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H. Knox Thames

American University Washington College of Law

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India's Failure to Adequately Protect Refugees

by H. Knox Thames*

India is home to one of the largest refugee populations in the world. According to the U.S. State Department's *Country Report on Human Rights Practices for 1998*, 315,493 refugees were residing in India. The United Nations 1951 Convention Relating to the Status of Refugees (Refugee Convention) defines a refugee as a person who, "owing to a 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." The Indian government, however, has signed neither the Refugee Convention nor its Protocol, and Indian law does not offer any special language or provisions for refugees, despite the large number of them seeking India's protection. Under Indian law, the term "foreigner" is the only reference to aliens of any kind; this places refugees, immigrants, and tourists in the same broad category. The Indian government dispenses the assistance available to refugees in a discriminatory and inequitable fashion. Indian laws, instead, should assist the refugees living within its borders in accordance with the international norms that the Refugee Convention established.

International Norms for the Treatment of Refugees

When a United Nations Member State signs the Refugee Convention or its 1967 Protocol Relating to the Status of Refugees (Protocol), it undertakes to apply the 34 rights and freedoms granted to refugees in the Refugee Convention. The Protocol updated the Refugee Convention by removing the geographic and temporal limitations that were originally written into the document. UN Member States that sign the Protocol are bound also to the definitions and rights in the Refugee Convention. The Refugee Convention presents standards dealing with discrimination on account of race, religion, or country of origin, as well as religious rights, property rights, right to association, access to courts, employment, welfare, housing, education, freedom of movement, identity papers and travel documents, expulsion, *non-refoulement*, and naturalization for refugees. The drafters based the list on the Universal Declaration of Human Rights, with the goal of assuring refugees' rights in their host countries. The world community now widely accepts these standards; as of October 1999, 137 countries have signed the Refugee Convention or its Protocol.

Although contracting states can add reservations to most of the articles, the drafters protected five rights and freedoms enumerated in the Refugee Convention from reservation: the refugee definition (Article 1), the obligation not to discriminate (Article 3), freedom of religion (Article 4), access to courts (Article 16(1)), and *non-refoulement* (Article 33). These provisions ensure that contracting states give people fleeing persecution the most basic assistance.

India has not agreed to any minimum standards for the treatment of refugees, and its policies towards refugees are without UN supervision. Moreover, India has rebuffed efforts from the United Nations High Commissioner for Refugees (UNHCR) and other international aid organizations to monitor and assist the Indian government with its refugee population. The Indian government repeatedly has barred access to many of the large refugee populations in the country's interior; international assistance and monitoring is occasionally granted for a very small number of refugees living in urban centers. The U.S. Committee for Refugees (USCR) 1998 Country Report on India cited that of the more than

300,000 refugees in India, only 18,500 have received UNHCR protection.

India's reasoning for not signing the Refugee Convention is the fear of indefinite legal responsibility for the vast numbers of persons seeking shelter. The Indian government does not believe it successfully can handle the requirements of the Refugee Convention, and such new pressures

would damage the country's economic and social balance. Moreover, USCR cited the Indian government as viewing the Refugee Convention as burdensome on the host country, while the international community is inactive. In addition, the Indian government argues its current refugee policy is in line with international norms.

Signing the Refugee Convention, however, would not only bind India to the obligations in the Refugee Convention, but it also would allow for substantial international assistance from other UN Member States for thousands of refugees in India. India's argument that the Refugee Convention places the burden on the host state while the international community is idle is unfounded because signing the agreement would allow UNHCR to provide greater assistance to the refugee population, relieving India of the burden. India's current policy is not adequately assisting the refugees within its borders, and its failure to recognize refugees will not cause the population to decrease. Yet, the government is unable to move forward, instead preferring to handle refugee situations on an *ad hoc* basis.

Indian Laws Inadequately Protect Refugees

Although the Indian government claims that its policies conform to international standards, no Indian law refers directly to refugees. The Registration of Foreigners Act of 1939, the Foreigners Act of 1946, and the Foreigners Order of 1948, are the primary documents that control the treatment of all foreigners in India. Article 2 of the 1939 Registration of Foreigners Act defines a foreigner as "a person who is not a citizen of India." The Foreigners Act of 1946 (Act) and the Foreigners Order of 1948 (Order) also use this definition of a "foreigner." Both the Act and the Order affirmatively give the Indian government the power to restrict movement inside India, to mandate medical examinations, to limit employment opportunities, and to control the opportunity to associate, as well as the ability to *refoule*, or "return," refugees. The Refugee Convention bars all of these actions.

Article 3 of the Order, the Power to Grant or Refuse Permission to Enter, lists some specific criteria for denying foreigners entry into India, such as requiring a valid passport and entry at a specified border location. In addition, the Indian government can prohibit entry in an *ad hoc* fashion, by attaching "such conditions as it thinks fit to grant leave to enter." If refugees cannot meet certain technical criteria, such as possessing a passport, the Indian government has the power to *refoule* them at the border, directly violating the Refugee Convention and customary international law. The U.S. Department of State, in its 1997 human rights report on India, cited examples of border authorities blocking entry to refugees without passports. Duplicating this power is Article 3(1) of the Act, which allows India to block entry of all foreigners. Once again, India does not have to consider any of the circumstances surrounding the person's request to enter, such as flight from persecution, but may "by order, make provision . . . with respect to all foreigners or with respect to any particular foreigner or any pre-

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scribed class or description of foreigner, regulating or restricting the entry of foreigners." In this area as well, the Act violates the Refugee Convention.

Article 3(2) of the Act lists restrictions that the Indian government can place on refugees already living in India, further violating the articles in the Refugee Convention. Article 3(2)(e) contains a list of nine broad orders regarding government regulation of rights and freedoms that the Refugee Convention guarantees. For example, India can require that foreigners reside in mandated areas. This restriction on movement enables India to confine foreigners to refugee camps and to conduct periodic camp inspections. Therefore, India can prohibit foreigners from associating with people it deems "inappropriate," prohibit select activities, and limit a foreigner's possessions. The language in Article 3(2) of the Act is broad and the terms are vague. Consequently, the Indian government has wide latitude in deciding which rights and freedoms in the Refugee Convention should be granted or denied to different refugee groups. For example, when the Chinese Premier visited in 1991, Tibetan refugee camp leaders and activists were arrested, and most Tibetan settlements and community organizations were placed under police surveillance.

The Order, like the Act, limits the rights and freedoms outlined in the Refugee Convention. Article 11 allows India to control an individual's place of residence, movement, "association with any persons or classes of persons," and possession of any specified articles. Article 10 of the Order, Restrictions on Employment, highlights sectors of employment not available to foreigners, unless the foreigner obtains special government approval. In addition, the Order gives India the power to create new restrictions on employment as it believes necessary. Article 14, Expenses of Deportation, allows India to seize a foreigner's personal property to pay for their transportation and/or living expenses if India decides it should remove or deny entrance to the foreigner. Thus, these articles of the Order make movement, possessions, association, and employment of persons a "privilege" that India can revoke. This power contradicts the Refugee Convention's list of rights and freedoms that must be observed.

India's *Refoulement* Policy

India's ability to *refoule* persons seeking asylum in India violates international customary law on the treatment of refugees, as well as the standards codified in the Refugee Convention. As part of customary international law, the policy of *non-refoulement* prevents a country from expelling refugees to countries where their lives or liberties would be threatened. The majority of states, including the 137 signatories to the Refugee Convention, consistently practice *non-refoulement* in its determination of whether to grant entrance to people seeking asylum. Furthermore, states consider *non-refoulement* an obligation to all persons seeking asylum, regardless of whether they are in countries that are signatories to the Refugee Convention. Most states, regardless of whether they are parties to the Refugee Convention, hold that *non-refoulement* transcends the Refugee Convention and observe this rule. The practice of *non-refoulement* by most states, as well as their respect for the policy as a legal obligation, has rendered *non-refoulement* customary international law. India consequently violates customary international law, as well as the Refugee Convention, when it returns groups at the border.

Incongruent Policy Toward Refugee Groups

India bases its treatment of various refugee groups on political grounds, resulting in an unstable and ever-changing domestic policy. India grants privileges to certain refugee groups based on bilateral and multilateral political relations with other states, as well as domestic political opinion. An examination of India's treatment of Tibetan refugees arriving in the 1960s and 1970s ver-

sus Tibetan refugees arriving since the 1980s provides an example of India's discriminatory policies. Tibetan refugees began to enter India in 1959, after Communist China's invasion of Tibet and its violent repression of a Tibetan rebellion, forcing the Dalai Lama, the spiritual leader of Tibet, to flee across the Indian frontier. 85,000 Tibetan refugees followed the Dalai Lama when China annexed Tibet in 1959. By 1998, according to the Tibetan Administration in India, the number of Tibetan refugees in India had reached more than 118,000. The Indian government conditioned the entry of any Tibetan refugees on the Dalai Lama's pledge to personally abstain from violent and political activities.

India gave Tibetan refugees arriving in the 1960s and 1970s preferential treatment compared to the other refugee communities living in India for a variety of reasons. The first group of Tibetan refugees to enter India had several exigencies that other refugee groups did not. First, a head of state of a previously independent country, the Dalai Lama, asked for shelter for himself and his people. Second, China's invasion of Tibet played a role in relations between Democratic India and Communist China and focused the world's attention on the Tibetans' plight. Third, Tibetan refugees were then, and still are, the largest body of refugees in India, and were thus too large a group to ignore. Fourth, Tibetan refugees are members of a society and culture that is eager to re-establish itself in its home territory and were viewed as only having a temporary reliance on India. As a result of these exigencies, India allowed the Dalai Lama to establish a Tibetan government-in-exile called the Central Tibetan Administration (CTA), seated in the northern Indian city of Dharamsala, but it did not officially recognize it. In addition, although no foreigners can own property in India, the Indian government provided land and housing to establish Tibetan farming settlements. Furthermore, the Indian government granted the Tibetan refugees who entered through the 1970s Indian Residential Certificates for identification purposes, permission to work, domestic travel rights, Indian Identity Certificates, which allowed them to travel outside India (similar to a passport), and medical treatment. Although, according to Indian law, the Indian government has no obligation to assist refugees, the Indian government chooses to grant these early Tibetan refugees services and opportunities no other group enjoys.

With the increasing number of Tibetan refugees coming to India after 1980, however, the Tibetan refugee community began to place greater strain on Indian services. The government decided to grant substantially less assistance to the Tibetan refugees arriving after 1980. According to both the USCR and the International Campaign for Tibet, although India admitted Tibetan refugees into the country after 1980, the government has denied these Tibetans both Residential Certificates and Identity Certificates. The refusal to grant both the Residential and Identity Certificates creates serious consequences because employment, international travel, and naturalization hinge on possession of these documents. As a result, these rights are unattainable for the new arrivals. In addition, the Indian government refused to grant Tibetans new allotments of land, despite the fact that the Indian government admitted 25,000 Tibetans between 1986 to 1996, according to a 1997 U.S. Senate Committee Hearing on Foreign Relations. CTA argues that this has led to overpopulation, unemployment, and food shortages in the Tibetan refugee community. Furthermore, press reports have described incidents of the Indian government returning to China small groups of Tibetan refugees seeking entry into India.

The Indian government's decline in assistance appears to be a result of India's attempt to improve its relations with China and domestic political opinion. Further subsidization of the Tibetan refugee community may strain India's relations with China. For instance, China could potentially view this assistance as Indian support for a Tibetan state, and subsequently, as an

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affront to China's sovereign claim over Tibet. In addition, the retrenchment of assistance is an attempt to stem the overpopulation of Tibetan settlements. According to a 1998 country report on India by USCR, "Because India has no legal framework for determining refugee status, it deals with refugees on an *ad hoc* basis, which has led to refugees being used as 'pawns in regional geopolitics.'" Basing refugee policy on domestic or foreign policy contradicts the purpose of the Refugee Convention.

Conclusion

India has an important role in the treatment of refugees because of its position as a leader in South Asia, setting an example for other states in the region, and it shelters one of the largest refugee populations in the world. India's lack of clear standards for the treatment of refugee groups, however, is resulting in violations of the international norms for the treatment of refugees.

Its policies are discriminatory and inequitable, even to members of the same group. Although Tibetan refugees who arrived prior to 1980 received adequate assistance from the Indian government, assistance to the Tibetan refugees who arrived after 1980 has declined greatly, forcing them to live in inhumane conditions. These inconsistent policies demonstrate that India should adopt basic standards of treatment for the refugees living inside its borders. In order for India to bring its refugee law into conformity with the international community, only improving its domestic laws is insufficient because it will continue to reject international assistance and monitoring of refugee groups. India should reform its refugee policies and accede to the Refugee Convention or its Protocol. ☉

**H. Knox Thames is a joint J.D./M.A. candidate at the Washington College of Law and the School of International Service at American University.*

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prospect of trials outside of Cambodia should not be discounted, and UN Member States should remain receptive to future opportunities to arrest former Khmer Rouge officials.

The possibility of domestic courts in states other than Cambodia prosecuting Khmer Rouge officials has complications. As the Group of Experts noted, securing custody over Khmer Rouge officials located in Cambodia is particularly problematic given the dearth of Cambodian extradition treaties and the fact that the surrender of officials, by extradition or otherwise, will ultimately require the consent of the Cambodian government, which it will unlikely give.

While the international community must remain conscious of these alternatives, the most likely prospect for Khmer Rouge accountability currently entails prosecutions before a joint or mixed tribunal, which would be established under Cambodian law but would involve international support and participation. In considering this option, the international community must continue to question the serious weaknesses identified in Cambodia's justice system as presently constituted, and must be cautious not to become a party to further serious violations of Cambodia's international human rights obligations through unfair trials. Both the international community and the Government of Cambodia should also bear in mind that Cambodian prosecutions of Khmer Rouge officials for acts that constitute serious violations of international humanitarian law in proceedings that do not meet international standards of impartiality and independence will not necessarily preclude the United Nations or its Member States from subsequently trying Khmer Rouge officials for the same acts in appropriate international or domestic trials. Nevertheless, hope remains that the Cambodian government and the United Nations will succeed in

finding an appropriate balance between the need for minimal guarantees of due process and Cambodia's desire to assume primary responsibility for trying the atrocities committed by the Khmer Rouge against its people.

Conclusion

The recent impasse between the United Nations and the Hun Sen government of Cambodia is one in a series of setbacks and frustrations surrounding the quest for Khmer Rouge accountability. The difficulties are not insurmountable, however, and the United Nations must persevere in its attempts to reach an acceptable arrangement with the Cambodian government. The most feasible prospect at present involves prosecutions by a joint or mixed tribunal under Cambodian law with international participation and support, and it is hoped that the interests of concerned parties inside and outside of Cambodia can be reconciled through this mechanism. At the same

time, adherence to minimal standards of due process must remain a fixed condition of any acceptable solution, and the international community should remain conscious of alternative means of prosecuting Khmer Rouge officials that do not necessitate Cambodia's voluntary cooperation, should negotiations with the Cambodian government ultimately fail. ☉

**Brian D. Tittlemore, LL.M. '95, is a staff attorney at the Inter-American Commission on Human Rights and a senior research associate at the War Crimes Research Office at the Washington College of Law. The opinions expressed are those of the author and not necessarily those of the Organization of American States or its organs, or the War Crimes Research Office.*



The Genocide Center outside Phnom Penh.

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