

PATCHWORK OF ARCHAIC REGULATIONS AND POLICIES IN INDIA: A BREEDING GROUND FOR DISCRIMINATORY PRACTICE AGAINST REFUGEES

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I. PATCHWORK OF REGULATION

Most modern democracies have some form of domestic legislation—or at the very least a semblance of a policy—on asylum seekers and refugee protection.1 The recent global refugee crisis has brought higher scrutiny to the refugee policies and practices of various countries. The numbers present a grim picture; there were 21 million refugees in 2015, the highest amount since World War II.2 The total number of refugees at the close of 2017 had crossed the 25 million threshold, constituting nearly one-third of the 68 million people forcibly displaced around the world.3 In South Asia alone, there are over 200,000.4 India is currently ranked twenty-sixth in the world in terms of the number of refugees within its territory (over

1. See generally LIBRARY OF CONGRESS, REFUGEE LAW AND POLICY IN SELECTED COUNTRIES (describing the law and policy on refugees and other asylum seekers in twenty-two countries and the European Union).

2. Global Trends: Forced Displacement in 2017, U.N. HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/globaltrends2017 (last visited Apr. 18, 2019).

3. Figures at a Glance, U.N. HIGH COMM'R FOR REFUGEES, https://www.unhcr.org/en-us/figures-at-a-glance.html (last visited Apr. 18, 2019).

4. Operations: Asia and the Pacific: South Asia, U.N. HIGH COMM'R FOR REFUGEES, http://reporting.unhcr.org/node/3410?y=2019 (last visited Apr. 18, 2019).

197,000).⁵ While these numbers have largely remained steady, in recent years, the number of refugees in India has dwindled in contrast to the global increase.⁶ Despite the sizeable number of refugees within its borders, India still remains one of the few liberal democracies in the world that is not a signatory to the 1951 Convention Relating to the Status of Refugees (Refugee Convention) or its 1967 Protocol. India also does not have any domestic legislation or uniform policy on the treatment of refugees. The Refugee Convention has over 145 signatories, an overwhelming majority of the 194 countries in the world. Other non-party states include Saudi Arabia, Kuwait, Bahrain, Malaysia, and Thailand.

The Refugee Convention was adopted in the wake of World War II to cater to the displacement of millions of Europeans.⁷ Eventually, the Refugee Convention accommodated refugees from different parts of the world with the 1967 Protocol. Since the convention was negotiated in a Western historical context, it is criticized as unrepresentative of other regions. It is still regarded by some as “Western,” something that regional arrangements in Africa and South America have tried to remedy.⁸

India has not signed on to the Refugee Convention for a host of reasons, including the convention’s purported Eurocentricity. India’s Foreign Secretary at the time, R.K. Nehru, communicated to the U.N. High Commissioner of Refugees (UNHCR) that the Indian government regards the global refugee policy as a part of the Cold War legacy.⁹ This stemmed in part from the Cold War-era fears of the spread of communism from the influx of people from Russia or coun-

5. *Refugee Population by Country or Territory of Asylum*, WORLD BANK, <https://data.worldbank.org/indicator/SM.POP.REFG> (last visited Apr. 18, 2019).

6. *Id.*

7. Gil Loescher, *UNHCR’s Origins and Early History: Agency, Influence, and Power in Global Refugee Policy*, 33 *REFUGEE* 77, 78 (2017).

8. See Andrew I. Schoenholz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 *CHI. J. INT’L L.* 81, 107–119 (2015) (describing the origins of the Convention and the need to supplement it regionally).

9. Rajeev Dhavan, Opinion, *India’s Refugee Law and Policy*, *HINDU* (June 25, 2004), <http://www.thehindu.com/2004/06/25/stories/2004062501791000.htm>.

tries with Soviet links.¹⁰ Additionally, scholars also believe that the South Asian geopolitical situation is unique, with deep divisions not only in demographics, but also across varied cultural, social, and political interests.¹¹ Perceived threats to local linguistic and cultural composition are much more acute in the region, exacerbated by permeable borders. Even though India has not recorded an official statement for backing out from the Refugee Convention, it is widely accepted that the reasons have to do with domestic security considerations. Various state governments in India also often cite the issue of overstressed local resources and infrastructure as impediments to receiving more refugees.¹²

More recently, the Ministry of Home Affairs has given a few reasons for India's continuing non-accession to the Convention.¹³ Notably, these reasons, while echoing earlier sentiments of perceived Eurocentricity of the Refugee Convention, focus on the Convention's inability to deal with situations of mass influx. The Ministry has also cited other reasons, including a perceived imbalance of rights and obligations between refugee receiving states and source states, lack of a minimum obligation on the part of states to not create refugee flows, and lack of a cooperation mechanism between different states to resolve the problems of refugees.

While India is not a signatory to the Refugee Convention, it has nevertheless ratified the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1948 Universal Declaration of Human Rights (UDHR), the 1963 Convention on the Elimination of all forms of Racial Discrimination 1963 (CERD), and the 1984 Convention Against

10. *Id.*

11. See e.g., Myron Weiner, *Rejected Peoples and Unwanted Migrants in South Asia*, 28 *ECON. & POL. WKLY.* 1 (1993) (considering the difficulty in assessing the South Asian situation in relation to "rejected" people and migrants).

12. UDITI SEN, *CITIZEN REFUGEE: FORGING THE INDIAN NATION AFTER PARTITION* 21–112 (2018).

13. Legislation for Refugees, 2006, No. 277, Unstarred Question, LOK SABHA (answered on Feb. 21, 2006), <http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=26414&lsno=14> (last visited Apr. 18, 2019) (India).

Torture (CAT),¹⁴ all of which bear on how refugees are treated. For example, the UDHR has made the right to seek asylum from persecution a human right.¹⁵ Flowing from the non-ratification of the Refugee Convention, the UNHCR has a limited—though critical—role to play in the registration and rehabilitation of refugees in India. In 1981, India allowed UNHCR to set up its country office in New Delhi. UNHCR India conducts its mandate Refugee Status Determinations (RSDs) for individual asylum-seekers from non-neighboring countries.¹⁶ In 1995, India joined the Executive Committee of UNHCR, and to date continues to be active in annual meetings, often urging the organization to allocate more funds for and provide holistic solutions to affected populations by engaging in sectors such as health, shelter, education, and livelihood until national or local actors take over these mandates.¹⁷

India has been accepting refugees en masse as a fledgling independent country. Most refugees come from Tibet (largely in 1959, 1970s and early 2000s), Bangladesh (in 1971), Sri Lanka (specifically the Tamils, since 1983), Afghanistan (after the Soviet invasion in the 1980s and at various points during the Taliban regime), Myanmar, and Pakistan, depending on the political situation in the neighboring countries. The Indian government has always treated various groups of refugees differently, based on their respective country of origin. For example, the government directly deals with Tibetans and Sri Lankan Tamils, whereas it directs refugees from some non-

14. See U.N. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 114 (“No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

15. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

16. U.N. High Comm’r for Refugees, *India, in* UNHCR GLOBAL APPEAL 2011 (UPDATE), 202, 203 (2012).

17. Statement of Shri Ajit Kumar, Ambassador & Permanent Representative of India to the United Nations, 67th Session of Executive Committee of the United Nations High Commissioner for Refugees, Geneva (Oct. 3–7, 2016), <http://www.unhcr.org/57f4edb37.pdf>.

neighboring countries and Myanmar to the UNHCR.¹⁸ Consequently, the government ends up discriminating between refugee groups based on country of origin and, sometimes, on the basis of religion, resulting in the creation of hierarchies. India recognizes only Tibetans and Sri Lankan Tamils as refugees, albeit in a non-legal sense.¹⁹ The Indian government has aided the Tibetans in particular, since their first entry into India in the 1950s,²⁰ providing them with land for settlements in the states of Karnataka, Himachal Pradesh, and Uttarakhand, as well as access to education, health, and welfare.²¹ On the other hand, India has not recognized the Bangladeshi Chakmas or the Rohingyas as refugees, effectively excluding them from access to basic facilities.²²

In policy and practice, India generally documents refugee groups as foreigners. This label is a relic of India's colonial past, a product of the enactment of the Foreigner's Act, 1946,²³ Registration of Foreigners Act, 1939,²⁴ and the Pass-

18. *India, supra* note 16, at 202; *see generally* HUMAN RIGHTS LAW NETWORK, REPORT OF REFUGEE POPULATIONS IN INDIA (2007) (describing the status of refugees of various ethnic groups in India).

19. Interestingly, The Ministry of Home Affairs has admitted that nationals from various countries have sought refuge. However, it went on to categorically state that the government refers to only Sri Lankan Tamils and Tibetans as refugees. Refugee Population in the Country, 2002, No. 2338, Starred Question, LOK SABHA (answered on Apr. 16, 2002), <https://eparlib.nic.in/bitstream/123456789/424017/1/39163.pdf>.

20. Anticipating this influx from Tibet due to a deteriorating political situation, the Indian government passed an order as early as 1950 under Section 3 of the Registration of Foreigner's Act (1939) and Section 3 of the Foreigner's Act (1946), directing that "any foreigner of Tibetan nationality, who enters India hereafter shall – (a) at the time of his entry into India obtain from officer-in-charge of the Police post at the Indo-Tibetan frontier, a permit in the form specified in the annexed Schedule; (b) comply with such instructions as may be prescribed in the said permit; and (c) get himself registered as a foreigner and obtain a certificate of registration. Regulating Entry of Tibetan National into India, 1950, Gen. S. R. & O. 1108 (India).

21. TIBET JUSTICE CENTER, TIBET'S STATELESS NATIONALS III: THE STATUS OF TIBETAN REFUGEES IN INDIA 11, 33 (2016).

22. *See* NASREEN CHOWDHORY, REFUGEES, CITIZENSHIP AND BELONGING IN SOUTH ASIA 107–64 (2018) (describing the Bangladesh policies on refugees).

23. Foreigners are defined as any persons who are not Indian citizens. The Foreigners Act, No. 31 of 1946, INDIA CODE (1993), vol. 1, § 2.

24. The Registration of Foreigners Act mandates that certain categories of foreigners who intend to stay in India more than 180 days, or as provided

port (Entry into India) Act, 1920. These statutes empower the Ministry of Home Affairs to establish an authority for the grant of identity documents and also enable the continuous monitoring of all refugees within Indian territory. The provisions in these statutes were intended to be highly restrictive²⁵ and have led to various ad hoc procedures – often leading to abrupt changes in the treatment of various refugee groups. It became clear that the term refugee would not be officially used to refer to these groups. Instead, Indian law would deem them to be foreigners. Therefore, the refugee label has no automatic legal import in India, and is merely a colloquial reference to groups of people who flee other countries to seek protection within Indian territory.

Because the existing Indian statutes do not differentiate between aliens, illegal immigrants, and refugees fleeing persecution, all such foreigners are vulnerable to forced expulsion. The most important principle of international refugee law is that of non-refoulement, or the prohibition of forced expulsion of refugees to a place where a threat to life or freedom exists. The Refugee Convention explicitly mentions this principle,²⁶ which has even received the exalted status of customary international law.²⁷ Even countries that are not a party to

in their visa authorization, are required to register with the Registration Officer of the Foreigner's Office. The Registration of Foreigners Act, No. 16 of 1939, INDIA CODE (1993), vol. 5.

25. The Foreigners Act empowers the government to prohibit, regulate, and restrict foreigners' entry into India or their departure from India; to limit their freedom of movement; to require them to reside in a particular place; to furnish proof of identity; to report to designated authorities at fixed intervals; to submit to photographing and fingerprinting at designated times by designated authorities as well as to medical examinations; and to prohibit them from association with persons of a designated description, from engaging in designated activities, and from using or possessing designated articles and regulating conduct in any way as maybe prescribed by the Central Government. The Foreigners Act, *supra* note 23, § 3.

26. U.N. Convention Relating to the Status of Refugees art. 33(1), *entered into force* Apr. 22, 1954, 189 U.N.T.S. 137 (“[W]here his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

27. See U.N. High Comm'r for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, REFworld (Jan. 31, 1994), <http://www.refworld.org/docid/437b6db64.html> (“ . . . UNHCR con-

the Refugee Convention, like India, are therefore bound to respect the principle of non-refoulement.

Nevertheless, the Indian Ministry of Home Affairs issued an affidavit claiming that the principle only applies to state parties to the Refugee Convention, and thus India need not adhere to it.²⁸ This affidavit contradicts earlier statements from India, wherein Indian representatives implored the international community to ensure that the concept of non-refoulement was not diluted in the process of resettlement of refugees in different countries.²⁹ The Ministry of External Affairs also criticized the 2016 European Union-Turkey deal on refugees, calling it a violation of the non-refoulement principle.³⁰

Despite its own domestic legal vacuum on the issue, India recommended that Australia codify the principle of non-refoulement in its migrations laws.³¹ India's back and forth on non-refoulement poses a danger to all refugee communities in India, uncovering a wide chasm in Indian law and policy which renders all such groups susceptible to arbitrary state action. Furthermore, an important judgment of the High Court of Gujarat declared: "The principle of 'non-refoulement' is encompassed in Article 21 of the Constitution of India and the protection is available, so long as the presence of the refugee is not prejudicial to the national security."³² The principle therefore has been read as part of the penumbra of the right to life and personal liberty under the Constitution of India, and qualified in much the same way as the Refugee Conven-

siders that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law.").

28. *Rohingya Refugees Illegal, Pose Security Threat: Centre to Supreme Court*, HINDU BUSINESS LINE (Sept. 18, 2017) <https://www.thehindubusinessline.com/news/national/rohingya-refugees-illegal-pose-security-threat-centre-to-supreme-court/article9863195.ece>.

29. Devirupa Mitra, *Modi Government Affidavit on Rohingya Refugees Reverses India's Long-Held Stand on Non-Refoulement*, WIRE (Sept. 21, 2017) <https://thewire.in/179994/indias-statement-rohingya-refugees-reversal-long-held-stance-non-refoulement>; Statement by Anil Kumar Rai, Counsellor, Humanitarian Affairs, 1st Thematic Discussion towards a Global Compact on Refugees, Geneva (July 10, 2017), <https://www.pmindiaun.gov.in/pages.php?id=1509>.

30. Mitra, *supra* note 29.

31. *Id.*

32. *Ktaer Abbas Habib Al Qutaifi and Another v. Union of India and Others*, (1999) 1 Crim LJ (Gujarat HC) 919, ¶ 19 (India).

tion exceptions.³³ While the Indian government does not automatically enforce international conventions and treaties,³⁴ these agreements do impose on India a duty³⁵ to respect them under their constitution.³⁶ However, this does not restrict the absolute power of the Indian government to expel a foreigner under domestic statutes. Refugees do not enjoy any official legal status or position in India, and a carve-out for them is unavailable in the Foreigners Act, thus rendering them vulnerable to arbitrary state action.

The Constitution of India grants certain fundamental rights to all people within its territory, regardless of citizenship status. Some constitutional rights, such as the right to freedom of speech and association, vest only in citizens as opposed to foreigners. Some of the rights available to non-citizens include the right to life and personal liberty (Article 21), the right to equality before law and equal protection of law (Article 14), freedom of conscience and practice of religion (Article 25), and protection against arrest and detention in certain cases (Article 22). Citing the applicability of Article 21 to foreigners in the case of the *National Human Rights Commission v. State of Arunachal Pradesh*,³⁷ the Supreme Court held that the state governments are under a constitutional obligation to protect threatened groups such as the Bangladeshi Chakma against forced expulsion. This also means that state governments are obligated to intervene, wherever systemic violence arises exist against refugee groups.³⁸

Volatility in the region as a result of the Rohingya crisis in bordering Myanmar and Bangladesh has led to a more

33. U.N. Convention Relating to the Status of Refugees, *supra* note 26, art. 33(2).

34. India has adopted a dualist approach to international law implementation domestically. The obligations that India has signed on to does not automatically become a corpus of its domestic law, and require enabling legislation.

35. This paper uses the word *duty* as distinct from *obligation*, because of the location of this duty in Part IV of the Indian Constitution, which concerns directive principles of state policy, the generally non-justiciable duties that the state progressively endeavors to fulfil. INDIA CONST. arts. 36–51.

36. INDIA CONST. art. 51.

37. *National Human Rights Commission v. State of Arunachal Pradesh and Another*, (1996) 1 SCC 742, ¶ 11 (India).

38. *Id.* ¶ 20.

hardline approach on the part of the Narendra Modi government.

Outlined below are a few incidents which are emblematic of the discriminatory practice that results from the lack of concrete law or policy on the treatment of all refugees in India.

II. INCIDENTS EMBLEMATIC OF DISCRIMINATORY PRACTICE

A. *Proposed Amendments to the Indian Citizenship Act, 1955, and the Revision of the National Register of Citizens*

Prime Minister Modi has taken the first steps towards making good on his election promise of amending the Indian Citizenship Act, 1955 to facilitate naturalization of all refugees and migrants—except those of the Islamic faith from Pakistan, Afghanistan, and Bangladesh. The amendment, though not explicit in its exclusion of Muslims, seeks to grant nationality only to certain minority groups (Hindus, Christians, Sikhs, Buddhists, Parsis, and Jains) from the aforementioned countries. To ensure the smooth application of the proposed amendment, concomitant changes to the erstwhile Foreigner's Act have also been proposed through the Foreigners (Amendment) Order, 2015, and the Passport (Entry into India) Amendment Rules, 2015, effectively exempting non-Muslims from the restrictive provisions therein.³⁹ These amendments are significant in light of the 2019 Indian parliamentary elections. Ostensibly, the government could be looking to consolidate the Bengali Hindu voter base in three key states: West Bengal, Tripura, and Assam.⁴⁰ Also flowing from these amendments is the revision of the National Register of Citizens (NRC), which requires all residents of the state of Assam to produce documents which prove that they entered India before March 24, 1971, a day before Bangladesh gained independence. This move is no doubt calculated to identify so-called illegal Bengali immigrants. However, coupled with the proposed amendments to the Citizenship Act, 1955, over four million resident Assamese could be stripped of their Indian

39. Rajeev Bhattacharya, *In PIL Against Citizenship Bill, Assamese Intellectuals Say It Violates Constitution*, WIRE, (Feb. 5, 2019), <https://thewire.in/law/in-pil-against-citizenship-bill-assamese-intellecutuals-say-it-violates-constitution>.

40. Subir Ghaumik, *Assam Citizenship Bill: Anti-Migrant Protests Rock North-East India*, BBC (Jan. 25, 2019), <https://www.bbc.com/news/world-asia-india-46997965>.

citizenship.⁴¹ This bill, though successful in the lower house of the Indian parliament (Lok Sabha), could not be successfully tabled in the upper house (Rajya Sabha), and is unlikely to be re-tabled before its official lapse date in June 2019.⁴² However, the Indian government has not shelved the idea of an NRC update. The Modi-led, Bharatiya Janata Party (BJP) government aims to ensure its passage in the near future, a very real possibility should Modi secure a second term. The BJP has included the amendments to the Citizenship Act in its manifesto for the upcoming elections.⁴³ There are also fears that these amendments may be promulgated as an ordinance before the parliamentary elections in May.

B. *Deportation of Rohingya*

The crisis brewing in neighboring Myanmar had obvious spillover effects in India. Many Rohingyas entered India through Bangladesh, escaping the hard conditions of an overcrowded Cox's Bazaar, eventually reaching New Delhi and dispersing to other parts of the country. New Delhi's response, though initially accepting of Rohingya refugees, has since stoked fear of terrorism and militancy.⁴⁴ The government has labelled the Rohingyas as illegal immigrants. In fact, the incumbent BJP President refers to such illegal immigrants as "termites," and even went so far as to threaten to throw them into the Bay of Bengal.⁴⁵ States have been asked to identify

41. *Assam Register: Four Million Risk Losing Indian Citizenship*, BBC (July 30, 2018), <https://www.bbc.com/news/world-asia-india-45002549>.

42. *Celebrations in Assam as Citizenship Bill is not Tabled in Rajya Sabha*, TIMES INDIA, (Feb. 13 2019), <https://timesofindia.indiatimes.com/india/celebrations-in-assam-as-citizenship-bill-is-not-tabled-in-rajya-sabha/article-show/67979038.cms>.

43. Shiv Visvanathan, Comment, *Notes on the BJP's Manifesto*, HINDU, (Apr. 11 2019), <https://www.thehindu.com/opinion/op-ed/notes-on-the-bjps-manifesto/article26798848.ece>.

44. K. YHOME, OBSERVER RESEARCH FOUND., EXAMINING INDIA'S STANCE ON THE ROHINGYA CRISIS, OBSERVER RESEARCH FOUNDATION ISSUE BRIEF No. 247 3, 6 (July 2018).

45. Devjyot Ghoshal, *Amit Shah Vows to Throw Illegal Immigrants into Bay of Bengal*, REUTERS, Apr. 12 2019, <https://www.reuters.com/article/india-election-speech/amt-shah-vows-to-throw-illegal-immigrants-into-bay-of-bengal-idUSKCN1RO1YD>.

these illegal immigrants, collect their biometric data, and round them up for deportation.⁴⁶

Recently, a writ petition was filed before the Supreme Court of India, challenging the government's decision to deport seven Rohingya men.⁴⁷ Some of the issues presented before the court included whether the deportation of Rohingyas constituted a violation of Article 14 of the Constitution (equality of treatment) and Article 21 (right to life and non-refoulement). The Rohingya petitioners alleged that there was widespread use of force by the Border Security Force (BSF), including the use of chili powder and stun guns, to deter people from entering Indian territory and as a means of "pushing back" the Rohingya.⁴⁸ This "push back," they contend, apart from being facially illegal, is especially egregious since the majority of the Rohingya refugees are children.⁴⁹ It is also claimed that rejections at the frontier are a form of indirect refoulement, drawing support from, inter alia, a UNHCR Note⁵⁰ and a reply from the UNHCR to the Federal Constitutional Court of Germany (FCC).⁵¹

The different, preferential treatment accorded to Sri Lankan Tamils also highlights the arbitrary nature of Indian government's policies. In its prayer, the petition seeks the court's intervention in stopping the Union Ministry as well as the various state governments from pushing back the Rohingya.⁵² They also asked the court to direct the Indian government to provide healthcare, education, and Refugee Identification cards to the Rohingyas.⁵³

The government has responded to the allegations of the Rohingya petitioners in the aforementioned case by denying such push backs, and has invoked security and border protec-

46. Advisory from Bharat Sarkar, Ministry of Home Affairs, to All State Governments, Advisory No. 24013/29/Misc./2017-CSR.III(i) on Identification of Illegal Migrants and Monitoring Thereof (Aug. 8, 2017), https://mha.gov.in/sites/default/files/advisoryonillegalmigrant_10092017_2.PDF.

47. Application for Directions on Behalf of the Petitioner with Affidavit ¶ 2, *Mohammad Salimullah v. Union of India*, Civ. No. 793/2017 (India Jan. 31, 2018).

48. *Id.* ¶ 4.

49. *Id.* ¶ 5.

50. *Id.* ¶ 15.

51. *Id.* ¶ 16.

52. *Id.* at 21.

53. *Id.*

tion concerns, citing the unique location of India with specific threats emanating from bordering Afghanistan, Pakistan, Myanmar, and Bangladesh. In its affidavit submitted in court,⁵⁴ the Government of India has vehemently asserted its sovereign right to secure the borders and the executive nature of such a task, suggesting that the judiciary should afford the executive deference in matters of national security. The government countered the allegation of preferential treatment to Sri Lankan Tamils by citing the Indo-Ceylon bilateral agreements of 1964 and 1974. Under the agreements, the Indian government had agreed to repatriate and grant citizenship to many Tamils of Indian origin. By making a reference to these agreements, the government once again highlighted that these are matters with which the executive is entitled to engage on a bilateral level at its discretion. The government also repeatedly emphasized that it was not a signatory to the Refugee Convention or its protocol, and therefore does not have to respect principles like non-refoulement contained therein, or to provide refugee identification cards.

However, litigation has not stopped the numerous deportations that the Indian government has carried out. In October 2018, the seven Rohingya petitioners were deported to Myanmar without a chance to present their claims for asylum, which drew condemnation from the international community and the United Nations.⁵⁵ In January 2019, the Indian government deported a family of five UNHCR-processed Rohingya who had been detained in the state of Assam since 2013. The UNHCR subsequently sought clarification from the Indian government on the reasons for their repatriation.⁵⁶ In a recent advisory, the Ministry of Home Affairs has disclosed that up to

54. Affidavit on Behalf of Respondent – Union of India ¶¶ 8, 12, Mohammad Salimullah v. Union of India, Civ. No. 793/2017 (India Mar. 15, 2018).

55. Stephanie Nebehay, *U.N. Concerned at Fate of Seven Rohingya Deported by India*, REUTERS, Oct. 5, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-india-un/u-n-concerned-at-fate-of-seven-rohingya-deported-by-india-idUSKCN1MF0WT>.

56. U.N. High Comm'r for Refugees, UNHCR Seeking Clarification from India over Returns of Rohingya (Jan. 4, 2019), accessed at <https://www.unhcr.org/news/press/2019/1/5c2f2a374/unhcr-seeking-clarification-india-returns-rohingya.html>.

twenty-two Myanmar “nationals,” including Rohingya, have been deported since August 2017.⁵⁷

III. CONCLUSION

The ad hoc imposition of executive policies and the instances outlined above demonstrate that the legal vacuum in which Indian refugees and other migrants live renders them soft targets for the governments in power. The government uses them either as a platform to win populist election campaigns or as a bargaining chip in foreign relations with other states, depending on the prevailing geopolitical climate.⁵⁸ A lack of recognition as asylum seekers strips groups like the Rohingyas of important legal rights and entitlements, such as those pertaining to access to loans, property ownership, and employment. Without official recognition, they remain a nebulous class of people, susceptible to discriminatory and capricious state treatment. The Indian government has only become more bold in its arbitrary treatment of Rohingyas seeking protection. Recently, thirty-one Rohingyas were caught in a stand-off between Bangladesh and India at the border for many days, with both sides refusing to accept them, until finally the BSF handed them over to the state of Tripura for detention.⁵⁹

India cannot forever insulate itself from international scrutiny and accountability for the treatment of refugees on its soil and at its borders. A recent damning report by the U.N. Human Rights Council reported that the Independent International Fact-Finding Commission (IIFFC) has found evidence of genocidal intent on the part of Myanmar’s military, the

57. 22 Myanmar Nationals Including Rohingya Deported Since August 2017: MHA, INDIAN EXPRESS, (Feb. 14, 2019) <https://indianexpress.com/article/india/22-myanmar-nationals-including-rohingya-deported-since-aug-2017-mha-5583039>.

58. See Anupama Roy, *Ambivalence of Citizenship in Assam*, 51 ECON. & POL. WKLY. 45, 46 (June 25, 2016) (describing the history of the citizenship question in Assam).

59. Meenakshi Ganguly, *Rohingya Refugees Caught Between India and a Hard Place*, DIPLOMAT (Feb. 2, 2019), <https://thediplomat.com/2019/02/rohingya-refugees-caught-between-india-and-a-hard-place>; 31 Rohingya Handed to Tripura Police Ending Standoff with Bangladesh, NDTV (Jan. 22, 2019), <https://www.ndtv.com/india-news/31-rohingya-handed-to-tripura-police-ending-standoff-with-bangladesh-1981568>.

Tatmadaw, in its operations against the ethnic Rohingya community in Rakhine.⁶⁰ In reaching its findings, the IFFC examined various instances of violence in the Rakhine, Kachin, and Shan regions of Myanmar from 2011 to 2018 that were illustrative of the Tatmadaw's systemic and premeditated oppression of the Rohingya minority. It found gross violations of human rights, criminal law, and humanitarian law as a result of mass murders, rapes, torture, routine forced confiscation of property, and burning of Rohingya villages. Even Bangladesh has felt ripples of the implications of the report for accountability. The pre-trial chamber of the International Criminal Court (ICC) recently issued an opinion, as a matter of *la compétence de la compétence*, stating that it could exercise jurisdiction over Myanmar officials, whose actions resulted in the forcible deportation of Rohingya into neighboring Bangladesh, which is a state party to the Rome Statute.⁶¹ Deportation in this case would be investigated as a crime against humanity and would be a continuing offence, one that originated in Myanmar and percolated into Bangladeshi territory without ending in Myanmar.⁶²

The issue of jurisdiction arose because of Myanmar's unwillingness to cooperate with investigations and Bangladesh's inability to prosecute, apart from the general lack of mobilization around a Security Council referral of the matter to the ICC. More broadly, and extrapolating even further, it could also be argued that in the event that an NRC update leads to violence and deportation of thousands deemed ineligible for citizenship (thereby losing lawful status in India), the ICC could step in and pursue accountability for actions of India—though a non-party to the Rome Statute—that resulted in forcible deportations to Bangladesh, or any other bordering party to the Rome Statute.⁶³

60. Human Rights Council, Rep. of the Indep. Int'l Fact-Finding Mission on Myan., ¶ 85–87, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

61. Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ¶ 88 (Sept. 6, 2018).

62. *Id.* ¶ 50, 66.

63. Priya Pillai, *ICC Ruling on Rohingyas Can Impact India As Well*, HINDUSTAN TIMES (Sept. 19, 2018), <https://www.hindustantimes.com/analysis/icc-ruling-on-rohingyas-can-impact-india-as-well/story-4wPIo90MFqIcAfwgXuoXTK.html>.

The Rohingyas have been accused by the Indian government of being “illegal immigrants” who have not followed the procedure to apply for asylum, and are therefore not entitled to refugee status.⁶⁴ Ironically, the government has not prescribed any procedure by which to seek asylum in India. The notion that all Rohingyas are illegal immigrants seems to be based on suspect discriminatory motives on the part of politicians and various authorities in India, making the case stronger for a uniform national law that clearly defines refugees and distinguishes them from other classes of migrants. On the international plane, India has attempted to keep up appearances by signing onto the New York Declaration for Refugees and Migrants, 2016, the precursor to the widely lauded 2018 Global Compact on Refugees.⁶⁵ However, this discrepancy between international engagements and domestic practice must be flagged, and the international community should pressure India into addressing its actions and inactions back home. Closing the regulatory gap would definitely make it tougher for the Indian government to continue with its ad hoc policies and discriminatory treatment, bringing it in line with international obligations on refugee treatment and protection.

64. Vijaita Singh, *Rohingya Are Illegal Immigrants, Not Refugees: Rajnath*, HINDU (Sept. 21, 2017), <https://www.thehindu.com/news/national/rohingya-are-illegal-immigrants-rajnath/article19726476.ece>.

65. Pallavi Saxena & Nayantara Raja, *The Imperative to Offer Refuge*, HINDU (June 20, 2018), <https://www.thehindu.com/opinion/op-ed/the-imperative-to-offer-refuge/article24203930.ece>.

