
REFUGEE PROTECTION IN INDIA: BUILDING A NATIONAL REFUGEE LAW WITH LESSONS FROM SOUTH AFRICA

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ABSTRACT

India today hosts one of the largest and most heterogeneous refugee populations in the world, yet it remains without a dedicated national statute governing the recognition, treatment, or protection of refugees. India is not a party to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol, and refugees on Indian soil continue to be governed by the colonial-era Foreigners Act, 1946, alongside an assortment of statutes never designed with displacement in mind. This paper undertakes a doctrinal and contemporary analysis of India's refugee governance framework. The study argues that India's continuing reliance on executive discretion and ad hoc judicial intervention, in place of codified rights, has produced an increasingly securitized and discriminatory regime one in which protection now correlates more closely with religious identity and diplomatic convenience than with the fact of persecution. Comparing India's position with South Africa, a Global South state that is party to the 1951 Convention and has enacted a rights-based domestic Refugees Act, 1998, the paper distils lessons of institutional design that remain available to India. It concludes by proposing the essential contents of a rights-based, non-discriminatory national refugee law for India.

Keywords: Refugee Law, Rohingya, Non-Refoulement, UNHCR, Article 21.

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1. Introduction: The Contemporary Refugee Question

Global forced displacement crossed 122 million people by mid-2025¹, the thirteenth consecutive annual rise, and South and Southeast Asia continue to generate and host a disproportionate share of this displacement. India's geographic position at the confluence of South, Southeast, and Central Asia has, for over seven decades, made it a receiving state for refugees fleeing persecution, civil war, and ethnic violence from the Tibetan exodus of 1959 and the Bangladesh Liberation War of 1971, to the more recent flight of Rohingya from Myanmar, Chin and Kuki-Zo refugees following the 2021 Myanmar coup, and religious minorities from Afghanistan. Despite this sustained history of forced migration into its territory, India has never enacted a law defining who a refugee is, how refugee status is to be determined, or what rights and obligations attach to that status.

This absence was, for much of independent India's history, filled by what scholars have called an ad hoc but broadly humanitarian executive practice, supplemented by an activist judiciary willing to read refugee protection into Article 21 of the Constitution.² That equilibrium has visibly shifted in the last five years. The enactment of the Citizenship (Amendment) Act, 2019 and the notification of the Citizenship (Amendment) Rules, 2024 have, for the first time, written a religious criterion into India's citizenship and refugee-adjacent framework.³ And in May 2025, the reported forcible expulsion of Rohingya refugees including UNHCR-registered persons into international waters off the Myanmar coast has been described by commentators as the clearest evidence yet that judicial humanitarianism can no longer substitute for codified law.⁴

This paper traces the logical architecture of India's refugee governance problem from the conceptual definition of a refugee under international law, through India's constitutional and statutory framework, and its most recent crisis, to a comparative examination of South Africa's rights-based statutory model in order to make the case that a national refugee law is no longer

¹UNHCR, Global Trends: Forced Displacement 2024 (June 2025), available at <https://www.unhcr.org/global-trends-report-2024>.

²Constitution of India, art. 21 ("No person shall be deprived of his life or personal liberty except according to procedure established by law").

³Citizenship (Amendment) Rules, 2024, G.S.R. 170(E), Gazette of India, Mar. 11, 2024; see also Al Jazeera, Why is India's Citizenship Amendment Act so controversial?, Mar. 12, 2024, available at <https://www.aljazeera.com/news/2024/3/12/why-is-indias-citizenship-amendment-act-so-controversial>.

⁴Jurist, From Haven to Hostility: India's Changing Immigration Policy on Rohingya Refugees, June 10, 2025, available at <https://www.jurist.org/commentary/2025/06/from-haven-to-hostility-indias-changing-immigration-policy-on-rohingya-refugees/>.

a matter of legislative preference but of constitutional and humanitarian urgency.

2. Conceptual and International Legal Framework

2.1. Defining the Refugee

Article 1A(2) of the 1951 Convention defines a refugee as a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality and is unable, or owing to such fear, unwilling to avail themselves of that country's protection.⁵ The 1967 Protocol removed the Convention's original temporal and geographic limitations, rendering it universally applicable.⁶ Together, these instruments, along with the Office of the UNHCR that the Convention created, remain the principal reference points of the international refugee regime, even for states such as India that have not ratified them.

2.2. The Non-Refoulement Principle and Customary Status

The cornerstone of refugee protection is the principle of *non-refoulement* the prohibition on returning a person to a territory where their life or freedom would be threatened. It is codified in Article 33 of the 1951 Convention, echoed in Article 3 of the Convention Against Torture,⁷ implicit in Article 7 of the ICCPR,⁸ and reiterated in the UN Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions⁹ and Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance.¹⁰ The widespread and consistent recognition of the principle across treaty and soft-law instruments has led most publicists to treat it as part of customary international law, binding even upon non-signatory states such as India.¹¹

⁵Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 1A(2).

⁶Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

⁷Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁸International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

⁹UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Principle 5, E.S.C. Res. 1989/65 (May 24, 1989).

¹⁰Declaration on the Protection of All Persons from Enforced Disappearance, art. 8, G.A. Res. 47/133 (Dec. 18, 1992).

¹¹B.S. Chimni, The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia, RCSS Policy Studies 4 (2000).

2.3. Gaps of the 1951 Framework for the Global South

The 1951 Convention's individualised, persecution-based test was designed for the European displacement of the immediate post-war period and does not comfortably accommodate the situations most common in South Asia: mass influx across porous borders, mixed migratory flows combining refugees and economic migrants, and displacement driven by generalised violence or statelessness rather than individual targeting. Nor does the Convention impose any binding mechanism of international burden-sharing, notwithstanding that the Global South today hosts the overwhelming majority of the world's displaced persons. Regional instruments outside Europe have tried to correct this: the 1969 OAU Convention extended the refugee definition to persons compelled to flee owing to "external aggression, occupation, foreign domination or events seriously disturbing public order",¹² and the 1984 Cartagena Declaration did the same for Latin America.¹³ No equivalent binding regional instrument exists for South Asia, notwithstanding non-binding efforts such as the 1966 Bangkok Principles as revised by the Asian-African Legal Consultative Organization. This regional vacuum is precisely why a domestic law rather than reliance on accession to the 1951 Convention alone is often argued to be the more appropriate instrument for India.

3. India's Legal and Constitutional Framework

3.1. The Absence of a Dedicated Statute

India has no legislation defining a refugee, prescribing a status-determination procedure, or codifying refugee rights. In its absence, refugees are governed by ordinary laws of general application the Foreigners Act, 1946,¹⁴ the Passport (Entry into India) Act, 1920, the Registration of Foreigners Act, 1939, the Citizenship Act, 1955, the Extradition Act, 1962, and the Illegal Migrants (Determination by Tribunals) Act, 1983 none of which distinguish a refugee fleeing persecution from an ordinary undocumented migrant. The Foreigners Act, in particular, vests the Central Government with what the Supreme Court in *Hans Muller of Nuremburg v. Superintendent, Presidency Jail* described as "absolute and unfettered" discretion to expel any foreigner¹⁵ a discretion re-affirmed decades later in *Louis De Raedt v.*

¹²OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. I(2), Sept. 10, 1969, 1001 U.N.T.S. 45.

¹³Cartagena Declaration on Refugees, Nov. 22, 1984, OAS/Ser.L/V/II.66, doc. 10, rev. 1.

¹⁴Foreigners Act, No. 31 of 1946, India Code.

¹⁵*Hans Muller of Nuremburg v. Superintendent, Presidency Jail*, Calcutta, AIR 1955 SC 367.

Union of India.¹⁶ A colonial statute drafted to police wartime enemy aliens thus remains, eighty years later, the principal legal basis on which India's refugee policy operates.

A private member's Bill most recently reintroduced as the Refugees and Asylum Seekers (Protection) Bill has been placed before Parliament on several occasions since 2006 without being enacted,¹⁷ and the National Human Rights Commission has itself recommended a national refugee law without eliciting a legislative response.

3.2. Constitutional Protection through Article 21 and Article 14

In the absence of statute, the judiciary has extended constitutional protection to refugees principally through Article 21's guarantee of life and personal liberty to "any person," not merely citizens, and through Article 14's guarantee of equality before the law. In *NHRC v. State of Arunachal Pradesh*, the Supreme Court directed the State to protect the life and liberty of Chakma refugees against threats of forcible expulsion and to forward their citizenship applications rather than obstruct them.¹⁸ In *Vishaka v. State of Rajasthan*, the Court held that international conventions not inconsistent with fundamental rights may be read into their interpretation,¹⁹ opening a doctrinal path by which unratified refugee-protection norms have nonetheless entered Indian constitutional reasoning.

3.3. Three Categories of Refugees in India

India's refugee population is, in practice, administered through three distinct and unequal tracks. First, Tibetan and Sri Lankan Tamil refugees are recognised and documented directly by the Government of India. Second, minority-community migrants from Pakistan, Bangladesh, and Afghanistan are typically granted long-term visas on grounds of persecution or humanitarian discretion, without formal refugee documentation, and since 2024 many are additionally eligible for fast-tracked citizenship under the CAA Rules. Third, refugees from all other countries including Afghans, Somalis, Iraqis, Iranians, Sudanese, and, controversially, the Rohingya of Myanmar fall under the mandate of the UNHCR's New Delhi office, which conducts refugee status determination that the Government of India does not itself formally recognise. This tiered structure, unmediated by statute, is the structural source of the disparate

¹⁶Louis De Raedt v. Union of India, (1991) 3 SCC 554.

¹⁷Refugees and Asylum Seekers (Protection) Bill, 2021, Bill No. LVII of 2021 (Lok Sabha) (not enacted).

¹⁸National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742.

¹⁹Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

treatment discussed in Part VI below.

4. Comparative Perspective: The South African Refugees Act, 1998

South Africa offers an instructive comparator: a Global South constitutional democracy that, like India, faces significant mixed migratory flows from its region, but which chose statutory codification over ad hoc executive discretion. South Africa is party to the 1951 Convention, its 1967 Protocol, and the 1969 OAU Convention, and gave these obligations domestic effect through the Refugees Act, 1998,²⁰ operating alongside the Immigration Act and a 1993 Basic Agreement between the South African Government and UNHCR.

4.1. Codified Rights

Chapter 5 of the Act, enacted in fulfilment of South Africa's constitutional human-rights mandate, codifies both refugee rights and duties. Section 27 entitles every recognised refugee to formal written documentation of status, full legal protection including free movement and access to the rights in the Bill of Rights, eligibility for permanent residence after five years of continuous, Standing Committee-certified refugee status, South African travel and identity documents, the right to seek employment, and access to the same basic healthcare and primary education available to citizens.²¹ Section 34 imposes a reciprocal duty on every refugee to obey the law of the Republic,²² establishing rights and obligations as two sides of a single statutory relationship rather than matters of unilateral executive grace.

4.2. Constrained Removal Powers

Section 28 permits removal only by order of the Minister of Home Affairs personally any removal order issued by a lesser official is void and only where necessitated by public order or national security, subject to due regard for the refugee's rights under domestic administrative law and international law, and subject to being given reasonable time to secure the consent of a receiving country of the refugee's choice.²³ Section 29 similarly constrains detention pending removal: no person may be detained beyond what is reasonable and justifiable, and any detention exceeding thirty days is subject to mandatory judicial review. In *Johnson v. Minister*

²⁰Refugees Act 130 of 1998 (S. Afr.).

²¹Id. § 27.

²²Id. § 34.

²³Id. § 28.

of *Home Affairs*, the Durban High Court held that fourteen months of undertrial detention violated the detainee's fundamental rights to dignity, personal freedom, and security,²⁴ a precedent the statute subsequently codified. Commentators have further argued that Section 29's use of the word "person," rather than "refugee," extends its detention safeguards to rejected asylum seekers as well.

4.3. Institutional Design

The Act creates dedicated Refugee Reception Offices and a Standing Committee for Refugee Affairs to conduct status determination, together with a Refugee Appeal Board. An institutional infrastructure is entirely absent in India, where UNHCR alone performs status determination for the majority of claimants, without any corresponding domestic administrative or appellate structure recognised by Indian law.

4.4. What South Africa Offers India

South Africa's system faces well-documented implementation strains, including chronic backlogs and allegations of corruption in its Refugee Reception Offices. But its statutory architecture nonetheless demonstrates three design features India's framework currently lacks: (i) a single, minister-level, legally reviewable removal power in place of dispersed and unaccountable administrative discretion under the *Foreigners Act*; (ii) a codified, non-discriminatory bundle of rights not contingent on the claimant's country or religion of origin; and (iii) a dedicated status-determination and appellate institution, reducing reliance on an international body whose domestic legal standing the Indian government itself now openly disputes.

5. Towards a National Refugee Law: Elements of a Model Framework

The tiered, religion- and nationality-inflected treatment of refugee groups expedited citizenship for non-Muslim minorities from three named countries under the CAA, continued government recognition of Tibetans and Sri Lankan Tamils, and disputed or hostile treatment of the Rohingya produces a system of protection correlated with identity rather than persecution, in tension with Article 14's guarantee of equality before law.

²⁴Johnson v. Minister of Home Affairs, 1997 (2) SA 432 (C).

India's continuing reliance on a charity-based rather than rights-based model allows protection to be extended or withdrawn as an act of administrative or diplomatic convenience, leaving refugees without the legal certainty that only codified, judicially enforceable rights can provide. A workable national refugee law for India should, at minimum, contain the following elements:

- i. A statutory definition of "refugee" combining the 1951 Convention's persecution-based test with a broader ground recognizing displacement caused by generalized violence, mass influx, or events seriously disturbing public order.
- ii. A dedicated, religion – and nationality – neutral refugee status determination procedure administered by a specialised domestic authority, reducing exclusive dependence on UNHCR determination that the government presently declines to recognise.
- iii. A codified non-refoulement guarantee, subject only to narrowly defined and judicially reviewable national-security exceptions, consistent with Article 33(2) of the 1951 Convention and customary international law.
- iv. Minister-level, legally reviewable removal powers modelled on Section 28 of the South African Act, replacing the dispersed and largely unreviewable discretion presently exercised under the Foreigners Act, 1946.
- v. Statutory limits on detention, including mandatory periodic judicial review, addressing the currently unregulated and indefinite detention documented in Assam and elsewhere.
- vi. A codified bundle of socio-economic rights to work, education, and basic healthcare extending the protections presently available only inconsistently through Article 21 litigation.
- vii. Specific protective provisions for refugee women and children, addressing the harassment and health hazards documented in Rohingya settlements.
- viii. A formal institutional coordination mechanism between the Ministry of Home Affairs, the National Human Rights Commission, and the UNHCR, replacing the present ad hoc and increasingly adversarial relationship.

Such a framework need not require accession to the 1951 Convention itself a step that would

carry its own complications, including the Convention's Article 42 reservation clause, which several scholars note would not by itself guarantee protection against the very rejections the Convention is meant to prevent. A tailored domestic statute, responsive to South Asia's specific migratory realities, remains the more appropriate and more immediately achievable instrument.

6. Conclusion

India's refugee governance has, for most of its post-independence history, rested on an unwritten compact: the executive would extend humanitarian shelter as a matter of policy, and the judiciary would step in, through Article 21, wherever that policy faltered.

South Africa's Refugees Act, 1998 shows that a Global South democracy confronting comparable migratory pressures can nonetheless choose codification over discretion, and rights over charity, without compromising legitimate national-security concerns indeed, by channeling those concerns through a reviewable, minister-level process rather than dispersed administrative discretion. India, a state that aspires to permanent membership of the UN Security Council and that has hosted displaced populations since long before the modern refugee regime existed, has both the institutional capacity and the moral standing to do the same. The absence of a national refugee law is no longer merely a legislative gap, it is an active governance failure with immediate human consequences. The passage of a rights-based, non-discriminatory national refugee law one that operationalizes non-refoulement, differentiates refugees from undocumented migrants, and creates predictable, reviewable institutions is a task that admits no further delay.