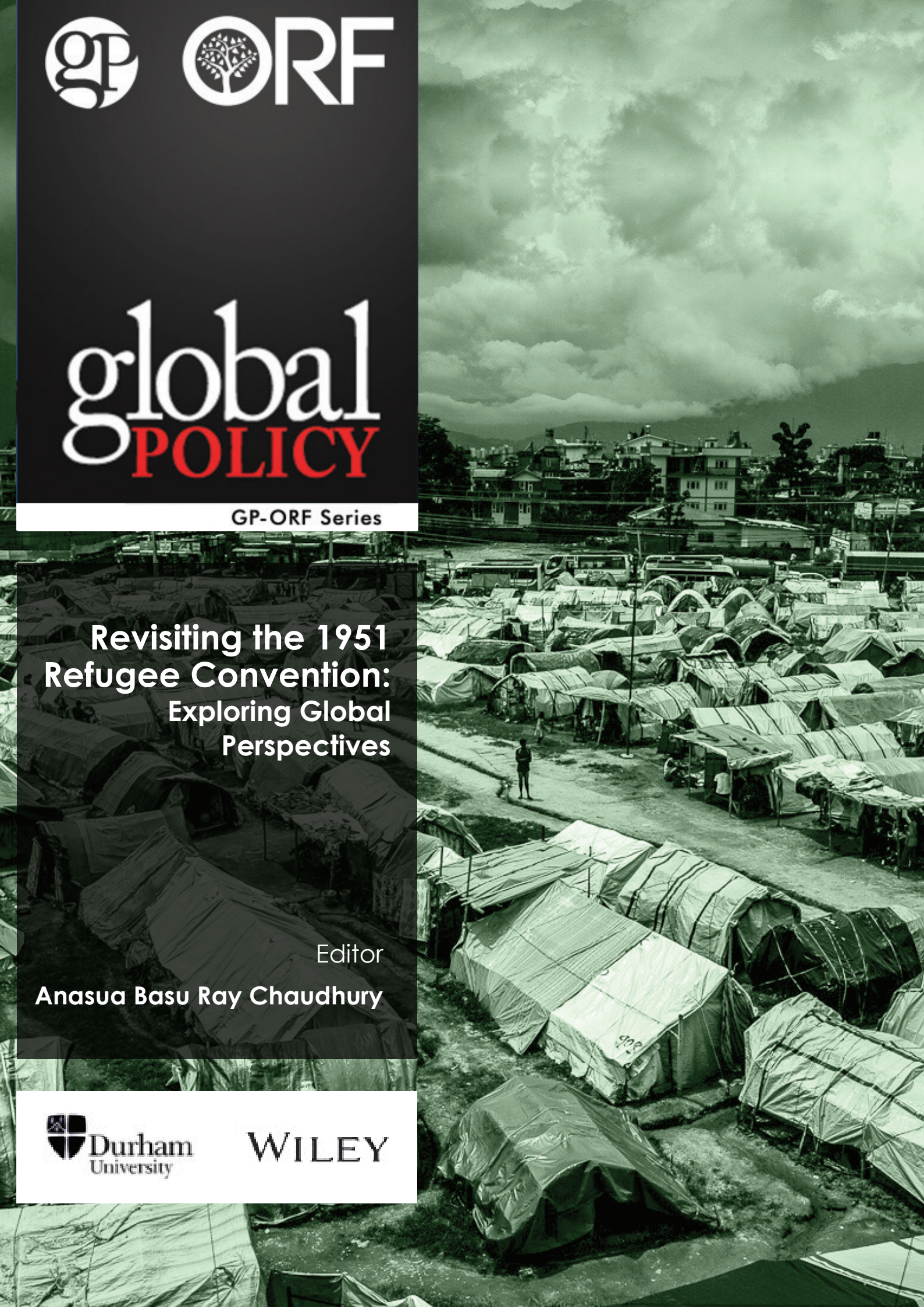

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GP-ORF Series

Revisiting the 1951 Refugee Convention:
Exploring Global Perspectives

Editor

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Editing and Production
Preeti Lourdes John

Design and Layout
Rahil Miya Shaikh

ISBN
978-93-90494-64-4

Citation
Anasua Basu Ray Chaudhury, ed, Revisiting the 1951 Refugee Convention: Exploring Global Perspectives, (New Delhi: ORF and Global Policy Journal, 2022).

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Introduction

The 1951 Convention Relating to the Status of Refugees was the first comprehensive attempt to define refugees and charted a detailed guideline for host countries to ensure the adequate protection and preservation of the rights of all refugees. The document was initially limited in its temporal and spatial scope as it covered the period before 1 January 1951 and confined its mandate to European refugees. The 1967 Protocol Relating to the Status of Refugees expanded the Convention's scope, making it the most relevant international legal regime for addressing the contemporary global refugee crisis.

According to the United Nations High Commissioner for the Refugees (UNHCR), 82.4 million individuals were forcibly displaced worldwide by the end of 2020 due to

persecution, conflict, violence, human rights violations, and events seriously disturbing public order (1). Of these forcibly displaced persons, 26.4 million are refugees, over 20 million of whom are under the mandate of the UNHCR (2). The scale of global displacement and forced migrations solidify the importance and indispensable nature of the 1951 Convention. Indeed, the Convention has evolved through the decades while remaining fundamental to the refugee protection regime. Despite its limitations, states, and regional and international organisations have tried to rely on the principles outlined in the Convention to formulate policies and agreements on the rights and protection of refugees.

As new political, social, economic, developmental, and environmental challenges emerge in an increasingly globalised world, the process of refugee creation has increased manifold. In 2021, the Convention marked its 70th year of coming into force. People, institutions, and countries have long debated the relevance and limitations of the Convention, criticising its diminishing impact and application. This can be attributed to allegations that some developed countries have flouted the norms set by the Convention, such as Australia (3) or the US (4).

In recent years, the Syrian refugee crisis has captured global attention due to the number of asylum seekers and the inhumane conditions of the arduous journey they make. This has propelled political discourse on the precarious situation of refugees as well as on the rising fear among the native populations in destination countries over security and demographic changes. Recent events in Europe (5) and North America have exposed existing negative sentiments towards migrants and asylum seekers, which has translated into a rise in right-wing populism and nationalist fervour.

The resultant criticism of the refugee regime and the unequal distribution of refugees globally led the UN General Assembly to adopt the New York Declaration for Refugees and Migrants in 2016, followed by two global compacts. But the COVID-19 pandemic has resulted in further hindrances in ensuring refugee protection. As the 1951 Convention completes 70 years in practice, renewed focus is needed to assess the significance and shortcomings of the existing refugee protection regime. Do the definitions and frameworks set forth by the Convention encapsulates the sociopolitical realities of the 21st century? To what extent can the universal mechanisms of refugee protection address the issues of local geographies? In understanding the limitations from historical narratives, this volume aims to analyse the importance of local geographies while dealing with the universal framework of refugee protection regime.

Historical Backdrop

The beginning of the 20th century was marked by a fall of empires. In 1917, the Russian Empire fell following the Bolshevik Revolution, leaving over a million people displaced across Europe. The League of Nations was compelled by the International Committee of the Red Cross to address the refugee issue and institute a framework for recognising their rights (6). The Office of the High Commissioner for Refugees was constituted to aid refugees, help them find

work, provide protections, and form legal solutions. At the end of the First World War, the borders of imperial states disappeared, and new political and social structures based on democratic ideals took shape across Europe. The creation of nation-states on ethnically and culturally homogenous grounds created a new wave of refugees in Europe.

In 1922, Fridtjof Nansen, the first High Commissioner for Refugees, instituted travel documents for the Russian refugees, thereby providing them a legal identity and enabling them to move between nation-states until accepted by a willing state. The 'Nansen passport', as the document came to be known, was eventually extended to Armenian refugees in 1924 and Christian refugees in the subsequent years (7). The institutional and legal frameworks of the refugee protection regime can be traced back to these travel documents. In the following years, temporary pacts and conventions related to refugees were agreed upon. The instruments determined the legal status of a refugee and created categories of refugees based on their country of origin. In 1938, a centralised body binding the various instruments of refugee protection came into being as the office of the High Commissioner for Refugees under the protection of the League (8).

As Europe was trying to manage and resettle those displaced during the First World War, violence descended on the Jews in Germany between 1933 and 1939. In 1940, as France, the Netherlands, Denmark, Belgium, and Luxemburg were occupied by the German army, Switzerland became the only safe haven for the displaced Jews in Central Europe. Switzerland came under massive migration pressure, consequently tightening its borders (9),(10). Unfortunately, the racially discriminated Jews were not recognised as refugees, and were only accepted at the discretion of the state.

During the occupation of German forces and in the aftermath of the Second World War, millions of people were displaced from their homes. The allied powers tasked the United Nations Relief and Rehabilitation Agency with repatriating and resettling those displaced (11). The establishment of the United Nations in 1945 dissolved the League of Nations and its institutional arms. The International Refugee Organization was tasked by the UN with the responsibility of assisting refugees but was replaced in 1949 by the UNHCR (12) with a mandate to supervise refugee resettlement, repatriation, assimilation, and integration across Europe. It is in this background that the 1951 Convention was formulated to set the norms for refugee protection.

The Convention: Features, Scope and Limits

Drafted under the aegis of the UN, the provisions of the Convention did not have a global appeal, evidenced by the language in the Convention that refers to the events in Europe before 1951. This exclusionary language, which limited the Convention's scope to European refugees (13), drew widespread criticism during its drafting process (14). Therefore, the Convention contained a temporal and geographic limitation. The formation of post-colonial independent states in the Indian subcontinent (India and Pakistan in 1947 and Bangladesh in 1971) also led to a humanitarian crisis with millions

displaced. Importantly, all three countries are non-signatories to the Convention. The decolonisation of Africa, formation of new independent states and civil conflicts gave rise to the need to extend the geographical purview of the Convention, and the limitation was rectified by the 1967 Protocol.

The Convention defines the status of a refugee, their rights, and the responsibilities of the state in granting them protection. It also provides the obligations of the refugee to the host state. An important feature of the Convention is the universal definition provided for the term 'refugee'—an individual who has "a well-rounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and "is unable or unwilling to return to his country of nationality." While this definition met the needs of the past decades, it is exclusionary to the people subjected to protracted wars and conflicts in present times. "A well-rounded fear of persecution" implies a direct threat to the person seeking asylum. As the Convention fails to provide a definition for the word "persecuted," it excludes those who are fleeing violence, conflicts, and human rights violations, threats from non-state actors, food insecurity, and climate and environment disasters. Additionally, the Convention has also been referred to as having "excluded women from the international right to protection from persecution" (15). As the idea of protection is central to humanitarianism, it is indeed necessary to revisit the efficacy of the Convention in contemporary circumstances.

The most important principle in the 1951 Convention is that of 'non-refoulment', provided in Article 33 (1). If the life or freedom of the refugee is threatened in their country of origin, states that are signatories to the Convention are obligated to not return or expel such individuals. This provision has been adapted as a customary international law and is also applicable to non-signatory states. Thus, all refugees are protected by the principle of non-refoulment, irrespective of the ascension or ratification to the Convention by the host country.

In this context, the precarious situation of Rohingya is worth noting, as it has become a severe concern in recent times. The Rohingya, described by the UN as the world's most persecuted people, have faced heightened fears of attack in Myanmar where they are not considered as citizens. Despite being recognised by the UNHCR as refugees, they are not formally granted rights as refugees in either Bangladesh or India, where they have sought asylum. This situation gives rise to one important question since nationality and citizenship are state prerogatives—since neither India nor Bangladesh are formal signatories to the international refugee conventions, how relevant are the existing laws in rendering protection to refugees in this part of the world?

Notably, the 1951 Convention is supplemented by other international conventions, regional agreements, national legislations, and judicial decisions, which together form the international refugee protection regime. These include the Convention Governing the Specific Aspects of Refugee Problems in Africa, and the Cartagena Convention that covers Latin America and Mexico. These conventions provide a broader definition

of refugees, widening the ambit of refugee protection in these regions by integrating the principles into national policy frameworks.

The Volume at a Glance

This volume intends to revisit the relevance of the 1951 Convention in today's world. To mark the significance of this important document, the essays in this compendium analyse various dimensions of the universal refugee protection regime. The volume is divided into three segments—Understanding the Relevance of the 1951 Convention; Refugee Protections and Local Geographies; and the Rohingya: Precarities of a Stateless People—to include perspectives from diverse geographies (South Asia, Middle East, Africa, Europe, and Australia) and various aspects of the global refugee protection framework. This compilation aims to be a valuable addition to the current debate on the relevance of universal refugee protection regimes.

Anasua Basu Ray Chaudhury

Endnotes

(1) UN High Commissioner for Refugees, *Global Trends: Forced Displacement in 2020*, Copenhagen, UNHCR, 2021, https://www.unhcr.org/60b638e37/unhcr-global-trends-2020

(2) Global Trends: Forced Displacement in 2020

(3) Australia's Refugee and Humanitarian Program comprises two sub-programmes: the onshore protection programme and the offshore resettlement programme. The onshore protection programme is available to asylum seekers who arrived in Australia on a valid visa. The offshore resettlement programme contains three categories: refugee, special humanitarian, and community support programme. Since 13 August 2012, any person arriving in Australia by sea without a valid visa can be moved to the Manus Island (in Papua New Guinea) or Nauru for processing, even if they applied for asylum immediately on arrival in the country. Since July 2013, successive Australian governments have stated that no refugees from Nauru or Manus will ever be resettled in Australia. Some refugees may be able to remain on the islands on a temporary or permanent basis, although integration prospects are limited. Rights experts have termed this offshore processing regime as a breach of international human rights standards. For more, see Kaldor Centre for International Refugee Law, "Australia's Refugee Policy: An overview," UNSW, https://www.kaldorcentre.unsw.edu.au/publication/australias-refugee-policy-overview

(4) Individuals entering the US through its southern land border are regarded as ineligible for asylum if they pass through another country first and did not seek asylum there irrespective of if they had access to effective international protection in those transit countries. The UNHCR is deeply concerned about this rule. For more, see "UNHCR deeply concerned about new U.S. asylum restrictions," *UNHCR*, July 15, 2019, https://www.unhcr.org/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html

(5) The scepticism towards accepting migrants and refugees in Western Europe has resulted in deadly implications for asylum seekers. To reduce the number of refugees arriving in Europe, the EU struck a controversial deal with Turkey aiming to prevent crossings over the Aegean Sea, by detaining anyone arriving on Greek islands under the threat of deportation. That had been the main route for most migrants reaching Germany after journeying through Balkan countries to reach Western Europe. For more, see Lizzie Dearden, "Refugee Crisis: Number of Asylum Seekers Arriving in Germany Drops By 600,000 In 2016," *The Independent*, January 11, 2017, https://www.google.co.in/amp/s/www.independent.co.uk/news/world/europe/refugee-crisis-germany-asylum-seekers-numbers-drop-600000-in-2016-angela-merkel-syria-middle-east-europe-eu-a7521191.html%3famp

(6) Elizabeth White, "The Legal Status of Russian Refugees, 1921–1936," *Comparativ* 27, no. 1 (2017), https://doi.org/10.26014/j.comp.2017.01.02 https://doi.org/10.26014/j.comp.2017.01.02

(7) UNHCR, Convention relating to the Status of Stateless Persons: Its History and Interpretation, https://www.refworld.org/docid/4785f03d2.html

(8) Shauna Labman, "Looking Back, Moving Forward: The History and Future of Refugee Protection," *Journal of International and Comparative Law* 10, no. 1 (2010), https://scholarship.kentlaw.iit.edu/ckjicl/vol10/iss1/2/

(9) The reasons for rigid border measures and stringent policies on deportation and the fear of the native population being replaced echoed in the narratives of European right-wing and nationalist parties. The tightened border measures meant that the displaced people could travel to Switzerland only for the purpose of transit to another country, provided travel to another country was guaranteed. The absence of such guaranteed travel would result in deportation. Because of this policy, approximately 90,000 Jews were directly or indirectly sent to concentration camps.

(10) Gerald Knaus, "Welche Grenzen brauchen wir? Zwischen Empathie und Angst – Flucht, Migration und die Zukunft von Asyl (Which Borders do we need? *Between Empathy and Fear – Refuge, Migration and the Future of Asylum*) (Munich: Piper Verlag, 2020), https://esiweb.org/pdf/KNAUS_Swiss%20tragedy%20and%20borders_21-05-26.pdf

(11) Labman, "Looking Back, Moving Forward: The History and Future of Refugee Protection"

(12) Labman, "Looking Back, Moving Forward: The History and Future of Refugee Protection"

(13) Paul Weis, "The Development of Refugee Law", *Michigan Journal of International Law* 27, no. 3 (1982), https://repository.law.umich.edu/mjil/vol3/iss1/2/

(14) Edwin O. Abuya et al., "The neglected colonial legacy of the 1951 convention", *International Migration, Volume* 59, no. 4 (2021), https://onlinelibrary.wiley.com/doi/full/10.1111/imig.12898

(15) Nahla Valji, "Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility," *Refuge: Canada's Journal on Refugees* 19, no. 5 (2001), https://doi.org/10.25071/1920-7336.21227

Understanding the Relevance of the 1951 Convention

The Test of Time: Reconceiving the Limitations of the 1951 Refugee Convention

Sabyasachi Basu Ray Chaudhury

The 1951 Convention Relating to the Status of Refugees has been the grundnorm of the international refugee law ecosystem. It was approved at a special United Nations (UN) conference on 28 July 1951 and consolidated previous international instruments relating to refugees. The 1951 Convention is a rights-based legal instrument associated with the principles of non-refoulement, non-discrimination and non-penalisation.

On the 70th anniversary of the 1951 Convention, UN High Commissioner for Refugees Filippo Grandi said it "continues to protect the rights of refugees across the world" and that "millions of lives have been saved" because of it. At the same time, Grandi also expressed concern about the recent "attempts by some governments to

disregard or circumvent the Convention's principles, from expulsions and pushbacks of refugees and asylum-seekers at land and sea borders, to the proposals to forcibly transfer them to third states for processing without proper protection safeguards" (1). His comments speak volumes as there have been frequent allegations of inhuman and degrading treatment by several states and their agencies in ensuring pushbacks, taking or destroying migrants' possessions, and depriving migrants of basic rights.

In the globalised world, numerous people are trying to move from one country to another or from one part of the world to another, some without 'valid' documents. Refugees, stateless persons, and asylum-seekers seek refuge in 'safer' countries, and economic migrants seek 'greener pastures' elsewhere. In this emerging situation, the existing international and regional legal mechanisms that guarantee the security and rights of refugees may appear to be insufficient, ineffective, and even partially redundant in an evolving neoliberal economic order facing the Westphalian state system and sovereignty.

Westphalian Order

The global order established through the Treaty of Westphalia in 1648 facilitated a system of sovereign states to invent policies to rule within a territory. This also excluded other authorities from interfering in the 'domestic' sphere. Neither the onset of the post-war era and the establishment of UN nor the contemporary neoliberal times, which prioritised capital over human mobility, have escaped the orthodoxy of Eurocentric ideas. After all, the Treaty of Westphalia had foreclosed the visions of limiting sovereignty for basic human rights, and the world has not been able to move much beyond that even nearly four centuries later (2).

The 1951 Convention was formulated to address the alarming refugee situation in Europe in the context of the Jewish massacre and the Second World War. However, these commendable moves largely ignored the unfolding situations in the erstwhile colonies in Asia and Africa, where the partitions of the territories and the somewhat artificial and arbitrary redrawing of boundaries accompanied the process of decolonisation and led to large-scale displacement of population, riots and massacres. In Europe, the boundaries drawn around territorial and sovereign states ended religious contestations, at least temporarily. Yet, at the same time, the European and colonial remaking of boundaries in Asia and Africa reignited ethnic and religious tensions. The long shadow of the Westphalian system has, in other words, been a curse in disguise for the postcolonial world.

The mixed and massive flows of people since the onset of the neoliberal economy in the 1990s made it more challenging to make a clear distinction between refugees and asylum-seekers on the one hand and migrants on the other. The earlier categorisations of people on the move also became blurred and failed to deal with the evolving global situations. The September 2001 terrorist attacks in the US and other attacks in Europe led to the large-scale criminalisation, securitisation and dehumanisation of refugees and migrants. In this scenario, the humanitarian approach towards distressed people was eclipsed by national security

priorities. Human security and humanitarian concerns of refugees also took a backseat.

Test of Time

Has the definition of refugee failed to stand the test of time? For several reasons, the 1951 Convention does not seem to offer an acceptable working definition of 'refugee' in the changing circumstances even though the definition of refugee, as mentioned in Article 1 of the Convention, has been updated several times through the 1967 Protocol, the OAU Convention or the Cartagena Declaration of Refugees. The definition of refugee, intimately associated with the postwar European imperatives, could not be decolonised to address the basics of displaced people.

In any case, various sizeable categories of uprooted people were conspicuous by their absence in the 1951 Convention. The definition was primarily based on narrow political criteria, emphasising individual persecution as the hallmark of the person in need of refuge or asylum. Under the changing circumstances, the definitional deficiencies become more pronounced in cases of mass exodus and internal displacement or situations of climate-induced or natural disaster-induced displacement. The definition could, in no way, take note of the migrants, including undocumented migrants, driven by economic and social forces in these neoliberal times.

Pushback, Pullback

In Europe, attempts to implement the principle of non-refoulement (a fundamental principle of international refugee law) involved substantial obligations, including the time-consuming and costly process of individual refugee status determination. The newly decolonised, economically poorer countries in the Global South also had to carry the burden of supporting huge refugee populations (for instance, during the Partition in 1947), without much say beyond accepting the legal obligation to do so. In the subsequent years, Global South countries were legally obligated to refrain from expelling refugees (3).

However, the prerogative of states in controlling the entry and stay of nonnationals in their territory has been inherent in the sovereign expression of power over national borders. Given the changing circumstances on the application of a blended strategy of the traditional pushback and the evolving pullback—mainly by Global North countries, including in the European Union (EU)—the principle of non-refoulement has also lost favour to the newer means of accepting refugees without making any enduring commitments for them. Instead, pullbacks are implemented through joint patrols and agreements to prevent migrants from approaching the border. This poses a serious problem of the responsibility for violations of migrants' human rights as most countries now consider refugees a burden that stymies economic and social development and drains national resources. While Bangladesh, a small and densely populated country of 160 million in the Global South, is under tremendous pressure to provide shelter to millions of Rohingya refugees, the more affluent and less populated Global North countries and regions—the EU, US and Australia, which is infamous for its 'Pacific Solution' of transferring asylum-seekers to processing centres in Nauru and Papua New Guinea—are

adopting new strategies to keep refugees at bay, primarily by tweaking the international refugee law, international human rights law and international humanitarian law (4).

An increasing number of countries seem determined to devise ways to respect only the letter and not the spirit of the 1951 Convention. Therefore, many countries now prefer soft laws that are easier to negotiate—or ignore—in the national interest. Soft laws are non-binding legal instruments, acting as guidelines to policy. Soft law provisions sometimes also turn into international customary law, which can be the basis for new formulations of hard law provisions.

Many countries, primarily in the Global North, have started adopting unregulated transfer programmes for incoming refugees and the externalisation of refugees through various opaque mechanisms (5) that operate largely at the discretion of the state authorities. Additionally, the privatisation of land and maritime border security—ostensibly to overcome the 'lack of resources' and 'overcrowding' at reception centres caused by the increase in refugee arrivals (6)—has made a mockery of the international refugee law ecosystem.

There has also been a trend of separating refugees, asylum-seekers and migrants from the legal and sovereign entity of the state, which allows it to evade the legal responsibilities associated with the principle of non-refoulement. This physical separation was earlier ascertained through the fencing of borders with barbed wires or walls. Transit zones were also created to apprehend migrants, deny them entry, and pushback to other countries where possible. Pushbacks have turned into an unofficial yet standardised practice for the coercive control of borders and migrants reaching the European shores. The growing interception at sea of vessels carrying refugees and migrants under the guise of search-and-rescue operations also create complex situations obfuscating the legal ecosystem of international and regional rules and principles.

Article 33(1) of 1951 Convention clearly states that: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (7). As the principle of nonrefoulement has increasingly been recognised as a norm of customary international law, it also applies to those states that have not ratified the Convention. However, there have been attempts to limit, shift, or circumvent these obligations.

The growing xenophobic mindset in the Global North led to the development of new and more radical border management strategies and externalisation of refugee and asylum policies, underlined, for instance, in the EU-Turkey Statement of 2016. Paragraph 1 of the Statement says: "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will occur in full accordance with EU and international law, thus excluding any collective expulsion. All migrants will be protected under the relevant international standards and in respect of the principle of non-refoulement. It will be a

temporary and extraordinary measure which is necessary to end the human suffering and restore public order" (8). Furthermore, the deal committed Turkey to accept the return of all asylum-seekers who travelled through it in exchange for billions of Euros in aid, visa liberalisation for Turkish citizens and revived negotiations for Turkey's accession to the EU. The €3 billion funding was designated for projects to improve the lives of refugees and host communities in Turkey (9).

Conclusion

The 1951 Convention is currently facing several challenges. First, given how the states have trampled non-refoulement and other basic principles underlined in the Convention in the post-war era, its future indeed hangs in the balance.

Second, how effective can such international mechanisms be in the changed circumstances if the legal basis of refugee law remains embedded in the Westphalian principles of sovereignty and territoriality even as the doctrine of sovereignty appears to undermine the very possibility of natural law thinking? Natural law, after all, "is not properly law if sovereignty is the essential condition of legal experience. It is not possible to conceive a law of nature if command is the essence of the law" (10).

Third, the 1951 Convention was primarily a mechanism for the post-war European situation that ignored the future concerns of decolonised states. The then colonial powers in Europe were mainly involved in formulating the modern refugee doctrine, while countries in Asia and Africa were excluded from the process of 'international' lawmaking. Therefore, it now remains how far the existing international legal ecosystem can address the Global South's concerns without having a pluriversal and decolonial approach to the contemporary refugee issue moving beyond the Euro-centric 1951 Convention.

Endnotes

(1) UNHCR, United Nations, https://www.unhcr.org/news/press/2021/7/6100199a4/1951-refugee-convention-70-years-life-saving-protection.html

(2) Sabyasachi Basu Ray Chaudhury, Statelessness, *International Conventions and the Need for New Initiatives? Addressing the New Frontiers of Statelessness* (Kolkata: Mahanirban Calcutta Research Group, 2018)

(3) Muhammad R. Alborzi, *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (Leiden: Martinus Nijhoff, 2006), pp. 270-71.

(4) Aulden Warbrooke, "Australia's 'Pacific Solution': Issues for the Pacific Islands," *Asia & the Pacific Policy Studies 1*, no. 2 (2014), https://onlinelibrary.wiley.com/doi/full/10.1002/app5.32

(5) This implies transferring the refugees to the soil of another country and making their own country only a transit. The externalisation of refugees can also be through a deal, such as the one between Turkey and the EU to ensure refugees and migrants cannot enter EU countries at all, keeping them at bay.

(6) Bill Frelick, Ian M. Kysel and Jennifer Podkul, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants", *Journal of Migration and Human Security 4*, no. 4 (2016), https://www.hrw.org/sites/default/files/supporting_resources/jmhs.pdf

(7) United Nations High Commissioner for Refugees, "The 1951 Refugee Convention", UNHCR, https://www.unhcr.org/1951-refugee-convention.html

(8) General Secretariat of the Council, Council of the European Union, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf

(9) "Q&A: Why the EU-Turkey Migration Deal is No Blueprint", *Human Rights Watch*, November 14, 2016, https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint

(10) Alessandro P. d'Entrèves, Natural Law: An Introduction to Legal (London: Hutchinson, 1970)

Impact of Regional Interventions on Global Refugee Law: Assessing the Kolkata Declaration

Nergis Canefe

Regional declarations on refugee law have had a tumultuous history in national and international contexts. The core instruments on which displaced populations rely to secure international protection are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. However, the challenges multiplied regarding the application or adoption of these international law instruments, including the interpretation of the scope of the principle of non-refoulement and the determination of the elements of the refugee definition. This highlights the need to re-examine the terms of the debate became a permanent feature of the global regulatory regime of forced migration. The Office of the United Nations High Commissioner for Refugees (UNHCR) has repeatedly commissioned papers and special reviews on these issues

from international refugee lawyers, experts and judges, and regional bodies and has taken it upon itself to formulate solutions. Consequently, the broader definitions of who is a refugee have been advanced via regional conventions and declarations, as illustrated by the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) (1) and the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) (2). These broader interpretations of international refugee law emanating from Africa and Latin America could well be said to be brought to the next level by the 2018 Kolkata Declaration on the State of the Global Protection System for Refugees and Migrants (3). However, certain differences must be analysed.

Setting the Context

Both the OAU Convention and the Cartagena Declaration have created regional norms for the use and acceptance of their broader approach to international refugee law. Specifically, the OAU Convention is a binding legal instrument and, as such, created regional law. On the other hand, the Cartagena Declaration is a non-binding legal instrument and thus only created customary legal norms to determine refugee status and protection measures. In both Africa and Central America, long-standing regional conflicts led to the adaptation of existing international legal instruments to conform with the tenets of local realities. Despite these developments, from the 1990s onwards, there has been continuous and substantial refugee flows in South Asia and West Asia, with the Rohingya, Syrian and recent Afghan refugee crises. This is the specific context within which the Kolkata Declaration should be examined. Furthermore, although they may initially be reviled, regional declarations challenging some of the givens of the mainstream international refugee regime must be regarded as an important component of the system. Particularly noteworthy are their interventions that broaden or question existing nexus requirements or rules of regulation pertaining to forced migration. Yet, as prevalent as these dissents are, they have received very little scholarly or practical attention outside of their regional domain. This is another important reason why the Kolkata Declaration, the OAU Convention and the Cartagena Declaration must be celebrated.

In this wider context, it is important to shed light on the distinct properties of the Kolkata Declaration as constitutive of a new analytical framework on forced migration. From a regional context, ethicised and racialised moral panic undermines both the reception and integration of refugees in South Asia. As the deprivation of cultural citizenship, membership and legal status diminish displaced and dispossessed populations' sense of affiliation, public disparagement reinforces existing patterns of prejudice and policies of discrimination. Furthermore, stigmatisation perpetuates the socioeconomic disadvantages of the displaced communities, structurally positioning them on the margins of society with minimal prospect for respect and dignifying representation in the political realm. However, South Asia does not occupy a unique place in the larger spectrum of forced migration movements. By the end of

2019, there were already 79.5 million forcibly displaced people globally (4). Furthermore, more than two-thirds of all refugees worldwide come from just five countries, only one of which is in South Asia—Syria, Afghanistan, South Sudan, Myanmar and Somalia (5).

In Focus: The Kolkata Declaration

Still, there are distinct elements present in the Kolkata Declaration that are globally applicable and present a tour de force in terms of redefining what 'international' stands for in the context of international refugee law and the regulation of forced migration. In 2016, all 193 UN member states unanimously adopted the New York Declaration for Refugees and Migrants, which is generally seen as the founding document for future regulation of mass displacement on a global scale (6). The New York Declaration specifically aimed at widening refugees' access to social and economic opportunities. Although the signatory governments expressed their commitment to the declaration, what has transpired on the ground since then is far from satisfactory. In a similar vein, under the aegis of the Global Compact on Refugees, the UN General Assembly declared that integration necessitates that the host communities and public institutions welcome refugees and meet the needs of a diverse population (7). This is a condition that is also underlined in the Kolkata Declaration, which clearly states that any protection framework "must combat discrimination based on race, religion, caste, ability, sexuality, gender and class that affect rights and dignity of all human beings" (8). However, what is observed with this declaration is not simply a regional reiteration of the Global Compact but also its political and historical contextualisation (9). The Kolkata Declaration, unlike the Global Compact or the New York Declaration preceding it, openly declares the "uneven geographies of protection in terms of sanctuaries, third countries, hotspots border zones, safe corridors, discriminating labour regimes with unequal labour rights, remittance-centric segments of global economy, as well as places characterised by intense financial and security operations" as the context within which global movements of forced migration take place. Regarding the specific conditions marking the histories of postcolonial nationhood in South Asia, the Kolkata Declaration also brings to the fore the presence of millions of stateless peoples in the region as part of the global refugee geographies. Finally, it demands that the (South) Asian situation calls for multi-scalar efforts to provide safety and dignity and the overall protection of refugees, asylum seekers, stateless persons, labour migrants, and internally displaced people. Hence, there is already an opening up of the category of displacement and dispossession on par with the region's realities and resonant with global flows of displacement.

It is also important to examine the circumstances under which the Kolkata Declaration came into existence. First is the proposition that extended exile is the rule and not the exception. Second, the exclusion of asylum seekers from full membership in the countries of arrival and the systemic production of precarity are generated by policy and backed up by societal consent. Third, nearly 90 percent of the world's refugees reside in the Global South and millions more are displaced but do not 'count' as refugees as per the standards imposed by national and

regional readings of international refugee law. The list of diagnoses and antidotes for the current refugee crisis, addressed by the Global Compact, is generated by academics and funded by the Global North. Fourth, neoliberal capitalism's dealings with forced migration find a pristine new form as loans or outright payments to countries that face a mass arrival of the displaced and the dispossessed. The terms of the new Global Compact on refugees and migrants can do little to change the conditions of the containment of the displaced by states in their regions of origin. Lastly, the Occidentalist legal framework of international refugee law, marked by the exacting language of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, is blind towards the de facto realities in Turkey, Lebanon, Bangladesh, Thailand, India, Uganda, Colombia, and many other countries that all host millions of the displaced on their territory without an explicit legal obligation (10).

Conclusion

The Kolkata Declaration was issued as a concerted attempt to reframe the global movement of displaced and dispossessed people. It was introduced to recalibrate the conversation around systemic violence, migration and protection and to reclaim refugee-migrant subjectivity (11). However, there has been little confidence outside of refugee and migration regulatory regime circles that the global compacts and such summits held much promise or that outcomes of pledges on funding and resettlement policies were unlikely to be honoured (12). The promotion of safe, orderly, and regular migration, and the promise of the three conventional 'durable solutions' (local integration, resettlement and return) on the scale needed are not issues to be dealt with through international 'in principle' agreements. There are serious historical, economic, political, institutional, cultural, and social constraints concerning the realisation of any such solution for the world's protracted displacement and the state of limbo in camps, tent cities, and semi-permanent mass urban dwellings of displaced populations. Moreover, institutions and sections of civil society that support solution-oriented approaches towards refugee and migrant populations are under strong attack from populist forces both in the Global North and South. The Hungarian Prime Minister Viktor Orban's call for "illiberal democracy" marked by razor-wire fences and devoted nativism (13) resonates with many leaders, from Poland to India and beyond.

Against this grim background, the Kolkata Declaration can be considered as a manifesto of both ethical and political significance, rather than an idealist trope in international refugee law promising to solve all problems for all parties involved within an imagined timeline. Indeed, a good start is to think about alternatives to the existing international architecture of refugee governance that seeks to address mass displacement and mobility more than as problems. One only needs to be reminded of Nauru, Manus Island, Christmas Island, and Guantanamo Bay as part of the same architecture, only in this case associated with detention, criminal and violent containment, and incarceration. With the turn towards an increased division of the world into metropolitan centres of wealth and vast areas of what is called 'permaconflict', millions of refugees are continuously on the move. This situation dictates the structural

possibility of the failure of agreements such as the global compacts. Beginning as a global sociopolitical movement, refugees must be regarded as a transnational or cross-national entity (14). Even utopian terms such as 'Refugia' coined by Robin Cohen, or the 'Refugee Nation' proposed Jason Buzi are more helpful in this regard, as they do not pretend to propose putative resolutions to the migrant and refugee crisis in toto (15). As indicated by the Kolkata Declaration, explorations of global solutions to the refugee system must start with the root causes of the constant reproduction of dispossession. The declaration is a singularly noteworthy effort against the international ghettoisation of refugees.

Endnotes

(1) United Nations High Commissioner for Refugees, "OAU Convention: Governing the Specific Aspects of Refugee Problems in Africa," UNHCR, https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html

(2) United Nations High Commissioner for Refugees, "Cartagena Declaration on Refugees," UNHCR, https://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.htm

(3) Centre for Refugee Studies, "Kolkata Declaration," York University, https://crs.info.yorku.ca/kolkata-declaration

(4) UNHCR, Global Trends: Forced Displacement in 2019, June 2020, Geneva, United Nations, 2020, https://www.unhcr.org/flagship-reports/globaltrends/globaltrends2019/#:~:text=By%20the%20end%20of%202019,record%20according%20to%20available%20data.&text=During%202019%2C%20an%20estimated%2011.0%20million%20people%20were%20newly%20displaced

(5) Bhupinder S. Chimni, Global Trends Analysis, Bonn, Development and Peace Foundation, 2018, http://alt.sef-bonn.org/fileadmin/Die_SEF/Publikationen/GT-ANALYSEN/GT-A_2018-03_en.pdf

(6) United Nations High Commissioner for Refugees, "New York Declaration for Refugees and Migrants," UNHCR, https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html

(7) United Nations, "Global Compact on Refugees," UNHCR, https://www.unhcr.org/5c658aed4.pdf

(8) Mahanirban Calcutta Research Group, "Kolkata Declaration 2018: Protection of Refugees and Migrants," MCRG, http://www.mcrg.ac.in/RLS_Migration/Kolkata_Declaration_2018.pdf

(9) Nergis Canefe, ed. *Transitional Justice and Forced Migration: Critical Perspectives from the Global South: Critical Perspectives from the Global South* (Cambridge: Cambridge University Press, 2019)

(10) Jennifer Hyndman, "Global Compacts or containment?: Geopolitics by design" in *Urban Recovery*, ed. Howayda Al-Harithy (London: Routledge, 2021), 14-34.

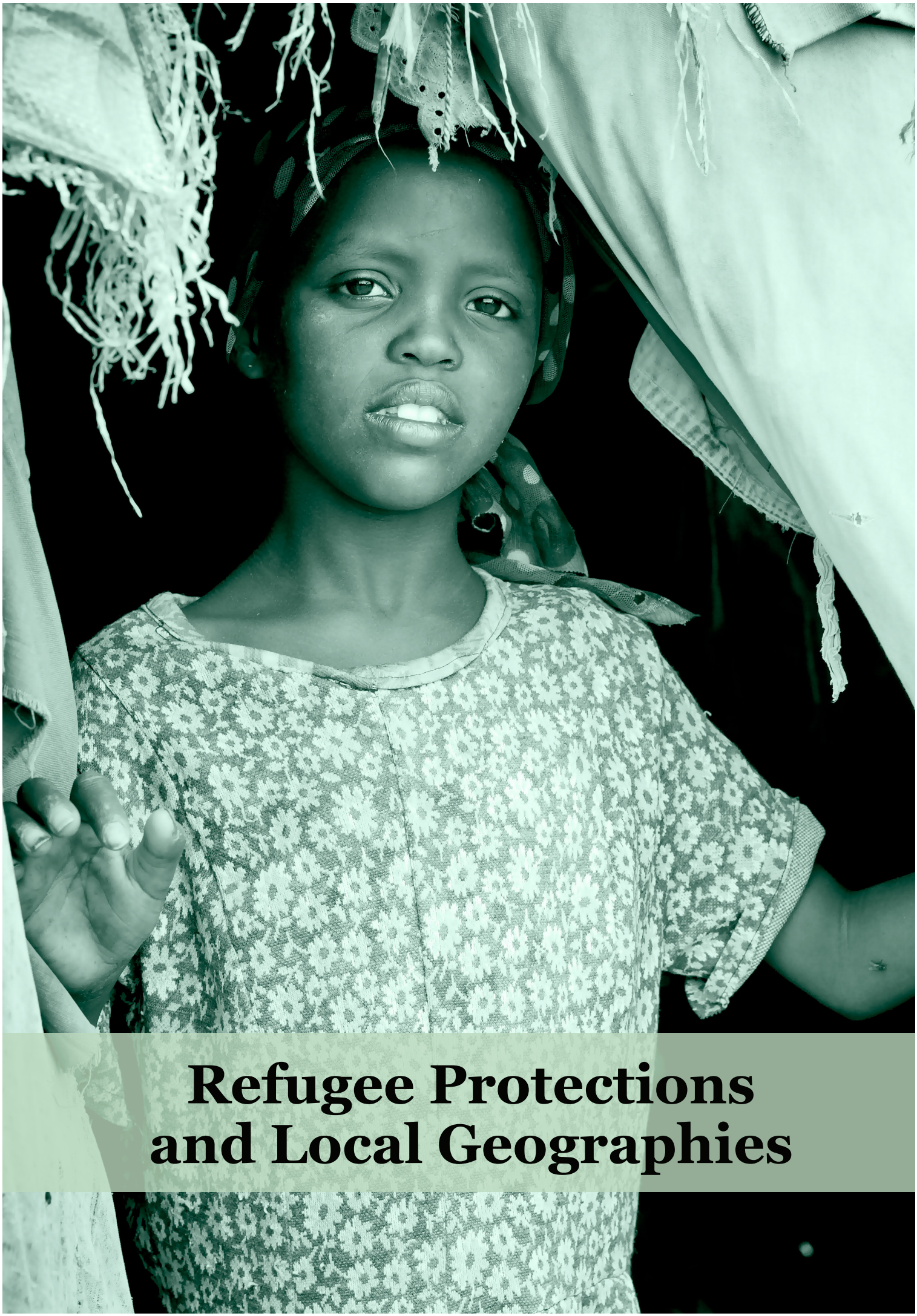
(11) Hyndman, "Global Compacts or containment?: Geopolitics by design,"

(12) Jeff Crisp, "New York Declaration on Refugees: A One-Year Report Card," *Refugees Deeply*, September 18, 2018, www.newsdeeply.com/refugees/community/2017/09/18/new-york-declaration-on-refugees-a-one-year-report-card

(13) Nicholas Mulder, "The revolt against liberalism: what's driving Poland and Hungary's nativist turn?," *The Guardian*, June 24, 2021, https://www.theguardian.com/world/2021/jun/24/revolt-against-liberalism-eastern-europe-poland-hungary-nativist-politics

(14) Nicholas Van Hear et al., "Refugia Roundtable," *Migration and Society* 1, no. 1 (2018), 10.3167/arms.2018.010116

(15) Robin Cohen, "Refugia: The Limits and Possibilities of Buzi's Refugee Nation," WordPress, posted July 30, 2015, https://nandosigona.wordpress.com/2015/07/30/refugia-the-limits-and-possibilities-of-buzis-refugee-nation/; Jason Buzi, *Refugee Nation: A Radical Solution to the Global Refugee Crisis* (California: Smashwords, Inc., 2015)



Refugee Protections and Local Geographies

Law and Politics of Refugee Protection in South Asia

Shuvro Prosun Sarker

South Asia, consisting of the eight member-states of the South Asian Association for Regional Cooperation (SAARC)—Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka—does not have any common system of governance to protect refugees. The inclusion of Afghanistan in the grouping is arguably a calculated move considering the intraregional governmentality of the founding member states of SAARC. Indeed, Afghanistan's inclusion in the SAARC in November 2005 came on the back of its accession to the 1951 Refugee Convention and 1967 Protocol in September 2005. Crucially, no other SAARC country is a party to the 1951 Refugee Convention or 1967 Protocol.

These countries also do not have specific laws for the protection of refugees and have developed preferences in the protection they offer through practice, welcoming certain refugee groups and refusing others (1). This kind of preferential protection practice refers to a regime of calculated kindness that makes refugee protection ambiguous. Interestingly, the reasons for not signing the two international instruments have rarely been subject to academic discussion except for in India, which regards the 1951 Convention and the 1967 Protocol as a partial regime that does not take into account conditions of 'mixed' refugee flows in developing countries (2).

As the Taliban's return to power in Afghanistan raises concerns about the country's approach towards treaty obligations relating to human security (3), it is also important to look into the legal and human rights obligations of the other SAARC countries in protecting refugees in their territory.

Several factors may influence the host country's refugee protection policy, including the costs and benefits of international assistance, relations with the origin country, the reaction of the local population, and security considerations (4). However, the most influential factor for India, Pakistan, and Bangladesh is religious affinity.

Tibetan, Tamil, Chakma, and Pakistani and Bangladeshi Hindu Refugees in India (5)

India has always attempted to regulate refugees through administrative measures, but doubts remain about the effectiveness of such efforts. In the absence of a legislative framework, the discriminatory treatment of refugees remains a possibility.

Additionally, laws related to the regulation of foreigners apply to refugees in India without distinction. The Foreigners Act, 1946 empowers the central government to regulate foreigners' entry, presence, and departure. The administrative policies under the Act relating to aliens are skeletal and leave wide discretion to the executive (6). Refugees who fled persecution are placed under the same rules as any other foreigners entering India for any other purpose, and thereby no legislative framework has been developed for identifying and determining refugee status (7). Given the government's absolute power over such matters, biases will surely creep in, weakening the rule of law. But the wide delegation of rule-making and discretionary powers to the authorities is a violation of the rule of law and can be challenged on the grounds of unconstitutionality and the violation of the right to equality (8).

Of the countries in India's neighbourhood and beyond, the United Nations High Commissioner for Refugees (UNHCR) operation in India is mandated to decide on the asylum claims of only Afghanistan and Myanmar nationals. But refugee status bestowed by the UNHCR does not preclude the refugees from the operation of the Foreigners Act or other relevant laws.

All other refugee groups (Tibetans, Tamil, Chakma, Pakistani and Bangladeshi Hindus) are the direct concern of the Indian government, and UNHCR has very little to do in the entire process of asylum-seeking or -granting, except in assisting

with repatriations. This clarifies the proposition that calculated moves or ambiguous strategies seem to be based on countries of origin and perceptions of persecution by the Indian state (9).

Afghan, Rohingya and Bihari Muslim Refugees in Pakistan and Bangladesh

In addition to those who entered Pakistan during the Partition and the liberation of Bangladesh, a significant flow of refugees started coming from Afghanistan in 1978. As Pakistan was not a signatory to the 1951 Convention or the 1967 Protocol, it did not have any international obligation to accept refugees. However, the acceptance of Afghan refugees wholeheartedly in such a large number seems similar to India's policy towards Tibetan, Tamils, Hindus, and Afghan minorities while creating a complex new identity (10).

Pakistan has repeatedly justified its action of providing shelter and support to Afghan refugees "mainly based on religion and humanitarian grounds" (11). These refugees reportedly enjoyed extensive favourable treatment related to personal status, acquiring property, employment, primary education, freedom of movement and travel documents in the initial years, even though this may have been in direct violation of the existing laws in Pakistan (12). However, over time, this trend declined (13).

During the British rule, Rohingya people from present-day Myanmar sought refuge in Cox's Bazar in modern Bangladesh (14). Since 1978, Rohingya refugees have come to independent Bangladesh in large numbers, with the first wave thought to amount to over 200,000 people (15). The Bangladeshi government protested against the "inhuman eviction of Burmese Muslim nationals," an outcome of "repressive measures resulting in the forcible expulsion of their nationals belonging to ethnic and religious minorities" (16). Rohingya refugees may have gone to Bangladesh due to several factors, including a similar culture and religion (17).

There have been several major waves of Rohingya refugees to Bangladesh (1991-1992, 2012, 2015, 2016 and 2017-2018), but the most recent surge (2017-18) garnered widespread global attention. While the Bangladeshi government's efforts to assist the refugees, especially those at Cox's Bazar, are commendable, there are some concerns that the Arakan Rohingya Salvation Army militant group may be active in the camps (18). At the same time, tensions between the local Bengali community and the Rohingya continue to fester (19). Amid this situation, Bangladesh's decision to repatriate refugees if they were willing raised questions on if the exercise was truly voluntary and if Myanmar was willing to accept the returnees (20).

Notably, the International Criminal Court has deemed the forced displacement of the Rohingya community from Myanmar as a "crime against humanity" (21). But it remains to be seen if a non-state party to the Rome Statute (Myanmar in this case) can be brought before the court even though the crime may attain ius cogens nature and obligation erga omnes.

It is also important to consider the situation of the Bihari Muslim community in Bangladesh, who may lack any effective connection of nationality (22). People from this community migrated primarily from Bihar and Uttar Pradesh during Partition and settled in East Pakistan (present-day Bangladesh). Although most of these migrants follow Islam, their culture and language were vastly different to those in Bangladesh. Their citizenship and other related rights are not yet fully realised despite the Bangladesh Supreme Court diktat to include them in the electoral roles and provide them with national identity cards (23).

Refugees Regimes in Other South Asian Countries

Sri Lanka is not seen as a popular host for refugees due to the number of 'persons of concern', as listed in UNHCR population statistics, and of the approximate asylum applications Sri Lanka receives each year, most are from refugees from Afghanistan, Pakistan and Myanmar (24). Under an agreement with the Sri Lankan government, the UNHCR is responsible for processing asylum claims, but the government confers no status to those who qualify as refugees (25). Sri Lanka's relatively small refugee population is not always safe, and there have been some reports of forced deportation and attacks (26). As per the UNHCR, Sri Lanka protects around 40,000 internally displaced people through its protection programmes. There is growing demand from the international community and the local human rights activists to operationalise the National Policy on Durable Solutions for Conflict-Affected Displacement and give effect to the recommendations of the Statelessness report (27).

The Maldives is not a signatory to the 1951 Convention and 1967 Protocol and does not have any national refugee law. It also does not have any direct relationship with the UNHCR. The UNHCR operates remotely from its New Delhi office and attempts to begin a dialogue with the Maldivian authorities about a protection mechanism, but the process remains problematic.

Little is known about Bhutan's approach to refugee protection. A search in the UNHCR Population Statistics Tool presents only one entry from 1966 showing that Bhutan received 3000 refugees from China. But Bhutan is known for its strict citizenship law that is aimed at protecting the nation's cultural and religious identity (28). Due to the change in the citizenship laws, Nepali-speaking minority Hindus were uprooted from Bhutan, with around 100,000 Bhutanese refugees taking shelter in Nepal (29).

Nepal maintains a direct relationship with the UNHCR, and is host to refugees primarily from Bhutan and Tibet. Both these refugee communities, Lhotsampas and Tibetans, are assisted by the UNHCR. In 2008, the Nepal Supreme Court directed the government to formulate a law to protect refugees (30), which was drafted in 2012 but is yet to be passed by parliament.

Conclusion

There is an unequal standard of protecting refugees (especially religious minorities) across the South Asian countries, as

evident from the practices of India, Pakistan and Bangladesh. At the same time, it is difficult to assess the legal application of a political commitment such as the New York Declaration for Refugees and Migrants and the subsequent Global Compact on Refugees as "the persuasive force of Assembly resolutions can indeed be very considerable... (I)t operates on the political, not the legal level: it does not make these resolutions binding in law" (31). This makes it clear that greater attention and political will is needed to observe the core human rights treaties to protect the life and liberty of refugees in the South Asian region.

Endnotes

(1) Ravi Nair, "Refugee Protection in South Asia", *Journal of International Affairs* 51, no. 1 (1997), http://www.mcrg.ac.in/RLS_Migration_2019/Readings_MODULE_F/Nair_Refugee%20Protection%20in%20South%20Asia.pdf ; Wei Meng Lim-Kabaa, "Migratory Movement and Refugee Protection in South Asia," ISIL Year Book of International Humanitarian and Refugee Law Articles II (2002): 58.

(2) Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection*, (Singapore: Palgrave, 2017) pp. 57.

(3) Joel Heard, "UN experts urge Afghanistan's new rulers to prohibit torture 'in any circumstances'", *UN News*, September 2, 2021, https://news.un.org/en/story/2021/09/1099072

(4) Karen Jacobsen, "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes", *The International Migration Review* 30, no. 3 (1996), http://www.mcrg.ac.in/RLS_Migration/Reading_List/Module_A/75.pdf

(5) Sarker, *Refugee Law in India*

(6) M.P. Singh, *'Positions of Aliens in India': Legal Position of Aliens in National and International Law*, (paper presented at the Heidelberg Colloquium, Heidelberg, Germany, August 28-30, 1985).

(7) Pia Oberoi, "Regional Initiatives on Refugee Protection in South Asia", *International Journal of Refugee Law* 11, no. (1999), https://doi.org/10.1093/ijrl/11.1.193

(8) J. N. Saxena, "Proposal for a Refugee Legislation in India," *Bulletin on IHL and Refugee Law* 2 (1997): 391

(9) Vijaita Singh, "Citizenship Amendment Act comes into effect from Jan. 10", *The Hindu*, January 10, 2020, https://www.thehindu.com/news/national/citizenship-amendment-act-comes-into-effect-from-jan-10/article30537592.ece; Shuvro Prosun Sarker, "Inception of Statelessness and Refugees' Battle for Citizenship in India: A Critical Study", Vol. 12-13, *ISIL Yearbook of International Humanitarian and Refugee Law*, Indian Society of International Law, 2012. ISSN: 09749500.

(10) Pierre Centlivres et al., "The Afghan Refugees in Pakistan: A Nation in Exile" *Current Sociology* 36, no. 2 (1988), https://doi.org/10.1177/001139288036002008
(11) Centlivres et al. "The Afghan Refugees in Pakistan: A Nation in Exile"
(12) Centlivres et al. "The Afghan Refugees in Pakistan: A Nation in Exile"
(13) Frédéric Grare and William Maley, *The Afghan Refugees in Pakistan*, https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1647.pdf.
(14) Chowdhury R Abrar, "Issues and Constraints in the Repatriation/ Rehabilitation of the Rohingya and Chakma Refugees and the Biharis", (paper presented at the Conference of Scholars and other Professionals Working on Refugees and the Displaced Persons in South Asia, Dhaka, Bangladesh, February 9-11, 1998).
(15) J.P. Anand, "Refugees from Burma", *Economic and Political Weekly* 13, no. 27 (1978), https://www.epw.in/journal/1978/27/our-correspondent-columns/bangladesh-refugees-burma.html
(16) Anand, "Refugees from Burma"
(17) A.K.M. Ahsan Ullah, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization", *Journal of Immigrant & Refugee Studies* 9, (2011), https://doi.org/10.1080/15562948.2011.567149
(18) Naomi Conrad, Stefan Czimmek and Arafatul Islam, "Rohingya militants active in Bangladeshi refugee camps", *DW News*, September 24, 2019, https://www.dw.com/en/rohingya-militants-active-in-bangladeshi-refugee-camps/a-50490888
(19) "Rohingya refugees shot dead by Bangladesh police during gunfight", *The Guardian*, August 25, 2019, https://www.theguardian.com/world/2019/aug/25/rohingya-refugees-shot-dead-by-bangladesh-police-during-gunfight
(20) "Myanmar has failed to act", *The Daily Star*, February 21, 2019, https://www.thedailystar.net/rohingya-crisis/myanmar-fail-create-congenial-atmosphere-take-back-rohingya-refugees-1704871
(21) International Criminal Court, United Nations, https://www.icc-cpi.int/Pages/item.aspx?name=pr1403
(22) Sumit Sen, "Stateless Refugees and the Right to Return: The Bihari Refugees of South Asian- Part 2", *International l Journal of Refugee Law* 12 (2000): 44.
(23) Abid Khan and others v. Government of Bangladesh and others, *Writ Petition No. 3831 of 2001,* in Refworld, https://www.refworld.org/cases,BAN_SC,4a54bbcf0.html ; Md. Sadaqat Khan (Fakku) and Others v. Chief Election Commissioner, Bangladesh Election Commission, *Writ Petition No. 10129 of 2007,* https://www.refworld.org/cases,BAN_SC,4a7c0c352.html.
(24) United Nations High Commissioner for Refugees, "Refugee Data Finder," UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=0Bvgm8
(25) Sri Lanka Factsheet 2018, UNHCR, https://www.unhcr.org/protection/operations/561681326/sri-lanka-fact-sheet.html
(26) "Sri Lanka: Refugees Threatened, Attacked", *Human Rights Watch*, April 29, 2019, https://www.hrw.org/news/2019/04/29/sri-lanka-refugees-threatened-attacked ; "Sri Lanka violates refugee law by deporting Pakistanis: UNHCR", *Reuters,* August 12, 2014, https://www.reuters.com/article/us-sri-lanka-refugees-un/sri-lanka-violates-refugee-law-by-deporting-pakistanis-unhcr-idUSKBN0GC1JO20140812
(27) Phuong Pham et al., "Challenges in Attaining Durable Solutions for Resettled Female-Headed Households in Vavuniya, Sri Lanka", *Journal of Peacebuilding & Development* 13, no. 2 (2018), https://journals.sagepub.com/doi/abs/10.1080/15423166.2018.1465450
(28) Matthew F. Ferraro, "Stateless in Shangri-La: Minority Rights, Citizenship, and Belonging in Bhutan", *Stanford Journal of International Law 48* (2012): 405
(29) Vidhyapati Mishra, "Bhutan is No Shangri-La", *The New York Times,* June 28, 2013, https://www.nytimes.com/2013/06/29/opinion/bhutan-is-no-shangri-la.html
(30) Supreme Court of Nepal, "Muhammad Rashid v. Government of Nepal*,* Nepal Kanoon Patrika 49.6 (2008): 765.
(31) International Court of Justice, "South West Africa (Eth. v. South Africa; Liber v. South Africa)*,"* ICJ*,* https://www.icj-cij.org/public/files/case-related/47/047-19660718-JUD-01-00-EN.pdf

Understanding India's Refugee Policy and the Need for an Institutionalised Approach

Ambar Kumar Ghosh

South Asia has long experienced a 'mixed and massive flow of people' (1). The process of migration, with people moving across international borders, continued unabated even after the creation of post-colonial nation-states with hardened territorial borders. The displacement of certain sections of people from one country to another has taken place due to push factors (political persecution, social prejudice and exclusion, economic hardships and environmental hazards in the country of origin), or pull factors (greater political security, better employment opportunities, and close community ties in the destination country). With the largest geographical expanse in South Asia, a strategic location, relatively greater political and economic heft, and multiple overlapping sociocultural identities, India has received the most documented and undocumented

immigrants from neighbouring countries. Those displaced include refugees, stateless people (2) and other undocumented immigrants who have entered Indian territory at different points of time (3). Although the precarity of these displaced people requires adequate redressal, this piece is confined to the Indian state's approach to the refugee population that it continues to receive on its territory since its inception as a territorial nation-state (4).

The 1951 Convention Relating to the Protection of the Refugees defines refugees as displaced persons who "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" (5). However, the definition remains inadequate as it fails to consider the process of refugee creation due to other factors like poverty, environmental hazards and climate change, and the overlapping or indistinguishable nature of such determinants. Nevertheless, the 1951 Convention and the more inclusive 1967 Protocol Relating to the Status of Refugees remain the main attempts by the United Nations to develop a dedicated international protection framework for refugees.

Like most other South Asian nations, India is not a signatory to the 1951 Convention Relating to the Status of the Refugees and the 1967 Protocol due to the Eurocentric bias of the documents, which do not consider the interests of non-Western countries (6). However, regardless of their ratification of the UN treaty obligations on refugee protection, all countries are mandated to adhere to the principle of non-refoulement, which stops them from sending refugees back to the country of origin unless the situation is congenial for their return.

Although India does not have a specific domestic law on refugee protection and is not a signatory to the international refugee protection mechanisms, it has given shelter to many refugees. Such protection has been accorded in the form of immediate assistance like shelter and food and long-term support for settlement and granting Indian citizenship. However, the entry, socioeconomic assistance and security provided to all sections of refugees have not always been adequately ensured and has been marred by various challenges. Over the years, India's citizenship laws have shaped its refugee recognition and protection policy. Despite not being a signatory to any international treaty on Refugee protection, India has been selectively accommodative in granting entry and protection to refugees, willingly including some communities and remaining more stringent towards others. However, granting entry to the refugee population has often not resulted in their proper recognition. Ensuring refugees' access to the necessities for survival and assisting them to gain social acceptability remains a chequered process for the Indian state, constantly marred by opposition from the local political elite and native sections of society alongside administrative apathy and inefficiency.

A History of Support

India's independence was accompanied by the mammoth displacement of people from Pakistan to India and vice versa. India received a vast number of refugees even as it consolidated its international borders and absorbed this section into its population through the Indian Citizenship Act, 1955. Even after its borders were demarcated, citizenship laws framed, and the passport system established, India continued to accept persecuted refugees from other countries.

Communal prejudices stemming from the partition legacy often led to violence or threats of violence on the minority communities living in Pakistan. Such conditions have led to the large-scale episodic and daily small-scale cross-border movement of refugees into Indian territory, often in an undocumented manner (7). In the 1950s, India also granted asylum to persecuted Tibetan refugees, which led to a deterioration in Sino-India relations. In 1964, the minority communities in erstwhile East Pakistan (present-day Bangladesh), the Buddhist Chakmas and the Hindu Hajongs, were displaced from their homeland in the Chittagong Hill Tract due to religious persecution and the construction of a dam and were compelled to take refuge in India. They were allowed to settle in Arunachal Pradesh (8). Subsequently, the Indian government also committed to granting citizenship to the refugee population settled in Arunachal Pradesh, a move that has gained support from the Supreme Court of India (9). India has also accorded protection to Sri Lankan Tamil refugees in the ethnically and geographically proximate state of Tamil Nadu during the prolonged civil war between the Sinhalese majority and the Tamilian minority in Sri Lanka (10). Similarly, the Nepali-origin Lhotshampa population in Bhutan, who face marginalisation from the Drukpa-dominated political regime in that country, have also sought refuge in India or used Indian territory as a transit point to Nepal (11).

The Spectre of Exclusion

The Rohingya from Myanmar's Rakhine State are another major vulnerable group to face relentless violence and persecution in their home country. As a result, they have been compelled to seek refuge in the neighbouring countries (12). But recently, India has been reluctant to officially grant protection and recognise them as refugees on its territory. Recently a section of Rohingya refugees were pushed back from Indian soil (13).

India's citizenship laws have led to a selective determination of immigrants to decide who will be granted refugee status and, eventually, citizenship and who will be exempted from this process entirely. India started its citizenship legal discourse from a policy of jus soli (citizenship by birth) in 1955, transforming to the more restrictive principle of jus sanguinis (citizenship by descent or ancestry based on certain specific dates), which became the crucial criteria for citizenship determination in the subsequent amendments to the citizenship law, in 1987 and 2003 (14). The 2019 amendment to the citizenship law has laid down that persecuted populations from Pakistan, Bangladesh and Afghanistan belonging to the minority communities (Hindus, Sikhs, Buddhists, Jains, Parsis and Christians) who arrived on Indian territory before the end of December 2014 will

be eligible for Indian citizenship (15). Such a legal discourse on citizenship that is selective in terms of ethnic identity and country of origin has also shaped India's approach towards refugee protection in the region.

Rampant Precarity

Although selective, the Indian state has largely accommodated refugees on its territory. But this has not always meant refugees are provided with adequate access to basic socioeconomic protections. For instance, while the Tibetan refugees in India are thought to have relatively better living conditions (16), other groups struggle for basic amenities, which is concerning (17). The refugees often face material deprivation and social prejudice from the local population. Given the lack of proper identity and residential documents, the refugees are deprived of social welfare schemes, struggle to find shelter and food, and often face bureaucratic and police antagonism (18). The lack of proper documentation, and with little to no chance of returning to their home country or getting Indian citizenship, relegates many into a condition of statelessness (19). Additionally, the presence of refugees has caused some resentment among the local population, leading to the further marginalisation of the refugees. The predicament of the Chakma and Hajong refugees in Arunachal Pradesh is a case in point; the locals have marginalised the refugee population despite the central government's assurance of granting them sociopolitical rights (20). Similarly, the movement against illegal immigrants from Bangladesh in Assam is another instance of prolonged protest by the native population against the displaced, which propelled the framing of the National Register of Citizens in the state to detect the illegal immigrants and initiate a process of detention and supposedly eventual deportation to the country of origin (21). But such a process is fraught with challenges and bureaucratic hurdles; differentiating between refugees and illegal immigrants in the course of identification is not easy, and many have also struggled to make available the relevant identity documents. This has resulted in the harassment of the poverty-stricken displaced population and the lower strata of Assam's local population (22). The deportation of detected illegal immigrants to their country of origin is also difficult without the concerned governments' cooperation, further adding to the uncertainty (23).

Need for Institutionalised Response Mechanism

The Indian constitution mandates the right to equality before the law, the right to life and liberty, the right to a free trial, and the freedom of religion to citizens and aliens alike. While India is not a signatory to the UN refugee conventions, it is bound by the international legal obligation of non-refoulement, and is "party to the Universal Declaration on Human Rights (1948), the International Convention on Civil and Political Rights (1966) and the International Convention on Economic, Social and Cultural Rights (1966) and the Convention on the Elimination of all forms of Racial Discrimination (1965) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984)" (24).

Given its centrality as a refugee-receiving state, India must formulate a comprehensive

national refugee protection law (25) that is responsive to the idiosyncratic needs of the South Asian region, where the flow of cross-border populations and the creation of refugees, stateless people and other displaced communities has a unique overlapping and complex nature. It is important to adhere to the immediate basic socioeconomic needs of the refugee population. Additionally, as articulated in the New York Declaration of Refugees (2016) and the Global Compact of Refugees (2018) (26), concerted efforts must be made to generate political will for developing the resilience of the refugee community for their long-term independent sustenance, to create a more congenial atmosphere for the healthy interaction between the host community and the refugees, and ensure conditions for their safe return to their host countries where possible.

Endnotes

(1) Ranabir Samaddar, "On Governing Unruly Population Flows," *Refugee Watch*, no. 32 (2008), http://www.mcrg.ac.in/rw%20files/RW32/1.Ranabir_Unruly.pdf

(2) Paula Banerjee, Anasua Basu Ray Chaudhury and Atig Ghosh, "The Grid: The stateless and the citizen," in *The State of Being Stateless: An Account of South Asia*, ed. Paula Banerjee, Anasua Basu Ray Chaudhury and Atig Ghosh (New Delhi: Orient BlackSwan, 2015)

(3) Partha S. Ghosh, *Migrants, Refugees and the Stateless in South Asia*, (New Delhi: Sage Publications, 2016)

(4) Anasua Basu Ray Chaudhury and Ambar Kumar Ghosh, "Trans-Border Migration: Bridging the Gap between State and Human Security," *ORF Occasional Paper*, April 2021, https://www.google.co.in/amp/s/www.orfonline.org/research/trans-border-migration-bridging-the-gap-between-state-and-human-security/

(5) United Nations High Commissioner for Refugees, "The Refugee Convention, 1951," UNHCR, https://www.unhcr.org/4ca34be29.pdf

(6) Saurabh Bhattacharya, "India Needs a Refugee Law," *Economic and Political Weekly* 43, no. 9 (2008), https://www.epw.in/journal/2008/09/notes/india-needs-refugee-law.html

(7) "Trans-Border Migration: Bridging the Gap between State and Human Security"

(8) Sabyasachi Basu Ray Chaudhury, "Uprooted Twice: Refugees from Chittagong Hill Tracts," in *Refugees and the State: Practices of Asylum and Care in India*, ed. Ranabir Samaddar (New Delhi: Sage Publications, 2003)

(9) Veerabhadran Vijayakumar, "Judicial Responses to Refugee Protection in India," *International Journal of Refugee Law* 12, no. 2 (2000), https://doi.org/10.1093/ijrl/12.2.235

(10) Anasua Basu Ray Chaudhury, "Ordeal of Citizenship: The Up-country Tamils in Sri Lanka and India," in *The State of Being Stateless: An Account of South Asia*, ed. Paula Banerjee, Anasua Basu Ray Chaudhury and Atig Ghosh (New Delhi: Orient BlackSwan, 2017)

(11) Shiva K. Dhungana, "Third Country Resettlement and the Bhutanese Refugee Crisis: A Critical Reflection", *Refugee Watch*, no. 35 (2010), http://www.mcrg.ac.in/rw%20files/rw35/2.shiva.pdf
(12) Sabyasachi Basu Ray Chaudhury and Ranabir Samaddar, "Introduction," in *The Rohingya in South Asia: People Without a State*, ed. Sabyasachi Basu Ray Chaudhury and Ranabir Samaddar (New York: Routledge, 2018)
(13) Nizamuddin Ahmad Siddiqui and Abu Zar Ali, "Supreme Court order allowing deportation of Rohingyas shows that India hasn't shed Partition baggage," *Scroll.in*, April 18, 2021, https://scroll.in/article/992447/supreme-court-order-allowing-deportation-of-rohingyas-
(14) Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge: Harvard University Press, 2013), 1-26.
(15) Apurva Vishwanath and Kaunain Sheriff M, "Explained: What NRC+CAA means to you," *The Indian Express*, December 25, 2021, https://indianexpress.com/article/explained/explained-citizenship-amendment-act-nrc-caa-means-6180033/
(16) Manan Mehra, "World's Most Successful Refugee Community – The Case of TibetanRefugees in India," *CJP*, February 18, 2020, https://www.google.co.in/amp/s/cjp.org.in/worlds-most-successful-refugee-community-the-case-of-tibetan-refugees-in-india/amp/
(17) H. Knox Thames, "India's Failure to Adequately Protect Refugees," *Human Rights Brief* 7, no. 1 (1999), https://www.scribd.com/document/475892275/Indias-Failure-to-Adequately-Protect-Refugees
(18) Suchismita Majumder, "The Jailed Rohingya in West Bengal," in *The Rohingya in South Asia: People Without a State*, ed. Sabyasachi Basu Ray Chaudhury and Ranabir Samaddar (New York: Routledge, 2018)
(19) Paula Banerjee, Anasua Basu Ray Chaudhury and Atig Ghosh, "The Grid: The stateless and the citizen"
(20) Samir Kumar Das and Anasua Basu Ray Chaudhury, "The stateless Chakmas in Arunachal Pradesh" in *The State of being Stateless: An Account of South Asia*, ed. Paula Banerjee, Anasua Basu Ray Chaudhury and Atig Ghosh (Hyderabad: Orient Blackswan, 2017), 127-180.
(21) Amalendu Guha, "Little Nationalism Turned Chauvinist: Assam's Anti-Foreigner Upsurge, 1979 80," *Economic and Political Weekly*, no. 41/43 (1980), https://www.scribd.com/document/245122455/Little-Nationalism-Turned-Chauvinist-Assam-s-Anti-Foreigner-Upsurge-1979-80-by-Amalendu-Guha
(22) Shruti Rajagopalan, "The inevitability of errors in determining citizenship," *LiveMint*, December 9, 2019, https://www.livemint.com/opinion/columns/the-inevitability-of-errors-in-determining-citizenship-11575909663129.html
(23) Nayanima Basu, "Bangladesh wants 'written' assurance from India that it won't send immigrants after CAA," *The Print*, December 30, 2019, https://theprint.in/diplomacy/bangladesh-wants-written-assurance-from-india-that-it-wont-send-immigrants-after-caa/342579/
(24) "India Needs a Refugee Law"
(25) Florina Benoit, "India: A National Refugee Law Would Equalise Protection," Refugees International Blog, posted 2004, http://www.refugeesinternational.org/content/article/detail/3227/
(26) United Nations High Commissioner for Refugees, "The New York Declaration for Refugees and Migrants," UNHCR, https://www.unhcr.org/en-in/5a561f727.pdf#zoom=95; United Nations High Commissioner for Refugees, "Global Compact on Refugees," UNHCR, https://www.unhcr.org/gcr/GCR_English.pdf

Analysing the Precarity and Marginalisation of the Lhotshampa Refugees

Rajesh S Kharat

In the 1990s, Bhutan's 'one nation one people' policy compelled over 100,000 Lhotshampas (Bhutanese of Nepali origin) to leave the country and seek asylum in India and Nepal. Despite the humanitarian assistance given by Nepal and international agencies, these refugees lived in deplorable conditions in the United Nations High Commissioner for Refugees (UNHCR) camps in Nepal and areas at the Indian border (such as in North Bengal). To date, procuring citizenship and other civil and political rights remains a distant dream for these refugees who continue to face the bitter experiences of forced migration.

A few rounds of formal talks between Bhutan and Nepal and several other dialogues have been held over the last three decades, but no permanent solution has been found.

India also could not fully understand the misery of the Bhutanese refugees and remained insensitive. In December 2006, their plight was aggravated with the withdrawal of UNCHR assistance from the camps.

Third country resettlement in the US, Australia, Canada, Norway, the Netherlands, Denmark and New Zealand has saved a large section of the Lhotshampas from the harsh camp conditions. However, most of these countries have preferred to accept only young and non-disabled refugees, leading to widespread resentment among older refugees who continue to languish in the camps.

Understanding the Lhotshampa Situation

According to Amnesty International, the Lhotshampa refugee situation is among the most protracted and neglected refugee crises globally (1). Despite the international community's efforts to provide legal protection to the Bhutanese refugees, their situation remains grim. Nevertheless, various protocols, regional mechanisms and numerous governmental and non-governmental agencies are involved in protecting their rights and finding a lasting solution. Moreover, the protection and rehabilitation of refugees are funded and assisted by the UN and its subsidiary agencies and other multilateral organisations. Countries like the US and those in the European Union have also provided financial assistance and urged the protection of the Lhotshampas' rights in the UNHCR camps in Nepal.

Although Nepal is not a signatory state to the 1951 UN Convention Relating to the Status of Refugees and its 1967Protocol, large numbers of refugees from Bhutan and Tibet are resettled there. The Nepal government has had a sympathetic attitude towards the Lhotshampas, accommodating them in transit camps when the first batch of refugees arrived in Nepal in the 1990s. Eventually, when these transit camps became overcrowded, additional land was provided. According to UNHRC data from April 2001, 1,07,571 refugees lived in eight camps located in the Jhapa and Morang districts of eastern Nepal while more than 20,000 refugees live around the country.

Despite the absence of any specific provision in the previous constitution relating to asylum or any specific legislation on the subject, the general international human rights instruments and domestic legislation applicable to foreigners apply to refugees in Nepal. For instance, the Immigration Act of 1991 is silent about the deportation of refugees. However, Section 14(2) of the Act retains the power of expulsion of aliens on national interest grounds. Notably, the Nepal government did not deport the 16 Bhutanese immigrants that the UNHCR rejected as refugees (2). The legislation indirectly helps Nepal maintain flexibility in its approach towards refugees and render its legal protection and support whenever refugees require it. To mention here, the Extradition Act of 1991 Section 12(1) supports the principle that political offenders are not to be extradited. This provision empowers the government of Nepal to permit foreigners, including refugees, to stay in Nepal until such time as determined by the government (3).

Challenges

Although the employment of refugees is not permitted in Nepal, many Bhutanese refugees scattered across the country and in UNHCR camps have to work to survive. Since they are willing to work at cheaper rates than local Nepali workers, landowners prefer to employ them in the fields. This 'competition' for jobs has led to minor clashes and conflict between the local Nepalese and Bhutanese refugees.

At the same time, 'donor fatigue' has also plagued the refugees. For instance, in December 2006, the World Food Programme warned that it had not received any international donations to fund its food aid to the Bhutanese refugees and would be forced to cut ration supplies (4). The WFP has since received donations from the European Community Humanitarian Office, Canada, and the US (5).

As many refugees continue to face a protracted situation, frustrations related to education and employment have grown. This, coupled with memories of persecution and alienation from their homeland, has led to increased incidences of depression, anxiety, and other mental health issues among the refugees. A 2011 study by the International Organization for Migration, in coordination with the UNHCR and the US State Department's Bureau of Population, Refugees, and Migration confirmed the disproportionately high number of suicides among Bhutanese refugees resettled in the US and in the camps in Nepal (6),(7). Despite their better situation in the US and in Nepal (where they could associate linguistically, culturally and ethnically), the persisting fear of being displaced dominated their memories, resulting in suicides and mental trauma.

Also, the normal health conditions of these refugees is impacted by persecution, repression and deprivation, civil unrest, separation, loss of family and friends, imprisonment, threat, beatings, torture and rape, overcrowding, poor hygiene and under-nutrition, poor healthcare due to destruction of infrastructure and limited access to health services while fleeing or in exile (8).

Other common health problems seen among Lhotshampa refugees include post-traumatic stress disorder; injuries due to torture; poor dental health as a result of poor nutrition; infectious diseases like tuberculosis and chronic intestinal parasites; under-immunisation in children and adults; under-managed chronic conditions such as hypertension, diabetes and chronic pain; and delayed growth and development in children, including deficits in hearing and speech. The refugees also routinely suffer from malaria, diarrhea, typhoid, diabetes, high blood pressure, cancers (breast, tobacco), respiratory illnesses, beriberi, and vitamin deficiencies (9).

Ensuring a safe learning environment and education is an essential strategy of refugee protection to help them become self-reliant. The refugee community has played a key role in setting up an education system in the camps; with the assistance and guidance of non-governmental organisations, refugees with teaching experience volunteered to set up schools for children and adults. At the same time, Lhotshampa refugee children between

the ages of 6 and 18 have access to basic education, and the UNHCR provides them with teaching and recreational materials (10).

Refugees also have access to counselling in camps and schools. Numerous awareness programmes are conducted on HIV/AIDS, human trafficking, drug abuse, domestic violence, child rights, and sexual and gender-based violence. Special support is provided to children with disabilities. Rampant unemployment has also resulted in tensions in family units, increased alcohol consumption among men and sexual and gender-based violence (11).

The Lhotshampas are a patriarchal community. In the camps, women are often restricted to household activities, are dependent on men, and face widespread discrimination and violence. At the same time, due to economic hardships, many women are compelled to turn to sex work (12). Other issues faced by the women refugees include workplace harassment and vulnerability, personal safety and security, and lack of access to judicial and administrative redressal methods.

The UN has been unable to reach a consensus on repatriating the Lhotshampas to Bhutan. Notably, the actual reason for their departure from Bhutan has never been questioned. Many were denationalised after they were evicted, some dissident organisations became involved in terror activities, and some people were forced to leave Bhutan by those known to them. In this tense context, third-country resettlement became the most durable option. Refugees must fulfil the following criteria to be eligible for resettlement: those with legal and physical protection needs; survivors of torture and trauma; on the grounds of medical conditions; women at risk; family reunification; unaccompanied elderly persons; others without prospects of durable solution (13). The UNHCR's Statute explicitly states that the organisation will help governments find permanent solutions to the refugee situation, including through their "assimilation within new national communities," or in other words, resettlement (14).

The vulnerable Lhotshampas refugees have become a politicised issue in Nepal. Since they are of Nepali origin, there were some fears that the refugees would start blending into Nepalese society while being integrated into the host country. This is why they have been exiled for years in the camps. The third-country resettlement programme has slowed down the refugees' fight for repatriation.

Refugees migrating to English-speaking countries, such as US, also have to learn and adjust to a new language, unlike in the camps in Nepal. However, the resettlement programme has divided the refugees as many would like to accept this offer and escape the camps, while others, including militant political leaders, see it as giving up on the long-standing desire to return to Bhutan with their citizenship rights restored (15).

Religious conversion is also another potential area of concern. Many refugees say they were expected to convert from Hinduism to Christianity to access basic facilities in the camps. At the same time, it is also possible that refugees converted prior to being resettled in

a third country to avoid any cultural clash and disturb the social fabric of the host country.

Conclusion

For Bhutan, the Lhotshampas issue appears not to exist, especially after enacting the new constitution. Provisions in the new constitution are so stringent that no outsider can stay for an extended period in Bhutan, ruling out the option of the Lhotshampas—or Bhutanese of other origins—to enter the country and stay for an extended period.

Additionally, given the experience of exile, Lhotshampas may be hesitant to return to Bhutan, especially if settled in liberal societies. This is even truer for first-generation Lhotshampas born in the countries where their parents were resettled. Despite the recorded instances of depression and anxiety, with time, the refugees appear to have settled in well in the new countries.

This paper is based on the observations, interviews and informal interactions with several refugees and United Nations High Commissioner for Refugees and International Organization for Migration officials during field visits conducted between 1994 and October 2021.

Endnotes

(1) Amnesty International, *Bhutan: Ten years later and still waiting to go home: The case of the refugees, August 2020*, London, Amnesty International, 2002, https://www.amnesty.org/en/documents/asa14/001/2002/en/

(2) United Nations High Commissioner for Refugees**,** *Population Data Unit DSJ, April 2001*, Geneva, UNHCR, 2001a

(3) Tapan K. Bose, Protection of Refugees in South Asia: Need for Legal Framework, https://www.worldcat.org/title/protection-of-refugees-in-south-asia-need-for-a-legal-framework/oclc/46974671

(4) "Absence of Funds Threatens UN Efforts to Feed 106,000 Bhutanese Refugees in Nepal," *UN News*, December 22, 2006 https://news.un.org/en/story/2006/12/204292-absence-funds-threatens-un-efforts-feed-106000-bhutanese-refugees-nepal

(5) "US, ECHO and Canada provide aid to WFP," *APFANEWS*, February 13, 2007, http://www.apfanews.com/stories/us-echo-and-canada-provide-aid-to-wfp.html

(6) Guglielmo Schininà, Sonali Sharma, Olga Gorbacheva and Anit Kumar Mishra*, Who am I?: Assessment of psychosocial needs and suicide risk factors among Bhutanese refugees in Nepal and after the third country resettlement,* Geneva*,* International Organization for Migration, 2011, https://www.iom.int/sites/g/files/tmzbdl486/files/migrated_files/What-We-Do/docs/Mental-Health-Assessment-Nepal_Final_11March.pdf

(7) "Who am I? Assessment of psychosocial needs and suicide risk factors among Bhutanese refugees in Nepal and after the third country resettlement"

(8) Observations and interviews with one of refugees during the first field trip to the Bhutanese refugee camps in Damak in 1994

(9) Observations and interviews with one of refugees during the first field trip to the Bhutanese Refugee camps in Damak in 1994
(10) Observations during the field trip in 2003
(11) Observations during the field trip in 2003
(12) Women's Refugee Commission, "It doesn't matter if you are disabled. You are talented" - The intersection of sexual and reproductive health and disability for Bhutanese refugees in Damak, Nepal, https://www.refworld.org/publisher,WCR,COUNTRYREP,BTN,50ffbce5280,,0.html
(13) Field Work Observations during 2007 to Beldangi camp no. 6 in Nepal
(14) Dr. Gerrit Jan van Heuven Goedhart, (speech, New York City, January 19, 1952), UNHCR, https://www.unhcr.org/admin/hcspeeches/3ae68fb78/address-dr-gerrit-jan-van-heuven-goedhart-united-nations-high-commissioner.html
(15) Field Work Observations during 2007 to Beldangi camp no. 6 in Nepal

India and the Sri Lankan Tamil Refugee Issue

K.M. Parivelan

The number of refugees globally is on the rise due to protracted conflicts and human rights violations, which has led to forced migration and enormous human displacement. Over 82 million people have been forcefully displaced, which is of concern. Newer conflicts and the other causes of refugee movements have increasingly interacted with other geopolitical challenges. Worryingly, by the end of 2020, 16 million people were in protracted refugee situations (1).

Globally, there are now 26 million refugees, 84 percent of whom are hosted in low and middle-income countries (2) that face internal challenges. Yet, many of these host countries have shown tremendous commitment towards refugees. While donors have responded generously, the gap

between needs and available resources continues to grow (3). In this context, it is pertinent to analyse and understand the current state of refugee protection at the global level and regional and national levels.

This paper traces the historical context of refugee protection in India, the legal vacuum, and contemporary challenges faced vis-à-vis refugee protection. It will examine the normative and practical relevance of 1951 Convention and Global Compact on Refugees (GCR) by looking at the Sri Lankan Tamils and Hill Country Tamils living in India with an uncertain future and their protracted displacement context.

Relevance of 1951 Convention

It is pertinent to analyse the functional relevance of the '1951 Convention Relating to the Status of Refugees' and the related 1967 Protocol. The 1951 Convention, the leading global treaty for the protection of refugees, marked its 70th anniversary in July 2001 amid concerns that some of its key provisions are being openly flouted by a growing number of countries, which is a matter of concern.

The Convention forms the foundation of the modern international legal system designed to protect those who flee their countries due to persecution or conflict. It is widely credited with saving countless lives and ensuring a means of escape for people facing imprisonment, torture, execution, and other human rights abuses due to their political or religious beliefs or belonging to a particular ethnic or social group. It provides a universal definition of who qualifies as a refugee and has the flexibility to incorporate the newer definitions of refugees that emerged over the years. While some scholars have argued that the definition of a refugee is archaic or outdated, it is a significant pillar to ensure the protection of refugee rights. The 1951 Convention defines a refugee as a person "who 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, unwilling to avail himself of the protection of that country" (4). The term 'refugee', as defined here, should be distinguished from other humanitarian categories, such as internally displaced persons, stateless persons or economic migrants.

The Convention also established a framework of basic refugee rights—such as the rights to identity papers, access to courts and education—without which their lives in asylum countries would be precarious and vulnerable. It also touches upon the principle of non-refoulement (in Article 33)—which forbids a host country from returning asylum seekers to their home countries where they may be in danger of persecution.

Currently, the most worrying global trend is the growing number of countries that are violating the principle of non-refoulment. Article 33 of the Convention states that "No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened…". If refugees are sent straight back to danger—or are prevented from leaving their countries in the first place—then all other measures designed to protect and assist them count for nothing.

1951 Convention and Global Compact on Refugees

The GCR is normatively expected to rejuvenate the 1951 Convention and its application. In September 2016, amid increased global attention to refugee challenges, the UN General Assembly adopted the New York Declaration for Refugees and Migrants (5). This represented a pivotal moment when 193 UN member states agreed to more responsiveness to movements and enhance the protection of all people on the move, including those crossing borders to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations, in response to the adverse effects of climate change and natural disasters, and in search of new economic opportunities (6).

The UN General Assembly affirmed the GCR in December 2018 with the participation of many countries and civil society organisations. After 18 months of intense engagement between 193 UN states and multiple other stakeholders, the global community agreed on two major global compacts, which today constitute an important body of international law that governs the protection of migrants and refugees. With nationalism, populism, and weak multilateralism on the rise, the importance of GCR must be acknowledged. When countries appear opposed to accepting refugees, such multilateral texts can remind them of their obligations.

The New York Declaration set in motion two separate and complementary processes—the consultative process led by the UNHCR to develop a GCR, and the intergovernmental process of negotiation a Global Compact on Safe, Orderly and Regular Migration, both of which have sought to address several similar challenges relating to refugee and migratory movements.

The GCR has broad four objectives—ease pressures on host countries; enhance refugee self-reliance; expand access to third-country solutions; and support conditions in the countries of origin for a safe and dignified return. But are the objectives specified in the GCR a recast of earlier durable solutions, or do they have new meaning in text and context?

The GCR is built upon a strong foundation of law, policy, and practice developed over many decades. While not legally binding, it has provided a firm basis for a more robust, comprehensive, and good faith application of international law and principles, which are already established and widely acknowledged in many national and domestic legal frameworks. Moreover, it aims to address the gaps in the international protection regime to ensure the burden and responsibility of refugees is shared, particularly in countries that host large numbers for sustained periods.

The Indian Perspective

Empathy and compassion have been the hallmarks of Indian civilisational ethos towards migrants. But in recent years, a trend has emerged that revolves around the notions of 'xenophobia' and 'othering'. There is a tremendous process of 'othering', leading to potential exclusions and discriminations. There is an ongoing debate on 'national security' versus 'humanitarianism' while dealing with refugee protection as a larger

canvas, be it at the executive or judicial level. India has a long history of hosting refugees but, ironically, does not have a legal framework or domestic legislation to deal with refugee protection. Given ongoing geopolitical trends and neighbourhood tensions post the 1971 Bangladesh refugee crisis, India prefers to see the refugee issue from the national security prism rather than as a humanitarian or human rights problem, which is a considerable challenge.

The Centre-state dichotomy and power-sharing relations have had a huge impact on refugee protection deficits in India. Even though India has historically accepted many refugees, it has dealt with the issues bilaterally or through a piecemeal approach. India has accorded differential treatment to refugees from different countries. Tibetan refugees in India have been treated far better than other refugee groups; the Chakma refugees from Bangladesh were provided with the right to life and dignity by the National Human Rights Commission; Sri Lankan Tamil refugees undergo an official refugee determination process during their entry into India.

India is not a party to the 1951 Convention or the 1967 Protocol, nor does it have a domestic law on refugees. This means that refugees are essentially protected under the Indian constitution. Nevertheless, the provisions of the international treaties pertaining to refugees have now acquired the status of customary international law.

Refugee Status Determination

At present, India proactively participates in the UNHCR-led executive committee. The UNHCR often plays a complementary role to the efforts of the Indian government, particularly regarding the verification of an individual's background and the general circumstances prevailing in the country of origin, in a process known as refugee status determination. For a claimant refugee to put forward a genuine claim for determination of refugee status, it is crucial to accumulate all documents that the claimant can muster in support of the grounds of persecution or fear that has resulted in the need to escape from their country of origin. The documentation may be in the form of an identity card of employment with some governmental agency in the country of origin or an identity card indicating membership of a particular group. Any other information that the claimant can gather to prove specific persecution or fear can strengthen their case.

Similarly, the claimant must be able to establish all statements to the interviewing authorities in a consistent manner without discrepancies. If there are apparent contradictions between the statements made by the claimant at different times to different persons, their claim to refugee status may be rejected. The statements made by the claimant must also not be contradictory to the general information available on the country of origin as per media and other reports. The corroboration and confirmation of facts pertaining to persecution by the UNHCR is an essential factor in determining refugee status. The UNHCR also plays an important role in finding durable solutions to the refugee situation, such as voluntary repatriation or resettlement.

Sri Lankan Refugees in India

Sri Lanka experienced a protracted civil war between the Tamils and Sinhalese, which was preceded by significant events like the introduction of the 'Sinhala language only' policy in 1956 and 'Buddhism as primordial religion' in 1971. These constitutional changes greatly impacted Sri Lanka's Tamil minority in terms of education and employment, eventually alienating them from Sri Lankan polity. Initial peaceful protests turned violent and subsequently escalated into a full-scale civil war. This led to the forced displacement of Sri Lankan Tamils, internally and externally. Those who fled the civil war turned to India in large numbers as refugees or displaced people. Since 1983, nearly 3 lakh Sri Lankan refugees and Hill Country Tamils have come to India as refugees in different phases (7). The Indian government followed a specific policy regarding Sri Lankan refugees and permitted them entry despite not having travel documents.

While Tibet refugees have been granted land for housing and monasteries, Sri Lankan Tamil refugees live in refugee camps, which are by and large temporary arrangements. Nevertheless, Sri Lankan Tamils enjoy a range of social welfare benefits like education, health, and monetary doles. Generally, the central government has shown a lukewarm response to Sri Lankan refugee needs, while the Tamil Nadu state government has been more proactive (such as the announcement by Chief Minister M.K. Stalin of a range of welfare measures to Sri Lankan Tamil refugees (8)). The non-refoulment principle was tested in 1991 in the aftermath of Rajiv Gandhi's assassination, with the reported forced expulsions of Sri Lankan refugees in Tamil Nadu camps. But this changed due to international pressure to uphold the principle of non-refoulement as stated in Article 33 of the 1951 Convention. Non-refoulement has contributed enormously to preventing arbitrary expulsions and protecting the rights of other refugee groups in India as well.

What kind of durable solutions can be expected to resolve their protracted displacement issue vis-à-vis options such as voluntary repatriation, local assimilation or third-country resettlement? The interim upscale of welfare measures can be coupled with durable solutions. But can India play a proactive role in facilitating this along with the UNHCR and other key stakeholders? This is the pertinent expectation to resolve the protracted Sri Lankan Tamil refugee issue and set the tone for broader adherence and accessibility to the 1951 Convention, the landmark framework for refugee protection.

Endnotes

(1) United Nations High Commissioner for Refugees, "Refugee Population Statistics Database," UNHCR, https://www.unhcr.org/refugee-statistics/

(2) UNHCR, "Refugee Population Statistics Database"

(3) United Nations High Commissioner for Refugees, Outcomes of the Global Refugee Forum 2019, December 2019, Geneva, UNHCR, 2019, https://www.unhcr.org/5ecd458c4.pdf

(4) United Nations High Commissioner for Refugees, "Convention Relating to the Status of Refugees (Article 1 Para. 2)," UNHCR, https://www.unhcr.org/4d934f5f9.pdf

(5) General Assembly, "New York Declaration for Refugees and Migrants," United Nations, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf

(6) Jessica Field and Srinivas Burra, eds., *The Global Compact on Refugees: Indian Perspectives and Experiences* (New Delhi: Academicians Working Group & UNHCR India, 2020)

(7) Director of Rehabilitation, *Information Handbook under Right to Information Act 2005* (Chennai: Department of Rehabilitation, Government of Tamil Nadu, 2010), https://www.tn.gov.in/rti/proactive/public/handbook_rehabilitation.pdf

(8) "Stalin announces ₹317 cr package for Lankan Tamil refugees," *The Hindu*, August 27, 2021, https://www.thehindu.com/news/national/tamil-nadu/stalin-announces-317-cr-package-for-lankan-tamil-refugees/article36138465.ece

Syrian Refugees in Jordan: Between Economic Precarity and Legal Vulnerability

Wa'ed Alshoubaki

The ongoing civil war has harshly impacted Syrians—millions have died, and more have fled to the neighbouring states. Since the start of the war, Jordan has received 1.2 million Syrian refugees who have majorly settled in urban areas, with only 18 percent living in camps (1). The 2015 population census revealed that 48 percent of Syrian refugees in Jordan are under the age of 15, and there are more women refugees than men in the 20-34 age category. This can be attributed to men staying in Syria to fight or seeking asylum in other countries (2). Consequently, 23 percent of Syrian refugee households in Jordan are led by women, exacerbating their vulnerability.

Although Jordan is the second-largest host country of refugees per capita (3), it has no specific law for receiving and settling

refugees. What are the applicable national and international laws and policies for refugee protection in Jordan? What role do the universal refugee protection mechanisms play in Jordan's legal regime for refugees?

Jordanian Position in Global Refugee Protection

An analysis of refugees' legal regime requires an understanding of the interaction between global governance mechanisms on refugee protection and the national legal system of individual nation-states. Historically, the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees are prominent non-binding legal landmarks for accepting refugees and not sending them back due to the threats they may encounter in their home country. However, Jordan is not a signatory of the 1951 Convention, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention of the Reduction of Statelessness, or the 1967 Protocol, and it receives refugees based on national laws and collaboration with the international community. Jordan has ratified the Casablanca Protocol to support the mobility of Palestinian refugees among Arab states and protect their rights to achieve solidarity and justice (4). Moreover, Jordan endorsed the 2004 Arab Charter on Human Rights, which upholds the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, and the Cairo Declaration on Human Rights in Islam (5).

The case of Syrian refugees involves cooperative efforts from the United Nations High Commissioner for Refugees (UNHCR), the host government and International Organization of Migration, and other humanitarian organisations to establish contextual knowledge, to coordinate donations, and to ensure the refugees' rights in receiving states (6). Jordan demonstrates that the alleviation of the consequences of the Syrian refugee crisis and providing better protection for Syrian refugees cannot be accomplished through a state-centric approach (7). Therefore, it joined the international community in the New York Declaration for Refugees and Migrants in September 2016 to respond to the requirements of the refugees and migrants and alleviate the pressure on hosting states (8); the Global Compact on Refugees (GCR) and the Global Compact on Migration (GCM) were adopted in December 2018. Jordan voted in favour of the two global compacts with the aim to lessen the pressure on receiving states and host communities due to the influx of refugees; enhance the independence of the refugees and provide them with better living conditions in terms of education, healthcare, and employment; and enable the voluntary return of refugees with safety and dignity (9). Similarly, the GCM protects migrants' rights related to work, education, freedom of belief and expression, women and children's rights, social inclusion, and nondiscrimination (10). Notably, the GCM and GCR are not legally binding, and their principles must be incorporated in national laws and policies to be implemented.

Syrian Refugees and Jordanian Law

Entry and Regularisation

The entry of Syrian refugees into Jordan is determined by a 1973 law (Law No. 24 of

1973 on Residence and Foreigners' Affairs) that deals with refugees and non-refugees in the same way and defines them as any person who is not from Jordan and seeks to enter the country officially (11). Indeed, the Jordan constitution pledges to protect political refugees from deportation and guarantees their freedom (12). Jordan has adopted an open border policy in accordance with the 1998 Memorandum of Understanding (MOU) with the UNHCR, which provided for the temporary settlement of Iraqi refugees in the country at the time of signing, and was later expanded to include Syrian refugees (13). It stipulates the resettlement of Syrian refugees into a third country within six months. This MOU covers the main element of the 1951 Convention as the criteria to consider a refugee and principles of non-refoulement, the right of a refugee to access courts and the labor market consistent with the national laws (14).

The urban verification exercise allows Syrian refugees to live outside camps and applies even to those refugees who had already left the camps under the applicable terms—being sponsored by a Jordanian with a first-degree relation to the refugee, being over 35 years old, having a permanent job, having no police record (15), or entering the country through official checkpoints (16). The exercise legalises the official residency of Syrian refugees, enables them to access public services and humanitarian assistance, and allows them to officially register births, marriage, and death (17).

However, Syrian refugees continue to face barriers in the civil documentation process, which requires applications to be submitted to local and national authorities and involves civil and religious court procedures to determine judicial facts. Additionally, the application processing fees and lack of information are extra barriers in the documentation process. In essence, some Syrian refugees face difficulty in the documentation process due to the mixed status of their households between UNHCR registration and Ministry of Interior card and the lack of official Syrian identification documents (18). These documentation problems increase the vulnerability of Syrian refugees, restricting their access to education, healthcare and laws and rights.

Employment

Given the lack of a national refugee law and the difficulties in refugees entering the labour market, Jordan's unemployment rate reached 24.72 percent in 2020 (19). According to Labour Law No. 8 of 1996, foreign workers cannot be employed without a work permit from the Ministry of Labour (20). Article 12 (b) of the law ensures that this work permit has a one-year limit and is renewable based on legal requirements for a fee of US$422 for non-Arabs and US$253 for Arab workers. These principles are applied to all foreigners, including refugees, without exception (21).

Against this backdrop, Syrian refugees work in the formal and informal labour market, with a lack of job security, discrimination, and poor work conditions (22), in addition to the cultural barriers and the cost of obtaining a formal work permit. However,

the Jordan Compact to integrate Syrian refugees into Jordan's labour market, create job opportunities, and protect them from the informal labour market (23). In essence, the Jordan compact is an integration agreement between Jordan and the European Union to create job opportunities for Syrian refugees and host communities and facilitate their access to public schooling (24). According to the agreement, Jordan alleviated the regulations for formal access to the labour market in selected sectors and waived the work permit fees. Consequently, the donor countries were obligated to provide optimum support for the Jordan Response Plan (JRP) to the Syrian crisis, which incorporated national and international efforts to deal with the Syrian refugee crisis through a series of strategic plans. Allowing Syrian refugees to enter Jordan's labour market is a major policy shift to provide better sustainable livelihood, self-reliance, socialisation, and regain self-esteem (25).

Social Welfare Policies

The massive influx of Syrian refugees into Jordan prompted Jordanian government intervention to provide sufficient support, including running and securing camps; providing refugees with shelter, food, and healthcare; and enabling them to have secure and decent living conditions (26). Jordan also incorporated the JRP, a resilience-based approach aimed to relieve the repercussions of the influx of Syrian refugees on the host communities and other refugees (27). It aims to reduce the expected deterioration of welfare at both the individual and institutional levels and strengthen the policy capacity for the sudden and excessive pressure on public services. The JRP involves ministries, ambassadors, UN representatives, non-governmental organisations, donors, and universities, to facilitate coordination between all stakeholders and enhance trust (28).

At the regional level, the 2014 Regional Refugee and Resilience Plan was initiated by Jordan, Lebanon, Egypt and Turkey to support refugees' protection and humanitarian assistance up to 2021 (29). This programme aims to alleviate the struggles of refugees and vulnerable host communities by enhancing the hosting capacity by providing public goods and services and protective support, such as mental health and psychosocial support (30). The core concept behind the welfare policies for refugees is to address these needs as essential and consider their needs and not rights in the absence of a national refugee law (Jordan collaborates with the UNHCR to provide holistic security policies and protect refugees from deportation and compulsory refoulement).

Conclusion

The analysis of Jordan's legal regime for refugees and the international obligations for refugee protection highlights many issues. The lack of a national refugee law that addresses Syrian refugees' humanitarian needs and civil rights has emphasised their legal vulnerability. The failure in addressing the legal recognition of Syrian refugees exacerbates their economic precarity due to the inability to enter the labour market, barriers in the documentation process, and lack of access to healthcare and education.

While Jordan is not a party to the 1951 Geneva Convention, the 1967 Protocol, and other international agreements that provide refugees with temporary protection, these international agreements lessen the stability and sustainability of refugees' living conditions since most are not legally binding.

Endnotes

(1) Wa'ed Alshoubaki and Michael Harris, "The Impact of Syrian Refugees on Jordan: A Framework for Analysis," Journal of International Studies 11, no. 2 (2018), https://doi.org/10.14254/2071-8330.2018/11-2/11

(2) Caroline Krafft and Zaynab Abdi, Who Are the Syrian Refugees in Jordan? Egypt, Economic Research Form, 2018, https://theforum.erf.org.eg/2018/05/22/syrian-refugees-jordan-educational-enrolment-progress/

(3) "On World Refugee Day, Jordan continues to be the second host country of refugees per capita in the world," June 20, 2021, United Nations Jordan, https://jordan.un.org/en/132334-world-refugee-day-jordan-continues-be-second-host-country-refugees-capita-world

(4) League of Arab States, Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol"), https://www.refworld.org/docid/460a2b252.html

(5) UN Office of the High Commissioner for Human Rights and League of Arab States, "Arab Charter on Human Rights," https://digitallibrary.un.org/record/551368?ln=en

(6) Alise Coen, "R2P, Global Governance, and the Syrian Refugee Crisis," The International Journal of Human Rights 19, no. 8 (2015), https://www.tandfonline.com/doi/abs/10.1080/13642987.2015.1082846

(7) Coen, "R2P, Global Governance, and the Syrian Refugee Crisis"

(8) United Nations General Assembly, "New York Declaration for Refugees and Migrants," October 3, 2016, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf

(9) UN High Commissioner for Refugees, "The Global Compact on Refugees," United Nations, https://www.unhcr.org/5c658aed4

(10) International Organization for Migration, "The Global Compact for Migration," United Nations, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195

(11) National Legislative Bodies/ National Authorities, Jordan: Law No. 24 of 1973 on Residence and Foreigners' Affairs, https://www.refworld.org/docid/3ae6b4ed4c.htm

(12) National Legislative Bodies/National Authorities, The Constitution of The Hashemite Kingdom of Jordan, https://www.refworld.org/pdfid/3ae6b53310.pdf

(13) Juline Beaujouan and Amjed Rasheed, "Syrian Crisis, Syrian Refugees," in Syrian Crisis, Syrian Refugees: Voices from Jordan and Lebanon, ed. Juline Beaujouan and Amjed Rasheed (Switzerland: Palgrave Macmillan 2020), 7-25.
(14) UN High Commissioner for Refugees, Memorandum of Understanding between the United Nations High Commissioner for Refugees and the Government of Jordan, https://www.refworld.org/pdfid/513d90172.pdf
(15) Luigi Achilli, Syrian Refugees in Jordan: A Reality Check, Fiesole, Migration Policy Center, 2015, https://migrationpolicycentre.eu/publication/syrian-refugees-in-jordan-a-reality-check/ (16) Norwegian Refugees Council, Securing Status: Syrian Refugees and the Documentation of Legal Status, Identity and Family Relationships in Jordan, November 2016, Oslo, https://www.nrc.no/globalassets/pdf/reports/securing-status.pdf
(17) Jordan INGO Forum, Syrian refugees in Jordan, A protection overview, https://reliefweb.int/sites/reliefweb.int/files/resources/JIF-ProtectionBrief-2017-Final.pdf
(18) NRC and IHRC, Securing Status: Syrian refugees and the documentation of legal status, identity, and family relationships in Jordan, November 2016, Oslo, Norwegian Refugee Council, 2016, https://www.nrc.no/resources/reports/securing-status-syrian-refugees-and-the-documentation-of-legal-status-identity-and-family-relationships-in-jordan/
(19) World Bank, Jordan Overview, December 2020, Washington DC, World Bank Group, 2020. https://www.worldbank.org/en/country/jordan/overview#1
(20) AHTNC, "Jordanian Labor Law no. (8) of 1996," Anti-Human Trafficking National Committee, http://www.ahtnc.org.jo/sites/default/files/labor_law.pdf
(21) Anti- Human Trafficking National Committee, "Jordanian Labor Law no. (8) of 1996"
(22) Zeynep Şahin Mencütek & Ayat J. J. Nashwan, "Employment of Syrian Refugees in Jordan: Challenges and Opportunities," Journal of Ethnic & Cultural Diversity in Social Work 29, (2020), https://www.tandfonline.com/doi/abs/10.1080/15313204.2020.1753614?journalCode=wecd20
(23) Musa Shteiwi, "The Jordanian Perception of the Syrian Refugee Crisis," in Syrian Crisis, Syrian Refugees: Voices from Jordan and Lebanon, ed. Juline Beaujouan and Amjed Rasheed (Switzerland: Palgrave Macmillan 2020), 83-98.
(24) Veronique Barbelet, Jessica Hagen-Zanker and Dina Mansour-Ille, The Jordan Compact: Lessons learnt and implications for future refugee compacts, London, Overseas Development Institute, 2016, https://cdn.odi.org/media/documents/12058.pdf
(25) Zeynep Şahin Mencütek & Ayat J. J. Nashwan, "Employment of Syrian Refugees in Jordan: Challenges and Opportunities"
(26) Razan Nasser and Steven Symansky, The Fiscal Impact of the Refugee Crisis on Jordan, Washington DC, The United States Agency for International Development, 2014, https://jordankmportal.com/resources/the-fiscal-impact-of-the-syrian-refugee-crisis-on-jordan-2014
(27) The Ministry of Planning and International Cooperation, Jordan Response Plan for Syrian Crisis 2016-2018, https://reliefweb.int/sites/reliefweb.int/files/resources/JRP16_18_Document-final+draft.pdf
(28) Wa'ed Alshoubaki, "A Synopsis of the Jordanian Governance System in the Management of the Syrian Refugee Crisis." Journal of Intercultural Studies. 39, no.5 (2018), https://www.tandfonline.com/doi/abs/10.1080/07256868.2018.1508007
(29) UN High Commissioner for Refugees, Regional Strategic Overview 2021-2022, https://reliefweb.int/report/lebanon/regional-refugee-resilience-plan-3rp-regional-strategic-overview-2021-2022
(30) Beaujouan and Rasheed, "The Syrian Refugee Policy of the Jordanian Government," 47-63.

Waiting for Third Country Resettlement: Exploring Temporal (Im)Mobility for Syrian Refugees in Jordan

Hanna Berg

"If they hadn't called us, I would have been in Europe now," Said claimed, and Mahmoud agreed (1). It was late in the afternoon, and Said had brought two of his friends to the café where we were meeting in Amman, Jordan. They, too, wished to travel. They had all registered as refugees at l-mufawaḍiyye (2) and gone through many interviews. Now, they waited.

March 2021 marked the tenth anniversary of the Syrian revolution, an uprising that resulted in millions of Syrians relocating to neighbouring countries and beyond. Said and many Syrians like him came to Jordan at the start of the revolution believing that this relocation was temporary. After ten years of violence (3) and ongoing peace negotiations (4),(5) between different parties (6), return remains unthinkable for the vast majority

(7). At the same time, legal regulations of residence, work, education and physical mobility for Syrian refugees in Jordan have generated aspirations of building a future elsewhere (8) (9) (10). In light of the current geopolitical context that provides few opportunities for Syrians to travel, third-country resettlement as a quota refugee has become key for realising such aspirations. Yet, for Said, like the majority of Syrians in Jordan, such an alternative has not yet been realised.

This article addresses how the legal refugee status, as a humanitarian-bureaucratic tool, mediates temporal (im)mobility for Syrian refugees in Jordan (11). Documents and the bureaucratic processes through which they are produced and reproduced has received much ethnographic engagement in relation to migration, refugees, and mobility. As mediating artefacts (12), they play a significant role (13) in processes of asylum (14), humanitarian resettlement projects (15) (16) (17), and visa applications (18) (19). Like documents (20) in other contexts (21) of displacement (22), the legal refugee status in Jordan produces multiple forms of both spatial and temporal (im)mobility. In this light, building on ethnographic fieldwork carried out in Jordan between 2017 and 2021 that engaged with Syrian refugees living in urban spaces, this essay focuses on how people with refugee status live with and in long-term conditions of waiting, or 'intiẓār maftūḥ (open-ended waiting).

As a result of its geographical proximity to the east of Palestine and Israel, west of Iraq, and south of Syria, Jordan has become marked as a "humanitarian hub" (23) to the millions (24) (25) of people (26) who have sought refuge (27) here throughout history (28). The ongoing conflict in Syria has displaced over 11 million Syrians, five million outside the country. In Jordan, about 600,000 Syrians are registered as refugees (although the actual number of Syrian refugees on Jordanian soil is assumed to be over one million) (29), making Jordan the country with the second-largest number of refugees in relation to the number of inhabitants per capita (30).

Despite hosting millions of refugees, Jordan is not a signatory of the 1951 Refugee Convention, and any domestic law on the treatment of asylum seekers or refugees is "virtually non-existent" (31). In 1998, the Jordanian government signed a memorandum of understanding with the United Nations High Commissioner for Refugees (UNHCR), in which the full responsibility for a durable solution for refugees lies beyond the Jordanian government. Article 5 in the memorandum states that it is the UNHCR's responsibility to "within no longer than six months" find a durable solution for the persons who have been recognised as refugees (32). Indeed, in the absence of any possibility to apply for asylum in Jordan, the UNHCR is the only body to which Syrians and other refugees can appeal for other durable solutions.

After entering Jordan, Syrians go through a registration process at the UNHCR. They are attributed an 'asylum seeker certificate', called l-mufawaḍiyye, confirming them as persons of concern to the UNHCR and are then "under the international protection of UNHCR in Jordan" (33). Since the Jordanian government does not recognise refugees, l-mufawaḍiyye does not prove their status as refugees. Yet, it is needed for Syrians to

access other state services. The contradictory and ambiguous ways in which l-mufawaḍiyye circulate in different bureaucratic and social processes in Jordan immobilises Syrians' lives in various ways, including waiting.

Over the course of many conversations, people in Jordan have often stressed the lack of *'istiqrār*, a sense of tangible permanency, stability and continuance, not unlike the permanent temporariness Ilana Feldman describes in her ethnographic engagement in the Palestinian refugee camp Burj al Barajneh (34). Situating the humanitarian self-definition of "temporariness" in the context of an ageing and dying population of Palestinian refugees, Feldman argues against the supposition of the refugee condition as temporal. Yet she demonstrates how long-term temporariness should not be equated to permanence but rather a mode of in-between. Accordingly, people this author encountered during fieldwork described Jordan as a station, an understanding that the UNHCR likely shares, given that the only tangible solution for Syrians in this country is resettlement or repatriation (35). Yet, unlike stations—places one allegedly moves through—Jordan has come to represent a space of entrapment, spatially and temporally, for Syrians. Like elsewhere in the West Asia region, Jordan's l-mufawaḍiyye involves a far-distant promise of third-country resettlement. While holding an asylum-seeker certificate implies the possibility of getting a call from the UNHCR, being chosen as a quota-refugee for third-country resettlement often takes years, and the relocation process itself may also take several years. Said and his family have been called to participate in six interviews in preparation for third-country resettlement. The first call was in early 2016, with about two months between each interview. After about a year of different appointments, it became quiet until May 2021, when UNHCR staff called to gather extra information. This assured Said that his family's file was still active and that travel was still a possibility.

Catherine Brun argues that the "future" has little room in the current humanitarian system since having a future involves the presence of "a temporal sense of potential" (36). Yet, assuring that there is "no reason to believe that humanitarianism as a governance system and as an imagery will disappear soon," she addresses not the future of humanitarianism but the temporalities it makes available (37). Accordingly, for Said and his friends, the promise of third-country resettlement has generated anticipations of the future on which they have based important life decisions, which have so far resulted in five years of 'intiẓār maftūḥ, open-ended waiting.

Synnøve Bendixsen and Thomas Hylland Eriksen propose that the "ability to make others wait" is a "familiar way of exerting power by bureaucrats and businesspeople worldwide" and thus waiting "expresses a domination by others," (38) something that becomes visible "in the very obvious sense of 'who waits for whom'." (39) In this light, many scholars (40) have examined the 'temporal limbo' (41) refugees and migrants experience (42) while going through different bureaucratic processes (43).

Yet, as Shahram Khosravi underlines, while associated with a "[l]ack of mobility in time and space," waiting "does not mean lack of mobilisation" (44). Instead, it can be understood as "a state of wakefulness engaged with potentialities or a different future" (45). In this respect, although indeterminate, *'intiẓār maftūḥ* should not simply be understood as a condition of "limbo". Engaging with how people both make sense of and act in relation to *'intiẓār maftūḥ* allows for locating such temporality within a broader typology than "the axis liminal/passive versus goal-oriented/active" (46). In light of the current challenges and possibilities for global refugee protection, *'intiẓār maftūḥ* in Jordan calls for further exploration of the role of bureaucratic processes concerning *l-mufawaḍiyye* in mediating certain forms of temporalities and how global policy frameworks can work to alter them.

Endnotes

(1) Respondents' names changed, conversation between author and interlocutors, August 25, 2021.

(2) The lexical meaning for *mufawaḍiyye* is commissariat or legation, but in Jordan it is popularly used to indicate the document confirming registration at the UNHCR or the UNHCR office itself.

(3) Adnan Ahmad, "سورية: مفاوضات سرّية بين تركيا و"قسد" برعاية دولية." (Syria: Secret negotiations between Turkey and SDF under international auspices), *Alaraby*, June 13, 2020, https://www.alaraby.co.uk/%D8%B3%D9%88%D8%B1%D9%8A%D8%A9-%D9%85%D9%81%D8%A7%D9%88%D8%B6%D8%A7%D8%AA-%D8%B3%D8%B1%D9%91%D9%8A%D8%A9-%D8%A8%D9%8A%D9%86-%D8%AA%D8%B1%D9%83%D9%8A%D8%A7-%D9%88%22%D9%82%D8%B3%D8%AF%22-%D8%A8%D8%B1%D8%B9%D8%A7%D9%8A%D8%A9-%D8%AF%D9%88%D9%84%D9%8A%D8%A9

(4) "منزوعة الأسنان'.. مفاوضات النظام السوري مع المعارضة في جنيف 'لن تصل إلى شيء' | الحرة" (Teeth pulled out… The Syrian regime's negotiations with the "opposition in Geneva" will reach nothing), *Al Hurra*, December 2, 2020, https://www.alhurra.com/syria/2020/12/02/%D9%85%D9%86%D8%B2%D9%88%D8%B9%D8%A9-%D8%A7%D9%84%D8%A3%D8%B3%D9%86%D8%A7%D9%86-%D9%85%D9%81%D8%A7%D9%88%D8%B6%D8%A7%D8%AA-%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D8%A7%D9%84%D8%B3%D9%88%D8%B1%D9%8A-%D9%85%D8%B9-%D8%A7%D9%84%D9%85%D8%B9%D8%A7%D8%B1%D8%B6%D8%A9-%D9%81%D9%8A-%D8%AC%D9%86%D9%8A%D9%81-%D9%84%D9%86-%D8%AA%D8%B5%D9%84-%D8%B4%D9%8A%D8%A6

(5) ''الأمم المتحدة وسوريا.. ثماني سنوات مع 'خفي حنين'" (The United Nations and Syria… Eight years "with" Khafi Hanin), *Al Jazeera*, January 15, 2019, https://www.aljazeera.net/news/politics/2019/1/15/الأمم-المتحدة-سوريا-مفاوضات-جنيف

(6) Sinem Cengiz, "Assessing the Astana Peace Process for Syria: Actors, Approaches, and Differences," *Contemporary Review of the Middle East* 7, no. 2 (2020), https://doi.org/10.1177/2347798920901876

(7) Charles Thépaut, "The Astana Process: A Flexible but Fragile Showcase for Russia," The Washington Institute, April 28, 2020, https://www.washingtoninstitute.org/policy-analysis/astana-process-flexible-fragile-showcase-russia

(8) Luigi Achilli, "Back to Syria? : Conflicting patterns of mobility along Syrian refugees in Jordan," *Orient* 57, no. 1 (2016), https://cadmus.eui.eu/handle/1814/38826

(9) Lewis Turner, "Explaining the (Non-)Encampment of Syrian Refugees: Security, Class and the Labour Market in Lebanon and Jordan," *Middle East Critique* 20, no.3 (2019), https://doi.org/10.1080/13629395.2015.1078125

(10) Katharina Lenner and Lewis Turner, "Making Refugees Work? The Politics of Integrating Syrian Refugees into the Labor Market in Jordan," *Middle East Critique* 28, no. 1 (2018), https://doi.org/10.1080/19436149.2018.1462601

(11) Keith D. Watenpaugh, *Bread from Stones: The Middle East and the Making of Modern Humanitarianism* (California: University of California Press, 2015), pp. 174

(12) Matthew S. Hull, "Documents and Bureaucracy," *Annual Review of Anthropology* 41, no. 1 (2012), https://doi.org/10.1146/annurev.anthro.012809.104953

(13) Heath Cabot, "The Governance of Things: Documenting Limbo in the Greek Asylum Procedure," *PoLAR: Political and Legal Anthropology Review* 35, no. 1 (2012), https://doi.org/10.1111/j.1555-2934.2012.01177.x

(14) Anna Tuckett, *Rules, Paper, Status: Migrants and Precarious Bureaucracy in Contemporary Italy* (California: Stanford University Press, 2018)

(15) Sophie Nakueira, "Governing through paperwork: Examining the regulatory effects of documentary practices in a refugee settlement," *Journal of Legal Anthropology* 3, no. 2 (2019), https://doi.org/10.3167/jla.2019.030202

(16) Marnie J. Thomson, "Black Boxes of Bureaucracy: Transparency and Opacity in the Resettlement Process of Congolese Refugees," *PoLAR: Political and Legal Anthropology Review* 35, no. 2 (2012), https://doi.org/10.1111/j.1555-2934.2012.01198.

(17) Marnie J. Thomson "What Documents Do Not Do: Papering Persecution and Moments of Recognition in a Congolese Refugee Camp," *Anthropologica* 60, no. 1 (2018), https://doi.org/10.3138/anth.60.1.t21

(18) Stef Jansen, "After the red passport: Towards an anthropology of the everyday geopolitics of entrapment in the EU's 'immediate outside'," *Journal of the Royal Anthropological Institute* 15, no. 4 (2009), https://doi.org/10.1111/j.1467-9655.2009.01586.x

(19) Mark B. Salter "The Global Visa Regime and the Political Technologies of the International Self: Borders, Bodies, Biopolitics," *Alternatives* 31, no. 2 (2006), https://doi.org/10.1177/030437540603100203

(20) Heath Cabot, *On the Doorstep of Europe: Asylum and Citizenship in Greece* (Philadelphia: University of Pennsylvania Press, 2014)

(21) Julie Peteet, *Space and Mobility in Palestine* (Bloomington: Indiana University Press, 2017)

(22) Anna Tuckett, *Rules, Paper, Status: Migrants and Precarious Bureaucracy in Contemporary Italy*

(23) Cathrine Brun, "There is no Future in Humanitarianism: Emergency, Temporality and Protracted Displacement.," *History and Anthropology* 27, no. 4 (2016), https://doi.org/10.1080/02757206.2016.1207637

(24) Dawn Chatty, "Refugees, Exiles, and Other Forced Migrants in the Late Ottoman Empire," *Refugee Survey Quarterly* 32, no. 2 (2013), https://doi.org/10.1093/rsq/hdt001

(25) Giulia E. Dardiry, "People Eat People: The Influence of Socioeconomic Conditions on Experiences of Displacement in Jordan," *International Journal of Middle East Studies* 49, no. 4 (2017), https://doi.org/10.1017/S0020743817000666

(26) Victoria Mason, "The Im/mobilities of Iraqi Refugees in Jordan: Pan-Arabism, 'Hospitality' and the Figure of the 'Refugee'," *Mobilities* 6, no. 3 (2011), https://doi.org/10.1080/17450101.2011.590035

(27) Joseph A. Massad, *Colonial effects: The Making of National Identity in Jordan* (New York: Columbia University Press, 2001)

(28) Laura Robson, "Refugees and the Case for International Authority in The Middle East: The League of Nations and the United Nations Relief and Works Agency for Palestinian Refugees in The Near East Compared," *International Journal of Middle East Studies* 49, no. 4 (2017), https://doi.org/10.1017/S0020743817000629

(29) Mohammad Ghazal, "Syrian refugee population increases slightly last year." *Jordan Times,* October 16, 2021, https://www.jordantimes.com/news/local/syrian-refugee-population-increases-slightly-last-year?__cf_chl_managed_tk__=pmd_KL9czwIThh.HODaP9Z1fppb7XhAPUDT0NsDtPkNWHQg-1634360105-0-gqNtZGzNAzujcnBszQfR

(30) UNHCR, Jordan: UNHCR Factsheet, https://reliefweb.int/report/jordan/jordan-unhcr-factsheet-september-2020.

(31) National Legislative Bodies/ National Authorities, Jordan: Law No. 24 of 1973 on Residence and Foreigners' Affairs, https://www.refworld.org/docid/3ae6b4ed4c.html

(32) UNHCR, "Memorandum of Understanding between the Government of Jordan and UNHCR," RESCUE, hgttps://www.rescuerefugees.eu/wp-content/uploads/2017/09/LE2JOR002_AREN.pdf

(33) UNHCR, "*Help Jordan, Registration*", 2021," UNHCR Jordan, https://help.unhcr.org/jordan/en/helpful-services-unhcr/registration-unhcr/

(34) Ilana Feldman, "Humanitarian Care and the Ends of Life: The Politics of Aging and Dying in a Palestinian Refugee Camp," *Cultural Anthropology* 32, no. 1 (2017), https://journal.culanth.org/index.php/ca/article/view/ca32.1.06

(35) Officially there are three solutions offered to refugees: repatriation, third-country resettlement, and integration. The latter is particularly unlikely in Jordan considering its nearly non-existent asylum law.

(36) Brun, "There is no Future in Humanitarianism: Emergency, Temporality and Protracted Displacement"

(37) Brun, "There is no Future in Humanitarianism: Emergency, Temporality and Protracted Displacement"

(38) Synnove Bendixsen and Thomas H. Eriksen, "Time and the Other: Waiting and Hope among Irregular Migrants," in Ethnographies of Waiting: Doubt, Hope and Uncertainty, ed. Manpreet K. Juneja and Andreas Bandak (London: Bloomsbury Academic, 2018), 92.

(39) Ghassan Hage, "Waiting Out the Crisis: On Stuckedness and Governmentality," in Waiting, ed. Ghassan Hage (Melbourne University Press, 2009) http://search.informit.com.au/documentSummary;dn=077538461209525;res=IELHSS

(40) Bendixsen and Eriksen, "Time and the Other: Waiting and Hope among Irregular Migrants"

(41) Elizabeth C. Dunn, "Humanitarianism, Displacement, and the Politics of Nothing in Postwar Georgia," *Slavic Review* 73, no. 2 (2014), https://doi.org/10.5612/slavicreview.73.2.287

(42) Paolo Gaibazzi, ""God's time is the best": Religious imagination and the wait for emigration in The Gambia," in The Global Horizon: Expectations of Migration in Africa and the Middle East, ed. Knut Graw and Samuli Schielke (Leuven: Leuven University Press, 2012)

(43) Shahram Khosravi, *Precarious Lives: Waiting and Hope in Iran* (Philadelphia: University of Pennsylvania Press, 2017)

(44) Shahram Khosravi, "Waiting, a state of consciousness," in Waiting and the Temporalities of Irregular Migration, ed. Christine M. Jacobsen, Mary A. Karlsen and Shahram Khosravi (London: Routledge, 2020), 206.

(45) Khosravi, "Waiting, a state of consciousness," 206.

(46) Synnove Bendixsen and Thomas H. Eriksen, "Time and the Other: Waiting and Hope among Irregular Migrants," 107.

Decoding Africa's Legal Protection Mechanisms for Refugees

Letlhokwa George Mpedi

Africa, a continent with 54 countries, has a long history of producing refugees (1). African countries are also important hosts for refugees (see Table 1), although this task is not evenly spread amongst all states (2). Indeed, the refugee crisis in Africa is predominantly due to internal strife (3).

Table 1: Refugees in Africa (as of end 2020)

	West and Central Africa	East and Horn of Africa and the Great Lakes	Southern Africa	The Middle East and North Africa
Refugees	1,353,611	4,511,575	720,533	2,483,780
Persons in refugee-like situations	-	-	-	26,000
Total refugees	**1,353,611**	**4,511,575**	**720,533**	**2,509,780**

Source: United Nations High Commissioner for Refugees (4)

Legal Protection Mechanisms

The legal protection of refugees in Africa is mainly perched on a three-legged framework consisting of:

International refugee law and standards: These are spearheaded by the Convention Relating to the Status of Refugees of 1951 (5) and the Protocol Relating to the Status of Refugees of 1967 (6). As of April 2015, the Convention and Protocol have been ratified or acceded by 48 African states (7).

Regional refugee laws and standards: The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (8) is the key regional instrument dealing with refugee protection in the continent. This instrument, signed and ratified by 46 African Union member states (9), has been conceived to "…render international refugee legislation applicable to the African context and reflect African circumstance and values around refugee protection" (10). Therefore, it supplements the 1951 Convention.

National refugee laws and policies: These laws and policies play a crucial role in extending rights and imposing obligations to refugees at the national level. They are generally in the form of Acts of parliament dealing specifically with refugees. In addition, the constitutions of some African countries—such as Botswana, the Democratic Republic of the Congo, Ghana, Kenya, Namibia, and South Africa—enshrine basic rights (right to human dignity and life) that are or should be made available to all, including the refugees.

A 2019 study established that 46 African states had national refugee laws (11).

Gaps and Challenges in Current Legal Regime

The international and regional refugee instruments are the bedrock of refugee protection in Africa (12). These instruments make provisions for non-discrimination (13); access to courts (14); gainful employment (15); welfare, labour legislation and social security (16); freedom of movement (17); and access to identity documents (18). The refugees are granted rights and must comply with certain obligations, such as respecting the laws and regulations of the host country (19).

The legal principles are standard and fundamental to the protection of refugees. Nevertheless, there are some gaps and challenges that require attention. First, it is commonly known that the full and effective implementation of the international (20) and regional refugee instruments remain elusive (21). Second, there are classes of refugees (for instance, climate refugees and economic refugees (22)) that are not (meaningfully) provided for in the applicable legal frameworks. The key issue here is that these frameworks tend to focus more on human-made refugee challenges, neglecting natural causes (23). The definition of refugee as per the OAU Convention is deemed by many to be broad enough to extend protection to victims of natural disasters as well (24).

Third, refugees are a diverse group of vulnerable persons. They consist of various groups and categories of persons that cannot

be (adequately) protected with a one-size-fits-all approach. The added vulnerability of these refugees stems from factors such as age (25) (for instance, unaccompanied minor refugees) (26) and sexual orientation (such as LGBTIQ+ refugees) (27).

Further, refugees experience a widespread human rights deficit (28). This situation is exacerbated by, among others, a lack of resources (29) and nationalistic sentiments prevalent in many African countries. (30) This, in turn, breeds xenophobia (31) and violence, including gender-based violence (32).

The African continent needs to "…lead in advancing refugee rights and finding long-term solutions to forced movement" (33). Indeed, "In order to solve the refugee problems, African states have to address the root causes of refugee movements. African states need to follow the principles of good governance, namely, accountability, transparency, openness, efficiency and efficacy, the rule of law and popular participation in the decision-making process. African governments should take effective measures to eliminate and combat all forms of ethnic, racial, religious and ideological divisions, adhere to democratic principles, refrain from interfering in the internal affairs of other states, and make efforts to create a climate of peace and stability. It is also very important that African states respect the African Charter on Human and Peoples Rights, as only the protection of human rights will discourage new influxes of refugees and create conditions favourable for voluntary repatriation" (34).

Conclusion

Africa has shown its ability to be progressive and ensure that its context is reflected in the regional refugee instruments to offer meaningful protection to those it seeks to defend. That spirit and mindset are more necessary now than ever to ensure that the refugee protection offered fits the purpose.

As the continent takes stock of how far it has come regarding the legal protection of refugees, it is crucial that it seriously looks at the new challenges that have emerged and respond with appropriate mechanisms. Naturally, such interventions should be centred on respecting, protecting, and advancing human rights. But, of course, the best solution to the refugee problem is to prevent and/or address the conditions and issues that force people to flee their home countries.

Endnotes

(1) Letlhokwa George Mpedi, "Africa and the Refugee Crisis: A Socio-Legal Inquiry," in *Refugees and Forced Migrants in Africa and the EU: Comparative and Multidisciplinary Perspectives on Challenges and Solutions*, ed. Elisabeth Wacker, Ulrich Becker, and Katharina Crepaz (Wiesbaden: Springer, 2019), 80–81

(2) Mpedi, "Africa and the Refugee Crisis: A Socio-Legal Inquiry," 80–81

(3) Medard RK Rwelamira, "Some reflections on the OAU Convention on Refugees: Some Pending Issues," *The Comparative and International Law Journal of Southern Africa* 16 (1983): 155.

(4) United Nations High Commissioner for Refugees, UNHCR Global Report 2020, https://reliefweb.int/report/world/unhcr-global-report-2020

(5) United Nations, Protocol Relating To The Status Of Refugees, in the United Nations Treaty Collection, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-5.en.pdf.

(6) United Nations, Protocol Relating To The Status Of Refugees, in the United Nations Treaty Collection, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-5.en.pdf.

(7) United Nations High Commissioner for Refugees, "State Parties to the 1961 Convention relating to the Status of Refugees and the 1967 Protocol," UNHCR, https://www.unhcr.org/en-ie/3b73b0d63.pdf

(8) Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, https://www.refworld.org/pdfid/3ae6b36018.pdf

(9) African Union, "OAU Convention Governing The Specific Aspects Of Refugee Problems In Africa," AU, https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf

(10) Marcia C. Schenck, "Africa's forgotten refugee convention," Africa is a Country, posted March 11, 2020, https://africasacountry.com/2020/11/africas-forgotten-refugee-convention

(11) David James Cantor and Farai Chikwanha, "Reconsidering African Refugee Law," *International Journal of Refugee Law* 31 (2019): 182

(12) Guy S. Goodwin-Gill, "The International Law of Refugee Protection," in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (Oxford: Oxford University Press, 2018)

(13) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Article 3)," UNHCR, https://www.unhcr.org/4d934f5f9.pdf

(14) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Articles 16(1) and (2))"

(15) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Articles 17 and 18)"

(16) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Articles 20, 21, 22(1) and (2), 23 and 24)"

(17) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Article 26)"

(18) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Articles 27 and 28)"

(19) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Article 2)"

(20) Adrienne Millbank, "The Problem with the 1951 Refugee Convention," in the Parliamentary Library, https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0001/01rp05

(21) Fatima Khan and Cecile Sackeyfio, "Situating the Global Compact on Refugees in Africa: Will it Make a Difference to the Lives of Refugees "Languishing in Camps"?," *Journal of African Law* 65 (2021): 35

(22) This includes flight by masses of people due an economic meltdown for survival. The recent Zimbabwe crisis is the case in point.
(23) Mpedi, "Africa and the Refugee Crisis: A Socio-Legal Inquiry," 80–81
(24) Mpedi, "Africa and the Refugee Crisis: A Socio-Legal Inquiry," 80–81
(25) Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017) pp. 17
(26) Sarah Swart, "Unaccompanied minor refugees and the protection of their socio-economic Rights under human rights law," *African Human Rights Law Journal* 9 (2009): 103 and Cantor and Chikwanha, "Reconsidering African Refugee Law"
(27) Annamari Vitikainen, "LGBT Rights and Refugees: a case for prioritizing LGBT status in refugee admissions," *Ethics & Global Politics* 13 (2020): 64
(28) Khan and Sackeyfio, "Situating the Global Compact on Refugees in Africa: Will it Make a Difference to the Lives of Refugees 'Languishing in Camps'?"
(29) Khan and Sackeyfio, "Situating the Global Compact on Refugees in Africa: Will it Make a Difference to the Lives of Refugees 'Languishing in Camps'?"
(30) Dulo Nyaoro, "The Development of Refugee Protection in Africa: From Cooperation to Nationalistic Prisms," in *Refugees and Forced Migrants in Africa and the EU: Comparative and Multidisciplinary Perspectives on Challenges and Solutions*, ed. Elisabeth Wacker, Ulrich Becker, and Katharina Crepaz (Wiesbaden: Springer, 2019), 13–35
(31) Gideon Muchiri Kaunga, "Reflections on the Role of Ubuntu as an Antidote to Afro-Phobia," *Journal of African Law* 65 (2021): 153 and Susan Waiyego Mwangi, "Emerging debates on Experiences and Challenges of Refugee Protection in Africa and Europe," in *Refugees and Forced Migrants in Africa and the EU: Comparative and Multidisciplinary Perspectives on Challenges and Solutions*, ed. Elisabeth Wacker, Ulrich Becker, and Katharina Crepaz (Wiesbaden: Springer, 2019), 107–125
(32) United Nations High Commissioner for Refugees, The Democratic Republic of the Congo: Regional Refugee Response Plan, https://reliefweb.int/sites/reliefweb.int/files/resources/DRC%202021%20RRRP_1.pdf
(33) Ottilia Anna Maunganidze, "Still no end in sight for Africa's refugee crisis," *Institute for Security Studies Today*, June 4, 2018, https://issafrica.org/iss-today/still-no-end-in-sight-for-africas-refugee-crisis
(34) Emmanuel Opoku Awuku, "Refugee Movement in Africa and the OAU Convention on Refugees," *Journal of African Law* 39 (1995): 79

Revisiting Freedom of Trade, Occupation, and Movement of Refugees in South Africa

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South Africa has a dark and troubled past characterised by decades of colonialism and repressive apartheid policies and laws (1), which forced many South Africans to seek refuge in other countries (2). Put differently, South Africa was, for many decades, a refugee-producing country (3). South Africa's rebirth in 1994 as a sovereign and democratic state founded on constitutional values (such as human dignity, non-racialism and non-sexism, constitutional supremacy, and the rule of law (4)) transformed the country in many ways (5). Notably, South Africa transitioned from being a refugee-producing country to one of the largest refugee-hosting nations on the African continent. In 2020, South Africa had 266,700 refugees and asylum seekers (6), with most of these being from the African continent

Table 1. Refugees and Asylum Seekers in South Africa (2020)

Country	Percentage
Somalia	± 30
Democratic Republic of Congo	29
Ethiopia	20
Remainder (mainly from Zimbabwe and Republic of Congo)	21
Total	**100 (266,700)**

Source: Kate Pond, "Refugees in South Africa Share Act of Kindness with their Hosts," UNHCR (2020) (8).

(see Table 1)—highlighting that a large percentage of African refugees and asylum seekers are hosted on that continent (7).

The handling of asylum seekers and the hosting of refugees in South Africa are regulated by law, which provides for, among others, the right to work and freedom of movement. South Africa subscribes to the principle of self-sufficiency and local integration (9) and not encampment when it comes to hosting asylum seekers and refugees. This approach circumvents encampment-related expenses (10).

The right to work and freedom of movement of refugees in South Africa is fundamental to their self-sufficiency and local integration. But there remain several gaps and challenges to this process, especially amid COVID-19.

Legislative Framework

Refugees in South Africa enjoy a variety of fundamental rights contained in the South African constitution. These rights, which are not absolute (11), include the right to equality (12); human dignity (13); right to life (14); right to privacy (15); freedom of association (16); freedom of movement and residence (17); labour rights (18); access to housing (19); access to healthcare, food, water and social security (20); education (21); access to information (22); access to just administrative action (23); and access to courts (24). Apart from being civil liberties, these constitutional rights are directly and indirectly fundamental to the refugees' ability to be self-sufficient and integrate locally in a meaningful manner.

South Africa enacted the Refugees Act 130 in 1998 to comply with its international law obligations on refugees (25). These commitments flow chiefly because South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (26). In addition, South Africa is a member of international organisations, such as the International Labour Organization. Accordingly, it must consider the soft law flowing from these organisations in its treatment of refugees (27).

Freedom of Trade, Occupation, and Movement

The freedom of trade, occupation, and movement is essential for the comprehensive realisation of self-sufficiency and local integration of the refugees. To this end, international conventions and the national refugee law provides refugees with a right to be involved in gainful employment. The 1951 Convention recognises wage-earning work (28) and self-employment (29) as gainful employment. In South Africa, the constitution provides every person (including refugees) with the right to freedom of movement and residence (30). This is important for seeking, travelling for, or taking up employment opportunities. The 1998 Refugees Act expressly protects the refugees' right to seek employment (31), reinforced by entitlements contained in the law, such as the right to an identity document (32) and a South African travel document (33).

Furthermore, refugees and asylum seekers are entitled to the protections contained in the country's labour laws (34). This includes protection from unfair discrimination and unfair labour practices. For instance, in *Minister of Home Affairs and Other v. Watchenuka and Another,* the court found a common prohibition on work and study for asylum-seekers to be illegal (35). The protection against unfair discrimination also extends to access to social security benefits (36). In the past, the country excluded asylum seekers from claiming unemployment insurance benefits despite them contributing to the Unemployment Insurance Fund, but the High Court of South Africa has now declared this practice unconstitutional (37). Before this, the Equality Court had ordered the adaption of the relevant computer system so that the asylum seekers could claim benefits (38).

Pitfalls, Challenges, Possible Solutions

The refugees' freedom to trade, occupation, and movement in South Africa are not without challenges. First, in as much as refugees have a right to work, the reality is that South Africa is marred by high unemployment. According to Statistics South Africa (39), the official unemployment rate at the second quarter of 2021 (using the narrow definition that does not include discouraged jobseekers) was hovering at 34.4 percent and increasing to 44.4 percent when discouraged jobseekers are considered (40). Job opportunities are in short supply even for locals, and the situation will likely remain gloomy in the near future. The dire unemployment situation in South Africa was exacerbated by the COVID-19 pandemic (41).

South Africa must address its high unemployment situation through active labour policies. Notably, the country has introduced a labour activation programme that aims to (re)integrate Unemployment Insurance Fund beneficiaries into the labour market.

While refugees are entitled to claim COVID-19 related benefits, such as through the Special Coronavirus Disease-19 Temporary Employee/Employer Relief Scheme, they experience problems accessing such relief measures (42). This is mainly due to widespread administrative and practical difficulties of accessing relevant

documentation, such as identity cards. This problem is made worse by the backlog in the asylum-seeker system in South Africa.

Second, South Africa has a thriving informal sector primarily because of the lack of formal job opportunities (43). Both nationals and non-nationals, including refugees, have the right to earn a living in that sector (44). The Supreme Court of Appeal confirmed this right in *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (45). However, in practice, foreign nationals (including refugees) face various challenges, from xenophobic attacks to police harassment (46). Public education and awareness measures should be promoted to address the intolerance against foreigners, including refugees.

Furthermore, certain legislative efforts undermine the right to work and freedom of movement of refugees. The 2013 Licensing of Business Bill is a case in point. This bill was criticised for trying "to increase barriers to entry to the informal sectors, effectively criminalising migrant operators in the interests of their South African counterparts" (47). Care must be exercised at a policy and legislative level to ensure that legal protection provided to refugees is not unwittingly eroded in the guise of shielding the interest of nationals. Refugees' right to trade and occupation must be respected, protected, promoted, and fulfilled in law, policy, and practice following international law.

Most importantly, litigation is essential in reinforcing the rights of the refugees. However, procuring the services of legal experts is expensive. Accordingly, it is paramount that barriers to access legal services and courts are eliminated. This should involve strengthening the refugees' ability to enforce their rights by decisively dealing with instances where unscrupulous legal practitioners overreach their clients, introducing measures aimed at eliminating the language and cultural barriers experienced by the refugees, and ensuring that refugees are enlightened about their legal entitlements through accessible information-sharing. Non-profit organisations have proved to be effective in protecting the rights of refugees. Thus, a closer collaboration between the relevant government departments and civil society networks is important in protecting and advancing the rights of refugees in South Africa.

Conclusion

It is significant that South Africa, formerly a refugee-producing country, has transitioned to one of the largest refugee-hosting countries on the African continent. This is not just an act of benevolence. It is a duty that flows from international and national laws. Of great importance is that the applicable laws in South Africa favour an approach where refugees are integrated within the local communities. In addition, refugees have a right to work, which upholds their dignity. South Africa must be cognisant of the challenges that confront its refugee regime and must implement solutions, such as those proposed in this essay, to ensure that refugees are awarded the dignity they deserve and as envisioned by international and national laws.

Endnotes

(1) Elizabeth S. Landis, "South African Apartheid Legislation I: Fundamental Structure," *The Yale Law Journal* 71 (1961): 1.
(2) Delphine Marie, "Lesotho marks the end of an era for apartheid's refugees," *UNHCR*, August 26, 2002, https://www.unhcr.org/news/latest/2002/8/3d6a139e4/feature-lesotho-marks-end-era-apartheids-refugees.html
(3) Jeff Handmaker, "No Easy Walk: Advancing Refugee Protection in South Africa," *Africa Today* 48 (2001): 92.
(4) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Sections 1 and 2)," South African Government, https://www.gov.za/documents/constitution-republic-south-africa-1996
(5) Audie Klotz, "Migration after Apartheid: Deracialising South African Foreign Policy," *Third World Quarterly* 21 (2000): 831.
(6) Kate Pond, "Refugees in South Africa share acts of kindness with their hosts," *UNHCR*, October 13, 2020, https://www.unhcr.org/news/stories/2020/10/5f7ec0574/refugees-south-africa-share-acts-kindness-hosts.html
(7) Letlhokwa George Mpedi, "Africa and the Refugee Crisis: A Socio-Legal Inquiry" in *Refugees and Forced Migrants in Africa and the EU: Comparative and Multidisciplinary Perspectives on Challenges and Solutions*, ed. Elisabeth Wacker, Ulrich Becker, and Katharina Crepaz (Wiesbaden: Springer, 2019), 73.
(8) Pond, "Refugees in South Africa Share Act of Kindness with their Hosts"
(9) Republic of South Africa, *Draft Refugee White Paper* (Pretoria: Government Printer (Republic of South Africa), 1998), pp. 15.
(10) Tove van Lennep, "The State of the South African Refugee Protection Regime: Part I – Current Status," *Helen Suzman Foundation*, October 30, 2018, https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status.
(11) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 36)"
(12) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 9)"
(13) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 10)"
(14) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 11)"
(15) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 14)"
(16) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 18)"
(17) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 21)"
(18) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 23)"
(19) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 26)"
(20) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 27)"
(21) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 29)"
(22) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 32)"
(23) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 33)"
(24) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 34)"
(25) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Sections 39 (1)(b), 231, 232 and 233)"
(26) Fatima Khan, Siphokazi Mbatani and Charlotte Marias, "Trusting Democracy: The Law can Work for Refugees, but what the System Needs Is an 'Injection of Humanity,'" *Journal of Asian and African Studies* 56(1) (2021): 49-51.
(27) International Labour Organisation, "R205 - Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)," ILO, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R205

(28) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Article 17)," UNHCR, https://www.unhcr.org/4d934f5f9.pdf
(29) United Nations High Commissioner for Refugees, "Convention relating to the Status of Refugees (Article 18)"
(30) Republic of South Africa, "The Constitution Of The Republic Of South Africa, 1996 (Section 21(1))"
(31) Southern African Legal Information Institute, "Refugees Act 1998 (Section 27(f)," SAFLII, http://www.saflii.org/za/legis/consol_act/ra199899/
(32) Southern African Legal Information Institute, "Refugees Act 1998 (Sections 27(d) and 30)"
(33) Southern African Legal Information Institute, "Refugees Act 1998 (Section 27(e)"
(34) Office of the President, Government of South Africa, "NO. 66 OF 1995: LABOUR RELATIONS ACT, 1995,"https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf; Office of the President, Government of South Africa, "No. 75 of 1997: Bfisic Conditions of Employment Act. 1997," https://www.gov.za/sites/default/files/gcis_document/201409/a75-97.pdf; Office of the President, Government of South Africa, "No. 85 of 1993: Occupational Health and Safety Act. 1993," https://www.gov.za/sites/default/files/gcis_document/201409/act85of1993.pdf
(35) Refugee Rights Unit, "Minister of Home Affairs and Others v Watchenuka and Another," University of Cape Town, http://www.refugeerights.uct.ac.za/usr/refugee/Case_Law_Reader/Minister_of_Home_Affairs_v_Watchenuka.pdf
(36) Avinash Govindjee, "Access to Social Security for Refugees and Asylum Seekers in South Africa: An Analysis of Recent Developments" in *Liber Amicorum: Assays in Honour of Professor Edwell Kaseke and Dr Mathias Nyenti*, ed. Marius Paul Olivier, Letlhokwa George Mpedi and Evance Kalula (Stellenbosch: African Sun Media, 2020), 73–86.
(37) Dakalo Singo, "A Brief Retrospective On Two Cases About Asylum Seekers," Werksmans Attorneys, https://www.werksmans.com/legal-updates-and-opinions/a-brief-retrospective-on-two-cases-about-uif-and-asylum-seekers/
(38) Singo, "A Brief Retrospective On Two Cases About Asylum Seekers"
(39) Statistics South Africa, Republic of South Africa, "Quarterly Labour Force Survey, Quarter 2:2021," http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2021.pdf
(40) Statistics South Africa, "Quarterly Labour Force Survey, Quarter 2: 2021"
(41) Statistics South Africa, "Quarterly Labour Force Survey, Quarter 2: 2021"
(42) Letlhokwa George Mpedi, "Commentary on the Unemployment Insurance Act and the Unemployment Insurance Contributions Act" in *South African Labour Law*, ed. Clive Thompson, and Paul Benjamin (Claremont: Juta, 2021), 13– 4.
(43) Godfrey Tawodzera and Jonathan Crush, *Comparing Refugees and South Africans in the Urban Informal Sector* (Cape Town: Southern African Migration Programme, 2017), pp 49.
(44) Tawodzera and Crush, *Comparing Refugees and South Africans*
(45) Southern African Legal Information Institute, "Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others," SAFLII, http://www.saflii.org/za/cases/ZASCA/2014/143.html
(46) Marius Pieterse, "Rights, Regulation and Bureaucratic Impact: The Impact of Human Rights Litigation on the Regulation of Informal Trade in Johannesburg," *Potchefstroom Electronic Law Journal* 20 (2017): 1.
(47) Lennep, "The State of the South African Refugee Protection Regime"

Securitisation of European Asylum and Migration Policies Continues to Escalate

Emily Venturi

In August 2021, following the Taliban takeover of Afghanistan, French President Emmanuel Macron controversially stated that Europe should protect itself from "irregular migratory flows" from Afghanistan (1), even though most Afghans fleeing the Taliban takeover would qualify for asylum according to the 1951 Refugee Convention. And at the time of writing, political rhetoric on another "migration crisis" from Afghanistan continues to escalate. The European political leadership's initial response to the collapse of the Afghan government is the latest development in Europe's increasing securitisation of migration. Indeed, when analysing the application of the 1951 Refugee Convention in Europe, the trend that emerges is one of increasing efforts to move asylum issues outside of Europe's borders in the name of security.

Critically, the securitisation of asylum and migration poses a challenge to the principles of the 1951 Refugee Convention and their application in Europe. To analyse the rise of security approaches to migration and asylum, the paper discusses three examples: (a) criminalisation of search and rescue operations in Italy, (b) pushbacks of migrants and asylum-seekers in Greece, and (c) European Union (EU) border externalisation policies.

Securitisation in European Politics and Policy

The concept of 'securitisation' was introduced in the study of international relations by Barry Buzan, Jaap de Wilde, and Ole Wæver to describe a process through which political actors attach national security value to policy choices unrelated to security (2). The discursive ability to present an issue as a security threat often premises a securitised approach to a policy area. Indeed, since 2015, many far-right parties in Europe have built their political fortunes on anti-immigration campaigns. Informally referred to as "Fortress Europe," (3) European efforts to limit the arrival of asylum seekers and outsource border control are a consequence of an increasingly securitised approach to migration. Despite only hosting approximately 10 percent of the world's refugees (4), EU leaders often blur the lines between refugees and migrants and paint these groups as a national security threat.

Italy: Criminalisation of search and rescue operations

Search and rescue (SAR) operations in the Mediterranean shifted significantly in 2015. EU member states moved from a decentralised system of national rescue operations to centralised EU border management and surveillance with the support of Frontex (the European Border and Coast Guard Agency). This resulted from a gradual shift compounded by the high cost of SAR operations and the consequent souring of national public opinion in southern European countries. Effectively, SAR operations changed from a nationally-led humanitarian approach to sea arrivals to focus on border enforcement, border-control agreements with countries of origin or transit (such as Libya), and the criminalisation of non-governmental organisations (NGOs) operating in national waters.

The criminalisation of humanitarian assistance to asylum seekers has become a pan-European trend, and Italy is one of the clearest examples. In 2019, during far-right Matteo Salvini's tenure as interior minister, the Italian government passed an emergency decree establishing sanctions against aiding irregular migration, including imposing fines on SAR NGO vessels, threats to revoke or suspend their licenses, and refusal of disembarkation at Italian ports. Despite soliciting the condemnation of UN human rights experts (5), Italian authorities initiated a variety of legal proceedings against non-governmental SAR rescuers, the most high-profile case being the house-arrest of NGO Sea-Watch captain Carola Rackete following her decision to enter the port of Lampedusa without authorisation (6).

The EU's centralisation of border management and surveillance in parallel to national legislation criminalising SAR operations sets

out a securitised approach to a humanitarian issue. The consequences have not only been counterproductive for cooperation on search and rescue but have also had grave implications for human life. Indeed, the securitisation of SAR operations correlates with increased migrant crossing mortality rates (7), shown by the higher proportion of migrant deaths in the Mediterranean for both years of Salvini's tenure as the Italian interior minister (8).

Looking forward, refocusing on humanitarianism within SAR operations is of key importance. At the national level, governments should revise legislation that criminalises humanitarian activities, support investigations and accountability mechanisms for human rights violations in the Mediterranean and explore opportunities to strengthen exchanges between national authorities and civil society. Increased oversight of Frontex's relatively opaque budget, operations, and reporting will improve transparency at the EU level, especially as the agency continues to grow. Finally, to support frontline countries such as Italy, arrangements to share responsibility across EU member states are still needed across various issues, from SAR operations to relocation pathways for recognised refugees.

Greece: Pushbacks at the border

The non-legal term "pushback" refers to when a person is apprehended after an irregular border crossing and immediately sent back to a neighbouring country without an individual assessment of their asylum claim. Pushback incidents have occurred over the years at various EU borders. Notably, 2020 saw an increase in reported pushback incidents on the Greece-Turkey border, particularly at the Evros land border (9). Subsequently, migration flows shifted towards the Aegean Islands and was met by the Greek Coastguard and Frontex's patrols, causing further reports of pushbacks at sea. The European Council on Refugees and Exiles described the practice as a "front-line tool of the country's migration policy," and a "first option in order to halt the flow of refugees and deter others" (10). In the case of asylum-seekers, indiscriminate pushbacks violate the right to seek asylum in another country, irrespective of travel modality.

International organisations and civil society have responded. In June 2020, both the International Organization for Migration (11) and the United Nations High Commission for Refugees (12) called for an investigation into "persistent reports of pushbacks and collective expulsions" at Greece's land and sea-borders to return migrants and asylum-seekers to Turkey, and therefore potentially violating international refugee law. The European Parliament's Committee on Civil Liberties Justice and Home Affairs also joined the calls for an investigation (13).

The use of pushbacks in Greece as a tool for migration control and deterrence is a worrying development within the overall trend of securitising migration and asylum in Europe. Most recently, the Greek authorities' initial response to the Afghan government's collapse and the related worries of increased migratory flows to Europe is not encouraging either. Indeed, reports have emerged that Greek authorities started to build a wall on the Greek-Turkey border, stating "our borders will remain inviolable" (14). This is yet another

indication of the willingness of European governments—such as in the Greek case—to fuel security narratives on asylum issues and implement securitised responses at the expense of the right to asylum and human lives.

EU: Border externalisation

The increase in the number of asylum-seekers attempting to reach Europe in 2015 because of the Syrian War—albeit limited compared to the pressures faced by Jordan, Lebanon and Turkey—had notable ramifications for the EU's institutional engagement on migration issues and its increased focus on security. Competencies in the policy areas of migration and asylum are shared between member states and the EU, meaning that European capitals often treat asylum through a lens of national sovereignty. However, after 2015, migration quickly became a leading issue for European voters, and the significance of asylum as a policy issue in Brussels also increased.

A primary example is the 2016 EU-Turkey deal. Turkey agreed to close its border with Greece and host returnees who had entered Europe irregularly in exchange for EU concessions that included a large funding package, refugee resettlement quotas, and lessening visa restrictions for Turkish citizens. From 2016 onwards, the EU also signed a series of migration partnership agreements with countries in North Africa, the Sahel, the Horn of Africa and the Middle East in a stated effort to "tackle the root causes" of migration (15). In practice, the partnership agreements linked EU development funding to migration management objectives, which also included funding for border management technologies and capacities.

The implications of these EU-led agreements with third countries are wide-reaching. Firstly, the EU-Turkey deal enabled Greece to return to Turkey anyone who had entered Europe irregularly without having already undergone a formal asylum application process. Secondly, the EU-Turkey deal also placed the EU on the backfoot when engaging with the Turkish government, on which it still depends to keep its borders sealed. Policies such as the EU-Turkey deal are unsustainable in the long term, and undermine Europe's commitment to its fundamental values, including the right to asylum (16).

In turn, the EU's migration partnership agreements have been criticised for their top-down approach to project design and implementation and their excessive focus on migrant repatriations. Moreover, such agreements are not only premised on the incorrect assumption that higher economic and human development levels reduce migration flows (17), but they also risk compromising development cooperation and the EU's foreign relations due to the agreements' short-term migration management objectives. To prioritise the international protection of asylum-seekers, cooperation on migration and development issues must acknowledge the mixed nature of migration flows. Overall, the linkage of migration management and development funding needs to be evaluated critically and through evidence-based methods.

Looking Ahead

Securitisation has significant consequences on the member states and EU high-level approaches to asylum. At the 70th anniversary

of the Refugee Convention, European efforts to push asylum and migration issues outside of the EU's borders are a worrying development. In terms of broader trends, what also emerges is a vacuum of accountability for violations of international law. Examples include pushbacks of asylum seekers at Greece's borders or the compromising of search and rescue operations in the Central Mediterranean. The current European context reignites debates on the need to establish an independent mechanism monitoring the implementation of the Refugee Convention.

Finally, when it comes to the rise of security-oriented approaches to the right to asylum, European public opinion consistently seems to play an influential role in electoral success and leadership decision-making. On refugee issues, the lack of political will among EU member states hinders any policy change. This is exemplified by the ongoing stalemates regarding the proposed New Pact on Asylum and Migration at the European Council, and the repeated difficulties to reform the Dublin Regulation and effectively redistribute asylum responsibilities. While the absence of domestic consensus often pushes migration issues outside of Europe's borders, lack of political will is not a structural condition. On the contrary, the EU and its member states have ample opportunities—and critically, the responsibility—to cultivate public support for a rights-based approach to asylum, especially as the international community marks the 70th anniversary of the Refugee Convention.

Endnotes

(1) Tim Hume, "French President Macron Slammed for Call to 'Protect' Europe From Afghan Refugees," *VICE News*, August 17, 2021, https://www.vice.com/en/article/n7bmzg/french-president-macron-slammed-for-call-to-protect-europe-from-afghan-refugees

(2) Barry Buzan, Ole Waever and Jaap D. Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner, 2013)

(3) Kenan Malik, "How we all colluded in Fortress Europe,", *The Guardian,* June 10, 2018, https://www.theguardian.com/commentisfree/2018/jun/10/sunday-essay-how-we-colluded-in-fortress-europe-immigration

(4) United Nations High Commissioner for Refugees, "Refugee Data Finder," UNHCR, https://www.unhcr.org/refugee-statistics/

(5) OHCHR, "Italy: UN experts condemn criminalisation of migrant rescues and threats to the independence of judiciary," United Nations Human Rights, 2019, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24833&LangID=E

(6) Eugenio Cusumano and Matteo Villa, "From Angels to Vice Smugglers: the Criminalization of Sea Rescue NGOs in Italy," *European Journal on Criminal Policy and Research* 27, no.3 (2020, https://link.springer.com/content/pdf/10.1007/s10610-020-09464-1.pdf

(7) International Organization for Migration, "Missing Migrants in the Mediterranean," Missing Migrants, https://missingmigrants.iom.int/region/mediterranean

(8) Eugenio Cusumano and Matteo Villa, "From Angels to Vice Smugglers: the Criminalization of Sea Rescue NGOs in Italy"
(9) European Council on Refugees and Exiles, "Access to the Territory and Push Backs: Greece," Asylum Information Database, https://asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/
(10) Asylum Information Database, "Access to the Territory and Push Backs: Greece,"
(11) International Organisation for Migration, United Nations, https://bit.ly/3wM2AhO
(12) United Nations High Commission for Refugees, "UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey," UNHCR, https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbackssea-land-borders-turkey.htm
(13) European Parliament, European Union, https://bit.ly/3uBahp9
(14) "Greece finishes fence at Turkey border amid warnings of Afghan migrant surge," *BBC News*, August 21, 2021, https://www.bbc.com/news/world-europe-58289893
(15) EU Commission, European Union, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1595
(16) EU Charter of Fundamental Rights, "Article 18 - Right to asylum," European Union Agency for Fundamental Rights, https://fra.europa.eu/en/eu-charter/article/18-right-asylum
(17) Hein D. Haas, "Migration Transitions: A Theoretical and Empirical Inquiry into the Developmental Drivers of International Migration," *IMI Working Papers* 24, (2010), https://www.migrationinstitute.org/publications/wp-24-10

Refugee Protection in the 21st Century: An Australian Perspective

William Maley

Refugee protection is at a crisis point. While push factors with the potential to drive large numbers of people from their homes remain highly potent, the mooted 'durable solutions' to refugee problems remain elusive and inadequate for most refugees. Voluntary repatriation in conditions of safety and security is increasingly difficult in an era when problems of state disruption are often critical (1). Countries of first asylum are wary of being left with the responsibility of supporting large numbers of refugees to whom the wider world may feel little sense of responsibility. And the resettlement of refugees by countries with the economic wherewithal to do so is becoming increasingly difficult. This is mainly because of the rise of populist political forces that seek to flourish by demonising those who have been forcibly displaced by a well-founded fear of being persecuted for

the reasons set out in the 1951 Convention Relating to the Status of Refugees. It is more important than ever that the protections for refugees built into the 1951 Convention be affirmed and consolidated. But to understand why this is the case, it is equally important to grasp both the nature of those protections and why they took the form they have. Only then are we in a position to understand how the actions of states in recent times have compromised those protections, with Australia having played a particularly sinister role in undermining the 1951 Convention itself.

The Protections of the 1951 Convention

The 1951 Convention is the most fundamental and important text that seeks to define a refugee and outline the rights that refugees are to enjoy (2). Some 146 States are parties to the Convention. As the Convention currently operates, "the term "refugee" shall apply to any person who… 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 … is unable or, owing to such fear, is unwilling to return to it" (3). Virtually every element of this definition has been elaborately scrutinised from a legal point of view, and a 1967 Protocol to the Convention gave it a broader temporal reach.

The Convention contains a complex range of protections, but all are subsidiary to the principal protection (non-refoulement, contained in Article 33.1): "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Why the 1951 Convention Protections are Important

To understand why the protection of non-refoulement is so important, it is necessary to recall some of the events of the 1930s, before the current Convention was negotiated, which highlighted the inadequacy of managed programmes of refugee assistance. These inadequacies were never more apparent than in the response to the outflow of Jewish refugees from Nazi Germany. The indifference they encountered in the face of mounting danger cast a shadow over policymakers at those times and the deliberations that led to the 1951 Convention. Fundamentally, too many states in the 1930s were not interested in coming to the aid of Jews. The most dramatic manifestation of this problem was the case of the passenger ship MS St. Louis. This merchant vessel set out for Havana, Cuba, from Hamburg, Germany, in May 1939, carrying over 900 Jewish passengers who hoped to secure protection in the New World. They ran up against the US's strict immigration quotas embodied in the 1924 Immigration Act. Unable to disembark his passengers in Havana, the captain headed for Miami in the US, but on 4 June, an official of the US State Department stated that "The German refugees … must await their turn … before they may be admissible to the United States" (4). The captain was forced

to sail back to Europe, and over a quarter of the passengers who were returned were subsequently murdered in the Holocaust.

This, sadly, was no isolated incident. In July 1938, a major conference was held at Evian in France to develop a multilateral response to the outflow of refugees from Germany. According to one analysis, the meeting was "widely regarded as a fiasco" (5). Only one state, the Dominican Republic, offered to resettle refugees in significant numbers, and the anti-Semitic sentiment was sadly on display. The following month, a British magistrate complained that "The way stateless Jews from Germany are pouring in from every port of this country is becoming an outrage. I intend would force the law to its fullest" (6). With such attitudes prevalent, it is hardly surprising that even as late as 1944, as news of the Holocaust increasingly surfaced, an official of the British Foreign Office wrote in a minute: "In my opinion a disproportionate amount of the time of this Office is wasted on dealing with these wailing Jews" (7).

The lesson from these experiences was stark—states and bureaucracies, pursuing their own limited interests, could not be trusted to respond humanely to the vulnerable through managed programmes. New provisions providing specific protection for individual refugees were therefore critically important. This was the great achievement of the 1951 Convention.

Threats to Protection

That said, refugee protection faces considerable threats. One threat is that some critical states are not parties to the 1951 Convention, even though they may have hosted significant numbers of refugees. Pakistan, India, and Indonesia are notable examples. While some non-parties have been generous towards refugees within their territory, the lack of international legal rights nonetheless leaves refugees in a vulnerable situation should circumstances change in such countries. On the other hand, some states have become parties to the Convention in what can almost be called 'bad faith'. Nauru, for example, acceded to the Convention on 28 June 2011 not because it was remotely positioned to deliver the rights that refugees were entitled to expect under the Convention, but because it was a necessary condition for the country to function as an offshore dumping ground for refugees who had sought to enter Australia (8).

A markedly more severe problem is the rise of populism in wealthy countries that are well-placed to honour responsibilities they voluntarily assumed by ratifying or acceding to the Convention. In his book *What is Populism?*, Jan-Werner Müller identifies three distinctive elements of populism—it is critical of elites, it is anti-pluralist, and it is a form of identity politics (9). Populist leaders typically succeed by identifying frustrated or embittered elements within a population, then persuade those groups that their discontents are actually to be blamed on some other group within society, including refugees. The particular problem refugees face is that those seduced by populist rhetoric are usually also voters, while refugees are not. This can create incentives even for mainstream political figures to pander to the concerns of those who might otherwise drift to populist camps. Strong, moderate leaders can potentially

stare down this threat, as German Chancellor Angela Merkel famously did when huge numbers of refugees arrived in Germany in 2015. Nonetheless, one consequence was the emergence of the far-right Alternative für Deutschland, which continues to contest German elections. The fear of populist forces can have the effect of disposing even moderate governments to drift away from a 'good faith' discharge of their obligations under the 1951 Convention. For example, in 2021, several European countries persisted until early August with attempts to deport 'failed' asylum seekers to Afghanistan (10)—even though the speed with which the situation in that country deteroritated (culminating in the collapse of the government on 15 August) meant that the basis upon which refugee protection might have been earlier denied to 'failed' asylum seekers no longer had any credibility.

Undermining the Convention: Australia's Contribution

Australia is among several countries to take the lead in undermining the 'good faith' discharge of responsibilities towards refugees, even though its status as an island continent means it is insulated from the kinds of vast refugee flows that poor countries in elsewhere have had to manage. Australia's 1901 Constitution contains no Bill of Rights, nor have 'human rights' been effectively codified in a single statute. Indeed, in 2015, the Migration Act 1958 was amended to remove specific mention of the 1951 Convention (11). Australian bureaucrats had long been animated by a "culture of control" (12) and had come to see Australia as a country of resettlement, even though its generosity as a country of resettlement did not in any way relieve it of the duties towards refugees appearing at the border to whom it owed obligations under the 1951 Convention. Nonetheless, Australia went down a path of ever more draconian treatment of the very refugees whom the Convention had set out to protect, namely those who fell outside resettlement quotas that states had set.

In the 1990s, Australia adopted a policy of mandatory non-reviewable detention of those who arrived without prior authorisation (13). In 2001, the government embarked on the 'Pacific Solution', dispatching to Nauru those who arrived by boat without visas. In 2013, it gave voice to the proposition that no person who arrived without a previously-issued visa would ever be permitted to remain permanently in Australia. The effect was to leave thousands of people in limbo, unable to get on with their lives, and often separated from close family members. This was justified as a move to deprive "people smugglers" of a product to sell, but it was quite clear that the motive was ultimately political (14), namely to avoid antagonising supporters of a far-right populist party known as One Nation.

Two very damaging consequences flow from this. One was the erosion of the rule of law; the choice of offshore detention venues like Nauru was plainly designed to deny refugees any access to the protection of an independent judiciary. The other was the entrenchment of cruelty as an element of policy. To the extent that offshore detention was intended as a deterrent, it could work only if it was known to function even more harshly than the regimes that refugees had fled. There is no evidence that this kind of deterrence worked, but it undoubtedly created

or aggravated mental health problems among people who had already suffered enormously, with some even dying due to the conditions in which they were held (15).

It would be disastrous if this were to become a policy for other countries to emulate, but that possibility cannot be ruled out in dark times. States have a terrible habit of learning from each other about new forms of cruelty to use as deterrents. It would be better to focus on the 'good faith' discharge of their obligations under the 1951 Convention.

Endnotes

(1) Amin Saikal, 'The dimensions of state disruption', in *From Civil Strife to Civil Society: Civil and Military Responsibilities in Disrupted States*, ed. William Maley, Charles Sampford and Ramesh Thakur (Tokyo: United Nations University Press, 2003), pp. 17-30.

(2) James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press, 2014); Guy S. Goodwin Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (Oxford: Oxford University Press, 2021); James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2021).

(3) United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, UNHCR, https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html

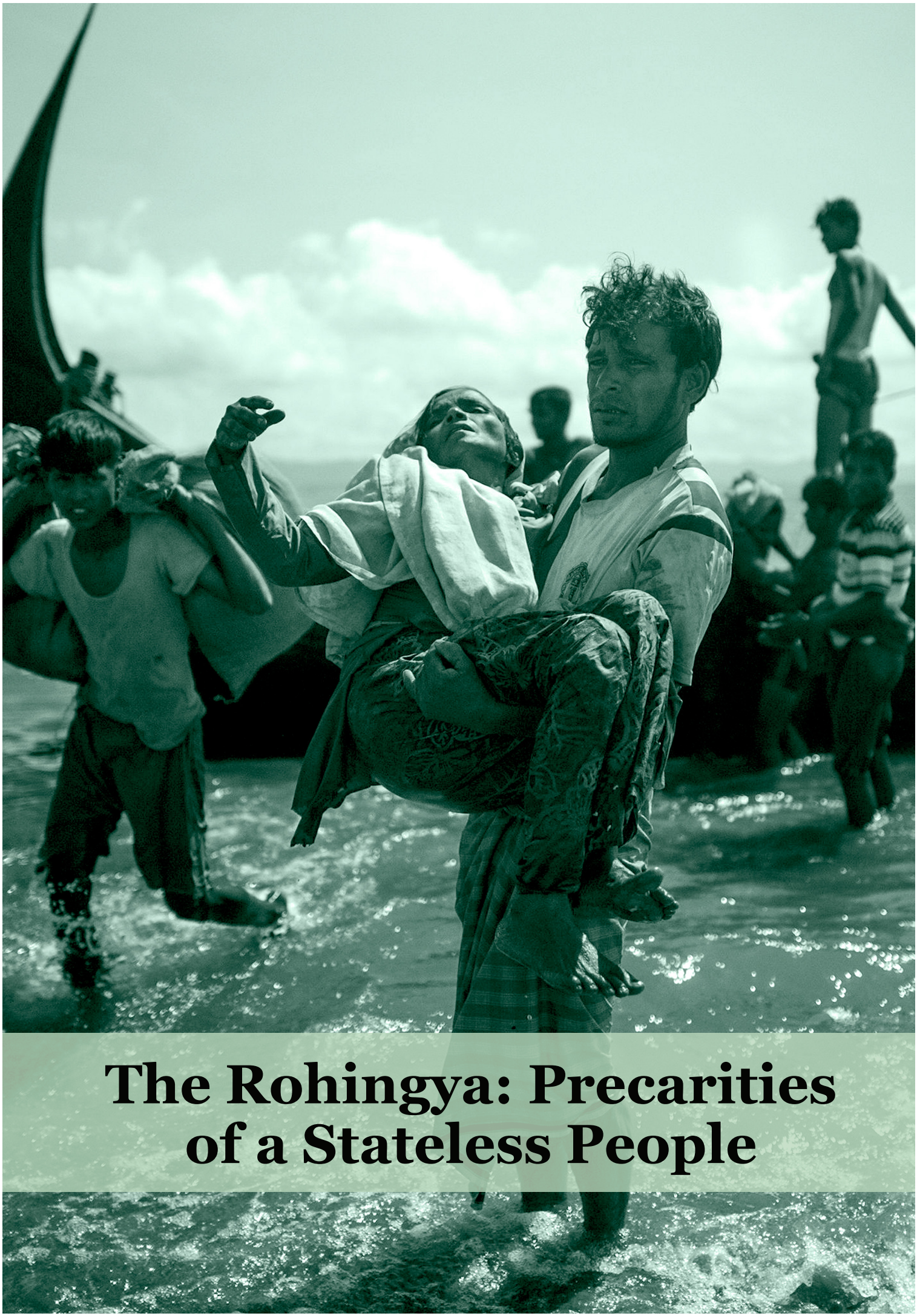
(4) Sarah A. Ogilvie and Scott Miller, *Refuge Denied: The St. Louis Passengers and the Holocaust* (Madison: University of Wisconsin Press, 2006), p.25.

(5) Peter Gatrell, *The Making of the Modern Refugee* (Oxford: Oxford University Press, 2013), p. 77.

(6) Ishaan Tharoor, 'Europe's fear of Muslim refugees echoes rhetoric of 1930s anti-Semitism', *The Washington Post*, September 2, 2015, https://www.google.co.in/amp/s/www.washingtonpost.com/news/worldviews/wp/2015/09/02/europes-current-anti-migrant-rhetoric-carries-echoes-of-1930s-anti-semitism/%3foutputType=amp

(7) Martin Gilbert, *Auschwitz and the Allies: How the Allies responded to the news of Hitler's Final Solution* (London: Michael Joseph, 1981), p. 312.

(8) See Madeline Gleeson, *Offshore: Behind the wire on Manus and Nauru* (Sydney: NewSouth Publishing, 2016).
(9) Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016).
(10) Loveday Morris and Denise Hruby, 'Europe's contentious deportations of Afghans grind to a halt as Taliban surges', *The Washington Post*, August 14, 2021, https://www.washingtonpost.com/world/europe/afghanistan-asylym-europe-taliban/2021/08/13/c7118ae4-fabb-11eb-911c-524bc8b68f17_story.html
(11) Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge: Cambridge University Press, 2018), p.95.
(12) See Kathryn Cronin, 'A culture of control: an overview of immigration policy-making', in *The Politics of Australian Immigration*, ed. James Jupp and Marie Kabala (Canberra: Australian Government Publishing Service, 1993), pp.83-104.
(13) Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem* (St Lucia: University of Queensland Press, 2003), pp. 37-38.
(14) William Maley, *What is a Refugee?* (New York: Oxford University Press, 2016), p. 100.
(15) William Maley, "Disasters, Systems, and Human Rights: Reflections on a Coronial Inquiry", *Georgetown Public Policy Review* 24 (2019): 5-14.



The Rohingya: Precarities of a Stateless People

Rohingya Women and Children in Bangladesh and the Limits of Legal Protection Regimes

Amena Mohsin and Nahian Reza Sabriet

A poem by Rohingya poet *Zaki Ovais* (*Someone I'm Afraid Of*) best depicts the life of the Rohingya in Myanmar—a land they claim as their homeland even as the State denies them their identity and citizenship, effectively turning them into stateless people (1).

"I'm a dove on the street of Yangon, jailed in the cage of inhumanity. I'm the water flowing in Mayu river, missing my partner: Air. I'm a human in the universe, denied the most basic rights. I'm someone I'm afraid of."

The Rohingya have been subjected to several spates of brutal violence in Myanmar, most recently in August 2017, following which over 700,000 Rohingya fled from that country and sought refuge in Bangladesh (2). In

2021, the number of Rohingya refugees in Bangladesh was estimated to be between 800,000 and 1.1 million (3). These numbers highlight the extent of violence the Rohingya face, but their plight has multiple layers that remain unaddressed. The Rohingya crisis is generally seen through the lenses of genocide, ethnocide and geopolitics. But there is also a strongly gendered dimension to the conflict. Gender in this context cannot be seen from the binaries of women and men; instead, 'power' relations are critical here. In the camps in Cox's Bazar, Bangladesh, 52 percent of Rohingya refugees are women and girls (4). As of 2020, an estimated 75,971 children have been living in the camps since 2017, with over 100,00 babies born there in the same period (5). Together, women and children comprise 85 percent of the Rohingya population in the Cox's Bazar camps (6).

It is important to examine the adequacy of existing legal and policy frameworks in addressing the persistent problems faced by Rohingya women and children. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, and the 2016 New York Declaration for Refugees and Migrants are appropriate mechanisms to evaluate the capability of the protection measures. Importantly, although neither Bangladesh nor Myanmar has acceded to the 1951 Convention, these instruments are the existing sources of international norms for refugee crises in the post-Second World War era.

Existing Legal Frameworks

The 1951 Convention is the bedrock of legal frameworks and protection measures for refugees. Surprisingly, the term "woman" appears only once in the 56-page document—under the provisions of labour legislation and social security (Article 24) (7). The term "children" appears three times in the main script—to denote the principle of unity of the family (introduction) (8), religious freedom (Article 4) (9), and employment of the refugee parents (Article 17) (10). Interestingly, the Convention uses 'he/him/his' as the only set of referent pronouns, and as of 2021, it has not yet changed the clauses to make them gender-inclusive.

The 2016 Declaration calls for incorporating a gender perspective into migration and refugee policies (11) and promoting "gender-specific needs, contributions and voices of women and girl refugees" (12). It also sheds light on the vulnerabilities faced by women and children, including "their potential exposure to discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery" (13).

However, the 1951 Convention, 1967 Protocol and the 2016 Declaration are not binding for non-signatory countries, so Bangladesh and Myanmar cannot be held to account under their clauses. Nevertheless, the Bangladesh constitution incorporates several rights that apply to non-citizens as well, such as the protection of the law, personal liberty, prohibition of forced labour (Article 31-34) (14). Bangladesh is also a signatory to several other treaties and conventions, such as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (15) and the 1989 Convention on the Rights of the Child (CRC) (16), which make the State obligated to

specific customary laws regarding the rights of women and children. Myanmar is also obligated under the UN Charter, CEDAW and CRC, which, although non-binding, exert a moral responsibility to abide by the norms of international law. Crucially, none of these conventions explicitly use the terms "refugee" or "displaced people" in their provisions.

Rohingya Women and Children in Refugee Camps

The international community has typically followed a state-centric approach on the Rohingya issue. A common gender-blind umbrella of "refugeehood" has been introduced, and the de facto policies favour the men within this frame, even though refugees are differentiated people, with each category having specific needs and challenges. The patriarchal structure that has dominated nearly all regimes and institutions—lawmaking, policymaking and decision-making of all kinds—is a major factor. Georgina Firth and Barbara Mauthe have illustrated two different approaches on the connection between gender, displacement and lawmaking (17). The "structural approach" suggests that refugee laws and conventions must have women-specific clauses to include a holistic viewpoint (18). The "human rights approach" assumes that cultural backgrounds can also contribute to the problems faced by women refugees (19). and supports their "emancipation, modernity and human rights" (20). Both approaches are from the Western school of thought, and the concepts of 'modernity,' 'emancipation' and 'human rights' are subject to critique, mainly through non-Western and subaltern perspectives. The concepts of 'security,' 'statehood' and 'sovereignty' are strongly gendered with masculine connotations. Therefore, securitising the State dominates geopolitical concerns, often at the cost of human rights. For instance, a simple Google search on the term 'Rohingya' highlights global concerns over State-security and big-power politics in the region instead of the plight of the Rohingya people.

The 2019 Inter Sector Coordination Group report on the Rohingya refugee crisis noted that around 16 percent of the households in the Cox's Bazar camps are headed by women (21). However, men retain the primal voice at the camps. For instance, a Rohingya woman narrated to the Bangladesh Rural Advancement Committee (BRAC) how she was barred from working outside on reuniting with her in-laws at the camp, even though she was the only earning family member (22). The BRAC identified discrimination and repression against women in the camps, restrictions on their movements, lack of legal protection services, and hindrances to their participation in development-oriented programmes as the major obstacles to the safety of Rohingya women in camps (23).

The World Health Organization and World Bank established blood banks and blood transfusion centres in Cox's Bazar during the COVID-19 pandemic (24). In August 2021, the World Bank also announced a US$590-million grant for Bangladesh to protect the refugees and host communities (25). During the pandemic, women refugees emerged as the primary caregivers in most households and participated in several income-generating activities, such as producing masks (26).

In 2020, the International Rescue Committee termed gender-based violence in the camps as a "shadow-pandemic" and reported that 81 percent of the Rohingya women refugees have faced intimate partner violence, with 56 percent being incidents of physical violence (27). The existing frameworks are not adequate to protect against violence in the camps, with Rohingya women identifying the "absence of a formal justice system" in the camps as a cause (28). Although some legal aid is provided through bodies like Bangladesh Legal Aid and Services Trust and the *Majhi* system (majhis are appointed block leaders for the Rohingya camps), challenges remain around situations of teasing and sexual misconduct in the camps. Many women refugees have already faced sexual violence, psycho-sexual trauma or brutal physical torture in Myanmar, and the situation in the camps only heighten their sufferings (29).

In 2020, UNICEF introduced 15 "safe spaces" in Cox's Bazar that offer protection services, including "group counselling, skills training and literacy sessions" (30) and an 'orphan friendly space' (run by the HMBD Foundation, a local NGO). As of 2018, around 6,000 "unaccompanied and separated" children were living in the Rohingya camps (31), which is roughly 24 percent of all children in the camp. The refugee camps in Cox's Bazar are also vulnerable to natural disasters and accidents, such as fires, and the 'safe spaces' are beneficial for the refugee and host communities during such situations.

Challenges related to child marriage, polygamy and marrying off "false widows" (32) (women whose husbands are not deceased but are either missing or separated from them) is rampant in the camps. Rohingya families are also getting their children married at a young age to assert the traditional form of protection, where the male partner is seen as the "protector" (33).

Another major challenge is to improve the disrupted education of the children in the camps, particularly the female children (34) who are more vulnerable due to the patriarchal values of the Rohingya community. Research has shown that communities under threat typically become more conservative and patriarchal to 'protect' themselves; after all, conflict and patriarchy are two sides of the same coin.

Conclusion

Regional organisations and neighbouring states have been reticent to address the Rohingya issue under the garb of "securitisation". Power politics has determined the major and regional powers' response and the larger global community to the Rohingya issue, compromising the international legal regimes.

The inadequacy of the international protection regimes and the absence of a formal justice system in the Cox's Bazar camps exacerbate the tense and challenging situation the Rohingya women and children refugees face. Although NGOs have designed and provided supportive spaces for the vulnerable population, the State must combat structural violence against women and children in the camps through formal law enforcement.

The concepts of "safety", "security" and "statehood" must be revisited and reimagined

beyond the Westphalian construct to include a people-centric formulation. Human rights must not be overlooked at the expense of geopolitical concerns. Academia and civil society in Myanmar and Bangladesh will be crucial to driving such a policy rethink in those countries. Unless the all-encompassing safety and basic dignity of the Rohingya people—woman, man or child—is guaranteed by prioritising human, global protection measures will continue to remain inadequate.

Endnotes

(1) Zaki Ovais, "Someone I'm Afraid of," *I Am a Rohingya: Poetry from the Camps & Beyond,* ed. James Byrne (London: Arc Publications, 2019).
(2) UNICEF, "Rohingya Refugee Crisis: UNICEF delivers vital support to vulnerable children and families," UNICEF Bangladesh, https://www.unicef.org/bangladesh/en/rohingya-refugee-crisis
(3) International Organisation for Migration, *IOM Bangladesh Rohingya Humanitarian Crisis Response - Monthly Situation Report,* Dhaka, IOM, 2021, https://bangladesh.iom.int/sites/bangladesh/files/documents/17-06-21/IOM%20Rohingya%20Crisis%20Response%20-%20External%20Sitrep%20-%20May%202021.pdf
(4) "As Rohingya Refugee Crisis Escalates, Women Emerge as Front-Line Responders," *UNFPA*, December 6, 2017, https://www.unfpa.org/news/rohingya-refugee-crisis-escalates-women-emerge-front-line-responders.
(5) Save the Children, *Bangladesh & Myanmar: More than 100,000 Babies Born in Refugee and Displacement Camps in Recent Years*, https://reliefweb.int/report/bangladesh/bangladesh-myanmar-more-100000-babies-born-refugee-and-displacement-camps-recent-0.
(6) UNOCHA, *ISCG Gender Profile (No.2) for Rohingya Refugee Response,* Dhaka, UNOCHA, 2019, https://www.humanitarianresponse.info/ru/operations/bangladesh/assessment/iscg-gender-profile-rohingya-refugee-response-no-226feb2019finalpdf.
(7) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(8) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(9) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(10) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(11) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(12) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"

(13) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(14) Nour Mohammad, "Refugee Protection Under the Constitution of Bangladesh: A Brief Overview," *Refugee Watch* 39 (2012): 141-156.
(15) United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, OHCHR, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx
(16) United Nations, Convention on the Rights of the Child, OHCHR, https://www.ohchr.org/en/professionalinterest/pages/crc.aspx
(17) Georgina Firth and Barbara Mauthe, "Refugee Law, Gender and the Concept of Personhood," *International Journal of Refugee Law* 25 (2013): 472-77.
(18) Firth and Mauthe, "Refugee Law, Gender and the Concept of Personhood"
(19) Firth and Mauthe, "Refugee Law, Gender and the Concept of Personhood"
(20) Firth and Mauthe, "Refugee Law, Gender and the Concept of Personhood"
(21) "ISCG Gender Profile (No.2) for Rohingya Refugee Response, 30 March 2019"
(22) Interview by an employee of BRAC, University College London, December 2012.
(23) "Ensuring safety of Rohingya Women (is) the main challenge: Brac," *United News Bangladesh,* 8 March, 2021, https://unb.com.bd/category/Bangladesh/ensuring-safety-of-rohingya-women-the-main-challenge-brac/65808.
(24) World Health Organisation, *Rohingya Crisis - Bangladesh situation report no. 10,* Dhaka, WHO, 2021, https://cdn.who.int/media/docs/default-source/searo/bangladesh/bangladesh---rohingya-crisis---pdf-reports/sitreps/2021/who-cox-s-bazar-situation-report-10.pdf?sfvrsn=7e8549ba_7
(25) "Rohingya crisis: Bangladesh gets $590 million fund from World Bank," *Dhaka Tribune,* August 2, 2021, https://www.dhakatribune.com/bangladesh/nation/2021/08/02/rohingya-crisis-bangladesh-gets-590-million-fund-from-world-bank.
(26) "UN Women and Rohingya women on the front line of COVID-19 response", *UN Women,* June 3, 2020, https://www.unwomen.org/en/news/stories/2020/6/feature-rohingya-women-on-the-front-line-of-covid-19-response
(27) International Rescue Committee, *The Shadow Pandemic: Gender-Based Violence among Rohingya refugees in Cox's Bazar, June 2020*, London, IRC, 2020, https://www.rescue-uk.org/report/shadow-pandemic-gender-based-violence-among-rohingya-refugees-coxs-bazar
(28) Verena Holzl, "As violence soars in refugee camps, Rohingya women speak up," *The New Humanitarian,* August 2, 2021, https://www.thenewhumanitarian.org/news/2021/8/2/as-violence-soars-in-refugee-camps-rohingya-women-speak-up
(29) Interview by an employee of Health Management Bangladesh Foundation, University College London, November 9, 2019.
(30) Kettie Jean and Jason Miks, "Preventing a silent crisis for Rohingya women and girls during COVID-19 pandemic," *UNICEF*, April 29, 2020, https://www.unicef.org/coronavirus/preventing-silent-crisis-rohingya-women-and-girls-during-covid-19-pandemic.
(31) Erin Taylor, "Alarming Number of Rohingya Children Orphaned by Brutal," *Save the Children,* August 22, 2018, https://www.savethechildren.org/us/about-us/media-and-news/2018-press-releases/alarming-number-rohingya-children-orphaned-brutal-violence
(32) Anne Sisson Runyan, "Gender Relations and the Politics of Protection," *Peace Review* 2, no. 4 (1990): 28-31.
(33) Andrea J. Melnikas et al., "Child marriage practices among the Rohingya in Bangladesh," *Conflict and Health* 14 (2020): 1-12.
(34) Sreeparna Banerjee "Children Left Behind: Challenges in Providing Education to the Rohingya Children in Bangladesh," Issue Brief, *Observer Research Foundation no. 564,* May 17, 2021, https://www.orfonline.org/research/children-left-behind-challenges-in-providing-education-to-the-rohingya-children-in-bangladesh/

Fallacies of Protection: Statelessness, Law, and the Rohingya in South Asia

Sucharita Sengupta

"Yes, I am a Rohingya …
Somewhere I wither in detention,
Somewhere I grow up in restrictions.
Somewhere I am banned from school,
Somewhere I am jailed without reason.
Yes, I am a Rohingya…"

These words by Ali Johar (1), who lives in the Rohingya refugee camps in Delhi, India, provide a small glimpse of the precarious poignancy of being a stateless Rohingya in a neatly divided world of nation-states. The United Nations High Commissioner for Refugees (UNHCR) has declared the Rohingya victims of genocide in their homeland, Myanmar, where they are not considered as citizens. However, despite being recognised by the UNHCR as refugees, they are not formally granted rights as refugees in Bangladesh and India, where they have sought asylum. Since the concepts of nationality and citizenship are essentially dependent on the sovereign domestic policies, two pertinent questions need addressing.

First, what is the efficacy of the international protection mechanism enshrined by the 1951 Convention Relating to the Status of Refugees as it completes 70 years? Second, since neither India nor Bangladesh are formal signatories of the international refugee conventions, how relevant are these laws in protecting refugees in these countries? The 1954 Convention Relating to the Status of Stateless Persons (2), 1961 Convention on the Reduction of Statelessness and a few regional conventions form the bedrock of the international legal framework to address statelessness (3). Defined simply, statelessness is when people are without a formal citizen status; it means living without a nationality or the protection of a state that citizens are entitled to.

In this context, it is worth recounting what Mohib, a Rohingya refugee in the Kutupalong camp in Bangladesh's Cox's Bazar camps, shared:

"Didi (elder sister), I need your help. I do not know whether you are aware of the world bank's latest proposal. On 2 August 2021, Bangladeshi national newspapers, media and tv channels have released a statement of the World Bank's recent proposal to the Bangladesh government (4) to integrate the Rohingya with the host community (Bangladeshi nationals). But the Bangladesh government has rejected it. Additionally, the foreign minister A K Abdul Momen has claimed that there are no UN registered refugees in Bangladesh. We are deeply frustrated on hearing this and would want to remind Bangladesh and the international community that there are 39,588 registered refugees in Cox's Bazar and two official camps in Kutupalong and Noyapara. We have gained refugee status by being registered jointly with the UNHCR and Govt of Bangladesh under the 1951 UN Convention and Law. However, despite this, we have been deprived of the fundamental refugee rights that we belong to. We have been waiting for a durable solution for 30 years in refugee camps, which are like open prison. I, on behalf of all of us, request you to spread the word to the international media and global international agencies about the plight of registered refugee in the camps of Bangladesh. As registered refugees we cater to 3 solutions as per the UN refugee protocols- 1) Go home with right 2) Local integration 3) resettlement in another country. Yet, after 30 years, we have been waiting and received nothing" (5).

To clarify, the one million refugees living in Bangladesh since 2017 are unregistered, but the early settlers were registered from the 1990s. Bangladeshi nationals are not allowed by law to marry the Rohingya but can marry persons of other nationalities. Is this because the Rohingya are stateless?

"We are not stateless; how can we be stateless when we have been born and lived through generations in Myanmar? Even Bangladesh recognises us to be nationals of Myanmar," said Mohib and another Rohingya activist in India who did not wish to be named (6). Indeed, despite claiming the Rohingya are stateless, Bangladesh, in collaboration with the UNHCR, has issued refugee cards that identify the Rohingya as undocumented migrants from Myanmar. Thus, although Bangladesh does not formally call the Rohingya refugees, it does acknowledge that they are from Myanmar.

Often, stateless people are denied asylum by other countries, despite the existing international frameworks. The Rohingya are a case in point. They are stateless and recognised by the UNHCR as refugees but are rarely given the rights of refugees in the camps in India and Bangladesh.

Political philosopher Hannah Arendt recounted her existential experiences as a stateless Jew oscillating between despair and hope of survival (7). Here, the depiction of a stateless figure is through the lens of refugee narratives, and the conventional understanding of statelessness has also been tied to refugeehood. The recognition of statelessness as an integral component of the broader debate concerning refugees is also embodied in the 2016 New York Declaration for Refugees and Migrants. However, this is not adequate to explain the legal paradoxes that stateless people like the Rohingya face in contemporary times because statelessness is not always about refugeehood induced by border crossings. Scholars like Judith Butler (8) argue that spatiality and temporality are important indexes to understand statelessness, where there may not be neatly outlined points of arrival and departures. Extending this further, scholars like Ranabir Samaddar and Sabyasachi Basu Ray Chaudhury (9) have noted citizenship as an important parameter in understanding contemporary instances of statelessness (10).

Statelessness and Refugeehood

Statelessness can result in refugeehood, as in the case of the Rohingya, and protracted refugeehood leads to a situation of statelessness, as has been seen in a few instances across Europe since the 2015 migration crisis. In both cases, the refugees live in a state of constant vulnerability. Mechanisms like the refugee conventions and recent additions like the Global Compact on Refugees are important in fostering empathy and consciousness for nation-states to handle such situations and render protection. They also provide a voice to the 'voiceless' (11), giving refugees the right to ask for rights.

In the Global Compacts on Refugees and the New York Declaration, migration and forced migration have been used synonymously, reinforcing a conflation of categories. Additionally, the existing refugee conventions are increasingly inadequate to render protection to refugees and stateless people. For instance, the Rohingya have been criminalised in the countries where they have sought asylum. The Rohingya have been linked to terror activities and incarcerated in India, often without proof and as illegal immigrants (12). However, can the UNHCR-recognised refugees and, in the Rohingya's case, stateless people be held responsible for crossing borders without sufficient 'documents'? This indicates a lacuna in the way the international legal system functions.

One of the core issues highlighted in the New York Declaration that resulted in the Global Compact was the notion of responsibility-sharing, and that countries hosting large numbers of refugees should be provided adequate support. It was also decided to "actively promote durable solutions for refugees, particularly in protracted refugee situations" (13). Both pacts bestow on nation-states the onerous task of a commitment to

cooperation and responsibility-sharing. While an important step to foster collaboration, it fails to address and resolve the root causes of departure that often leaves lasting impacts on the refugees. Many of them do not wish to return to their home countries unless the issue of nationality is resolved. Bilateral negotiations or initiatives between states must consider the people without which there will be no real change or durable solution.

Interactions with Rohingya refugees in Indian prisons (in 2014) and Bangladesh camps (in 2015 and 2019) show that the Bangladesh government's refugee rehabilitation policy vis-à-vis the Rohingya has changed through the years. Although it has become more humanitarian after the 2017 Rohingya genocide, the core concerns of the right to and freedom of mobility remain unaddressed.

In stating narratives of dispossession, what is often forgotten is that refugees are human beings who only naturally want to break free from their captivated existence. Such drives of desperations are often termed as 'illegal' without trying to understand why there is a strong resistance among the younger generations of Rohingya refugees to change their camp existences. "We are living in hell, sister. It's a prison. We are not stateless, our country is Myanmar," said Faruk, a Rohingya settler who was deported from Saudi Arabia to Cox's Bazar in August 2017 (14). Interestingly, most of the people interviewed by this author in 2019 (15) testified to having a more secure life within the Bangladesh camps than in Myanmar. But as conditions in the camps worsen and the pandemic exacerbates the situation, this sentiment might soon change.

Bangladesh tackled the 2017 refugee crisis relatively well with help from local and international humanitarian agencies (16). However, discontent is now rising due to frictions over resources. Rohingya youth (between the ages of 15-20 years) told me during my stay in Bangladesh in 2019 that although they are entitled to basic rights like education and work, they are denied access to these (17). The will to break free from the current condition is so urgent that many are choosing to make false national identity cards, paying hefty sums to local agents (18). This situation continues.

Any critique of the international refugee conventions must look at the good and the bad. It is important to go beyond the narrow lens of questioning the relevance of the global conventions in the South Asian context as countries like India and Bangladesh have shown exemplary instances of hosting refugees despite being non-signatories. It is also a fact that both India and Bangladesh, and many other countries like them, were not even parties to the discussion when the 1951 Convention was formulated, and hence, post-colonial countries were forced upon these compacts without any consultation. So, rightfully, the globality of the 'international' conventions can be questioned. At the same time, most international laws and conventions on refugees exist more theoretically, falling short of holistically addressing the contemporary migration crises worldwide. There is no one specific solution or response to the refugee crisis, but one can hope that nation-states adopt a more humanitarian approach while analysing refugee conditions and situations in South Asia and beyond.

Endnotes

(1) Reproduced here with Ali Johar's permission.
(2) Office of the United Nations High Commissioner for Refugees, "Convention Relating to the Status of Stateless Persons (Article 1.1)," UNHCR, https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf
(3) Foster Michelle and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford: Oxford University Press, 2019)
(4) S.M. Najmus Sakib, "Dhaka rejects World Bank proposal on integrating Rohingya into Bangladesh," *Anadolu Agency*, August 3, 2021, https://www.aa.com.tr/en/asia-pacific/dhaka-rejects-world-bank-proposal-on-integrating-rohingya-into-bangladesh/2322506#
(5) Mohib, phone conversation with the author, August 10, 2021.
(6) Mohib, phone conversation with author, August 10, 2021; Anonymous, text messages to author, August 12, 2021.
(7) Richard J. Bernstein, "Hannah Arendt on the Stateless," *Parallax* 11, no. 1 (2005), https://doi.org/10.1080/1353464052000321 09
(8) Judith Butler and Gayatri Chakravorty Spivak, "Introduction," in *Who Sings the Nation-State? Language, Politics, Belonging* (Oxford: Seagull Books, 2007)
(9) Sabyasachi Basu Ray Chaudhury and Ranabir Samaddar, "Introduction," in *The Rohingya in South Asia: People Without a State*, ed. Sabyasachi Basu Ray Chaudhury and Ranabir Samaddar (New York: Routledge, 2018)
(10) In legal terms, there are two forms of statelessness, de jure and de facto. De jure is when a person is not considered a national by any state under the operation of its law. De facto is when people have been described broadly as effectively being without a nationality because they are unable to avail themselves of the protection of the state. In recent years, there have been many debates over the validity of de facto statelessness. The Rohingya are de jure, deracinated and scattered through their mobility across international borders in South and Southeast Asia.
(11) The term has been used here to refer to how a stateless person or refugee is normally viewed. It is not to say that refugees or stateless people are mere victims and 'voiceless'.
(12) Shaikh Azizur Rahman, "Rohingya Refugees Face New Crackdown in India," *VOA*, February 16, 2021, https://www.voanews.com/a/south-central-asia_rohingya-refugees-face-new-crackdown-india/6202129.html
(13) Ranabir Samaddar, "Promises and Paradoxes of a Global Gaze", (paper presented at a conference on the State of the Global Protection System for Refugees and Migrants, 2018: Impressions and Outcomes, Kolkata, Mahanirban Calcutta Research Group, November 25-30, 2018).
(14) Faruk, text messages to author, July 3, 2021.
(15) Author's field experience, 2019.
(16) Author's field experience, March 2019; Jessica Olney, Nurul Haque and Roshid Mubarak, *We Must Prevent a Lost Generation: Community-led education in Rohingya camps*, Oslo, Peace Research Institute Oslo, 2019, https://www.prio.org/download/publicationfile/1838/Olney,%20Haque,%20Mubarak%20-%20We%20Must%20Prevent%20a%20Lost%20Generation%20-%20PRIO%20Paper%202019%20(1).pdf
(17) Conversations with the author in Bangladesh, May 2019.
(18) Author's field experience, March 2019.

Continued Insecurity for Rohingya in Bangladesh's Bhasan Char

Sreeparna Banerjee

In both its legal and social sense, citizenship embodies a form of social power and capital that is unfortunately beyond the reach of South Asian refugees (1). South Asian countries that host many refugees, such as India, Bangladesh and Pakistan, have not ratified the prevailing international law that protects refugees—the 1951 Refugee Convention or its 1967 Protocol. As a result, forced migrants (2) are left without the secure legal status awarded to recognised refugees, a deficit that magnifies the challenge of accessing state protection and securing social capital within the host community (3). The status of these forced migrants is best captured by the concept of de facto statelessness, which signals their lack of access to the protective responsibility of any sovereign nation (4). Thus, the concept of refugee protection in

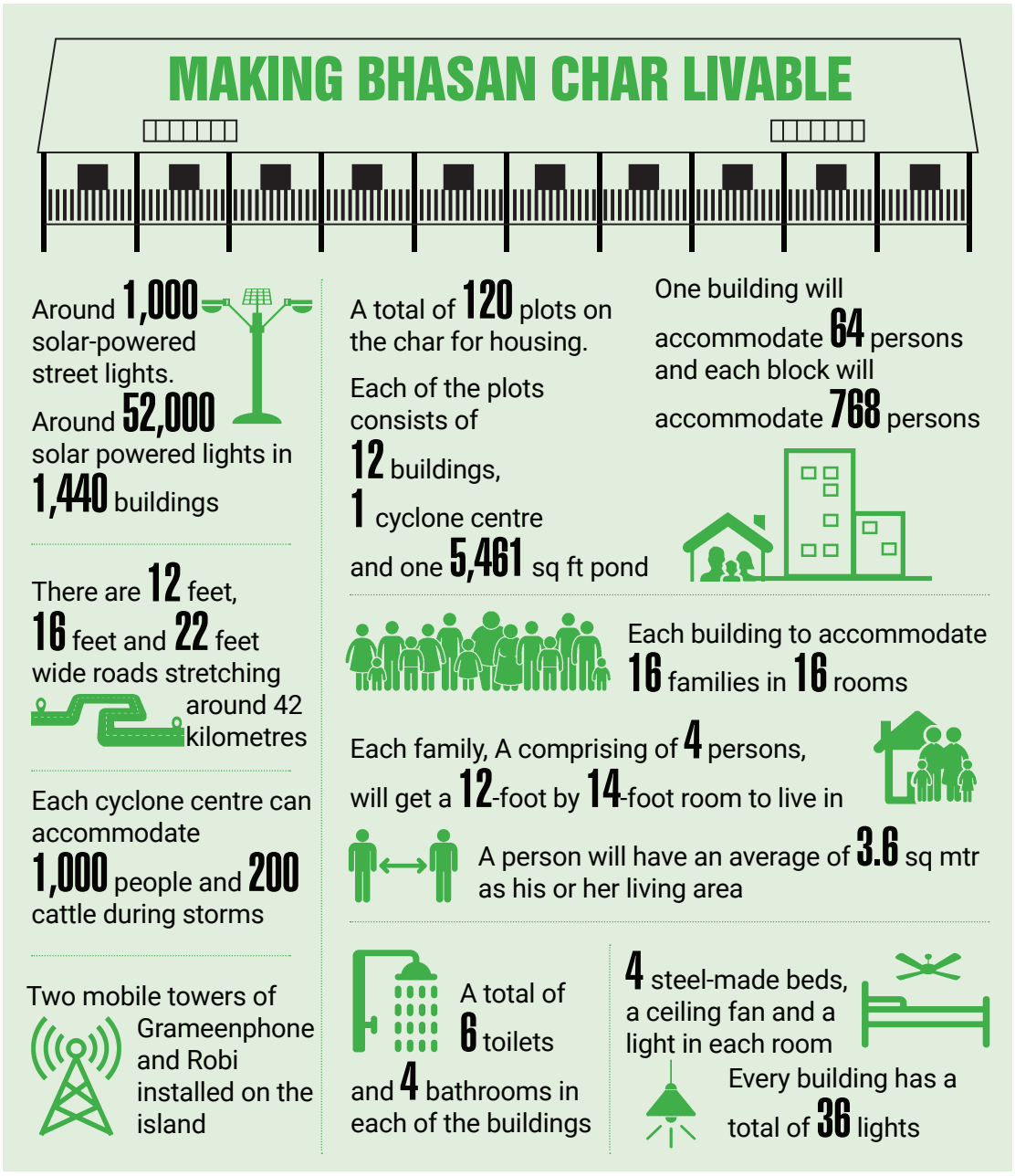
South Asia automatically becomes complex. The experience of the displaced Rohingya from Myanmar, 884,041 of whom now live as stateless persons in Bangladesh (5), is a powerful case in point. In Bangladesh, they are referred to as 'Forcibly Displaced Myanmar Nationals' instead of refugees since the country is not a signatory to the 1951 Convention. Until the end of 2019, most of the displaced Rohingya resided in the 34 camps in Cox's Bazar district, while some made boat journeys to reach Malaysia and Indonesia for better economic opportunities. However, since February 2020, Rohingya refugees arriving on boats have been barred from entering other countries due to COVID-19 restrictions, and those rescued by Bangladesh coast guards were placed at Bhasan Char island (6). Since December 2020, the Bangladesh government has been sending more displaced people to Bhasan Char to ease the burden on the congested Cox's Bazar camps, even before the UN officials could hold technical assessments and declare the island fit to live (7). By May 2021, more than 18,000 displaced persons have been relocated to Bhasan Char (8), and about 80,000 more are scheduled to be shifted by the end of November or early December (9). Against this backdrop, to what extent can the universal refugee protection mechanisms address the issues of the Rohingya in Bhasan Char?

Figure 1: Map of Bhasan Char

Source: Human Rights Watch (10)

Bhasan Char, a silt island in the mouth of the Ganges, Meghna, and Brahmaputra River system, has been chosen as a temporary relocation spot for about 100,000 displaced Rohingya until they can be repatriated to Myanmar (11). The area has been developed under the Ashrayan 3 initiative with 120 brick-built cluster villages and 120 cyclone shelters. Flood protection embankments have been built, as have education centres, playgrounds, mosques, healthcare facilities, and a police station (See Figure 2) (12).

Figure 2: Provisions in Bhasan Char



Source: Business Standard (13)

Bangladesh has promised better living conditions, medical care, livelihood options, and safety to encourage the Rohingya to settle on the island. However, reports suggest these promises are not being fulfilled.

Livelihood Concerns

Inadequate food supplies and few income-generating activities have led to much disturbance on the islet (14). The Bangladesh government has promised to provide livelihood opportunities, including agricultural work; fish, poultry and dairy farming; apiculture; and handicrafts. Shops were also said to be set up in the designated marketplace and materials produced by the Rohingya on the island were to be sold on the mainland with the help of a non-governmental organisation (15). However, the process of setting up work opportunities has not taken place. In July 2021, 17 items (such as a few fishing nets, sewing machines, animals, hair dressing tools, and electrical and carpenter equipment) have been provided along with rickshaw vans and repair kits for shoes, to meet some of the expectation for a short period of time (16). But there remains a need to design and implement skills training programmes to make the displaced people self-reliant.

Healthcare

Poor health facilities remain a major concern. In May 2020, reports suggested that the 400 people stationed on Bhasan Char (ostensibly to quarantine due to COVID-19 restrictions) were facing severe medical problems after being stranded at sea for months and were unable to access proper medication and care (17). Only paracetamol tablets were provided, and specialised medicines for communicable diseases like diarrhoea and dysentery and non-communicable diseases like diabetes and high blood pressure# were lacking. The situation remains unchanged (18). Bangladesh has previously confirmed that healthcare facilities on the island were insufficient to tackle major health emergencies (19), meaning such cases would need to be taken to hospital in the Hatiya Island or Noakhali Islet, both about a three-hour boat ride away. In June 2021, several people reportedly died after being unable to reach the mainland for further treatment (20). There are also apprehensions regarding women and girls who may have encountered sexual or other forms of brutality while on the boats or on the island. The absence of counselling and treatment for such cases could translate into deeper emotional and physical issues. As for the COVID-19 vaccine, while Bangladesh began vaccinating people at Cox's Bazar from August 2021, no inoculation plans have been announced for Bhasan Char (21).

Security Concerns

The Rohingya on the island have complained that police officers stationed to protect them often punished them physically or verbally (22). For instance, women have been punished for speaking on mobile phones and children beaten for playing in a different block. As a result, there have been many instances of people escaping the island to return to Cox's Bazar, with some drowning while making the unsafe journey and others caught and taken

into custody (23). In October 2021, the UN signed a memorandum of understanding with the Bangladesh government to address issues pertaining to the Rohingya voluntarily relocating to Bhasan Char and to travel back to Cox's Bazar to meet their families (24). An additional security concern is that the embankments around the island are inadequate to withstand a category three storm or worse. Indeed, the occurrence of severe cyclonic storms over the Bay of Bengal has increased by 26 percent over the last 120 years (25). Climate change and a rise in sea level suggest that cyclones in the Bay of Bengal are likely to increase frequency and intensity (26). To further mitigate risks, the UN believes it might be critical to have an emergency management plan in case of severe weather events (27).

Need for Protection Mechanisms

The situation in Bhasan Char appears to be a violation of human rights. This calls for the refugee protection mechanisms to be strengthened, especially in countries that do not comply with the 1951 Convention. In many respects, the Convention is a basic statement of a state's protection obligations (28), and was never intended as a comprehensive document since it does not deal with large-scale refugee movements, the question of asylum or admission to asylum, the details of international co-operation, or the promotion of solutions other than those related to the status of the individual as a refugee (29). While the 1967 Protocol addressed a few of these concerns, the 2016 New York Declaration for Refugees and Migrants set out the key elements of a Comprehensive Refugee Response Framework to be applied to large-scale movements of refugees and protracted refugee situations (30). This was followed by the Global Compact on Refugees (GCR), which aims to enhance coordination on international migration and present a framework for comprehensive global cooperation on migrants and human mobility (31). The GCR hoped to include the much-needed refugee protection mechanisms for South Asia. As the first large-scale refugee displacement since its inception, the Rohingya crisis provided an opportunity to test the GCR's provisions. However, the GCR has been applied in a limited manner in response to the Rohingya crisis and has yet to demonstrate its influence on policy and practice. The challenging context of the Rohingya crisis reveals evident weaknesses in the GCR, including a lack of clarity on its scope and purpose, alongside unresolved questions around leadership and accountability (32). If regional structures are considered, scholars have made many attempts in the South Asian Association for Regional Cooperation (SAARC) countries to establish regional refugee protection frameworks to manage the tide of migration in South Asia (33). However, all such efforts have been stalled over national security concerns and religious discrimination, undermining human security imperatives (34). Still, there is a clear need for a regional governance structure for refugee protection. This step will also ensure that none of the SAARC member states are overburdened due to the refugee situation. However, dialogues on this must be initiated among the SAARC countries, for which political will is vital. At the same time, Bangladesh must re-evaluate its strategy to deal with the current circumstances. The mounting cases of mistreatment by officials on

the island necessitates a proper judicial (and remedial) apparatus. The absence of domestic refugee laws complicates the situation, but the refugees have the right to enjoy the protection of the law as laid out in Article 31 of Bangladesh's constitution (35).

Conclusion

While Bangladesh has shouldered weighty responsibilities towards the displaced Rohingya, the major focus is pinned on their repatriation to Myanmar. The situation in Myanmar after the 2021 coup makes it highly unlikely that any repatriation procedure will take place soon (36). Thus, consistent efforts and funding are required for the refugees' long-term survival. Bangladesh must work out mechanisms with the UN to ease local travel restrictions with proper travel passes and documentation and implement them. This will facilitate a better law-and-order situation within and around the island. Livelihood options should be made available, and proper skills programmes must be designed and implemented. Adequate ration, medicines and sanitation and hygiene materials should also be provided. To protect the rights of the Rohingya, the objectives of the GRC and other refugee mechanisms must be restructured judiciously.

Endnotes

(1) Bernd Reiter, *The Dialectics of Citizenship: Exploring Privilege, Exclusion, and Racialization*, (East Lansing: Michigan State University Press, 2013)

(2) According to the International Organization for Migration, a forced migrant is any person migrating to "escape persecution, conflict, repression, natural and human-made disasters, ecological degradation, or other situations that endanger their lives, freedom or livelihood".

(3) International Organization for Migration, *World Migration Report 2020*, Geneva, IOM, 2019, https://publications.iom.int/system/files/pdf/wmr_2020.pdf

(4) Atig Ghosh, "Words of law, worlds of loss: the stateless people of the Indo-Bangladeshi enclaves", in *The State of Being Stateless: An Account of South Asia*, ed. Atig Ghosh, Anasua Basu Ray Chaudhury and Paula Banerjee (New Delhi: Orient Blackswan Publication, 2015), 20-49.

(5) ISCG Secretariat, "2021 Joint Response Plan for the Rohingya Humanitarian Crisis", https://reliefweb.int/sites/reliefweb.int/files/resources/2021_jrp_with_annexes.pdf

(6) "2020 was 'deadliest' year ever for Rohingya sea journeys: UNHCR", *Aljazeera*, August 20, 2021, https://www.aljazeera.com/news/2021/8/20/rohingya-sea-journeys-un

(7) Rajesh Jha, "Bangladesh sends 3rd Batch of Rohingya refugees to Bhashan Char Island", *DD News*, January 21, 2021, https://ddnews.gov.in/international/bangladesh-sends-3rd-batch-rohingya-refugees-bhashan-char-island

(8) "2021 Joint Response Plan for the Rohingya Humanitarian Crisis"

(9) "Bangladesh plans to move 81,000 Rohingya to island after UN deal: officials", *The Hindu*, October 8, 2021, https://www.thehindu.com/news/international/bangladesh-plans-to-move-81000-rohingya-to-island-after-un-deal-officials/article36896707.ece
(10) "'Bangladesh Is Not My Country' The Plight of Rohingya Refugees from Myanmar," *Human Rights Watch*, 5 August 2018, https://www.hrw.org/sites/default/files/report_pdf/bangladesh0818_web2.pdf
(11) Sreeparna Banerjee, "From Cox's Bazar to Bhasan Char: An Assessment of Bangladesh's Relocation Plan for Rohingya Refugees", *Observer Research Foundation*, May 7, 2020, https://www.orfonline.org/research/from-coxs-bazar-to-bhasan-char-an-assessment-of-bangladeshs-relocation-plan-for-rohingya-refugees-65784/
(12) Sreeparna Banerjee, "From Cox's Bazar to Bhasan Char: An Assessment of Bangladesh's Relocation Plan for Rohingya Refugees"
(13) Shamsuddin Illius, "An inside look at Bhashan Char – the new home for Rohingyas", *The Business Standard*, December 30, 2019, https://www.tbsnews.net/rohingya-crisis/inside-look-bhashan-char-new-home-rohingyas
(14) "Bangladesh: Cyclone Endangers Rohingya on Silt Island", *Human Rights Watch*, May 20, 2020, https://www.hrw.org/news/2020/05/20/bangladesh-cyclone-endangers-rohingya-silt-island
(15) Syed Samiul Basher Anik and Fazlur Rahman Raju, "Inside the Bhashan Char plan for Rohingyas", *Dhaka Tribune*, January 29, 2019, https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/01/29/inside-the-bhashan-char-plan-for-rohingyas
(16) Raheed Ejaz, "Rohingyas on Bhasan Char happy with livelihood materials", *Prothom Alo*, July 16, 2021, https://en.prothomalo.com/bangladesh/rohingyas-on-bhasan-char-happy-with-livelihood-materials
(17) "Bangladesh: Cyclone Endangers Rohingya on Silt Island"
(18) "An Island Jail in the Middle of the Sea", *Human Rights Watch*, June 7, 2021, https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char
(19) Banerjee, "From Cox's Bazar to Bhasan Char: An Assessment of Bangladesh's Relocation Plan for Rohingya Refugees"
(20) Meenaxi Ganguly, "Rohingya Refugees Facing Medical Crisis on Bhasan Char", *Human Rights Watch*, June 30, 2021, https://www.hrw.org/news/2021/06/30/rohingya-refugees-facing-medical-crisis-bhasan-char
(21) "Bangladesh vaccinates Rohingya refugees against Covid-19", *Dhaka Tribune*, August 10, 2021, https://www.dhakatribune.com/bangladesh/nation/2021/08/10/inoculation-begins-in-rohingya-refugee-camps
(22) "An Island Jail in the Middle of the Sea"
(23) Human Rights Watch, "Bangladesh: Fleeing Rohingya Die at Sea", https://reliefweb.int/report/bangladesh/bangladesh-fleeing-rohingya-die-sea
(24) UNB, "UN signs deal with Bangladesh to help Rohingyas in Bhasan Char", *Dhaka Tribune*, October 9, 2021, https://www.dhakatribune.com/bangladesh/rohingya-crisis/2021/10/09/crucial-mou-on-un-s-operational-engagement-in-bhashan-char-signed
(25) Om Prakash Singh, "Long-term trends in the frequency of severe cyclones of Bay of Bengal: Observations and simulations", *Mausam* 58, no. 1 (2007), https://metnet.imd.gov.in/mausamdocs/15816_F.pdf
(26) Banerjee, "From Cox's Bazar to Bhasan Char: An Assessment of Bangladesh's Relocation Plan for Rohingya Refugees"
(27) Saleh Norman, "Rohingya refugees live in fear of cyclones on Bangladesh island", *The Third Pole*, June 3, 2021, https://www.thethirdpole.net/en/climate/rohingya-refugees-fear-cyclones-bhashan-char-bangladesh/
(28) United Nations High Commissioner for Refugees, "The Refugee Convention, 1951", *UNHCR*, https://www.unhcr.org/4ca34be29.pdf
(29) UNHCR, "The Refugee Convention, 1951"

(30) General Assembly, "Resolution adopted by the General Assembly on 19 September 2016", *United Nations*, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1
(31) United Nations, "The Global Compact on Refugees", *UNHCR*, https://www.unhcr.org/5c658aed4.pdf
(32) Humanitarian Policy Group, Karen Hargrave and Veronique Barbelet, "The Global Compact on Refugees: Lessons from Bangladesh", Overseas Development Institute, https://cdn.odi.org/media/documentsThe_Global_Compact_on_Refugees_lessons_from_Bangladesh.pdf
(33) Andrew Renata Kaldor Centre for International Refugee Law, "Regional refugee protection in comparative perspective Lessons learned from the Asia-Pacific, the Americas, Africa, and Europe", UNSW Australia, https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_2_Regional_refugee_protection_in_comparative_perspective.pdf
(34) Nafeez Ahmed, "As Rohingyas flee Myanmar, India needs to drop religious criteria in its refugee law", *The Conversation*, September 5, 2017, https://theconversation.com/as-rohingyas-flee-myanmar-india-needs-to-drop-religious-criteria-in-its-refugee-law-79648
(35) Legislative and Parliamentary Affairs Division, "The Constitution of the People's Republic of Bangladesh (ACT NO. OF 1972)", Government of the People's Republic of Bangladesh, http://bdlaws.minlaw.gov.bd/act-367.html
(36) Sreeparna Banerjee, "Myanmar: The Rohingya question in the current coup", *Observer Research Foundation*, February 11, 2021, https://www.orfonline.org/expert-speak/myanmar-rohingya-question-current-coup/

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Acknowledgments

The editor acknowledges her debt to Prarthana Sen, ORF intern and an M.A. in political science, for editorial assistance.

The editor is thankful to ORF interns Roja Rose Mathew (a postgraduate student at the Department of Geopolitics and International Relations, MAHE) and Arlene Noronha (a graduate student at Amity University, Noida) for data collection efforts and sharing research inputs.