Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?

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1 Introduction

This article emerges from, among other factors, my identity and my lived experiences and understanding of South Asian history. Those who had firsthand experiences of the malaises of the Partition of India in 1947 are long gone, and the current generation of people have effectively become “custodians of such collective memory” that have been deeply etched in the identity and ethos of a subcontinental being.¹ The memories of the Partition of India, though not mainstream, serve to signify the development of modern-day South Asia and also “humanize and pluralize Partition stories” – characteristics that escaped British imagination and colonial historiographies which projected distorted tropes that served to demonize the subaltern and further their own political goals.² I believe that I too have the responsibility to not only articulate such memories through academic interventions, but also provide some steps towards understanding refugee history that has overlooked the subjective experiences of displacement in the aftermath of the Partition. This article forms a small part of a larger project – to write into international refugee law the alternate modes of international protection that resist and challenge the Eurocentric and hegemonic norms as outlined by the 1951 Convention Relating to the Status of Refugees, which projects a faux universality with respect to its application.

The article's objective is to analyze the marginalization of South Asian experiences of refugeehood and provide some insights into the alternate mechanisms of refugee protection that have been developed in response. The first part of this article will engage in discussions on South Asian states' relationship to the 1951 Convention Relating to the Status of Refugees. While many scholars have

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1 YASMIN KHAN, *THE GREAT PARTITION: THE MAKING OF INDIA AND PAKISTAN* xxv (2017).

2 *Id.*

called for South Asian nations to sign and ratify the 1951 Convention, this article will rationalize the regional disillusionment to the Convention's approach. The second part of the article will attempt to engage with discussions on Third World Approaches to International Law (TWAIL) and its role in understanding South Asian approach to the global refugee regime, in an attempt to decenter the narrative to bring postcolonial states within the purview of such discussions. The third part of the article will articulate moments of defiance with the help of case law and archival records. The article will conclude with a short analysis on the significance of alternate locations of practice to enable a more holistic understanding of the global refugee regime.

A rich body of literature has analyzed the Partition and its repercussions on the subcontinent's reconstruction after the formal end to colonialism. However, a regional myopia is noticeable in its understanding.³ The Partition of India should be understood as a global event akin to post-WWII reconstruction of Western Europe that also resulted in mass displacement across newly formed nation-states. As Vazira Zamindar outlines the mechanics of the Partition, similarities of such dispossession and disenfranchisement can be drawn from the European experience. She explains: "[A] Partition Council began exacting the task of counting and dividing the vast machinery of colonial statecraft into two – everything from tables and chairs, weather instruments and military hardware, to railway engineers and office clerks."⁴ Millions were dispossessed by both India and Pakistan as a result of this violent end to formal colonialism. Stories of the Partition invoke and capture the quintessential nature of "all the aporias of belonging in a cartography of nation-states. Where ... is India? Where is Pakistan? Who is Indian? Who is Pakistani?"⁵

The international community's response to the displacement in Western Europe post-WWII was accompanied by institutionalization of refugee protection mechanisms. However, contemporaneous displacement during and after the Partition of India did not capture as much attention at an international level. This article argues that displacement was as much a defining feature of the Partition of India as it was during post-WWII reconstruction of Europe. Despite forced displacement being a defining feature across the globe during this time, much of the literature has extensively focused on the latter. This article will attempt to demonstrate the gaps that persist with respect to conceptualizing forced displacement in South Asia. Given the lack of deeper examination of

3 *Id.* at xxi.

4 VAZIRA FAZILA-YACOOBALI ZAMINDAR, *THE LONG PARTITION AND THE MAKING OF MODERN SOUTH ASIA: REFUGEES, BOUNDARIES, HISTORIES 1* (1st ed. 2010).

5 *Id.* at 2.

refugee protection in the region, this article will establish how resistance to the global refugee regime has been articulated with the establishment and implementation of ad-hoc alternatives to hegemonic refugee protection.

1.1 *1951 Convention Relating to the Status of Refugees*

The international community's efforts in post-WWII repatriation of European refugees and forced migrants were marked by the United Nations proposing the "assimilation of all stateless persons, including refugees, under a new international regime."⁶ Despite political antagonism that proved to be obstacles to effectively actualizing a holistic vision of refugee protection, the United Nations High Commissioner for Refugees (UNHCR) was established and an effective international refugee protection instrument was proposed, i.e., the 1951 Convention Relating to the Status of Refugees.⁷ The Convention was viewed as the cornerstone in refugee protection norms. It was also an attempt to codify legally binding international refugee protection mechanisms. Given that the Convention was built on the heels of post-WWII disenfranchisement in Europe, the definition of a refugee was constrained temporally and geographically.⁸ This meant that the Convention applied only to those who were fleeing specific circumstances, during specific periods in history, in Europe.⁹ The 1967 Protocol Relating to the Status of Refugees abolished the temporal and geographical restrictions so as to allow for a more universal application of the 1951 Convention's norms.¹⁰ Despite the 1967 Protocol removing the temporal and spatial constraints, South Asian States remained disillusioned with the Refugee Convention's core objectives. Perhaps for this

6 JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 91 (2005).

7 *Id.*

8 *See id.* at 96.

9 Article 1(A)(2) of the *Refugee Convention* (For the purposes of the present Convention, the term "refugee" shall apply to any person who: As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it); Convention relating to the Status of Refugees art. 1(A)(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

10 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 8791 (entered into force Oct. 4, 1967).

reason, States in the region have instead chosen to regard refugee protection as matters between States and have reasserted their position that the Convention and Protocol fail to capture the experiences of displacement in the region by not ratifying these instruments.

1.2 *Imprecision of the Global Refugee Regime*

Over the years, a growing body of academic literature and judicial interventions have interrogated normative characterizations of forced displacement, which has led to problematizing pre-existing narratives on this issue. McAdam and Goodwin-Gill argue that the current refugee regime “imperfectly [covers] what ought to be a situation of exception” and continues to be an incomplete legal framework.¹¹ The refugee framework was established in light of conflicts and upheavals faced by the international community, which caused mass migration and disenfranchisement. Hathaway points out that the system of protection for refugees was imprecise and did not clearly set up specific responsibilities for states. The initial perception of the refugee protection, as a temporary mechanism, also added to the imprecision.¹² The current system of refugee protection “rejects the goal of comprehensive protection for all involuntary migrants.”¹³ The responsibility of states to step in to protect those involuntary migrants is limited. Additionally, Hathaway argues that the assistance provided to refugees is done so without taking into account their subjective experiences, due to the standardized characterization of a refugee.¹⁴ Existing refugee protection mechanisms only take into account the asylum states’ well-being and are the result of an uneasy “compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk.”¹⁵ This compromise results in a weak framework and a “narrow scope of legal protection,” as it fails to meet the needs of forced migrants.¹⁶

Gil Loescher in his work also points to the shortcomings and limitations of the current refugee protection framework. By problematizing the current characterization of refugees, Loescher argues that a majority of forced or

11 GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 1 (3rd ed. 2007).

12 *Id.* at 86.

13 James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 *HARVARD INTERNATIONAL LAW JOURNAL* 129, 132 (1990).

14 *See id.*

15 *Id.* at 133.

16 *Id.*

involuntary migrants today are fleeing circumstances other than those outlined in the 1951 Convention.¹⁷ State incompetence and failure are more prominent circumstances as opposed to state persecution. By pointing to the example of the decade long economic and political disarray in Zimbabwe in the early 2000s, Loescher argues that only small minority of those who fled the country were doing so due to individualized persecution.¹⁸ He points to normative gaps in the current framework of refugee protection by arguing that widespread human rights deprivations, state fragility and environmental distresses have also caused displacement in recent years. Loescher calls for a better understanding of human mobility to better afford protection for those facing such crises.¹⁹

2 Regional Disillusionment to the Refugee Regime

2.1 *From the League of Nations to the United Nations*

India's experience with refugee protection predated post-Partition displacement. A founding member of the League of Nations,²⁰ India had provided assistance, sanctuary, and identity certificates to Russian refugees²¹ and refugees from the Saar.²² As part of efforts to settle Jewish refugees in India, a Jewish colony was created in the suburbs of Delhi to aid those expelled from Germany.²³

17 Gil Loescher, *Human Rights and Forced Migration*, in HUMAN RIGHTS: POLITICS AND PRACTICE 311 (Michael Goodhart ed., 3rd ed. 2016).

18 *Id.*

19 *Id.*

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

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

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

23 Letter from Indian civil servant Badri Prasad Mital to The Right Honourable Edward Fredrick Lindley Wood, Baron Irwin of Kirby Underdale on the 'Proposed Settlement of Jewish Refugees in India' (Jan. 16, 1939), in Settlement of Jewish Refugees in India, FO 371/24098/1737, Registry No W 1737/1737/48 (National Archives, London). The request was forwarded by A. Dibdin, Esq, India Office to AWG Randall, Esq, Foreign Office (Document No P & J 671/39 in the same file, dated 17 February 1939). The request was

Despite India's engagement in these processes, it was with mixed sentiments. Some Indian nationalist leaders declared that "the League of Nations was a fraud and was meant for the perpetuation of imperialism",²⁴ while a member of India's Council of State, Phiroz Sethna, argued that "India cannot take her rightful place in international affairs unless she has her right place as a nation".²⁵ India subsequently became a full member of the United Nations while it was still under British rule.²⁶

2.2 *Partition of India and Drafting of the Convention*

The Partition of India, which divided British India into India and Pakistan, constituted a violent end to formal colonialism in South Asia and resulted in mass displacement across newly created international borders – Hindus and Sikhs to India, and Muslims to Pakistan.²⁷ Both States faced tremendous challenges in responding to the protection needs of the displaced, which led to "extraordinary interventions"²⁸ and the groups being pitted against one another.²⁹ This coincided with the early deliberations for a post-war international refugee treaty. Reflecting on these deliberations during a visit to Europe in 1946, India's Defence Minister, V.K. Krishna Menon, stated that "[the] outstanding and overall impression left on my mind are very limited reference to our internal problems and difficulties",³⁰ a matter that coloured both India and Pakistan's engagement with the formal drafting process of the Refugee Convention.

After the Partition, India and Pakistan attempted to engage constructively with the formal drafting process of what was to become the Refugee Convention.³¹ A UN General Assembly resolution adopted in January 1946 stated that the "main task concerning displaced persons [was] to encourage and assist in every way possible their early return to their countries of origin".³²

subsequently approved by the latter without objection on 23 February 1939, as per a handwritten note in the same document.

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

25 *Id.* at 13.

26 *Id.* at 17.

27 ZAMINDAR, *supra* note 4, at 1.

28 KHAN, *supra* note 1, at xxiii.

29 ZAMINDAR, *supra* note 4, at 1.

30 Government of India, External Affairs Department, *Report by V.K. Krishna Menon on Visits to Various European Capitals*, at 41 (Government of India Press 1946) (cited in Oberoi 18 n. 1).

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

32 'The Question of Refugees, UNGA res. 8(I) (Jan. 29, 1946). See also Constitution of the International Refugee Organization (adopted Dec. 15, 1946, entered into force Aug. 20, 1948) 18 UNTS 3.

At the 77th meeting of the Third Committee on Social, Humanitarian and Cultural Questions, the representative from Pakistan drew attention to that resolution and stated that “[to] avoid disturbing friendly relations between nations, refugees should not be settled in a region in which the majority of the inhabitants were opposed to such resettlement”.³³ The representative noted that the resolution provided that States should be willing to encourage and assist in every possible way the early return of persons of concern to their country of nationality or habitual residence. However, given the unique circumstances of the Partition of India, which created new borders along ethno-religious lines, the idea of returning people to their place of habitual residence or country of nationality could not be considered. At a subsequent Economic and Social Council (ECOSOC) meeting in 1949, India sought to recognize its efforts in assisting refugees during the Second World War. However, from 1947 onwards it had been faced with its own refugee problem, post-Partition, and ‘had been unable to give anything more than moral support to the International Refugee Organization’.³⁴ The Indian representative pointed out that this ‘was not from lack of sympathy with its aims, but from lack of resources’.³⁵ Despite their initial reluctance, India and Pakistan continued to engage with the formal drafting process of the Refugee Convention. However, both States expressed concerns on various issues, most importantly the definition of a refugee. Noting the option contained in article 1B of the Convention to limit the definition to people displaced on account of ‘events occurring in Europe before 1 January 1951’, the representative from Pakistan ‘was of the opinion that the definition ... should not be limited by any territorial boundaries’, and furthermore expressed the hope ‘that the scope of the definition would be extended by the General Assembly so as to cover unfortunate people both inside and outside the boundaries of Europe’.³⁶ In separate meetings of the Third Committee, India and Pakistan’s permanent representatives to the United Nations requested that the Convention address racial and religious discrimination directed towards some refugees.³⁷ They also expressly requested

33 Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Seventh Meeting held at Lake Success, New York (Nov. 6, 1947), U.N. Doc. AC.3/SR.77, 189 (statement of Mrs. Hussain).

34 Economic and Social Council, Summary Record of the Ninth Session, Three Hundred and Twenty-Sixth Meeting (Aug. 6, 1949) U.N. Doc. E/SR.326, 628 (statement of Mr. Desai).

35 *Id.*

36 Economic and Social Council, Summary Record of the Eleventh Session, Four Hundred and Sixth Meeting (Aug. 11, 1950) U.N. Doc. E/SR.406, 278 (statement of Mr. Amin).

37 Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Seventy Ninth Meeting, held at Lake Success, New York (Nov. 7, 1947) U.N. Doc.

that displacement resulting from the Partition be addressed. However, they were met with resistance, resulting in their disillusionment with both the Convention and UNHCR's mandate.³⁸ India stated that the 'objections raised confirmed [their] belief that fundamental differences existed'.³⁹

Despite efforts to draw attention to post-Partition displacement the international community failed to see this as a situation of mass displacement. The complex history of the Partition of India captures the depth of dispossession and disenfranchisement of South Asians amidst incomprehensible bureaucratic and physical violence that was the result of cartographic divisions mapped on to people. States in the region were left to find solutions in their own terms given the international community's disregard. Pakistan, for instance, included *muhajir* or refugee as a category in its 1951 census. *Muhajirs* were those who had moved to Pakistan as 'a result of Partition or fear of disturbances connected therewith'.⁴⁰ The newly formed government of Pakistan provided them settlement in urban areas in the province of Sindh. Similarly, India and Pakistan signed the 1950 Nehru-Liaquat Pact whereby the two governments agreed to protect people who had been displaced as a result of violence along religious lines.⁴¹ The pact also guaranteed minorities throughout 'complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality'.⁴² South Asian States' responses to mass exodus since the Partition of India show that, in essence, they have adhered to the core principle of *non-refoulement* in article 33 of the Convention.⁴³ A number of ad hoc mechanisms have developed to provide sanctuary, material assistance, and protection to refugees. Tibetan, Sri Lankan, and Bangladeshi refugees in India, Afghan refugees in Pakistan, Bhutanese refugees in Nepal,

AC.3/SR.79, 200 (statement of Mr. Sen). See also Third Committee 189 n 9 (statement of Mrs. Hussain).

38 Oberoi, *supra* note 31, at 42.

39 Third Committee, Social, Humanitarian and Cultural Questions, Summary Record of the Eightieth Meeting held at Lake Success, New York (Nov. 7, 1947) U.N. Doc. AC.3/SR.80, 211 (statement of Mr. Sen).

40 *Id.*

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

42 *Id.* para. A.

43 Veerabhadran Vijayakumar, *A Critical Analysis of Refugee Protection in South Asia*, 19(2) REFUGE IO (2001).

and Rohingya refugees in Bangladesh have all been provided either temporary sanctuary or long-term protection.⁴⁴

2.3 *A Myth of Difference: Racialization of the Refugee Regime*

B.S. Chimni's work suggests another reason for regional disillusionment from a more contemporary sense. He argues that a new approach that challenged the established notions of refugee law "created the myth of difference (the idea that great dissimilarities characterized refugee flows in Europe and the Third World)."⁴⁵ The myth of difference contributed to an understanding that "the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe since the end of the First World War."⁴⁶ This approach created "an image of a 'normal' refugee" who could be identified as "white, male and anti-communist – which clashed sharply with individuals fleeing the Third World."⁴⁷ This approach, as Chimni argues, not only created an inherent difference in the way forced migration was perceived in the Third World, but also laid the blame of disproportionate refugee flows on postcolonial states. This underestimated the role that colonialism played in creating such instabilities and postcolonial anxieties of individuals.

Such a disparate perception of groups of refugees originating from the Global South is not new, given the exclusion of such narratives during the establishment stage of the Convention. The subcontinent's disillusionment with the global refugee regime could also be attributed to the racialized and colonial origins of the idea of 'human,'⁴⁸ which resulted in a widespread dispossession and disenfranchisement in the region. As Mayblin argues, the myth of difference, in addition to historically constrained notions of persecution, was foundational in conceptualizing specific practices of international protection; this points to the "hegemonic epistemology of colonial modernity ... as the most adequate framework within which one might begin to understand the exclusionary politics of asylum today."⁴⁹ The inadequacy of integrating postcolonial anxieties, theories of race and racism within the historical development of the global refugee regime is essential to understanding South Asia's disillusionment.

44 *Id.* at 9.

45 B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 JOURNAL OF REFUGEE STUDIES 350, 350 (1998).

46 *Id.* at 351.

47 *Id.*

48 LUCY MAYBLIN, *ASYLUM AFTER EMPIRE: COLONIAL LEGACIES IN THE POLITICS OF ASYLUM SEEKING* 30 (2017).

49 *Id.*

The effects of the Partition of India are far-reaching and have continued to define the experiences of modern-day South Asia. However, as Khan points out, the Partition risks being viewed as an exceptional circumstance that induced massive mobility across such borders. Such understandings further place the history of displacement that foregrounded the founding of modern-day South Asia, beyond the means of comparative accounts. This has resulted in the systematic silencing of post-Partition woes of many who continue to feel its effects.⁵⁰

While the objective is not to subsume the subcontinent's colonial and post-colonial refugee history into European or Western history, it is significant to note that this narrative of exclusivity has largely left out questions on what constitutes forced displacement or who can be identified as a refugee in South Asia, which could serve as a rationale for regional disillusionment. Despite the Partition of India resulting in one of the largest displacements in the 20th century that were comparable to the events of post-WWII Europe, they failed to make an impact on the establishment of the international protection framework that characterized refugeehood based on strict characteristics that were uniquely European and excluded the experiences of the subcontinent.⁵¹ A narrow definition of what constituted persecution or its well-founded nature, under the auspices of the 1951 Convention, failed to capture the subjective experiences of colonial violence within its purview. As Zamindar argues, the subcontinent's experience of colonial and postcolonial displacements "has largely gone unexamined ... because of its peripheral location to postwar international order."⁵²

3 TWAIL and Its Impact on Understanding South Asian Perspectives on the Refugee Regime

It is evident that refugee frameworks that pre-existed the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol have mandated states to operate under the terms as set out by Eurocentric norms. States contravening such terms have been viewed as transgressors. This legacy of Eurocentricity has continued to be the basis for the current refugee framework as well. The narratives on India's relationship to an international legal framework like that of the global refugee regime have often been viewed as a form of 'subcontinental

⁵⁰ KHAN, *supra* note 1, at xxiii.

⁵¹ ZAMINDAR, *supra* note 4, at 6.

⁵² *Id.* at 6–7.

defiance.' This then begs the question on whether 'Indian exceptionalism' with respect to the global refugee regime could be viewed as a defiant or deviant position.

At the heart of TWAIL is the idea that Western states have always enjoyed a sense of dominance through presumed superiority, enabling them to suggest other nations are like-minded when it comes to the international legal order.⁵³ They have not only been successful in maintaining the status quo of imbalance inherent in international law but have also been instrumental in establishing the rules governing that legal order. This perpetuates the West's practice and tendency to use global legal institutions to continuously persecute and demonize the Global South.⁵⁴ At the heart of this lies international law's deep connections to structures of power and inequality. However, international legal order remains a contested space in which some states continue to challenge this sense of hegemony through their acts of defiance and resistance by developing ad-hoc and parallel mechanisms towards international protection of refugees. Jan Hendrik Willem Verzijl in his 1957 article wrote:

Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of [European] beliefs, and in both of these aspects it is mainly of Western European origin.⁵⁵

This quote is reinforced in the work of Antony Anghie, who argues that "international law regards colonialism ... and ... non-European societies and their practices ... as peripheral to the discipline ... because international law was a creation of Europe."⁵⁶ This sense is reflected clearly in several frameworks of international law, more specifically the global refugee regime. As mentioned earlier, South Asia's sidelining during the initial discussions around the 1951 Convention Relating to the Status of Refugees is a clear example. This goes to the heart of what Anghie describes: "[c]olonialism ... [is] far from

53 See GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 6 (2004).

54 *Id.*

55 J.H.W. Verzijl, *Western European Influence on the Foundation of International Law*, 1 DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES ANNUAL MEMORIAL LECTURE 137 (1957).

56 Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, in 27 *THIRD WORLD QUARTERLY* 739, 739 (2006).

being peripheral to the discipline of international law [as it] is central to its formation.”⁵⁷ The false sense of universalism projected by international law frameworks is the result of colonialism.⁵⁸ As a result of the process by which positivist jurists devised doctrines founded on “explicitly racial and cultural criteria to decree certain states [and peoples as] civilized,”⁵⁹ non-European societies were sidelined and expelled from the realm of international law since they were considered devoid of any cognizable legal personality. Such societies, in the eyes of the Europeans, were incapable of raising any objections to dispossession and disenfranchisement which were integral parts of conquest and exploitation.⁶⁰ Therefore, it is easy to recognize the systematic process by which colonialism managed to define and subsume personhood and identity of colonial subjects within the bounds of European experience, which then enabled the entrenchment of a deeply flawed system of international legal order that continued to advance the interests of hegemonic states in the Global North.⁶¹

Finally, international law frameworks like the 1951 Convention can be viewed as exclusionary from TWAIL lens. As Anghie points out, with the emergence of colonial territories into sovereign states, their involvement in and challenges to the predominant system were viewed as a disruption to the pre-existing global legal order.⁶² International law, which was undoubtedly European in nature, began to view newly independent states as outsiders who had to be accommodated within the system. The lack of reflexivity is clear from the establishment of the Convention as European solution to a European problem. While the Convention deemed those disenfranchised post-WWII in Europe as worthy of protection, postcolonial anxieties that led to mass displacement across newly created international borders in the subcontinent failed to feature within this framework. This clearly captures the notion that non-European states and their issues were viewed as “peripheral to ... international law.”⁶³ Larger European states continue to find ways to exclude and marginalize states in the Global South with the help of the international law that the former created.

57 *Id.* at 742.

58 *Id.*

59 *Id.* at 745.

60 *Id.*

61 *Id.*

62 *Id.* at 740.

63 *Id.* at 739.

4 Deviance v. Defiance: How is Resistance to Hegemony Expressed by South Asia?

Having established that the existing global refugee regime constitutes an imperfect and incomplete framework in providing protection to people of concern, it is critical to confront the historical imbalances that have defined the development of the regime. TWAIL has certainly proven to be a convenient crucible for theoretical musings to identify structures that are inherently disadvantageous to the welfare of Third World states and peoples. This emerges from B.S. Chimni's criticisms of TWAIL, the very discipline and scholarship he helped propel; he argues that "[u]nfortunately, TWAIL ... has [never] been able to effectively critique neo-liberal international law or project an alternative vision of international law."⁶⁴ However, this argument questions the efficacy of TWAIL and "bemoans [the] collective failure [of Third World] to articulate an alternative to the mainstream international legal regime."⁶⁵ As Al Attar and Miller argue, despite decades of TWAIL scholarship "redress[ing] the historical biases that ... undermine Third World well-being[,] power imbalances continue to persist."⁶⁶ For instance, this is evident from the lacunae that exists in contextualizing forced migration in South Asia. The newly independent states in the region were compelled to establish reactionary or ad-hoc measures to protect forced migrants. This echoes Al Attar and Miller's counter argument to Chimni's prevailing view of Third World states' inability to articulate a cohesive counter-vision to structural imbalances. Al Attar and Miller argue that the clarity in this vision is not for the states' lack of trying but the "result of ... forceful counter-challenges waged by First World actors, unmoved by the Third World plight."⁶⁷

However, India's role in developing ad-hoc protection mechanisms continues to be met with reproach. For instance, a March 2008 article titled *India Needs a Refugee Law* in the Economic and Political Weekly by Saurabh Bhattacharjee quite articulately presents a case for India's need to develop a comprehensive domestic refugee law, while simultaneously adhering to its

64 B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 47, 48 (Antony Anghie, B.S. Chimni, Karin Mickelson & Obiora Okafor eds., 2003).

65 Mohsen Al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 31 *THIRD WORLD QUARTERLY* 347, 348 (2010).

66 *Id.* at 347.

67 *Id.*

commitments and obligations to customary international law.⁶⁸ The arguments are based on the Constitution of India that presents a directive principle that India shall envisage to respect international law and treaty obligations.⁶⁹ While the article acknowledges that India's disillusionment with the 1951 Convention Relating to the Status of Refugees was based on the framework's Eurocentrism, it criticizes India for seeking assistance from the UNHCR during the arrival of Iranian and Afghan refugees in the 1980s. Bhattacharjee also makes the assumption that India has absolved itself of its responsibilities towards the principles of non-refoulement and other refugee protection standards by not acceding to the Convention.⁷⁰ He concludes by arguing that "Indian law and practice provides a distorted and incomplete protection to refugees [and] ... fails to recognize them as a distinct category of persons."⁷¹ Bhattacharjee goes on to say that India has failed in its commitments to human rights standards and has denied basic protection to a large number of refugees.

Bhattacharjee's characterization of India as divergent with respect to its commitments to refugee protection is not uncommon given the predominant narrative expressed by the international community to characterize non-signatory states. The ongoing policies and legislative interventions of the Indian government, namely the Citizenship Amendment Act of 2019, certainly point to such indifference. However, a more pragmatic approach to India's disillusionment with the international frameworks like the Convention and the Protocol provides a more comprehensive view of some of the regional or national developments on refugee protection. Historically, India has shown resistance to the global refugee regime, which moderately embodies the vision of TWAIL scholarship and provides an opportunity to actualize some of the visions to temper the pre-existing structural imbalances in the global refugee regime.

4.1 *Examples of Resistance*

For instance, in the 1960s, when Tibetan Refugees arrived in India, then Prime Minister of India Jawaharlal Nehru declined the assistance of the Office of the UNHCR on the basis that India's treatment of Tibetan refugees would be internationally inspected and scrutinized. Non-cooperation was demonstrable from India's rejection of a proposal to have a UNHCR representative

68 Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 ECONOMIC AND POLITICAL WEEKLY 71 (2008).

69 *Id.* at 72.

70 *Id.*

71 *Id.* at 74.

present in the country to oversee the operations of resettling Tibetan refugees. A deep sense of paternalism and colonial characterization of the conditions of refugees in India is also obvious from another Interoffice Memorandum between the UNHCR Representative from London and the UNHCR Geneva dated January 8, 1963.⁷² This particular memorandum refers to the visit of Lady Alexandra Metcalfe (daughter of the former Viceroy of India, Lord Curzon) to India to inspect the status of Tibetan refugees. References were being made not only to the “deplorable conditions of Indian citizens” but also to India’s “apathy towards Tibetan refugees.”⁷³

The archives also show an Interoffice Memorandum dated November 6, 1961 from Gilbert Jaeger, then Deputy Director of the Office of the UNHCR in Geneva, during the peak of the Tibetan refugee influx in India. The memo referred to the visit of a representative Mr. P.N. Sharma from an Indian-based NGO Lok Kalyan Samiti.⁷⁴ The memorandum indicated that Mr. Sharma had asserted that the UNHCR “could not and should not impose its assistance upon the Indian government and could not start collecting aid for Tibetan refugees in India in the present circumstances.”⁷⁵

One final moment of resistance can also be noticed with the rejection of international institutions to be established and accredited in India with respect to resettling Tibetan refugees in India. A letter dated January 25, 1962 from the Central Relief Committee’s General Secretary Mr. Kalyan Singh Gupta to Mr. Gilbert Jaeger shows that the Government of India was welcoming aid from voluntary organizations, be they foreign or Indian. However, Mr. Gupta made it abundantly clear that the Central Relief Committee was the agency “responsible for receiving and coordinating such aid.”⁷⁶ Mr. Gupta asserted that such circumstances mandated that aid would be acceptable “provided these are made direct to the Central Relief Committee India, which is the operative agency.”⁷⁷

72 Memorandum from the UNHCR Rep. London on Tibetan Refugees to the High Comm’r for Refugees, G.XV.1.15/46 – 4/11 (Jan. 8, 1963).

73 *Id.*

74 Interoffice Memorandum from Gilbert Jaeger, Deputy Dir. of the High Comm’r, on Tibetan Refugees in India – Visit of Shri PN Sharma, File No. 11/1-15/0/IND/TIB (Nov. 6, 1961) (UNHCR Archives, Geneva).

75 *Id.*

76 Letter from Kalyan Singh Gupta, Gen. Secretary of the Central Relief Committee (India) to Gilbert Jaeger, Deputy Dir. Off. of the High Comm’r for Refugees, File No. 11/1-15/0/IND/TIB, Ref. No. 16(62)-9030 (Jan. 25, 1962) (UNHCR Archives, Geneva).

77 *Id.*

The archival documents demonstrate India's resistance to the global refugee regime and international assistance. The assertion of an independent oversight body to extend protection to refugees also demonstrates the rejection of normativity with which refugees were being characterized under the refugee regime. This was one of the many moments of the subcontinent's defiance and iconoclasm to an assumed universality of a Eurocentric global refugee regime. This also provides a glimpse into an alternate location of practice of refugee protection that has been in existence in the global sphere for several decades.

Despite non-accession to international refugee law instruments, states in the region have continued to provide protection in a way that is different from Western notions. For instance, from a contemporary sense, South Asian states are not new to widespread involuntary migration. The Partition of India in 1947, the Tibetan influx of the 1960s, the Bangladesh Liberation War of 1971 and the Sri Lankan Civil War that ravaged the island nation for close to three decades from the 1980s have all led to massive human mobility within the region. South Asian states are also experiencing an influx of Rohingya refugees from Myanmar in the recent years. However, the relegation of South Asia's contextual specificities by a hegemonic refugee framework has resulted in the establishment of domestic ad-hoc solutions to respond to periods of human mobility in the region. In addition to the constraints and imprecisions inherent in the international refugee regime, nuancing refugeehood in countries that do not possess a national asylum law is more complex.

4.2 *Case Law and Jurisprudence*

An examination of such ad-hoc solutions also points to the fact that countries like India have developed policies, complex case laws and jurisprudence to tackle issues of refugee protection despite not being signatories to the 1951 Convention. For instance, the case of *Khudiram Chakma v. State of Arunachal Pradesh*⁷⁸ emerged from a writ petition filed by Chakmas, a group that sought refuge in India from Bangladesh in 1964. Under a resettlement scheme drawn up in 1996, the Chakmas were resettled to the North East Frontier Agency, which later became the Indian state of Arunachal Pradesh. However, a few years later, local villagers lodged complaints against the Chakmas alleged that they were encroaching on their lands and dealing with arms and ammunition.⁷⁹ An enquiry into the matter led to the Chakmas being vacated and moved back. The Supreme Court of India looked into Article 14 of the Universal Declaration

⁷⁸ *State of Arunachal Pradesh v. Chakma*, (1994) 1 SCC 615 (India).

⁷⁹ *Id.*

of Human Rights⁸⁰ to uphold the obligation of refugee protection. Though the principle of non-refoulement marks the foundation of the 1951 Convention Relating to the Status of Refugees, the Supreme Court of India in its own defiant sense held that Chakma refugees who had escaped persecution in Bangladesh could not be forcibly sent back due to the threats they may have faced. The Court further held that this could in turn result in the deprivation of their right to life under Article 21 of the Constitution of India.⁸¹

This approach was further reinforced in the case of *National Human Rights Commission v. State of Arunachal Pradesh*.⁸² This emerged from a public interest petition, filed by the National Human Rights Commission and sought to enforce the rights, under Article 21 of the Indian Constitution.⁸³ The Court in the National Human Rights Commission case held that “[the] Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws.”⁸⁴ The Court in this case also held that the “[s]tate is bound to protect the life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons ... to threaten the Chakmas to leave the State,” and included state institutions must take steps to “carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the state without being inhibited by local politics.”⁸⁵ A brief analysis of case law and archival analysis provides an indication that an alternative regime of protection is noticeable in refugee protection in the region. The larger research agenda is to present findings on whether there is coherence in the way the refugee definition has been applied in alternate locations of practice like the subcontinent.

The case of *Ktaer Abbas Habib Al Qutaifi v Union of India* originated from a special civil application to the High Court of Gujarat, which sought direction to release two Iraqi asylum seekers from detention in the western Indian state of Gujarat.⁸⁶ The petitioners sought a stay of deportation, based on the principle of *non-refoulement*, and release from detention. The court noted the Supreme Court’s ruling in *NHRC* that the Constitution guarantees certain

80 *Id.*

81 *Id.*

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

83 Article 21 of the Constitution of India states that “No person shall be deprived of his life or personal liberty except according to procedure established by law.” INDIA CONST. art. 21.

84 *Id.*

85 *Id.*

86 *Ktaer Abbas Habib Al Qutaifi v. Union of India*, (1999) CRI LJ 919 (India).

fundamental human rights to non-citizens,⁸⁷ and held that '[the principle of non-refoulement] prevents expulsion [sic] of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.⁸⁸ The court further stated that this aligned with 'Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of the United Nation [sic] including our country are expected to respect for international treaties and conventions concerning Humanitarian law'.⁸⁹

4.3 *Alternate Locations of Practice as Moments of Resistance to Hegemony*

The colonial ethos that institutionalized international law is highlighted by Falk and others. They question the role of international law by highlighting the notion that mainstream scholarship on the subject has failed to include perspectives from the Global South.⁹⁰ They argue that many within the South and the rest of the world have viewed the Third World as an object of regulation and repression, that have continued to ignore traditional legal norms. International law has been instrumental in homogenizing all legal traditions which tend to subsume identities of those in the Global South.⁹¹ They also point out that the role of resistance in shaping international law doctrines and institutions and the need to recognize its role are equally critical while discussing TWAIL.⁹² This notion is reinforced by Upendra Baxi in his account of TWAIL. He argues that the "Third World emerges through practices of resistance and struggle" by those under the yoke of coloniality. He further argues that such practices "offer the best possible readings of the critique" of the faux universalization of international law practices.⁹³

This article has set out to analyze the defiant role the subcontinent has played in developing alternate locations and mechanisms of practice by ignoring the hegemonic prescriptions that mandate specific standards for refugee

87 *Id.* at para. 10.

88 *Id.* at para. 18.

89 *Id.*

90 See Richard Falk et al., *Introduction, in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 1, 1 (Richard Falk et al. eds., 2008).

91 *See id.*

92 *See id.*

93 Upendra Baxi, *What may the 'Third World' expect from International Law?*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 9, 10 (Richard Falk et al. eds., 2008).

protection. The standards outlined by the global refugee regime have not been representative of the South Asian experience; hence resistance to such mechanisms is significant in this discussion. Therefore, as Falk and others argue, “normative implications of taking the resistance of the ‘Other’, ‘subaltern’ seriously, are significant” in discussions on TWAIL.⁹⁴ Baxi argues that “Third Worldism as offers histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilizational plurality and diversity.”⁹⁵ Though a critical reading of the international refugee regime has been quite prevalent, incorporating Baxi’s stance on civilizational plurality is not only a work in progress, but significant in the South Asian case. A holistic understanding of the role of the global refugee regime is possible with the help of writing into refugee history the postcolonial anxieties that continue to define South Asian identity and personhood. As Baxi argues Third Worldism offers some critical modes of reading the historical practices of resistance, “complicate ... [the] reading[s] [of] ... the normative” international law principles and “pose some profound challenges to the [‘] legalised hegemony[’] of the ‘Great Powers’ in relation to their [o]ther” or out-law states.⁹⁶

5 Conclusion

The contemporary foundation of refugeehood in South Asia was built on the origins of the Partition of India. The subsequent instability that led to involuntary migration across newly created international borders marks a significant aspect in history to map conceptualizations of refugeehood in the region. This enables an analysis on what the alternate conception is. But most importantly, articulating moments of defiance to the global refugee regime and exploring alternate locations of practice with respect to how forced migration is conceptualized and responded to could prove to be steps in the right direction in overcoming hegemonic approaches to how significant gaps in historical narratives and discourses on forced migration could be mitigated. The nature of international institutions in charge of refugee protection is intrinsically Eurocentric, a quality that is deeply entrenched in mechanisms and procedures adopted in their approach to their mandate. This demonstrates a need

94 Falk et al., *supra* note 90, at 4.

95 Baxi, *supra* note 93, at 10.

96 *Id.* at 11.

to project a sense of plurality in perspective with respect to what constitutes response to mobility as opposed to an assumed universality of the global refugee regime. The regime's grandiose aspirations of universalism present an illusory picture of accessible protection and humanitarianism, which makes all other forms of alternate histories, conceptions, locations of practice and discourses optional and relevant only as critiques to this larger hegemonic framework. Therefore, a few thoughts, as expressed in this article, on South Asia's place within forced migration studies are steps to initiate discussions on defiance to the global refugee regime.