nature of Indians to admit this wholly”.⁹⁰² O’Brien squarely places the responsibility on the two subcontinental states to accept this connection as a vital element in their consideration of cross-border relations by quoting Nehru’s understanding of

⁸⁹⁹ Dossier No.: D.O. 196/554, File No.: 2-SEA B/5, Document No.: PL.5/6/11 (National Archives, London) (3rd October 1964). This is a dossier that contains documents with regards to the arrival of refugees to India from East Pakistan. The series of letters and memoranda are in reference to the help sought by the Minister of Rehabilitation, Mr. Mahavir Tyagi. This particular letter was sent to Miss Eleanor Emery, the Head of the Commonwealth Relations Office by a Representative of the British High Commission in India, T.J. O’Brien explaining the assistance requested by the Indian Government to provide material aid to refugees.

⁹⁰⁰ *ibid.*

⁹⁰¹ *ibid.*

⁹⁰² *ibid.*

the issue during the last few months of his life. He also characterizes those who do not accept this as “heretics”; he recommended that the Colonial Office should be involved by suggesting that the British will “lose no opportunity of deploying the argument” with Indian ministers and officials.⁹⁰³ In October 1964 the Prime Minister of India Lal Bahadur Shastri and President of Pakistan General Ayub Khan met in Karachi to discuss the ongoing issues in South Asia. The New York Times on the day of their meeting reported that after “nearly five hours of talks, they said in a joint statement that relations between their countries needed to be improved.”⁹⁰⁴ Such statements were not new and consistent failures were a testament to the turmoil that preoccupied both states that were trying to manage state-building projects while simultaneously protecting refugees and migrants. The statement avoided suggesting what the problems were⁹⁰⁵, however, continued communal violence and irreconcilable differences on control over Jammu and Kashmir culminated in the 1965 Indo-Pakistani war that led to more disturbances and displacement in the region. The war ended with the signing of the Tashkent Declaration in 1966 which was supposed to have functioned as a peace agreement but did not live up to its expectations.

The cross-border crisis continues: 1971 Bangladesh Liberation War and Refugee movements

Political events, internal conflicts, and unrest in East Pakistan began to raise concerns for the Government of Pakistan, headquartered in West Pakistan, which unleashed a systematic and violent campaign to suppress political opposition in the East. Opposition political movements in East Pakistan were rooted in vocal disapproval of domination by West Pakistan, as tensions had been looming between two wings of undivided Pakistan since the early days of the partition.⁹⁰⁶

⁹⁰³ *ibid.*

⁹⁰⁴ The New York Times, ‘*Shastri and Ayub Meet Informally on Indian-Pakistani Issues*’, Karachi (October 13, 1964).

⁹⁰⁵ *ibid.*

⁹⁰⁶ Louise Holborn with the assistance of Philip and Rita Chartrand, *Refugees: A Problem of Our Time. The Work of the United Nations High Commissioner for Refugees, 1951-1972* (The Scarecrow Press Inc. 1975) (Volume I) 754.

From the promulgation of an Islamic Constitution that had alienated a significant proportion of the population to imposing Urdu as the official language, despite many in East Pakistan being Bengali speakers, the growing discontent led to demands of autonomy and secession from many East Pakistani nationalists.⁹⁰⁷ In the provincial elections of 1954, the United Front, a party that promised to fight for autonomy won 300 out of the 309 seats in East Pakistan, thereby cementing its popularity and rejection of West Pakistani domination.⁹⁰⁸ As Jackson explains, the opposition to West Pakistan ran deeper than just the general discontent as there was “a profound difference in social structure and political culture between [East] and the society of the western provinces.”⁹⁰⁹ Jackson explains that the Western provinces were plagued by “a combination of feudalism and plutocracy”, however, on the other hand, in East Pakistan “the most important social force was not the old Urdu-speaking Muslim upper class, but the Bengali-speaking Muslim middle class, whose political leaders had undergone their formative experiences in the parliamentary government of the former undivided province of Bengal” in British India.⁹¹⁰ In addition to these issues, the political movement in East Pakistan was founded on the idea that an acceptable framework for Pakistani unity was difficult to find, since there was an impression of ‘internal colonialism’ that East Pakistanis felt when it came to their relationship with Pakistan.⁹¹¹

While social, political, and economic discontent were some of the elements of East Pakistan’s push for secession, it is also equally critical to note that the discontent also emerged from the lack of unifying constitutional characteristics if East and West Pakistan were to co-exist. The ongoing project of nation-building in the subcontinent was instrumental in much of the

⁹⁰⁷ Oberoi (n 30) 105.

⁹⁰⁸ *ibid.*

⁹⁰⁹ Robert Jackson, *South Asian Crisis: India, Pakistan, Bangladesh* (Chatto and Windus Ltd. 1975) 14.

⁹¹⁰ *ibid.*

⁹¹¹ *ibid.* 15.

discontent. Though the Partition of India established the theory of two nations, one Muslim and one Hindu, without regard for geographic, cultural, or linguistic affinities, there were stark differences in the political philosophy of the two parts of Pakistan.⁹¹² If Pakistan was to be truly built as an Islamic nation, it would be at odds with East Pakistan's demographic since a fifth of its population was non-Muslim. The crisis occurred from the questionable notions upon which a unified Pakistan would exist and sustain.⁹¹³ The political leaders in East Pakistan believed that Islamic exclusiveness would mean that the Hindu minority would be deprived of their electoral rights. They also believed that in addition to depriving them of their Bengali majority within East Pakistan, this would be a continuation of what the British Raj envisioned in their divisive political imposition whereby two separate electorates along religious and communal lines were created.⁹¹⁴ The political leaders of the East believed that their ideologies were more inclusive and progressive, and a unified Pakistan would mean an erasure of their identity, and social and cultural value system.⁹¹⁵

These tensions were festering since the promulgation of the 1962 Pakistani Constitution which concentrated the power in the President's Office based in West Pakistan, which the East Pakistanis felt was a way to diminish their region and interests. Economic and political disenfranchisement of East Pakistanis led to disturbances and riots in the late 1960s that denounced West Pakistan's domination. The 1970 Pakistani election process was a moment of reckoning for East Pakistan, given that a decision was made to hold a common vote that disregarded specific interests and concerns of those in the East. This served as a referendum on East Pakistan's secession and autonomy, which was a popular message among political campaigners in East

⁹¹² *ibid* 16.

⁹¹³ *ibid*.

⁹¹⁴ *ibid*.

⁹¹⁵ *ibid*.

Pakistan. The national party that led this message of secession was the Awami League under the leadership of Sheikh Mujibur Rehman. His popularity drove dissident movements against West Pakistan and led to increasing unrest and riots. The Pakistani Army was swiftly deployed in the East and Rehman was arrested. India's intervention and attention to these issues galvanized secessionist movements. Right from the Partition, India was not wedded to the idea of two nations and believed that nationhood was based on progressive secular values. However, Pakistan's nation-builders in the early days wanted to provide a home for South Asia's Muslim community. This aspiration was at risk with East Pakistan's urge to secede. India threw its support behind the East Pakistani secessionist movement and had begun helping many political leaders inside its territory. While the Bangladesh Liberation War had begun by March 26, 1971, by April 10, Bangladesh officially seceded from Pakistan. However, the war had led to the massacre of millions and led to the displacement of hundreds of thousands who started arriving in the border states of India.

Early days of refugee arrivals from Bangladesh

Refugees began arriving in India soon after the disturbances had begun in East Pakistan and the army was deployed to neutralize dissident movements. In the initial days of the crisis, the flow of refugees was gradual and was treated as foreigners who had to obtain residence permits to stay in India.⁹¹⁶ India also considered them as evacuees and did not plan on providing permanent sanctuary for these refugees. India's intention was clear: by providing sanctuary, albeit temporary, to Bangladeshi refugees, India wanted to prove to the international community its commitment to humanitarian values and service to refugees. However, the ulterior motive was to demonstrate that Pakistan was instrumental in creating instabilities in the region and reinforce the need for a secular

⁹¹⁶ Oberoi (n 30) 111.

state.⁹¹⁷ The complexity of this particular crisis was evident from the implied ‘threat’ that Bangladeshi refugees posed to India. In responding to the crisis of 1971, “India was keen to separate the refugee experience of 1947 from that of 1971”.⁹¹⁸ India’s actions were attempts to provide reinforcement to the narrative that the partition was a mistake back then, which manifested in continued disturbances and instabilities in the subcontinent. Though India had begrudgingly internalized the need to maintain colonially installed borders, providing sanctuary to refugees from the subcontinental neighborhood allowed it to retain “effective control over its own border”.⁹¹⁹

In the early days of this crisis, India’s refugee management was done through local NGOs who had set up check-posts, rehabilitation camps, and relief centres in the North-Eastern and Eastern border states of India. Relief took the form of vaccination campaigns against cholera and smallpox, and temporary residence permits that facilitated refugees to access food through public distribution systems and rations.⁹²⁰ By the end of April 1971, about a month after the official secession of Bangladesh, an estimated 1.2 million refugees had arrived in India and by May the refugee arrival rate had swelled to 83,000 per day. Hindus constituted 70% of the refugees and the Pakistani offensive had taken the form of violence against students, intellectuals, and party workers and members of the Awami League who had initiated secessionist movements.⁹²¹ Despite explicit insistence that refugees could not remain as permanent residents in India, the Indian government did its best to bring relief to refugees. The efforts that were initiated in the early days were done with immediacy in mind. When the problem reached epic proportions, the Central Coordination Committee for Refugee Relief was set up within the Rehabilitation Department of the Ministry of

⁹¹⁷ *ibid.*

⁹¹⁸ Antara Datta, *Refugees and Borders in South Asia: The Great Exodus of 1971* (Routledge 2013) 20.

⁹¹⁹ *ibid.*

⁹²⁰ Oberoi (n 30) 112.

⁹²¹ Holborn (n 906) 755.

Labour and was charged with the task of establishing camps and coordinating relief programs.⁹²² This Committee worked in tandem with state governments in India, voluntary organizations, and international agencies. An estimated 896 refugee camps were set up in less than nine months that housed close to 7 million refugees. While international assistance was readily available, much of the efforts were undertaken by a number of Indian volunteer agencies.⁹²³

The involvement of UNHCR

Given the magnitude of this crisis, India's Permanent Representative to the United Nations, Samar Sen, made a formal request to the Secretary-General U Thant, to initiate humanitarian actions.⁹²⁴ The initiatives included the establishment of the Focal Point operation for humanitarian assistance to refugees from East Pakistan in India which was "distinct from the traditional responsibilities of the Office of the High Commissioner".⁹²⁵ The Focal Point operation "involved mobilization of international support and funds, procurement and delivery of relief supplies to India, and coordination with the Indian government, which organized the distribution of these supplies".⁹²⁶ A focal point representative was based in New Delhi and led the relief effort for Bangladeshi refugees in India in collaboration with other voluntary agencies. Under this arrangement, agencies such as UNICEF, WHO, FAO/WFP had agreed to coordinate with the UNHCR on fund-raising activities and entrusted the High Commissioner to coordinate with the Government of India and other agencies that were involved in relief.⁹²⁷ As was clear from the lead up to the crisis that the disturbances arose from politically sensitive matters concerning Pakistan's unified existence. The High Commissioner of Refugees in Geneva explained to the High

⁹²² *ibid* 756.

⁹²³ *ibid*.

⁹²⁴ Office of the United Nations High Commissioner for Refugees, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford University Press 2000) 62.

⁹²⁵ *ibid*.

⁹²⁶ *ibid*.

⁹²⁷ Holborn (n 906) 759.

Commissioner of Refugees in India that “the *Secretary-General*’s decision [to appoint a Focal Point representative] was intended to depoliticize the matter”.⁹²⁸ The High Commissioner said that this was in light of the well-established relationship of the UNHCR with the Indian Government’s Ministry of Rehabilitation and noted that the “presence of [High Commissioner] in India would be strengthened by the secondment of a senior UNHCR official”.⁹²⁹ After these arrangements were agreed upon, UNHCR sent in a fact-finding mission to New Delhi, composed of Deputy High Commissioner Charles Mace, Director of Operations, Thomas Jamieson, and a Legal Consultant, Dr. Paul Weis, to survey the situation in May 1971.⁹³⁰ The fact-finding mission concluded that the UN’s efforts were to focus on urgent relief measures for refugees in India and facilitating voluntary repatriation.⁹³¹

The Focal Point unit comprised five officers and through the Standing Interagency Consultation Unit (SICU), coordinated relief efforts to refugees. Though this was coordinated through UNHCR, each specialized agency such as UNICEF, WFP, and FAO were also involved and had different purposes in the protection efforts, which interacted with the Central Coordination Committee of the Government of India. Though there was a symbiotic relationship between various specialized international agencies and the Government of India in the early days, by late May India had demanded a change in the composition of this committee. India wanted only the Red Cross, the Government ministries, and few UN agencies to be represented in relief efforts and “further requested that aid, as far as possible, be given as cash, which could then be used to purchase relief supplies within India”.⁹³² The Indian government’s trepidation with the

⁹²⁸ Fonds 11, Series 1, I.IND.PAK [1], (UNHCR Archives, Geneva) (16th May 1971). This is a Cable from the High Commissioner of Refugees, Geneva to the High Commissioner of Refugees, New Delhi, explain the need for Focal Point Operations in India Government to provide material aid to refugees.

⁹²⁹ *ibid.*

⁹³⁰ Holborn (n 906) 760.

⁹³¹ *ibid.*

⁹³² Oberoi (n 30) 114.

involvement of international agencies was also evident in its placing “restrictions on the number of foreign NGO personnel that was directly allowed to administer relief aid in India”.⁹³³ The intent was to restrict international access to a rather politically sensitive border which hearkens back to the comments that Nehru had made during the Tibetan refugee crisis which were to disallow international scrutiny of the issue.

Despite limiting the access available to international agencies, in October 1971, UNHCR’s report on the prevailing situation of East Pakistani refugees indicated that collaborative efforts undertaken by the Government and UNHCR were channelled in two directions. One was emergency relief measures for East Pakistani refugees and the other was facilitating voluntary repatriation of refugees to Pakistan.⁹³⁴ According to this report, the Government of India, despite being burdened with the heaviness of this crisis, was able to effectively issue relief measures. Each head of each refugee family residing in the camps across the country was issued with a ration card that enabled them to access food and other essential goods with respect to material relief.⁹³⁵ Every refugee was able to receive 300 g of rice, 100 g of wheat, 100 g of pulses, 25 g of edible oil, 25 g of sugar, and 20 g of salt per day and half the amount for refugee children. However, UNHCR expressed concerns with respect to child malnutrition and deficiencies. Nutritional therapy centres for children under five were recommended. On the basis of this recommendation UNICEF, FAO and the Indian Red Cross Society launched mass supplementary feeding programs that were aimed at providing badly needed protein-rich foods and multivitamins.⁹³⁶ While relief efforts were being

⁹³³ *ibid.*

⁹³⁴ East Pakistan Refugees in India: Relief; Dossier No.: D.O. 133/227, File No.: 11/1 (Part J), Document No.: GE: 71-21674 (National Archives, London) (15th October 1971). This is a dossier that contains documents with regards to the relief provided to refugees from East Pakistan during the 1971 crisis. This particular report titled ‘Assistance to East Pakistan refugees through the United Nations’ outlines the efforts undertaken by India and Pakistan in collaboration with UN agencies.

⁹³⁵ *ibid.*

⁹³⁶ *ibid.*

carried out, voluntary repatriation of refugees was also discussed as one of the main options during the crisis. The Government of Pakistan had urged refugees to return home. The Government of India was agreeable to such terms given that on several occasions it had indicated that refugees were allowed to live in India only temporarily.⁹³⁷ After consultation with the Government of Pakistan, the UN High Commissioner appointed as his representative in Dacca Mr. J.D.R. Kelly in order to facilitate voluntary repatriation. The representative in Dacca and his colleagues visited the reception centres that were established by the Government of Pakistan along the border with India.⁹³⁸ The Pakistan authorities had reported that by September 30, 1971, around 43,000 people had crossed through the reception centres. An additional 129,000 people had crossed the frontiers back to their homes in East Pakistan through one of the unauthorized routes without passing through reception centres bringing the total to 173,000 people, of which 45,000 were Hindus and the rest were Muslims.⁹³⁹

India's relationship with UNHCR during this crisis was contentious at best, as has been the case since the latter's inception. However, during this particular crisis, reports and updates were presented by the Commonwealth Office, the Government of India, and UNHCR on which agency was directing relief measures. This precipitated confusion over UNHCR's mandate in India and sowed further discord in the relationship. In light of the narratives presented by UNHCR on the status quo of refugees, Indian policymakers began to question the neutrality of the organization. Kelly's visit to the border between India and East Pakistan to oversee repatriation was in part due to Pakistan's change in attitude towards international agencies. While India was steadfast in its disapproval of international intervention, Jackson argues that Pakistan's weakening economic

⁹³⁷ *ibid.*

⁹³⁸ *ibid.*

⁹³⁹ *ibid.*

conditions contributed to its vulnerability and the adoption of a new attitude towards international assistance. Influenced by the pressure which the United States and other Western powers brought to bear Yahya Khan was forced “to reverse his rejection of U Thant’s proposals in April for a United Nations role in East Pakistan”.⁹⁴⁰ Soon after overseeing the repatriation, much to the chagrin of India, UNHCR declared that life was slowly returning to normal. India felt that the UNHCR was attempting to intrude into the political sphere and promote repatriation despite the unchanged situation on the ground. In the Lok Sabha (the Lower House of the Indian Parliament), Deputy Minister of External Affairs Mr. Surendra Pal Singh said that the UNHCR had persuaded Pakistan into agreeing for a UNHCR representative to be present at Dacca but did not provide any details on how the presence of a UNHCR man in Dhaka alone would “induce the refugees to go back”.⁹⁴¹ Mr. Singh was of the opinion that “conditions should be created in East Bengal for the safe and early return of refugees under credible guarantees”.⁹⁴² By this time, India’s tenuous relationship with the UNHCR intensified. The Government of India declared that the circumstances under which refugees would return would be dependent on the regime change. India recognized that the Awami league that had been fighting for secession should be brought to power. As it stood, there were no effective guarantees for the safe return of refugees.⁹⁴³

Finally, during an Executive Committee meeting of UNHCR in October 1971, the issue of East Pakistani refugees in India was the focus. The High Commissioner in this meeting provided a rather self-aggrandizing update on his work as a focal point for the UN systems during the East

⁹⁴⁰ Jackson (n 909) 47.

⁹⁴¹ Government of India, Lok Sabha Debates, 2nd Session, vol. V, 12 July 1971. Statement by Deputy Minister of External Affairs Shri Surendra Pal Singh on the question posed by Shri B.S. Murthy a Member of Parliament. The question was as follows: Will the Minister of External Affairs be pleased to state whether the United Nations High Commissioner for Refugees said on the 15th of June 1971 in Calcutta that an organisation would soon be established to help the return of East Bengal refugees? Was this matter discussed with the Government of India?

⁹⁴² *ibid.*

⁹⁴³ Oberoi (n 30) 119.

Pakistan crisis. Though he emphasized that his role was purely non-operational, he also gave UNHCR the credit for leading the repatriation efforts.⁹⁴⁴ India had certainly made its position very clear on the UN's involvement; the UN was to be restricted to fundraising and channelling contributions to the Government of India in addition to coordinating activities regarding the use of those contributions. India had also strongly opposed to UN's efforts at institutionalizing refugee camps thereby removing the "threat of the UN operation there becoming another permanent political and economic burden on the international community". The High Commissioner in his comments also said that the principal incentive for the UNHCR was to promote conditions that would lead to a permanent solution and noted that the governments of both India and Pakistan supported the view that the refugees should be repatriated of their own free will and claimed that an effective solution to repatriation was possible only with the consent and consensus of the host country and the country of origin. However, this was belied by the fact that UNHCR had imposed itself at the border of India and Pakistan during the repatriation process as mentioned earlier. While the work of the High Commissioner and his staff received warm praise from all speakers in the executive committee meeting, the observers from Pakistan and India were very restrained and moderate during the proceedings. The Government of India instead stated that it had set aside \$360 million of relief funds and \$69 million in foreign aid for close to 10 million East Pakistani refugees. They also pointed out that the narrative that was built around India's response to the crisis was damaging.

⁹⁴⁴ East Pakistan Refugees in India: Relief; Dossier No.: D.O. 133/227, File No.: 11/3, Document No.: 1230/1510 (National Archives, London) (12th October 1971). This document titled 'UNHCR Executive Committee Meeting: India/Pakistan' was addressed to the Foreign and Commonwealth Office outlining the ongoing crisis concerning refugees from East Pakistan.

The Eurocentric narrative perpetuates

Despite India's efforts in providing relief and sanctuary to many, the narrative of the crisis continued to feed into the notion that Indian authorities had been reckless in their approach with respect to understanding the magnitude of the issue. This narrative did not make any mention of how colonialism, which ended with the territorial reorganization of the subcontinent, had contributed to the perpetual instability and ongoing displacement within the region. Their actions during the formalization process of the 1951 *Convention* that marginalized the experiences of displacement in the subcontinent also went unstated. Rather, many of the concerns expressed were about 'restoring stability' to the subcontinent devoid of contextual or historical understanding of the issues and providing solutions by scrutinizing the issue at an international level. The crisis was viewed as the "embodiment of longstanding regional and ethnic stereotypes" that manifested in perpetual instabilities.⁹⁴⁵ The narrative of collective madness that was associated with partition displacement prolonged well after 1947, whereby the subcontinent was viewed as the chaotic other, a common currency of Eurocentric discourse.⁹⁴⁶

Such representations were also evident from much of the correspondence and memoranda exchanged between different wings of the British Government on the issue of Bangladeshi refugees. As archival documents show, with the active involvement of British Voluntary Agencies and the British Government in the crisis, several pieces of correspondence reveal how India's response was characterized. For instance, in a letter to the British High Commissioner Peter Male in New Delhi, the British Deputy High Commissioner based in Calcutta, F.S. Miles, addressed the issue of malnutrition of children in refugee camps in India.⁹⁴⁷ In this letter, F.S. Miles informs

⁹⁴⁵ Peter Gatrell, *The Making of the Modern Refugee* (Oxford University Press 2013) 167.

⁹⁴⁶ *ibid.*

⁹⁴⁷ East Pakistan Refugees in India: Relief; Dossier No.: D.O. 133/227, File No.: 11/1 (Part J), Document No.: 10/5 (National Archives, London) (8th October 1971). This is a dossier that contains documents with regards to the relief provided to refugees from East Pakistan during the 1971 crisis. This particular letter was sent to Mr. Peter J. E.

Peter Male of the complaints the former had received from the local UNICEF representative about the Indian Government's restrictions on international agencies' ability to provide aid to refugees. He further refers to Indian officials actively working on rehabilitation efforts as not being "dynamic" and as being "unable to cope" with the manifestations of the crisis.⁹⁴⁸ In the letter, he continues to criticize Indian officials and their abilities by saying that they left the refugee camps in a "dirty state".⁹⁴⁹ The assumed supremacy of European intervention as being the ultimate salvation for those vulnerable during such times was evident from Miles's letter, in which he says that "Indians do not generally feel as deeply about the effects of child malnutrition as Europeans do", and that the death of thousands of children amid the crisis was "merely an extension of something India has always lived with".⁹⁵⁰

The pattern of an utter absence of self-reflection was not unprecedented and was evident from not only this letter, but in many others prior to this during different waves of refugee movements in the subcontinent. In essentializing famine as an Indian phenomenon, Miles overlooked the fact that only three decades prior to this crisis had the British authorities under Churchill engineered the Bengal Famine that killed over 2 million people. This ostensibly humanitarian regime that is designed to protect refugees is therefore belied by centuries of British colonialism that inflicted oppression and violence in the subcontinent, which had led to the crises that had befallen the region now. This was also an indication that Indians were forever thwarted in their efforts to attain full sovereignty and were still compelled to rely on the support of the British.

Male, the British High Commissioner in New Delhi by Mr. F.S. Miles who was the Deputy British High Commissioner based in Calcutta explaining the incidents of malnutrition among child refugees in rehabilitation camps.

⁹⁴⁸ *ibid.*

⁹⁴⁹ *ibid.*

⁹⁵⁰ *ibid.*

Concluding note on refugeehood and Indo-Pak border

The analysis of partition displacement and the perpetual cross-border instability that induced further displacement years later, enables us to understand the border between India and Pakistan as a critical element in nationalism and new notions of citizenship. As Datta argues, refugees are frames “to examine the multiple ways in which the border was disrupted” and negotiated over a period of time.⁹⁵¹ Refugeehood was also a vehicle for India and Pakistan to maintain effective control over its territory in a time when asserting their sovereignty over their own territorial space was difficult. As the preceding sections outlined, for India, Pakistan (and the United Nations), the border became a site of violence and resentment, but for the refugees, the space inside the border became a site of refuge and belonging. This made refugees, not only a manifestation of the contentious nature of colonial boundary-making but also a figure that was an essential “product of the modern political border”.⁹⁵² The archival records and the narratives on refugeehood in the preceding sections also demonstrated that while crossing the border may have been impulsive, “it is also an overtly political act”.⁹⁵³ Datta argues that while it may not be possible to gauge the political intent of a refugee that crossed the border, in doing so, they had forsaken the territory of one nation-state and placed themselves in another, thereby “partaking in a definite political process”.⁹⁵⁴ By responding to such refugee movements India was compelled to build a refugee regime that would be dynamic and flexible in nature. In its current form, it may risk being viewed as unnuanced or insignificant due to the *ad-hoc* nature of its approach. However, the response to these movements demonstrates that while remaining true to the objectives of international refugee law, India had developed a system of refugee protection while contending

⁹⁵¹ Datta (n 918) 19.

⁹⁵² *ibid.*

⁹⁵³ *ibid.*

⁹⁵⁴ *ibid.*

with cross-border tensions and other issues of a political nature. By responding to unprecedented mass refugee movements within the subcontinent in an expeditious manner, India has built a system that is consistent with the historical context of post-partition displacement in the region ostensibly anomalous to the European approach. India has resisted the universalized notions of the *Convention* and *Protocol* and has instead “shown a generosity towards refugees which is a part of its civilizational ethos”.⁹⁵⁵ Though India does not possess a national asylum system, Indian courts have responded to the concerns of refugees consistently. Therefore, rather than viewing this system as being incompatible with the global refugee regime, a more inclusive narrative of refugee protection needs to be codified by accounting for absent histories in the development of international refugee law.

⁹⁵⁵ B.S. Chimni, ‘Foreword’ in Jessica Field and Srinivas Burra (eds.), *The Global Compact on Refugees: Indian Perspectives and Experiences* (Academicians Working Group & UNHCR India 2020) ix.

Paradigm shift in refugee studies and impacts in India

By the 1980s, India's national approach to asylum and refugee protection had reached a point of reckoning. This coincided with the ensuing "paradigm shift" in the field of refugee studies that called for, "a critique of the positivist approach, a reconfiguration of fundamental elements of the regime, a reinterpretation of the past, a concern for internal consistency, and a quest for legitimacy".⁹⁵⁶ This chapter maps some of the contemporary notions of refugeehood in India, beginning with the arrival of Sri Lankan refugees. By contextualizing the global shifts in the discipline that began in the 1980s, this chapter will provide clarity on the impacts these shifts generated in Indian practice and approach to refugee protection. The preceding chapters outlined that there was a radical difference in the nature of refugee flows in the subcontinent as compared to the refugee flows in Europe. This meant that the subcontinent's *ad-hoc* approach ran parallel to the conventional mechanisms of refugee protection as outlined in international refugee law instruments. Despite a reckoning that there was a need for a critical reimagination of academic and institutional traditions of refugee studies, postcolonial states and states in the global south were still blamed for refugee flows. The new approach that followed was to provide "assistance and protection to refugees in the region of origin and contended that the appropriate solution to refugee flows from the Third World was voluntary repatriation".⁹⁵⁷ Simultaneously, with increasing postcolonial instabilities in the subcontinent, India's attitude towards forced displacement was under scrutiny by the international community. This was evidenced by the pressures India faced while responding to the arrival of Sri Lankan refugees on its shores. During the most intense anti-Tamil pogroms in Sri Lanka in 1983, termed Black July, many Tamils sought sanctuary in the

⁹⁵⁶ Chimni (n 53) 351.

⁹⁵⁷ *ibid* 352.

neighboring Indian state of Tamil Nadu.⁹⁵⁸ This congruently increased the pressures to internationalize India's response to the instabilities in Sri Lanka. However, in its role as the regionally preeminent power, India managed to rebuff such pressures and sought to define the parameters of the conflict and its response on its own terms.⁹⁵⁹ Nevertheless, having experienced close to four decades of postcolonial displacement in the region, the time had come for India to evaluate its role in the development of international refugee law.

The previous chapter outlined India's evolving responses to refugee movements within the subcontinent after the partition. As the chapter analyzed, the sudden and massive displacement of millions within the region since 1947, challenged India's ability to effectively respond to diverse groups of refugees expeditiously and without advanced planning. It is also evident that India's post-partition refugee protection practice may still appear to be unnuanced, given that it grew out of instantaneous responses to massive displacements. It was also well established that India's disillusionment with the *Convention* compelled it to develop refugee protection norms that were more suitable to the subcontinental context. Therefore, standards of refugee protection developed organically over a period of time while India was still struggling to find its place in the international community as a sovereign and independent state. Though India may not have ratified the *Convention*, its practice was consistent with the overall objectives of international refugee law. Yet another rationale to this *ad-hoc* approach is the inability of positivist or conventional norms of refugee protection to offer solutions to refugeehood in the global south. India in its role as a postcolonial member state of the international community has repeatedly exercised its power to resist these institutional norms and traditions. The resistance is a vociferous attempt to pivot towards solutions that would be more viable in the subcontinent. This has not only manifested in

⁹⁵⁸ Oberoi (n 30) 216.

⁹⁵⁹ Zolberg et.al. (n 74) 146.

anti-institutional academic traditions but has also provided new meaning, “to the definition of refugees contained in the *1951 Convention*”.⁹⁶⁰ In attempting to write subcontinental traditions into international refugee law, I have consciously made an effort to not engage in a superficial attempt to present alternative epistemologies to refugeehood. While a critical rewriting of international refugee law, and a reconceptualization of refugee studies scholarship is something that I have yet to engage in, this penultimate chapter not only provides steps for future research but also brings together the significance of including absent historical and legal traditions within literature.⁹⁶¹

Having provided this context, this chapter outlines India’s more recent engagements with international refugee law. In seeking to map the nuance and dynamism inherent in India’s refugee protection efforts, the chapter begins by examining the response to refugee movements from Sri Lanka in the 1980s. The chapter will then evaluate India’s domestic policy structure and the impact of jurisprudential developments on refugee protection norms established through case law. This will provide a unique insight into India’s *ad-hoc* responses to refugee policy. Finally, in order to ascertain whether or not India’s approach to conceptualizing refugeehood can be construed as coherent/consistent, its engagement with the Global Compact on Refugees will also be examined.

Refugees from Sri Lanka

One of the most significant events of displacement in recent years in the subcontinent was the arrival of Sri Lankan Tamil refugees to the southern Indian state of Tamil Nadu. State-sponsored anti-Tamil violence inflicted by the Sinhalese majority intensified in the early-1980s. The seed of communal conflict had already been sown by way of 150 years of British rule on Sri

⁹⁶⁰ Chimni (n 53) 355.

⁹⁶¹ *ibid.*

Lanka (formerly Ceylon). The conflict had been steadily escalating throughout the years after the end of British colonial rule in Sri Lanka in 1948.⁹⁶² It should be noted that, as in previous instances of mass displacement in the subcontinent, the forced migration of Sri Lankan Tamils was also a manifestation of postcolonial adjustment processes that impeded Tamil self-determination and equity. The colonial rule in Sri Lanka gave rise to new social formations under one central administration for the purposes of economic exploitation and political control. This also meant that Tamil populations were interspersed with the majority Sinhalese population.⁹⁶³ With the colonial state providing opportunities for upward mobility, many Tamils began to dominate public sector professions, given that the lands they were on were infertile and barren. However, the British had also curated a form of “colonial capitalism that inserted the plantation mode on common land”.⁹⁶⁴

The flashpoint that manifested in the two and half decade long Sri Lankan civil war, was the result of postcolonial adjustment that aggravated the uneven development and disenfranchisement of many Tamils after the end of British rule in 1948.⁹⁶⁵ The colonial government left Sri Lanka in disarray and the Sinhalese majority government adopted their newfound privileges thereby reinforcing discrimination against Tamils. This form of Sinhalese nationalism grew out of the country’s anticolonial struggles that were predominantly led by them. They hence presented themselves as the ideological hegemons and independent Sri Lanka’s identity resulted in being most closely associated with Sinhala culture.⁹⁶⁶ Their economic growth was formidable and enabled absolute domination over other ethnic groups, more significantly the

⁹⁶² Ambalavaner Sivanandan, ‘Sri Lanka: Racism and the Politics of Underdevelopment’ (1984) 26 *Race & Class* 1.

⁹⁶³ *ibid.*

⁹⁶⁴ *ibid.*

⁹⁶⁵ Zolberg et.al. (n 74) 145.

⁹⁶⁶ *ibid.*

Tamils. Such differences had been festering for decades that led to a series of anti-Tamil pogroms, the decades following the independence of Sri Lanka.⁹⁶⁷

Arrival of Sri Lankan refugees: the early days

The 1983 anti-Tamil pogroms manifested in massive displacement into India. A detailed overview of the Sri Lankan civil war is not only outside the scope of this thesis, but also requires a dedicated research project of its own. Hence, the focus will be on India's response to the displacement of Tamils over the years and its transformation in response to domestic disturbances. This will also be compared to some of the developments that were being considered at a global level in order to build a more inclusive system of refugee protection. India's response to forced displacement after the partition was not uniform and was ambiguous as Chimni points out.⁹⁶⁸ As Zolberg et.al. argue, India's approach to providing sanctuary to Sri Lankan refugees was tentative at first. India's cautious approach to the instabilities in Sri Lanka was in sharp contrast to its "unconcealed intervention in Bangladesh".⁹⁶⁹ However, this was overshadowed by domestic considerations whereby a pro-Tamil role was favoured by a large population of the southern state of Tamil Nadu. Zolberg et.al argue, given that over 50 million Tamils lived in the Indian state of Tamil Nadu, there were sympathetic considerations to the Sri Lankan Tamil struggle for self-determination and autonomy.⁹⁷⁰ India's response to Sri Lankan refugees was, hence, not solely based on the humanitarian needs of those disenfranchised and persecuted, but also based on the appeals made by "co-ethnic Tamils in India".⁹⁷¹

The response to the arrival of Tamil asylum-seekers in Europe in the mid-1980s was in fact vastly different from the Indian response. In fact, European governments "refused to improve

⁹⁶⁷ *ibid.*

⁹⁶⁸ Chimni (n 93) 464.

⁹⁶⁹ Zolberg et.al. (n 74) 147.

⁹⁷⁰ *ibid.*

⁹⁷¹ Oberoi (n 30) 217.

protection for Tamil asylum seekers”.⁹⁷² This restrictive approach was undertaken “despite UNHCR claiming that the Tamils’ predicament was of legitimate concern”.⁹⁷³ As Loescher pointed out, governments in Europe “accused the UNHCR of “taking over the sovereign state’s function of deciding whether or not asylum outside the *Convention* should be granted””.⁹⁷⁴ As has been established in the preceding chapters, disparate standards of protection were institutionalized within instruments of refugee protection. Despite reaching this point of reckoning Chimni argues that “scholars have failed to address the international dimension of the causes of refugee flows”.⁹⁷⁵ This is a manifestation of the idea of ‘human’ that allowed for the brutalization of racialized bodies and placed them outside the corpus of human rights norms. The relationship between coloniality and the hierarchical ordering of the world’s populations, an element that was analyzed in an earlier chapter, is not innocuous as they undergird contemporary applications of refugee law. The European approach to Tamil asylum-seekers in the 1980s is a reflection of this institutionalized hierarchy. In the early days of the Sri Lankan civil war, India had adopted a more benevolent approach to refugees due to the linguistic and cultural proximity that many in southern India shared with their Tamil counterparts. However, European states had refused to adopt an “externalist view of the causes of refugee flows” which has led to “repatriation [becoming] the only solution to the global refugee problem”.⁹⁷⁶ Given that states in the global north had squarely placed the “State of physical origin of refugees responsible for displacement, there rests “no obligation [on the former] to resettle those fleeing inhumane conditions”.⁹⁷⁷

⁹⁷² James Milner and Jay Ramasubramanyam, ‘The Office of the United Nations High Commissioner for Refugees’, in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 191.

⁹⁷³ *ibid.*

⁹⁷⁴ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 238.

⁹⁷⁵ Chimni (n 53) 361.

⁹⁷⁶ *ibid.*

⁹⁷⁷ *ibid.*

India's response in the early days

In the early days of the Sri Lankan refugee arrivals, a few thousand people began arriving across the Palk Strait into southern India.⁹⁷⁸ During a Rajya Sabha debate on the issue in November 1983, the then Minister of State in the Ministry of External Affairs Shri A. A. Rahim reported that “between July 25th and October 31st, 1983, 15,338 Tamils holding Sri Lankan passport and 1,047 Tamils holding Sri Lankan identity certificates have come to India”.⁹⁷⁹ He added that a further 7,602 Tamil repatriates holding Indian passports had also arrived. Though India was not adequately prepared to accommodate them, two camps in the southern Indian towns of Mandapam and Kottapattu were established to house over 5,000 refugees.⁹⁸⁰ Mr. Rahim also reported that relief assistance by way of rations, cash doles and essential commodities, were also provided in addition to families receiving Rs. 3,000 (\$60) per family by way of living assistance. However, India, like in other events of forced displacement, declared that the sanctuary provided was temporary and refugees will “return to Sri Lanka when conditions have improved”.⁹⁸¹ India urged that a “political settlement which would be acceptable to all communities would certainly help to restore a sense of security and instil confidence in these displaced.”⁹⁸²

Besides providing sanctuary to many Tamils, India was also providing covert support and training to Tamil separatist militant groups like the LTTE (Liberation Tigers of Tamil Eelam). This was rooted in the idea that if India had not risen in support of the Tamil cause in Sri Lanka, it would likely be construed as India not standing by its own Tamil population.⁹⁸³ With the conflict

⁹⁷⁸ Oberoi (n 30) 216.

⁹⁷⁹ Government of India, Rajya Sabha Debates, 128th Session, Refugees from Sri Lanka, 18 November 1983.

Statement by Minister of State for External Affairs Shri A.A. Rahim on the question posed by V. Venka and V. Gopalsamy Members of Parliament. The question was as follows: Will the Minister of External Affairs be pleased to state the number of refugees who have come to India from Sri Lanka since 1st July 1983 and what measures have been taken by the Government for their rehabilitation?

⁹⁸⁰ *ibid.*

⁹⁸¹ *ibid.*

⁹⁸² *ibid.*

⁹⁸³ Oberoi (n 30) 217.

escalating over the next four years, 150,000 Sri Lankan refugees had arrived in India and were housed in camps across Tamil Nadu.⁹⁸⁴ This was the result of India maintaining a “completely open admissions policy for Sri Lankan Tamils”.⁹⁸⁵ By 1987, the conflict had escalated to such an extent that the Indo-Sri Lankan Accord had to be signed between to ensure the regional containment of hostilities and to exclude any foreign powers to intrude in the ongoing conflict.⁹⁸⁶ The Accord also endeavoured to solve the ethnic crisis in Sri Lanka and ensure the safe passage of refugees and returnees. This meant that some Indian troops were deployed as the Indian Peacekeeping Force (IPKF).⁹⁸⁷ Around the same time, the Sri Lankan Government and UNHCR signed a Memorandum of Understanding that would provide emergency assistance to returnees and displaced persons who wished to return to Sri Lanka after the Indo-Sri Lanka Peace Accord was signed.⁹⁸⁸ The involvement of UNHCR was particularly significant in assisting those who had returned voluntarily to Sri Lanka. Soon after the MoU was signed, about 75,000 refugees had returned within a year. By March 1989, another 48,000 people returned to Sri Lanka, though refugees continued to arrive in India. Though most of these returnees had gone back to Sri Lanka voluntarily, there was also the question of whether they had freely expressed their views on repatriation.⁹⁸⁹ Chimni argues that there was undeniable pressure from the Indian government for Sri Lankan refugees to return, though many had responded positively to this move. The Government’s pressure was directed through discontinuing dole and rations for those who did not

⁹⁸⁴ *ibid.*

⁹⁸⁵ Zolberg et.al. (n 74) 148.

⁹⁸⁶ Oberoi (n 30) 219.

⁹⁸⁷ *ibid.*

⁹⁸⁸ UN High Commissioner for Refugees, ‘Memorandum of Understanding Between the Democratic Socialist Republic of Sri Lanka and the United Nations High Commissioner for Refugees’ (31 August 1987) <https://www.refworld.org/docid/3f4df05f4.html> [accessed March 25, 2021].

⁹⁸⁹ Chimni (n 128) 384.

register as refugees under the terms of the Foreigners Act and were hence treated as illegal aliens.⁹⁹⁰

A change in tone: repatriation of Tamil refugees

The Indian Government decided to withdraw its troops by March 1990 while refugees continued to leave for India. The Organisation for Eelam Refugee Rehabilitation (OFERR) reported that over 200,000 refugees had been living in India of which 115,000 were living in 237 camps across the state of Tamil Nadu in 1991.⁹⁹¹ As mentioned earlier in the thesis, India's initially benevolent approach to providing refugees from Sri Lanka with sanctuary and aid, transformed to these groups being viewed as a national security threat after the assassination of former Indian Prime Minister Rajiv Gandhi in May 1991 which was widely believed to have been carried out by the LTTE.⁹⁹² There were calls to deport Sri Lankan refugees which did not receive widespread support from the Indian Government. However, the unsteady and inconsistent waves of repatriation and refugee arrivals led the Indian government to sign a bilateral agreement with the Sri Lankan Government to begin repatriation of refugees.⁹⁹³ By 1992, refugees began to be repatriated to temporary transit camps in Sri Lanka. However, this process was called into question after UNHCR in Sri Lanka raised concerns about security threats. With the Indian Government allowing UNHCR presence in the southern city of Madras (currently Chennai), which was based on an MoU signed between the Government of India and the UNHCR, refugees were able to access assistance at the point of departure as they did at the point of arrival in Sri Lanka.⁹⁹⁴ The process, as Chimni demonstrates, was not smooth. From rough seas to security threats, the process was paused on many occasions. The Indian Government was also construed as not doing its due

⁹⁹⁰ *ibid.*

⁹⁹¹ *ibid* 385.

⁹⁹² Oberoi (n 30) 219.

⁹⁹³ Chimni (n 128) 385.

⁹⁹⁴ *ibid* 387.

diligence to provide refugees full access to services rendered by UNHCR.⁹⁹⁵ Right from the beginning of the instabilities in Sri Lanka, India had pushed for non-interventionist policies. This meant that several international NGOs and other organizations that provided essential services for refugees were barred from working. The barring of organizations that provide essential service was viewed as a form of coercion to compel refugees to choose repatriation.⁹⁹⁶ Though the rationale for this change in tone may have been adopted with domestic national security interests in mind, this was no different from the approach adopted by European states around the same time. The Dutch and Swiss governments, for instance, were not willing to grant them refugee status based on constrained notions of defining a refugee. They contended that Sri Lankan Tamil asylum-seekers were fleeing civil war and not individual persecution, and therefore “did not qualify for refugee status”.⁹⁹⁷ The Dutch and Swiss governments also believed that “Tamils could be returned to the south of Sri Lanka and deported groups of them in 1984 and 1985”.⁹⁹⁸

The complexity of refugee protection with respect to Sri Lankan Tamils in India was influenced by several factors. While there is no way to categorically deny that the Government of India coerced many Sri Lankan refugees to return, it was evidenced by implicit pressures created by “keeping camps in a state of disrepair, withholding food rations and stipends”, and other such issues, that made repatriation a better choice.⁹⁹⁹ The horrors faced by Tamils in Sri Lanka are indescribable and they deserved a safe haven. Though the contention was that repatriations were more forced and less voluntary, it is critical to put these actions in perspective. As has been noticed in this project thus far, despite India’s disillusionment with the instruments of international refugee

⁹⁹⁵ *ibid* 386.

⁹⁹⁶ *ibid*.

⁹⁹⁷ Loescher (n 974) 237.

⁹⁹⁸ *ibid*.

⁹⁹⁹ Chimni (n 128) 386.

law, it has remained true to the core objectives of refugee protection. India has admitted refugees for decades from within the region and prior to the partition from Europe. Therefore, the ambiguous approach to Sri Lankan refugee protection can be attributed to some serious domestic considerations. As Oberoi notes “[following] the assassination of Rajiv Gandhi, international and domestic pressure prevented the reorientation of India’s policy towards Sri Lankan Tamil refugees”.¹⁰⁰⁰ She further argues that “the domestic politics of Indian polity whereby Delhi cannot afford to alienate the vast population of Indian Tamils, has also had an important influence on refugee policy”.¹⁰⁰¹ The result was a deficiency of benevolence and sympathy for Sri Lankan refugees among the people of Tamil Nadu. Chimni notes that the approach to Sri Lankan refugees should also be considered based on the “evolving relationship” between the two countries.¹⁰⁰² India played a “mediatory role in the conflict”, which created further instabilities in Sri Lanka.¹⁰⁰³ The reports of possible forced or involuntary repatriation paint a picture of India’s insensitivity to the plight of Sri Lankan refugees. However, it must be noted that despite India’s opposition to the UNHCR since its inception, the latter was allowed to operate an office in Madras based on the MoU signed between the Government and UNHCR. Though UNHCR was not able to actively engage in refugee protection activities, Chimni argues that “it must also be recognized that their interviews with refugees at the point of departure did offer some safeguard [...] is believed [to have] deterred involuntary repatriation”.¹⁰⁰⁴

Such safeguards were further reinforced by the decision in *A. C. Mohammed Siddique v. Government of India and others* in which the High Court of Madras expressed its unwillingness to

¹⁰⁰⁰ Oberoi (n 30) 231.

¹⁰⁰¹ *ibid.*

¹⁰⁰² Chimni (n 128) 387.

¹⁰⁰³ *ibid.*

¹⁰⁰⁴ *ibid.*

let any Sri Lankan refugees be forced to return to their country against their will.¹⁰⁰⁵ Despite such safeguards, refugees' willingness to be repatriated was called into question based on writ petitions filed to the High Court of Madras. In *P. Neduraman and Dr. S. Ramadoss v. The Union of India and the State of Tamil Nadu*, the petitioners sought a temporary injunction to prevent the Indian government from continuing the repatriation process on the basis that many refugees were coerced to sign letters of consent. The petitioners also argued that refugees' access to rations and doles, and right to movement was being curbed.¹⁰⁰⁶ However, the court ruled against the petitioners and held that "since the UNHCR being a world agency was involved in ascertaining the voluntariness of the refugees return to Sri Lanka, it is not for the Court to consider whether the consent is voluntary or not".¹⁰⁰⁷ The High Court of Madras, in this case, acknowledged the competence and impartiality of UNHCR representatives and relied on the Agency to do its due diligence when it came to repatriations.¹⁰⁰⁸ The arguments that the petitioners advanced were that no verification mechanisms were in place before refugees were repatriated, which the Court did not accept. In fact, it was discovered that refugees were presented with forms to sign expressing their willingness to be returned to Sri Lanka. Therefore, there was no way to conclude that repatriations were forced or involuntary.¹⁰⁰⁹ The narrative that India was forcing out Sri Lankan refugees was also misplaced. As in past cases of refugee movements, India's response to Sri Lankan refugees was complicated given the circumstances under which such approaches were adopted. However, India's approach was yet again criticized as being inadequate. It must be noted that India's relationship with UNHCR has ebbed and flowed throughout the last few decades of refugee

¹⁰⁰⁵ *A. C. Mohammed Siddique v. Government of India and others*, Writ Petition Nos.: 6708 & 7916 of (1992) (High Court of Madras).

¹⁰⁰⁶ *P. Nedumaran and Dr. S. Ramdoss v Union of India and the State of Tamil Nadu*, Writ Petition Nos.: 12298 and 12343 (1992) (High Court of Madras).

¹⁰⁰⁷ *ibid.*

¹⁰⁰⁸ *ibid.*

¹⁰⁰⁹ *ibid.*

movements in the subcontinent. However, this was yet another reminder that though India has qualms about ratifying the *Refugee Convention* or allowing UNHCR's active operation, it once again proved its commitment to customary international law and the principle of *non-refoulement*.

Though India had adopted the policy of repatriating Sri Lankan Tamils in collaboration with UNHCR, it has also been viewed as regressive and self-serving in certain cases given that host states' interests outweigh those of refugees. In recent years, repatriation has been proposed as a durable solution due to an "internalist explanation of the root causes of refugee flows".¹⁰¹⁰ Such an interpretation shifts the responsibility of creating conditions congenial for the return of refugees on states of origin as opposed to proposing solutions that are reflective of refugees' material conditions should they choose to return. This has led to repatriation being pursued as a humane solution even when it is not appropriate to do so.¹⁰¹¹ Though repatriation has been viewed as a voluntary decision made by refugees themselves, the question still remains as to whether the material conditions in host states are so dire that refugees have been forced to make this decision.¹⁰¹² Chimni argues that by squarely presenting repatriation as a voluntary choice made by refugees themselves, institutions and scholars of refugee studies run the risk of "ignoring its links with the regressive policies of host states and the international community".¹⁰¹³

India's relationship to UNHCR

As the previous chapters and sections have outlined, India's relationship with the Office of the United Nations High Commissioner for Refugees is tenuous at best. Though India has found ways to work with the agency throughout the last few decades, the organization's impartiality and

¹⁰¹⁰ Chimni (n 53) 363.

¹⁰¹¹ *ibid* 364.

¹⁰¹² *ibid*.

¹⁰¹³ *ibid* 365.

non-political identity have been called into question. As Forsythe argues, despite UNHCR positioning itself as a non-political agency within the international protection regime, more often than not, it has not stood by the initial precepts of the mandate of being non-political in nature.¹⁰¹⁴ As seen from the analysis of various refugee movements in the subcontinent, the ambiguous identity of UNHCR was evident from the myriad ways in which it attempted to wield its power and influence over refugee protection practice in India. The ostensible power of UNHCR is also questionable given that it is unable to carry out its responsibilities without the support of states.¹⁰¹⁵ Milner and Ramasubramanyam argue that “UNHCR’s behavior stems from the pathologies of international organizations, namely from the reliance [...] on States for access to territory and funding”.¹⁰¹⁶ They further contend that since UNHCR does not possess “autonomous power, the interests of states have frequently conditioned UNHCR’s ability to fulfil its responsibilities detailed in the *Convention*”.¹⁰¹⁷

As noted in the introductory note of the Statute of the United Nations High Commissioner for Refugees “Resolution 319 (IV), of 3 December 1949, the United Nations General Assembly decided to establish a High Commissioner’s Office for Refugees as of 1 January 1951”.¹⁰¹⁸ The Statute also states that the UNHCR will function to provide international protection to refugees and seek permanent solutions for them. While the core mandate of the organization was clear, it is also evident from the Statute that “UNHCR was not intended to be able to fulfil this mandate on its own [and...] has needed to rely on the cooperation of States [...] to undertake its work”.¹⁰¹⁹

¹⁰¹⁴ David Forsythe, ‘UNHCR’s Mandate: The Politics of Being Non-Political’ (10 March 2001) New Issues in Refugee Research Working Paper No 33 <<https://www.refworld.org/docid/4ff57eb32.html>> accessed 4 April 2021.

¹⁰¹⁵ *ibid.*

¹⁰¹⁶ Milner and Ramasubramanyam (n 972) 190.

¹⁰¹⁷ *ibid.*

¹⁰¹⁸ ‘Statute of the Office of the United Nations High Commissioner for Refugees’ UNGA Resolution 428(V) (14 December 1950) (UNHCR Statute).

¹⁰¹⁹ Milner and Ramasubramanyam (n 972) 188.

When Resolution 319 (IV) was proposed, India expressed its displeasure. As mentioned earlier, Mrs. Kripalani, the Indian representative at the time, expressed that her government was unwilling to contribute to merely establishing an administrative machinery.¹⁰²⁰ Since then, India has viewed the UNHCR's presence as an interference. The presence of UNHCR was not welcome in India also due to the prevailing notion in the subcontinent, as mentioned before, that refugees were a matter of bilateral or trilateral relations and international agreements, or organizations could constrict their freedom of action.¹⁰²¹ UNHCR's actions are also severely constrained by its heavy reliance on voluntary contributions from affluent states in the global north. This has affected the agency's ability to effectively provide solutions to refugees who were attempting to make their way to Europe. For instance, as Loescher points out that in the 1980s European states faced the arrival of over 1.3 million asylum seekers from Asia, the Middle East, and Africa who were fleeing political crises and conflicts. Despite many of these people facing threats upon return to their countries of origin, Europe did not consider them to be refugees.¹⁰²² Amid the arrival of such a massive number of refugees, UNHCR urged states to broaden the criteria for refugee protection. Instead, as Loescher notes, "with the upsurge in asylum claims, European governments were not as willing to submit to the UNHCR's authority and leadership".¹⁰²³ States in Europe began to build barriers, adopted restrictive policies to deter more people from arriving, and toughened access to asylum procedures.¹⁰²⁴ States in the region were preoccupied with their need to safeguard their autonomy over issues of immigration and refugee policy, which resulted in UNHCR not being

¹⁰²⁰ UN General Assembly, Fourth Session, Third Committee, Two Hundred and Sixty-Third Meeting (n 757).

¹⁰²¹ Weiner (n 32)

¹⁰²² Loescher (n 974) 235.

¹⁰²³ *ibid* 236.

¹⁰²⁴ *ibid*.

“perceived by governments to be the sole authority and source of legitimacy on refugee and asylum matters”.¹⁰²⁵

At this juncture, it is crucial to critically evaluate UNHCR’s relationship with states in Europe and compare it to that of states in the global south. It has been established that UNHCR heavily relies on European states for its existence and operation. While the agency has been more willing to bend to the demands of European states and overlook their inflexibility in allowing refugees from the global south to access protection, the same yardstick was not applied to states in the subcontinent. This was evident from some European governments’ refusal to extend refugee status to Sri Lankan Tamil asylum-seekers as mentioned earlier. Subsequent to the deportation of Tamil asylum-seekers from the Netherlands and Switzerland, UNHCR interviewed some of the remaining Tamils who were also facing the risk of deportation. The agency concluded that many of them indeed have a well-founded fear of persecution as outlined in the *Refugee Convention*.¹⁰²⁶ Many young Tamil men were viewed as threats by the Sri Lankan security forces as they were thought to be guerrilla fighters for the LTTE and faced threats from the government upon their return.¹⁰²⁷ Despite drawing such conclusions, the UNHCR did not push European governments to grant them full refugee status. They were instead treated as “extra-Conventional refugees” and were safe from forced repatriation or deportation. This meant that they did not receive the full protection as outlined in the *Refugee Convention*.¹⁰²⁸ India on the other hand was faced with massive and sudden refugee movements throughout the last seven decades, despite its constraints, the Government managed to provide immediate and expeditious support to those in need while simultaneously dealing with domestic postcolonial anxieties. India also instituted relief programs,

¹⁰²⁵ *ibid* 238.

¹⁰²⁶ *ibid* 237.

¹⁰²⁷ *ibid* 238.

¹⁰²⁸ *ibid*.

and established government agencies and central ministries, to provide material aid and other basic amenities to refugees. While doing so, India also expressly rejected the presence and support of UNHCR like it had done since the inception of the agency. As the analysis in the previous chapters reveals, during the course of every event of refugee movements, UNHCR's insistence to forcibly intervene in India was grounded on the inherent assumption that states in the subcontinent were apathetic to the plight of refugees and were incapable of being able to effectively provide relief and sanctuary to those on the move. This not only exposes UNHCR's duplicitous approach to refugee protection but also highlights its allegiance to European states. The role of UNHCR is also clearly paternalistic in nature, whereby it provides cognizance to European states' intransigence with respect to refugee protection but fails to view India's practice as being in congruence with the core objectives of international refugee law. In doing so, it has provided fodder for India's resistance to its presence.

Milner and Ramasubramanyam argue, the UNHCR has also been instrumental in adopting its discursive and productive power in understanding refugeehood that has created and enforced "new realities through the use of knowledge, discourse, and claims to legitimacy".¹⁰²⁹ Though this may have functioned to advance progressive interpretations of international refugee law, it has also served to constrain refugee rights in many cases and has also failed to account for postcolonial subjectivities of the subcontinent.¹⁰³⁰ For instance, UNHCR was instrumental in establishing large refugee camps to contain refugee movements from the global south in order to insulate host states in the global north from burden-sharing. As mentioned earlier, regional containment is not only an indication of the racialization of refugeehood¹⁰³¹ but also an indication of the pernicious ways in

¹⁰²⁹ Milner and Ramasubramanyam (n 972) 187.

¹⁰³⁰ *ibid.*

¹⁰³¹ Achiume (n 417).

which the agency has wielded its power to deny durable solutions to many.¹⁰³² Similarly, as mentioned earlier, by quoting the enormity of the problem as a reason, states like the US denied any provision for funding relief programs under UNHCR's mandate for those who were displaced during the partition.¹⁰³³ Furthermore, as seen earlier, in the early days of the UNHCR's inception, the agency drew the ire of Indian representatives for not making genuine efforts to include the concerns of refugees in the subcontinent within its mandate.¹⁰³⁴

The UNHCR projects its discursive and productive power with the help of constrained rules inherent in international refugee law. While discussions on the role of UNHCR in literature include elements of its legal status, structure, and functioning, and matters of power and pathologies, “a key omission has been the failure to study the ideological or legitimization [functions]”.¹⁰³⁵ An earlier chapter provided some analysis on the social, political, and temporal context under which the UNHCR was established, with specific references to the subcontinent's engagement. Subsequent discussions on UNHCR's interventionist role in subcontinental refugee movements revealed that, though “the organization represents its institutional field and concerns to the outside world [...] it actively promotes norms of international behavior” and frames issues to prompt specific policy responses.¹⁰³⁶ As seen earlier, this approach negates the unique circumstances of the context in question and fails to accommodate more inclusive norms of protection. As Chimni argues, “the dominance of the positivist legal approach, both outside and inside UNHCR, has meant that the knowledge and dissemination functions of [the agency] have received little attention”.¹⁰³⁷ The formalist approach, that Chimni suggests takes into account the

¹⁰³² Milner and Ramasubramanyam (n 972) 195.

¹⁰³³ Oberoi (n 30) 22.

¹⁰³⁴ UN General Assembly, Fifth Session, Third Committee, Three Hundred and Thirty-Second Meeting (1 December 1950) UN Doc A/C.3/SR.332, 377, para 23 (statement of Mrs. Menon).

¹⁰³⁵ Chimni (n 53) 366.

¹⁰³⁶ *ibid.*

¹⁰³⁷ *ibid.*

functioning of UNHCR within the “larger social order, in particular the historical and political contexts in which they originate and function”.¹⁰³⁸ One of the core objectives of this project has been to include these absent discourses. Despite repeated modes of resistance from subcontinental states, UNHCR’s role remains prominent, given that the organization continues to serve the interests of a coalition of powerful states. Chimni argues that only when such powerful states are “persuaded that an international organization is the appropriate form in which to defend their interests is it brought into existence”.¹⁰³⁹ As seen throughout the last few chapters, the role of the agency has not been seamless given that the establishment and functioning of the organization have been consistently contested by states like India. While there are qualms about discrediting the role of UNHCR entirely, it must be noted that “the knowledge production and dissemination functions of the organization are steered by the dominant coalition of states”.¹⁰⁴⁰ Even when there are demands for a transformation of the grandiose vision of the organization by states in the global south, renewed conceptualizations of refugeehood have yet to take centerstage in these discussions. Instead, as Chimni argues, hegemonic states recognize that exercising critical influence could shape norms and convergent expectations about international behavior.¹⁰⁴¹ In the case of UNHCR the asymmetry persists; Al-attar would attribute this to the first world’s inability to forego its power and privileges.¹⁰⁴²

Finally, since the mid-1980s state practice of refugee protection, especially in the global North, has created new challenges for UNHCR. The absence of an international body to adjudicate asylum cases has meant that domestic courts have become important within which a state’s asylum

¹⁰³⁸ *ibid.*

¹⁰³⁹ *ibid.*

¹⁰⁴⁰ *ibid.*

¹⁰⁴¹ *ibid.*

¹⁰⁴² al Attar (n 153).

policies have been challenged. Such proceedings have increased UNHCR's engagement in national and regional courts.¹⁰⁴³ However, this is not significant just in global north states. For instance, despite India's lack of wholehearted acceptance of UNHCR's role in the application and advancement of international refugee law, apart from being involved in carrying out Refugee Status Determination in individual cases since 1981, the agency has also engaged with India's domestic courts in some cases. The courts system in India has also taken the initiative to engage with UNHCR in cases where the Government may have refused protection or may have begun deportation procedures. Milner and Ramasubramanyam contend that "[this] form of engagement is very different from the appeals structure built into mandate RSD system, wherein UNHCR engages directly with an individual case".¹⁰⁴⁴ This engagement with courts involves states and UNHCR's "deliberative function vis à vis the interpretation of the *1951 Convention*"¹⁰⁴⁵ and in India's case the underlying objectives of international refugee law. Aside from the judicial system issuing directives to the Government to collaborate with UNHCR on refugee protection, in certain other cases where individuals were seeking protection from persecution, courts have unilaterally invoked appropriate provisions from both the Constitution of India and customary international law principles.

Jurisprudential developments and impact on refugee protection in India

In addition to UNHCR's involvement in refugee situations in the subcontinent, the agency has undertaken refugee status determination at the insistence of the judiciary.¹⁰⁴⁶ It is also critical to note that courts at all levels have been involved in providing relief to refugees and asylum

¹⁰⁴³ Geoff Gilbert, 'UNHCR and Courts: *Amicus Curiae ... Sed Curia Amica Est?*' (2016) 28(4) International Journal of Refugee Law 623.

¹⁰⁴⁴ Milner and Ramasubramanyam (n 972) 191.

¹⁰⁴⁵ Gilbert (n 1043) 627.

¹⁰⁴⁶ Vijaykumar (n 80) 10.

seekers. An earlier section at the beginning of the thesis has presented the decisions of some of the cases. However, it is critical to also look at a few others that have contributed to extending refugee protection through judicial directives.

Supreme Court of India

The Supreme Court of India in *N.D. Pancholi v State of Punjab* stayed the deportation order issued against a refugee from Iran and allowed time for them to seek protection from the UNHCR office in New Delhi.¹⁰⁴⁷ Similarly, in *Malavika Karlekar v Union of India*, the Supreme Court of India stayed the deportation of 21 Burmese Nationals from the Andaman Islands, pending their refugee status determination by UNHCR.¹⁰⁴⁸ The Court also reposed faith in UNHCR to make an accurate determination of their status. The Court also held that their deportation order should be stayed on the grounds that “their claim for refugee status is pending determination”.¹⁰⁴⁹ Furthermore, given the nature of their claims for grant of refugee status, the Court noted that “these individuals pose no danger or threat to the security of the country.”¹⁰⁵⁰ Other decisions of the Supreme Court have provided relief to refugees based on constitutional provisions and principles of customary international law. As mentioned before, in *Khudiram Chakma v State of Arunachal Pradesh*, the Court held that forcibly returning Chakma refugees to Bangladesh could result in the deprivation of their right to life as per article 14 of the UDHR, Article 13 of the ICCPR, and article 21 of the Constitution of India.¹⁰⁵¹ In *National Human Rights Commission (NHRC) v State of Arunachal Pradesh* the Court stated that India “is bound to protect the life and personal liberty of

¹⁰⁴⁷ *N.D. Pancholi v State of Punjab and Others*, Writ Petition (Criminal) No 243 of 1988, 9 June 1988 (for Prel. Hearing) (Supreme Court of India).

¹⁰⁴⁸ *Malavika Karlekar v Union of India*, Writ Petition (Criminal) No 583 of 1992, 25 September 1992 (Supreme Court of India).

¹⁰⁴⁹ *ibid.*

¹⁰⁵⁰ *ibid.*

¹⁰⁵¹ *State of Arunachal Pradesh v Khudiram Chakma*, 1994 AIR 1461 (Supreme Court of India).

every human being”, and hence the state’s institutions must take steps to “carry out its legal obligations to safeguard the life, health and well-being of Chakmas”.¹⁰⁵²

Decisions by High Courts

In addition to the Supreme Court’s intervention, various High Courts in India have also interpreted and expanded the scope of domestic legal provisions to include asylum seekers within their purview. These courts have also provided relief in cases where individuals had intentions of seeking asylum or were facing deportation to a state where they may face serious threats or were facing detention under the authority of border officials. More importantly, High Courts have also recognized the significance of UNHCR’s role in refugee protection by allowing individuals to approach the New Delhi office to lodge asylum applications.

In the late 1980s during the 8888 Uprising, several pro-democracy activists were persecuted by the military junta in Myanmar; many Burmese citizens also faced oppression and atrocities at the hands of the junta. This led to many fleeing to India to seek protection. One of them was Ms. Zothansangpuii a 33-year-old Burmese citizen. After crossing into the Indian territory, she was apprehended and convicted for violating the Foreigner’s Act and sentenced to 180 days in prison.¹⁰⁵³ Ms. Zothansangpuii sought relief from the Guwahati High Court on the grounds that she had arrived in India due to a fear of persecution. She further contended that if she were deported to Myanmar, she risks facing serious threats to her life and well-being.¹⁰⁵⁴ She asked the Court to grant her relief from deportation so that she could approach the Office of the UNHCR in New Delhi to seek asylum. The Court took a sympathetic view of her case and stated that she may not be deported for one month after her release from prison. The Court “enable[d] her to go

¹⁰⁵² *National Human Rights Commission v State of Arunachal Pradesh*, 1996 SCC (1) 742 (Supreme Court of India).

¹⁰⁵³ *Zothansangpuii v State of Manipur and another*, Civil Rule No. 981 of 1989, 20 September 1989 (Guwahati High Court, India).

¹⁰⁵⁴ *ibid.*

to Delhi for the purpose of seeking political asylum as stated in the petition”.¹⁰⁵⁵ Similarly, in *U. Myat Kyaw and another v State of Manipur and another*, the petitioners who had been a part of pro-democracy movements in Myanmar, had entered India without valid travel documents and voluntarily surrendered to authorities on July 14, 1991.¹⁰⁵⁶ The Guwahati High Court petitioners allowed the petitioners, who were detained in Manipur Central Jail, to be released on interim bail for two months to enable them to approach UNHCR, Delhi, to seek refugee status.¹⁰⁵⁷ As mentioned in the introductory chapter, in *Bogyi v Union of India*, the High Court of Assam stayed the deportation order of an asylum seeker from Burma and directed the UNHCR office in New Delhi to consider his application for political asylum.¹⁰⁵⁸ *Khy-Htoon and others v State of Manipur*, concerned the detention of eight Burmese refugees in Manipur Central Jail in Imphal.¹⁰⁵⁹ The petitioners argued that the State of Manipur had refused to comply with their request to seek refugee status in the Office of the UNHCR in Delhi. In directing the respondents to produce these refugees before UNHCR Delhi, the Guwahati High Court invoked the principle of right to life and other fundamental rights guaranteed under Articles 21 (right to life) and 22 (protection against unlawful detention) of the Indian Constitution.¹⁰⁶⁰ In staying the deportation of these refugees and allowing them to approach UNHCR, the High Court also considered the principle of *non-refoulement* under international refugee law.¹⁰⁶¹ Similarly, the High Court of Punjab and Haryana in *Shah Ghazai and another v. Union of India and another*, allowed two Afghan refugees to

¹⁰⁵⁵ *ibid.*

¹⁰⁵⁶ *U. Myat Kyaw and Nayzin v State of Manipur and the Superintendent of Jail, Manipur Central Jail, Imphal*, Civil Rule No. 516 of 1991, 26 November 1991 (Guwahati High Court, India).

¹⁰⁵⁷ *ibid.*

¹⁰⁵⁸ *Bogyi v Union of India*, Civil Rule No. 1847 of 1989, 17 November 1989 (Guwahati High Court, India).

¹⁰⁵⁹ *Khy-Htoon and others v the State of Manipur*, Civil Rule No. 515 of 1990, 15 September 1990 (Guwahati High Court, India).

¹⁰⁶⁰ *ibid.*

¹⁰⁶¹ *ibid.*

approach UNHCR Delhi to seek asylum.¹⁰⁶² Finally, as mentioned earlier, petitioners Mr. Al Qutaifi and Mr. Al Mansoori, who were asylum seekers from Iraq, sought a stay of deportation and release from detention based on the principle of *non-refoulement*.¹⁰⁶³ The court, in this case, restated the decision formulated in the Supreme Court of India¹⁰⁶⁴ that the Constitution of India guarantees certain fundamental human rights to citizens as well as non-citizens.¹⁰⁶⁵ The court used the principle of *non-refoulement* along with Article 21 of the Indian Constitution to direct the petitioners' case to the UNHCR for refugee status determination.¹⁰⁶⁶

In some cases, High Courts have prevented the deportation of individuals who have either been recognized as refugees by UNHCR or are awaiting a decision on their applications. *Seyed Ata Mohamamdi v Union of India*, concerned a petition launched by an Iranian national who was recognized as a refugee by UNHCR Delhi and wanted to travel to Canada.¹⁰⁶⁷ However, the Government of India had planned to deport Mr. Mohamamdi on the grounds that he was living in India illegally.¹⁰⁶⁸ The Bombay High Court, in this matter, upheld the decision made by UNHCR and held that “there is no question of deporting the petitioner to Iran, since he has been recognized as a refugee by the UNHCR.”¹⁰⁶⁹ The court further permitted the refugee to travel to whichever country he desired, an order that is in line with the principle of *non-refoulement*.¹⁰⁷⁰ The Metropolitan Magistrate in Delhi passed a similar order in *State v. Mohammad Ehsan*, and

¹⁰⁶² *Shah Ghazai and Assadullah v Union of India and Secretary, Home, Government of Punjab, and District Magistrate, Amritsar*, Writ Petition (Criminal) No 499 of 1996 (High Court of Punjab and Haryana, India).

¹⁰⁶³ *Ktaer Abbas Habib Al Qutaifi and Another v. Union of India and Others*, 1999 CRI.L.J. 919, India: High Courts, 1999.

¹⁰⁶⁴ *National Human Rights Commission v. State of Arunachal Pradesh* (n 1052).

¹⁰⁶⁵ *ibid* (n 1063) para (10).

¹⁰⁶⁶ *ibid*.

¹⁰⁶⁷ *Seyed Ata Mohamamdi v Union of India and others*, Writ Petition (Criminal) No 7504 of 1994 (Bombay High Court, India).

¹⁰⁶⁸ *ibid*.

¹⁰⁶⁹ *ibid*.

¹⁰⁷⁰ *ibid*.

considered the deportation order of this Afghan refugee unnecessary as he was recognized as a refugee by UNHCR.¹⁰⁷¹ Finally, the Kolkata High Court intervened in a case where two individuals were seeking a stay of deportation and permission to be resettled to a third country. Petitioners Ba Aung and Soe Win, who were Burmese citizens, were both detained in a correctional centre in Kolkata.¹⁰⁷² Having been granted refugee status by UNHCR, Aung and Win were seeking permission to exit India in order for them to travel to Sweden, which was their resettlement country.¹⁰⁷³ However, the State Government of West Bengal had detained them, which led the Kolkata High Court to order the Ministry of Home Department, Government of West Bengal as well as the Ministry of Home Department, and Union of India to hand them over to UNHCR. They were thereafter directed to allow the petitioners to leave for Sweden.¹⁰⁷⁴

The last few chapters examined India's practice towards refugee protection. Though India's position within the refugee regime remains ambiguous it has shown a great deal of commitment through its membership in UNHCR's ExCOM and has also stayed true to the overall objectives of international refugee law. The courts system in India has also recognized the legitimacy of UNHCR in refugee status determination, despite voted against its establishment back in 1950. The preceding section articulates that despite being a non-signatory to the *1951 Convention*, India's courts' system has been effective in implementing modes of refugee protection. For instance, more recently in *Dongh Lian Kham and another v Union of India and another*, the High Court of Delhi stayed the deportation of two individuals by concluding that though the principle of *non-refoulement* does not apply in India since it is a non-signatory of the

¹⁰⁷¹ *State v Mohammad Ehsan*, FIR No. 435 of 1993 (Metropolitan Magistrate Court, New Delhi, India).

¹⁰⁷² *Ba Aung and Soe Win v Union of India and Others*, CAN 3708 of 2006 (High Court of Calcutta, India) [Appeal from Constitutional Writ Jurisdiction (Mandamus Appeal)]

¹⁰⁷³ *ibid.*

¹⁰⁷⁴ *ibid.*

1951 Convention, the principle is the basis of fundamental right to life and liberty as enshrined in Article 21 of the Indian Constitution.¹⁰⁷⁵ The jurisprudential developments outlined in this section indicate that contrary to popular belief that India is defiant to international refugee law norms, it has not only articulated a keen understanding of institutions such as UNHCR but has also frequently recognized the significance of providing relief to persons of concern by reshaping international refugee law principles in accordance with subcontinental experiences of forced migration.

India and the Global Compact on Refugees

The final strand of this chapter will explore India's more recent engagement with international refugee law. Having examined India's engagement with the *Convention* and UNHCR, this section analyzes some of the more recent interactions with international refugee law and the impact on domestic refugee policy. Among the most recent developments in international refugee law is the adoption of the Global Compact on Refugees (GCR) in December 2018 with the support of many UN Member States including India.¹⁰⁷⁶ This section will outline some of the core elements of the GCR and then analyze its impact on India.

The GCR begins with the words, “[the] predicament of refugees is a common concern of humankind”.¹⁰⁷⁷ However, though is not legally binding, it claims to represent the “political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries”.¹⁰⁷⁸ While the GCR's basis is fundamental

¹⁰⁷⁵ *Dongh Lian Kham and another v. Union of India and another*, Writ Petition (Criminal) No 1884 of 2015, 21 December 2015 (High Court of Delhi, India).

¹⁰⁷⁶ UN General Assembly, Seventy-Third Session, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees*, (17 December 2018) Supplement No. 12; UN Doc. A/73/12, (Part II).

¹⁰⁷⁷ *ibid* (para 1).

¹⁰⁷⁸ *ibid* (para 4).

principles of humanity, chronologically, the document sets out the need to operationalize principles of responsibility and burden-sharing before the right to seek asylum.¹⁰⁷⁹ The GCR is an earnest attempt at increasing the levels of international cooperation with respect to refugee protection. The Compact makes references to protracted refugee situations throughout the document, and also the inordinate burden that some states have had to accept in hosting refugees. However, like the *1951 Convention's* formalization, the Global Compact also fails to make references to the role of Western intervention in increased refugee flows. As Chimni notes, though this may not be true of all refugee movements, as Rohingya refugees are on the move due to ongoing ethnic cleansing in Myanmar, the GCR is “silent on the role of external actors in the production of refugees”.¹⁰⁸⁰ However, though the GCR notes that “addressing root causes is the responsibility of countries at the origin of refugee movements”, as the past few chapters have noted, historicizing Rohingya refugee movements also points to the recklessness of the formal end to colonialism.¹⁰⁸¹ As Shahabuddin argues, as “the example of the Rohingya crisis reveals, what seemed to be a solution at the time of decolonisation of Myanmar turned out to be a recipe for humanitarian catastrophe as the postcolonial nation-building process failed”.¹⁰⁸² Aside from the Rohingya crisis, Chimni contends that major refugee outflows from Afghanistan, Iraq, and Syria have been the result of armed Western intervention.¹⁰⁸³

The GCR has created the potential for states to dilute or contravene the pre-existing principles of international refugee law and human rights law. As mentioned earlier, while easing the pressure on host states seems to be a focus for the GCR¹⁰⁸⁴, it fails to make tangible suggestions

¹⁰⁷⁹ *ibid* para (5).

¹⁰⁸⁰ BS Chimni, ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2018) 30 *International Journal of Refugee Law* 630.

¹⁰⁸¹ Global Compact on Refugees (n 1076) (para 8).

¹⁰⁸² Shahabuddin (n 427) 358.

¹⁰⁸³ Chimni (n 1080).

¹⁰⁸⁴ Global Compact on Refugees (n 1076) (para 7).

on how the current system of refugee protection system could benefit from strengthening. As the outflow of Syrian refugees a few years ago demonstrated, several European states had erected walls and borders to prevent entry. However, the text of the GCR fails in its responsibility to call on states to lift restrictions placed on asylum seekers. Despite calling for international cooperation, the GCR emphasizes alleviating pressure on host states, which, as Chimni argues, is a “misplaced priority”.¹⁰⁸⁵ Chimni goes so far as to say that the GCR non-committal approach enables “States to deny the right to seek asylum against the spirit of the 1951 *Refugee Convention* [...] which are already empowered by their sovereignty to keep asylum seekers out”.¹⁰⁸⁶

In April 2021, the Danish Government revoked the residency permits of 189 Syrian refugees by insisting that some parts of Syria are safe to return to.¹⁰⁸⁷ This points to yet another flaw in the GCR. While the intent is to “support conditions in countries of origin for return in safety and dignity”¹⁰⁸⁸, the text also states that voluntary repatriation is not necessarily predicated on the “accomplishment of political solutions in the country of origin, in order not to impede the exercise of the right of refugees to return to their own country”.¹⁰⁸⁹ However, this is a very ambiguous proposition given that this opens the possibility for refugees to be ‘forcibly repatriated’. As Chimni argues, placing no conditions on the safe and orderly return of refugees to their countries of origin can mean that they are repatriated to circumstances that are “far from conducive”.¹⁰⁹⁰ He further argues that this also has the capacity to “legitimize the actions of

¹⁰⁸⁵ Chimni (n 1080) 631.

¹⁰⁸⁶ *ibid.*

¹⁰⁸⁷ Bethan McKernan, Denmark strips Syrian refugees of residency permits and says it is safe to go home, *The Guardian*, April 14, 2021. (<https://www.theguardian.com/world/2021/apr/14/denmark-revokes-syrian-refugee-permits-under-new-policy>) [accessed April 15, 2021].

¹⁰⁸⁸ Global Compact on Refugees (n 1076) (para 7).

¹⁰⁸⁹ *ibid* (para 87).

¹⁰⁹⁰ Chimni (n 1080) 631.

countries seeking to deprive refugees of a dignified life” in flagrant violation of the principle of *non-refoulement*, as Denmark has done with Syrian refugees.¹⁰⁹¹

As with the *1951 Convention*, the GCR also fails to clearly account for the unique nature of displacement of states in the global south, specifically the subcontinent. Though Section 2.3 of the GCR contains three paragraphs on “regional and subregional approaches”, it homogenizes their role in advancing refugee protection.¹⁰⁹² The text mentions that “the characteristics of regional and subregional mechanisms and groupings vary” but would “play an important role in comprehensive responses”.¹⁰⁹³ However, these Comprehensive Responses center the role of UNHCR as opposed to allowing for dynamic *ad-hoc* regional mechanisms to co-exist independent of international intervention. This is evident from the text that UNHCR would “[play] a key role in Support Platforms, solidarity conferences and other arrangements with the consent of concerned States”.¹⁰⁹⁴ The text also reads that “past comprehensive responses have also demonstrated the value of regional cooperation in addressing refugee situations in a manner which encompasses the political dimensions of causes”.¹⁰⁹⁵ However, the preceding chapters have clearly outlined why such a characterization is simplistic. Refugee movements that have occurred within the subcontinent transcend some of the broad notions as outlined in the GCR. As Chimni argues, the GCR should have dedicated a separate section that identifies the problems in different regions unambiguously.¹⁰⁹⁶ For instance, given that India is not a signatory to the *1951 Refugee Convention*, no new obligations emanate from the GCR. However, the GCR is typically geared towards signatory states. In response to this constraint, the Indian delegation during the

¹⁰⁹¹ *ibid.*

¹⁰⁹² Global Compact on Refugees (n 1076) (section 2.3).

¹⁰⁹³ *ibid* (para 28).

¹⁰⁹⁴ *ibid* (para 29).

¹⁰⁹⁵ *ibid* (para 28).

¹⁰⁹⁶ Chimni (n 1080) 632.

formalization process contended that they “recognize the fact that a number of States [are] not parties to the international refugee instruments”.¹⁰⁹⁷ The delegation believed that in the past India “had shown a generous approach to hosting refugees” and therefore requested that the GCR enumerate “commitments and obligations of those who are [not] party to the *Refugee Convention* and its Protocol”.¹⁰⁹⁸ The delegation also wanted to “see greater clarity and consistency in the definition and usage of important terms in the text” – more importantly, the word Refugees.¹⁰⁹⁹

However, the GCR is of little consequence to India’s existing approach to refugee protection. Though India has been generous in the past by hosting refugees, in recent years there has been a change in tone. In August 2017, the Government of India directed authorities to identify ‘illegal immigrants’, including Rohingya refugees, and commence deportation procedures. A writ petition was filed in the Supreme Court of India to prevent the forced return of Rohingya.¹¹⁰⁰ Almost 4 years later, on April 8, 2021, the Supreme Court of India issued an order rejecting Rohingya refugees’ right to *non-refoulement*. In rejecting the petitioners’ plea, the Court ordered that since “India is not a signatory either to the United Nations Convention on the Status of Refugees 1951 or to the Protocol of the year 1967”, the principle of *non-refoulement* is inapplicable.¹¹⁰¹ The Court referenced “national security ramifications” and considered the arrival of refugees as “a continuous threat of influx of illegal immigrants”.¹¹⁰² Finally, in ordering the government to allow for deportations, the Court said that “rights guaranteed under Articles 14 and

¹⁰⁹⁷ Statement by India made during the first round of formal consultations on the Global compact on refugees (Geneva, Switzerland, 13-14 February 2018). (<https://www.unhcr.org/en-in/events/%20conferences/5a86d1d67/statement-indiafirst-%20formal-consultation-agenda-item.html>) [accessed April 15, 2021].

¹⁰⁹⁸ *ibid.*

¹⁰⁹⁹ *ibid.*

¹¹⁰⁰ *Mohammad Salimullah v Union of India*, Writ Petition (Civil) No 793 of 2017, 30 August 2017 (Judgement on 8 April 2021) (Supreme Court of India).

¹¹⁰¹ *ibid.*

¹¹⁰² *ibid.*

21 may be available to non-citizens, the fundamental right to reside and settle in this country is available only to citizens”.¹¹⁰³ This policy decision coupled with the judgement on the writ petition has emerged in light of India’s anti-Muslim sentiments and attempts to redefine citizenship along religious lines. In addition to contravening the Supreme Court’s past decisions on protecting refugees’ right to *non-refoulement*¹¹⁰⁴ and applying Articles 14 and 21 of the Indian Constitution to non-citizens¹¹⁰⁵, the current government has also been very selective about who deserves protection. The absence of national refugee law has become more of an issue in recent years given the draconian executive action undertaken by the ruling government in India that has hurt several groups of refugees like the Rohingya.

The April 2021 decision is also an example of how legal institutions that were relatively independent in the past have begun to toe the governmental line. Several underlying political and systemic issues exist that can be attributed to this slow decline in benevolence towards refugees. A detailed examination of such issues remains outside the purview of this project. However, given the uninviting and ambiguous domestic legal and policy environment that refugees are currently placed in, the prospect of a Global Compact initially provided some cause for hope. But, as Burra argues, it does not “provide any new avenues for better access to protection in general”.¹¹⁰⁶ As mentioned earlier, the GCR does a poor job of discussing the right to asylum and access to protection given the misplaced emphasis laid on mitigating the pressures on host states. While the Compact’s relevance to India is of little consequence, given the absence of any significant obligations on the issue of access to protection, there is still some cause for hope. The GCR, besides

¹¹⁰³ *ibid.*

¹¹⁰⁴ *Arunachal Pradesh v Khudiram Chakma* (n 1051).

¹¹⁰⁵ *NHRC v Arunachal Pradesh* (n 1052).

¹¹⁰⁶ Srinivas Burra, ‘The Global Compact on Refugees and India: Reinforcing the Status Quo’ in Jessica Field and Srinivas Burra (eds.), *The Global Compact on Refugees: Indian Perspectives and Experiences* (Academics Working Group & UNHCR India 2020) 71.

state action, also proposes a “multi-stakeholder and partnership approach”.¹¹⁰⁷ Among the recommendations, is the role of faith-based actors that could support the “planning and delivery of arrangements to assist refugees and host communities”.¹¹⁰⁸ With more civil society involvement along with a transparent system in place, the involvement of such organizations could prove to be a step in the right direction. More importantly, the ongoing narrative built against Muslim refugees, specifically the Rohingya, faith-based actors prove to be critical.¹¹⁰⁹ In 2012, when I was employed in UNHCR’s Delhi office, a Rohingya-led protest demanding that they receive refugee status, led to the involvement of Zakat Foundation of India and many other local Muslim civil society organizations.¹¹¹⁰ These are, however, not sustainable and long-term solutions as there needs to be a longer-term solution for refugees. At a time when religious tensions in India are high, there is a need for a more flexible characterization of refugeehood. India’s current attitude towards refugee protection belies its past practice. However, this is a manifestation of “narrow nationalism” that is deeply tied to a postcolonial geopolitical space which continues to be in a state of flux.¹¹¹¹ As Chimni argues, this “needs to be actively revisited in a global age [and...] the refugee should [...] be seen as an agent of a progressive, democratic, and just global order”.¹¹¹²

¹¹⁰⁷ Global Compact on Refugees (n 1076) (section 3.2).

¹¹⁰⁸ *ibid* (para 41).

¹¹⁰⁹ Burra (n 1106) 71.

¹¹¹⁰ Bindu Shajan Perappadan, Rohingya asylum seekers back in Delhi, *The Hindu*, May 18, 2012.

(<https://www.thehindu.com/news/national/rohingya-asylum-seekers-back-in-delhi/article3433267.ece>) [accessed April 15, 2021].

¹¹¹¹ Chimni (n 1080) 634.

¹¹¹² *ibid*.

Conclusion: An attempt at coherence and consistency

Mainstream literature on refugee law and refugee studies have continued to follow the contours of Eurocentric norms and institutions of forced displacement and have failed to adequately include perspectives from the global south. This project provided the first steps in mitigating this asymmetry and identified moments of dispute, tensions, and differences in understanding refugee protection in India. One of the most critical elements of this project was to identify the locus of power in the global refugee regime and the exclusivity inherent in the refugee regime. With the help of archival documents and case studies, this project demonstrated that colonial domination and racism were never properly linked to forced displacement. Many scholars continue to follow internalist explanations of refugee movements which lay the blame solely on ‘refugee-producing states’ that generally tend to be in the global south.¹¹¹³ However, such explanations fail to account for the complex social, political, and economic realities of the states in question. The root causes of refugee flow are much more than just states’ inability to adequately protect their own citizens. Globally, this is also a strategy carved out by western states that absolve themselves of their responsibility towards refugees.

Much of refugee literature does not consider the hegemony and Eurocentrism of international refugee law frameworks. This can be attributed to the “colonial amnesia” inherent in the establishment of refugee protection norms whereby events within Europe were “readily brought to mind as contextually significant”.¹¹¹⁴ Even the more recent interventions in international refugee law, such as the Global Compact on Refugees, dilute the already unstable foundations of frameworks like the *1951 Convention* and its *1967 Protocol*. Refugeehood and

¹¹¹³ Chimni (n 53) 361.

¹¹¹⁴ Mayblin (n 71) 175.

forced displacement are still treated as problems to be solved through exclusionary protection norms as opposed to understanding their root causes.¹¹¹⁵ Moreover, academic literature in the field also mirrors these inherent distortions and asymmetries. Though there has been some critical literature in the field it is still sparse. In fact, some of the more recent critical interventions in refugee studies have also been undertaken by white scholars in the global north. My attempt is not to disparage the work of these scholars; however, I am perturbed by the absence of voices from critical scholars of the global south. This is not for our lack of trying, but due to the entrenched asymmetry in knowledge production and the privileging of certain voices within the domain of refugee studies.

Refugee studies scholarship, both mainstream and critical, continues to remain within the exclusive realm of scholars in the global north. While I also possess this privilege of working from the global north on a project concerning the global south, my objective is to create inroads into refugee studies literature as an emerging scholar who is originally from the subcontinent. The transnational impact of my inability to carry out this research in the global south can be captured in A. Sivanandan's words... "We are here because you were there".¹¹¹⁶ Centuries of colonialism not only eroded subcontinental identities but also disabled me from imagining them devoid of such oppressive forces. A commentary on the disparity of academic resources requires a separate body of work. However, the fact that we as scholars from the global south seek out opportunities in the global north is yet another reminder of the asymmetry. Sivanandan's words informed my approach and also prompted me to gain a deeper understanding of the interconnections between colonialism and subcontinental displacements. The work I undertook as a part of this project and the analysis of archival documents map India's relationship with its former colonial power through institutions

¹¹¹⁵ *ibid.*

¹¹¹⁶ A. Sivanandan, *Communities of Resistance: Writings on Black Struggles for Socialism* (Verso Books 2019) x.

like UNHCR, Save the Children, and other international NGOs. This research exposes the double standard of Britain's understanding of international refugee law norms and institutions. While meting out repressive policies against black and brown bodies, the British positioned themselves as a liberatory power by opening the doors for European refugees in the subcontinent.

As opposed to just being interested in understanding the asymmetry in knowledge production, I position myself as one of the targets of this systemic bias and present this project as a tool of resistance in order to alleviate some of these inequities. I have done this by analyzing some of the unexamined assumptions of international refugee law's ostensibly egalitarian nature and also by relying on the knowledge I gained as a former practitioner of UNHCR. Contrary to the assumption that international refugee law contains within it the true elements of emancipatory forces, I have argued that the creation of international refugee law is implicated in its inherently hierarchical and racist positioning of those displaced in the global south. This has given nations "license to treat their own citizens and citizens of other countries by vastly disparate standards".¹¹¹⁷

My project began with a brief outline of the subcontinent's place in the development of international refugee law. By articulating the contestations of India's engagement with frameworks of refugee protection, the project provided a deeper analysis of an alternate location of practice that has existed in the field for the last seven decades. Having established that there is an absence of narratives on colonial histories in the evolution of international refugee law, the project engaged in a detailed review of literature from *Third World Approaches to International Law (TWAIL)*. The rationale for this was to propose an alternate view of the development of international refugee law. In response to dominant narratives in which the subcontinent does not feature, the review of TWAIL literature coupled with perspectives from postcolonial and decolonial studies, provided

¹¹¹⁷ Mark Gibney, 'U.S. Foreign Policy and the Creation of Refugee Flows', in Howard Adelman (ed), *Refugee Policy: Canada and the United States* (York Lanes Press 2021) 87.

the foundation for a more inclusive understanding of refugeehood. While mainstream narratives of international law are beholden to the chronology proposed by European powers after the end of the Second World War, my project diverged from these narratives and challenged the privileging of Eurocentric narratives. For this purpose, TWAAIL provided the tools to counter the prevailing hegemonic discourse in the field. The first three chapters of the project perceived mainstream international refugee law as a product of western thought. By considering a range of historical, social, and political factors, I highlighted the role of the subcontinent in the development of international refugee law. The review also provided a brief window into the relationship between race and the refugee regime, which was also a consistent theme of this project.

The chapter following the literature review outlined the importance of subcontinental geopolitics in understanding displacement. The thesis made multiple references to cartographic divisions and the need for international refugee law to take cognizance of forcible postcolonial state creation as being foundational in understanding displacement. However, the purpose of this chapter was to highlight the fact that the universalization of the nation-state model based on arbitrarily drawn borders, resulted in dangerous consequences for many in the subcontinent. The Partition of India was followed by several waves of refugee movements across the newly created borders which were manifestations of unresolved territorial disputes and erasure of identities. However, the transformation of colonial political units to postcolonial nation-states was considered to be a step towards modernity by the colonists. The postcolonial boundaries in the subcontinent manifested in outcomes that were convenient for colonists but decimated the capacity for subcontinental self-determination. This also created inequitable outcomes for various groups of people on either side of the newly created international borders. This has continued to be a great source of distress, 74 years after the Partition of India. The rationale for highlighting

subcontinental geopolitics was to demonstrate that international law has continued to perpetuate colonial legacies and has resulted in further disempowerment of already vulnerable groups in the region.¹¹¹⁸

As mentioned earlier, one of the objectives of the project was to identify the locus of power within the refugee regime. However, power did not exist without resistance which is what the next chapter captures. While the oppression of the third world is an integral part of the discussions, I have made an active effort to capture active resistance against hegemonic forces starting with India's role as a founding member of the League of Nations. The chapter articulated that India's resistance to Eurocentric international law norms predates the establishment of the UN. India utilized its anomalous identity to develop the rudiments of India's resistance to global forces of oppression. While contemporary resistance to international refugee law norms offered more tangible outcomes, it was critical to capture the genesis of India's pre-independence international identity that traversed the liminal space between being a British Dominion and possessing sovereign powers in the context of the League of Nations. Subcontinental anticolonial resistance came in the form of India's central role in the League Against Imperialism that co-existed with the League of Nations. The discussions during the 1927 Brussels Conference provided the foundation for India to engage in more active resistance in the post-independence era.

The following chapter located India in the evolving conceptions of international refugee law. This was particularly critical in rewriting and reconceptualizing the history of international refugee law by including India's role in offering relief and protection to European refugees during the interwar period. Mapping conventional approaches to this history, helped in identifying the absent discourses. While there is some literature on India's engagement with contemporary norms

¹¹¹⁸ Shahabuddin (n 427).

of refugee protection, not much has been written about India's approaches to refugee protection before its independence in 1947. With the help of archival documents from the League of Nations in Geneva, I demonstrated India's benevolence towards European refugees, specifically Armenian, Russian, Greek, and Polish, while battling colonial oppression at the hands of the British. Not only were the rudiments of international refugee law exclusionary in practice, but literature by prominent refugee studies and refugee law scholars mirrored these approaches. Therefore, India was overlooked. I filled this gap by showing India's prominence in refugee protection, and I argued that the conventional image of India as a deviant force in the global refugee regime today, is a misnomer.

The longest chapter in this thesis concerns India's post-independence engagement with international refugee law. Once again, mainstream accounts of international refugee law do a very poor job of India's role in resisting myopic notions of the *1951 Convention* and the mandate of the UNHCR as they do not capture the legacy of refugee protection in the region. Though critical scholars have identified challenges to mainstream international law in general through TWAIL, international refugee law has yet to receive this level of critical attention. While I do not claim to have decolonized international refugee law altogether, this chapter provides some nascent perspectives in this direction. By mapping India's engagement in the formalization process of the *1951 Convention* and UNHCR (*travaux préparatoires*), I demonstrated the resistance to imperial characteristics of international refugee law. The systematic exclusion of subcontinental perspectives, despite several appeals by India and Pakistan, led to India voting against resolutions in the UNGA that confirmed the implementation of the *Convention* and the mandate of UNHCR. Analysis of India's disillusionment with UNHCR and the *Convention*, is followed by case studies that show India's *ad-hoc* refugee protection approaches in response to waves of refugees from the

region. While India had to deal with the disarray during the partition, a decade later it was confronted with the first wave of refugees from Tibet. After coming away disillusioned from the formalization process of the *Convention* India was intent on developing refugee protection norms of its own. However, India was simultaneously in an ambiguous and transitional position between leaving behind the legacies of the Empire and moving forward with postcolonial nation-building projects. The case studies not only showed India's strategic ambiguity with respect to extending protection to various groups of refugees, but also demonstrated that India never wavered from the core precepts of international refugee law. India's ability to develop *ad-hoc* norms of protection was a challenge to the prevailing notion of noncompliance to international refugee law and a challenge to the construction of the idea of a 'refugee' devised by western powers. This chapter not only uncovers the Eurocentrism of contemporary notions of international refugee law, but also highlights that incessant Western intervention over the years was instrumental in concealing their role in displacement. This chapter and a large part of the thesis is a challenge to the dominant view that Europe has been generous to refugees, and the subcontinent has not.

The penultimate chapter outlines India's recent engagement with international refugee law and more specifically the Global Compact of Refugees. By mapping global paradigm shifts in international refugee law, this short chapter highlights India's efforts in protecting Sri Lankan Tamil refugees and also examines the shifts in approach towards refugee acceptance. While other chapters have made some references to India's relationship to UNHCR, this chapter dedicates a section to provide some more clarity. By highlighting the discursive power of the Agency and its heavy reliance on states for legitimacy, I argued that UNHCR's impartial and non-political character is questionable. India's reluctance to work with UNHCR is attributed to the agency

overlooking the needs of partition refugees, and in more recent times not condemning restrictive asylum policies of several European states.

This chapter also provided a detailed account of the role played by India's Courts system in providing relief to refugees. As a non-signatory to the *Convention*, India has extended constitutional provisions to persons of concern. While a constitutionalized right to asylum does not exist in India, there is a great deal of importance in highlighting cases where constitutional provisions have been invoked in the interest of refugee protection, despite the absence of national asylum law. More recently, however, the tide is changing to the detriment of refugees. Nevertheless, there is some cause for hope. Some judicial institutions have defied the government's exclusionary notions of protection as evidenced by a May 2021 decision in the Manipur High Court. As I was concluding the thesis, the Manipur High Court in *Nandita Haksar v the State of Manipur and others* held that "the far-reaching and myriad protections afforded by Article 21 of our Constitution, as interpreted and adumbrated by our Supreme Court time and again, would indubitably encompass the right of non-refoulement..." thereby expanding the scope and purpose of the constitutional protection against deprivation of personal liberty.¹¹¹⁹ In stark contrast to the Supreme Court's April 2021 decision, the Manipur High Court also held that refugees were fleeing their respective countries of origin under imminent threat to their lives and liberty. However, predicating relief on their ability to answer for admitted violations of India's domestic laws, "would be palpably inhuman".¹¹²⁰ Finally, the High Court's decision hinged on numerous precedents as examined earlier and constitutional principles in keeping with the core objectives of international refugee law.¹¹²¹

¹¹¹⁹ *Nandita Haksar v the State of Manipur and others*, Writ Petition (Criminal) No 6 of 2021, 3 May 2021 (High Court of Manipur, India) para (9).

¹¹²⁰ *ibid* para (12).

¹¹²¹ *ibid*.

In summary, the task of rewriting the history of international refugee law by including perspectives from the subcontinent is complex and an ongoing process. This project provided some steps to challenge universal applications of international refugee law by highlighting alternate locations of practice. The thesis has also engaged with the intricacies of international refugee law's imperialist history. Critical approaches to international refugee law are still in their infancy. Broadening the scope of understanding by including regional and sub-regional perspectives is a significant step in the field which is what this project has done. Though, the contemporary foundation of refugeehood in South Asia was built on the origins of the Partition of India, India's benevolence towards refugees predates this event. However, contemporary manifestations of India's refugee protection practice do not correspond to what India has done to other groups of refugees. In fact, with the advent of proto-fascist political movements in the country, refugee protection norms have fallen prey to ethnoreligious sentiments. The current system is unfortunately a poor reflection of India's past.

My future research will build on my current doctoral project. With the intention of putting together a book manuscript, it will reimagine South Asia within the global refugee regime. By shifting the gaze from what South Asian states do on their territory, my future research agenda will explore the 'personality' they bring to the development of international refugee law, at a time when the regime is committed to bringing issues of forced displacement in the Global South to the fore. Domestic institutional actors in the subcontinent have long been significant in the development of refugee protection practice in India as highlighted in this thesis. I hope to develop dynamic partnerships with practitioners and policymakers to create opportunities for future collaboration and dialogue. I also hope to develop pathways for future research, methodological innovations, discussions, and policy change concerning refugeehood in the region.

As I conclude this project, I wish I could say that this represents the end of the discussion on refugeehood in South Asia. However, this barely represents the beginning...!

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ⁱ Some sections of this 'Introduction' are from my book chapter **Regional Refugee Regimes: South Asia** in the 2021 **Oxford Handbook of International Refugee Law** edited by Cathryn Costello, Michelle Foster, and Jane McAdam.