

**LEXKHOJ RESEARCH JOURNAL  
OF LAW & SOCIO-ECONOMIC  
ISSUES**

**ISSN: 2456-4524**



**VOLUME II ISSUE I**

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## ROHINGYA MUSLIMS AS REFUGEES IN INDIA

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### **Abstract**

*This article analysis the legal validity of the decision of Government of India to deport Rohingya Muslims. The analysis is restricted to only public international law. The central argument is that the decision of the government violates international law on two sources. Firstly, it violates various human rights treaties entered by India such as International Covenant on Civil and Political rights, 1966 and Convention on Rights of Child, 1989. Secondly, it violates the customary law such as the principle of non- refoulement. Moreover, a brief analysis of the domestic laws which suggests that the decision is invalid and the correct jurisdiction to challenge this is Supreme Court of India.*

### **Rohingya Muslims as Refugees in India**

This paper critically analysis Government of India's stand to deport Rohingya Muslims. This paper is primarily restricting itself on providing a detailed analysis on the basis of international law. However, it would be an incomplete analysis if domestic laws are not incorporated. Domestic laws and the interpretation of such laws have the power to change the government's opinion by terming it illegal. In addition, as India follows Dualist school of thought for integrating international law, an analysis of domestic laws is crucial.<sup>1</sup> Dualist school of thought believes that international law and domestic laws are two separate and distinct system of laws. To incorporate international law a state according to dualist should of thought needs a law to be made such a state.<sup>2</sup> Therefore, after analysing the situation on the basis of international law, it will be followed by a brief analysis on the basis of domestic law.

### **Cause and the rise of Rohingya Muslims as Refugee in India**

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<sup>1</sup> < available at <https://rostrumlegal.com/constitutional-commitment-to-international-obligations/> > Last accessed on 21<sup>st</sup> Oct' 2017 at 23:32.

<sup>2</sup> Supra 1: However, India seems to be moving to a mix of both Monist and Dualist School of thought due to the interpretation being given by Supreme Court of India especially for protection of human rights.

Rohingya Muslims is an ethnic group which forms the minority in Buddhist dominated Myanmar. Citizenship laws of Myanmar have denied Rohingya Muslims citizenship as Myanmar considers them to be foreign nationals from Bangladesh. Furthermore, laws of Myanmar grant only a temporary permit to Rohingya Muslims. On the other hand, Rohingya Muslims believe that they are a part of Myanmar since hundreds of years. Due to this conflict, around one million Rohingya Muslims have been stateless and thereby, being left to systemic abuse. Moreover, they have been denied of human rights such as freedom of movement, work, privacy, basic health care and education services and many more.<sup>3</sup> However, for this paper it would not be necessary to develop further on the historical conflict between Rohingya Muslims and the State of Myanmar.

This conflict of Rohingya Muslims and Myanmar in the recent time have become grave due to Arakan Rohingya Salvation Army (ARSA) allegedly attacked few Myanmar soldiers, known as Tatmadaw.<sup>4</sup> ARSA is a group whose objective is to “defend, salvage and protect Rohingya Community”<sup>5</sup>. In addition, Government of Myanmar believes this group to be a terrorist outfit which is strongly denied by ARSA. Based on this act of ARSA, Tatmadaw have launched a strong crackdown on Rohingya Community killing hundreds of them and forcing lakhs of them to leave their hometown. This act of Myanmar Government has been described by the UN Chief as an “textbook example of ethnic cleansing”.<sup>6</sup> Due to all of this, about forty thousand Rohingya Muslims have come to India to seek refuge. Out of this forty thousand, about fifteen thousand have been recognised by UN and have received refugee documentation as well.<sup>7</sup>

Government of India’s policy suggests that the government wants to deport all these forty thousand of Rohingya Muslims on the basis that they are a threat to national security.<sup>8</sup> Intelligence agencies believe that these Muslim are in touch with Pakistan based militant

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<sup>3</sup> <available at <http://www.independent.co.uk/news/world/asia/burma-rohingya-muslims-ethnic-cleansing-un-massacre-minority-myanmar-aung-san-su-kyi-human-rights-a7940021.html> > & < available at <http://www.independent.co.uk/news/world/asia/india-rohingya-muslims-deport-burma-40000-supreme-court-terrorists-bangladesh-myanmar-a7953851.html> > Last accessed on 21<sup>st</sup> Oct’2017 at 23:32

<sup>4</sup> <available at <https://in.reuters.com/article/myanmar-rohingya-india/india-calls-rohingya-refugees-threat-to-national-security-idINKCN1BP23E> > Last accessed on 21<sup>st</sup> Oct’ 17 at 23:55: The word “allegedly” has been used as there has been no independent investigation. In addition, State of Myanmar is an interested party so therefore, the use of the word allegedly.

<sup>5</sup> <available at <http://www.aljazeera.com/indepth/features/2017/09/rohingya-india-fear-deportation-myanmar-170911134706072.html> > Last Accessed on 21<sup>st</sup> October 17 at 23:57

<sup>6</sup> Supra 2,3,4 and 5

<sup>7</sup> Supra 2,3,4 and 5

<sup>8</sup> Supra 2,3,4 and 5

group.<sup>9</sup> However, this policy has been challenged in the supreme court by two Rohingya Muslims with the aid of Human rights organization and activists. Hence, this article gives an analysis of international and domestic laws which may be applied in this present case.

### **Analysis on the basis of international law**

Article 38 of Statute of The International Court of Justice comprehensively lays down what constitutes as “international law”. Firstly, Article 38(1)(a) suggests convention whether general or particular expressly recognised by the state. This lays down conventions, treaties and protocols are binding on states which have “expressly” recognised it which suggests only binding on states which have consented to that treaty. In addition, the case of Federal Republic of Germany v. Denmark and Netherlands commonly known as North Sea Continental Shelf case the International Court of Justice (hereinafter ICJ) has held a state which has not consented or accepted a treaty, such provisions of the treaty would not be binding on that State.<sup>10</sup> Secondly, Article 38(1)(b) suggests international custom as general practice accepted as law. This lays down two key elements; (i) general practice and (ii) accepted as law known as *Opinio Juris*. In the landmark case between Colombia v Peru also known as the Asylum case the court added guidelines for what is considered as general practice. It laid down two elements that is uniformity and consistency of practice.<sup>11</sup> In addition, a few other factors like long duration, universality and others. Thirdly, Article 38(1)(c) suggests other principles that are recognised by civilised nations. A few examples of this could be rule of law, concept of *res judicata*, and remedy when rights violated-reparations and other such principles. These three are the main sources or the primary sources of international law.

However, international law is not restricted to these sources, Article 38(1)(d) gives due significance to writings of highly qualified jurists and judicial precedents but subject to Article 59. The resolutions passed by the United Nations Security Council, General Assembly and state papers are a few examples of other sources to give guidance on international law. Article 59 of the Act lays down that judicial precedents only have a binding force between

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<sup>9</sup> Supra 2,3,4 and 5

<sup>10</sup> [1969] ICJ Reports 3 pg. no. 41

<sup>11</sup> [1950] ICJ Reports 6 pg. no. 266

the parties to which that decision applies. Therefore, unlike the practice prevalent in India, a judicial decision of the ICJ is not law for other parties. Having highlighted the major sources of international law, the following paragraphs will discuss each one of them in greater detail.

### **Conventions and Protocol**

There are two conventions relating to international refugee- 1951 Convention relating to the Status of Refugees and Secondly, 1967 Protocol relating to the Status of Refugees. 1951 Convention relating to the Status of Refugees defines refugee someone who has a fear of persecution on the basis of race, religion, nationality, or for being part or a member of any particular social group or for having a political opinion. In addition, who is unable to get the protection of that country (means the country where there is a fear of the refugee of being persecuted) or return to that country.<sup>12</sup> In addition, following from 1951 Convention Relating to the Status of Refugees is the codification of the refugee's right to not be forced to go back to the country where he has a fear of being prosecuted- this is known as the Principle of non-refoulement.<sup>13</sup> However, India is not a party to either 1951 Convention Relating to the Status of Refugees or the 1967 Protocol. Nonetheless, about 141 countries as of September 2001 are parties to either of these two conditions. As India has not ratified or signed either of these two agreements therefore based on the consent theory and Article 38 of ICJ these two conventions can't be applied to India.

However, India has acceded, ratified or signed various others human rights law. Human Rights law and Refugee law are related as international refugee law is a sub-set of international humanitarian. Two such treaties that India has acceded is the International Covenant on Civil and Political Rights, 1966 on 10<sup>th</sup> April 1979 and Convention on Rights of Child, 1989 on 11<sup>th</sup> December 1992 both these agreements protects human rights.

Article 7 under Part III of International Covenant on Civil and Political Rights, 1966 reads as "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"<sup>14</sup> and an interpretation of this could suggest the principle of non-refoulement is

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<sup>12</sup> Article 1(2) of 1951 Convention

<sup>13</sup> Article 33(1) of 1951

<sup>14</sup> Article 7 of *The International Covenant on Civil and Political Rights, 1966*. <available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> > Last Accessed on 23<sup>rd</sup> October 17 at 21:02

read under this article.<sup>15</sup> Moreover, the objective of non-refoulement principle is to protect the freedom and life of the refugee. This is something which is clearly protecting a person from torture and inhuman treatment. Furthermore, The Convention on the Rights of the Child applies to every child which includes a child refugee as well. Under the convention it is a duty of the State, in this case of India, to protect and provide humanitarian assistance in the enjoyment of the rights that is there is the convention and deporting them would be a violation of such rights.

It is very clear from the situation prevalent in Myanmar that if they are deported, it would result in their death or inhuman treatment. Therefore, based on this India could not be able to deport these refugees as it has an obligation to protect everybody from inhuman or degrading treatment.

### **Customary International Law**

Article 38(1)(b) of the Statute of the International Court of Justice treats international customs, as primary source of public international law. As explained earlier international customs have two key elements- consistent state practice and opinion juris (accepted as law). Principle of non- refoulement of refugees as stated in Article 33(1) of the 1951 Convention and other various other international human rights law<sup>16</sup> satisfies the conditions needed to be considered to be a rule of international customary law.<sup>17</sup> Therefore, principle of non-refoulement is binding on states like India even if they have not ratified or signed or acceded the 1951 Convention or the 1967 Protocol. In addition, the New Zealand Court of Appeal has said “the prohibition on refoulement, contained in Art(icle) 33(1) of the Refugee Convention is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all states, which arise when states follow certain practices generally and consistently out of sense of legal obligation.”<sup>18</sup> Moreover other courts such as

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<sup>15</sup> UNHCR Refugee Protection: A guide to international refugee law <available at <http://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> > Last Accessed on 23<sup>rd</sup> October 17 at 22:20

<sup>16</sup> 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa- Article II || The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment- Article 3 || Declaration on the Protection of All Persons from Enforced Disappearance- Article 8 || Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions- Principle 5 || The Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World- Article 2

<sup>17</sup> UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol <available at <http://www.unhcr.org/4d9486929.pdf> > Last accessed on 23<sup>rd</sup> October 17 at 22:25

<sup>18</sup> *Zaoui v. Attorney General* [2005] 1 NZLR 690, para no. 34

Federal Republic of Germany also consider Principle of Non- refoulement to be a part of customary law.<sup>19</sup> Furthermore, history of India suggests they have always complied and followed with the principle of non- refoulement- Tibetan community.<sup>20</sup>

Another custom in international law that could be considered is the prohibition of torture. This custom is so central to international law that it reconsidered to be a jus cogens (peremptory norm- such principles from which no derogation is ever permitted<sup>21</sup>).<sup>22</sup> Principle of non-refoulement is merely an extension of the broader understanding of prohibition of torture. If refoulement is allowed then it would be the gravest form of torture.<sup>23</sup>

Hence, considering the nature of non-refoulement is rooted so deep in the international human rights law it would be a violation of International law if India deports Rohingya Muslims to Myanmar.

### **Domestic Laws**

There is no specific domestic refugee law in place also in India which grants protection to refugees. However as per the Indian constitution, there are a few fundamental rights that can be enjoyed by all the person irrespective of their nationality, or race, they are granted to all every individual due the inherent nature of being a human.<sup>24</sup> They are the two most important rights. Firstly, equality before law as protected by Article 14 and secondly, protection of life and personal liberty as granted by Article 21. When we say the fundamental right is given to all it includes citizen, non-citizen and even the refugee, state can't take it away that freedom with the safeguards granted by the constitution of there being a law.<sup>25</sup> In addition, the government failure to treat refugees recognised by United Nation and illegal immigrants alike is a serious breach of right of equality. There is no reasonable classification, it is arbitrary to treat this two classes as the same level. Moreover, Article 32 grants people to approach the Supreme Court for violation of fundamental rights does not use the word "citizen" or any such terms hence a petition by refugees would be maintainable.

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<sup>19</sup> 2 BvR 1938/93

<sup>20</sup> Supra 17

<sup>21</sup> <Available at [https://www.law.cornell.edu/wex/jus\\_cogens](https://www.law.cornell.edu/wex/jus_cogens) > last accessed on 23<sup>rd</sup> October 17 at 22:54

<sup>22</sup> Supra 14 pg. no.11 para no. 21

<sup>23</sup> Supra 5- Instead of being deported to Myanmar, they would prefer to die in India.

<sup>24</sup> Article 14 and 21 of Indian Constitution: use of word "any person" and "no person" respectively give the indication it applies to everybody irrespective of the person being a refugee.

<sup>25</sup> < Available at <http://www.livelaw.in/rohingyas-fundamental-rights-like-indians-sc-jurisdiction-hear-plea-deportation-nariman-read-rejoinders/> > last Accessed on 23<sup>rd</sup> October 17 at 23:09

However, the defence or the reason stated by the Government of National Threat may have some merits. Nonetheless, evidence needs to be shown that all or majority of the Rohingya Muslims are a threat to national security. Furthermore, looking at the liberal approach the Supreme Court takes in interpreting fundamental rights as shown through various human rights violation cases. It is very likely that the court might consider this to be a violation of right to life and equality at least for the 15,000 UN recognised and documented refugees.

### **Conclusion**

The decision of the Home Ministry to deport all the Rohingya Muslims is a violation of international law and at the same time a violation of national human rights law. There may be the case the decision to deport Rohingya Muslims not recognised by the United Nations or the National Human Rights Commission may be justified not to Myanmar but to another country who is accepting Rohingya Muslims as refugees. This could also be done for refugees which are recognised by the United Nations.