

Alien-Nation: Defining India's Refugee Policy

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ABSTRACT

The Indian subcontinent, pre-1947, was a melting pot of diverse cultures and beliefs before it was split into three separate nations by the partition. The subsequent physical demarcation into India, Pakistan, and Bangladesh only sparked a steady stream of cross-border spillovers, encouraged by the familial and racial bonds that persist even today. An assortment of refugees, economic migrants, and illegal immigrants flood into present-day India, and receive identical treatment under the Foreigners Act, 1948, despite their varied status under international law. Extending not only to Bangladeshis but also to Sri Lankan Tamilians crossing the narrow Palk Strait to trade and live in Tamil Nadu, the phenomenon of migration is catalysed by the ease of integration into an ethnically similar Indian society. The internationally recognised problem of repatriation is aggravated by cultural assimilation, further incentivising the cross-border journey from neighbouring states such as Tibet and Myanmar.

The lack of domestic refugee law, bilateral treaties, and international conventions pose an impending need to formulate specific provisions, as an attempt at equitable treatment of refugees, safeguarding their fundamental human rights and curtailing unbridled and undifferentiated migration. This paper intends to distinguish status and consequent treatment of refugees while considering not only the fear of persecution due to violence or warfare but also alarming socio-economic factors such as extreme poverty and rapidly submerging lands due to global warming. The authors intend to establish a framework to distinguish between refugees and illegal immigrants, while comparing opinions and established legal systems like the 1951 convention, British and other European laws, to regulate the subsequent treatment of refugees in India.

INTRODUCTION

Historically, South Asia has witnessed significant intra-regional movement and dislocation of regional groups fleeing ethnic or religious persecution, or political instability. India's multi-ethnic, multilingual, and relatively stable society has often made it a safe haven for refugees. Additionally, the physical proximity of eight border-sharing states substantially encourages migration.

This phenomenon has perpetuated through decades, making India a land of massive refuge. Even today, this is confirmed by the steady flow of refugees from many of its sub-continental neighbours at regular intervals. Despite steady migration through porous Indian borders, the country lacks a specific, uniform law to govern refugees. There have been attempts through ad hoc

executive orders and developing judicial opinion, but there persists dire need for a standard threshold. Absence of the same is lethal for the presently vague distinction between refugees and other migrants. Consequently, their treatment may not be sensitive to the special needs of a refugee. India's uncertain stance on international treaties and conventions on the subject also make its position disputable.

The first part of this paper discusses India's unique history and geo-political position in which refugee laws need to be determined, followed by an examination of the national laws and international conventions presently governing the entry and conduct of refugees in India. Next, the authors propose an appropriate definition of refugees, alongside suitable exclusion and cessation clauses, as well as the inalienable principle of non-refoulement.

HISTORICAL CONTEXT

In August 1947, India awoke to an independent nation after three hundred years of colonisation. However, independence came at the cost of history's greatest human migration across two newly partitioned nations - India and Pakistan. Millions of Muslims crossed over to West and East Pakistan (now known as Bangladesh), while millions of Hindus and Sikhs headed in the opposite direction to seek refuge. This marked the first migration in the history of India. Following the gruesome partition, the independence struggle in Bangladesh resulted in widespread fear of persecution, sending millions trekking into neighbouring Indian states of West Bengal, Meghalaya, and Assam.

While the eastern states have been flooded with migrants from Bangladesh, the north-eastern states are home to millions of Tibetans escaping the political quagmire in their home nation. While refugees flocked into India from the neighbouring nations on east and west following independence, the south witnesses a steady flow of Tamilian refugees from Sri Lanka. The island nation in the south, owing to its domestic communal strife, encourages the familiar Tamilians to cross the sea and seek refuge in the southern state of Tamil Nadu.

Bangladeshi Refugees

Ever since the partition of British India in 1947, successive waves of people facing hostile conditions, persecution, intolerance, and adverse economic situations in present-day Bangladesh

have found sanctuary in India.

The largest influx of refugees was seen during the Bangladesh liberation war.¹ Lakhs of people living in the then East Pakistan (now Bangladesh) escaped the genocide, which followed the war for independence from West Pakistan, settling in temporary refugee settlements along the border states of West Bengal, Assam, Tripura, and Meghalaya.

As the massacres in Bangladesh escalated, millions of refugees fled to India due to regional conflicts in their home nation. Furthermore, as the Research and Analysis Wing reported, “some of them later returned to their homes in Bangladesh, the majority chose to assimilate within India.”²

A shared history, culture, and physical territory made for significant factors contributing to apparent assimilation. Refugees opted to assimilate owing to familiarity and cultural similarities, this, however, did not grant them any special treatment under the law, and they were occasionally subjected to forceful deportation as illegal migrants by the administration. The largely unsupervised inflow that continued for several decades after the liberation war meant that distinction between illegal migrants and refugees was blurred, with both being categorised under the same umbrella.

Tibetan refugees

The relationship between China proper and Tibet was long and tortuous. Both China and Tibet were under the rule of the Mongolian Yuan Dynasty in the thirteenth and fourteenth centuries.³ Physically proximate, the two nations have been at loggerheads about Tibet’s status as an independent state. Despite Tibet’s de facto independent status from 1911 to 1950, the international community had never formally recognized it as an independent state.

¹ Willem Van Schendel, “A History of Bangladesh,” Cambridge University Press, (2009). Available at <http://www.cambridge.org/catalogue/catalogue.asp?isbn=9780521861748>

² The primary foreign intelligence agency of India

³ China’s official history of Sino-Tibetan relations claims that Tibet became a part of China during Yuan times. See, for example, Dangdai zhongguo de xizang [Contemporary China’s Tibet] (Beijing: Zhongguo shehui kexue, 1991), Vol. 1, pp. 40–43; and Wang Gui et al., Xizang lishi diwei bian [A Discussion on Tibet’s Historical Position] (Beijing: Minzu, 1995), ch 4

China attacked Tibet under Mao Zedong's leadership as settlement of the 'Tibet issue.'⁴ China took control of Lhasa, the capital city of Tibet by 1950. A year later, the Tibetan government signed a 17-point agreement with China that recognised China's sovereignty over Tibet as a trade-off for maintaining the Dalai Lama's supremacy in conducting domestic affairs.⁵ In 1959, after almost a decade of revolt against China's violation of terms of the agreement, state-inflicted violence against Tibetans, and the destruction of thousands of monasteries, the 14th Dalai Lama and thousands of his followers fled Tibet to take refuge in India. Now, the Dalai Lama lives in his abode at Dharamsala in north-eastern India. This serves as a perpetual pull factor for refugees to escape the fear of persecution and rising domestic discord, and journey to proximate Indian states to seek refuge. Tibetan refugees are also subject to comparatively favourable treatment, by virtue of the political sway that the Dalai Lama's asylum holds.

Pakistani Refugees

In the backdrop of the partition, and with Pakistan consisting of an Islamic majority population, migration of the minority into familial border states of India became a perpetual reality. India, on regular occasions, has accepted pleas of refuge from persecuted religious minorities from Pakistan. Most of the refugee settlements are located in Gujarat and Rajasthan along the India-Pakistan border. The condition of the refugees in India, though vastly better from what they escaped in Pakistan, is not rosy.

Most of them live in refugee colonies with dilapidated, make-shift houses and work as daily wage labourers. The government usually provides citizenship to Pakistani refugees after strenuous arguments, appeals, and long periods of convincing the authorities owing to security concerns. Since the partition, the population of religious minorities in Pakistan has dwindled, and thousands flee to India seeking protection from the persecution they were subjected to in Pakistan.

Tamil refugees

Around one lakh Sri Lankan Tamils currently live in India, with most having arrived during or

⁴ Ianguo Yilai Mao Zedong Wengao [Mao Zedong's Manuscripts since the Founding of the People's Republic] (Beijing: Zhongyang wenxian, 1987), Vol. 1, pp. 152–153

⁵ "Tibet Justice Center – Legal Materials on Tibet – China – Seventeen-Point Plan for the Peaceful Liberation of Tibet (1951) [p.182

around the time of the Sri Lankan civil war.⁶ The people escaped violence and killings in Sri Lanka and sought refuge in the southern state of Tamil Nadu and also in some settlements in Kerala and Karnataka. The refugees cross the narrow Palk Strait, fearing persecution, to find shelter in India. The hostile political environment between the Tamilians and Sinhalese and ethnic similarities between the Indian population and minority refugees catalyses this migration. However, in India, the administration has not been conducive to the needs of such refugees because of the alleged involvement of LTTE⁷ in the assassination of former Prime Minister, Rajeev Gandhi.⁸ The administrative resentment, coupled with the lack of a standard code of treatment, renders these refugees helpless on the shore between both nations.

INDIA'S LEGAL POSITION ON REFUGEES

Laws Governing Refugees under Status Quo

India is a federal state, boasting of its reputation as the largest democracy in the world. The Union legislature reserves the sole right to deal with the subject of citizenship, naturalization, and aliens via formulating legislation.

Refugee-Specific legislation, which regulates the entry and status of refugees, is absent in India. Refugees are subjected to whimsical administrative treatment, hinging on their date and place of entry. Consequently, putting all migrants under the same blanket treatment accorded under the Indian Foreigner's Act, 1946,⁹ as aliens in India. Exceptions have been made in the past via special provisions such as in the case of Ugandan refugees (of Indian origin) through the Foreigners from Uganda Order, 1972.¹⁰

In India, refugees fall within the ambit of the term 'alien,' mentioned in the Constitution of

⁶ Thiranagama, Sharika. In *My Mother's House: Civil War in Sri Lanka*. University of Pennsylvania Press, 2011. <http://www.jstor.org/stable/j.ctt3fhdj6>

⁷ Ibid.

⁸ Kaarthikeyan, Radhavinod Raju, "Rajiv Gandhi Assassination," Sterling Publishers, 2008 https://books.google.com/books/about/Rajiv_Gandhi_Assassination.html?id=7MqfCkBGdQ8C
<http://www.refworld.org/docid/3ae6b4df4.html>

⁹ India: Act No. 31 of 1946, Foreigners Act, 1946 [], 23 Nov 1946, available at <http://www.refworld.org/docid/3ae6b4df4.html>

¹⁰ India's Position on Legal Status of Refugees, Chapter IV, 2010 available from shodhganga.inflibnet.ac.in/bitstream/10603/68492/10/10_chapter%204.pdf

India,¹¹ in Section 83 of the Indian Civil Procedure Code,¹² and in Section 3(2)(b) of the Indian Citizenship Act, 1955.¹³ Additionally, The Foreigners Act, 1946 defines a ‘foreigner’ as ‘a person who is not a citizen of India’ and empowers the Central Government to regulate entry, acceptance, and exit from India. The Registration of Foreigners Act, 1939, is the authority of determining procedure related to the registration of foreigners entering, remaining, and departing from India. The Passport Act, 1920, and the Passport Act, 1967 also outline the powers of the government to impose conditions for entry into India and to issue passports and travel documents to regulate departure from India.

In the light of the aforementioned established legal framework, vagueness regarding the definition of a ‘refugee’ is a glaring reality. There has been no distinction between an illegal immigrant and a refugee, making them susceptible to similar treatment under the umbrella legislation, and arbitrary administration.

The procedure of induction also remains vague and undefined, not making room for special considerations required to induct a refugee. The standard procedure would require production of valid documents prescribed by Indian law,¹⁴ and the eventual failure to comply may also lead to

¹¹ Constitution of India, Article 22, Para 3 and Entry 17, List I, Schedule 7

¹² Section 83 of the Indian Civil Procedure Code - Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any Court otherwise competent to try the suit as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court

¹³ Section 3(2)(b) of the Indian Citizenship Act, 1955 - Citizenship by birth-

- (1) Except as provided in sub-section (2), every person born in India
 - (a) on or after the 26th day of January 1950, but before the 1st day of July 1987;
 - (b) on or after the 1st day of July 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
 - (c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where—
 - (i) both of his parents are citizens of India; or
 - (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.
- (2) A person shall not be a citizen of India by virtue of this section if at the time of his birth—
 - (a) either his father or mother possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India; or
 - (b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.]

¹⁴ Act No. 15 of 1967 dated 24th. June 1967

forced deportation at the international border of entry, which is a significant problem for refugees. In another eventuality, a refugee may also be detained and interrogated for a pending decision by the administrative authorities regarding the plea for refuge or/and asylum. A refugee also faces the prospects of prosecution for violation of the Registration of Foreigners Act, 1939 and Rules¹⁵ made thereunder and if found guilty of any offence under this Act, may be punished with imprisonment extending up to one year or with a fine up to one thousand rupees or with both.

Given that there is no legislation on the issue, the policy governing refugees has traditionally been based on a combination of ad hoc executive policies and judicial pronouncements, and thus lacks any formal structure. In the absence of a specific law as mentioned above, the statute that deals with the entry and exit of foreigners is the Foreigners Act of 1946 that does not recognize refugees as a special category deserving of humanitarian protection. This has given rise to an inconsistent approach towards different nationalities, and an asylum policy that, on the whole, lacks uniformity.

Constitutional Framework and Judicial Development

India is a country governed by the Rule of Law,¹⁶ and the Indian Constitution is a living document that sets a high standard of human rights. The Constitution confers a set of rights on citizens, a few of which apply to every human being. Every person is entitled to equality before the law and equal protection of the law regardless of their citizenship.

The Constitution of India guarantees certain Fundamental Rights to non-citizens, which by default, extend to all migrants in the territory of India. The rights so guaranteed include: Right to Equality (Article 14), Right to Life and Personal Liberty (Article 21), Right to Protection under Arbitrary Arrest (Article 22), Right to Protection in Respect of Conviction of Offences (Article 20), Freedom of Religion (Article 25), Right to Approach Supreme Court for Enforcement of Fundamental Rights (Article 32).

¹⁵ Registration of Foreigners Act, 1939 d) for requiring any foreigner entering, being present in, or departing from, 1[India] to produce, on demand by a prescribed authority, such proof of his identity as may be prescribed

¹⁶ A.D.M. Jabalpur v. Shivakant Shukla 1976 AIR 1207, 1976 S.C.R. 17

The constitutional rights protect the human rights of the refugee to live with dignity.¹⁷ The liberal interpretation that Article 21 has received now includes right against solitary confinement and¹⁸ right against custodial violence.¹⁹

The Supreme Court has taken recourse to Article 21 of the Constitution in the absence of legislation to regulate and justify the stay of refugees in India. In *N.H.R.C. v. State of Arunachal Pradesh*,²⁰ the Government of Arunachal Pradesh was directed to safeguard the life of Chakmas²¹ residing in the State and dictated that their application for citizenship should not be withheld. In another instance, *Malavika Karlekar v. Union of India and Another* it was held that refugees should not be subjected to detention or deportation and that they are entitled to approach the U.N High Commissioner for grant of refugee status.²² In *P. Nedumaran v. Union of India*, the need for voluntary nature of repatriation, was emphasised, and the Court held that the U.N.H.C.R., being a world agency, was to ascertain the voluntariness of the refugees and, hence, it was not upon the Court to consider whether consent was voluntary.²³ However, in an inconsistent opinion, Supreme Court concluded in *Hans Muller of Nuremburg v. Superintendent, Presidency Jail Calcutta, and Others*, that the Government had “absolute and unfettered” discretion to expel foreigners.²⁴ Reiterating the same in *Louis de Raedt v Union of India*, courts held that there is no provision in the Constitution inhibiting the absolute and unlimited power of the government to expel foreigners under the Foreigners Act of 1946.²⁵ In the light of wavering judicial opinion and vague legislation determining the treatment of refugees, the existing legal framework needs crystallization.

¹⁷ Maneka Gandhi v. Union of India A.I.R. 1981 SC 746

¹⁸ Sunil Batra vs Delhi Administration 1980 AIR 1579, 1980 S.C.R. (2) 557

¹⁹ Inderjeet vs State of Uttar Pradesh 1979 AIR 1867, 1980 S.C.R. (1) 255

²⁰ N.H.R.C. v. State of Arunachal Pradesh, 1996 AIR 1234, 1996 S.C.C. (1) 742

²¹ Within the Chittagong Hill Tracts, the Chakmas are the largest ethnic group and make up half of the region's population. Available from <http://www.everyculture.com/wc/Afghanistan-to-Bosnia-Herzegovina/Chakmas.html>

²² Writ Petition (Criminal No) 583 of 1992, India: Supreme Court, 25 Sept 1992

²³ P. Nedumaran v. Union of India, 1993 (2) ALT 291, 1993 (2) ALT Cri 188

²⁴ Hans Muller of Nuremburg v. Superintendent, Presidency Jail Calcutta and Others, (1955) 1 SCR 1284, India: Supreme Court.

²⁵ Louis de Raedt v Union of India, 1991 AIR 1886, 1991 S.C.R. (3) 149

International Law and their Enforceability in India

The cornerstone of international legislation on refugees is the 1951 Convention²⁶ on Status of Refugees and the 1967 Protocol²⁷ attached to it. The term ‘refugee’ defined thereunder is as follows:

“...a person 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 that protection of that country; or who, not having a nationality and being outside a country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.”

At this juncture, it is noteworthy that India is not a signatory to the 1951 Convention relating to the status of refugees or the 1967 Protocol. India’s international position in terms of treatment of refugees has therefore been disputable. However, it is equally imperative to realize that India is a signatory to various other international and regional treaties and conventions relating to universal human rights and refugees such as the U.N. Declaration on Territorial Asylum,²⁸ the Universal Declaration of Human Rights,²⁹ and the International Convention on Civil and Political Rights.³⁰ India is also a member of Executive Committee of the U.N.H.C.R.,³¹ which approves and supervises the material assistance programs of the U.N.H.C.R., placing a persuasive, if not binding obligation, on it to build a constructive partnership with U.N.H.C.R. by following the provisions of the 1951 Refugee Convention.

As a party to these treaties, India is under a legal obligation to protect the human rights of refugees by taking appropriate legislative and administrative measures under Article 51(c)³² and

²⁶ Convention Relating to the Status of Refugees, 28 Jul, 1951, 189 U.N.T.S. 137.

²⁷ Protocol Relating to the Status of Refugees, 31 Jan, 1967, 606 U.N.T.S. 267

²⁸ U.N. General Assembly, Declaration on Territorial Asylum, 14 Dec 1967, A/RES/2312(XXII)

²⁹ Universal declaration of human rights (217 [III] A). Paris

³⁰ United Nations, Treaty Series, vol. 999, p. 171

³¹ 1975-2009 (Conclusion No. 1-109).

³² Constitution of India, Article 51(c)) - Foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration PART IVA FUNDAMENTAL DUTIES

Article 253.³³ These treaties also put India under the obligation to uphold the principle of non-refoulement.

With regard to adopting international conventions in domestic laws, in *Vishaka v. State of Rajasthan*,³⁴ the Court affirmed that reliance could be placed on international laws. Therefore, the question that arises is whether India can refer to the 1951 Convention in interpreting the domestic legislation and whether it is really necessary to ratify these conventions. Furthermore, ratifying the 1951 Convention will not solve the problem because Article 42 of the convention permits reservation with respect to the rights of refugees, leaving room for subjective treatment. The solution that the authors seek to propose is enacting uniform legislation specifically for refugees to omit discretion of the executive and the judiciary in deciding a refugee's fate.³⁵

REFUGEE DEFINITION

The problem of an overwhelming number of refugees entering India can be traced back to the lack of a definition. The applicability of refugee laws can only be evaluated once the population to which such laws apply has been determined. The question of 'who is a refugee' must, therefore, be authoritatively answered by binding legislation or judicial verdict before delving into the procedural or practical application of such laws. For the past few decades, various efforts have been undertaken to formulate such legislation, but with little or no success. Among these is the Model Law drafted by the South Asian Eminent Persons Group (EPG),³⁶ the South Asia declaration on Refugee and Migratory Movements,³⁷ and the Asylum Bill, 2015³⁸ put forward by renowned diplomat and civil servant Dr. Shashi Tharoor.

³³ Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body

³⁴ *Vishaka v. State of Rajasthan* (A.I.R. 1997 SUPREME COURT 3011)

³⁵ Bhattacharjee. Saurabh. India Needs a Refugee Law. *Economic and Political Weekly*, Vol. 43, No. 9 (March 1-7, 2008): 71-75 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760460

³⁶ 36Refugees and Asylum Seekers (Protection) Bill, 2006, available from (P.I.L.S.A.R.C. Bill) <https://notacoda.files.wordpress.com/2014/08/refugees-and-asylum-seekers-protection-bill-2006.pdf>

³⁷ 37South Asia Declaration on Refugee and Migratory Movements, January 2004 available from http://shodhganga.inflibnet.ac.in/bitstream/10603/28291/17/17_appendices.pdf.

³⁸ The Asylum Bill of 2015, Lok Sabha 334 of 2015 (2015). (Tharoor Bill)

These proposed laws, in addition to various internationally recognised conventions such as the 1951 Convention Relating to the Status of Refugees,³⁹ the 1967 Protocol relating to the Status of Refugees,⁴⁰ the Cartagena Declaration on Refugees,⁴¹ and the O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,⁴² do not adequately pertain to an Indian context. This section, therefore, collates the appropriate sections from each of these conventions, declarations, and laws, in order to propose a comprehensive definition of refugees in a uniquely Indian context.

The proposed provision is as follows:

A refugee is any person who:

1. is compelled to leave his country and is unable or unwilling to return to, or is unable or unwilling to avail himself of the protection of, that country because of a well-founded fear of persecution on account of race, religion, gender, nationality, ethnic identity, membership of a particular social group or political opinion; or
2. owing to external aggression, occupation, foreign domination, serious violations of human rights or other events seriously disrupting public order in either a part or whole of his country of origin, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin.”

This definition differs from the universally accepted definition put forth by the 1951 Convention in several key aspects, which have been intentionally modified to suit the specific geopolitical context in which India rests, as well as its unique socio-legal history. The key differences include two additional grounds of persecution, gender, and ethnic identity, as well as an expanded definition on the basis of human rights violations or public order disturbances, each of which is discussed hereunder.

Compelled to leave

The phrase ‘compelled to leave’ has been used in place of the traditional ‘outside the country of

³⁹ Convention Relating to the Status of Refugees, 28 Jul, 1951, 189 U.N.T.S. 137. (1951 Convention)

⁴⁰ Protocol Relating to the Status of Refugees, 31 Jan, 1967, 606 U.N.T.S. 267.

⁴¹ Cartagena Declaration, 22 Nov, 1984, in Inter-American Commission on Human Rights, Annual Report 1984-85, 190-193, O.A.S. Doc. O.E.A./Ser.L/V/II.66, doc.10, rev. 1

⁴² O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept, 1969, 1001 U.N.T.S. 45.

his nationality,⁴³ as the latter results in a systematic exclusion of those seeking refugee status before departing their country. Given the volatile environment in their habitual place of residence, refugees may seek or apply for refugee status prior to leaving their country. Situations might arise where the individual is forced to leave his home but is still within the borders of his country.⁴⁴ Such internally displaced persons are excluded from the definition of refugees, despite being in an equally dangerous position.

Departure from their homes on account of persecution is sufficient to bring them within the ambit of the refugee definition, and any additional criteria requiring them to be outside their country of origin is cumbersome. International opinion is vehemently in favour of including such internally displaced people within the ambit of the definition,⁴⁵ under conditions when the government is unable or unwilling to protect them. Therefore, in the presence of all other requirements of the refugee definition, internally displaced persons must not be excluded from the ambit of refugees.

Additionally, the deliberate use of compelled to leave replaces ‘country of his nationality,’ in order to convey India’s fluid concept of nationality. Since its inception, India has rejected the idea of homogeneous nationhood,⁴⁶ and consequently, nationality. Rather, the focus is on multiculturalism, and membership of distinct ethnic communities, which finds further discussion

⁴³ 1951 Convention; P.I.L.S.A.R.C. Bill; Tharoor Bill.

⁴⁴ Miranda, Carlos Ortiz. “Toward A Broader Definition Of Refugee: 20th Century Development Trends.” *California Western International Law Journal* 20, no. 2 (1989): 315–27.

<http://scholarlycommons.law.cwsl.edu/cwilj/vol20/iss2/9>; Biermann, Frank, and Ingrid Boas. “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees.” *Global Environmental Politics* 10, no. 1 (February 2010): 60–88. doi:10.1162/glep.2010.10.1.60.

⁴⁵ Mooney, E. “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern.” *Refugee Survey Quarterly* 24, no. 3 (2005): 9–26. doi:10.1093/rsq/hdi049; Coles, G. J. L. “Some Reflections on the Protection of Refugees from Armed Conflict Situations.” *In Defense of the Alien* 7 (1984): 78–121. <http://www.jstor.org/stable/23141143>. (Coles, Armed Conflict Situations).

⁴⁶ Acharya, Bhairav. “The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals.” *N.U.J.S. Law Review* 9 (2016): 173–228. http://nujlawreview.org/wp-content/uploads/2017/01/2016-9-3-4-Bhairav-Acharya-The-Future-of-Asylum-in-India_-Four-Principles-to-Appraise-Recent-Legislative-Proposals.pdf. (Acharya, “Future of Asylum”); Guha, Ramachandra. *India After Gandhi*. HarperCollins, 2007.

in the addition of ethnic groups as grounds for persecution.⁴⁷

Grounds for persecution

The 1951 Convention puts forth five definitive criteria, based on which an individual may be persecuted. These include race, religion, nationality, political opinion and membership of a social group.⁴⁸ While all of these parameters are integral parts of the definition and are necessary to it, they are not exhaustive in an Indian context. Two additions are, therefore, proposed to the Convention definition – gender and ethnic identity.

Gender

The inclusion of gender is necessitated by the need to formally recognize the same as a source of systematic oppression and persecution over the years. Gender, as a ground for persecution, includes not only sexual abuse or violence⁴⁹ but also any other form of harm caused by systematic discrimination against either gender.⁵⁰ The erroneous categorisation of ‘violence against women’ as ‘private’ instead of ‘political’ has contributed to a lack of recognition of gender as a cause of persecution.⁵¹ With the inclusion of this parameter, regimes in which women are systematically oppress may also give rise to refugees under the new definition.⁵²

The specific use of gender, as opposed to sex, conveys not only biological difference between men and women as grounds for persecution but also the socio-cultural connotations that it has acquired over centuries. Gender refers to the social construction of power relations between women and men, and its implications for identity, status, roles, and responsibilities.⁵³ With

⁴⁷ See page 18.

⁴⁸ 1951 Convention

⁴⁹ “Gender-Related Persecution: An Analysis of Recent Trends.” *International Journal of Refugee Law* 9, no. Special Issue (1 Oct, 1997): 79–113. doi: 10.1093/reflaw/9.special_issue.79.

⁵⁰ Office of the High Commissioner for Refugees. *Guidelines on the Protection of Refugee Women*, 1991. <http://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>.

⁵¹ Crawley, Heaven. “Gender, Persecution and the Concept of Politics in the Asylum Determination Process.” *Forced Migration Review* 9 (2000): 17–20. <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR09/fmr9.6.pdf>. (Crawley, “Gender Persecution”).

⁵² Sagar, Arun, and Farrah Ahmed. “The Model Law for Refugees: An Important Step Forward?” *Student Bar Review* 17 (2005): 73–100. (Sagar, “Model Law”).

⁵³ Crawley, “Gender Persecution.”

changing attitudes over time and cultures, the understanding of gender varies as well. Consequently, it must follow that refugee status must account for these gender-specific experiences, which contribute to the feeling of persecution.

While gender has largely been read into the definition of social groups since the inception of the definition,⁵⁴ explicit recognition of the same is required for its implementation in countries reluctant to enforce refugee law.

Ethnic Identity

Similar to the conception of gender as opposed to sex, ethnic identity becomes a ground for persecution not because it is naturally occurring, but because it is socially acquired. While race is a set of characteristics, such as biological and physical features, which are genetic, ethnicity is derived from family heritage, culture, language, or even nationality.⁵⁵ The myriad factors that contribute to the formation of ethnic identity indicate that there can be fractionalisation within races, or religions, of ethnic groups. Consequently, the shared experiences of such groups would be vastly different, as they associate with different characteristics.⁵⁶ Thus, although ethnic identity has been interpreted to fall within the ambit of both race and nationality,⁵⁷ its express recognition is necessary given the strong identification with ethnic identity in South Asia.⁵⁸

External Aggression, occupation, foreign domination, serious violation of Human Rights

In addition to sub-clause (a), which largely mirrors the 1951 Convention, the addition of sub-clause (b) to contextualise the definition of a refugee is notable. The expansion of the definition and its

⁵⁴ Executive Committee, United Nations High Commissioner for Refugees, *Refugee Women and International Protection No. 39 (XXXVI) – 1985* (Vienna: United Nations, 1985), available from <http://www.unhcr.org/excom/exconc/3ae68c43a8/refugee-women-international-protection.html>.

⁵⁵ Wakefield, W. David, and Cynthia Hudley. "Ethnic and Racial Identity and Adolescent Well-Being." *Theory Into Practice* 46, no. 2 (2007): 147–54. doi:10.1080/00405840701233099.

⁵⁶ Ibid.

⁵⁷ Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law*. Third. Oxford: Oxford University Press, 2007.; United Nations, Office of the High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, H.C.R./IP/4/Eng/REV.1 (January 1992), available from <http://www.unhcr.org/4d93528a9.pdf>. (U.N.H.C.R. Handbook).

⁵⁸ Acharya, "Future of Asylum"; Khilnani, Sunil. *The Idea of India*. Farrar, Straus, & Giroux, 1997.; Mishra, Binoda K. "The Nation-State Problematic in Asia: The South Asian Experience." *Perceptions* 19, no. 1 (2014): 71–85. http://sam.gov.tr/wp-content/uploads/2014/05/Binoda_Mishra.pdf.

scope serves to account for those victims of countrywide instability, war, or aggression, which excludes them from the refugee definition.⁵⁹ There has been express recognition that the Convention requires victims of war or general instability to prove persecution on one of the recognised grounds to qualify for refuge.⁶⁰

The principle underlying this expansion is that refugee status stems not only from the deliberate refusal of protection but also from a generally disturbed situation, which renders state protection meaningless.⁶¹ This definition was first adopted by the Organisation of African Unity, which was in the throes of national liberation struggles and experienced a fifteen-year period of continuous instability.⁶² India also finds itself in political turmoil on the northern border, with Pakistan being a constant source of agitation on the Kashmir contention, and insurgencies from war-torn Afghanistan.

Additionally, India has consistently been a significant player in South Asian politics, pioneering most S.A.A.R.C. activities and steering policy decisions of countries such as Bhutan and Nepal.⁶³ Thus, the situation of prevalent instability along with existing relation between S.A.A.R.C. nations thrust a moral obligation on India⁶⁴ to stand in solidarity with the people of these nations in situations of threat, such as external aggression or human rights violations. This obligation has been recognised by most South Asian nations, through the Declaration adopted by the Eminent Persons Group comprising of jurists and professions from key players in the region.⁶⁵

Other events seriously disrupting public order

The inclusion of ‘other events seriously disrupting public order’ is motivated by the numerous manifestations of general instability that may present itself in a nation. The mention of ‘external

⁵⁹ 59 U.N.H.C.R. Handbook, Chapter II(B).

⁶⁰ Adan v. Secretary of State for the Home Dept., (1999) 1 AC 293.

⁶¹ Coles, *Armed Conflict Situations*.

⁶² Bouscaren, Anthony T., and Louise W. Holborn. “Refugees: A Problem of Our Time, the Work of the United Nations High Commissioner for Refugees, 1951-1972.” *International Migration Review* 10, no. 1 (1976): 112. doi:10.2307/3002412.

⁶³ Dash, Kishore C. “The Political Economy of Regional Cooperation in South Asia.” *Pacific Affairs* 69, no. 2 (1996): 185-209. www.jstor.org/stable/2760724.

⁶⁴ Astri Suhrke, “Global Refugee Movements and Strategies of Response,” in *U.S. Immigration Policy: Global and Domestic Issues* (Mary M. Kritz ed., 1983) 157

⁶⁵ South Asia Declaration.

aggression...’ is not exhaustive by any means, and limiting such a definition to merely these recognised factors would be exclusionary to a large populace. In order to prevent the ambit of public order disturbances from being stretched too wide, the qualification of ‘seriously’ has been included, excluding minor disturbances such as rioting from the ambit of this clause.

More importantly, the inclusion of public order disruptions allows for the acceptance of environmental refugees within this definition. Increasingly, rising sea levels and volatile environmental conditions have been giving rise to inhabitable conditions in various nations. Estimates place the number of environmental refugees worldwide at approximately 25 million.⁶⁶ Closer to home, 7% of Bangladesh is projected to be submerged by 2100, as a result of rising sea levels and coastal exploitation.⁶⁷ Similarly, those who are victims of disasters such as Chernobyl, or the Bhopal Gas Leak, may also, in circumstances of absence of state protection, find place within the ambit of this definition. While environmental refugees fit the criterion of persecution, as their lack of protection is often a result of governmental policymaking,⁶⁸ they do not fit into any of the grounds of persecution within the definition, necessitating the inclusion of public order.

PROPOSED FRAMEWORK

Exclusion clause

Equally important to defining the ambit of who constitutes a refugee is determining the negative – who are excluded from the ambit of such a definition and cannot claim protection. The contextualization of this becomes especially crucial, given the spectrum of refugees that India sees, and the consequent security threat that may emerge from the same. The primary purpose, therefore, of the exclusion clause is to ensure that the security concerns of India are met,⁶⁹ and the influx of refugees does not result in a threat to the safety of citizens. The proposed provision, therefore, reads:

⁶⁶ Myers, Norman. “Environmental Refugees.” *Population Environment* 19, no. 2 (November 1997): 167–82. doi:10.1023/A:1024623431924.

⁶⁷ Myers, Norman. “Environmental Refugees in a Globally Warmed World.” *BioScience* 43, no. 11 (December 1993): 752–61. doi:10.2307/1312319.

⁶⁸ Cooper, Jessica B. “Environmental Refugees: Meeting the Requirements of the Refugee Definition.” *N.Y.U. Environmental Law Journal* 6 (1998): 480–529.

⁶⁹ U.N.H.C.R. Handbook, Chapter IV.

I. A person shall be excluded from protection under this Act if:

- A. there are serious reasons for considering that:
 1. he has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes which India has acceded to; or
 2. he has committed a serious non-political crime outside India prior to his entry into the national territory; or
 3. he has instigated, abetted or otherwise participated in committing the acts mentioned in sub-clauses (i) or (ii); or
 - B. he poses a serious threat to the public order or national security of India and has been convicted of an offence in India which is punishable by a term of imprisonment of at least ten years; or
 - C. he poses a serious threat to the public order, or national security of India and there are serious reasons for considering that has committed an act outside India that, if committed in India, would constitute an offence punishable by a term of imprisonment of at least ten years.
- II. In the assessment of clauses (a) to (c) of sub-section (1), consideration shall be given to consequences of such exclusion, including the degree of persecution feared and the threat to applicant's life or freedom.
 - III. The exclusion of the applicant from protection under this Act shall not require the exclusion of his dependants where none of the reasons for exclusion applies to them.
 - IV. This shall not apply to a person who is recognized by the competent authorities of India as having the rights and obligations which are attached to the possession of Indian nationality.

The contextualisation of this clause is achieved by ensuring a few key features within the provision. First, the standard of exclusion that has been set, second the inclusion of instigation and abetment as grounds of exclusion, third, the consideration of persecution, and fourth, the applicability of the rule to dependants.

i. Standard of exclusion

The provision enlists certain grounds of exclusion, in terms of the commission of crimes, which disqualifies an individual from seeking refuge. Sub-sections (a) and (c) disqualify an individual if there are '*serious reasons for considering*' that he has committed war crimes or crimes against humanity. As opposed to this, the standard imposed by sub-section (b) is mere conviction. The reason for this difference can be attributed to the certainty attached to sub-section (b), as opposed

to sub-sections (a) and (c).

Ordinarily, the metric of conviction is not applied to the commission of crimes against humanity, as most criminals seeking refuge do so in order to escape prosecution and conviction.⁷⁰ Sub-section (b) fundamentally differs from this in several respects. It deals solely with national law, actions committed within the territory of India, and the decisions of Indian law enforcement authorities with regard to the same. The possibility, therefore, of seeking refuge to avoid prosecution cannot be applied to this sub-section. Further, the usage of this parameter must be purposively interpreted, bearing in mind the underlying intention. The commission of a crime, which is definitively established by a conviction thereof, would pose a direct threat to the safety of citizens and other individuals under the protection of the Indian government.⁷¹ Therefore, the established parameters of determining guilt within national criminal jurisprudence are sufficient to disqualify an individual from refuge, and is not too onerous a condition to impose.

On the other hand, the parameter for exclusion under clauses (a) and (c) necessitates that there must be '*serious reasons for considering*' that the person has committed the acts prescribed. This is an intentionally high standard set, as the guiding principle to exclusion clauses is that their construction, and by extension, their ambit has to be restrictive and narrow.⁷² The standard goes beyond mere suspicion; it sets a parameter higher than 'reasonable grounds,'⁷³ but falls short of the criminal standard applied to the trial of war crimes. This is reinforced by the use of the word 'considering' which is likened to belief and imposes a higher threshold than 'suspecting.'⁷⁴ Given the grave consequences of exclusion, a higher standard has been deliberately set to restrict the proportion of individuals falling within its ambit.

ii. *Instigation, abetment, participation*

The Convention provision under Article 1F(a) does not contain an express mention of excluding abettors or those participating in the commission of the specified crimes. However, through its

⁷⁰ Sagar, "Model Law".

⁷¹ Goodwin-Gill, Guy S. "Refugees and Security." *International Journal of Refugee Law* 11, no. 1 (1999): 1-5. doi:10.1093/ijrl/11.1.1.

⁷² U.N.H.C.R. Handbook.

⁷³ *Al-Sirri (F.C.) v Secretary of State for the Home Department*, (2012) U.K.S.C. 54. (Al-Sirri).

⁷⁴ *Ibid.*

interpretation and implementation across the world, such participants have come to be included within the ambit of the Article.⁷⁵ While all members of an organisation responsible for a war crime are not automatically excluded, where there is proof of the individual's complicity to the crime,⁷⁶ he falls within the ambit of this exclusion. Therefore, where an individual is party to the design of the crime or contributed to it with the intention of its perpetration,⁷⁷ he can be lawfully denied refuge.

iii. Consideration of persecution

In the process of determining whether refuge can be denied to an applicant, the consequences of such exclusion form a relevant consideration. Commonly referred to as double balancing, the authorities must account for the gravity of the crime committed, as well as the threat of persecution that the applicant faces if he were to return.⁷⁸ The Convention Handbook recognises the need for such balancing when it outlines its formula – if the applicant has not committed a very grave crime, and the consequences of his exclusion are severe, he should not be denied protection, however, if the converse situation prevails, exclusion is warranted.⁷⁹

This is also in consonance with the principle of proportionality, which dictates that no action should be disproportionate to its intended purpose.⁸⁰ It necessarily follows that the consequences of governmental action cannot be more severe than the events that led to such action. Therefore, a refugee is still regarded as bona fide if the consequences of his exclusion outweigh his crimes or threat to society.

iv. Applicability to dependants

The restrictive and sparing use of exclusion clauses⁸¹ implies that each applicant must be

⁷⁵ U.N.H.C.R. Handbook, Chapter IV.

⁷⁶ *El Hayek v. Canada* (Minister of Citizenship and Immigration) 2005 FC 835; *Jaouadi v. Canada* (M.C.I.) 2005 FC 1256

⁷⁷ *R (on the application of J.S.) (Sri Lanka) v. Secretary of State for the Home Department*, (2010) U.K.S.C. 15; *Prosecutor v Brđjanin* (unreported) 3 Apr 2007.

⁷⁸ Cantor, David James. "The End of Refugee Law?" *Journal of Human Rights Practice* hux022 (2017) doi: [10.1093/jhuman/hux022](https://doi.org/10.1093/jhuman/hux022)

⁷⁹ U.N.H.C.R. Handbook, Chapter IV.

⁸⁰ German Federal Administrative Court, Qualification Directive, BVerwG 10 C 48.07.

⁸¹ U.N.H.C.R. Handbook, Chapter IV.

individually examined in order to determine whether they are excluded from the protection offered to a refugee. It, therefore, follows that the exclusion of an individual does not automatically exclude his dependants. Special precaution is taken when considering the applications of minors, in consonance with the Principle of Family Unity that is fundamental to refugee laws.⁸²

Cessation Clause

Crucial to the enactment of any refugee protection law is clarifying the circumstances in which protection can rightfully be denied to him. A cessation clause, therefore, outlines situations where the refugee has voluntarily gained alternate sources of protection, relieving the burden on the Indian government to provide for him.⁸³ The proposed clause is as follows:

- I. A person shall cease to be a refugee for the purposes of this Act if:
 - A. he can no longer refuse to avail himself of the protection of the country of his citizenship, because the circumstances in respect to which he was recognised as a refugee have ceased to exist; or
 - B. he voluntarily re-avails himself of the protection of his country of origin; or
 - C. he has acquired the citizenship of India; or
 - D. he has acquired the citizenship of some other country and enjoys the protection of that country, or
 - E. he has voluntarily re-established himself in the country which he left, or outside which he remained owing to fear of persecution.
- II In the assessment under clauses (a) and (e) of sub-section (1),:
 - F. consideration shall be given to whether the circumstances upon which the status was granted no longer apply or have changed significantly and permanently; and
 - G. due consideration shall further be given to any compelling reasons presented by the refugee concerned, arising out of his persecution, for refusing to return to his country of origin or his former ordinary residence.

In line with Article 1C of the Convention, two kinds of instances are presented by sub-clause (1) – voluntary and involuntary. Sub-sections (b) to (e) involve the refugee voluntarily assuming protection under alternate governments or regimes. This differs fundamentally from sub-section (a), which outlines a scenario when the refugee's cause of persecution no longer exists,

⁸² U.N.H.C.R. Handbook, Chapter VI.

⁸³ Sagar, "Model Law".

removing the need to protect him. While this may, prima facie, present possibilities of misuse, safeguards to its implementation have been imposed through sub-clause (2), mandating an examination of the prevailing circumstances and compelling reasons against return, if there be any. The use of the word ‘shall’ mandates such consideration of circumstances, further reducing the scope of misuse.

Right Against Refoulement

Aside from the definition of who constitutes a refugee, perhaps the most crucial feature of any refugee law is the principle of non-refoulement. As a right that ensures that refugees are not expelled or sent back to their origin countries where they may be harmed, this principle forms the basis of all refugee law.⁸⁴ The underlying principle of non-refoulement is that an individual cannot be sent back to the place that gave rise to his refugee status. The present provision bears a few key differences to the Convention provision of the right, including its ambit, which has been expanded to fit the widened definition of a refugee. The proposed provision reads:

- I. No person may be expelled or returned (“refouler”) in any manner whatsoever to the frontiers of territories where:
 - A. he may be subjected to persecution on account of his race, religion, gender, nationality, ethnicity, membership of a particular social group or political opinion, or
 - B. his life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, serious violations of human rights or other events seriously disrupting public order in either part or whole of that country.
- II. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of India, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

The nature of the right is such that it must be guaranteed to all persons – it is an absolute right, the application of which is restricted only in certain pre-determined situations. This is

⁸⁴ U.N.H.C.R., *Voluntary Repatriation*, E.X.C.O.M. Conclusion No. 18 (XXXI), 1980 available at <http://www.unhcr.ch/cgi-bin/texis/vtz/home/opendoc.htm?tbl=EXCOM&id=3ae68c6e8&page=exec>; U.N.H.C.R., *General Conclusion on International Protection*, E.X.C.O.M. Conclusion No. 65 (XLII), 1991 available at <http://unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=3ae68c404>.

reflected by the use of the catchall phrase ‘*no person may be expelled,*’ as opposed to the Convention’s usage of ‘no refugee.’ The latter could prove to be a hindrance, and may present scope for misusing the inalienable nature of this right – prior to recognition as a refugee, those who try to seek protection from a country may be refused entry into the country or turned back at the border.⁸⁵ This harm is only aggravated with the usage of ‘no refugee present within the territory of India’ in the Asylum Bill, 2015,⁸⁶ and may defeat the purpose of enacting refugee protection laws.

Additionally, the scope of protection has been expanded in order to reflect the change in defining refugees. Refoulement can be prevented on the grounds of prevailing instability in the individual’s country of origin; wherein there has been a disruption of public order or external aggression. Similarly, a threat of persecution on the grounds of gender or ethnicity is sufficient to accord the right of non-refoulement to refugees.

However, the usage of ‘*particularly serious crime*’ within the exception of the right against refoulement may be misused by implementing authorities. While the ambiguity of the phrase is intentional, in order to account for unforeseen circumstances that may pose a threat to the security of Indian society, it also presents scope for misuse. The categorisation of a particularly serious crime is subjective and can be construed against a bona fide refugee seeking protection. It has been suggested that replacing the phrase with an annex of crimes considered ‘particularly serious’ may rid the law of this ambiguity.⁸⁷ This defect may, therefore, be rectified by suitable rules enacted by executive authorities, to clarify the usage of the phrase, or even by judicial opinion, interpreting its meaning in consonance with its purpose.

CONCLUSION

For the past six decades, since its independence, India has seen a massive influx of refugees from across various borders – Bangladesh, Pakistan, Sri Lanka and Tibet are all responsible for a significant proportion of the refugees that India houses. Despite this, the lack of specific laws governing them is a glaring reality. Present legislation such as the Foreigners Act, 1946, in addition

⁸⁵ Acharya, “Future of Asylum”.

⁸⁶ Tharoor Bill.

⁸⁷ Acharya, “Future of Asylum”.

to the Constitution of India, merely classify all non-citizens as ‘aliens,’ failing to distinguish between legal, and illegal immigrants and refugees. In the absence of this not only is there scope of inadequate provision of necessities and basic rights, but deportation also becomes a significant possibility.

The most troubling reality of lacking legislation is the arbitrary nature of treatment meted out to refugees – the Supreme Court has invoked the Right to Life, which applies to aliens as well, to protect the rights of refugees in India, even invoking the powers of the U.N.H.C.R. at times. Unfortunately, the contrary position has equal legality and legitimacy, wherein the government may exercise their unfettered right to expel foreigners from the country, regardless of its consequences.

In light of this, the authors undertake to contextualise existing legislation both internationally and within the South Asian region to cater to India’s specific historical and geo-political situation. A refugee has thus been defined, expanding the scope to include those who are victims of civil war, general instability, or persecution on the basis of gender or ethnic identity. Similarly, the standards of exclusion have been defined in an Indian context, placing emphasis on the consequences of exclusion and participation in grave crimes. While the cessation clause largely mirrors the Convention’s provision of the same, the right against refoulement has been adapted according to the enlarged definition of a refugee, broadening its ambit.

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