

**Revisiting the Obligations of Contracting and Non-Contracting States to the  
1951 Refugee Convention in Light of Rohingya Refugee Crisis & Non-Refoulement**

by

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Submitted in partial fulfilment of the requirements

for the degree of Master of Laws

at

Dalhousie University

Halifax, Nova Scotia

August 2023

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### **Abstract**

Rohingya refugees are one of the most discriminated and persecuted minorities in the contemporary world. The 2017 mass exodus of Rohingya in Myanmar forced approximately 700,000 Rohingyas to flee Myanmar and take shelter in neighboring countries. At present, Bangladesh is hosting majority of Rohingya refugees. Thousands of

Rohingya refugees are taking refuge in other contracting and non-contracting states of the 1951 Refugee Convention. This makes it important to reflect on the protection mechanism available to refugees. This thesis examines the root cause of Rohingya refugee crisis by examining the postcolonial laws in Myanmar that led to one of the biggest refugee crises facing the contemporary world. Drawing on the Rohingya refugee crisis, this thesis will explore the protection mechanism available to refugees. In doing so, the thesis adopts a comparative legal analysis of contracting and non-contracting states of the 1951 Refugee Convention, with an intent to reveal whether refugee protection mechanism is better in contracting states as compared to the non-contracting states of the 1951 Refugee Convention.

#### **List of Abbreviations Used**

AAPP - Assistance Association for Political Prisoners

ACHR - American Convention on Human Rights

AFPFL - Anti-Fascist People's Freedom League

APBn - Armed Police Battalion

ASEAN - Association of Southeast Asian Nations

BGP - Border Guard Police

CAA - Citizenship (Amendment) Act

CAT - Convention against Torture

CEDAW - Convention on the Elimination of All Forms of Discrimination Against

#### Women

CESCR - Committee on Economic, Social, and Cultural Rights

CRC - Convention on the Rights of the Child

CSC - Citizenship Scrutiny Cards

CUAET - Canada-Ukraine Authorization for Emergency Travel

ECtHR - European Court in Human Rights

EU - European Union

FRC - Foreign Registration Certificates

HC – High Court

HRC - Human Rights Committee

ICCPR - International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ICVA - International Council of Voluntary Agencies

IOM - International Organization for Migration

IHRL – International Human Rights Law

IRL – International Refugee Law

IRPA - Immigration and Refugee Protection Act

NHRC – National Human Rights Commission  
NRC - National Registration Cards  
NVC - National Verification Card  
OAU -Organization of African Unity  
PSR - Private Sponsorship of Refugees  
RSAB - Refugee Status Advisory Board  
RMMRU - Refugee and Migratory Movements Research Unit  
SC – Supreme Court  
TRC - Temporary Registration Certificate  
UDHR – Universal Declaration of Human Rights  
UN - United Nations  
UNDP - United Nations Development Programme  
UNEP - United Nations Environment Programme  
UNHCR - United Nations High Commissioner for Refugees  
UNTS – United Nations Treaty Series  
UOI – Union of India  
VCLT - Vienna Convention on the Law of Treaties

### **Acknowledgment**

I would like to extend my sincere gratitude and appreciation for my supervisor Professor Constance MacIntosh. Her support, guidance, insights, and encouragement from the beginning and completion of this thesis have been valuable. I have learned so

much from her, even within a relatively short term, amidst the challenges of settling in a new country. Her kindness and concern for my wellbeing motivated me at every stage.

I also want to thank Professor Olabisi D. Akinkugbe for his valuable suggestions. His insightful suggestions on relevant sources and post-colonial theory have improved my analysis. I am also grateful to Professor Richard Devlin and Professor Colin Jackson for their invaluable guidance on legal scholarships and research methodologies.

I would like to extend my gratitude to Schulich School of Law and the Faculty of Graduate Studies for the financial relief, which enabled me to complete this thesis on time. I further want to thank my friends and classmates for showing interest in my research. They have been so kind and sympathetic. I am also grateful to my parents and my friends in India, who empowered me at every juncture. I could not have done this without them. Last but not least, I would like to thank the almighty for his many blessings on me.

## Chapter 1: Introduction

### 1.1. An Overview of the thesis

The 1951 Refugee Convention Relating to the Status of Refugees and its 1967 Protocol<sup>1</sup> (hereinafter referred to as the 1951 Refugee Convention) are the key legal documents that constitute the international refugee law regime.<sup>2</sup> The 1951 Refugee Convention provides various protection mechanisms that are to be respected and enforced by the countries that have ratified the 1951 Refugee Convention and are hosting refugees. However, there are a lot of countries that host a large number of refugees, despite being a non-contracting state to the 1951 Refugee Convention,<sup>3</sup> due to sharing borders with or being close to refugee-producing countries where those refugees have little realistic chance of reaching a contracting state, unless the contracting states choose to resettle them.<sup>4</sup> Rohingya are one such refugee population. My thesis seeks to analyze whether and how non-contracting states to the 1951 Refugee Convention have nonetheless complied with core principles of the 1951 Refugee Convention, with reference to the ‘Rohingya refugee crisis’. This analysis includes drawing comparisons with how contracting countries have acted.

Rohingya are the ethnic minorities and largely Muslim in the predominantly Buddhist country of Myanmar.<sup>5</sup> The history of persecution of Rohingyas dates back to the post-independence era of Myanmar<sup>6</sup>, wherein ethnic minorities were denied

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<sup>1</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, UNTS 189 1951 at 137.

<sup>2</sup>*Ibid.*

<sup>3</sup>Rawan Arar & David Scott FitzGerald, *The Refugee System: A Sociological Approach* (Cambridge, UK: Polity, 2022).

<sup>4</sup>Erik Christopherson, “A few countries take responsibility for most of the world’s refugees”, (1 March 2020), online: <<https://www.nrc.no/shorthand/fr/a-few-countries-take-responsibility-for-most-of-the-worlds-refugees/index.html>>.

<sup>5</sup>Anthony Ware & Coostas Laoutides, *Myanmar’s ‘Rohingya’ Conflict* (New York, NY: Oxford University Press, 2018).

<sup>6</sup>*Ibid.*



citizenship on the basis of the 1982 Citizenship Act of Myanmar.<sup>7</sup> Thereafter, the Rohingyas were denied the freedom of movement and were restricted within the state borders of Rakhine state in Myanmar, where they were denied even basic amenities.<sup>8</sup> This event forced them to flee their homeland and seek refuge in the neighboring countries. Subsequently in 2017, due to a large-scale military attack against the Rohingya minorities about 700,000 Rohingyas fled Myanmar and sought refuge in other countries.<sup>9</sup> As a result of these events, Rohingyas are now termed as the “most persecuted refugees in the world”.<sup>10</sup> In fact, the United Nations called the mass exodus of Rohingyas a “most acute refugee emergency”.<sup>11</sup>

My thesis focuses on the case study of Rohingya refugees and compares the legal policies and practices of states in light of whether they are contracting or non-contracting states to the 1951 Refugee Convention. I chose the research topic because there is a lack of systematic and comparative study regarding the acceptance and treatment of refugees in contracting and non-contracting states to the 1951 Refugee Convention. Most of the countries with the highest number of refugees who are not yet a signatory to the 1951 Refugee Convention provide protection to a vast number of refugees on the basis of the principle of *non-refoulement* (a principle of customary international law).<sup>12</sup> However,

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<sup>7</sup>*Citizenship Act, Burma 1982*online (pdf): <[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=87413&p\\_country=MMR&p\\_count=86](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=87413&p_country=MMR&p_count=86)>.

<sup>8</sup>“Myanmar: Rohingya trapped in dehumanising apartheid regime”, *Amnesty International* (21 November 2017), online: <<https://www.amnesty.org/en/latest/press-release/2017/11/myanmar-rohingya-trapped-in-dehumanising-apartheid-regime/>>.

<sup>9</sup>Meenakshi Ganguly& Brad Adams, “For Rohingya Refugees, There’s No Return in Sight”, (5 June 2019), online: *Human Rights Watch*<<https://www.hrw.org/news/2019/06/05/rohingya-refugees-theres-no-return-sight>>.

<sup>10</sup>“Rohingya Refugee Crisis Explained”, online: *UNHCR*<<https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/>>.

<sup>11</sup>“Rohingya emergency”, online: *UNHCR*<<https://www.unhcr.org/emergencies/rohingya-emergency>>.

<sup>12</sup>Maja Janmyr, “The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda” (2021) 33:2 *Intl J Refugee L* 188–213, online: <<https://doi.org/10.1093/ijrl/eeab043>> at 188.

sometimes non-contracting states do not comply with this principle and cite reasons such as national security for their actions.<sup>13</sup>

The thesis is divided into five chapters. Each substantive chapter will answer a specific research question. Chapter I will introduce the thesis, locate the research, identify the research questions, and produce a literature review. This chapter is descriptive. Chapter II will discuss in detail the history (specifically postcolonial history) of Rohingya refugees, and the human rights violations faced by them in the post-independence period in Myanmar. Further, this chapter will also analyze the root cause behind the persecution of Rohingya refugees. For this, the chapter would rely mostly on analyzing the post-colonial laws and policies of Myanmar that resulted in the Rohingya crisis. Chapter III of the thesis will discuss the international response to the Rohingya refugee crisis by analyzing the protection framework under the 1951 Refugee Convention. Most importantly, this chapter will focus on a comparative analysis of the legal protection framework of contracting and non-contracting states to the 1951 Refugee Convention in regard to Rohingya refugees. The last substantive chapter of the thesis will explore the principle of *non-refoulement*, its application, limitations, and state practices. It will specifically analyze India's practice of *non-refoulement* regarding Rohingya refugees. As many Rohingyas have fled to India, I devote a full chapter to India's treatment of Rohingya, which I find to be inconsistent with the principle of *non-refoulement* and discriminatory. There is then a short concluding chapter.

## **1.2. Research Questions**

For a clear analysis, there are four research questions that will guide the discussion.

These are:

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<sup>13</sup>Withit Mantaph, *The status of refugees in Asia* (New York: Oxford University Press, 1992).

(a) What are the root causes behind the persecution of Rohingya people/refugees in Myanmar?

(b) What are the differences between the legal framework of contracting and non-contracting countries to the 1951 Refugee Convention regarding the protection of Rohingya refugees?

(c) Considering the international legal frameworks such as the International Refugee law and the International human rights law, at play, what are the differences, on the ground, for how Rohingya refugees have been and are treated by contracting and non-contracting states of the 1951 Refugee Convention?

(d) What are the limitations of the principle of *non-refoulement*? Is India's stance on the deportation of Rohingya refugees in violation of the principle of *non-refoulement* justified?

### **1.3. Research Methodologies**

Research methodology is a systematic way to answer the research questions in a thesis. The methodology has been defined by some scholars as something that is related to the 'field of inquiry' and which has theoretical connotations.<sup>14</sup> It has also been defined as a systematic procedure applied by a scholar for his research/project.<sup>15</sup> In simple terms it could be understood as a science of how research is performed. It informs the overall approach of the research.<sup>16</sup> There is, however, no debate that good scholarship must focus on methodology.<sup>17</sup>

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<sup>14</sup>Robert Cryer et al, *Research Methodologies in EU and International Law* (UK: Hart Publishing Ltd, 2011) at 5.

<sup>15</sup>Elizabeth Fisher et al, "Maturity and Methodology: Starting a Debate about Environmental Law Scholarship" (2009) 21:2 J Envtl L 213–250, online: <<https://doi.org/10.1093/jel/eqp012>> at 215.

<sup>16</sup>Cryer et al, *supra* note 14 at 6.

<sup>17</sup>David Feldman, "The Nature of Legal Scholarship" (1989) 52:4 Mod L Rev 498–517, online: <<https://www.jstor.org/stable/1096178>> at 498.

Research methodology should always be made clear and should be well thought of, because it has scholarly consequences.<sup>18</sup> In fact, it plays a significant role in answering the research questions.<sup>19</sup> Our choice of methodology also reflects our personal style, professional, and personal goals.<sup>20</sup> Therefore, deciding upon research methodology is a matter of choice. This choice of methodology also reflects our research approach. Therefore, it is important for a researcher to carefully determine the methodology/methodologies for his research.

The legal research methodologies that I use for my thesis are doctrinal, historical, comparative, and theoretical (post-colonial theory).

### **1.3.1. Doctrinal Research**

Doctrinal legal research involves systematic exposition of legal rules governing a particular legal category.<sup>21</sup> It also includes identifying and analyzing primary sources of law (statutes, jurisprudence, legislations, etc.). Doctrinal research also analyzes the connection between different legal rules. It seeks to explain the areas of difficulty and also predict future developments.<sup>22</sup> Therefore, it could be said that doctrinal research is a two-fold process. First, it requires the identification of sources of law and second, it involves analysis of those legal sources.<sup>23</sup>

As one must first identify the law before critiquing it,<sup>24</sup> I will be using doctrinal methodology to locate the relevant primary and secondary sources of law before critically analyzing them. For instance, I will use doctrinal research in chapter 2 of my thesis

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<sup>18</sup>*Ibid.*

<sup>19</sup>Cryer et al, *supra* note 14 at 8.

<sup>20</sup>*Ibid* at 9.

<sup>21</sup>Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 Deak L Rev 83, online: <<https://ojs.deakin.edu.au/index.php/dlr/article/view/70>> at 101.

<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.*

<sup>24</sup>Cryer et al, *supra* note 14 at 38.

(along with historical methodology) to critically analyze primary sources of law such as the Union Citizenship Act<sup>25</sup> and the 1982 Citizenship Act of Myanmar<sup>26</sup>. Further, in chapter 3 of my thesis, I use doctrinal analysis (along with comparative methodology) to identify and analyze the legal policies and regulations of the contracting and non-contracting states to the 1951 Refugee Convention. For this, I analyze the Constitution of India<sup>27</sup>; the Constitution of Bangladesh<sup>28</sup>; the 1951 Refugee Convention<sup>29</sup>; and Canada's Immigration and Refugee Protection Act, Canada<sup>30</sup>; in regard to protection mechanisms for refugees.

I also use doctrinal research to undertake conceptual clarifications and examinations in chapter 4 of my thesis. In chapter 4, I examine the concept of the principle of *non-refoulement* and provide clarity to the readers by explaining its evolution, its theoretical basis, application, limitations, and state practices. I discuss the principle of *non-refoulement* in the context of India. I draw upon the decisions of courts to draw upon the analysis<sup>31</sup>. The analysis reveals the evolution of the principle of *non-refoulement* as *jus cogens* (a customary rule in international law). I also analyze the judicial approach adopted by the Indian courts to reveal India's discriminatory stance towards Rohingya refugees.

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<sup>25</sup>*Union Citizenship Act*, Burma 1948(Act LXVI) online (pdf): < [https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs/UNION\\_CITIZENSHIP\\_ACT-1948.htm](https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs/UNION_CITIZENSHIP_ACT-1948.htm)>.

<sup>26</sup>*Citizenship Act*, *supra* note 7.

<sup>27</sup>*Constitution*, India, online (pdf): < <https://legislative.gov.in/sites/default/files/COI.pdf>>..

<sup>28</sup>*Constitution*, People's Republic of Bangladesh 1972, online: < <http://bdlaws.minlaw.gov.bd/act-367.html>>.

<sup>29</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1.

<sup>30</sup>*Immigration and Refugee Protection Act*, SC 2001, c 27.

<sup>31</sup>*Mohammad Salimullah v Union of India*, [2021] AIR 2021 SC 1753 (India)[*Salimullah*]; *Indian Union Muslim League v Union of India*, [2019] WP (C) 1470/2019 (India)[*Muslim League*].

Concerning secondary legal sources, I rely mostly on books, journal articles, law reform documents, policy documents, etc. To locate these sources, I relied on online platforms such as Westlaw, CanLii, LexisNexis, SCCOnline, SSRN, and Researchgate, etc., in order to effectively answer the research questions in my thesis, I rely on law dictionaries and related literature to interpret areas where there is ambiguity.

I also use doctrinal research for the purpose of producing a literature review. A Literature review is a critical analysis of pre-existing literature related to a research topic.<sup>32</sup> Further, I also explore the work of scholars in regard to the issue of Rohingya refugees and the available protection mechanisms under the 1951 Refugee Convention. This approach of doctrinal legal research serves an important purpose of critically assessing some of the laws from a post-colonial perspective.

### **1.3.2. Historical Research**

History plays a crucial role in understanding the present world, but it also lets us know about the events that shaped the world. It is important for understanding aspects of the society. History also plays a significant role in legal education as it is crucial for understanding the law.<sup>33</sup> Therefore, it is essential to have a historical approach to law. Legal history is important for a number of reasons, including: (1) understanding the development of law; (2) how law is shaped by other factors; and (3) it allows us to make decisions.<sup>34</sup>

A doctrinal analysis of the post-colonial citizenship laws of Myanmar necessitates a historical-legal approach. The Rohingya refugee crisis began in the post-independence

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<sup>32</sup>Maggie Walter, (Oxford: Oxford University Press, 2010) at 485.

<sup>33</sup>Jim Phillips, "Why Legal History Matters" (2010) 41 WUWLR 293 at 316.

<sup>34</sup>*Ibid.*

period of Myanmar, when the Union Citizenship Act<sup>35</sup>, was passed by the government. This act defined the ethnic groups entitled to citizenship in Myanmar. However, it excluded Rohingyas. Only those Rohingyas whose families had stayed in Myanmar for two generations, or more were given identity cards and citizenship.<sup>36</sup> Subsequently, in 1982, when the Citizenship Act<sup>37</sup> was passed, it legally took away the citizenship of Rohingya. This discriminatory treatment, embedded within the legal system can take us back to the beginning of the law's objective and its role in justifying the injustices that has exacerbated with time. Therefore, a historical approach is important to analyze the cause of the discrimination and I explore it in depth in Chapter 2.

Situating the law within its historical context serves three main purposes: (a) tracing the beginning of the Rohingya refugee crisis; (b) analyzing the role of law in abetting the Rohingya refugee crisis; and (c) examining the root cause of human rights violations against the Rohingyas. This historical-legal analysis helps expose the discriminatory elements that exist within the law.

I use the historical methodology in the thesis to look at pre-independence and post-independence events in Myanmar that led to discrimination against Rohingyas. I also analyze the citizenship laws of Myanmar to understand the role of law alongside the institution and actors that implemented it to create the mass exodus of Rohingyas. Therefore, historical methodology is strictly employed for analyzing the root cause of the Rohingya refugee crisis (including the root cause of human rights violations faced by Rohingya in Myanmar) and assessing the effect of post-independence laws in justifying

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<sup>35</sup>*Union Citizenship Act, supra* note 25.

<sup>36</sup>*Union Citizenship Act, ibid* at s 4(2).

<sup>37</sup>*Citizenship Act, supra* note 7.

the violence against the Rohingyas. The application of historical methodology is limited to chapter 2 of the thesis.

### **1.3.3. Comparative Research**

Comparative law could be understood in simple terms as, comparing different legal systems.<sup>38</sup> It signifies the study of and research in law by comparison of two or more legal systems.<sup>39</sup> Comparative research serves various purposes, including: (a) understand a legal system or a particular area of law; (b) interpretation of rules of law; <sup>40</sup>(c) study different ways of resolving conflicts adopted by different legal systems;<sup>41</sup> (d) evaluating how effective legal systems are in resolving conflicts;<sup>42</sup> (e) helping understand some of the concepts and institutions of customary international law<sup>43</sup>; (f) to aid unification of law or law reforms; and (g) to comprehend one's own law and develop critical standards to aid its improvement.

Every investigation in comparative law commences with the posing of a question or set of questions.<sup>44</sup> My investigative question for comparing different legal systems is whether the accession to the 1951 Refugee Convention necessarily means a better refugee protection framework. To answer this question, I am comparing the legal policies of three different systems (Canada, India, and Bangladesh), in regard to providing protection to refugees. Out of these three legal systems, Canada is a contracting state to the 1951 Refugee Convention and the other two (India and Bangladesh) are non-contracting states to the Convention. I chose these three countries because they have a few things in

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<sup>38</sup>Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law*, 3rd ed (Oxford, UK: Clarendon Press Publication, 1998) at 1.

<sup>39</sup>W J Kamba, "Comparative Law: A Theoretical Framework" (1974) 23:3 ICLQ 485 at 486.

<sup>40</sup>Zweigert & Kotz, *supra* note 38 at 1.

<sup>41</sup>*Ibid.*

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.*



common, such as: (a) they have a common law system; (b) they were British colonies in the past; and (c) they have provided asylum to Rohingya refugees.

There is a lack of systematic and comparative literature on protection mechanisms adopted by contracting and non-contracting states to the 1951 Refugee Convention.<sup>45</sup> My objective here, thus, is to compare how contracting and non-contracting states differ in their legal and *de jure* approach to provide protection to refugees, by referring to Rohingya refugee crisis. There is a common assumption that refugee protection is superior in signatory states when compared to non-contracting states.<sup>46</sup> However, in many contracting and non-contracting states alike, limiting refugees' claim to asylum is a part of the political agenda and has nothing to do with accession to the 1951 Refugee Convention.<sup>47</sup> The literature on infringement of human rights of asylum seekers in Australia,<sup>48</sup> for instance, contradicts this assumption. Not only do non-contracting states host a higher percentage of asylum seekers and refugees, but some of these countries, like India, also argue that they treat refugees in a better manner than countries that have ratified the convention.<sup>49</sup> This contention by the non-contracting states despite the lack of formal accession to the 1951 Refugee Convention makes a compelling case for comparing the legal basis and *de jure* practices of contracting & non-contracting states with respect to practical approach to refugees. This approach also inspires a great comparative appeal because non-contracting states rely entirely upon principles of

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<sup>45</sup>Janmyr, "The 1951 Refugee Convention and Non-Signatory States", *supra* note 12.

<sup>46</sup>*Ibid.*

<sup>47</sup>*Ibid.*

<sup>48</sup>Thalia Kehoe Rowden, "Human rights abuses of refugees and asylum seekers in Australia", (10 August 2020), online: *Human Rights Measurement Initiative*<<https://humanrightsmasurement.org/human-rights-abuses-of-refugees-and-asylum-seekers/>>.

<sup>49</sup>Jeff Crisp & Nicholas Maple, "Relevant or redundant? The future of the international refugee protection regime", (22 July 2021), online: *Refugee Law Initiative Blog*<<https://rli.blogs.sas.ac.uk/2021/07/22/relevant-or-redundant-the-future-of-the-international-refugee-protection-regime/>>.

customary international law (for example - the principle of *non-refoulement*) for providing protection to refugees.

So, my aim behind this comparative research is to assess this assumption by comparing and analyzing legal policies and *de jure* practices of these three legal systems. One of the criticisms of comparative law is that it leaves the comparatist with immense materials which could be unsystematic.<sup>50</sup> I am cautious to avoid this, by limiting my study to the refugee law framework (for contracting states) and principles of customary international law (for non-contracting states), with a focus on the treatment to Rohingya refugees.

#### **1.3.4. Theoretical Research (Post-colonial theory)**

Every legal research has some theoretical basis, which determines the progress of the research. The theoretical basis of legal research also decides the research questions and the methodology.<sup>51</sup> Theory is a way or ideas meant to clarify and explain something.<sup>52</sup> It can help a researcher in questioning the presumptions related to their research and interrogating assumptions related to methodology.<sup>53</sup> I will be using post-colonial theory in my research.

‘Colonialism’ and ‘Post-colonialism’ are complex words. Different understandings of the term ‘colonialism’ often complicate the meaning of the term ‘post-colonialism’. Colonialism can be defined as “a conquest and control of lands and goods of a smaller country by a powerful country”.<sup>54</sup> Colonialism has been deemed to bring together people belonging to different races and ethnicities, who lived independently of each other, within

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<sup>50</sup>Jonathan Hill, “Comparative Law, Law Reform and Legal Theory” (1989) 9:1 Oxford J Leg Stud 101.

<sup>51</sup>Cryer et al, *supra* note 14 at 5.

<sup>52</sup>Jim Stewart, Victoria Harte & Sally Sambrook, “What Is Theory” (2011) 35:3 J European Industrial Training 221 at 222.

<sup>53</sup>Richard F Devlin, “The Charter and Anglophone Legal Theory” (1997) 4:1 Rev Const Stud 19 at 22.

<sup>54</sup>A Loomba, *Colonialism/Postcolonialism*, 3rd ed (London: Routledge: Taylor & Francis, 2015) at 20.

one boundary.<sup>55</sup> Evidently, colonialism did not take place in a similar manner in different parts of the world and had different implications on the people and their culture.<sup>56</sup>

Generally, the word post-colonialism connotes the period after colonialism or the ‘after-independence’ era of the former colonies. Much like colonialism, post-colonialism cannot be used in a single sense as a country may be both post-colonial (after gaining independence) and neo-colonial (by remaining economically/culturally dependent on former colonies)<sup>57</sup> at the same time.<sup>58</sup> According to postcolonial theorists, post-colonialism can be construed as anything but a mere transfer of governance (from one regime to another).<sup>59</sup> As Anghie remarks, “the post-colonial states embraced the Western notion of nation-states and embodied specific concepts of nation, ethnicity, and territory, which demanded a transformation of indigenous people and resulted in ethnic tensions.”<sup>60</sup>

In some countries the effect of post-colonialism directly influences ‘class’ and ‘ethnicity’.<sup>61</sup> The repercussions of colonialism are most conspicuous in Third World countries (like Myanmar) where the state got divided on ethnic lines and engaged in brutalities against the minorities.<sup>62</sup> The oppression of ethnic groups also results from the absence of a stable democracy in post-colonial states.<sup>63</sup> The most accurate example of

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<sup>55</sup> Antony Anghie, “Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations” (2006) 41:3 *Tex Intl LJ* 447 at 455.

<sup>56</sup> *Ibid.*

<sup>57</sup> Antony Anghie, “The Evolution of International Law: Colonialism and Postcolonial Realities” (2006) 27:5 *Third World Quarterly* 739 at 750. In *Third World Societies* colonialism was replaced by neo-colonialism.

<sup>58</sup> *Ibid* at 28.

<sup>59</sup> *Ibid* at 31.

<sup>60</sup> Antony Anghie, *Bandung and the Origins of Third World Sovereignty* (Cambridge: Cambridge University Press, 2017) at 554.

<sup>61</sup> Jyoti Syal, “Tale of the dispossessed- Mahasweta Devi’s Little One” (2016) 8:3 *Intl J Current Research* 485.

<sup>62</sup> Antony Anghie, *supra* note 57 at 750.

<sup>63</sup> Mohammad Shahabuddin, “Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar” (2019) 9:2 *Asian J Intl L* 334 at 336.

this could be seen in Myanmar where ethnic minorities (Rohingya) continue to suffer.<sup>64</sup> In this sense, post-colonial theorists like Shahabuddin have rightfully linked the development of post-colonial states with the suppression of ethnic minorities.<sup>65</sup> Loomba has also described post-colonialism as ‘contestation of colonial domination’ and ‘legacies of colonialism’.<sup>66</sup>

In the thesis, postcolonial theory is discussed to describe the continuing legacy of colonialism in the post-independence Myanmar. While looking at the ‘Rohingya refugee crisis’, most scholars consider the ‘cultural’ and ‘religious’ aspect. However, they often neglect the postcolonial perspective. In light of the fact that the Rohingya crisis began immediately after the independence of Myanmar in 1948,<sup>67</sup> it is important to look at the issue from a postcolonial lens.

By using the post-colonial theory, I look at post-colonial Myanmar, which had no space for the cultures or beliefs of ethnic ‘Rohingyas’ and how the attitude of the government and the majority (Buddhist population), towards Rohingyas replicated the colonialist views. Post-colonialism theory in the thesis focuses on the impact of wartime policies of the British era, like the ‘divide and rule’ policy on the independent state of Myanmar. Further, I look at the influence of post-colonialism on the legal arena. It is not an unknown fact that most of the British colonies have borrowed the law from their colonial predecessors (for example: India, Canada, Bangladesh, Pakistan, etc.). Sometimes, the laws remain unchanged for decades. Therefore, I analyze the role of colonial legacies (law) that shaped contemporary society and played a role in justifying

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<sup>64</sup> *Ibid* at 335.

<sup>65</sup> *Ibid* at 336.

<sup>66</sup> Loomba, *supra* note 54 at 32.

<sup>67</sup> Karim Mohammad Aminul, *Genocide and geopolitics of the Rohingya Crisis* (New York: Nova Science Publishers, 2020).

the discrimination and injustices against the Rohingyas in Myanmar. However, the postcolonial theory is used only in the context of Myanmar, and it is not used for comparative analysis in the thesis.

I certainly acknowledge the critique that postcolonial theory is sometimes written in a confusing manner.<sup>68</sup> This confusion could be due to several reasons. Firstly, the term ‘post-colonialism’ has become diverse in nature and therefore it becomes difficult to describe the context.<sup>69</sup> Secondly, the inter-disciplinary nature of postcolonial theory makes the analysis complex.<sup>70</sup> To avoid this confusion in the thesis, I have confined the research and analysis to only those aspects of post-colonialism that have incited the Rohingya refugee crisis. Therefore, I analyze the role of law and the involvement of institutions (military, parliament, etc.) in encouraging the discrimination and violence faced by Rohingyas in Myanmar.

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<sup>68</sup>Loomba, *supra* note 54.

<sup>69</sup>*Ibid.*

<sup>70</sup>*Ibid.*

## Chapter 2: The Rohingya 'Identity'-Background of Rohingya

The term 'Rohingya' has become controversial in recent decades. Rohingya is a term that issued to refer to the 'ethnic religious minorities' of Myanmar who are predominantly Muslims.<sup>71</sup> However, the democratic government of Myanmar deny existence of any such ethnic minorities in Myanmar'.<sup>72</sup>Outside of Myanmar, it continues to be used in reference to refugees belonging to this ethnic tribe, collectively known as Rohingya refugee. Rohingya Refugees are one of the most persecuted minorities in the contemporary world.<sup>73</sup> The history of their persecution dates back to the independence of Myanmar in 1948.<sup>74</sup> Myanmar's 'Rohingya conflict' transformed into the most acute 'refugee crisis' over the last decade.<sup>75</sup>

But what was the root cause that led to their persecution in their own country? In order to understand this, it is important to trace the background of Rohingyas in both historical and contemporary contexts. For this purpose, the first two sections of this chapter have been divided into colonial and postcolonial Myanmar. These two sections will analyze the root causes of persecution of Rohingya by discussing different laws and policies and their effect on Rohingya identity and citizenship in Myanmar. These sections will also provide a general historical background of the major events in colonial and postcolonial Myanmar concerning the Rohingya conflict. The last section of this chapter will highlight the human right violations that Rohingyas are facing in Myanmar. This chapter is significant because it will analyze the reason behind the Rohingya refugee

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<sup>71</sup>MaungZarni& Alice Cowley, "The Slow-Burning Genocide of Myanmar's Rohingya" (2014) 23:3 Pac Rim L &Pol'y J 683.

<sup>72</sup>Ware &Laoutides, *supra* note 5.

<sup>73</sup>"Rohingya Refugee Crisis: Supporting the Stateless Minority Fleeing Myanmar"(last visited 29 June 2023), online: *UNHCR*<<https://www.unrefugees.org/emergencies/rohingya-refugee-crisis/>>.

<sup>74</sup>M Mahruf C Shohel, "Lives of the Rohingya children in limbo: Childhood, education, and children's rights in refugee camps in Bangladesh" (2023) 53:1 Prospects (Paris) 132.

<sup>75</sup>note 11.

crisis by looking at the socio-legal predicament faced by Rohingya in colonial and postcolonial Myanmar.

### **2.1. Colonial History of Rohingya in Burma (Myanmar)**

Rohingyas are predominantly Muslim people who originally resided in the Ma Yu Frontier area in Myanmar.<sup>76</sup> They lived in ‘Arakan’ or the present day ‘Rakhine’ state of Myanmar.<sup>77</sup> The ‘Arakans’ have been residing in the area as early as 1429.<sup>78</sup> Therefore, Rohingya were known as ‘Indo-Arakanese’ during British rule.<sup>79</sup> In pre-colonial Arakan, the minority Muslims and Buddhists co-existed peacefully.<sup>80</sup> However, when Burma (present-day Myanmar) conquered Arakan (Rakhine) during 1785, it induced a series of political transitions which abetted the beginning of Rohingya identity formation.<sup>81</sup> In Burma's conquest, thousands of Rakhine people were executed.<sup>82</sup> To escape the ongoing violence and persecution, thousands of Indo-Arakanese fled to British Bengal (present-day Bangladesh).<sup>83</sup> Dr. Francis Buchanan recalls that the “Indigenous Muslims in Arakan called themselves Rohingya or rooinga”.<sup>84</sup> So, the identity of Rohingya as a distinctive group can be dated back to the British colonization of Arakan.

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<sup>76</sup>Roy Chowdhury, “An un-imagined community: the entangled genealogy of an exclusivist nationalism in Myanmar and the Rohingya refugee crisis” (2020) 5:26 *Social Identities* 590.

<sup>77</sup>*Ibid.*

<sup>78</sup>GE Harvey, *History of Burma- From the Earliest Times to 10 March 1824: The beginning of the English Conquest* (London: Frank Cass & Co. Ltd., 1925). See also, Arthur Purves Phayre, *History of Burma: Including Burma Proper, Pegu, Taungu, Tenasserim, and Arakan* (Montana: Kessinger Publishing, 2010).

<sup>79</sup>Nasir Uddin, *The Rohingya Crisis: Human Rights Issues, Policy Concerns and Burden Sharing* (London: Sage Publishing, 2021).

<sup>80</sup>Aman Ullah, “The Muslim Massacre of Arakan in 1942”, (5 April 2019), online: *The Rohingya Post* <<https://www.rohingyapost.com/the-muslim-massacre-of-arakan-in-1942/>>.

<sup>81</sup> Roy Chowdhury, *supra* note 71 at 597.

<sup>82</sup>*Ibid.*

<sup>83</sup>“History of the Rohingya”(last visited 1 July 2023), online: *Rohingya Culture Centre* <<https://rccchicago.org/history-of-the-rohingya/>>.

<sup>84</sup>Francis Buchanan, “A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire” (2003) 1:1 *SOAS Bulletin of Burma Research* 41. “[T]he Mohommedans who have been long settled in the country, call themselves Rooinga, or natives of Arracan.” *See Zarni, supra* note 66 at 690.

After Burma came under the British rule in 1824,<sup>85</sup> the colonial ‘divide and rule’ policy<sup>86</sup> of the British pitted the majority Buddhist population of Burma and the minority Rohingya Muslims against each other.<sup>87</sup> Due to the anti-colonial nationalism sentiments of the Buddhists of Burma, Muslim people were selected by the British for administrative posts.<sup>88</sup> This created a boundary between the two religious’ groups.

However, due to World War II, the British army retreated from Burma to reorganize its forces in India.<sup>89</sup> During this time British rule remained in force.<sup>90</sup> But, their presence was dispersed throughout the country.<sup>91</sup> This led to Japan’s invasion of Burma, also known as the ‘Burma Campaign’.<sup>92</sup> The Japanese invasion meant an opportunity for removing British rule in Burma.<sup>93</sup> Therefore, the Burmese nationalists supported the Japanese army against the British.<sup>94</sup> Conversely, the Arakanese Muslims

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<sup>85</sup>Joseph Dautremer, *Burma under British rule* (London: T.F. Unwin, 1913),online (pdf): *The Library of Congress*<<https://www.loc.gov/item/13021446/>>.

<sup>86</sup>The British pursued a policy of ‘divide and rule’ in British colonies. Under this policy, the British attempted to divide the population into distinct groups. One community was separated from the other by various means, such as urban segregation (separate towns were established for indigenous people and migrants to physically separate them). The divide and rule policy affected cities like Rangoon where racially mixed populations resided. AJ Christopher, “Divide and Rule: The Impress of British Separation Policies” (1998) 20:3 Area 233 online (pdf): JSTOR, <<http://www.jstor.org/stable/20002624>>.

<sup>87</sup>Dorothy Settles, “The Rohingya Genocide is Rooted in British Colonialism”, (5 October 2020), online: *Spheres of Influence*< <https://spheresofinfluence.ca/the-rohingya-genocide-is-rooted-in-british-colonial-legacy/>>.

<sup>88</sup>*Ibid.*

<sup>89</sup>Philip Woods, *Reporting the Retreat: War Correspondents in Burma, 1942* (London: Oxford University Press, 2017).*See*, Philip Woods, “The beginning of the end of Empire? Reassessing the reporting of the British retreat in Burma”, (26 January 2017) online (blog): LSE <<https://blogs.lse.ac.uk/southasia/2017/01/26/the-beginning-of-the-end-of-empire-reassessing-the-reporting-of-the-british-retreat-in-burma/>>.

<sup>90</sup>Woods, *supra* note 89.

<sup>91</sup>*Ibid.*

<sup>92</sup>Japan invaded Burma in December 1941. *See*, “The Burma Campaigns, 1941-1945 - Operations”, *Canadian War Museum*, online: <[https://www.warmuseum.ca/cwm/exhibitions/newspapers/operations/burma\\_e.html](https://www.warmuseum.ca/cwm/exhibitions/newspapers/operations/burma_e.html)>.

<sup>93</sup>*Ibid.*

<sup>94</sup>Jayita Sarkar, “Rohingyas and the Unfinished Business of Partition”, *The Diplomat* (16 January 2018), online: <<https://thediplomat.com/2018/01/rohingyas-and-the-unfinished-business-of-partition/>>.



(Rohingya) supported the British due to the favors they received during their rule.<sup>95</sup> As a consequence, there was inter-communal violence between the two communities (Buddhist and Muslims) in Burma.<sup>96</sup> The Japanese supported Buddhist nationalists against the Rohingya Muslims. In retaliation, the British army provided the Rohingya Muslims with weapons to reciprocate the violence.<sup>97</sup> These incidents of violence laid down the pillar of present-day conflict.

After their defeat in 1943,<sup>98</sup> the Japanese army left Burma in 1945, and British colonial rule remained in place.<sup>99</sup> While still being a British colony, Burma's society remained deeply divided.<sup>100</sup> The conflict between the societies, Burmese nationalists, and the ethnic minorities (loyal to the British) continued to worsen.<sup>101</sup> Burma achieved its independence from the British in 1948.<sup>102</sup> After gaining independence, Burma was shortly

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<sup>95</sup>British favored Arakanese Muslims by recruiting them as soldiers. Agence France-Presse, "Tracing history: Tension between Rohingya Muslims, Buddhists date back to British rule", *Hindustan Times* (16 September 2017), online: <<https://www.hindustantimes.com/world-news/tracing-history-tension-between-rohingya-muslims-buddhists-date-back-to-british-rule/story-9mo9eTjOaJ4JQmXGef0BHL.html>>. The British recruited Rohingya Muslims to positions of power; See, "Rohingya" (last visited 28 June 2022), online: *Religion and Public Life, Harvard Divinity School* <<https://rpl.hds.harvard.edu/faq/rohingya>>.

<sup>96</sup>Jayita Sarkar, "How WWII shaped the crisis in Myanmar", *The Washington Post* (10 March 2019), online: <<https://www.washingtonpost.com/outlook/2019/03/10/how-wwii-shaped-crisis-myanmar/>>.

<sup>97</sup>Ben Macintyre, "Britain's role in the Rohingya tragedy", *The Times* (1 September 2018), online: <<https://www.thetimes.co.uk/article/britain-s-role-in-the-rohingya-tragedy-pdmmkwzc7>>. See also, Sarkar, *supra* note 96.

<sup>98</sup>Conclusions of a Meeting of the Cabinet (10 August 1945), United Kingdom, The National Archives of UK (CAB/128/1), online (pdf): <<http://filestore.nationalarchives.gov.uk/pdfs/small/cab-128-1-cm-45-20-3.pdf>>.

<sup>99</sup> Donald M. Seekins, "Japan's Development Ambitions for Myanmar: The Problem of "Economics before Politics" (2015) 34:2 *J Current Southeast Asian Affairs* 113. See, Raymond A. Callahan and Daniel Marston, *The 1945 Burma Campaign and the Transformation of the British Indian Army* (Lawrence: University Press of Kansas, 2021). See also, "Myanmar profile- Timeline", *BBC News* (2 September 2019), online: <<https://www.bbc.com/news/world-asia-pacific-12992883>>.

<sup>100</sup>*Ibid.* See also, "Written Evidence from Dr Lee Jones" (last visited 29 June 2023), online: *U.K. Parliament* <<https://committees.parliament.uk/writtenevidence/82874/html/>>.

<sup>101</sup>*Ibid.* See also, "Written Evidence from Dr Lee Jones" (last visited 29 June 2023), online: *U.K. Parliament* <<https://committees.parliament.uk/writtenevidence/82874/html/>>.

<sup>102</sup>After the Japanese troops surrendered and returned from Burma, Britain agreed for independence of Burma on May 17, 1945. In 1947, the British government and the Burmese nationalists signed an agreement in London that declared Burma's independence within one year. Finally, Burma achieved its independence on January 4, 1948. See, Micheal Clodfelter, *Warfare and Armed Conflicts* (U.S.A: McFarland & Company Inc., 1992) 630-631, 904-906. Herbert K. Tillema, 1991, "Cold war alliance and overt

led by the Anti-Fascist People's Freedom League (AFPFL) party (1948-1958).<sup>103</sup> However, post-independence, Burma also witnessed a series of political conflicts that affected Rohingyas directly.<sup>104</sup>

In this context, Anghie's observation on colonialism is apt, the colonization of Burma brought together people belonging to different race and ethnicity and led to their social disintegration.<sup>105</sup> The colonial period in Burma led to social disintegration between different communities in the country. While it is correct to say that the British policies provoked hatred for minority communities in Burma, it would be inaccurate to hold them entirely responsible for the postcolonial policies that encouraged the 'anti-Rohingya' sentiment.<sup>106</sup> Therefore, it is important to understand the postcolonial policies of the Union of Burma and its effect on the Rohingya, which is discussed in the next section.

## **2.2. The Role of Postcolonial laws and policies of Myanmar in Rohingya Crisis**

Rooted in the colonial period, the Rohingya crisis was exacerbated after the independence of Burma. The postcolonial laws, military regime, and resistance from the Buddhist nationalist majority are some of the factors that resulted in the mass exodus of Rohingyas. This section describes these factors in detail to understand the root cause of the Rohingya refugee crisis. For clarity, the postcolonial period has been divided into four phases: (a) First phase (1948-1962)- this phase discusses the immediate post-

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military intervention, 1945-1991" (1994) 20:3 Empirical and Theoretical Research in International Relations 249.

[https://uca.edu/politicalscience/home/research-projects/dadm-project/asiapacific-region/british-burma-1920-](https://uca.edu/politicalscience/home/research-projects/dadm-project/asiapacific-region/british-burma-1920-1948/#:~:text=The%20Constituent%20Assembly%20adopted%20a,Kingdom%20on%20January%204%2C%201948.)

[1948/#:~:text=The%20Constituent%20Assembly%20adopted%20a,Kingdom%20on%20January%204%2C%201948.](https://uca.edu/politicalscience/home/research-projects/dadm-project/asiapacific-region/british-burma-1920-1948/#:~:text=The%20Constituent%20Assembly%20adopted%20a,Kingdom%20on%20January%204%2C%201948.)

<sup>103</sup>Frank N. Trager, "The Political Split in Burma" (1958) 27:10 Far Eastern Survey 145. See, John Seabury Thomson, "The AFPFL: Continuity in Burmese Politics" (1957) 17:3 The Antioch Rev 297.

<sup>104</sup> After gaining "Independence and Modern Rule" (last visited 29 June 2023), online: *Harvard Divinity School* <<https://rpl.hds.harvard.edu/religion-context/country-profiles/myanmar/independence-and-modern-rule-1948%E2%80%93present>>.

<sup>105</sup> Antony Anghie, *supra* note 55 at 455.

<sup>106</sup>*Supra* note 82.

independence laws and their role in providing citizenship to Rohingyas; (b) Second phase (1962-1990)- this phase highlights the period when the civilian government of Myanmar was replaced by the military junta. This phase also analyzes the effect of laws enacted by the new government (military regime) and its implications on citizenship of Rohingyas; (c) Third phase (1990-2015)- the third phase describes some new laws and policies introduced by the government which provided certain rights to Rohingya except the citizenship right. This phase is important for understanding the circumstances that led to mass exodus of Rohingyas; (d) Fourth phase (2016-Present): the last and the recent phase sums up the effect of three phases which resulted in persecution and forced expulsion of Rohingyas from Myanmar. Each of these phases will discuss the prominent changes in socio-legal circumstances in Myanmar that led to the biggest refugee crisis facing the contemporary world.

### **2.2.1. First Phase (1948-1962)**

In the immediate postcolonial period, the Union Citizenship Act, 1948<sup>107</sup> was enacted by the government of Myanmar. This law defined Indigenous peoples of Burma as racial groups which settled in Burma before the year 1823.<sup>108</sup> It granted citizenship status to a person only if their ancestors of two generations had their permanent home in one of the territories of Burma or were born in Burma.<sup>109</sup> Under the Act, a person can be entitled to elect for citizenship, if they had been granted a certificate of naturalization or citizenship under the act.<sup>110</sup> The 1948 Act<sup>111</sup> along with the Constitution of Burma,

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<sup>107</sup>*Union Citizenship Act, supra* note 25.

<sup>108</sup>*Ibid* art 3(1).

<sup>109</sup>*Ibid* art 4(2).

<sup>110</sup>*Ibid* art 4(1).

<sup>111</sup>*Ibid*.

1947<sup>112</sup> prescribed guidelines for obtaining citizenship in Burma. Although the act was exclusionary as it officially excluded identifying Rohingya as an ethnic group,<sup>113</sup> it did not bar Rohingyas from getting citizenship. This could be seen by the fact that many Rohingya obtained Union Citizenship cards and were also issued Citizenship Certificates under the act.<sup>114</sup>

The government also enacted the Residents of Burma Registration Act<sup>115</sup> in 1949 and the Residents of Burma Registration Rules<sup>116</sup> in 1951. These statutes were enacted to provide a 'Temporary Registration Certificate' (TRC) to people who were not verified citizens.<sup>117</sup> Under the 1951 Residents of Burma Citizenship Rules,<sup>118</sup> individuals over twelve years of age were issued National Registration Cards (NRCs).<sup>119</sup> NRC acted as an identity card and was issued to the residents of Burma (mainly citizens).<sup>120</sup> Similarly, Non-Citizens were issued Foreign Registration Certificates (FRCs) under the Foreigners Registration Act<sup>121</sup> and Rules of 1948.<sup>122</sup> Many Rohingyas, if not all, were able to obtain

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<sup>112</sup>*The Constitution of Burma*, 1947, s. 10–12, online (pdf): <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79573/85699/F1436085708/MMR79573.pdf>>.

<sup>113</sup>*Union Citizenship Act*, *supra* note 25 art 3(1).

<sup>114</sup>Trevor Gibson, Helen James & Lindsay Falvey, *Rohingyas: Insecurity and Citizenship in Myanmar* (Thaksin University Press, 2017) at 88–90.

<sup>115</sup>*The Residents of Burma Registration Act*, 1949,(Act 41), online (pdf): <[https://www.burmalibrary.org/docs12/The\\_Residents\\_of\\_Burma\\_Registration\\_Act-1949.pdf](https://www.burmalibrary.org/docs12/The_Residents_of_Burma_Registration_Act-1949.pdf)>.

<sup>116</sup>*The Residents of Burma Registration Rules*, 1951, online (pdf): <[https://www.burmalibrary.org/docs12/Residents\\_of\\_Burma\\_Registration\\_Rules-1951.pdf](https://www.burmalibrary.org/docs12/Residents_of_Burma_Registration_Rules-1951.pdf)>.

<sup>117</sup>Aman Ullah, “The Rohingya and the White Cards Saga”, (5 April 2019), online: *The Rohingya Post*<<https://www.rohingyapost.com/the-rohingya-and-the-white-cards-saga/>>.

<sup>118</sup>*The Residents of Burma Registration Rules*, *supra* note 116.

<sup>119</sup>Ullah, *supra* note 117; *Myanmar: The Politics of Rakhine State*, Asia Report N°261 (International Crisis Group, 2014).

<sup>120</sup>Ullah, *supra* note 117; “Rohingya: Issues relating to statelessness” (2021) Department of Home Affairs, Australian Government (Country of Origin Information Services Section (COISS)).

<sup>121</sup>*The Foreigners Registration Act*, 1940(Act VII), online (pdf): <[https://myanmar-law-library.org/IMG/pdf/the\\_registration\\_of\\_foreigners\\_act.pdf](https://myanmar-law-library.org/IMG/pdf/the_registration_of_foreigners_act.pdf)>.

<sup>122</sup>*Registration of Foreigners Rules*, 1948online (pdf): [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=87414](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=87414).

NRC, like other Burmese nationals.<sup>123</sup> NRC allowed Rohingyas to enjoy citizenship rights such as the right to vote, the right to hold elected office, government positions, etc.<sup>124</sup> Therefore, NRC acted as the most important document that verified the legal standing and identity, and acted as a pathway to get citizenship for Rohingyas in Burma.

During this brief post-independence period, Rohingyas were treated as citizens of Burma and also held government posts.<sup>125</sup> In fact, U Nu, the first Prime Minister of Burma described Rohingyas as one of the 'ethnic races' of Burma.<sup>126</sup> Similarly, Sao Shwe Thaik, the first President of Burma also referred to Rohingya as Burmese nationals who enjoy equal status as other nationals.<sup>127</sup> However, in 1962 the Military coup (also known as the 1962 Burmese *coup d'etat*), replaced the Civilian government with the Union Revolutionary Council (Military junta), chaired by General Ne Win.<sup>128</sup> The military regime made a series of changes to the law, which led to discrimination and undermined the social acceptance of Rohingyas.

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<sup>123</sup>Country of Origin Information Services Section, *Rohingya: Issues relating to statelessness* (Australia: Australian Government, Department of Home Affairs, 2021) at 3, online (pdf): <<https://www.homeaffairs.gov.au/foi/files/2022/fa-220100492-document-released.PDF>>.

<sup>124</sup>"Evidence of Belonging - Burma's Path to Genocide", online: *United States Holocaust Memorial Museum*<<https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-1/evidence-of-belonging>>.

<sup>125</sup>During the period from 1948-1962, Rohingya served as the Member of the Parliament, civil servants, etc. See, Michael F. Martin, "Burma's Brutal Campaign Against the Rohingya" (Statement before Committee on Foreign Affairs Subcommittee on Asia and the Pacific U.S. House of Representatives, 26 September 2017), online (pdf): <<https://docs.house.gov/meetings/FA/FA05/20170927/106434/HHRG-115-FA05-Wstate-MartinM-20170927.pdf>>.

<sup>126</sup>"Burma's Path to Genocide", online: *United States Holocaust Memorial Museum*<<https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-1/prime-minister-recognizes-rohingya>>Prime Minister U Nu quoted, "Located to the southwest of the Union [Burma] is 'Rakhine'.....The majority of the nationals living in those areas are Rohingya who are Muslims."

<sup>127</sup>Md Khalid Rahman, "Citizenship of the Rohingya in Myanmar: A historical account", *The Daily Star* (24 August 2021), online: <<https://www.thedailystar.net/law-our-rights/news/citizenship-the-rohingya-myanmar-historical-account-2159176>>.

<sup>128</sup>NehginpaoKipgen, "Political Change in Burma: Transition from Democracy to Military Dictatorship (1948-62)" (2011) 46:20 *Economic and Political Weekly* 48-55, online: <<https://www.jstor.org/stable/23018213>>.

### 2.2.2. Second Phase (1962-1992)

The second phase starts with the military government (military junta) replacing the civilian government of Myanmar in the 1962 Burmese *coup d'etat*. Later the military junta changed the name of 'Burma' to 'Myanmar'.<sup>129</sup> This phase is significant because the military regime not only replaced existing government but also introduced a number of discriminatory laws and policies, notably to take away the citizenship of Rohingya. After the military coup in 1962, the military administration stopped issuing NRC cards to Rohingyas, meaning that only FRCs was being issued to them.<sup>130</sup> It is important to understand that the NRC cards stated that "bearing this card does not mean that the holder is a citizen of this country".<sup>131</sup> But, it is also noteworthy that although the NRC cards did not guarantee citizenship status to Rohingyas,<sup>132</sup> they were a formal identity document that could create a pathway to get citizenship.<sup>133</sup> As Rohingya were no longer issued NRC cards, they were indirectly denied the opportunity to apply for citizenship.<sup>134</sup>

The Burmese military junta also demonstrated discrimination towards Rohingyas through a series of military operations. In 1974, the military regime launched the 'Sabe Operation' targeting the Rohingya community.<sup>135</sup> Under this operation, the military started confiscating the NRC cards of Rohingya (who had managed to obtain them).<sup>136</sup> As a consequence, thousands of Rohingya became unable to prove their identity or apply for

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<sup>129</sup>The military junta changed the name of Republic of Burma to the Republic of Myanmar in 1989. "Who, What, Why: Should it be Burma or Myanmar?", *BBC News* (2 December 2011), online: <<https://www.bbc.com/news/magazine-16000467>>.

<sup>130</sup>Jose Maria Arraiza& Olivier Vonk, *Report on Citizenship Law: Myanmar* (Italy: European University Institute, 2017).

<sup>131</sup>*Supra* note 117.

<sup>132</sup>Arraiza&Vonk, *supra* note 124 at 6.

<sup>133</sup>*Ibid.*

<sup>134</sup>*Ibid.*

<sup>135</sup>note 120.

<sup>136</sup>*Ibid.*

citizenship or naturalization certificates.<sup>137</sup>In 1978, under the command of General Ne Win, the military launched another operation named, ‘Operation Dragon King’ (Nagamin) in Rakhine state.<sup>138</sup> Under this operation, Rohingya were forced to present their NRC cards and other identity documents to the administration under the threat of arrest.<sup>139</sup>At this point the identity cards of Rohingya were confiscated.

These military operations stripped Rohingya of their legal status and made them 'foreigners' or 'illegal immigrants'. These operations also led to a series of atrocities against the Rohingya (such as mass arrests, violence by authorities, rape, persecution, etc.) and their mass displacement.<sup>140</sup>Subsequently, the military government replaced the Union Citizenship Act of 1948 with a new law that came to be known as the 1982 Citizenship Law of Burma.<sup>141</sup> The 1982 law officially stripped Rohingya in Myanmar of their citizenship and identity.<sup>142</sup> The notion that Rohingya are foreigners in their own country is primarily due to the Burma Citizenship Act, of 1982.<sup>143</sup>The act was a part of the ‘agenda’ of the nationalist government of Burma to claim power in the majoritarian Burmese state.<sup>144</sup>

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<sup>137</sup>NRC acted as a formal identity document that allowed Rohingyas to enjoy voting rights and other similar rights.

<sup>138</sup> Operation Dragon King was launched by the military junta in 1978. See, Martin, *supra* note 119. See, Habiburahman, Sophie Ansel & Andrea Reece, *First, They Erased Our Name: a Rohingya Speaks* (Victoria: Scribe, 2019) at 13.

<sup>139</sup>*Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, by UN Human Rights Council, UN Doc A/HRC/39/CRP.2 (UNHRC, 39th Sess, 2018) at 115.

<sup>140</sup> Approximately 200,000 Rohingyas fled to Bangladesh from Myanmar owing to atrocities committed in name of Operation Dragon King. Amnesty International, *See*, “Myanmar, The Rohingya Minority: Fundamental Rights Denied”, Amnesty International”, online: *Amnesty International* <<https://www.amnesty.org/en/wp-content/uploads/2021/06/asa160052004en.pdf>>.

<sup>141</sup>*Citizenship Act*, *supra* note 7.

<sup>142</sup>Arraiza& Vonk, *supra* note 124 at 8.

<sup>143</sup>*Ibid.*

<sup>144</sup>“Burma Citizenship Act, The”, online: *Harvard Divinity School*<<https://rpl.hds.harvard.edu/faq/burma-citizenship-act>>.

The law grants citizenship status to individuals who are considered by the government<sup>145</sup> to have settled in Myanmar before 1823 (the occupation by the British in Burma).<sup>146</sup> Unlike the 1948 Act<sup>147</sup> (which granted equal rights to elect for citizenship), the 1982 Citizenship law defined three kinds of citizenship namely: citizen; associate citizen, and naturalized citizen.<sup>148</sup>

According to the act, a citizen is a person who is “*a National such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D.*”<sup>149</sup> However, if a person was unable to produce evidence that their ancestors settled in Burma before 1823, they may be determined as associate citizens' by the government.<sup>150</sup> Similarly, the citizens who have applied for citizenship status under the 1948 Union Citizenship Act, may also be determined as associate citizens.<sup>151</sup> If a person is neither a citizen nor has applied for citizenship status under the 1948 Union Citizenship Act, but can furnish 'conclusive evidence' that he or his parents entered and resided in Burma before 4<sup>th</sup> January 1948, they can apply for 'naturalized citizenship'.<sup>152</sup> So, naturalized citizens are children of the immigrants who came to Burma before 1948.<sup>153</sup>

Based on these three kinds of citizenship mentioned in the act, it is difficult for a Rohingya to obtain citizenship. This is because:

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<sup>145</sup>*Citizenship Act, supra* note 7, s 4,8(a),8(b).

<sup>146</sup>*Ibid*, s 3; *Myanmar's 1982 Citizenship Law and Rohingya* (Burmese Rohingya Organisation UK, 2014).

<sup>147</sup>*Union Citizenship Act, supra* note 25, ss 4–5.

<sup>148</sup>*Citizenship Act, supra* note 7, s 2.

<sup>149</sup>*Ibid*, s 3.

<sup>150</sup>*Ibid*, s 23.

<sup>151</sup>*Ibid*.

<sup>152</sup>*Ibid*, s 42.

<sup>153</sup>*Ibid*.



a.) Section 3 of the law recognizes Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan, and other ethnic groups who settled in Myanmar before 1823.<sup>154</sup> Myanmar recognizes 135 ethnic groups based on the language they speak.<sup>155</sup> These groups are entitled to citizenship according to the law and are deemed ‘citizens’. However, the government of Myanmar does not recognize Rohingya Muslims to be a national ethnic group.<sup>156</sup> Therefore, they are ineligible to apply for full citizenship because of their ethnic group.

b.) The discrimination as to eligibility for citizenship is also based on the Union Citizenship Act of 1948. The government does not acknowledge that the Rohingya immigrated to Arakan before the British Colonial period i.e. before 1823.<sup>157</sup> This automatically excludes them from obtaining citizenship. Although many Rohingya families settled in Arakan before 1823,<sup>158</sup> they would need sufficient proof to obtain citizenship. Even if somehow, they submit the application for citizenship with sufficient evidence, the Central body established under the act has final authority to decide about the status of citizenship.<sup>159</sup>

Further, the act eliminates the possibility of Rohingya and their children obtaining citizenship. According to the law, if an associate or a naturalized citizen loses their citizenship then the child also ceases to be a citizen (associate citizen or naturalized citizen accordingly).<sup>160</sup> The acts forbid obtaining any kind of citizenship by adoption.<sup>161</sup>

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<sup>154</sup>*Ibid*, s 3.

<sup>155</sup>Amnesty International, *supra* note 134. See Habiburrahman, *supra* note 132 at 9.

<sup>156</sup>*Ibid* atp.9.

<sup>157</sup>*Citizenship Act*, *supra* note 7, s 3.

<sup>158</sup>“Discrimination in Arakan”(last visited 8 August 2023), online: *Human Rights Watch*<<https://www.hrw.org/reports/2000/burma/burm005-02.htm>>.

<sup>159</sup>*Citizenship Act*, *supra* note 7, s 65, 66, 68.

<sup>160</sup> *Ibid.*, s 29(b) & 51(b).

<sup>161</sup>*Ibid.*, s 73.

Therefore, even if a citizen, associate citizen, or naturalized citizen adopts a foreigner or a Rohingya, they will not acquire citizenship.

After a careful analysis of the 1982 Citizenship Law of Burma, it would not be incorrect to state that the act is discriminatory against Rohingyas as it renders majority of Rohingyas ineligible for citizenship of Myanmar. Further, the act is also in clear violation of the right to a nationality,<sup>162</sup> the principle of non-discrimination,<sup>163</sup> and other human rights assigned under the Universal Declaration of Human Rights (UDHR) and other international legal instruments ratified by Myanmar.<sup>164</sup> The International Court of Justice has also affirmed that the state cannot deny nationality and citizenship to a person if the person has “genuine and effective” links to a particular state.<sup>165</sup> The denial/lack of citizenship means restrictions on the number of rights, arbitrary treatment by the state, and other obstacles for Rohingya. Therefore, the law clearly discriminates against Rohingya population on the basis of their ethnic race and by taking away their citizenship the law makes them vulnerable to a number of human rights violations.

The 1982 Act was supported by General Ne Win who implemented government policies that led to further oppression and persecution of Rohingya in Myanmar.<sup>166</sup> One such policy was issuing of Citizenship Scrutiny Cards (CSCs), also known as 'pink cards'

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<sup>162</sup>United Nations General Assembly, *The Universal Declaration of Human Rights (UDHR)*, 1948, 217 A (III), art 15.

<sup>163</sup>*Ibid* art 7.

<sup>164</sup>Myanmar has ratified several international legal instruments that mention right to a nationality. One such instrument is the UN Convention on the Rights of the Child. The convention stipulates registering a child at immediately after birth and also provides for the right of the child for a nationality. It places obligation on the state parties to the convention for the implementation of the right to a nationality of a child. See *Convention on the Rights of the Child*, 1989, United Nations, Treaty Series, vol. 1577, art 7 available at: <https://www.refworld.org/docid/3ae6b38f0.html>.

<sup>165</sup>Nottebohm Case (*Liechtenstein v. Guatemala*), [1995] ICJ Rep 4.

<sup>166</sup>Arraiza&Vonk, *supra* note 124 at 6.

to Rohingya.<sup>167</sup> Getting a CSC meant that the individual has to reapply for citizenship under the 1982 Act.<sup>168</sup> In order to reapply for citizenship, individuals had to provide documents such as birth certificates, or some proof which verified that their families were living in Burma before the year 1823.<sup>169</sup> However, owing to the previous operations conducted by the military junta (Operation Sabe and Operation Dragon King), majority of the Rohingya surrendered their identity cards and other documents. Due to absence of these documents, they were not issued CSCs, and could not apply for citizenship.<sup>170</sup> This changed their legal status in the country of their residence. In 1992, the military, after implementing various policies targeting Rohingya, conducted counter-insurgency attacks against Rohingya in Rakhine.<sup>171</sup> This forced more than 250,000 Rohingya to flee Myanmar during the next few years.<sup>172</sup>

During this phase the military was involved in numerous operations that resulted in forced displacement of Rohingyas. First of all the military government took the identity cards (NRC cards) of Rohingya and then they took their chance of getting citizenship. While the seizing of identity cards and other documents was an act of effective denial of citizenship, the 1982 Citizenship Law was an act of formal denial of citizenship to Rohingyas. The policies introduced by the military government during this phase indicate a discriminatory oppressive bureaucratic move against Rohingyas.

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<sup>167</sup>note 120 at 5.

<sup>168</sup>*Ibid.*

<sup>169</sup>*Ibid.*

<sup>170</sup>*Ibid* at 6–7.

<sup>171</sup>*Burma's Brutal Campaign Against the Rohingya.*

<sup>172</sup>*Ibid*; United States Bureau of Citizenship and Immigration Services, Burma [Myanmar], *Information on the situation of Rohingyas*, MMR01001.ZCH (2001) online: <<https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&docid=3deccd7a4&skip=0&publisher=USCIS&querysi=MMR01001.ZCH&searchin=fulltext&sort=date>>.

### 2.2.3. Third Phase (1993-2015)

During the time period from 1993 to 2015, Rohingyas enjoyed certain rights. This phase is significant because the condition of Rohingya improved during this brief period of time. In the early 1990s, the government started issuing yet another kind of card known as Temporary Registration Cards (TRCs) to Rohingya.<sup>173</sup> TRCs were also known as 'white cards' and were issued to Rohingya who previously had NRC or to those who were undocumented and functioned as their only official identity document.<sup>174</sup> These white cards were issued to Rohingya under Section 13 of the Resident of the Burma Registration Rules, 1951.<sup>175</sup> These white cards allowed Rohingyas to take part in the 2008 referendum and gave them the right to vote in the 2010 elections.<sup>176</sup>

The TRCs gave several other rights (right to vote and the right to stand for public office) to Rohingyas but did not grant citizenship.<sup>177</sup> They were the identity documents of Rohingya until the year 2014.<sup>178</sup> In 2015, the Parliament of Myanmar passed the 2015 Referendum Law which gave the right to vote to temporary residents (including the white card holders).<sup>179</sup> Although this law gave temporary voting rights to Rohingya, their status

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<sup>173</sup>The White cards were issued during early 1990s. There is a lack of clarity regarding the exact year in which these cards were issued. Some believe that White cards were issued in mid 1990s. See, Natalie Brinham, "Looking Beyond Invisibility: Rohingyas' Dangerous Encounters with Papers and Cards" (1992) 24:2 *Tilburg L Rev* at 161–162. It is also believed that white cards were issued in 1991. See, *National Verification Cards - A Barrier to Rohingya Repatriation*, by Richard Potter & Kyaw Win (Burma Human Rights Network, July 2019), available at: <https://www.bhrn.org.uk/en/report/1090-national-verification-cards-a-barrier-to-rohingya-repatriation-full-report.html>. White cards are also believed to be issued in 1995. See, Ullah, *supra* note 111.

<sup>174</sup> *Supra* note 133 at 117.

<sup>175</sup> *The Residents of Burma Registration Rules*, *supra* note 116, s 13.

<sup>176</sup> note 120 at 5–7.

<sup>177</sup> White cards were required for numerous activities such as going to a neighboring village, getting married, etc. See, Brinham, *supra* note 173 at 162.

<sup>178</sup> Patrick Hein, "The Re-ethnicisation of Politics in Myanmar and the Making of the Rohingya Ethnicity Paradox" (2018) 74:4 *India Quarterly* 361, online: <<https://www.jstor.org/stable/48505579>>.

<sup>179</sup> Tim Hume, "Myanmar gives Rohingya voting rights, then backtracks", *CNN* (12 February 2015), online: <<https://www.cnn.com/2015/02/12/asia/myanmar-rohingya-voting-rights/index.html>>.

of citizenship was still unclear.<sup>180</sup> In response to the law, there were widespread protests by the Buddhist nationalist groups in Myanmar.<sup>181</sup> As a consequence, the then-President of Myanmar, Thein Sein issued an executive order that revoked the voting rights of the white card holders.<sup>182</sup> Further, the President also announced that TRCs would expire by the end of May 2015.<sup>183</sup> This again left millions of Rohingya living in Myanmar without any voting rights or a proper identification document.<sup>184</sup> Following the announcement, the white card holders were also required to surrender their TRCs by the end of May 2015.<sup>185</sup>

Rohingya were never considered citizens of Myanmar and had limited rights, especially after the enactment of the 1982 Citizenship Act, but after their TRCs were revoked, they were stripped of their identities. After the TRCs were revoked, Rohingya were provided with yet another card by the government, called, the National Verification Card (NVC) in 2015.<sup>186</sup> According to the interviews conducted by different human right organizations, NVCs were yet another kind of card that would classify Rohingya as foreigners and deprive them of the possibility of getting citizenship of Myanmar.<sup>187</sup>

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<sup>180</sup>*Ibid.*

<sup>181</sup>“Myanmar revokes Rohingya voting rights after protests”, *BBC News* (11 February 2015), online: <<https://www.bbc.com/news/world-asia-31421179>>.

<sup>182</sup>*Ibid.*

<sup>183</sup>*Ibid.*

<sup>184</sup>Hume, *supra* note 179.

<sup>185</sup>Gibson, James & Falvey, *supra* note 114 at 89.

<sup>186</sup>NVCs were officially known as Identity Card for National Verification (ICNV). *See*, Brinham, *supra* note 173.

<sup>187</sup>The NVCs do not grant citizenship of Myanmar and could make Rohingyas foreigners in Myanmar. *See*, “Bangladesh: New Risks for Rohingya Refugees”, *Human Rights Watch* (18 May 2023), online: <<https://www.hrw.org/news/2023/05/18/bangladesh-new-risks-rohingya-refugees>>. Fortify Rights conducted an interview of a Rohingya man who returned to Myanmar from Bangladesh. The man along with other Rohingya refugees was issued the NVC. During the interviews it was also revealed that when two Rohingya men tried to apply for the citizenship of Myanmar with their NVCs, their application was denied. *See*, “Myanmar: New Evidence of Denial of Rohingya Citizenship”, *Fortify Rights* (16 January 2020), online: <<https://www.fortifyrights.org/mya-inv-2020-01-16/>>. *See also*, “Myanmar Rohingya Repatriation Seen Delayed by Genocide Trial, 2020 Elections”, *Radio Free Asia* (16 December 2019),

Allegedly, Rohingya were coerced into accepting the NVCs in order to gain access to facilities like healthcare, education, freedom of movement, etc.<sup>188</sup>

At the same time, there were attacks by the local security forces (*NaSaKa*) in the Rakhine state, targeting Rohingya.<sup>189</sup> In response to the attacks by the military, Rohingya militants reiterated violence against the security forces in Myanmar.<sup>190</sup> The clash between Rohingya militants and security forces triggered further attacks on the Rohingya community, prompting thousands to flee the country.<sup>191</sup> Between the years 2012 to 2015, more than 112,000 Rohingya fled Myanmar via a sea route (Bay of Bengal).<sup>192</sup> Lack of clarity regarding their legal status followed by continuous violence and human rights violations by the military forced Rohingya to flee Myanmar to neighboring states (predominantly Bangladesh) during this phase.<sup>193</sup>

#### **2.2.4. Fourth Phase (2016-Present)**

The preceding phases (second and third phase) indicate that Rohingya in post-colonial Myanmar consistently suffered violence, discrimination, and various human rights abuses because of their unclear legal status. Due to these reasons, there was continuous mass displacement of Rohingyas throughout the post-independence

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online: <<https://www.rfa.org/english/news/myanmar/myanmar-rohingya-repatriation-seen-delayed-12162019170448.html>>.

<sup>188</sup>note 187.

<sup>189</sup>*NaSaKa* are the border security forces consisting of custom officials, police, and Immigration officers. See, *Myanmar: The Rohingya Minority: Fundamental rights denied*, ASA 16/005/2004 (Amnesty International, 2004) at 4–5; Andrew RC Marshall, “SPECIAL REPORT: Plight of Muslim minority threatens Myanmar Spring”, *Reuters* (15 June 2012), online: <<https://www.reuters.com/article/myanmar-rohingya-muslims-idINDEE85E02N20120615>>.

<sup>190</sup>note 189 at 4.

<sup>191</sup>*Ibid.*

<sup>192</sup>Vivian Tan, “Over 168,000 Rohingya likely fled Myanmar since 2012 - UNHCR report”, *UNHCR* (3 May 2017), online: <<https://www.unhcr.org/news/stories/over-168000-rohingya-likely-fled-myanmar-2012-unhcr-report>>.

<sup>193</sup>note 189.

era.<sup>194</sup>This escalated in the fourth phase. During 2016 and 2017, there were massive clashes between the Arakan Rohingya Salvation Army and the border police in Rakhine State.<sup>195</sup> In 2017 the armed forces and the national police in Myanmar launched a 'clearance operation' targeting Rohingya Muslims.<sup>196</sup> According to some reports, more than 6,700 Rohingya were killed during the August 2017 military crackdown, including children.<sup>197</sup> Around August 2017 these attacks forced more than 700,000 Rohingya to flee the borders of Myanmar to neighboring countries.<sup>198</sup> The majority of the Rohingya refugees fled to Cox Bazar, Bangladesh, where they came to live under crisis in overcrowded refugee camps (this is discussed in detail in the subsequent sections).<sup>199</sup>

Even after worldwide condemnation for these attacks and accusations of genocide and crimes against humanity,<sup>200</sup> the military junta continues carrying out attacks targeting Rohingya Muslims.<sup>201</sup> The recent reports of military attacks started again after the

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<sup>194</sup>Lindsey N Kingston, "Protecting the World's Most Persecuted: The responsibility to protect and Burma's Rohingya Minority" (2015) 19:8 Intl JHR 1163.

<sup>195</sup>MYANMAR'S ARMED FORCES AND THE ROHINGYA CRISIS, by Andrew Selth (United States Institute of Peace) at 13.

<sup>196</sup>"Myanmar: Government Rohingya Report Falls Short", *Human Rights Watch* (22 January 2020), online: <<https://www.hrw.org/news/2020/01/22/myanmar-government-rohingya-report-falls-short>>.

<sup>197</sup>The report by Doctors Without Borders (MSF) states that around 6,700 Rohingya were killed during the 2017 military crackdown in Myanmar. See, "Rohingya refugee crisis", online: *Doctors Without Borders - USA* <<https://www.doctorswithoutborders.org/what-we-do/focus/rohingya-refugee-crisis>>.

<sup>198</sup>A report of the exact number of Rohingya's fleeing the border varies. The International Organization for Migration (IOM) suggested that around 700,000 Rohingya refugees fled Myanmar fearing for their lives. See, "IOM steps up support as Rohingya refugee numbers rise in Southeast Asia | UN News", *United Nations News* (31 January 2023), online: <<https://news.un.org/en/story/2023/01/1133017>>.

<sup>199</sup>Abhishek Bhatia et al, "The Rohingya in Cox's Bazar: When the Stateless Seek Refuge" (2018) 20:2 Health & Human Rights 105.

<sup>200</sup>Michael A Becker, "The Plight of the Rohingya: Genocide Allegations and Provisional Measures in The Gambia v Myanmar at the International Court of Justice" (2021) 21:2 Melbourne J Intl L 428, online: <<http://classic.austlii.edu.au/au/journals/MelbJIL/2020/15.html>>; Swapna Gopinath, "Ronan Lee. Myanmar's Rohingya Genocide: Identity, History and Hate Speech" (2023) 14:2 Genocide Studies Intl 191.

<sup>201</sup>"Myanmar military accused of war crimes, genocide in German suit", *Al Jazeera* (24 January 2023), online: <<https://www.aljazeera.com/news/2023/1/24/myanmar-military-accused-of-war-crimes-genocide-in-german-suit>>.

military launched a coup on February 1<sup>st</sup>, 2021.<sup>202</sup> The military junta carried out nationwide crackdowns including attacks, violence, arbitrary detention, extrajudicial killings, torture, and other human rights abuses in Myanmar(targeting both Rohingyas and civilians).<sup>203</sup>Since 2021 and throughout 2022 the military attacks have intensified targeting Rohingya in Rakhine, Kachin, Karen, and Shan states in Myanmar.<sup>204</sup> According to a detailed report by the United Nations Office of the High Commissioner for Human Rights, more than 3,000 people were killed by the military, whereas about 17,500 people were arbitrarily arrested.<sup>205</sup>Despite opposition from International organizations, the violence, and human rights abuses against Rohingya in Myanmar have only intensified. This also implies that the situation of Rohingya in Myanmar is not expected to improve within the next few decades.

Based on a careful analysis, it would be apt to state that the status of Rohingya has only declined since the independence of Myanmar in 1948. However, the discrimination against Rohingya based on ethnic and religious roots dates back to the colonial period and has played a major role in exacerbating the Rohingya refugee crisis. Amongst various legislations described in this chapter, the 1982 Citizenship Act played a huge role in stripping millions of Rohingya of their identities and making them stateless. The important provisions of the law and its implementation by the government of Myanmar to deny Rohingya the right to a nationality will be discussed in the next section, where it is shown that denying this human right enabled the breaching of many other human rights.

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<sup>202</sup>“Myanmar: Military Coup Kills Fragile Democracy” (1 February 2021), online: *Human Rights Watch*<<https://www.hrw.org/news/2021/02/01/myanmar-military-coup-kills-fragile-democracy>>.

<sup>203</sup>Ministry of Foreign Affairs of the National Unity Government,*Statement on the adoption of the resolution on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar*(16 November 2022), online: *Ministry of Foreign Affairs*<<https://mofa.nugmyanmar.org/statement-19-2022/>>.

<sup>204</sup>Tirana Hassan, *Myanmar: Events of 2022* (Human Rights Watch, 2023).

<sup>205</sup>*Situation of human rights in Myanmar* (Myanmar: Office of the High Commissioner for Human Rights (OHCHR), 2023).



### **2.3. Human rights violations towards Rohingyas in Myanmar**

As discussed above, the foundational basis of the 1982 Burma Citizenship Law is discriminatory.<sup>206</sup> By denying Burmese citizenship to Rohingya, the law automatically deprives Rohingyas of basic human rights.<sup>207</sup> The idea of denying even basic rights goes against the notion of important human rights instruments ratified by Myanmar such as the UDHR, ICESCR, CEDAW, CRC.<sup>208</sup> Further, this denial has cascading effects on many other human rights as discussed in this part.

As discussed above, it is important to understand that the human rights violations faced by Rohingya in Myanmar is not a result of just 1982 Citizenship Law distinctly but is a combined effect of the postcolonial treatment (law and policies, discriminatory treatment by the government) of Rohingya (as discussed in section 2.2) in Myanmar. This section will analyze in detail the numerous human rights violations against Rohingya in Myanmar such as discriminatory treatment; violation of the right to a nationality, right to education, freedom of movement, right to an adequate standard of living, freedom of religion, right to life, and arbitrary arrest.

#### **2.3.1. Discrimination**

Rohingyas are categorized by the government of Myanmar as ‘illegal immigrants from Bangladesh’ OR ‘Bengali’.<sup>209</sup> The government of Myanmar has been discriminating against Rohingya for decades, denying them citizenship and any rights.<sup>210</sup> In fact, the

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<sup>206</sup>Arraiza& Vonk, *supra* note 124.

<sup>207</sup>*Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee*, UN Doc. A/73/332 (2018) at para 52.

<sup>208</sup>*Ratification Status for Myanmar* (UN Human Rights Treaty Bodies) (last visited 30 June 2023), online: <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN)>.

<sup>209</sup>“Myanmar tells Rohingya, be ‘Bengali’ or stay in refugee camps”, *Asia News* (10 March 2014), online: <<https://www.asianews.it/news-en/Myanmar-tells-Rohingya,-be-Bengali-or-stay-in-refugee-camps-32327.html>>.

<sup>210</sup>Nick Cheesman, “How in Myanmar National Races Came to Surpass Citizenship and Exclude Rohingya” (2017) 47:3 *J Contemp Asia* 461; Poppy Elena McPherson & Simon Lewis, “Exclusive:

government failed to identify Rohingyas as people and excluded them from the 2014 census.<sup>211</sup> Due to these atrocities, the UN Secretary General Antonio Guterres described them as, “one of the most discriminated people in the world”.<sup>212</sup>

The principles of non-discrimination and equality are at the core of every international, regional, and domestic legal instrument.<sup>213</sup> These principles lay the foundation of international human rights law.<sup>214</sup> The UDHR,<sup>215</sup> ICCPR,<sup>216</sup> and ICESCR<sup>217</sup> emphasize the principle of non-discrimination. In addition to the above covenants, several international instruments such as the UN Convention on the Rights of Child (CRC) stipulates protecting children from discrimination, especially the most disadvantaged and vulnerable children.<sup>218</sup> Moreover, as the member of the United Nations,<sup>219</sup> Myanmar has a legal obligation to “*respect and observe human rights and fundamental freedom for all without any distinction as to race, sex, language, or religion*”.<sup>220</sup> The Constitution of Myanmar also upholds equality in its basic principles.<sup>221</sup>

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Myanmar rejects citizenship reform at private Rohingya talks”, *Reuters* (27 June 2018), online: <<https://www.reuters.com/article/us-myanmar-rohingya-meeting-exclusive-idUSKBN1JN0D7>>.

<sup>211</sup>note 209.

<sup>212</sup>*Ibid.*

<sup>213</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 1,7.

<sup>214</sup>“The Right to Equality and Non-discrimination”, online: *Icelandic Human Rights Centre* <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination>>.

<sup>215</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 2.

<sup>216</sup>United Nations General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, Treaty Series 999 1966 art 2(1).

<sup>217</sup>United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, United Nations, Treaty Series, vol 993 1966 art 2(2).

<sup>218</sup>*Convention on the Rights of the Child*, *supra* note 164 art 2.

<sup>219</sup>Myanmar is a member of the UN since 1948. *See*, “Permanent Mission of the Republic of the Union of Myanmar to the United Nations”, online: <<https://www.un.int/myanmar/>> (last visited 1 July 2023), online: United Nations <<https://www.un.int/myanmar/>>.

<sup>220</sup>*Charter of the United Nations*, 1 UNTS XVI, 1945 art 55(c).

<sup>221</sup>*Constitution of the Republic of the Union of Myanmar*, 2008 art 6(e).

Article 347, of the Constitution of Myanmar also guarantees equal rights and legal protection to any person in Myanmar.<sup>222</sup>

Despite these legal protections, Rohingya in Myanmar are discriminated against in every possible way.<sup>223</sup> They are denied recognition as a person, face violence, abuse, cruel, inhumane, and degrading treatment, and are denied access to basic amenities of life.<sup>224</sup> Contrary to the international human rights instruments and the Constitution of Myanmar, they are not protected but abused in the name of the law. This statement will be apparent by discussing various human rights violations faced by Rohingya in Myanmar in the next sub-sections.

### **2.3.2. Right to a Nationality**

The right to nationality is affirmed in many international legal instruments. Article 15 of the UDHR affirms the right to a nationality and also asserts that "no one shall be arbitrarily denied this right".<sup>225</sup> The issue of nationality has also been addressed in the Convention on Reduction of Statelessness;<sup>226</sup> Convention relating to the Status of Refugees;<sup>227</sup> Declaration on the Human Rights of Individuals who are not Nationals of

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<sup>222</sup>*Ibidat* art 347.

<sup>223</sup>Human Rights Council, "Myanmar Authorities must ensure full Legal Recognition of the Right to Citizenship of All Rohingya People, Deputy High Commissioner tells Human Rights Council- Council Concludes Interactive Dialogue with the High Commissioner on his Annual Report" (21 June 2023), online: *UN Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/news/2023/06/myanmar-authorities-must-ensure-full-legal-recognition-right-citizenship-all-rohingya>.

<sup>224</sup>"Rohingya", online: *Human Rights Watch* <<https://www.hrw.org/tag/rohingya>>.

<sup>225</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 15.

<sup>226</sup>UN General Assembly, *Convention on the Reduction of Statelessness*, United Nations, Treaty Series, vol 989 1961.

<sup>227</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1.

the Country in which they live;<sup>228</sup> and the Convention Relating to the Status of Stateless Persons (coincidentally Myanmar has not ratified any of these Conventions).<sup>229</sup>

Although Rohingya and their families were born in Myanmar, and have a history and residence in the country, they were denied citizenship under the 1982 Burma Citizenship Act.<sup>230</sup> This left millions of Rohingya without a nationality. Unlike the citizenship laws of many other nations,<sup>231</sup> the Burmese citizenship law does not recognize a child born in Myanmar as a citizen, if one or both of the parents is a Rohingya.<sup>232</sup> According to the 1982 law, a person born in Myanmar should have his birth registered to get citizenship.<sup>233</sup> However, only the nurses and midwives assigned by the state can record births in the register.<sup>234</sup> This step is crucial in obtaining birth certificates. Due to discrimination, Rohingya do not have access to state-assigned nurses and midwives.<sup>235</sup> Therefore, the children born to Rohingya parents are not recorded in the official register, and they are unable to get birth certificates.<sup>236</sup> As a result, they are unable to apply for citizenship and claim nationality. This act of the government in Myanmar is in clear violation of Article 15, UDHR.<sup>237</sup> Further, Myanmar also ratified the UN Convention on the Rights of the Child in 1991.<sup>238</sup> Article 7 of the Convention requires the state parties to the convention to ensure that the birth of a child should be registered and the child shall

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<sup>228</sup>General Assembly resolution 40/144, *Declaration on the Human Rights of Individuals who are not nationals of the country in which they live*, General Assembly resolution 40/144 1985.

<sup>229</sup>UN General Assembly, *Convention Relating To The Status of Stateless Persons*, 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>.

<sup>230</sup>Cheesman, *supra* note 210.

<sup>231</sup>Example is India, Canada, etc.

<sup>232</sup>*Citizenship Act*, *supra* note 7, s 5,7,29.

<sup>233</sup>*Ibid*, s 8.

<sup>234</sup>“Life in Limbo”, (2 June 2022), online: *United Nations in Myanmar*<<https://myanmar.un.org/en/184536-life-limbo>>.

<sup>235</sup>*Ibid*.

<sup>236</sup>*Ibid*.

<sup>237</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 15.

<sup>238</sup>*Convention on the Rights of the Child*, *supra* note 164.

have a right to acquire a nationality.<sup>239</sup> It also requires the state parties to implement these rights in their national legislation.<sup>240</sup> However, the situation in Myanmar indicates a clear violation of its obligations under the Convention.

With no legal claim of nationality in their country, millions of Rohingya are deprived of other important human rights.<sup>241</sup>

### **2.3.3. Right to Education**

Lack of citizenship and Myanmar's discriminatory policies toward Rohingya also restrict their access to education. The right to education has been affirmed in the Universal Declaration of Human Rights (UDHR),<sup>242</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>243</sup> The government of Myanmar restricts Rohingya from getting secondary education in state-run schools.<sup>244</sup> Since the majority of the Rohingya do not have access to basic amenities, they cannot afford to send their children to private English medium schools.<sup>245</sup> Rohingya are forced to attend schools belonging to their community (Madarsa – Islamic Schools).<sup>246</sup> Education provided by Madarsa's is not recognized by the majority of the universities because their curriculum is focused mainly on Islamic teachings.<sup>247</sup> Since 2012, the Rohingya are forced to receive education in the universities reserved for their ethnic group.<sup>248</sup> They are

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<sup>239</sup>*Ibid* art 7(1).

<sup>240</sup>*Ibid* art 7(2).

<sup>241</sup>note 224.

<sup>242</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 26(1).

<sup>243</sup>*International Covenant on Economic, Social and Cultural Rights*, *supra* note 217 art 13(1).

<sup>244</sup>Ishak Mia Sihel, “The urgency of reforming madrasa education in Myanmar”, online: *OpenDemocracy*<<https://www.opendemocracy.net/en/urgency-of-reforming-madrasa-education-in-myanmar/>>.

<sup>245</sup>Sihel, *Ibid*.

<sup>246</sup>*Ibid*.

<sup>247</sup>*Ibid*.

<sup>248</sup>Armando Augello Cupi, “Restrictions on Education for Rohingya Communities”, (6 December 2022), online: *Global History Dialogues*<<https://globalhistorydialogues.org/projects/restrictions-on-education-for-rohingya-communities/>>.

barred from receiving education at any Burmese University.<sup>249</sup> Moreover, the schools reserved for Rohingya education do not have the required types of equipment and are different from other schools (schools for non-Rohingya).<sup>250</sup> The majority of the teachers do not even have formal training.

The education system in Madarsa is confined to religion and has less relevance for the contemporary job market.<sup>251</sup> Due to the restrictions on access to education, Rohingyas are unable to get proper employment.<sup>252</sup> In fact, they are not aware of their rights. In their fight for survival, education is the least important of rights that Rohingyas in Myanmar can ever think of.

#### **2.3.4. Freedom of Movement**

The right to freedom of movement within the territory of a country or the right to leave any country is enshrined in the Universal Declaration of Human Rights.<sup>253</sup> Rohingyas living in Myanmar have strict restrictions on freedom of movement both within and outside of the country.<sup>254</sup> As Rohingyas are deemed 'foreigners',<sup>255</sup> they need to abide by the Registration of Foreigners Act<sup>256</sup> and Rules of 1940.<sup>257</sup> The act requires any foreigner entering or being present in the country to report his presence to the authority within a prescribed time.<sup>258</sup> Further, it also requires a foreigner traveling within the country to inform the prescribed authority about his arrival to such part of the

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<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> note 158.

<sup>253</sup> *The Universal Declaration of Human Rights (UDHR)*, *supra* note 156, art 13.

<sup>254</sup> "Myanmar: No Justice, No Freedom for Rohingya 5 years on", (24 August 2022), online: *Human Rights Watch* <<https://www.hrw.org/news/2022/08/24/myanmar-no-justice-no-freedom-rohingya-5-years#:~:text=The%20Rohingya%20who%20remain%20in,care%2C%20education%2C%20and%20livelihoods>>.

<sup>255</sup> *Ibid.*

<sup>256</sup> *The Foreigners Registration Act*, *supra* note 121.

<sup>257</sup> *Registration of Foreigners Rules*, *supra* note 122.

<sup>258</sup> *The Foreigners Registration Act*, *supra* note 121, s 3(a).

country,<sup>259</sup> his intended date of departure,<sup>260</sup> his place of stay<sup>261</sup> etc. In case a foreigner fails to comply with the provisions of the act he shall be punished with imprisonment, a monetary fine, or both.<sup>262</sup> Additionally, he might also face deportation or be detained.<sup>263</sup> The act is arbitrary as it allows the immigration officer to enter any place or vessel and arrest a person without any warrant for suspicion of contravening the provisions of the act.<sup>264</sup>

The majority of the Rohingyas live in camps confined to the boundaries of Rakhine state in Myanmar.<sup>265</sup> They face travel restrictions and also need permission from the government to leave the state or even travel from one village to another.<sup>266</sup> Due to the lack of citizenship rights, they are often forced to pay bribes to the Border Guard Police (BGP) to obtain travel permits.<sup>267</sup> After the 2017 coup, the military junta imposed new movement restrictions on Rohingyas.<sup>268</sup> They frequently face arrest and imprisonment for attempting to escape from their camps and villages.<sup>269</sup> According to the report by Human Rights Watch, the military arrested more than 2,000 Rohingya for unauthorized travel.<sup>270</sup> Those who are arrested for unauthorized travel are most often punished with

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<sup>259</sup>*Ibid*, s 3(b).

<sup>260</sup>*Ibid*, s 3(c).

<sup>261</sup>*Ibid*, s 3(d).

<sup>262</sup>*Ibid*, s 5(1).

<sup>263</sup>*Ibid*, s 5(2)-5(3).

<sup>264</sup>*Ibid*, s 2B.

<sup>265</sup>Rebecca Root, “More than 100 Rohingya refugees jailed for trying to flee Myanmar camps” *The Guardian* (11 January 2023), online: <<https://www.theguardian.com/world/2023/jan/11/more-than-100-rohingya-refugees-jailed-for-trying-to-flee-myanmar-camps#:~:text=About%20600%2C000%20Rohingya%20remain%20in,of%20the%20Rohingya%20had%20worsened>>.

<sup>266</sup>note 189 at 13–15.

<sup>267</sup>note 8.

<sup>268</sup>*Supra* note 259.

<sup>269</sup>“Myanmar: Rohingya Jailed for Traveling”, (8 October 2019), online: *Human Rights Watch*<<https://www.hrw.org/news/2019/10/08/myanmar-rohingya-jailed-traveling>>.

<sup>270</sup>“Myanmar: No Justice, No Freedom for Rohingya 5 Years On”, (24 August 2022), online: *Human Rights Watch*<<https://www.hrw.org/news/2022/08/24/myanmar-no-justice-no-freedom-rohingya-5-years>>.

imprisonment<sup>271</sup> under the provisions of the Registration of Foreigners Act, 1940<sup>272</sup>. The restriction also applies to Rohingya children, who also face arrest and are sent to a child detention center for traveling without obtaining permission from the government.<sup>273</sup>

These restrictions on freedom of movement on Rohingya also affect their access to food, healthcare, employment, livelihood, and other necessary amenities.<sup>274</sup>

### **2.3.5. Right to an adequate standard of living**

The right to an adequate standard of living is an important human right embodied in both UDHR and the ICESCR.<sup>275</sup> A clear reading of Article 25 of UDHR<sup>276</sup> and Article 11 of ICESCR,<sup>277</sup> reveals that the right to an adequate standard of living should be interpreted broadly. This right is interconnected with other rights such as the right to adequate food, water, and the right to health. The Committee on Economic, Social, and Cultural Rights (CESCR) highlights the importance of the right to adequate food by stating that, "the right to adequate food should not be interpreted in a narrow sense and should imply the availability of sufficient food to satisfy dietary needs."<sup>278</sup> Similarly, the CESCR also stipulates the importance of the right to water by stating that, "the right to

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<sup>271</sup>*Supra* note 259.

<sup>272</sup>*The Foreigners Registration Act*, *supra* note 115, s 5(1). The provision prescribes a punishment of imprisonment which could extend to 3 years.

<sup>273</sup>note 269.

<sup>274</sup>note 270.

<sup>275</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 25; *International Covenant on Economic, Social and Cultural Rights*, *supra* note 217 art 1.

<sup>276</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 25(1). UDHR states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

<sup>277</sup>*International Covenant on Economic, Social and Cultural Rights*, *supra* note 217 art 11. ICESCR states, "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

<sup>278</sup>*General Comment 12 on the Right to Adequate Food (art. 11) of the International Covenant on Economic, Social and Cultural Rights* (United Nations Economic and Social Council, 1999).



water means access to sufficient and safe water suitable for domestic and personal use."<sup>279</sup> The right to an adequate standard of living also includes adequate housing and access to healthcare facilities.<sup>280</sup> Therefore, for the realization of this right, other rights should also be fulfilled.

Considering the situation in Myanmar, Rohingyas are confined to the state of Rakhine, where they are being denied freedom of movement (as discussed in the previous section). Due to this, they do not have access to adequate housing, food, water, or healthcare.<sup>281</sup> Further, they do not have access to basic amenities (healthcare and housing assistance) that are otherwise available to other people by virtue of being a citizen of Myanmar.<sup>282</sup> The lack of accessibility of basic amenities to Rohingya does prove the violation of the right to an adequate standard of living guaranteed to everyone.

### **2.3.6. Freedom of Religion**

Freedom of Religion is manifested in UDHR.<sup>283</sup> This right has two aspects. The first aspect is the right to hold or change religious or other beliefs.<sup>284</sup> This right is absolute.<sup>285</sup> The second aspect is the freedom to manifest religious beliefs and thoughts.<sup>286</sup> This right is not absolute and is subject to restrictions prescribed by law such as morality, public

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<sup>279</sup>General Comment no. 15 on the Right to Water (Article 11 and 12) of the International Covenant on Economic, Social and Cultural Rights (United Nations Economic and Social Council, 2003).

<sup>280</sup>The Universal Declaration of Human Rights (UDHR), *supra* note 156, art 25.

<sup>281</sup>*Supra* note 264.

<sup>282</sup>*Ibid.*

<sup>283</sup>The Universal Declaration of Human Rights (UDHR), *supra* note 162 art 18.

<sup>284</sup>International Covenant on Civil and Political Rights (ICCPR), *supra* note 210 art 18(2); "The right to freedom of thought, conscience and religion: for ombudsman schemes", online: *Equality and Human Rights Commission* <<https://www.equalityhumanrights.com/en/advice-and-guidance-human-rights-multipage-guide/right-freedom-thought-conscience-and-religion>>.

<sup>285</sup>note 284.

<sup>286</sup>International Covenant on Civil and Political Rights (ICCPR), *supra* note 210, art 18(3).

safety, health, etc.<sup>287</sup> The Constitution of Myanmar also guarantees freedom of religion to its citizens.<sup>288</sup>

In Myanmar, Buddhism is the predominant religion.<sup>289</sup> The state believes in the notion of “one nation, one race, and one religion”.<sup>290</sup> The state promotes Buddhism by various means. It has also instituted a State Ministry of Religious Affairs and a Department for Promotion and Propagation of Buddhist Teachings.<sup>291</sup> Although the Constitution of Myanmar talks about religious freedom, intolerance for other minority religions is evident through state-sponsored attacks on religious minorities.<sup>292</sup> Rohingya is one such religious minority that faces violation against their freedom of religion.

Article 34 of the Constitution of Myanmar confers to its citizens the right to freely profess and practice religion.<sup>293</sup> As previously discussed, their majority of the Rohingya's are Muslims and not considered citizens of Myanmar, therefore, their right to religious freedom is not protected by the Constitution of Myanmar. Due to this reason, the Rohingya often face systematic violations of their freedom of religion.<sup>294</sup> Sometimes, the violation of freedom of religion is misinterpreted because Rohingyas are targeted due to their status of being a both a religious and an ethnic minority group of Myanmar.<sup>295</sup> The

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<sup>287</sup>*Ibid.*

<sup>288</sup>*Constitution of the Republic of the Union of Myanmar, supra* note 215, art 34.

<sup>289</sup>*2019 Report on International Religious Freedom: Burma* (Office of International Religious Freedom, U.S. Department of State) <<https://www.state.gov/reports/2019-report-on-international-religious-freedom/burma/>>. About 90% of the population practices Buddhism in Myanmar. “Buddhism in Myanmar”, online: *Harvard Divinity School* <<https://rpl.hds.harvard.edu/faq/buddhism-myanmar>>.

<sup>290</sup>Thomas Reese, “Burma’s religious freedom crisis”, *National Catholic Reporter* (16 December 2016), online: <<https://www.ncronline.org/blogs/faith-and-justice/burma-s-religious-freedom-crisis>>.

<sup>291</sup>*Ibid.*

<sup>292</sup>“Burma’s Human Rights Record Tied to Lack of Religious Freedom: USCIRF”, (21 May 2020), online: *Scientology Religion* <<https://www.scientologyreligion.org/blog/burmas-human-rights-record-tied-to-lack-of-religious-freedom-uscirf.html>>.

<sup>293</sup>*Constitution of the Republic of the Union of Myanmar, supra* note 215, art 34.

<sup>294</sup>*Violations of the right to freedom of religion or belief since the coup d’état in Myanmar: A briefing paper* (International Commission of Jurists, 2022).

<sup>295</sup>note 289.

report of the International Commission of Jurists on the right to freedom of religion or belief also highlights the incidents of violence by the Myanmar Military on religious minorities (Rohingya Muslims).<sup>296</sup> The military often raids and attacks religious places, places of worship, and sets up military encampments on religious sites.<sup>297</sup>

Due to the intolerance for religious freedom in Myanmar, it has been repeatedly classified as a 'country of particular concern' by the U.S. Commission on International Religious Freedom (USCIRF).<sup>298</sup> Amongst the violation of their right to freedom of religion, other human rights violations have forced millions of Rohingya to flee Myanmar.

### **2.3.7. Arbitrary arrest**

Article 9 of the UDHR prohibits arbitrary arrest, detention, or exile.<sup>299</sup> Amongst other human rights violations against Rohingya in Myanmar, the military has also been actively involved in arbitrary arrests and detention. According to Human Rights Watch, the Myanmar Military and its authorities have detained more than 135,000 Rohingya over the last decade in Myanmar.<sup>300</sup> The military is mainly involved in arresting and detaining the Rohingya, Kaman Muslims, and the supporters of the anti-coup regime.<sup>301</sup> According to the report by the Burma Assistance Association for Political Prisoners (AAPP),

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<sup>296</sup>note 294.

<sup>297</sup>*Ibid.*

<sup>298</sup>U.S. Department of State, *Burma 2022: International Religious Freedom Report* (U.S.: Office of International Religious Freedom, 2022).

<sup>299</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 156, art 9.

<sup>300</sup>"Myanmar: The Rohingya's Decade of Detention", *Human Rights Watch* (15 June 2022), online: <<https://www.hrw.org/news/2022/06/15/myanmar-rohingyas-decade-detention>>. *See also*, Shayna Bauchner, "'Nothing Called Freedom': A Decade of Detention for Rohingya in Myanmar's Rakhine State", (10 June 2022), online: *Human Rights Watch* <<https://www.hrw.org/content/382193>>.

<sup>301</sup>"Human rights in Myanmar", online: *Amnesty International* <<https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/myanmar/report-myanmar/>>.

approximately 5,415 people were arbitrarily arrested and detained in the year 2022 alone.<sup>302</sup>

These arrests are mainly for political reasons.<sup>303</sup> Moreover, most often the military denies the claims of arbitrary arrest and detention,<sup>304</sup>so, the whereabouts of the majority of the detainees remain unknown, further aggravating the human rights abuses. Thus, these arrests also lead to enforced disappearances, which have not been accounted for to date.<sup>305</sup> In some situations, even children are arbitrarily arrested and detained as a proxy for their parents.<sup>306</sup>

Due to a lack of citizenship and unfair treatment, Rohingyas are prohibited from filing a petition against this unlawful detention and arbitrary arrests.<sup>307</sup> Owing to the incidents of arbitrary arrest and the impact of the military coup targeting Rohingya, the UN Security Council called for a cessation of violence, the release of prisoners, and respect for human rights.<sup>308</sup>

### **2.3.8. Right to Life**

The right to life is the most important human right. The importance of this right could be estimated by the fact that this right is part of a majority of international, regional, and domestic human rights instruments.<sup>309</sup> The right to life is a fundamental right and is inherent in all human beings.<sup>310</sup> Further, no derogation from this right is

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<sup>302</sup>*Ibid.*

<sup>303</sup>*Ibid.*

<sup>304</sup>*Ibid.*

<sup>305</sup>“Myanmar: Hundreds Forcibly Disappeared”, (2 April 2021), online: *Human Rights Watch*<<https://www.hrw.org/news/2021/04/02/myanmar-hundreds-forcibly-disappeared>>.

<sup>306</sup>*Ibid.*

<sup>307</sup>*Supra* note 295.

<sup>308</sup> “The Situation in Myanmar- Security Council” (21 December 2022), online: *United Nations*<<https://media.un.org/en/asset/k1p/k1pv0py1z1>>.

<sup>309</sup> The right to Life is enshrined in numerous legal instruments including Art 3. UDHR, Art. 2 Human Rights Act, General Comment No. 36 on article 6: Right to Life.

<sup>310</sup>*General Comment No. 36 on the Right to Life (Article 6)* (The International Covenant on Civil and Political Rights, 2019), CCPR/C/GC/36 at para 2.

possible, even in the state of emergency.<sup>311</sup> There are many facets to the realization of the right to life. First, this right should not be interpreted narrowly and should be guaranteed to everyone without any discrimination of any kind.<sup>312</sup> Second, this right also entails the enjoyment of a life with dignity.<sup>313</sup> Most importantly, the right is protected by law and the State parties should ensure the protection of this right.<sup>314</sup> The State parties should also provide effective remedies in case of violation of the right to life.<sup>315</sup>

The right to life is often understood to be an absolute right. However, there are certain situations where this right is not protected. For example, the right to life is not violated if a person dies in public authority (lawful arrest, lawful detainment, use of force while the person carries out unlawful violence, etc.).<sup>316</sup> Nevertheless, even in such circumstances, the use of force should not be ‘unreasonable’ or ‘disproportionate’.<sup>317</sup> Furthermore, there are many case studies and legal examples about the fulfillment and protection of the right to life, which is beyond the scope of this thesis.

However, the right to life is important and is also interlinked with many other rights for its fulfillment. What’s important is that the state has a positive obligation to protect this right.<sup>318</sup> In this context, it is crucial to note that in Myanmar, there have been several incidents of violence carried out by the state military.<sup>319</sup> Myanmar’s military has been carrying out violence, killings, arbitrary arrest, torture, and other acts against Rohingya

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<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid* at para 3.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid* at para 4.

<sup>315</sup> *Ibid.*

<sup>316</sup> “Article 2: Right to life”, online: *Equality and Human Rights Commission* <<https://www.equalityhumanrights.com/en/human-rights-act/article-2-right-life>>.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Supra* note 294.

which are in direct violation of the right to life.<sup>320</sup> The report of the United Nations on the Situation of Human Rights in Myanmar reveals that more than 2,940 people were killed by security forces between, 1<sup>st</sup> February 2021 and 31<sup>st</sup> January 2022.<sup>321</sup> The report also reveals the widespread use of military force (airstrikes, artilleries, etc.), extrajudicial killings, and custodial killings targeting Rohingyas in Myanmar. Bombings on Rohingya camps, air strikes on Rohingya townships, and the deliberate killing of Rohingya, indicates that these attacks directly targets Rohingya. These unlawful attacks not only violate the right to life but are discriminatory, as they directly target innocent civilians (Rohingyas).<sup>322</sup>

The incidents of attacks, violence, restriction on humanitarian assistance and basic services, and persecution against Rohingyas in Myanmar which are described in this section constitute grave human rights violations.<sup>323</sup> These human rights violations also indicate that the state is involved in perpetrating violence against Rohingyas in Myanmar.<sup>324</sup> This has forced millions of Rohingya to seek refuge in other nations.<sup>325</sup> Many international organizations (including the United Nations) and nation-states have repeatedly criticized the human rights violations occurring in Myanmar.<sup>326</sup> Despite this criticism, these violations are still persistent.

#### **2.4. Conclusion**

The Rohingya refugee crisis is one of the most acute refugee crises in the contemporary world. The Rohingya crisis is often understood as a religious and ethnic

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<sup>320</sup> note 205.

<sup>321</sup> *Ibid.*

<sup>322</sup> *Supra* note 295.

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*

<sup>325</sup> *Supra* note 264.

<sup>326</sup> “Myanmar: Cycle of ‘human rights violations and abuses’ Continues warns Bachelet”, *UN News* (14 June 2022), online: <<https://news.un.org/en/story/2022/06/1120362>>.

conflict between the ‘Buddhist’ and ‘Muslims’ in Rakhine state.<sup>327</sup> However, a clear analysis of colonial and post-colonial history of Myanmar reveals that there are multiple reasons behind the Rohingya crisis. Myanmar went through a series of political conflict which affected the country and its residents, majorly Rohingya. From being under the British rule since 1824 to Japan’s invasion in 1942, and gaining independence in 1948, Burma has clearly been under different political regimes. These political regimes gave rise to inter-communal conflict. One of the instances of such conflict was a division between Burmese Buddhists and Arakanese Muslims during the British rule. So, the Rohingya conflict can be well traced back to the colonial period. Perhaps, the observation of post-colonial theorists like Shahabuddin is correct and the oppression of Rohingya due to unstable political regime in Myanmar implies that the absence of stable democracy in post-colonial states leads often results in oppression of ethnic groups.<sup>328</sup>

However, the Rohingya conflict is not just a result of colonial conflict in Burma; the postcolonial laws also played a crucial role in advancing this conflict. The discriminatory laws and policies of the postcolonial Buddhist government (nationalist government and military junta) aided in broadening the gap between these two communities. Further, the postcolonial laws stripped Rohingya of their citizenship, making them stateless. The lack of citizenship led to a number of human rights violations against Rohingya which ultimately led them to escape the borders of their country and find refuge in other neighboring countries.

The analysis in this chapter reveals that the Rohingya crisis is not simply an ethnic or religious conflict, as it is mostly understood, but, is also due to the postcolonial law

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<sup>327</sup>Zarni, *supra* note 66.

<sup>328</sup> Mohammad Shahabuddin, *supra* note 63 at 336.

and policies in Myanmar. The Rohingya crisis is of complex origin rooted in the colonial period, aggravated in the postcolonial period, and evolving in the present. Analysis of the root cause behind persecution of Rohingya in Myanmar also lines up with the observations of post-colonial theorists like Anghie, Shahabuddin, and Loomba, who righteously linked the development of post-colonial states with suppression of ethnic minorities.<sup>329</sup> The analysis also reveals that the exodus of Rohingya was possible partly because of Burmese citizens (Buddhist majority) who protested against voting rights of Rohingyas in the past. While the Burmese citizens silently watched the discriminatory treatment and human rights violations committed against Rohingya in Myanmar, the Rohingya crisis received international attention. Therefore, the next chapter will discuss the international response to the Rohingya refugee crisis and whether this response will help improve the situation of Rohingya refugees in the near future.

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<sup>329</sup> Antony Anghie, *supra* note 57 at 750; Mohammad Shahabuddin, *supra* note 63 at 336; Loomba, *supra* note 54 at 20.



### Chapter 3: International Response to the Rohingya Refugee Crisis

The evidence of discrimination, human rights abuses, and persecution of Rohingyas by Myanmar's government and military is undeniable.<sup>330</sup> Over the past two decades, numerous reports, articles, and other details about the Rohingyas support these claims.<sup>331</sup> Reports have analyzed the situation of Rohingya refugees in the countries of the refuge (such as Bangladesh, India, Malaysia, Canada, Australia, etc.).<sup>332</sup> These reports highlight the extent of attention Rohingyas Refugees have got globally.<sup>333</sup>

Despite receiving extensive international attention, Rohingyas continue to suffer from discrimination and human rights abuses.<sup>334</sup> Therefore, it is important to analyze the international response and action towards the ongoing Rohingya refugee crisis. This chapter highlights the measures taken by the international community to respond to Rohingya refugees, some of which are not that supportive. This chapter has been divided into three sections. The first section describes the protection that should be available to refugees under the 1951 Refugee Convention<sup>335</sup> and the action taken by the UNHCR to protect Rohingyas fleeing Myanmar. This chapter then shifts its focus to the action taken by the signatory and non-signatory states of the 1951 Refugee Convention toward Rohingya refugees. The second section discusses the response of a specific signatory state, Canada, towards the Rohingya refugee crisis. Subsequently, the last section highlights the response of two non-signatory states, Bangladesh and India, towards Rohingyas refugees. While analyzing the legal policies of Contracting and Non-Contracting States in regard to Rohingyas refugees, this section focuses on a comparative

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<sup>330</sup>Selth, *supra* note 195 at 17.

<sup>331</sup>Selth, *supra* note 195.

<sup>332</sup>*The Displaced and Stateless of Myanmar in the Asia-Pacific Region* (United Nations High Commissioner for Refugees (UNHCR, 2021).

<sup>333</sup>*Ibid.* *Supra* note 292.

<sup>334</sup>*Supra* note 320.

<sup>335</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1.

analysis to understand, which countries amongst the two are better supporting refugees. The comparative analysis illustrates the different approaches of Contracting and Non-Contracting States in regard to refugee protection. Since, this thesis focuses entirely on Rohingya refugees; the comparative analysis is focused on Rohingya refugees.

### **3.1. The 1951 UNHCR Convention and Protection of Refugees**

The 1951 Convention relating to the status of Refugees,<sup>336</sup> (hereinafter referred to as the 1951 Convention) and its 1967 Protocol is the most important and universally accepted instrument of International Refugee Law. The 1951 Convention lays down the definition of 'refugee'<sup>337</sup> and also provides rights and protection that come with 'refugee' status.

According to Article 1(a)(2) of the 1951 Convention, any person can be recognized as a refugee who has a well-founded fear of persecution based on grounds of race, religion, nationality, membership of a particular social group, or political opinion, is outside of his country of nationality and owing to such fear is unable to or, unwilling to avail protection of his country of nationality; or who, without nationality, and is outside his country of former residence owing to effects of such events and fear, is unable or unwilling to return to it.<sup>338</sup> This definition is important for two reasons – a) it provides an umbrella for the person who could have been otherwise considered an illegal immigrant, and; b) the rights and privileges recognized in this convention are enjoyed by all those who meet the threshold of the definition. Further, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter referred to as the UNHCR

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<sup>336</sup>*Ibid.*

<sup>337</sup>*Ibid* art 1(A)(2).

<sup>338</sup>*Ibid.*

Handbook) also provides guidance for interpreting the term ‘persecution’.<sup>339</sup>The UNHCR Handbook stipulates that any act of discrimination against a different group would amount to persecution if the people in that group are facing substantially prejudicial restrictions (such as the restriction on right to practice his religion, earn a livelihood, etc.).<sup>340</sup>

Based on the above definition and the guidance in the UNHCR Handbook, the majority of the Rohingya, who were forced to flee the borders of Myanmar owing to the fear of persecution in the form of arbitrary detention, murder, violence and other fundamental human rights violation due to their race and religion (as discussed in Chapter 2) would likely meet the criteria for claiming the status of a refugee.<sup>341</sup> Therefore, they should enjoy certain rights as well as protection in the country of refuge. The 1951 Convention bestows certain duties on Contracting States (signatory states to the 1951 Refugee Convention) to safeguard the rights of refugees lawfully staying in their territory.

According to the 1951 Convention, the Contracting States should adhere to the principle of non-discrimination as to race, religion, or country of origin of the refugees.<sup>342</sup> The 1951 Convention states that refugees should be governed by the law of the country of their domicile/residence.<sup>343</sup> These rights are compiled into two categories – a) rights which are accorded to refugees in the same manner as it is ensured to its nationals and b)

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<sup>339</sup>*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees HCR/IP/4/ENG/REV. 4 (Geneva: UN High Commissioner for Refugees (UNHCR), 2019).

<sup>340</sup>*Ibid.*

<sup>341</sup>“Burmese Refugees in Bangladesh: Still no Durable Solution”, 12 *Human Rights Watch* 3 (2000), available at: <https://www.hrw.org/reports/2000/burma/index.htm>. See, note 10.

<sup>342</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1 art 3.

<sup>343</sup>*Ibid* art 12.

rights which are guaranteed to refugee in the same manner as accorded to the other aliens (most favorable treatment).

**Refugees are accorded the same treatment as nationals with regard to:**

- Non-discrimination on the basis of race, religion, or country of origin;<sup>344</sup>
- Freedom of Religion;<sup>345</sup>
- Religious Education of Children;<sup>346</sup>
- Industrial Property and Artistic Rights (trademarks, patents, scientific works, etc.);<sup>347</sup>
- Access to court and legal assistance;<sup>348</sup>
- Elementary Education;<sup>349</sup>
- Public relief and assistance, remuneration, family allowances, working hours, overtime, apprenticeship, training, and benefits of collective bargaining;<sup>350</sup> and
- Social security.<sup>351</sup>

**Refugees are accorded the same treatment as most favored aliens with regard to:**

- Related to acquisition of movable and immovable property, and the rights arising as a result of such acquisition;<sup>352</sup>
- Wage earning employment;<sup>353</sup>

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<sup>344</sup>*Ibid* art 3.

<sup>345</sup>*Ibid* art 4.

<sup>346</sup>*Ibid*.

<sup>347</sup>*Ibid* art 14.

<sup>348</sup>*Ibid* art 16.

<sup>349</sup>*Ibid* art 22(1).

<sup>350</sup>*Ibid* art 24(1)(a).

<sup>351</sup>*Ibid* art 24(1)(b). *Social security means legal provisions regarding employment injury, occupational diseases, maternity, sickness, disability, old age, unemployment, family responsibilities, and other contingencies per national law or regulations.*

<sup>352</sup>*Ibid* art 13.

- Self-employment;<sup>354</sup>
- Liberal professions;<sup>355</sup>
- Freedom of movement and the right to choose their place of residence.<sup>356</sup>

The Contracting States are also required to issue identity papers<sup>357</sup>, and travel documents<sup>358</sup> to the refugees lawfully staying in their territories for travel. Apart from the rights accorded to the refugees staying lawfully in the territory of the Contracting States, the 1951 Convention stipulates certain obligations on the Contracting States, as regards the refugees staying unlawfully in the country of refuge. The Convention makes it clear that the Contracting States should refrain from imposing penalties on refugees on account of their illegal entry if they present themselves to the authorities within a reasonable amount of time and show a good cause for their illegal entry.<sup>359</sup> Further, the Contracting States cannot expel or return (refouler) a refugee to a territory where his life or freedom is threatened on grounds of his race, religion, nationality, membership of a particular social group, or political opinion.<sup>360</sup>

For successful implementation of the provisions, the 1951 Convention stipulates that the Contracting States should cooperate with the Office of the High Commissioner for Refugees (UNHCR), or any other agency of the United Nations accordingly.<sup>361</sup> The

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<sup>353</sup>*Ibid* art 17(1). Clause 2 of art. 17 stipulate that the refugees should be exempt from restrictive measures imposed on aliens for the protection of the national labor market.

<sup>354</sup>*Ibid* art 18. According to this provision, self-employment means types of employment in which the refugee can engage on his account, such as in agriculture, industry, handicrafts, and commerce and employment in which they can establish commercial and industrial companies.

<sup>355</sup>*Ibid* art 19. Art. 19(1) states that refugees who hold diplomas recognized by the competent authorities of the Contracting States can practice liberal professions.

<sup>356</sup>*Ibid* art 26.

<sup>357</sup>*Ibid* art 27.

<sup>358</sup>*Ibid* art 28.

<sup>359</sup>*Ibid* art 31(1).

<sup>360</sup>*Ibid* art 33.

<sup>361</sup>*Ibid* art 35(1).

Contracting States are also required to provide appropriate information and statistical data concerning the condition of refugees, implementation of the Convention, and any law or regulations concerning refugees, to the UNHCR.<sup>362</sup>

Therefore, it is clear that the 1951 Convention provides certain rights to refugees in the country of refuge. It also sets some standards for the treatment of refugees in the Contracting States. Further, the Convention has ensured the proper application of its provisions by specifying the role of UNHCR. As the UNHCR plays an important role in ensuring the application of the provisions of the 1951 Convention by the Contracting States, the next sub-section highlights the response of UNHCR concerning the Rohingya refugee crisis.

### **3.1.1. The Response of the UNHCR to the Rohingya refugee crisis**

The Office of the High Commissioner of Refugees or the UNHCR is a global organization established by the General Assembly in 1950.<sup>363</sup> It was established in the aftermath of World War II to help people displaced due to the effect of the war.<sup>364</sup> With a mandate of protecting and safeguarding the rights of refugees, the UNHCR is now active in approximately 137 countries worldwide.<sup>365</sup> The UNHCR performs its function with the guidance of the 1951 Convention and its 1967 Protocol.<sup>366</sup> Further, it is not only concerned with protecting the rights of refugees, but also works to support former refugees (refugees who have returned to their home country), displaced people, and stateless persons.<sup>367</sup>

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<sup>362</sup>*Ibid* art 35(2).

<sup>363</sup>“About UNHCR”, online: *UNHCR*<<https://www.unhcr.org/about-unhcr>>.

<sup>364</sup>*Ibid*.

<sup>365</sup>*Ibid*.

<sup>366</sup>*Ibid*.

<sup>367</sup>*Ibid*.

For seventy-three years, since its establishment, the UNHCR has been a central organization, working with countries to strengthen and regulate laws and policies to uphold the rights of refugees.<sup>368</sup> This also holds when applied to the case of Rohingya refugees. The UNHCR, being the central agency concerning refugees, displaced, and stateless people, has time and again responded to the Rohingya refugee crisis.<sup>369</sup> Following the 2017 mass exodus of Rohingya, the UNHCR has been focused on providing humanitarian aid and assistance to Rohingya by operating in Myanmar, Bangladesh, and other countries.<sup>370</sup> Together with the Asian Development Bank (ADB) and the World Bank, the UNHCR has been engaging in development-oriented approaches to meeting the humanitarian needs of Rohingyas in different countries.<sup>371</sup> It has also tried to promote the representation of Rohingya refugees across multiple sectors by co-ordinating with organizations such as the International Organization for Migration (IOM),<sup>372</sup> the United Nations Development Programme (UNDP), and the International Council of Voluntary Agencies (ICVA).<sup>373</sup> Moreover, the UNHCR has actively maintained its position on upholding the principle of *non-refoulement* and tried to materialize the conditions for the repatriation of Rohingya refugees.<sup>374</sup> It has also been consistent in providing monetary funding to Rohingya refugees residing in refugee camps

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<sup>368</sup> *Ibid.*

<sup>369</sup>“Rohingya emergency” (October 2022), online” *UNHCR* <<https://www.unhcr.org/emergencies/rohingya-emergency>>.

<sup>370</sup>“UNHCR: Rohingya crisis needs lasting solutions” (21 August 2020), online: *UNHCR* <<https://www.unhcr.org/news/briefing-notes/unhcr-rohingya-crisis-needs-lasting-solutions>>.

<sup>371</sup>*Situation Reports - Myanmar* (UN High Commissioner for Refugees (UNHCR), 2018), <https://reporting.unhcr.org/situation-reports-2018-2021?sitcode=505&year=2018>.

<sup>372</sup> Bimbisar Irom, “News Framing of the Rohingya Crisis: Content Analysis of Newspaper Coverage from Four Countries” (2022) 20:1 *J Imm & Refugee studies* 109 at 116.

<sup>373</sup> *note 371*.

<sup>374</sup> *Ibid.*

in different countries.<sup>375</sup> Most importantly, the UNHCR is focused on preparing detailed situation reports every year regarding its key achievements, incomplete goals, law and policy, and its operational context regarding Rohingya refugees in Myanmar and Bangladesh.<sup>376</sup>

The UNHCR is operational in both Contracting as well as Non-Contracting States (of the 1951 Convention).<sup>377</sup> While the Contracting States have an obligation under the 1951 Convention to provide protection and rights to refugees, the Non-Contracting States are not bound by the provisions of the convention. Nevertheless, the UNHCR operates in both types of countries to oversee and safeguard the rights of refugees.<sup>378</sup> Therefore, the next sections discuss the effectiveness of protection mechanisms provided by the Contracting and Non-Contracting States to the Rohingya refugees. It also discusses the role of UNHCR in Contracting and Non-Contracting States of the 1951 Convention.

### **3.2. Response of Contracting States**

The 1951 Refugee Convention and its 1967 Protocol is a fundamental instrument for refugees and asylum seekers. Since its inception, countries have had the freedom to determine whether to be a signatory or not. As of 2023, 149 states have signed the 1951 Convention, its protocol or both,<sup>379</sup> while 44 member states of the UN have yet to

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<sup>375</sup> *UNHCR distributes aid to Rohingya Refugees ahead of Bangladesh winter* (United Nations High Commissioner for Refugees (UNHCR), 2017).

<sup>376</sup> *Situation Reports - Myanmar* (UN High Commissioner for Refugees (UNHCR), 2019).

<sup>377</sup> “Protecting people forced to flee” (last visited 13 August 2023), online: *UNHCR* <<https://www.unhcr.org/what-we-do#:~:text=UNHCR%20works%20to%20protect%20refugees,education%2C%20work%20and%20health%20care>>.

<sup>378</sup> *Ibid.*

<sup>379</sup> “The 1951 Refugee Convention and Key International Conventions” (last visited 13 August 2023), online: *UNHCR* <<https://www.unhcr.org/il/en/1951-refugee-convention-and-international-conventions#:~:text=The%201951%20Refugee%20Convention%20and%20its%201967%20Protocol%20are%20the,legal%20obligations%20to%20protect%20them>>.



become the contracting states.<sup>380</sup> These non-contracting states are primarily located in the south, south-east and middle-east Asia (such as – India, Bangladesh, Pakistan, Malaysia, Lebanon, Jordan etc).<sup>381</sup> Apart from them, there are some other countries, which are not party to the convention such as Cuba, Guyana, Uzbekistan, etc.<sup>382</sup> A detailed discussion about the non-contracting parties and their response will be addressed in the next part of the chapter. This part focuses on the response of contracting states.

It is evident from the previous part of the chapter, that the Contracting State Parties have certain obligations on respecting the provisions of the 1951 Refugee Convention. However, for the obligations to be triggered, the refugee must be in the state territory. This raises the question of whether refugees are able to access the territory of the contracting states.

According to the recent data from UNHCR (2023), there are 35.3 million refugees (29.4 million under UNHCR mandate and 5.9 million Palestine refugees under United Nations Relief and Work Agency’s mandate) and 5.4 million Asylum seekers in the world.<sup>383</sup> Out of the total number of refugees, 85% of them were hosted by developing countries while the remaining 15% by developed countries in the last decade (2013-

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<sup>380</sup>Sarah Namondo, “Signatory Or Non-Signatory To The Refugee Convention: Refugee Protection Is A Global Responsibility”, (30 December 2021), online: *The Organization for World Peace*<<https://theowp.org/reports/signatory-or-non-signatory-to-the-refugee-convention-refugee-protection-is-a-global-responsibility/>>.

<sup>381</sup>*Ibid.*

<sup>382</sup>*Ibid*;Janmyr, “The 1951 Refugee Convention and Non-Signatory States”, *supra* note 12 at 189.

<sup>383</sup>“Figures at a glance”, online: *UNHCR USA*<<https://www.unhcr.org/us/about-unhcr/who-we-are/figures-glance>>.

2021).<sup>384</sup> Turkey currently hosts the highest number of refugees (3.6 million) along with Iran, Colombia, Germany, and Pakistan.<sup>385</sup>

In the fiscal year 2023, USA admitted 31,797 refugees<sup>386</sup> (against its 1,25,000-admission ceiling) which is significantly very less as compared to 1980s when their refugee intake was more than 2,00,000.<sup>387</sup> Similarly, in 2021, the European Union (EU) hosted less than 10% of the world's refugees.<sup>388</sup> The percentage has however increased recently to 20% due to influx of Ukrainian refugees.<sup>389</sup> In terms of total population, 1.5% of total populations of the EU are refugees.<sup>390</sup> In contrast, Lebanon (a non-contracting state) has 25% of total population as refugees.<sup>391</sup> This percentage of refugees further reduces to 0.001% in the case of Japan which has hosted only 1,107 refugees in the last decade.<sup>392</sup>

Some contracting northern states resist having refugees in their territory. For example, Denmark passed a legislative amendment 'L 226', which would allow the country to transfer the asylum seekers (who make it to their territory) to a 'safe third countries' (non-EU country).<sup>393</sup> It is noteworthy that, while still being a contracting state,

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<sup>384</sup>"Refugee host countries by income level", online: *UNHCR Refugee Statistics*<<https://www.unhcr.org/refugee-statistics/insights/explainers/refugee-host-countries-income-level.html>>.

<sup>385</sup>note 383.

<sup>386</sup>"Admissions and Arrivals", online: *Refugee Processing Center*<<http://www.wrapsnet.org>>.

<sup>387</sup>Claire Klobucista, James McBride & Diana Roy, "How Does the U.S. Refugee System Work?", online: *Council on Foreign Relations*<<https://www.cfr.org/backgrounder/how-does-us-refugee-system-work-trump-biden-afghanistan>>.

<sup>388</sup>"Statistics on migration to Europe", online: *European Commission*<[https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en)>.

<sup>389</sup>*Ibid.*

<sup>390</sup>*Ibid.*

<sup>391</sup>Christopherson, *supra* note 4.

<sup>392</sup>*Ibid.*

<sup>393</sup>Denmark has adopted a law L 226 on June 8<sup>th</sup> 2021, which is an amendment to the Law on Foreigners. This law would allow Denmark to process asylum applications and transfer asylum seekers to a third non-EU country. *See* "The newly adopted Danish law L 226 on asylum processing", Parliamentary Question, (14 July 2021), online: *European Parliament*<<https://www.europarl.europa.eu/doceo/document/P-9-2021->

Denmark returned asylum seekers from Greece to Turkey (a non-contracting state) under a joint EU-Turkey statement in 2016.<sup>394</sup> Denmark has also revoked residency status of more than 200 Syrian refugees claiming that their land of origin is no longer a persecuted.<sup>395</sup>

While discussing the intake of refugees by contracting states, it is important to discuss the policy of the EU. The EU uses the “Dublin system” to manage the flow of refugees.<sup>396</sup> The Dublin system comprises of the Dublin Regulation and the Eurodac regulation.<sup>397</sup> The Dublin regulation outlines the criteria to determine which contracting state of EU is responsible for processing the protection claim of asylum seeker.<sup>398</sup> The Eurodac regulation supports the Dublin regulation by mandating contracting states to administer fingerprint process of asylum seeker upon their entry to Europe.<sup>399</sup> The Dublin system was introduced with the intention to establish a Common European Asylum

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003626\_EN.html>. The new law L 226 allows Denmark to transfer asylum seekers to a third country under an international agreement between Denmark and the third country. *See*, Nikolas Feith Tan & Jens Vedsted-Hansen, “Denmark’s Legislation on Extraterritorial Asylum in Light of International and EU Law”, (15 November 2021), online: *EU Immigration and Asylum Law and Policy*<<https://eumigrationlawblog.eu/denmarks-legislation-on-extraterritorial-asylum-in-light-of-international-and-eu-law/>>.

<sup>394</sup>“EU-Turkey statement”, (18 March 2016), online: *European Council*<<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

<sup>395</sup>Bethan McKernan, “Denmark strips Syrian refugees of residency permits and says it is safe to go home”, *The Guardian* (14 April 2021), online: <<https://www.theguardian.com/world/2021/apr/14/denmark-revokes-syrian-refugee-permits-under-new-policy>>.

<sup>396</sup>Dublin system includes the Dublin Regulations [Dublin II (2003) and Dublin III (2013)]. *See*, “Country responsible for asylum application (Dublin Regulation)”, online: *European Commission*<[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en)>. The Dublin System was established after the Convention Implementing the Schengen Agreement (1985) and the Dublin Convention (1997) came into force. *See*, Ashley Binetti Armstrong, “You Shall Not Pass! How Dublin System Fueled Fortress Europe” (2020) 20:2 *Chicago J Int L* 350.

<sup>397</sup>Armstrong, *supra* note 396 at 350–351.

<sup>398</sup> Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible For Examining an Application For International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (recast), 2013 O.J. (L 180) (entered into force July 19, 2013) [hereinafter Dublin III].

<sup>399</sup>Armstrong, *supra* note 396 at 350–351.

System and ease the process of asylum seeker.<sup>400</sup> However, this system is problematic because under this system, the member state where the asylum seeker first entered is responsible for evaluating the protection claim of that asylum seeker. This criterion put those countries like Italy and Hungary, which are located at the border area of the EU, in disadvantageous situation.<sup>401</sup> As a result, these states started permitting entry of the asylum seekers without taking fingerprints and further dispatching them to other countries to get rid of their liability.<sup>402</sup> In fact some contracting states such as Hungary, Greece, Slovenia, Austria etc. constructed physical barriers (wall and fence) on their border to restrict flow of refugees in their country.<sup>403</sup> These incidents reflect the unwillingness of some contracting states to take refugees.

The situation further worsens when it comes to providing refuge to Rohingya refugees. There is no contracting state in the list of top five countries which host the highest number of Rohingya refugees and only two contracting states (Australia – 9<sup>th</sup> and USA - 10<sup>th</sup> position) in the list of top 10 hosting countries.<sup>404</sup> The fact, there are only five contracting states in the list of top 16 hosting countries.<sup>405</sup> This shows that the contracting states are hosting an insubstantial number of Rohingya refugees. For example, Australia hosts approximately 11,000 Afghan refugees;<sup>406</sup> 6,000 Ukrainian refugees;<sup>407</sup> but, it is

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<sup>400</sup>*Ibid* at 351.

<sup>401</sup>*Ibid* at 357.

<sup>402</sup>*Ibid*.

<sup>403</sup>*Ibid* at 359–362.

<sup>404</sup>SorwarAlam, “INFOGRAPHIC - Top Rohingya-hosting countries”, (24 August 2019), online: *AA*<<https://www.aa.com.tr/en/asia-pacific/infographic-top-rohingya-hosting-countries/1563674>>.

<sup>405</sup>*Ibid*.

<sup>406</sup>Katharina Buchholz, “Where Afghan Refugees Are Located”, (18 August 2021), online: *Statista Daily Data*<<https://www.statista.com/chart/25559/host-countries-of-afghan-refugees>>.

<sup>407</sup>Phil Mercer, “Australia Grants Refugee Visas to Thousands of Ukrainians Fleeing War”, *VOA* (20 April 2022), online: <<https://www.voanews.com/a/australia-grants-refugee-visas-to-thousands-of-ukrainians-fleeing-war/6537211.html>>.

hosting only 470 Rohingyas under the Humanitarian Program.<sup>408</sup> Similar data is seen in the context of countries like Japan (560 Rohingya refugees), the EU (3,000 Rohingya refugees), and Canada (approximately 1000 Rohingya refugees).<sup>409</sup> Notwithstanding, these states are providing humanitarian aid to support Rohingya refugees.<sup>410</sup> For instance, the EU has provided humanitarian assistance worth 68 million euros in the last two years.<sup>411</sup> Similarly, U.S.A. has provided 2.1 billion dollar aid in the last five years.<sup>412</sup>

Based on these above-mentioned discussions, following points can be concluded about contracting states -

a) Contracting states hosts relatively few refugees, despite many of them being wealthy.<sup>413</sup>

b) Developing countries host most of the refugees. Some of those countries are contracting states but majority of them are non-contracting states (such as – Bangladesh, Pakistan, India, Lebanon etc.).

c) Some powerful and developed contracting states are not showing any willingness to host refugees (example – Japan).

d) Some contracting states are willing to bear the expenses of refugee but does not want to accommodate them within their state boundaries (example – Denmark).

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<sup>408</sup>Alam, *supra* note 404.

<sup>409</sup>*Ibid.*

<sup>410</sup>*Ibid.*

<sup>411</sup>“Humanitarian aid: EU releases over €43 million for Myanmar and Bangladesh”, (1 February 2023), online: *European Commission* - *European Commission*<[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_372](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_372)>.

<sup>412</sup>“Additional Humanitarian Assistance for the Burma and Bangladesh Regional Crisis”, (8 March 2023), online: *United States Department of State*<<https://www.state.gov/additional-humanitarian-assistance-for-the-burma-and-bangladesh-regional-crisis/>>.

<sup>413</sup>Alexander Betts, “The United States Can Afford More Refugees”, (16 June 2021), online: *Boston Review*<<https://www.bostonreview.net/articles/the-united-states-can-afford-more-refugees/>>. “East African Countries host seven times more refugees than the United Nations despite their GDP is sixty times lower.” See also, Constantin Ruhe, Charles Martin-Shields & Lisa Maria Groß, “The Asylum Hump: Why Country Income Level Predicts New Asylum Seekers, But Not New Refugees” (2021) 34:2 *Journal of Refugee Studies* 1730–1746, online: <<https://doi.org/10.1093/jrs/feaa007>>.

e) Non-contracting states are sheltering far more Rohingya refugees than contracting states.

f) Contracting states are providing substantial humanitarian assistance to Rohingya refugees through financial donations.

These are the general observations regarding the Contracting States. In order to further understand a detailed role of contracting states and for purpose of this thesis, the next part analyzes the case study of Canada regarding their response to refugees and particularly Rohingya refugees.

### **3.2.1. Canada's Response to Rohingya Refugees**

Canada is one of the Contracting States of the 1951 Refugee Convention and its 1967 Protocol, Canada has a strong tradition of protecting refugees.<sup>414</sup> According to the UNHCR, Canada is one of the countries which have voluntarily resettled the largest number of refugees.<sup>415</sup> Since the 1980s, Canada has provided shelter to more than 1,088,015 refugees.<sup>416</sup> In the past, Canada has provided refuge to approximately 28,200 Afghan refugees;<sup>417</sup> 25,000 Syrian refugees;<sup>418</sup> 7,000 Uganda refugees;<sup>419</sup> and other categories of refugees. Moreover, in 2022, during Russia's attack on Ukraine, the Canadian government announced the Canada-Ukraine Authorization for Emergency

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<sup>414</sup>Canada signed the 1951 Refugee Convention and its 1967 Protocol in the year 1969. "Canada: A History of Refuge", (4 August 2021), online: *Government of Canada* <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role/timeline.html>> Last Modified: 2021-08-04.

<sup>415</sup>"Canada resettled more refugees than any other country in 2018, UN says", *CBC* (20 June 2019), online: <<https://www.cbc.ca/news/politics/canada-resettled-most-refugees-un-1.5182621>>.

<sup>416</sup>"Refugees in Canada", online: *UNHCR Canada* <<https://www.unhcr.ca/in-canada/refugees-in-canada/>>.

<sup>417</sup>Kandice Pardy, "Why are some refugees more welcome in Canada than others?", *Policy Options* (27 February 2023), online: <<https://policyoptions.irpp.org/magazines/february-2023/ukrainian-afghan-refugees/>>.

<sup>418</sup>"Canada's response to the conflict in Syria", (21 June 2022), online: *Government of Canada* <[https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/response\\_conflict-reponse\\_conflicts/crisis-crisis/conflict\\_syria-syrie.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflicts/crisis-crisis/conflict_syria-syrie.aspx?lang=eng)> Last Modified: 2022-06-21.

<sup>419</sup>Sheyfali Saujani, "When Ugandan Asian refugees arrived in Canada in 1972", (6 May 2021), online: *Library and Archives Canada Blog* <<https://thediscoverblog.com/2021/05/06/when-ugandan-asian-refugees-arrived-in-canada-in-1972/>>.

Travel (CUAET).<sup>420</sup> The CUET allowed Ukrainians to stay in Canada for up to 3 years.<sup>421</sup> Since the outset of CUAET, Canada has provided shelter to more than 167,595 Ukrainian refugees.<sup>422</sup>

However, it is shocking that despite its policy of resettling refugees, Canada has provided refuge to merely 1000 Rohingya refugees since 2006.<sup>423</sup> While Canada took less than a month to announce its support to Ukrainian refugees, including direct flights,<sup>424</sup> Rohingyas are still facing numerous human rights violations and living amid continuous threats of persecution in Myanmar.<sup>425</sup> Therefore, this section analyzes Canada's legal policy on protecting refugees. This section also focuses on Canada's treatment of Rohingya refugees and the drawbacks in the existing criteria for the resettlement of refugees.

### **3.2.1.1. Protection and Resettlement of Refugees in Canada**

Canada has gained a reputation for protecting refugees. It signed the 1951 Refugee Convention and its 1967 Protocol in 1969.<sup>426</sup> Since then, the country has recognized its obligations towards protecting refugees, not only as a humanitarian response but also as a

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<sup>420</sup>“Canada to welcome those fleeing the war in Ukraine”, (3 March 2022), online: *Government of Canada*<<https://www.canada.ca/en/immigration-refugees-citizenship/news/2022/03/canada-to-welcome-those-fleeing-the-war-in-ukraine.html>>

<sup>421</sup>*Ibid*; Pardy, *supra* note 408.

<sup>422</sup>Pardy, *supra* note 417.

<sup>423</sup>Nick Logan, “Canada’s Rohingya fear world has forgotten refugee crisis 5 years after genocide in Myanmar”, *CBC* (25 August 2022), online: <<https://www.cbc.ca/news/world/myanmar-rohingya-genocide-refugees-1.6558584>>. See also, JN Jonaid, “The Rohingya Crisis: A Call for International Action and Canada’s Leadership in Resettlement”, (25 May 2023), online: *Open Canada*<<https://opencanada.org/the-rohingya-crisis-a-call-for-international-action-and-canadasleadership-in-resettlement/>>. Only 300 Rohingya refugees arrived in Canada in between 2006-2010.

<sup>424</sup>“Canada’s response to the Russian invasion of Ukraine” (last visited 13 August 2023), online: *Government of Canada*<[https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crises/ukraine.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/ukraine.aspx?lang=eng)>. Emilie Bergeron, “Aeroplan-funded flights bringing Ukrainians to Canada expected to begin in June” *The Globe and Mail* (18 May 2022), online: <<https://www.theglobeandmail.com/canada/article-aeroplan-funded-flights-bringing-ukrainians-to-canada-expected-to/>>.

<sup>425</sup>*Supra* note 292.

<sup>426</sup>4 June 1969. “40th anniversary of Canada signing the Refugee Convention”, online: *Canadian Council for Refugees*<<https://ccrweb.ca/sites/ccrweb.ca/files/static-files/40thanniversary.htm>>.

legal requirement.<sup>427</sup> After ratifying the refugee convention, the Government of Canada introduced the Immigration Act in 1976.<sup>428</sup> This act was significant legislation, which not only provided a fundamental framework to determine Canada's Immigration policy,<sup>429</sup> but also formally included 'refugees' as a separate class of Immigrants.<sup>430</sup> The act also identified the right of 'Convention Refugees' to come and lawfully remain in Canada.<sup>431</sup>

After the Act came into effect on 1<sup>st</sup> April 1978,<sup>432</sup> a special task force was established in 1980, for the successful implementation of the act and for improving the refugee determination system.<sup>433</sup> Based on the recommendations of the task force, a Refugee Status Advisory Board (RSAB) was established.<sup>434</sup> Further, in *Singh v. Minister of Employment and Immigration*,<sup>435</sup> the Supreme Court of Canada ruled that everyone who is residing in Canada (including the refugees and asylum seekers) is equally entitled to the protection of the Charter of Rights and Freedom.<sup>436</sup> The court also stipulated that refugees also have the right to an oral hearing of their claims.<sup>437</sup> Subsequently, an oral hearing process was also established to allow the refugee a fair chance during the

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<sup>427</sup>*Ibid.*

<sup>428</sup>*An Act Respecting Immigration to Canada, 1976* Ottawa: SC 25-26 Elizabeth II, Chapter 52 [The Immigration Act, 1976].

<sup>429</sup>*Ibid.*, s 3.

<sup>430</sup> Sec. 2(1). According to the act, a "Convention refugee" means any person who-  
(a) because of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion,  
(i) is outside the country of the person's nationality and is unable, or because of that fear, unwilling to avail himself of the protection of that country, or  
(ii) not having a country of nationality, is outside the country of the person's former habitual residence, and is unable or, because of that fear, is unwilling to return to that country.

Sec.2(1) also defines an "immigrant" as a person who seeks landing (in Canada).

<sup>431</sup>*An Act Respecting Immigration to Canada, 1976, supra* note 428, s 4(2.1).

<sup>432</sup>*Supra* note 419.

<sup>433</sup> Jan Raska, "Canada's Refugee Determination System", (21 August 2020), online: *Canadian Museum of Immigration at Pier 21* <<https://pier21.ca/research/immigration-history/canadas-refugee-determination-system>>.

<sup>434</sup>*Ibid.*

<sup>435</sup> [1985] 1 S.C.R. 177.

<sup>436</sup>*Ibid.*, para 35.

<sup>437</sup>*Ibid.*, para 58-59



determination process.<sup>438</sup> The recommendations by the task force and the *Singh* judgment were significant in improving Canada's refugee determination process.

Further, the government also introduced a Private Sponsorship of Refugees (PSR) program in 1979.<sup>439</sup> This was one of Canada's most distinctive ways of resettling refugees from across the world. According to the statistics, more than 200,000 refugees were resettled under the PSR program.<sup>440</sup> In recognition of Canada's commitment to the protection of refugees, the UNHCR awarded the 'Nansen Medal' to the people of Canada.<sup>441</sup> However, shortly after receiving the honor, Canadian Government introduced Bill C-84,<sup>442</sup> in 1987, to put several restrictions on refugee claimants.<sup>443</sup> The bill was intended to deter refugee claimants from seeking refuge in Canada.<sup>444</sup> The Bill received assent in 1988, and its provisions were incorporated in the Immigration Act, of 1976, by way of an amendment on January 1, 1989.<sup>445</sup> The Bill incorporated some important amendments to the refugee determination system. Under the legislation, the Minister of Immigration was granted the authority to turn back the unauthorized ships carrying refugee claimants in Canadian Waters.<sup>446</sup> The act also permitted the government to categorize people as a risk to security without doing a refugee determination process.<sup>447</sup> It also gave power to the government to detain any person who is suspected of security risk

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<sup>438</sup>Raska, *supra* note 433.

<sup>439</sup>"Private sponsorship of refugees program", (30 May 2022), online: *Government of Canada* <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program/section-2.html>> Last Modified: 2022-05-30.

<sup>440</sup>note 426.

<sup>441</sup>P Hurwitz, "The New Detention Provisions of the Immigration Act: Can They Withstand a Charter Challenge" (1989) 47:2 U Toronto Fac L Rev 587.

<sup>442</sup>Bill C-84, the Immigration Deterrence and Detention Bill, *An Act to amend the Immigration Act, 1976 and the Criminal Code in the consequence thereof*, 2d Sess., 33d Parl., 1986-87.

<sup>443</sup>Hurwitz, *supra* note 441.

<sup>444</sup>James C Hathaway, "Selective Concern: An Overview of Refugee Law in Canada" (1988) 33 McGill LJ 676.

<sup>445</sup>Hurwitz, *supra* note 441.

<sup>446</sup>Hathaway, *supra* note 444.

<sup>447</sup>*Ibid.*

without any judicial review for 7 days. The period of detention could, however, be extended to 21 days, by the Minister of Immigration.<sup>448</sup> The amendment introduced several provisions that also penalized persons helping or sheltering the refugee claimants. Therefore, the amendment was criticized on several fronts.<sup>449</sup> This amendment indicated Canada's deviation from its commitment to the 1951 Refugee Convention.

However, it is noteworthy that the amendment respected the principle of *non-refoulement*. Even though the act authorizes the Minister of Immigration to send back unauthorized ships containing refugee claimants in Canadian waters, they can do so only if the ship can return to a "safe country", where the refugees are not at risk of persecution.<sup>450</sup> Therefore, it could be concluded that although the act was intended to limit the number of refugees coming into Canada, it also indicated that Canada was willing to protect the refugees by not refouling them to a country where they might face persecution. As a Contracting State, Canada determined its criteria for refugee determination, but by placing a reasonable limitation of not returning the refugees where they have a threat of persecution, it respected the most important provision (*non-refoulement*) of the 1951 Refugee Convention.<sup>451</sup>

After facing criticism for amending the act, Canada issued 'Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution', in 1993.<sup>452</sup> Thus, Canada revived its reputation by becoming the first country in the world to provide refuge to

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<sup>448</sup>James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge University Press, 2014).

<sup>449</sup>*Ibid*; Brahm Segal, "Restructuring Canada's Refugee Determination Process: A Look at Bills C-55 and C-84" (2005) 29:3 cd 733–759, online: <<http://id.erudit.org/iderudit/042906ar>>.

<sup>450</sup>Hathaway & Foster, *supra* note 448 at 355.

<sup>451</sup>GS Goodwin-Gill, *The Refugees in International Law* (Oxford: Clarendon Press, 1983) at 69.

<sup>452</sup>Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, online: <<https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx#:~:text=3.1%20The%20first%20Chairperson's%20Guideline,claimants%20fearing%20gender%2Drelated%20persecution>>.

women who face persecution as a consequence of gender discrimination. The most important steps that demonstrates Canada's commitment to the protection of refugees under the 1951 Refugee Convention was the enactment of the Immigration and Refugee Protection Act (IRPA) in 2001.<sup>453</sup> The act was introduced to offer protection to the refugees; fulfill Canada's commitment to international legal obligations concerning refugees, and uphold respect for human rights.<sup>454</sup> In respect of its obligations towards the 1951 Refugee Convention, the person in need of protection can make a refugee claim on the grounds mentioned in the 1951 Refugee Convention.<sup>455</sup> Further, IRPA also broadens the scope of protection by offering refuge to people who are also at risk of torture or cruel and unusual treatment or punishment in line with the commitment Canada has made under International Human Rights Instruments.<sup>456</sup> If the claim made by the person in need of protection is established, then under the IRPA, he would be granted the same rights as a Convention refugee.<sup>457</sup> IRPA also bestows other important rights to the person recognized as a Convention refugee such as *non-refoulement*.<sup>458</sup> Moreover, IRPA not only focuses on protecting refugees but also gives them an opportunity for permanent resettlement. Under sec. 99(4) of the act, Convention refugees can apply to become permanent residents of Canada.<sup>459</sup> Therefore, IRPA is the most significant legislation that

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<sup>453</sup>*The Immigration and Refugee Protection Act*, SC 2001, c 27. The act came into force on June 28, 2002

<sup>454</sup>*Ibid*, s 3(2)(a)-(h).

<sup>455</sup>*Ibid*, s 96.

<sup>456</sup>*Ibid*, s 3(2)(d), 97(1)(a)-(b). Canada has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on June 24, 1987. See, "Human Rights", online: *United Nations Treaty Collection* <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-9&chapter=4&clang=_en)>. See also, *Selvarajah v Canada*, [2014] FC 769, para. 73. In this judgment, the court stated that the applicant was at risk of torture if returned to Sri Lanka and therefore should be accorded protection. .

<sup>457</sup>"Chapter 14 - Persons in need of protection", (16 December 2021), online: *Immigration and Refugee Board of Canada* <<https://irb.gc.ca:443/en/legal-policy/legal-concepts/Pages/RefDef14.aspx>> at 14 Last Modified: 2021-12-16.

<sup>458</sup>IRPA, *supra* note 453, s 115(1).

<sup>459</sup>*Ibid*, s 99(4).

indicates Canada's intention to protect and resettlement of refugees. It is a model legislation, which sets a benchmark for other countries (both Contracting and Non-Contracting countries) to follow.

Canada has come a long way since it ratified the 1951 Refugee Convention in 1969. It has not only enacted legislation to respect its obligations under the convention but has also introduced different programs and guidelines, such as the Private Sponsorship of Refugees (PSR) program;<sup>460</sup> Guidelines on Gender Considerations in Proceedings Before the Immigration and Refugee Board,<sup>461</sup> etc. to show its commitment to protection and resettlement of refugees. However, despite its reputation for resettling the largest number of refugees in the world,<sup>462</sup> Canada has ignored several classes of refugees including Rohingya refugees. This disparity is clear when comparing the number of Ukrainian refugees and Rohingya refugees residing in Canada. While there are more than 150,000 Ukrainian refugees currently residing in Canada after Russia's invasion in 2022,<sup>463</sup> there are merely 1000 Rohingya refugees who have been resettled to Canada since 2006.<sup>464</sup> Such a huge gap indicates that there is some difference in how Canada views different refugee populations. Therefore, the next part reviews Canada's response to the Rohingya refugee crisis to analyze the drawbacks in the current framework.

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<sup>460</sup>“Private sponsorship of refugees program” (last visited 10 August 2023), online: *Government of Canada* <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program/section-2.html>>.

<sup>461</sup>*Supra* note 443.

<sup>462</sup>“Refugees in Canada” (last visited 10 August 2023), online: *UNHCR Canada* <<https://www.unhcr.ca/in-canada/refugees-in-canada/>>.

<sup>463</sup>The number of Ukrainian refugees currently residing in Canada differs. *See*, Yuriy Umansky, “Canada is facing the largest wave of Ukrainian immigration ever”, (28 April 2023), online: *New Canadian Media* <<https://newcanadianmedia.ca/many-ukrainians-have-applied-for-a-visa-to-come-to-canada-but-many-of-them-choose-not-to-come/>>; Pardy, *supra* note 408; Helene Jouan, “Canada: Ukrainian refugees find a new ‘family’ in Alberta”, *Le Monde* (23 February 2023), online: <[https://www.lemonde.fr/en/international/article/2023/02/23/canada-ukrainian-refugees-find-a-new-family-in-alberta\\_6016985\\_4.html](https://www.lemonde.fr/en/international/article/2023/02/23/canada-ukrainian-refugees-find-a-new-family-in-alberta_6016985_4.html)>.

<sup>464</sup>Logan, *supra* note 423; Jonaid, *supra* note 423.

### 3.2.1.2. Canada's treatment of Rohingya Refugees

Canada has always been vocal about its support for Rohingya refugees and has continuously condemned Myanmar's security forces for carrying out illegal attacks against Rohingyas.<sup>465</sup> After the 2017 military crackdown, Canada sent a Special Envoy to Myanmar.<sup>466</sup> In 2018, the Special Envoy released a report reviewing the refugee crisis in Myanmar. The report highlighted the Rohingya crisis in Myanmar and Bangladesh and also made some recommendations to the Canadian government. The report suggested that (a) Canada should take a leadership role by providing humanitarian assistance and developmental aid to Rohingyas in Myanmar and Bangladesh;<sup>467</sup> (b) it should assist the UN and other international organizations;<sup>468</sup> (c) the Government of Canada should formulate a funding plan for support to Rohingyas in both countries;<sup>469</sup> (d) Canada should welcome Rohingya refugees living in Bangladesh and Myanmar;<sup>470</sup> and (e) it should engage with the government of Myanmar and pursue a policy to provide developmental assistance and emphasize the return of Rohingyas to Myanmar.<sup>471</sup>

Because of these suggestions, the government of Canada, in 2018, responded by allocating a fund of \$300 million for international assistance to the Rohingya refugee

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<sup>465</sup>“Canada’s response to the Rohingya and Myanmar Crises” (last visited 9 July 2023), online: *Government of Canada* <[https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/myanmar.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/myanmar.aspx?lang=eng)>.

<sup>466</sup>Mayyu Ali, “Canada should offer refuge to Rohingya genocide survivors”, *Policy Options Politiques* (31 March 2023), online: <<https://policyoptions.irpp.org/magazines/march-2023/canada-rohingya-refuge/>>.

<sup>467</sup>“‘Tell them we’re human’ What Canada and the world can do about the Rohingya crisis - Report of Special Envoy to Myanmar Bob Rae - Recommendations”, online: *Government of Canada* <[https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/rep\\_sem-rap\\_esm.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/rep_sem-rap_esm.aspx?lang=eng)> Last Modified: 2022-08-12.

<sup>468</sup>*Ibid.*

<sup>469</sup>*Ibid.*

<sup>470</sup>*Ibid.*

<sup>471</sup>*Ibid.*

crisis, over 3 years (2018-2021).<sup>472</sup> The fund was used for providing humanitarian assistance to Rohingya refugees in Bangladesh and Myanmar.<sup>473</sup> Subsequently, Canada also announced an additional fund of \$288.3 million for 2021-2024 to support Rohingya refugees.<sup>474</sup> Canada also announced to increase in international cooperation for Rohingya refugees by appointing a Special Envoy.<sup>475</sup>

Apart from financial assistance, Canada has also imposed sanctions on Myanmar under the *Special Economics Measures Act*,<sup>476</sup> for human rights violations committed by the government of Myanmar.<sup>477</sup> Further, Canada, along with France, Germany, Italy, Japan, the U.K, the U.S.A, and the High Representative of the European Union also condemned the Military junta for the human rights situation in Myanmar, at the G7.<sup>478</sup> Canada also issued a joint statement with the Kingdom of Netherlands supporting Gambia's efforts in the matter of the case of *Gambia v. Myanmar*.<sup>479</sup> In this case,

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<sup>472</sup>“Canada’s strategy to respond to the Rohingya crisis in Myanmar and Bangladesh (2018 to 2021)”, online: *Government of Canada*<[https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/myanmar-phase1.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/myanmar-phase1.aspx?lang=eng)> Last Modified: 2022-07-27.

<sup>473</sup>“Canada’s strategy to respond to the Rohingya and Myanmar crises (2021 to 2024)”, online: *Government of Canada*<[https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/myanmar-phase2.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/myanmar-phase2.aspx?lang=eng)> Last Modified: 2022-07-27.

<sup>474</sup>*Ibid.*

<sup>475</sup>*Ibid.*

<sup>476</sup>*Special Economics Measures Act* 1992, Special Economic Measures (Burma) Permit Authorization Order SOR/2007-286; *Special Economic Measures (Burma) Regulations* SOR/2007-285.

<sup>477</sup>Kanishka Singh, “Canada adds sanctions on Russia, Iran, Myanmar over human rights”, *Reuters* (9 December 2022), online: <<https://www.reuters.com/world/canada-adds-sanctions-russia-iran-myanmar-over-human-rights-2022-12-09/>>. Originally Canada imposed sanctions on Myanmar in 2007 for grave breach of international peace and security. In 2022, Canada imposed additional sanctions on Myanmar for committing atrocities on civilians and escalating human rights violations in the country. “Canadian Sanctions Related to Myanmar”, online: *Government of Canada*<[https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/myanmar.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng)> Last Modified: 2023-08-04.

<sup>478</sup>Office of the Spokesperson, “G7 Foreign Ministers’ Statement on the Myanmar Military Junta’s Executions”, (28 July 2022), online: *United States Department of State*<<https://www.state.gov/g7-foreign-ministers-statement-on-the-myanmar-military-juntas-executions/>>.

<sup>479</sup>“Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in The Gambia v. Myanmar case at the International Court of Justice”, (2 September 2020), online: *Government of the Netherlands*<<https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement->

Gambia, a West African Nation, filed a lawsuit at the International Court of Justice (ICJ) against Myanmar, accusing Myanmar of committing genocide against Rohingya.<sup>480</sup> Canada and the Kingdom of Netherlands supported Gambia in this case and issued a joint statement affirming their obligation towards the international community.<sup>481</sup> It also declared assisting Gambia regarding any legal issues in the matter thereof.<sup>482</sup>

Canada has also supported ASEAN'S Five Point Consensus aimed at resolving the Rohingya crisis in Myanmar.<sup>483</sup> It has also endorsed the UN Secretary General's Special Envoy's efforts to address the situation in Myanmar.<sup>484</sup> Moreover, the Government of Canada has also imposed sanctions on Myanmar's Major-General Maung Maung Soe under the Sergei Magnitsky Law,<sup>485</sup> for his role in committing gross violations of human rights against Rohingyas in Myanmar.<sup>486</sup>

Undoubtedly, Canada has condemned the government of Myanmar's (and Myanmar's Military Junta) treatment of Rohingyas. It has also tried to provide financial assistance for supporting the Rohingya refugees living in Myanmar and Bangladesh. Strict sanctions imposed on Myanmar also show Canada's solidarity with Rohingyas.

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of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice> Last Modified: 2020-09-02T11:49.

<sup>480</sup>*Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (The Gambia v Myanmar)*, 2023 International Court of Justice, available at: <https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>.

<sup>481</sup>note 479.

<sup>482</sup>*Ibid.*

<sup>483</sup>“Chairman’s Statement on the ASEAN Leaders’ Meeting, 24 April 2021 and Five-Point Consensus”, (24 April 2021), online: *Association of Southeast Asian Nations*<<https://asean.org/chairmans-statement-on-the-asean-leaders-meeting-24-april-2021-and-five-point-consensus/>>.

<sup>484</sup>“Canada’s response to the Rohingya and Myanmar crises”, online: *Government of Canada*<[https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/myanmar.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/myanmar.aspx?lang=eng)> Last Modified: 2022-07-27.

<sup>485</sup>*The Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, SS 2017, c 21.

<sup>486</sup>LevonSevunts, “Canada imposes sanctions on Myanmar general over Rohingya abuses”, *CBC* (16 February 2018), online: <<https://www.cbc.ca/news/politics/myanmar-general-sanctions-canada-1.4539003>>.

However, these efforts only partially help Rohingya refugees from human rights violations they are facing in Myanmar and Bangladesh. Many Rohingya refugees are also living in refugee camps in Non-Contracting States in difficult situations. In such circumstances, it is disappointing that Canada has only chosen to exercise its discretion to resettle only 1,000 Rohingya refugees within its borders. The mass exodus of Rohingyas from Myanmar happened in 2017. Even after 6 years, Canada has shown no effort to resettle Rohingya refugees within its borders. Moreover, Canada's decision of decreasing the funding from \$300 million in 2018 to \$288.3 million in 2021 also shows its lack of seriousness in improving the situation of Rohingyas living in Myanmar and Bangladesh. In the past, Canada has provided shelter to refugees from different countries.<sup>487</sup> However, its lack of support regarding the resettlement of Rohingya refugees shows a problematic trend that is shared by other Contracting States too. But why is the treatment of Rohingya differs from other group of refugees? What amounts to this discrimination? These questions are discussed in the next part. In answering these questions, it is also important to analyze the drawbacks of Canada's Immigration law and policies. The next section uncovers the discrimination towards Rohingya refugees regarding Immigration and Refugee Protection law and the policies concerning Immigration in Canada.

### **3.2.1.3. Drawbacks in Canada's existing refugee and immigration mechanism**

Canada is often regarded as the 'Global leader in refugee settlement'.<sup>488</sup> Its immigration and refugee protection policy is well organized and is often appreciated as exemplary for other countries.<sup>489</sup> In this regard, Canada's Refugee Resettlement Program

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<sup>487</sup>28,200 Afghan refugees; 25,000 Syrian refugees; 7,000 Uganda refugees; *See, supra* note 408.; *supra* note 409.; *supra* note 410.

<sup>488</sup>Amelia Cheatham & Diana Roy, "What Is Canada's Immigration Policy?", *Council on Foreign Relations* (7 March 2023), online: <<https://www.cfr.org/backgrounder/what-canadas-immigration-policy>>.

<sup>489</sup>*Ibid.*



is one of its kinds.<sup>490</sup> This program intends to resettle ‘refugees’ as ‘permanent residents’.<sup>491</sup> Canada has granted approximately 437,000 people permanent residency in 2022.<sup>492</sup> Out of these about 17.2% of new permanent residency visas were granted to refugees and protected persons.<sup>493</sup> It has settled approximately 47,600 refugees in 2022.<sup>494</sup>

Despite this liberal policy to resettle refugees, it is shocking that Canada has resettled only 1,000 Rohingya refugees till now.<sup>495</sup> This indicates that Canada has some preference when granting asylum and permanent residency to different groups of refugees. But what are the factors that encourage Canada's preference for some groups of refugees? For understanding this, it is important to look at several factors related to Canada's Immigration system.

In the nineteenth and twentieth centuries, before the adoption of the 1951 Refugee Convention, Canada did not favor immigration by certain groups (these groups include people of non-European, non-Christian descent, people who are disabled, ill, or poor).<sup>496</sup> However, after signing the 1951 Refugee Convention in 1969, Canada became more

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<sup>490</sup>“Refugee resettlement (REF-OVS-1)”, online: *Government of Canada*<<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/resettlement.html>> Last Modified: 2023-05-03.

<sup>491</sup>*Ibid.* Two categories of refugees are generally assisted for resettlement under Canada's Refugee Resettlement Program - (a) Government Assisted Refugee (GAR) Program; and (b) Private Sponsorship of Refugees (PSR) Program.

<sup>492</sup>“Canada grants record permanent residency permits in 2022”, *Reuters* (3 January 2023), online: <<https://www.reuters.com/world/americas/canada-grants-record-permanent-residency-permits-2022-2023-01-03/>>. See, Rachele Younglai & Janice Dickson, “Immigration to Canada hits record high in 2022”, *The Globe and Mail* (3 January 2023), online: <<https://www.theglobeandmail.com/business/article-immigration-to-canada-hits-record-in-2022/>>.

<sup>493</sup>Vimal Sivakumar, “IRCC unveils the top 10 source countries of new immigrants to Canada in 2022”, *CIC News* (16 February 2023), online: <<https://www.cicnews.com/2023/02/ircc-unveils-the-top-10-source-countries-of-new-immigrants-to-canada-in-2022-0233180.html>>.

<sup>494</sup>Soo-Jung Kim, “UNHCR calls for concerted action as forced displacement hits new record in 2022”, (14 June 2023), online: *UNHCR Canada*<<https://www.unhcr.ca/news/unhcr-calls-for-concerted-action-as-forced-displacement-hits-new-record-in-2022/>>.

<sup>495</sup>note 455.

<sup>496</sup>*Supra* note 479.

liberal in its approach to its immigration policy, reflecting the commitments of non-discrimination in the 1960 Bill of Rights.<sup>497</sup>

There are a few factors that influence Canada's Immigration and Refugee Policy, which could explain its preference for some group of refugees. Generally, Immigration and refugee resettlement are influenced by politics and public opinion.<sup>498</sup> As Immigration has become a significant part of advancing Canada's economy,<sup>499</sup> Canada is focused mostly on building human capital by encouraging a skilled population.<sup>500</sup> This is implied by the fact that majority of the immigrants in Canada are highly educated people.<sup>501</sup> Further, the *IRPA* also reflects Canada's intention of building its economy by providing residency (or resettling refugees) to skilled and educated people (or refugees).<sup>502</sup> Bill C-31 amended the *IRPA* and also reorganized Canada's refugee and immigration policy.<sup>503</sup> New classes of Immigration were added through *IRPA*, such as the Federal Skilled Worker Program; Temporary Worker Program, and the Provincial Nominee Program

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<sup>497</sup>Canadian Bill of Rights Act, C.R.C 1978, c.394.

<sup>498</sup>Clayton Ma, "Canadian Refugee Policy", (10 November 2020), online: *The Canadian Encyclopedia*<<https://www.thecanadianencyclopedia.ca/en/article/canadian-refugee-policy>>.

<sup>499</sup>"Benefits of immigration on Canadian sectors", online: *Government of Canada*<<https://www.canada.ca/en/immigration-refugees-citizenship/campaigns/immigration-matters/growing-canada-future.html>>.

<sup>500</sup>*Ibid.*

<sup>501</sup>*See*, "Labour force characteristics of immigrants by educational attainment, annual", (6 January 2023), online: *Statistics Canada*<<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410008701>> Last Modified: 2023-01-06; *See*, "A portrait of educational attainment and occupational outcomes among racialized populations in 2021", (18 January 2023), online: *Statistics Canada*<<https://www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-X/2021011/98-200-X2021011-eng.cfm>>. *See*, AEChallinor, "Canada's Immigration Policy: a Focus on Human Capital", (15 September 2011), online: *Migration Policy Institute*<<https://www.migrationpolicy.org/article/canadas-immigration-policy-focus-human-capital>>.

<sup>502</sup>*IRPA*, *supra* note 444, s 3 (1)(a).

<sup>503</sup>*Bill C-31, Protecting Canada's Immigration System Act*, SC 2012, c 17.

(PNP).<sup>504</sup> This implies that, Canada is more focused on providing residency to immigrants based on their ability to contribute to Canada's economy.<sup>505</sup>

As discussed in the above sections, most of the Rohingya refugees do not have access to basic amenities like food, water, healthcare, or education due to their non-recognition as citizens of Myanmar.<sup>506</sup> Besides, compared to the refugee crisis in other countries (Ukraine, Afghanistan, Syria, etc.), the Rohingya crisis is not of recent origin but has been ongoing since the independence of Myanmar. So, many generations of Rohingyas (residing either in Myanmar or taking refuge in non-Contracting states like Bangladesh) did not get an opportunity to gain proper education or skills. This implies that Rohingya refugees are not educated or skilled. Thereby, they likely cannot contribute as easily to Canada's economy as other groups of refugees from more middle-class origins (such as Ukrainian refugees, Afghan refugees, Syrian refugees, etc.). This may explain Canada's non-preference for providing refuge to uneducated and unskilled Rohingya refugees.

Undoubtedly, Canada is supporting Rohingya refugees in Myanmar and Bangladesh through its financial aid and by engaging with the UNHCR, civil society partners, and various NGOs.<sup>507</sup> But, certainly, it is not doing enough to provide to refugees or resettle one of the largest refugee populations in the world. As discussed earlier, being a contracting state to the 1951 Refugee Convention does not imply a responsibility to resettle refugees. But, as Canada is doing exemplary work in protecting

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<sup>504</sup> *Supra* note 493, Regulations Amending the Immigration and Refugee Protection Regulations SOR-2002-227.

<sup>505</sup> *Ibid* at 493.

<sup>506</sup> *Supra* note 320.

<sup>507</sup> Ibtesum Afrin & Deeplina Banerjee, "Rohingya refugees are an untapped source for Canada's workforce", *Policy Options Politiques* (1 March 2023), online: <<https://policyoptions.irpp.org/magazines/march-2023/rohingya-opportunity-canada-workforce/>>.

and resettling the highest number of refugees (by providing them with permanent residency), based on its immigration and refugee protection policies,<sup>508</sup> it could certainly provide the same treatment to Rohingya refugees. Canada should welcome more number of Rohingya refugees to maintain its tradition of providing humanitarian support to the refugees instead of prioritizing skilled refugees. Instead, its preference seems to be resettling highly educated and skilled people, which could contribute to the economy.

Although, Canada's immigration policy has improved through the years, its discrimination towards Rohingya refugees is not setting a good precedent. This trend is also shared by other contracting states of the 1951 Refugee Convention.<sup>509</sup> As opposed to this, non-contracting states, shelter the majority of the refugees.<sup>510</sup> In fact, some of the lower-middle-income, non-contracting states like Bangladesh shelter a million Rohingya refugees.<sup>511</sup> This could mean that non-contracting states are less resistant in accepting all refugees as compared to contracting states. The next part of the thesis analyzes the legal framework of non-contracting states regarding refugee protection by highlighting the case of Rohingya refugees.

### **3.3. Non-Contracting States and Rohingya Refugees**

The 1951 Convention and its Protocol are intended to ensure that refugees are protected, and their rights are respected. Although the 1951 Convention has 149 State Parties,<sup>512</sup> more than 80% of refugees are hosted by developing nations (both low and middle-income nations), most of which have not ratified the Convention or its

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<sup>508</sup>note 495.

<sup>509</sup> note 395.

<sup>510</sup>Janmyr, *supra* note 12.

<sup>511</sup> “Rohingya Crisis” (23 July 2023), online: *UNICEF* <<https://www.unicef.org/emergencies/rohingya-crisis>>.

<sup>512</sup>“States parties, including reservations and declarations, to the 1951 Refugee Convention”, online: *UNHCR*<<https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1951-refugee-convention>>.

Protocol.<sup>513</sup> Likewise, the majority of the Rohingya refugees are hosted by South-Asian countries namely Bangladesh, India, Malaysia, Indonesia, Nepal, Thailand, etc.<sup>514</sup> All of these countries have not yet ratified the 1951 Convention or its Protocol, and are not bound by the provisions of the Convention.<sup>515</sup>

After the August 2017, mass exodus, the majority of Rohingyas took refuge in Bangladesh (which hosts the largest number of Rohingya refugees), Malaysia, and India,<sup>516</sup> all of which are middle-income countries.<sup>517</sup> As none of these countries have ratified the 1951 Convention or its 1967 Protocol, Rohingya cannot claim 'refugee' status or the rights recognized by the convention, in these countries. They are considered 'stateless' or 'illegal migrants'.<sup>518</sup> Nonetheless, most of these Non-Contracting States prefer to refer to the Rohingya as 'refugees' as a 'diplomatic strategy' to avoid international pressure.<sup>519</sup>

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<sup>513</sup>Comms Group, "UNHCR report: 80% of world's refugees in developing countries", online: *UNHCR*<<https://www.unhcr.org/news/news-releases/unhcr-report-80-worlds-refugees-developing-countries>>. See, Naureen Rahim, "Bangladesh and the 1951 Refugee Convention", (6 February 2023), online: *Refugee Law Initiative Blog*<<https://rli.blogs.sas.ac.uk/2023/02/06/bangladesh-and-the-1951-refugee-convention/>>.

<sup>514</sup>"The Rohingya: The world's largest stateless population", online: *Doctors Without Borders*<<https://msf.org.au/rohingya-worlds-largest-stateless-population>>.

<sup>515</sup>*Supra* note 503.

<sup>516</sup>According to the UNHCR, more than one million Rohingya are living in Bangladesh. See, "Bangladesh", online: *UNHCR*<<https://www.unhcr.org/countries/bangladesh>>. Malaysia hosts about 103,000 Rohingyas, See, "Malaysia", online: *UNHCR*<<https://www.unhcr.org/countries/malaysia>>. India is hosting about 19,000 Rohingya, See, "Myanmar situation", online: *Global Focus, UNHCR*<<https://reporting.unhcr.org/operational/situations/myanmar-situation>>.

<sup>517</sup>According to the UNHCR, more than one million Rohingya are living in Bangladesh. See, "Overview : Bangladesh", online: *The World Bank*<<https://www.worldbank.org/en/country/bangladesh/overview>>. India has also been classified as a lower-middle income country by the World Bank. See, "Data for India, Lower middle income", online: *World Bank Open Data*<<https://data.worldbank.org>>. Malaysia is also a middle-income country with a high level of income inequality. See, "Overview : Malaysia", online: *The World Bank*<<https://www.worldbank.org/en/country/malaysia/overview>>.

<sup>518</sup>Bayes Ahmed, "Are Rohingyas protected in countries that did not sign the 1951 refugee convention?", (5 October 2021), online: *UCL IRDR Blog*<<https://blogs.ucl.ac.uk/irdr/2021/10/05/rohingya/>>.

<sup>519</sup>Mohammad Sajedur Rahman & Nurul Huda Sakib, "Statelessness, forced migration and the security dilemma along borders: an investigation of the foreign policy stance of Bangladesh on the Rohingya influx" (2021) 1:7 *SN Soc Sci* 160, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8241465/>>.

In the absence of any legal mechanism to protect the rights of the refugees in the Non-Contracting States, the UNHCR, along with other agencies of the UN, and international and local organizations works for ensuring some basic amenities for the refugees.<sup>520</sup> Usually, in Non-Contracting States, the UNHCR performs the task of registration and status determination of refugees.<sup>521</sup> The refugees identified by the UNHCR are then provided with an ‘identification card’.<sup>522</sup> Although these identification cards given by the UNHCR do not provide them with any legal status in the Non-Contracting countries, they reduce the possibility of refoulement.<sup>523</sup> The refugees registered by the UNHCR also have access to certain services and aid by the UNHCR. The Non-Contracting countries, which are willing to host refugees, are not bound to provide any rights to refugees, and each country has their own approach.<sup>524</sup> For example, in countries like Saudi Arabia and Malaysia, the refugees do not have guaranteed rights to education and healthcare.<sup>525</sup> While in India, primary education and healthcare are accessible to all refugees.<sup>526</sup> However, refugees are not allowed to work in any of the Non-Contracting countries. But, to meet their basic needs, some refugees work illegally

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<sup>520</sup> Tiffany May, “Helping the Rohingya” *The New York Times* (29 September 2017), online: <<https://www.nytimes.com/2017/09/29/world/asia/rohingya-aid-myanmar-bangladesh.html>>.

<sup>521</sup> Nayna Bose, “UNHCR distributes pioneering smart ID cards to refugees in India” (17 August 2011), online: *UNHCR* <<https://www.unhcr.org/news/stories/unhcr-distributes-pioneering-smart-id-cards-refugees-india#:~:text=Stories-,UNHCR%20distributes%20pioneering%20smart%20ID%20cards%20to%20refugees%20in%20India,Som,e%2018%2C000%20will%20be%20distributed>>.

<sup>522</sup> *Ibid.*

<sup>523</sup> *Ibid.*

<sup>524</sup> Non-Contracting States apply different approaches to recognizing refugees. For example, Saudi Arabia gave residency permits to Rohingya refugees who arrived before 2011. These Rohingya refugees can legally stay in Saudi Arabia. *See*, “Saudi Arabia to deport 250 Rohingya to Bangladesh: Activist group”, *Al Jazeera* (21 January 2019), online: <<https://www.aljazeera.com/news/2019/1/21/saudi-arabia-to-deport-250-rohingya-to-bangladesh-activist-group>>.

<sup>525</sup> *Ibid.* Erik Christophersen “A few countries take responsibility for most of the world’s refugees” *NRC* (1 March 2020), online: <<https://www.nrc.no/shorthand/fr/a-few-countries-take-responsibility-for-most-of-the-worlds-refugees/index.html>>.

<sup>526</sup> “JRS India: Ensuring Refugee Education for the Most vulnerable” *JRS USA* (28 August 2020), online: <<https://www.jrsusa.org/story/jrs-india-ensuring-refugee-education-for-the-most-vulnerable/>>.

in these countries. Due to this, there have been cases of detention and deportation of refugees (this treatment is in regard to all refugees in general).

Nevertheless, the Non-Contracting States are currently bearing the burden of hosting the majority of the Rohingya refugees. Therefore, it is important to discuss the legal policies of these Non-Contracting States to understand the treatment received by the Rohingya refugees. As it would be impossible for the author to discuss the legal policies of all the Non-Contracting States in a Master's thesis, the current thesis would discuss in detail the treatment of Rohingya refugees in Bangladesh and India.

### **3.3.1. Response of Bangladesh to support Rohingya Refugees**

Despite being a Non-Contracting State to the 1951 Convention, Bangladesh is one of the countries which have been hosting Rohingyas since the 1990s.<sup>527</sup> In fact, this lower middle-income country is currently hosting more than a million Rohingya refugees.<sup>528</sup> With 919,000 refugees residing in Kutupalong and Nayapara refugee camps, the district of Cox Bazar in the Chittagong division of the Southeast Coast of Bangladesh is now the largest refugee camp in the world.<sup>529</sup>

Although it is hosting the majority of Rohingyas, being a non-Contracting State, the government of Bangladesh has no legal obligation to recognize the rights of Rohingyas. This section describes the legal policies of Bangladesh in dealing with Rohingyas and the issue of human rights violations in refugee camps of Bangladesh.

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<sup>527</sup>Larry Thompson, "Bangladesh: Burmese Rohingya refugees virtual hostages - Myanmar", (9 May 2005), online: *Reliefweb*<<https://reliefweb.int/report/myanmar/bangladesh-burmese-rohingya-refugees-virtual-hostages>>.

<sup>528</sup>note 516.

<sup>529</sup>"Rohingya Refugee Crisis Explained", (13 July 2022), online: *UNHCR*<<https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/>>.

### 3.3.1.1. Exodus of Rohingya in Myanmar and Bangladesh's Response

Although the forced migration of Rohingyas to Bangladesh escalated after the implementation of the 1982 Citizenship Act, the beginning of Rohingya migration to Bangladesh could be traced back to 1784.<sup>530</sup> Since then, there have been many instances of the influx of Rohingyas to Bangladesh. One such major incident of Rohingya influx in Bangladesh was witnessed during Japan's invasion of Burma in 1942.<sup>531</sup> During this period, approximately 22,000 Rohingyas fled to Bangladesh.

The forced migration increased significantly after Myanmar's Independence. The major episodes of forced migration of Rohingyas to Bangladesh started in 1978 when General Ne Win initiated 'Operation Dragon King'.<sup>532</sup> Under this operation (as discussed in Chapter 2), a screening was performed before a national census and this forced the Rohingyas to surrender their NRC documents or other identity cards.<sup>533</sup> This also led to a series of mass arrests, violence, and persecution against Rohingyas.<sup>534</sup> As a result, approximately 200,000 Rohingyas fled to Bangladesh to protect themselves.<sup>535</sup> Subsequently, due to atrocities committed by the military in Myanmar, a significant number of Rohingyas fled to Bangladesh.<sup>536</sup> Ultimately, in 2017, the clearance operations launched by the military targeting Rohingyas, 700,000 Rohingya fled the borders of

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<sup>530</sup>During the annexation of Arakan by Burmese King Bodawapaya in 1784, many Arkanese refugees fled to Bangladesh and never returned to Burma again. See, *Rohingya refugees in Bangladesh and Thailand* (Danish Immigration Service, 2011) at 7. See, Imtiaz Ahmed, ed, *The plight of the stateless Rohingyas: responses of the state, society & the international community* (Dhaka: University Press, 2010) at 14.

<sup>531</sup>note 530 at 7.

<sup>532</sup>*Ibid.*

<sup>533</sup>note 114.

<sup>534</sup>*Ibid.*

<sup>535</sup>note 530.

<sup>536</sup>*Ibid.*



Myanmar and took refuge in Bangladesh.<sup>537</sup> The 2017 exodus of Rohingyas is considered the ‘worst humanitarian crisis’.<sup>538</sup>

Due to the large number of migrating Rohingya refugees, the government of Bangladesh took several steps to repatriate Rohingyas back to Myanmar. In 1978, following a large influx of Rohingya, Bangladesh signed a bilateral agreement with Myanmar for the repatriation of Rohingya.<sup>539</sup> This agreement was meant to repatriate Rohingyas from camps in Bangladesh to Myanmar upon the presentation of NRC cards.<sup>540</sup> In fact, the agreement uses the terms ‘lawful residents’ or ‘residents’.<sup>541</sup> The agreement also states that after the successful repatriation of residents of Burma from Bangladesh, both governments would function to prevent illegal crossing of the border.<sup>542</sup> The agreement indicated Bangladesh's willingness to repatriate Rohingyas. The agreement was significant, because it was the first document after the independence of Myanmar which formally acknowledged Rohingyas as ‘lawful residents’.<sup>543</sup> In

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<sup>537</sup>Reuben Lim Wende, “Stateless Rohingya continues to struggle for survival in Myanmar” (25 August 2022), online: *UNHCR* <<https://www.unhcr.org/news/stories/stateless-rohingya-continue-struggle-survival-myanmar>>.

<sup>538</sup> United Nations, Press Release, SC/13469 “Myanmar’s Refugee Problem among World’s Worst Humanitarian, Human Rights Crises, Secretary-General Says in Briefing to Security Council” (28 August 2018), online: <<https://press.un.org/en/2018/sc13469.doc.htm#:~:text=Briefing%20the%2015%2Dmember%20Council,humanitarian%20and%20human%20rights%20crises%E2%80%9D>>.

<sup>539</sup> *1978 Repatriation Agreement*; Faisal Mahmud, “Bangladesh-Myanmar Rohingya Repatriation Deal Raises More Questions Than It Clarifies”, *The Wire* (26 November 2017), online: <<https://thewire.in/external-affairs/bangladesh-myanmar-rohingya-repatriation-deal-press-brief-raises-questions-clarifies>>.

<sup>540</sup> note 539 at para 1(a).

<sup>541</sup> *Ibid* at para 1(a), 1(b) and 2.

<sup>542</sup> *Ibid* at para 6.

<sup>543</sup> Anders Corr, “Secret 1978 Document Indicates Burma Recognized Rohingya Legal Residence”, *Forbes* (29 December 2016), online: <<https://www.forbes.com/sites/anderscorr/2016/12/29/secret-1978-document-indicates-burma-recognized-rohingya-legal-residence/>>.

furtherance of the agreement, approximately 180,000 Rohingya were repatriated to Myanmar.<sup>544</sup>

After successful repatriation measures, the Government of Bangladesh concluded a second bilateral agreement with Myanmar, in 1992.<sup>545</sup> Unlike the 1978 agreement, this time Myanmar set some conditions for repatriation of Rohingyas.<sup>546</sup> Rohingyas who repatriated were required to apply for citizenship under the 1982 Act upon returning.<sup>547</sup> As a consequence, over 150,000 Rohingyas were repatriated to Myanmar.<sup>548</sup> Although the agreement fulfilled its purpose of repatriation of Rohingyas back to Myanmar, it was criticized on the International level for the lack of involvement of the UNHCR. Therefore, in 1993, the Government of Bangladesh signed a Memorandum of Understanding with the UNHCR, allowing it to facilitate an organized voluntary repatriation process for Rohingyas who wanted to return to Myanmar.<sup>549</sup> As a result, UNHCR was allowed to monitor the status of Rohingya in Rakhine State and facilitate their voluntary repatriation.<sup>550</sup> Under the Memorandum of Understanding, UNHCR, together with the Government of Bangladesh repatriated 7,500 Rohingyas to Myanmar.<sup>551</sup> However, after the repatriation process terminated in 1997, about 399 Rohingyas were forcibly returned to Myanmar by Bangladeshi Officials.<sup>552</sup> This led to massive protests

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<sup>544</sup>Carl Skutsch, *Encyclopedia of the World's Minorities* (Routledge, 2013) Google-Books-ID: yXYKAgAAQBAJ.

<sup>545</sup>*Myanmar Bangladesh Rohingyas - The Search for Safety*, ASA 13/07/97 (Amnesty International, 1997).

<sup>546</sup>Rahman & Sakib, "Statelessness, forced migration and the security dilemma along borders", *supra* note 510.

<sup>547</sup>note 545.

<sup>548</sup>Skutsch, *supra* note 544.

<sup>549</sup>"BURMA: memorandum on repatriation" (22 January 1994), online: *Burma Library* <<https://www.burmalibrary.org/reg.burma/archives/199401/msg00058.html>>.

<sup>550</sup>note 545.

<sup>551</sup>*Ibid* at 2.

<sup>552</sup>*Ibid*.

from the UNHCR and subsequently, the Government of Bangladesh agreed not to return Rohingyas involuntarily.<sup>553</sup>

Although Bangladesh maintains the position that it will not allow Rohingyas to settle in Bangladesh permanently,<sup>554</sup> it is hosting the majority of Rohingya refugees. The next section discusses the legal obligations (domestic and international legal obligations) of Bangladesh with respect to protection of refugees who are within its borders.

### **3.3.1.2. Protection of Refugees in Bangladesh - The Constitution of Bangladesh and Respect for International Obligations**

The million Rohingya refugees taking shelter in Bangladesh remain vulnerable to various human rights violations.<sup>555</sup> Like most South Asian countries, Bangladesh is not a signatory to the 1951 Convention or its 1967 Protocol.<sup>556</sup> It does not have any domestic laws addressing the status or rights of refugees. However, Bangladesh is a state party to some of the major human rights instruments and is also a member of the UN Human Rights Council.<sup>557</sup> The Constitution of Bangladesh also stipulates respect for international law and the principles of the United Nations Charter.<sup>558</sup> Due to this, it has some obligations to refugees and some of the provisions of these international instruments also indirectly promote the rights of refugees.

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<sup>553</sup> *Ibid.*

<sup>554</sup> Sajeeb Wazed, "Why Bangladesh Cannot Accept All the Rohingya" *The Diplomat* (19 January 2018), online: <<https://thediplomat.com/2018/01/why-bangladesh-cannot-accept-all-the-rohingya/>>.

<sup>555</sup> "Bangladesh: Rampant Police Abuse of Rohingya Refugees", *Human Rights Watch* (17 January 2023), online: <<https://www.hrw.org/news/2023/01/17/bangladesh-rampant-police-abuse-rohingya-refugees>>.

<sup>556</sup> UNHCR, *supra* note 503.

<sup>557</sup> "Ministry of Foreign Affairs", (29 January 2018), online: *Ministry of Foreign Affairs - Bangladesh* <<https://mofa.gov.bd/site/page/http%3A%2F%2Fmofa.gov.bd%2Fsite%2Fpage%2Fa9ac80c2-77b8-4216-83d1-6f6c251f1b58>>; "Human rights in Bangladesh", online: *Amnesty International* <<https://www.amnesty.org/en/location/asia-and-the-pacific/south-asia/bangladesh/report-bangladesh/>>.

<sup>558</sup> *Constitution*, Bangladesh, *supra* note 28 art 25; *Hussain Muhammad Ershad v Bangladesh*, 21 BLD (AD) (2001) 69. In this case, the Supreme Court of Bangladesh stated that "the Universal Human Rights norms, whether in the Universal Declaration of Human Rights or other Covenants are not directly enforceable in the national courts. However, if their provisions are incorporated in the domestic laws, they are enforceable in the national courts."

The UDHR is the most important human rights instrument which Bangladesh has agreed to. It applies to all human beings.<sup>559</sup> UDHR has several provisions that are relevant for persons who are refugees. It recognizes that every human being has a right to seek asylum from persecution.<sup>560</sup> Further, many provisions in the UDHR applies to all human being irrespective of nationality. Some of these are:

- a) Right to life, liberty, and security;<sup>561</sup>
- b) A prohibition from slavery or servitude;<sup>562</sup>
- c) A prohibition from torture or cruel, inhuman, or degrading treatment or punishment;<sup>563</sup>
- d) Right to recognition as a person before the law;<sup>564</sup>
- e) Equality before the law and equal protection from any discrimination;<sup>565</sup>
- f) Prohibition of arbitrary arrest, detention, or exile;<sup>566</sup>
- g) Freedom of movement;<sup>567</sup> and
- h) Right to a nationality.<sup>568</sup>

As Bangladesh has ratified the UDHR, it is bound to respect its provisions in respect of Rohingya refugees. Bangladesh has also ratified the International Covenant on Civil and Political Rights (ICCPR), which ensures civil and political rights to individuals within the jurisdiction of a state, without discrimination of any kind.<sup>569</sup> The ICCPR also

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<sup>559</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162.

<sup>560</sup>*Ibid* art 14(1).

<sup>561</sup>*Ibid* art 3.

<sup>562</sup>*Ibid* art 4.

<sup>563</sup>*Ibid* art 5.

<sup>564</sup>*Ibid* art 6.

<sup>565</sup>*Ibid* art 7.

<sup>566</sup>*Ibid* art 9.

<sup>567</sup>*Ibid* art 13.

<sup>568</sup>*Ibid* art 15(1).

<sup>569</sup>*International Covenant on Civil and Political Rights (ICCPR)*, *supra* note 210, art 2(1).

recognizes certain rights which are available to everyone irrespective of nationality. Like the UDHR, it stipulates that no person shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment,<sup>570</sup> and it also prohibits slavery or servitude.<sup>571</sup> It also states that every person who is lawfully within the territory of a state shall have the right to movement and freedom to choose his residence.<sup>572</sup> However, it recognizes that these rights shall be subject to certain restrictions provided by law (national security, public health, and rights and freedoms of other individuals).<sup>573</sup> Finally, the covenant specifies that an alien lawfully present in the territory of a state shall be expelled only in pursuance of a decision recognized by the law, and there shall be compelling reasons against such expulsion.<sup>574</sup> It also specifies that the case of such expulsion of an alien shall be reviewed by a competent authority.<sup>575</sup>

Another Convention which Bangladesh has ratified is the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.<sup>576</sup> This Convention stipulates that a State Party should not expel, return (*refouler*), or extradite a person to a State where he has a fear of being subjected to torture,<sup>577</sup> and that a State Party shall also consider factors like gross or mass human rights violations in a state while returning a person to that state.<sup>578</sup>

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<sup>570</sup>*Ibid* art 7.

<sup>571</sup>*Ibid* art 8.

<sup>572</sup>*Ibid* art 12(1).

<sup>573</sup>*Ibid* art 12(3).

<sup>574</sup>*Ibid* art 13.

<sup>575</sup>*Ibid*.

<sup>576</sup>*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, 1465: 85 (entered into force 26 June 1987) General Assembly Resolution 34/46.

<sup>577</sup>*Ibid* art 3(1).

<sup>578</sup>*Ibid* art 3(2).

One final Convention which Bangladesh has ratified is the Convention on the Rights of the Child, 1989.<sup>579</sup> This Convention specifically stipulates safeguarding the rights of a child, and providing appropriate protection and humanitarian assistance to a child who is seeking refugee status or is considered a refugee.<sup>580</sup> According to provisions of the Convention, the State Parties shall co-operate with the United Nations or other intergovernmental or non-governmental organizations to protect the rights of such child and trace his family members.<sup>581</sup>

All the above-mentioned instruments have some provisions that safeguard the rights of refugees and asylum seekers. Therefore, Bangladesh, as a State Party to the above international legal instruments is obliged to protect and promote these rights of refugees and asylum seekers.

The Constitution of Bangladesh also ensures equality before the law and has some provisions (fundamental rights) which are applicable to non-citizens.<sup>582</sup> Article 31 of the Constitution confers an inalienable right to every person within Bangladesh (citizen or non-citizen), to enjoy the protection of the law and prohibits any action detrimental to the life, liberty, body, reputation, or property of any person, except in accordance with law.<sup>583</sup> The Constitution also stipulates that no person shall be deprived of his life or liberty, except in accordance with law.<sup>584</sup> Further, it safeguards both citizens and non-citizens against arbitrary arrest or detention.<sup>585</sup> It states that no person shall be arrested or

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<sup>579</sup>*Convention on the Rights of the Child*, *supra* note 164.

<sup>580</sup>*Ibid* art 22(1).

<sup>581</sup>*Ibid* art 22(2).

<sup>582</sup>*Ibid* Art III.

<sup>583</sup>*Ibid* art 31; *Abdul Latif Mirza v Government of Bangladesh*, [1979] 31 DLR AD.

<sup>584</sup>*Convention on the Rights of the Child*, *supra* note 164 art 32.

<sup>585</sup>*Ibid*, art 33.

detained without being informed of the grounds of arrest,<sup>586</sup> and enumerates that nobody shall be denied the right to consult and to be defended by a legal practitioner of his choice.<sup>587</sup>The Constitution also prohibits any form of forced labor.<sup>588</sup>

Therefore, the Constitution of Bangladesh can be used to safeguard the rights of the refugees.<sup>589</sup> Moreover, a refugee, like a citizen of Bangladesh, can also move to the court of law for enforcement of their rights.<sup>590</sup>In fact, the Supreme Court of Bangladesh has shown its support to safeguard the rights of refugees in its various decisions.<sup>591</sup> In the landmark decision of *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*,<sup>592</sup> the Supreme Court of Bangladesh directed the state to release a Rohingya refugee who had been unlawfully imprisoned and arrange for his accommodation in the refugee camp.<sup>593</sup> Further, the judgment found that "the 1951

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<sup>586</sup>*Ibid*, art 33(1).

<sup>587</sup>*Ibid*.

<sup>588</sup>*Ibid*, art 34.

<sup>589</sup>*See*, ABM Imdadul Haque Khan, "Bangladesh's obligation towards refugees" *Dhaka Tribune* (21 May 2014), online: <<https://www.dhakatribune.com/bangladesh/laws-rights/65238/bangladesh%E2%80%99s-obligation-towards-refugees>>.In addition to international legal instruments and the Constitution, in the absence of any domestic legislation to address refugees, municipalities have authority to pass laws to deal with matters such as granting residence permits to foreigners. Under these municipal laws of Bangladesh, refugees are considered foreigners. As a result refugees are also governed by the provisions of the Foreigners Act (1946); the Registration of Foreigners Act (1939); the Passport Act (1920); the Bangladesh Citizenship (Temporary Provision) Order (1972); the Extradition Act (1974); and the Naturalization Act (1926), etc. These domestic legislations, specifically, the Foreigners Act, of 1946, are used by the government of Bangladesh to deal with non-citizens (or refugees). Sec. 2(a) of the Foreigner's Act defines a foreigner as a person who is not a citizen of Bangladesh, and includes refugees within its ambit. Sec. 3 of the act entitles the government to formulate rules regarding the entry, leave, and stay of foreigners in Bangladesh.

<sup>590</sup>*Ibid.*, art.102. Art. 102(1) states that *the High Court, on the application of any person aggrieved, may give such orders, as may be appropriate for the enforcement of any fundamental rights conferred by the Constitution.*

<sup>591</sup>M. Sanjeeb Hossain, "Bangladesh's judicial encounter with the 1951 Refugee Convention" (last visited 10 July 2023), online: *Forced Migration Review*<<https://www.fmreview.org/issue67/hossain>>

<sup>592</sup>*Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, Writ petition no. 10504 of 2016. In this case, Rafique (a Rohingya who came to Bangladesh) illegally entered Bangladesh and was detained under section 14 of the Foreigners Act, 1946. He was sentenced to five years of imprisonment. However, he was still imprisoned after completing his sentence and was directed by the court to return to Myanmar. Therefore, current case was filed by the Refugee and Migratory Movements Research Unit (RMMRU) against the State.

<sup>593</sup>*Ibid*.

Refugee Convention had become a part of the customary international law, binding upon all countries."<sup>594</sup>Importantly, for the purposes of this thesis, the judgment highlighted the relevance of the principle of *non-refoulement* concerning the refugees.<sup>595</sup>The court explained that:

*as per the principle of non-refoulement, no refugee should be returned (refouler) to a place where his life or freedom would be jeopardized on account of his race, religion, nationality, membership of a particular social group or political opinion.*<sup>596</sup>

Further, the court, in this judgment, recognized the fact that Rohingyas are persecuted in Myanmar, and hundreds of Rohingya have therefore, entered Bangladesh illegally to save themselves from being persecuted or tortured.<sup>597</sup> The court also stipulated that:

*By being a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Bangladesh cannot expel or return (refouler) or extradite a person to a state where there are substantial grounds to believe that he would be at risk of being subjected to torture.*<sup>598</sup>

The judgment is significant for many reasons. First, the judgment recognizes that Rohingyas are persecuted in Myanmar and came to Bangladesh to save themselves from being persecuted and tortured. Second, the judgment acknowledges the importance of the principle of *non-refoulement*. Third, the judgment identifies that the 1951 Refugee Convention has become a part of the customary international law and is binding upon all

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<sup>594</sup>*Ibid.*

<sup>595</sup>*Ibid.*

<sup>596</sup>*Ibid.*, pg. 9.

<sup>597</sup>*Ibid.*

<sup>598</sup>*Ibid.*, pg.10.



the countries. Lastly, the judgment set a landmark precedent indicating Bangladesh's respect for international legal instruments.

Therefore, in the absence of any specific domestic legislation addressing the rights of refugees, Bangladesh is bound by various international legal instruments and its Constitution to deal with refugees. Further, recent jurisprudence also highlights the country's seriousness towards respecting the rights of refugees and the principle of *non-refoulement*, even though the country is not a party to the 1951 Convention. It is clear that Bangladesh has a satisfactory legal framework to protect the right of the refugees within its border. But are these legal protections implemented to protect the right of the refugees? In answering this question and analyzing the implementation of Bangladesh's legal framework in protecting Rohingya refugees, it is important to discuss the situation of human rights in refugee camps in Bangladesh, where the majority of Rohingya refugees reside. The next section reviews the situation of human rights in refugee camps in Bangladesh.

### **3.3.1.3. Situation of Human Rights in Refugee Camps**

Bangladesh hosts about a million Rohingya in refugee camps in the district of Cox Bazaar.<sup>599</sup> It is also one of the largest and most densely populated refugee camps in the world.<sup>600</sup> However, there have been reports of continuous human rights violations in refugee camps in Bangladesh.<sup>601</sup> Despite Bangladesh being a party to major human rights instruments like the UDHR and ICCPR, some of the reported human rights situation in refugee camps indicates violation of the right to food and water, arbitrary arrest,

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<sup>599</sup>note 11. According to the latest estimates, approximately 943,000 Rohingyas live in refugee camps in Bangladesh.

<sup>600</sup>"Rohingya in Bangladesh: The world's largest refugee camp", online: *Danish Refugee Council* <<https://help.drc.ngo/en/how-we-work/life-as-a-refugee/rohingya-in-bangladesh-the-world-s-largest-refugee-camp/>>.

<sup>601</sup>*HRW, supra* note.

detention, torture, and other ill-treatment, which goes against Bangladesh's obligations under these human rights instruments.<sup>602</sup>

Rohingya refugees living in refugee camps also face abuse by police forces and the military. In 2020, two special Armed Police Battalion (APBn 14 and APBn 16), were formed to monitor security, law, and order, over the Rohingya refugee camps.<sup>603</sup> The APBn has been accused of violence, arbitrary arrest, and harassment in the refugee camps.<sup>604</sup> Although the authorities have denied reports of such violence by the police, Refugees and humanitarian workers have alleged abuse and wrongful detention by the police.<sup>605</sup> Similarly, there have been reports of torture and other cruel treatment by the security forces.<sup>606</sup> Both the Constitution of Bangladesh and the major human rights instruments prohibit arbitrary arrest and detention.<sup>607</sup> Despite this, the authorities have been suspected of conducting arbitrary arrests, and enforced disappearances, without acknowledging having arrested them or their whereabouts.<sup>608</sup>

But arbitrary arrest, detention, and other cruel treatment are the least of the concerns for Rohingyas who are struggling to fulfill their basic need of food and water for survival. Due to overcrowding in refugee camps, there is always a shortage of food in

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<sup>602</sup>note 557.

<sup>603</sup>Mohammad Ali Jinnat& Mohammad Jamil Khan, "Armed police battalions take charge of Rohingya camps in Cox's Bazar", (2 July 2020), online: *The Daily Star*<<https://www.thedailystar.net/city/news/armed-police-battalions-take-charge-rohingya-camps-coxs-bazar-1923689>>.

<sup>604</sup>note 555.

<sup>605</sup>*Ibid*; "Home minister: HRW's allegation of APBn abusing Rohingya refugees not fact-based", (19 January 2023), online: *Dhaka Tribune*<<https://www.dhakatribune.com/bangladesh/303083/home-minister-hrw-s-allegation-of-apbn-abusing>>.

<sup>606</sup>"Bangladesh: Rohingya Refugees Allegedly Tortured", (27 April 2021), online: *Human Rights Watch*<<https://www.hrw.org/news/2021/04/27/bangladesh-rohingya-refugees-allegedly-tortured>>.

<sup>607</sup>*Constitution of People's Republic of Bangladesh*, *supra* note 28 art 33; *The Universal Declaration of Human Rights (UDHR)*, *supra* note 162 art 9; *International Covenant on Civil and Political Rights (ICCPR)*, *supra* note 216 art 9(1).

<sup>608</sup>"Country Reports on Human Rights Practices for 2022 - BANGLADESH", (2022), online: *United States Department of State*<[https://www.state.gov/wp-content/uploads/2023/02/415610\\_BANGLADESH-2022-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2023/02/415610_BANGLADESH-2022-HUMAN-RIGHTS-REPORT.pdf)>.

these camps.<sup>609</sup> Moreover, there is a risk of life-threatening acute malnutrition in Rohingya children living in the refugee camps.<sup>610</sup> The right to food has been recognized as a human right.<sup>611</sup> Due to the decreases funding for the Joint Response Plan for the Rohingya humanitarian crisis, the refugee camps are witnessing serious food shortages, which is a clear violation of their human rights.<sup>612</sup> Similarly, due to a shortage of water, the water rations for Rohingya refugees in Bangladesh have been decreased to critical levels.<sup>613</sup> This also indicates the violation of their human right.<sup>614</sup>

Although the human rights violations against refugees cannot be justified there are several reasons for these violations, some of which Bangladesh cannot control.<sup>615</sup> The refugees taking shelter in these refugee camps rely entirely on humanitarian assistance from the UNHCR and other inter-governmental or non-governmental organizations.<sup>616</sup> Monetary funds from these organizations support the government of

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<sup>609</sup>“Malnutrition rates among Rohingya refugee children in Bangladesh appear to be at least double earlier estimates”, (3 November 2017), online: <<https://www.unicef.org/press-releases/malnutrition-rates-among-rohingya-refugee-children-bangladesh-appear-be-least-double>>.

<sup>610</sup>*Ibid.*

<sup>611</sup>*General Comment 12 on the Right to Adequate Food (art. 11) of the International Covenant on Economic, Social and Cultural Rights* (United Nations Economic and Social Council, 1999). See, *The Right to Adequate Food*, Fact Sheet No. 34 (United Nations Office of the High Commissioner of Human Rights, 2010). The Right to food could be realized only when everyone has physical and economic access to food or its procurement. See, “About the right to food and human rights”, online: *OHCHR* <<https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights>>. Right to food means regular, permanent, and unrestricted access to qualitatively and quantitatively sufficient food.

<sup>612</sup>Meenakshi Ganguly, “Food Crisis in Rohingya Refugee Camps in Bangladesh”, (21 February 2023), online: *Human Rights Watch* <<https://www.hrw.org/news/2023/02/21/food-crisis-rohingya-refugee-camps-bangladesh>>. See, Kaamil Ahmed, “UN warns of ‘unconscionable’ cuts to Rohingya food rations as donations fall”, *The Guardian* (17 February 2023), online: <<https://www.theguardian.com/global-development/2023/feb/17/un-warns-of-unconscionable-cuts-to-rohingya-food-rations-as-donations-fall>>.

<sup>613</sup>Jack Nolos, “Longer dry season shrinks water supply for Rohingya refugees to critical levels”, *UNHCR Canada* (24 May 2019), online: <<https://www.unhcr.ca/news/longer-dry-season-shrinks-water-supply-rohingya-refugees-critical-levels/>>.

<sup>614</sup>*Resolution A/RES/64/292. United Nations General Assembly, July 2010. note 279.* According to the UN, clean drinking water and sanitation are acknowledged as human rights and are important in the realization of other human rights.

<sup>615</sup>“Bangladesh Population 2023”, online: *World Population Review* <<https://worldpopulationreview.com/countries/bangladesh-population>>.

<sup>616</sup>note 516.

Bangladesh to provide basic amenities such as food, water, shelter, etc., to refugees.<sup>617</sup> Recently, the United Nations has requested a funding of approximately \$876 million for 2023, to support the Rohingya taking shelter in refugee camps in Bangladesh.<sup>618</sup> According to the UNHCR, this funding would ensure the fulfillment of accessibility to food, shelter, drinking water, healthcare, and other services to a million refugees living in refugee camps in Bangladesh.<sup>619</sup> However, it is estimated that in 2023, less than half the amount of funding would be received due to the policy decision of contracting states.<sup>620</sup> It is not the first time Rohingya camps in Bangladesh have received less funding than what they need.<sup>621</sup> Ever since the 2017 exodus, refugee camps have not been getting sufficient funds to support an estimated 1 million refugees in Bangladesh.<sup>622</sup> Due to insufficient funding, there has been an acute food shortage and other essentials in these camps.<sup>623</sup> According to UN experts, a shortage in funding, coupled with a shortage of food and other essentials, could lead to several human rights violations.<sup>624</sup>

Apart from the shortage of funding, the overburden of refugees could also be one of the reasons for serious human rights violations committed in refugee camps in Bangladesh. Along with approximately a million refugees, the population of Bangladesh is more than 172 million.<sup>625</sup> Being a lower-middle income country coupled with

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<sup>617</sup>*Ibid.*

<sup>618</sup>Sebastian Strangio, “UN Says It Needs \$876 Million for Rohingya Refugee Crisis”, *The Diplomat* (9 March 2023), online: <<https://thediplomat.com/2023/03/un-says-it-needs-876-million-for-rohingya-refugee-crisis/>>.

<sup>619</sup>*Ibid.*

<sup>620</sup>Rebecca Tan & Mohammad Faruque, “Aid dwindles for Rohingya refugees as money goes to Ukraine, other crises”, *Washington Post* (1 May 2023), online: <<https://www.washingtonpost.com/world/2023/03/15/rohingya-refugee-camp-donations-bangladesh/>>.

<sup>621</sup>*Ibid*; Ganguly, *supra* note 603. The World Food Programme (WFP) has also reduced its funding and cut the monthly food rations for refugee camps in Bangladesh.

<sup>622</sup>Tan & Faruque, *supra* note 611; Ganguly, *supra* note 603.

<sup>623</sup>Ganguly, *supra* note 612.

<sup>624</sup>*Ibid.*

<sup>625</sup>note 615.

insufficient funds, Bangladesh does not have enough resources to even provide its own citizens with food and water.<sup>626</sup> Therefore, fulfilling even the basic amenities like food and water in overcrowded refugee camps in this situation is not possible for Bangladesh, leading to the violation of several human rights.<sup>627</sup> Political factors, lack of accountability of law enforcement agencies for human rights violations, failure to execute and implement international legal obligations, and corruption of the authorities are also some of the reasons behind serious human rights violations in Bangladesh.<sup>628</sup> However, Bangladesh is also responsible for some of the Human Right violations. For example, after the Armed Police Battalion (APBn) took over the security in Rohingya camps in Bangladesh, the Rohingya refugees have been facing continuous human rights violations.<sup>629</sup>

While in principle, refugees should receive many legal protections (as discussed in section 3.3.1.1), the situation in the refugee camps in Bangladesh reveal that these legal obligations may not be respected, and human rights instruments that Bangladesh has an obligation to respect are being violated. However, it cannot be ignored that despite being a non-Contracting and a low-middle-income country, Bangladesh is sheltering the greatest number of refugees and practicing the principle of *non-refoulement* to a considerable extent, and some of its failings can be attributed to contracting states not providing the UNHCR with adequate funding. This does not hold for some countries like

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<sup>626</sup> “The World Bank in Bangladesh” (6 April 2023), online: *The World Bank* <<https://www.worldbank.org/en/country/bangladesh/overview>>.

<sup>627</sup> Daniel P. Sullivan, “Hope amid Despair: Finding Solutions for Rohingya in Bangladesh” (13 December 2022), online: *Refugee International* <<https://www.refugeesinternational.org/reports-briefs/hope-amid-despair-finding-solutions-for-rohingya-in-bangladesh/>>.

<sup>628</sup> MstRaeenAfroze&Masrur Abdullah Abid, “Human Rights Violations in Bangladesh and the Role of Law Enforcement Agencies: A Critical Analysis” (2022) 06:05 IJRIS 658–664, online: <<https://www.rsisinternational.org/journals/ijriss/Digital-Library/volume-6-issue-5/658-664.pdf>> at 659.

<sup>629</sup>note 555.

India which has adopted a different approach in dealing with Rohingya refugees. This issue has been discussed in detail in the next section.

### **3.3.2. India's Treatment of Rohingya Refugees**

Rohingya migrated to several neighboring countries in South-East Asia after fleeing persecution in Myanmar.<sup>630</sup> India is one such country which is sheltering more than 40,000 Rohingya refugees.<sup>631</sup> Out of these 40,000 Rohingyas, about 20,000 are registered with the UNHCR in India.<sup>632</sup> Being a lower-middle income country like Bangladesh, India is also a Non-Contracting party to the 1951 Refugee Convention and its 1967 Protocol.<sup>633</sup> However, its treatment of Rohingya refugees, differ greatly from that of Bangladesh.

Although India does not have a domestic legal policy for protection of refugees, it has maintained that it 'respects and follows the 1951 Convention irrespective of any discrimination, and provides refuge to all'.<sup>634</sup> Notwithstanding, India's policy towards Rohingya refugees in the recent years has been criticized at international front.<sup>635</sup> Therefore, this section would focus on India's legal framework to deal with refugees and its discriminatory treatment of Rohingyas. The next chapter will focus on how India approaches the principle of *non-refoulement*.

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<sup>630</sup>Daniel P Sullivan & Priyali Sur, "Shadow of Refuge: Rohingya Refugees in India", (18 May 2023), online: *Refugees International* <<https://www.refugeesinternational.org/reports-briefs/shadow-of-refuge-rohingya-refugees-in-india/>>.

<sup>631</sup>*Ibid.*

<sup>632</sup>Khushboo Sandhu & Meryl Sebastian, "Rohingya and CAA: What is India's refugee policy?", *BBC News* (19 August 2022), online: <<https://www.bbc.com/news/world-asia-india-62573446>>.

<sup>633</sup>*Supra* note 503.

<sup>634</sup>Sullivan & Sur, *supra* note 630.

<sup>635</sup> "India: Government Policies, Actions Target Minorities" (19 February 2021), online: *Human Rights Watch* <<https://www.hrw.org/news/2021/02/19/india-government-policies-actions-target-minorities>>.

### 3.3.2.1. India's Legal Framework for Refugees

India has dealt with refugees since its independence and partition from Pakistan in 1947.<sup>636</sup> In the past, it has sheltered refugees from Pakistan, Sri Lanka, Afghanistan, Tibet, Bangladesh, etc.<sup>637</sup> Despite being a Non-Contracting party to the 1951 Convention or its 1967 Protocol, India is currently providing refuge to more than 200,000 refugees in total.<sup>638</sup> Moreover, the country also doesn't have a domestic legal framework to deal with refugees.<sup>639</sup> Similar to other Non-Contracting countries like Bangladesh, India also relies on International legal framework and the Constitution to provide protection to refugees.

India is a state party to major International Legal instruments which safeguards the rights of citizens and non-citizens equally. As of 2023, India is a state-party to the Universal Declaration of Human Rights (UDHR),<sup>640</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>641</sup> International Covenant of Economic, Social, and Cultural Rights (ICESCR),<sup>642</sup> Convention on the Rights of the Child (CRC),<sup>643</sup> Convention on Discrimination of All Forms of Discrimination Against Women (CEDAW),<sup>644</sup> etc. Further, India deals with refugees in an 'ad-hoc' manner under administrative and political matters.<sup>645</sup> Non-citizens (including refugees) are also dealt by the Foreigners

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<sup>636</sup> Ria Kapoor, "Removing the International from the Refugee: India in the 1940s" (2021) 12:1 *Intl J Human Rights, Humanitarian, and Development* 1.

<sup>637</sup> Martand Jha, "India's refugee saga, from 1947 to 2017", *Mint* (6 January 2018), online: <<https://www.livemint.com/Sundayapp/clQnX60MIR2LhCitpMmMWO/Indias-refugee-saga-from-1947-to-2017.html>>.

<sup>638</sup> Shivangi Seth, "Why India needs a refugee law | Lowy Institute", online: *The Interpreter* <<https://www.lowyinstitute.org/the-interpreter/why-india-needs-refugee-law>>.

<sup>639</sup> Ranabira Samaddara, *Refugees and the State Practices of Asylum and care in India, 1947-2000* (Sage Publications: New Delhi, 2003)

<sup>640</sup> "UN Treaty Body Database" (last visited 10 August 2023), online: *UN Human Rights Treaty Bodies* <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN)>.

<sup>641</sup> *Ibid.*, Ratified on 10<sup>th</sup> April, 1979.

<sup>642</sup> *Ibid.*, Ratified on 10<sup>th</sup> April, 1979.

<sup>643</sup> *Ibid.*, Ratified on 11 December, 1992.

<sup>644</sup> *Ibid.*, Ratified on 9 July, 1993.

<sup>645</sup> Monika Verma, "The Plight of Rohingya Refugees in India: Living in Denial" (2022) 12:3 *SNUACAR* 479–504, online: <<http://www.dbpia.co.kr/Journal/ArticleDetail/NODE11184194>>.

Act, 1946.<sup>646</sup> Apart from these, the Constitution of India also safeguards the rights of non-citizens (including refugees). Some provisions of the Constitution of India such as the right to equality,<sup>647</sup> and the right to life,<sup>648</sup> apply to all.

Despite these protections, different class of refugees, especially Muslim refugees (based on country and religion) are treated distinctly by the Indian government.<sup>649</sup> In fact, in the absence of ratification of the 1951 Convention, India provides refugee status on a case by case basis.<sup>650</sup> Sometimes, UNHCR helps the Indian government regarding the verification of a person, for refugee status determination.<sup>651</sup> It is noteworthy that sometimes the UNHCR with the consent of the Indian government recognizes some individuals as refugees under its mandate and is responsible for providing support and assistance to them.<sup>652</sup> The refugees recognized by the UNHCR are not always accorded refugee status by the Indian government.<sup>653</sup> The ‘ad-hoc’ manner of dealing refugees in India often leads to arbitrary treatment.<sup>654</sup> Most often the refugees recognized by the Indian government have access to basic facilities like education, healthcare, and employment.<sup>655</sup> However those who UNHCR recognizes as refugees, but who India does

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<sup>646</sup>*The Foreigners Act, 1946*, (Act 31 of 1946). According to sec. 2(a) of the act, a ‘foreigner’ is a person who is not a citizen of India.

<sup>647</sup>*Constitution of India*, *supra* note 27 art 14. It states that the state shall not deny ‘any person’ equality before law or equal protection of law within the territory of India.

<sup>648</sup>*Ibid* art 21.

<sup>649</sup>ShreehariPaliath, “‘India Needs A Transparent Legal Framework To Protect Refugees’ Human Rights’”, *India Spend* (19 June 2022), online: <<https://www.indiaspend.com/indiaspend-interviews/india-needs-a-transparent-legal-framework-to-protect-refugees-human-rights-822560>>.

<sup>650</sup>ShuvroProsunSarker, *Refugee Law in India* (Springer: Singapore, 2017).

<sup>651</sup>T Ananthachari, “Refugees In India: Legal Framework, Law Enforcement And Security” (2001) 7 ISIL Year Book of International Humanitarian and Refugee Law, online: <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html>>.

<sup>652</sup>*Ibid*.

<sup>653</sup>*Ibid*.

<sup>654</sup>Sandhu & Sebastian, *supra* note 632.

<sup>655</sup>*Ibid*.



not recognize as refugees, rarely have access to such facilities and often face human rights violations.<sup>656</sup>The next section describes the discrimination Rohingya face in India.

### **3.3.2.2. Plight of Rohingya Refugees in India**

India has provided refuge to different categories of refugees since its partition, including Rohingya refugees.<sup>657</sup> However, Rohingyas have been treated distinctly from other refugees, especially since the last decade, due to their religious identity.<sup>658</sup> Indian government has denied ‘refugee’ status to Rohingyas and categorized them as ‘illegal foreigners’.<sup>659</sup> Due to their illegal status they are often targeted by the Indian government and face discrimination.<sup>660</sup> In India, people are required to have a valid identity document (known as Aadhar card) to avail various social amenities such as opening a bank account, registering children for school, or even renting a place.<sup>661</sup> Although Rohingyas have a valid refugee card issued by the UNHCR, as proof of identity, they are denied an Aadhar Card.<sup>662</sup>The lack of proper identity documents impacts their various rights and leads to various forms of discrimination. Several examples are discussed below.

### **Right to Education**

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<sup>656</sup>Paliath, *supra* note 649.

<sup>657</sup>Jha, *supra* note 637. India has been sheltering refugees from different countries like Bangladesh, Tibet, Afghanistan, Sri Lanka, and Myanmar.

<sup>658</sup>*Examining India’s Stance on the Rohingya Crisis*, by K Yhome, Issue no. 247 (Observer Research Foundation (ORF), 2018) at 3; Tarushi Aswani, “‘It’s Like We’re Caged Everywhere We Go’”, (22 October 2021), online: *Foreign Policy* <<https://foreignpolicy.com/2021/10/22/rohingya-refugees-india-modi-bjp-muslim-marginalization/>>. No Reference

<sup>659</sup>See, “Not refugees, Rohingya involved in illegal acts: Kiren Rijiju”, (1 August 2018), online: *The Indian Express* <<https://indianexpress.com/article/india/not-refugees-rohingya-involved-in-illegal-acts-kiren-rijiju-5285388/>>. See also, Deeptiman Tiwari, “Minister calls Rohingya ‘refugees’, later ‘illegal foreigners’: Puri announces housing for Rohingya in Delhi, backs down after Home denial”, (17 August 2022), online: *The Indian Express* <<https://indianexpress.com/article/cities/delhi/rohingya-refugees-delhi-detention-centre-bakkarwala-hardeep-singh-puri-8095474/>>.

<sup>660</sup>Tiwari, *supra* note 659; note 659; “Rohingyas will never be accepted: Home Minister Amit Shah”, *ANI* (9 December 2019), online: <<https://www.aninews.in/news/national/general-news/rohingyas-will-never-be-accepted-home-minister-amit-shah20191209235243/>>.

<sup>661</sup> “India: Identification Project Threatens Rights” (13 January 2018), online: *Human Rights Watch* <<https://www.hrw.org/news/2018/01/13/india-identification-project-threatens-rights>>.

<sup>662</sup> The Hindu Bureau, “Rohingya refugees in arbitrary detention, denied exit permissions by India: Report” *The Hindu* (18 May 2023), online: <<https://www.thehindu.com/news/national/rohingya-refugees-in-arbitrary-detention-denied-exit-permissions-by-india-report/article66867255.ece>>.

The Constitution of India stipulates to provide free and compulsory education to ‘all children’ in the age group of 6-14 years.<sup>663</sup> But, Government schools in India require Aadhar card as an identity document for getting admission.<sup>664</sup> Therefore, Rohingya often face discrimination in terms of access to education due to being denied Aadhar cards. This violates their fundamental right of getting education.

### **Access to Healthcare**

Rohingyas are also suffering from lack of access to healthcare services in India.<sup>665</sup> The Constitution of India does not explicitly recognize the right to health as a fundamental right. However, the Indian judiciary has time and again interpreted the right to health as a fundamental right under the ambit of right to life.<sup>666</sup> In the case of, *Parmanand Katara v. Union of India*, the Supreme Court of India held that the Government has the responsibility to provide adequate medical aid to every person.<sup>667</sup> But, Rohingya living in refugee camps in India do not have proper access to healthcare services. They receive healthcare services in form of medical camps conducted by the UNHCR. Rohingya women living in refugee camps in India, receive minimal prenatal care.<sup>668</sup> Rohingya also suffered from lack of healthcare services during Covid-

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<sup>663</sup> *Constitution of India*, *supra* note 27, art 21(a).

<sup>664</sup> Rajeev Mullick, “Now, Aadhar card mandatory for all U.P. govt primary, upper primary students” *The Hindustan Times* (27 June 2022), online: <<https://www.hindustantimes.com/cities/lucknow-news/now-aadhaar-card-mandatory-for-all-u-p-govt-primary-upper-primary-students-101656349303567.html>>.

<sup>665</sup> Rohini Mitra & Aditya Srinivasan, “COVID-19: Little Access To Healthcare, Cramped Quarters Put Rohingyas At High Risk”, *India Spend* (19 April 2020), online: <<https://www.indiaspend.com/covid-19-little-access-to-healthcare-cramped-quarters-put-rohingyas-at-high-risk/>>.

<sup>666</sup> See, *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*.

<sup>667</sup> AIR 1989 S.C. 2039.

<sup>668</sup> Mitra & Srinivasan, *supra* note 665. In 2016, 17% of the child deliveries took place in refugee camps.

19.<sup>669</sup> This clearly shows their plight and discrimination they are facing in India due to their illegal status.

### **Lack of Basic Amenities**

Rohingyas in India also suffer from lack of basic amenities. Lack of identity documents bars them from getting several basic amenities. They do not have access to government subsidized foods due to lack of ‘Ration cards’.<sup>670</sup> Further, due to absence of any legal identity card, they do not have proper employment opportunities.<sup>671</sup> They also suffer from lack of sanitation, electricity, water facilities in refugee camps.<sup>672</sup> As a result, they have to live in difficult living conditions.

Apart from the above-mentioned concerns, Rohingyas are also at fear of deportation from India. After the mass exodus of Rohingyas in 2017, India announced its intention of deporting Rohingyas due to their ‘illegal statuses’.<sup>673</sup> The government also accused Rohingyas of being involved in illegal activities.<sup>674</sup> More than 200 Rohingyas are also detained in holding centres in India on charges of ‘illegal entry’.<sup>675</sup>

Unlike Bangladesh, Rohingya refugees in India are at high risk of refoulement, and arbitrary detention.<sup>676</sup> Therefore, it is clear that even among Non-Contracting States,

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<sup>669</sup>Kanika Gupta, “Rohingya refugees struggle for vaccine in COVID-hit India”, *Al Jazeera* (18 June 2021), online: <<https://www.aljazeera.com/news/2021/6/18/rohingya-refugees-struggle-for-vaccine-in-covid-hit-india>>.

<sup>670</sup>Raqib Hameed Naik, “Hunger will kill us before coronavirus, say Rohingya in India” *AlJazeera* (31 March 2020), online: <<https://www.aljazeera.com/news/2020/3/31/hunger-will-kill-us-before-coronavirus-say-rohingya-in-india>>.

<sup>671</sup>“Rohingya Refugees Fact-Finding Report of Kalindi Kunj, ShramVihar, Budena Camp, Chandni Camp” Human Rights Law Network (HRLN).

<sup>672</sup>*Ibid.*

<sup>673</sup>Mohammed Shafeeq, “Kill us here but don’t send us back, say Rohingya refugees in Hyderabad”, *The News Minute* (18 August 2017), online: <<https://www.thenewsminute.com/article/kill-us-here-dont-send-us-back-say-rohingya-refugees-hyderabad-66981>>.

<sup>674</sup>“India: Rohingya Deported to Myanmar Face Danger”, *Human Rights Watch* (31 March 2022), online: <<https://www.hrw.org/news/2022/03/31/india-rohingya-deported-myanmar-face-danger>>.

<sup>675</sup>*Ibid.*

<sup>676</sup>*Ibid.*

treatment of refugees varies to a considerable extent. Where on the one side, Bangladesh is sheltering a considerable number of Rohingya refugees, giving importance to the principle of *non-refoulement*; India is discriminating against Rohingya refugees by explicitly announcing their decision to refool them.<sup>677</sup> These distinct policies of Non-Contracting States towards Rohingya refugees have put them in limbo. The current approach of providing a few basic rights to Rohingya refugees may change anytime, depending on the political situation of the country, such as in India (discussed in subsequent sections). This would abet the *refoulement* of Rohingyas to Myanmar. As the Non-Contracting States do not believe in the resettlement or local integration of Rohingya refugees, therefore, in the long term, these refugees would still be unrecognized and left without a proper identity.<sup>678</sup>

### **3.4. Conclusion**

Although refugees are suffering from human rights violations in non-Contracting states due to different factors, the non-contracting States are, in some instances making considerable efforts to try respecting the International human rights instruments, including the 1951 Refugee Convention to provide refuge to asylum seekers. It is apparent that non-contracting states are bearing the burden of refugee populations more than contracting states. The human rights violations refugees are facing in non-contracting countries are due to the fact that they are not party to the 1951 Convention, and underfunding, it is not justifiable. But contracting states should become more liberal in their approach of accepting and resettling more refugees. This could also help in preventing various human rights violations that refugees are facing in non-contracting states, and in resettling refugees. Clearly, the refugee protection mechanism is different in

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<sup>677</sup>Salimullah, *supra* note 31.

<sup>678</sup>Janmyr, *supra* note 12.

both contracting and non-contracting states and suffers from some drawbacks, and currently neither offer long term meaningful solutions for Rohingya refugees. While the contracting states certainly have an obligation to protect refugees, the obligation commences only if they accept refugees in the first place. The lack of willingness to accept refugees (in particular Rohingya refugees) is a problematic trend in majority of contracting states. In contrast, the wide percentage of refugees hosted in non-contracting states indicate that, non-contracting states are carrying more of the burden to protect refugees who would otherwise be forced to return (refouled) to their home country where they were being persecuted. In light of these observations, the next part reviews the principle of *non-refoulement*, an important principle of the 1951 Refugee Convention, which has gained reputation as a principle of customary international law. In absence of a proper refugee law framework, the non-contracting states majorly on the principle of *non-refoulement* for extending protection to refugees. Therefore, the next part analyzes the evolution of the principle of *non-refoulement* as customary international law. Although being recognized as a principle of customary international law, some non-contracting states have conflicting opinions regarding the principle. Therefore, the next part also analyzes India's (a non-contracting state) stance on *non-refoulement* by discussing its treatment of Rohingya refugees.

#### **Chapter 4: Understanding the principle of *non-refoulement* & India's stance on Rohingya refugees**

The principle of *non-refoulement* is one of the most important principles under international refugee law, human rights law, and humanitarian law.<sup>679</sup> The principle of *non-refoulement* prohibits states from returning a person to a place where they have a risk of persecution, human rights violation, torture, or other forms of ill-treatment.<sup>680</sup> The significance of this principle could be drawn from the fact that it has become a peremptory norm of the international law, from which no derogation is permitted.<sup>681</sup>

It is the most important legal principle for constraining the action of non-contracting states of the 1951 Refugee Convention when refugees seek asylum. In order to analyze the application of this principle by non-contracting states, this chapter will focus on the case study of India, a non-contracting state. As the thesis focuses on Rohingya refugees, this chapter will in particular analyze India's treatment of Rohingya refugees. For this purpose, the chapter has been divided into two sections. The first section discusses the principle of non-refoulement, including its importance and evolution as customary international law and *jus cogens*. This section also discusses *non-refoulement* with regard to the 1951 convention and its relevance for the non-contracting states. The second section will analyze India's stance on *non-refoulement*. For this, the section will discuss India's refugee policy, highlighting important legislation. Lastly, the second section will examine important jurisprudence by Indian courts on *non-refoulement* and its consequences for Rohingya refugees in India.

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<sup>679</sup> Alice Edwards, "Temporary protection, derogation and the 1951 Refugee Convention" (2012) 13:2 Melbourne J Intl L 595.

<sup>680</sup> "The principle of non-refoulement under international human rights law", online: OHCHR <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> at 1.

<sup>681</sup> Jean Allain, "The Jus Cogens Nature of Non-Refoulement" (2001) 13:4 Intl J Refugee L 533.

From this analysis, the chapter seeks to understand India's position on *non-refoulement*. As India has been accused of discriminating against Rohingya refugees in light of India's recent policy concerning citizenship, which could put Rohingyas at risk of deportation and detention,<sup>682</sup> this chapter will also seek to analyze whether India is discriminating against Rohingya refugees.

#### **4.1. *Non-Refoulement- A guaranteed protection?***

The principle of *non-refoulement* is an important part of international law, which is embodied in various legal instruments as well as customary law. The term *non-refoulement* is derived from the French word “*refouler*”, which means send back or return.<sup>683</sup> So, *non-refoulement* refers to the prohibition against forced expulsion or removal of a person from the jurisdiction of a state to a place (country of nationality or habitual residence) where there are substantial grounds to believe that the person would be subjected to human rights violations or persecution.<sup>684</sup>

Originally, the term “*refoulement*” was used in the 1951 Refugee Convention, to put an obligation on the states not to expel or return (refouler) a ‘refugee’ to a country where he faces a risk of his life or freedom.<sup>685</sup> Article 33 of the 1951 convention provides a prohibition of *refoulement* and stipulates in paragraph 1, that:

*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened*

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<sup>682</sup>Meenakshi Ganguly, “Rohingya Refugees Caught Between India and a Hard Place”, *Human Rights Watch* (2 February 2019), online: <<https://www.hrw.org/news/2019/02/02/rohingya-refugees-caught-between-india-and-hard-place>>.

<sup>683</sup>M AlviSyahrin, “The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law” (2021) 6:1 JILS 56.

<sup>684</sup>C W Wouters, *International legal standards for the protection from refoulement: a legal analysis on the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture* (Antwerp; Portland: Portland, OR: Intersentia; Distribution for the USA and Canada, International Specialized Book Services, 2009) at 25; note 680.

<sup>685</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1 art 33.

*on account of his race, religion, nationality, membership of a particular social group, or political opinion.*<sup>686</sup>

Afterward, the term appeared in the Convention against Torture (CAT), wherein the state parties were obliged not to expel, return (refouler), or extradite a person to a state where he would be at risk of being subjected to torture.<sup>687</sup> Similarly, the Human Rights Committee (HRC) in General Comment No. 31 entails an obligation on state parties, “*not to extradite, deport, expel, or remove a person from their jurisdiction or territory to a country where there are substantial grounds for believing that there is a risk of irreparable harm such as that contemplated by Article 6 and 7 of the ICCPR*”.<sup>688</sup>

Based on the above definitions, the principle of *non-refoulement* emphasizes the negative and positive obligations of a state. First, it prohibits the states from removing an individual from its territory or jurisdiction to a place where they are at risk of being subjected to serious harm. This establishes a negative obligation on the state.<sup>689</sup> Similarly, it also bestows positive obligations on a state.<sup>690</sup> To comply with the principle of *non-refoulement*, a state may be required to take certain actions to prevent people from being expelled to a country, where they are at risk of being persecuted, tortured, or suffering human rights violations.<sup>691</sup>

Apart from being recognized in international legal instruments, the principle of *non-refoulement* is also a part of various regional international instruments such as the

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<sup>686</sup>*Ibid* art 33(1).

<sup>687</sup>*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra* note 576 art 3.

<sup>688</sup>*General comment no. 31 : The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (UN Human Rights Committee (HRC), CCPR/C/21/Rev.1/Add.13, 2004) at para 12.

<sup>689</sup>Wouters, *supra* note 684.

<sup>690</sup>*Ibid.*

<sup>691</sup>*Ibid.*



African Unity Organization Convention, 1969 (OAU),<sup>692</sup> and the American Convention on Human Rights, 1969 (ACHR).<sup>693</sup> The principle of *non-refoulement* has been affirmed in the Bangkok Principles, adopted by the Asian African Legal Consultative Committee, 1966.<sup>694</sup> Moreover, it has also been adopted by non-binding international instruments such as the Cartagena Declaration of 1984,<sup>695</sup> and the Declaration on Territorial Asylum, 1967.<sup>696</sup> Further, the European Court in Human Rights (ECtHR) has also interpreted the principle of *non-refoulement* as a part of Article 3 of the ECHR.<sup>697</sup> In addition to these, the principle of *non-refoulement* is also affirmed in the Constitution of many states.<sup>698</sup>

The key difference in the application of *non-refoulement* under these different legal instruments is the category of individuals who fall under its protection. For instance, under the 1951 Refugee Convention, the principle of *non-refoulement* applies specifically

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<sup>692</sup>Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 1001 UNTS 45 1969 art II, para 3. Article II of the convention puts an obligation on the member states and stipulates that "No person shall be subjected to measures such as rejection at the frontier, return or expansion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened."

<sup>693</sup> The American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/SER. L. V/II. 82 DOC.6 REV.1 at 25 (1992). The American Convention on Human Rights, 1969, art. 22. Article 22 of the convention states that "In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions."

<sup>694</sup>Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles")*, 1966 art III(1).

<sup>695</sup> Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66.doc.10, rev.1, (1984-85), sec.III (5).

<sup>696</sup> A/RES/2312 (XXII), 14 December 1967, art.3. See, Resolution (67) 14 on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, para. 2.

<sup>697</sup>*European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5 1950 art 3. See, *Soering v United Kingdom*, 1989 European Court of Human Rights. See, *CruzVaras v Sweden*, 1991 European Court of Human Rights; *Chahal v United Kingdom*, 1991 European Court of Human Rights.

<sup>698</sup>Selin Esen, "The Principle of Non-Refoulement as a Constitutional Right of Asylum Seekers in Turkey" (2016) *Verfassungsblog*, online: <<https://verfassungsblog.de/the-principle-of-non-refoulement-as-a-constitutional-right-of-asylum-seekers-in-turkey/>>. The principle of non-refoulement finds a place in the Constitution of France, Italy, Spain, Germany, etc.

to refugees and asylum seekers.<sup>699</sup> Under International Human Rights law, *non-refoulement* extends to all individuals under the jurisdiction of a particular state and it protects the individuals from different threats such as torture, human rights violations, irreparable harm, death penalty, etc.,<sup>700</sup> which may or may not lead to persecution, and so it potentially protects a larger category of people than the 1951 Refugee Convention.

The inclusion of *non-refoulement* as an important provision in the legal instruments by the international community indicates its wide acceptance. But does its acceptance indicate guaranteed protection? Or are there any limitations on its application? To answer these questions and understand the scope of protection offered by *non-refoulement* to refugees and asylum seekers, it is important to analyze the nature (application) of this principle.

#### **4.1.1. *Non-Refoulement* as a Rule of Customary International Law**

Due to its adoption in international, regional, national, and non-binding legal instruments, the principle of *non-refoulement* is accepted as a norm in ‘customary international law’.<sup>701</sup> A customary international law consists of rules or norms which form a ‘general practice accepted as law’.<sup>702</sup> Generally, for a rule to become a part of customary international law it requires two components- (a) it is consistent with state practice, and (b) it is legally mandated by the states (*opinion juris*).<sup>703</sup> The definition

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<sup>699</sup>Tilman Rodenhauer, “The principle of non-refoulement in the migration context: 5 key points”, (30 March 2018), online: *Humanitarian Law & Policy Blog* <<https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/>>.

<sup>700</sup>*Ibid.*

<sup>701</sup>Syahrin, *supra* note 683.

<sup>702</sup>The Statute of the International Court of Justice, 59 Stat. 1031, 1060 (1945), art. 38 (1)(b). Article 38(1)(b) states, “international custom, as evidence of a general practice accepted as law”. *See also*, “Customary international humanitarian law” (29 October 2010) online: *ICRC* <<https://www.icrc.org/en/document/customary-international-humanitarian-law-0>>.

<sup>703</sup>*See, Continental Shelf Case (Libya v Malta)*, 1985 ICJ Rep 13 at 29-30. The ICJ stated, “The essence of the customary international law must be in the actual practice of the states and *opinion juris*.” *See also*, Jean Allain, “The jus cogens Nature of non-refoulement” (2002) 13:4 Intl J Refugee L 538.

indicates that a rule or a norm should be generally recognized by states and is observed consistently, in a manner that the obligatory character of the rule or norm is binding on all states.<sup>704</sup> This means that the states which are not practicing that rule must also respect it.<sup>705</sup>

There are some provisions in the 1951 Refugee Convention that reflect the rules of customary international law.<sup>706</sup> These include the right to non-discrimination,<sup>707</sup> and the freedom to practice religion.<sup>708</sup> Similarly, the principle of *non-refoulement* came to be recognized as a part of customary international law.<sup>709</sup> The UNHCR supported this view in its Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol that was issued in 26<sup>th</sup> January 2007.<sup>710</sup> It stipulated that,

*The principle of non-refoulement as enshrined in the 1951 Convention and complemented by non-refoulement obligations under international human rights law, constitutes a rule of customary international law.*<sup>711</sup>

This view of the UNHCR is based on consistent state practice of *non-refoulement* and its recognition as a norm.<sup>712</sup> Further, the UNHCR asserted in its advisory opinion that the principle of *non-refoulement*, as enshrined in Article 33 of the 1951 Convention,

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<sup>704</sup>Brian D Leppard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010) at 7.

<sup>705</sup>*Ibid.*

<sup>706</sup>Allain, *supra* note 672.

<sup>707</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1 art 3.

<sup>708</sup>*Ibid* art 4.

<sup>709</sup>Allain, *supra* note 672.

<sup>710</sup>*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007 at para 15.

<sup>711</sup>UNHCR, The Principle of non-refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=437b6db64>.

<sup>712</sup>*UNHCR Note on the Principle of Non-Refoulement* (UN High Commissioner for Refugees (UNHCR), 1997).

constitutes a rule of customary international law and is binding on all States, including the states which are non-contracting to the 1951 Convention or its 1967 Protocol.<sup>713</sup> It pointed out that the practice of hosting a large number of refugees by the non-contracting states of the 1951 Convention, and their response/justifications in cases of *refoulement*, confirms that even the non-contracting states accept the principle of *non-refoulement* as binding.<sup>714</sup>

Apart from the 1951 Refugee Convention, the principle of *non-refoulement* has been adopted in a significant number of UN declarations and other international instruments (as discussed above) and there is a consensus amongst legal scholars that the principle of *non-refoulement* is legally binding.<sup>715</sup> The states who are non-contracting to the 1951 Convention must also respect these provisions. This indicates a consensus of states on the significance of *non-refoulement* and consistent state practice of the principle.<sup>716</sup> Therefore, at its core, the principle of *non-refoulement* is considered a part of customary international law, and binding on all states.<sup>717</sup>

In recent times, the principle of *non-refoulement* has also evolved as *jus cogens*.<sup>718</sup> *Jus cogens* are customary norms from which no derogation is permitted.<sup>719</sup> The evolution of *non-refoulement* as *jus cogens* is discussed below.

#### **4.1.2. Evolution of non-refoulement as *jus cogens***

In the contemporary era, the principle of *non-refoulement* has gained the reputation of *jus cogens*.<sup>720</sup> *Jus Cogens* or ‘peremptory norms’ in international law are legal norms

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<sup>713</sup> *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, *supra* note 710 at para 15.

<sup>714</sup> *Ibid.*

<sup>715</sup> Phil CW Chan, “The Protection of Refugees and Internally Displaced Persons: Non-Refoulement under Customary International Law?” (2006) 10:3 Intl JHR 42.

<sup>716</sup> *Ibid* at 234.

<sup>717</sup> Rodenhauer, *supra* note 699.

<sup>718</sup> Allain, *supra* note 672.

<sup>719</sup> Lepard, *supra* note 704 at 7.

from which no derogation is allowed.<sup>721</sup> The concept of *jus cogens* in international law originates through Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT).<sup>722</sup> According to the VCLT, “a *peremptory norm or jus cogens* is a norm accepted and recognized by the international community, as a norm from which no derogation is allowed.”<sup>723</sup> It also states that any treaty which conflicts with *jus cogens* is void.<sup>724</sup> Recently, the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), adopted by the International Law Commission stipulated that *jus cogens* gives rise to obligations, concerning which all states have a legal interest and any breach of such obligation arising under *jus cogens* would be serious.<sup>725</sup> Therefore, the non-derogatory nature of *jus cogens* applies to all states of the international community.<sup>726</sup>

The evolution of *non-refoulement* as *jus cogens* in international law can be analyzed on certain grounds. According to article 53 of the VCLT, any norm of the international law can be accepted as *jus cogens* if- (a) it is accepted and recognized by the international community; and (b) any derogation from the norm is not permitted.<sup>727</sup> As discussed in the preceding section, *non-refoulement* is adopted by various international, regional, and national legal frameworks.<sup>728</sup> It is also accepted as a norm of customary international law and even the non-contracting state parties to the 1951 Refugee

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<sup>720</sup> Allain, *supra* note 672.

<sup>721</sup> Robert Kolb, *Peremptory International Law- Jus Cogens: A General Inventory* (Oxford, UK: Hart Publishing Ltd, 2015) at 2.

<sup>722</sup> United Nations, *Vienna Convention on the Law of Treaties*, Treaty Series, vol 1155, 1969, arts 53 and 64.

<sup>723</sup> *Ibid* art 53.

<sup>724</sup> *Ibid* art 64.

<sup>725</sup> International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*, A/77/10 2022.

<sup>726</sup> Clare Frances Moran, “Strengthening the Principle of Non-Refoulement” (2021) 25:6 Intl JHR 1032.

<sup>727</sup> VCLT, *supra* note 722 art 53.

<sup>728</sup> note 678.

Convention adhere to the principle of *non-refoulement*.<sup>729</sup> This establishes the fact that *non-refoulement* is accepted and recognized by the international community. Further, in answering whether any derogation from the principle of *non-refoulement* is permitted, the Executive Committee of the UNHCR has reflected its opinion. The Committee has reaffirmed in Conclusion No. 25 of 1982 that, “*the principle of non-refoulement is acquiring the character of the peremptory rule of international law*”.<sup>730</sup> In Conclusion No. 55 of 1989, the Committee called on the states, “*to refrain from taking measures that result into expelling or returning refugees in contravention to fundamental prohibitions against these practices*”.<sup>731</sup> Similarly, the Committee in Conclusion No. 77 of 1995 once again declared that the principle of *non-refoulement* is incumbent on all members of the international community.<sup>732</sup> Finally, the Committee in Conclusion No. 79 recalled that the principle of *non-refoulement* is not subject to derogation.<sup>733</sup> Therefore, the conclusion from the Executive Committee of the UNHCR confirms the *jus cogens* status of the principle of *non-refoulement*. Moreover, the Cartagena Declaration of 1948 reiterates the *jus cogens* nature of *non-refoulement*.<sup>734</sup>

Based on the above consideration, it is clear that the principle of *non-refoulement* forms part of customary international law and has evolved as a rule of the peremptory norm (*jus cogens*). Therefore, no derogation from this principle is allowed. Even in the

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<sup>729</sup> note 672.

<sup>730</sup> *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (UNHCR, No. 25, A/37/12/Add.1, 1982).

<sup>731</sup> *Ibid.*

<sup>732</sup> *Ibid.*

<sup>733</sup> *Ibid.*

<sup>734</sup> *The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America*, PPLA/2013/03 2013 art III(5). The declaration states, "The principle of non-refoulement is the cornerstone of the international protection of refugees. This principle is imperative regarding refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens".

cases when a state acts in violation of *non-refoulement*, it does not necessarily compromise the *jus cogens* nature of the principle, if the state recognizes or seeks to defend the violation, as explained in the *Nicaragua* case:

*If a state acts in a way prima facie incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is justifiable on that basis, the significance of that attitude is to conform rather than to weaken the rule.*<sup>735</sup>

Although the principle of *non-refoulement* forms an important protection mechanism for refugees and asylum seekers, which cannot, in any circumstances, be derogated, there are certain limitations on its application. As stipulated in the *Nicaragua* case, these limitations or exceptions do not affect the *jus cogens* nature of *non-refoulement*.<sup>736</sup> The extent of these limitations is discussed below.

#### **4.1.3. Limitations on the principle of *non-refoulement***

The purpose of *non-refoulement* is to ensure that refugees and asylum seekers are protected against forcible return to a place where they have a risk of suffering from persecution, torture, human rights violations, etc. As discussed above, the principle is recognized as *jus cogens* and therefore is non-derogatory. This means that the principle of *non-refoulement* stipulated in Article 3 CAT, Article 7 ICCPR, and Article 3 ECHR are absolute and cannot, in any circumstances, be derogated, except if a recognized limitation is present.

It is recognized that the principle has some limitations under the 1951 Refugee Convention. Article 33(2) of the 1951 Convention stipulates that the refugee may not

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<sup>735</sup>See, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*; *Merits*, 1986 International Court of Justice (ICJ).

<sup>736</sup>*Ibid.*

claim the protection of *non-refoulement*, if: (a) a refugee poses a threat to the security of the country of asylum; and (b) a refugee has been convicted by a final judgment of a serious crime, which constitutes a danger to the community of the country of asylum.<sup>737</sup> Article 33(2) implies that to return or expel a refugee from a country of asylum, he must be a danger to the national security or community of that country. But, *refoulement* should be the last resort.<sup>738</sup> To establish reasonable grounds, the burden of proof is on the State.<sup>739</sup> The State should establish that there was a nexus between the refugee and the danger he possessed to the national security or the community and that the danger is sufficiently serious.<sup>740</sup> In this regard, the European Court of Justice clarified that the danger must be genuine and sufficiently serious to endanger national security or the fundamental interest of society.<sup>741</sup>

Further, concerning the *refoulement* of a refugee, the Executive Committee of UNHCR in Conclusion No. 7 of 1977, stated that *refoulement* should be allowed in exceptional cases only after due consideration of all circumstances.<sup>742</sup> This implies that the scope of application of the limitation clause in Article 33(2) should be applied with caution, only in exceptional circumstances. It should be applied in situations where the refugee poses a threat to the national security and the community of the country of

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<sup>737</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, supra* note 1 art 33(2).

<sup>738</sup>*Ibid* art 1(F). Article 1(F) of the 1951 Refugee Convention does not apply to individuals who- (a) has committed crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) has been guilty of acts contrary to the purposes and principles of the United Nations. Therefore, Article 1(F) of the 1951 Refugee Convention results in refugee status being precluded. In this case, the provisions of the 1951 Refugee Convention does not apply at all. This means the person is not eligible for the protection against *refoulement* under the 1951 Refugee Convention.

<sup>739</sup>Wouters, *supra* note 684 at 114.

<sup>740</sup>*Ibid*.

<sup>741</sup>*Regina v Pierre Bouchereau*, [1977] 2 CMLR 800.

<sup>742</sup>note 730.



asylum, despite facing a well-founded fear of persecution in his country of nationality/residence.<sup>743</sup>

Although Article 33(2) limits the refugee from claiming the benefits of *non-refoulement*, the limitations do not mean that a person ceases to be a refugee unless Article 1(F) is also offended.<sup>744</sup> This suggests if Article 33(2) is in play, that the refugee simply cannot claim the protection of the state of asylum (to which he poses a threat), but they are still entitled to claim protection from other states (states where the refugee does not endanger the national security or community) and the UNHCR.<sup>745</sup> Further, if the *refoulement* of a refugee from the state of asylum puts them in threat of torture or other forms of prescribed ill-treatment, then they can claim the protection of *non-refoulement* under Article 3 of CAT,<sup>746</sup> Article 7 of the ICCPR,<sup>747</sup> and Article 3 of the ECHR,<sup>748</sup> as the case may be. The UNHCR in its advisory opinion also stipulates,

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<sup>743</sup>Wouters, *supra* note 675 at 484; E Lauterpacht & D Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* (Cambridge: Cambridge University Press, 2003) at 76.

<sup>744</sup>Wouters, *supra* note 86 at 114; *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 87 art 1D-1F. Article 1D states that, "the convention shall not apply to a person who is at present receiving protection or assistance from organs and agencies of the UN other than the UNHCR.; Article 1E states that, "the Convention shall not apply to a person who has assumed rights and obligations attached to the possession of the nationality of country they have taken residence.; Article 1F states that "the provisions of the convention does not apply to any person who has committed a crime against peace, a war crime, crime against humanity, serious non-political crime outside the country of refuge before his admission as a refugee; and acts contrary to the principles of the UN." As the thesis is focused on Rohingya refugees, who do not fall into any of the three categories defined by arts. 1D-F of the convention, the author has limited the scope of discussion concerning the limitations of *non-refoulement* for refugees and asylum seekers.

<sup>745</sup>Wouters, *supra* note 684 at 195; *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1 arts 1D-1F.

<sup>746</sup>*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 576 art 3.

<sup>747</sup>*International Covenant on Civil and Political Rights (ICCPR)*, *supra* note 216 art 7.

<sup>748</sup>*ECHR*, *supra* note 697 art 3.

*The provisions of Article 33(2) of the 1951 Refugee Convention do not impact the obligations of non-refoulement of the host state under the international human rights law, which does not permit any exceptions.*<sup>749</sup>

However, the decision of the Supreme Court of Canada in *Suresh v. Canada* (Minister of Citizenship and Immigration),<sup>750</sup> makes a potential deviation regarding *refoulement* of a refugee to torture. In this case, the appellant was a Convention refugee from Sri Lanka. He was issued a deportation certificate under Section 40(1) of the Immigration Act of Canada.<sup>751</sup> The Minister of Citizenship and Immigration, notified him that he would be deported as he was considered a danger to the security of Canada under Section 53(1)(b) of the Immigration Act.<sup>752</sup> The appellant applied for a judicial review alleging that although he presented an oral submission, he was not given a copy of the Immigration Officer's memorandum and he was neither provided with an opportunity to respond to it orally or in writing. He also alleged that his rights under Section 2(b),<sup>753</sup> 2(d),<sup>754</sup> and Section 7<sup>755</sup> of the Canadian Charter of Rights and Freedom have been infringed. The Supreme Court of Canada while allowing the appeal observed that, "Deportation to torture is prohibited by the ICCPR and the CAT. Deportation to torture may deprive a refugee under Section 7 of the Charter of Rights. Canadian Law and international norms reject deportation to torture." The court concluded that the Minister

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<sup>749</sup> *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, *supra* note 710 at para 11.

<sup>750</sup> 2002 SCC 1.

<sup>751</sup> *IRPA*, *supra* note 453, s 40(1).

<sup>752</sup> *Ibid*, s 53(1)(b). "The regulations may provide for any matter relating to the application of this Division, and may include provisions respecting- (b) the circumstances in which a removal order shall be made or confirmed against a permanent resident or a foreign national."

<sup>753</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24), s 2(b). "Everyone has a fundamental freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

<sup>754</sup> *Ibid*, s 2(d). "Everyone has a fundamental freedom of association."

<sup>755</sup> *Ibid*, s 7. "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

of Immigration should generally decline to deport refugees where there is a substantial risk of torture. But they can do so in exceptional circumstances and in doing so they must conform to the principles of fundamental justice under Section 7 of the Charter. Significantly the court held that, “the Immigration Act leaves open a possibility to deport a person, if the person constitutes a danger to the security of Canada and the threat must be serious, grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm.”

This decision signifies that a host state may not expel or return a refugee because they pose a threat to national security or the community, except in exceptional circumstances. While *refouling* a refugee, the host state must also consider if removing the refugee would expose them to a substantial risk of torture or other irreparable harm.<sup>756</sup> So, a refugee may be expelled from the country of asylum under Article 33(2) of the Refugee Convention, but they can still claim the protection of *non-refoulement* under other legal instruments of the international human rights law (CAT, ICCPR, and ECHR). The limitations under the 1951 Refugee Convention are not absolute. Therefore, it could be concluded that while there are exceptions to the application of *non-refoulement* under international law, the limitations of national security and threat to the community given in the 1951 Refugee Convention should be applied very carefully, in exceptional circumstances. The restrictive nature of the limitations proves the *jus cogens* nature of the principle of *non-refoulement*.

In light of the extremely restrictive nature of the limitation of *non-refoulement* (overall), the recognition as customary international law, and *jus cogens* nature, the

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<sup>756</sup>*Ibid* s 7; E. Lauterpacht & Bethlehem, *supra* note 145 at 166.

principle of *non-refoulement* has gained relevance in states that are non-contracting to the 1951 Refugee Convention or its 1967 Protocol.

The above section has discussed in detail how the principle of *non-refoulement* should operate pursuant to international law. This chapter now turns to the application of *non-refoulement* in practice. As the case study for this thesis is Rohingya refugees, India being a non-contracting state is bound only to the principle of *non-refoulement*, and it shelters a large number of Rohingya refugees,<sup>757</sup> the next section discusses how India interprets its obligations.

#### **4.2. India's stance on the principle of non-refoulement and discrimination against Rohingya refugees**

India is one of the few countries which are non-contracting to the 1951 Refugee Convention or its 1967 Protocol.<sup>758</sup> Notwithstanding, India has offered protection to millions of refugees since its independence from the British in 1947.<sup>759</sup> For example, India provided sanctuary to a large number of refugees and asylum seekers from Pakistan after the partition in 1947.<sup>760</sup> It offered refuge to Tibetan refugees after the Chinese invasion in 1959.<sup>761</sup> The government of India further allowed Chakmas and Hajongs refugees to rehabilitate to India following the submersion of Kapati dam, in the period 1964-1969.<sup>762</sup> India has hosted Rohingya refugees for decades.<sup>763</sup> Similarly, the country

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<sup>757</sup> Sullivan & Sur, *supra* note 621.

<sup>758</sup> *Supra* note 503.

<sup>759</sup> Jha, *supra* note 628.

<sup>760</sup> *Ibid.*

<sup>761</sup> Ria Kapoor, "Nehru's Non-Alignment Dilemma: Tibetan Refugees in India" (2019) 42:4 South Asia 675.

<sup>762</sup> SumirKarmakar, "Arunachal govt plans to rehabilitate Chakmas and Hajongs in other states" *Deccan Herald* (25 April 2023), online: <https://www.deccanherald.com/india/arunachal-govt-plans-to-rehabilitate-chakmas-and-hajongs-in-other-states-1212870.html>>.

<sup>763</sup> India has hosted Rohingya refugees since decades. It has provided them shelter in 2005, 2015 and again in 2016-2017. Ravi Nair, "Detention and deportation of Rohingya refugees fly in the face of India's obligations – The Leaflet", (5 April 2022), online: *The Leaflet*<<https://theleaflet.in/rohingya-refugees-in-india-detain-and-deport/>>.

has offered refuge to different groups of refugees (Tamils refugees from Sri Lanka, Afghan refugees, Burma refugees, etc.) and continues to do so.

Currently, India is a host to more than 405,000 refugees, belonging to different neighboring countries.<sup>764</sup> Out of these 405,000 refugees, approximately 174,303 refugees (those from Tibet and Sri Lanka) are protected directly by the government of India and about 46,000 refugees (mainly from Myanmar and Afghanistan) are registered with the UNHCR.<sup>765</sup> Despite being a non-contracting party to the 1951 Refugee Convention and a lack of national framework concerning refugees, UNHCR has acknowledged that, “India’s long-standing practice of hosting refugees shows its compliance to the principle of *non-refoulement*.”<sup>766</sup>

However, in recent years India’s decision to deport Rohingya refugees<sup>767</sup> and the enactment of the Citizenship (Amendment) Act of 2019 (hereinafter referred to as the CAA),<sup>768</sup> which prevents Muslim refugees and asylum seekers from applying for citizenship in India,<sup>769</sup> indicates a discriminatory stance towards Rohingya refugees (as they are Muslims) and reveals a questionable approach to the principle of *non-refoulement*. In order to analyze the discrimination towards Rohingya refugees and the uncertain stance on *non-refoulement*, this section will discuss India’s refugee protection

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<sup>764</sup>See, Suhas Chakma, “India: Over 10,000 sought refuge in India during 2022”, *Rights & Risks Analysis Group* (21 February 2023), online: <<http://www.rightsrisks.org/banner/indiarefugeereport2022/>>. See, Bikash Singh, “10,000 persons sought refuge in India in 2022: Report”, *The Economic Times* (22 February 2023), online: <<https://economictimes.indiatimes.com/news/india/10000-persons-sought-refuge-in-india-in-2022-report/articleshow/98131798.cms>>.

<sup>765</sup>UNHCR *Submission on India: UPR 27th Session* (UN High Commissioner for Refugees (UNHCR), 2016) at 2.

<sup>766</sup>*Ibid* at 1.

<sup>767</sup>Salimullah, *supra* note 31.

<sup>768</sup>India: *The Citizenship (Amendment) Act, 2019*, 2019.

<sup>769</sup>Hadza Min Fadhli, “India’s Relations with Muslim countries During the Implementation of CAA/NRC: India-Indonesia and India-Malaysia Relations” (2022) 5: 2 *J Intl Studies* 156.

mechanism (or the lack of it thereof), its jurisprudence on *non-refoulement*, and the effect of the CAA on Rohingya refugees in India.

#### 4.2.1. India's Refugee Policy

As discussed in the previous section, India is a non-contracting state to the 1951 Refugee Convention and its 1967 Protocol and does not have any legal framework addressing refugees and asylum seekers. Despite this, India is a signatory to some international legal instruments relating to refugees, asylum seekers, and universal human rights protection,<sup>770</sup> such as the UN Declaration of Territorial Asylum,<sup>771</sup> the UDHR,<sup>772</sup> and the ICCPR<sup>773</sup>. It is also a member of the UNHCR Executive Committee (UNHCR ExCom).<sup>774</sup>

In the absence of any uniform national legislation safeguarding refugees, India deals with refugees on an *ad hoc* basis.<sup>775</sup> In some instances it also relies on a bilateral policy, concerning the source country while determining the refugee status.<sup>776</sup> Further, while dealing with non-citizens (including refugees) India relies on domestic legislation such as the Passport Act, 1920;<sup>777</sup> the Passports Act 1967;<sup>778</sup> the Registration of

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<sup>770</sup>Indira Boutier, "The Non-Ratification of the 1951 Convention on Refugees: An Indian Paradoxical Approach to Human Rights" 115, 2021 CanLIIDocs 1690, online: <<https://www.canlii.org/en/commentary/doc/2021CanLIIDocs1690#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>> at 116.

<sup>771</sup>*Declaration on Territorial Asylum*, A/RES/2312(XXII) 1967.

<sup>772</sup>*The Universal Declaration of Human Rights (UDHR)*, *supra* note 162.

<sup>773</sup>*International Covenant on Civil and Political Rights (ICCPR)*, *supra* note 216.

<sup>774</sup>"ExCom membership by date of admission of members", online: UNHCR<<https://www.unhcr.org/media/excom-membership-date-admission-members>>. India became a member of the UNHCR ExCom in 1995. ExCom helps in discussing issues of refugee protection, budget, etc., regarding the UNHCR in the member states.

<sup>775</sup>Ananthachari, *supra* note 651.

<sup>776</sup>*Ibid.* "The Indian government deals with refugees through a policy of bilateralism, depending on the relationship with the other country. For example, India allowed Afghan refugees (Indian origin) who came to India through Pakistan, without any travel documents. This policy was continued till 1993. However, after 1993, it no longer allowed Afghan refugees entering freely into India."

<sup>777</sup>*The Passport Act, 1920*, ACT NO XXXIV OF 1920.

<sup>778</sup>*The Passport Act, 1967*, Act No XXXIV of 1967.

Foreigners Act, 1939<sup>779</sup>; the Foreigners Act, 1946;<sup>780</sup> and the Foreigners Order, 1948<sup>781</sup>. These statutes have been applied by the Indian government to determine the entry, stay, and expulsion of individuals who are non-citizens of India.<sup>782</sup> It is noteworthy that none of these statutes contain the term “refugee”,<sup>783</sup> and they do not distinguish between refugees, illegal migrants, or foreigners. The Foreigners Act, 1946 defines a person who is a non-citizen of India as a “foreigner”.<sup>784</sup> Therefore, any person who is not a citizen of India is considered a ‘Foreigner’ in India including refugees and is treated accordingly to the provisions of the legislation in place.

The statutes confer powers on the Central government of India to regulate non-citizens. For example, the Foreigners Act of 1939<sup>785</sup> regulates the registration of foreigner’s entry, stay, and departure from India.<sup>786</sup> Section 3(1) of the Foreigners Act of 1946,<sup>787</sup> confers power to the Central government of India with respect to prohibition, entry, or regulation of foreigners (generally to all foreigners, any specific class of foreigners or any particular foreigner) in India.<sup>788</sup> The act also empowers the government to regulate rights and freedom of any foreigners in India.<sup>789</sup> According to this provision the government can order a foreigner to reside in a particular area,<sup>790</sup> and impose restriction on their movement, thus violating their freedom of movement within or

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<sup>779</sup>*The Registration of Foreigners Act, 1939*, ACT NO XVI OF 1939.

<sup>780</sup>*The Foreigners Act, 1946*, *supra* note 646.

<sup>781</sup>*The Foreigners Order, 1948*, ORDER UNDER THE FOREIGNERS ACT, 194 6.

<sup>782</sup>*Ibid.*

<sup>783</sup>*The Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, *supra* note 485 at 131.

<sup>784</sup>*The Foreigners Act, 1946*, *supra* note 646, s 2(a).

<sup>785</sup>*Ibid.*

<sup>786</sup>*The Registration of Foreigners Act, 1939*, *supra* note 779, s 2(a).

<sup>787</sup>*The Foreigners Act, 1946*, *supra* note 646, s 3(1).

<sup>788</sup>*Ibid.*

<sup>789</sup>*Ibid*, s 3(2).

<sup>790</sup>*Ibid*, s 3(2)(e)(i).

outside the country.<sup>791</sup> Similarly, the provisions of the Foreigner's Act of 1948<sup>792</sup> confer power on the government to grant or refuse entry to foreigners in India, on different grounds.<sup>793</sup>

Notwithstanding the above, the Constitution of India protects the rights of non-citizens in some instances, including refugees (as discussed in Chapter 3). Furthermore, the Indian courts have extended the protection of Article 21 (right to life) of the Indian Constitution to persons who are non-citizens.<sup>794</sup> In this regard, the Supreme Court of India asserted:

*The Constitution of India confers some rights on every human being and certain others on citizens. Every person is entitled to equality before law and equal protection of laws. No person can be deprived of his life and personal liberty except according to the procedure established by law. The State is bound to protect the life and liberty of every human being, be he a citizen or otherwise.*<sup>795</sup>

Similarly, the Indian courts have time and again interpreted constitutional provisions to protect the rights of refugees. In the case of *Malavika Karlekar v. Union of India*,<sup>796</sup> the Supreme Court of India granted interim protection against deportation to 21 refugees while their refugee status determination was pending.<sup>797</sup> Despite this protection conferred by the Constitution of India, non-citizens, including refugees, have limited rights, when it comes to their stay and residence in India. The Supreme Court of India has

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<sup>791</sup>*Ibid*, s 3(2)(e)(ii).

<sup>792</sup>*The Foreigners Act, 1946*, *supra* note 637.

<sup>793</sup>*Ibid*, s 3.

<sup>794</sup>*See, Okonavalov v Commander, Coast Guard Region*, 2006 4 SCC 620. *See also, Railway Board v Chandrima Das*, 2000 SCC 465, 484.

<sup>795</sup>*National Human Rights Commission v. State of Arunachal Pradesh*, 1996 SCC (1) 742.

<sup>796</sup>*Malavika Karlekar v Union of India*, 1992 SCC Online SC 249.

<sup>797</sup>*Ibid*. *See, Mailwand's Trust of Afghan Human Freedom v State of Punjab*, WP (CrI) No 125 and 126 of 1986. *See also, ND Pancholi v State of Punjab*, WP (CrI) No 243 of 1988.



asserted that although foreigners are entitled to the protection of their life and personal liberty under Article 21 of the Constitution, the right does not allow them to stay or reside in the country.<sup>798</sup> Further, the Supreme Court, while upholding the validity of the Foreigners Act, 1946, observed:

*The Foreigners Act bestows the Central Government, absolute and unfettered discretion regarding the expel for foreigners from India. There is no provision in the Constitution fettering this unrestricted right and discretion to expel.*

This indicates that although non-citizens including refugees are granted the protection of their life and liberty, they can be expelled at the discretion of the government, on the basis of the domestic legislation in place. As India does not distinguish in its legislation between genuine refugees and foreigners, there's a likelihood that the government may exercise its discretionary authority in a manner that jeopardizes the protection of refugees. However, India has attempted to adopt a legal policy to protect refugees and asylum seekers. This has been discussed below.

#### **4.2.1.1. The Asylum Bill, 2015**

In 2015, the Asylum Bill of 2015<sup>799</sup> was drafted to establish a legal framework for the protection of refugees and asylum seekers in India.<sup>800</sup> Although the bill was not passed, it was intended to process claims for asylum and accord rights and obligations arising from such status.<sup>801</sup> The bill was a step forward in India's initiative of protection of refugees and asylum seekers.

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<sup>798</sup>*Louis De Raedt v Union of India*, 1991 3 SCC 554. See, *State of Arunachal Pradesh v Khudiram Chakma*, 1994 Supp (1) SCC 615.

<sup>799</sup>*The Asylum Bill, 2015*, (Bill No 334 of 2015).

<sup>800</sup>*Ibid.*

<sup>801</sup>*Ibid.*

Significantly, the bill defined ‘refugee’ in section 2(1)(u).<sup>802</sup> It also defined criteria for a person to be qualified as a refugee in section 4(1).<sup>803</sup> According to the provision, a person qualifies to be a refugee if-

(a) they are outside their country of origin and are unable or unwilling to return to or avail the protection of their country owing to a well-founded fear of persecution on account of race, religion, sex, nationality, ethnicity, membership of a particular social group, or political opinion;<sup>804</sup> or

(b) they left his country owing to serious and indiscriminate threats to life, physical integrity, or freedom resulting from generalized violence or events seriously disturbing public order.<sup>805</sup>

It is noteworthy that the definition of refugee in the bill was aligned with the definition of refugee in the 1951 Refugee Convention.<sup>806</sup> The bill also had provisions for *non-refoulement* in Section 8.<sup>807</sup> Further the bill the formulation of a National Commission for Asylum and its powers.<sup>808</sup> It had the provisions to deal with situation of the mass influx of refugees,<sup>809</sup> and on rights and duties of refugees and asylum-seekers.<sup>810</sup> Unfortunately, the bill was not adopted. But, in 2019, a similar bill was introduced in the

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<sup>802</sup>*Ibid*, s 2(1)(u). Refugee means “an applicant whose asylum application has been determined to meet the criteria under section 4 of the Commission or the Appellate Board, as the case may be, under the terms of this Act or who has been declared to be a refugee by a notification under section 30.”

<sup>803</sup>*Ibid*, s 4(1).

<sup>804</sup>*Ibid*, s 4(1)(a).

<sup>805</sup>*Ibid*, s 4(1)(b).

<sup>806</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1 at 1A(2).

<sup>807</sup>*The Asylum Bill, 2015*, *supra* note 799, s 8. “No refugee present within the territory of India shall be expelled or returned in any manner whatsoever to any country where his life or freedom would be threatened on account of his race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion.”

<sup>808</sup>*Ibid*, c IV.

<sup>809</sup>*Ibid*, c V, s 30–33.

<sup>810</sup>*Ibid*, c VII.

Parliament of India.<sup>811</sup> The Refugee and Asylum Bill of 2019,<sup>812</sup> contained similar provisions as the 2015 bill on refugee status,<sup>813</sup> rights and protections, principle of *non-refoulement*,<sup>814</sup> etc.<sup>815</sup> However, the 2019 also failed to be adopted into a statutory format.<sup>816</sup> Instead the Parliament of India adopted the Citizenship (Amendment) Act, 2019.<sup>817</sup> This bill was controversial and was passed amidst widespread protests across the country.<sup>818</sup> The provisions of the bill are discussed below.

#### **4.2.1.2. The Citizenship (Amendment) Act, 2019**

The Citizenship (Amendment) Act, 2019 granted any person who belonged to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities from Afghanistan, Bangladesh, or Pakistan, exemption from being treated as ‘illegal migrants’ in India, if they entered into India on or before 31<sup>st</sup> December, 2014.<sup>819</sup> Under the provisions of the act, the persons belong to the six religious communities (Hindu, Sikh, Buddhist, Jain, Parsi or Christian) would be granted a certificate of registration or certificate of naturalization, subject to some conditions.<sup>820</sup> According to the Citizenship Act of 1955,<sup>821</sup> a person can acquire the citizenship of India through four ways- (a) birth;<sup>822</sup> (b) descent;<sup>823</sup> (c) registration;<sup>824</sup> or (d) naturalization.<sup>825</sup> Thus by granting a certificate of

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<sup>811</sup> Refugee and Asylum Bill, 2019 (No. LXX of 2019).

<sup>812</sup> *Ibid.*

<sup>813</sup> *The Asylum Bill, 2015, supra* note 799, s 4(1).

<sup>814</sup> *Ibid*, s 8.

<sup>815</sup> *Ibid*, c 7.

<sup>816</sup> *Supra* note 802.

<sup>817</sup> *CAA, supra* note 768.

<sup>818</sup> Samiya Latief, “What is citizenship law and why people are protesting against it” *The Times of India* (17 December 2019), online: < <https://timesofindia.indiatimes.com/india/what-is-citizenship-amendment-act-and-why-has-it-triggered-protests/articleshow/72759793.cms>>.

<sup>819</sup> *CAA, supra* note 768, s 2(1)(b).

<sup>820</sup> *Ibid*, s 6B(1).

<sup>821</sup> *The Citizenship Act, 1955*, Act no 57 of 1955.

<sup>822</sup> *Ibid*, s 3.

<sup>823</sup> *Ibid*, s 4.

<sup>824</sup> *Ibid*, s 5.

<sup>825</sup> *Ibid*, s 6.

registration and naturalization, the Citizenship Act 2019 grants citizenship to the people belonging to the six religious communities who have arrived in India on or before 31<sup>st</sup> December, 2014.<sup>826</sup>

The act was criticized on the national front because Muslim refugees and asylum seekers who took sanctuary in India would be labeled as ‘illegal immigrants’. By excluding Muslims, the act violates the principle of non-discrimination affirmed in international human rights instruments.<sup>827</sup> The act also violates the right to equality under the Constitution of India.<sup>828</sup> Notably, the majority of Rohingya refugees belong to the Muslim community.<sup>829</sup> Other classes of refugees residing in India belong to different religious communities (Tibetan and Chakma refugees- Buddhist; and Hajong refugees- Hindus). Therefore, by exempting Muslims from the list of religious communities, the act automatically discriminates against Rohingya refugees in India.

The discriminatory nature of the CAA is also evident in the decision of the Madras High Court in *Abirami v. Union of India*<sup>830</sup> wherein, the High Court issued direction to the Central government of India to grant Indian citizenship to a Sri Lankan refugee residing in India. The High Court in its judgment observed:

*The parliament of India has recently amended the Citizenship Act. The persecuted minorities from the immediate neighborhood such as Pakistan, Afghanistan, and Bangladesh now have an opportunity of getting Indian Citizenship. Though Sri Lanka does not fall within the said amendment, the very same principle is equally applicable.*

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<sup>826</sup>CAA, *supra* note 170, s 6B(2). See, *The Citizenship Act, 1955*, *supra* note 223.

<sup>827</sup>CAA, *supra* note 170, s 2.

<sup>828</sup>*Constitution, India*, *supra* note 27 art 14.

<sup>829</sup> “Who are Rohingya” *AlJazeera*(18 April 2018), online: <  
<https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya>>.

<sup>830</sup>*Abiramiv. Union of India*, W.P. No. 12361 of 2022.

*One can take judicial notice of the fact that Hindu Tamils of Sri Lanka were primarily victims of racial strife.*<sup>831</sup>

The judgment takes a liberal interpretation of the CAA in order to grant Indian citizenship to Hindu refugees from Sri Lanka, even though the CAA allows only refugees from Afghanistan, Bangladesh, or Pakistan to apply for citizenship. The judgment in *Abirami's* case was delivered in 2022,<sup>832</sup> after the Supreme Court of India's decision to deport Rohingya refugees (the majority of whom are Muslims), in *Mohammad Salimullah's* case.<sup>833</sup> This statute and judgment illustrates India's discriminatory treatment of Rohingya refugees. The next section discusses the judgment in *Salimullah's* case to analyze India's treatment of Rohingya refugees and its stance on *non-refoulement*.

#### **4.3. *Mohammad Salimullah* case: India's non-compliance with *non-refoulement* and discrimination against Rohingyas**

In 2017, the Home Ministry of India issued a circular to all the States and Union territories in India, to identify and initiate the deportation of illegal migrants from Rakhine State (Rohingya).<sup>834</sup> For this the government relied on the power conferred to it by the provisions of the Passport Act of 1920,<sup>835</sup> and the Foreigners Act of 1946.<sup>836</sup> In response to the government order, Mohammad Salimullah (a Rohingya immigrant) filed a petition in the Supreme Court to prevent deportation of Rohingya refugees to Myanmar.<sup>837</sup>

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<sup>831</sup>*Ibid* at para 4.

<sup>832</sup>*Supra* note 821.

<sup>833</sup>Salimullah, *supra* note 31.

<sup>834</sup>*Advisory on Illegal Immigrants* (Ministry of Home Affairs, 2017).

<sup>835</sup>*The Passport Act, 1920*, *supra* note 777, s 4.

<sup>836</sup>*The Foreigners Act, 1946*, *supra* note 646, ss 14 and 14A(b).

<sup>837</sup>Malcolm Katak, "REFOULING ROHINGYAS: THE SUPREME COURT OF INDIA'S UNEASY ENGAGEMENT WITH INTERNATIONAL LAW" (2021) 7:2 JLIA 116–127, online: <<https://e-jlia.com/index.php/jlia/article/view/298>> at 117.

The main issue raised was that the deportation would constitute a violation of Article 14 (right to equality),<sup>838</sup> Article 21 (right to life),<sup>839</sup> and Article 51(c) [fostering respect for International law and treaty]<sup>840</sup> of the Indian Constitution.<sup>841</sup> The petitioners contended that the proposed deportation would also violate India's international obligations under the principle of *non-refoulement*.<sup>842</sup> However, in March 2021, approximately 170 Rohingya refugees were detained and arrested from the State of Jammu & Kashmir in India, to be deported to Myanmar.<sup>843</sup> Therefore, Mohammad Salimullah filed an interim application on 11<sup>th</sup> March 2021, to prevent the deportation of Rohingya from India.<sup>844</sup>

#### **4.3.1. The judgment**

In response to the interim application filed by Mohammad Salimullah, the Supreme Court of India, on 8<sup>th</sup> April 2021, passed an interim order allowing deportation of Rohingya refugees from India, subject to the procedure prescribed by law.<sup>845</sup> The judgment was delivered by the bench of three judges consisting of the Chief Justice of India S.A. Bobde, Justice AS Bopanna, and Justice V. Ramasubramanian.<sup>846</sup> While dismissing the plea, the court stated that India is not a signatory to the 1951 Refugee Convention.<sup>847</sup> Concerning Article 51(c)<sup>848</sup> of the Indian Constitution (fostering respect for international law and treaty obligations), the court asserted that, “the national courts

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<sup>838</sup> *Constitution, India, supra* note 27, art 14.

<sup>839</sup> *Ibid*, art 21.

<sup>840</sup> *Ibid*, art 51(c). The article 51(c) of the constitution states to, “Foster respect for international law and treaty obligations in dealings of organized peoples with one another.”

<sup>841</sup> *Constitution, India, supra* note 27.

<sup>842</sup> *Mohammad Salimullah v Union of India, supra* note 31.

<sup>843</sup> Umer Maqbool, “Rohingya Refugees Stage Protest in J&K Detention Centre, Demand Immediate Release” *The Wire* (18 July 2023), online: < <https://thewire.in/rights/rohingya-refugees-stage-protest-in-jk-detention-centre-demand-immediate-release>>.

<sup>844</sup> *Mohammad Salimullah v Union of India, supra* note 31.

<sup>845</sup> *Ibid*.

<sup>846</sup> *Ibid*.

<sup>847</sup> *Ibid* at para 12.

<sup>848</sup> *Constitution, India, supra* note 27.

can draw inspiration from the International Conventions/Treaties, so long as they are not in conflict with the municipal law.”<sup>849</sup>

Further, the court accepted that the rights under Articles 14 and 21 of the Constitution are guaranteed to all, irrespective of citizenship, but the right to reside and settle in any territory in India, under Article 19(1)(e)<sup>850</sup> is available only to Indian citizens.<sup>851</sup> While refusing to grant the interim relief, the court did stipulate that Rohingya refugees shall not be deported unless the procedure provided by the law is followed.<sup>852</sup>

#### **4.3.2. Analysis of the Judgment**

It could be contended that the judgment is flawed on many grounds. While discussing Article 51(c), the court acknowledged that municipal courts could draw inspiration from international legal instruments if they are not in conflict with the municipal laws.<sup>853</sup> However it failed to acknowledge the international obligation of *non-refoulement* (contended by the petitioners) as customary international law. India is a state party to both ICCPR and the CAT, both of which recognize the principle of *non-refoulement*.<sup>854</sup> The Supreme Court of India has asserted in various decisions that the application of customary law should be encouraged in Indian domestic legislation.<sup>855</sup> The court has also clarified that in case of conflict between the application of customary law and domestic legislation, the customary law should prevail.<sup>856</sup> By allowing the

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<sup>849</sup> *Mohammad Salimullah v Union of India*, *supra* note at para 12.

<sup>850</sup> *Constitution, India*, *supra* note 27, art 19(1)(e). Article 19(1)(e) states, “all citizens shall have the right to reside and settle in any part of the territory of India.”

<sup>851</sup> *Mohammad Salimullah v Union of India*, *supra* note 31 at para 13.

<sup>852</sup> *Ibid* at para 15.

<sup>853</sup> *Ibid* at para 12.

<sup>854</sup> “UN Treaty Body Database” (last visited 10 August 2023), online: *UN Human Rights Treaty Bodies* <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN)>.

<sup>855</sup> *People’s Union for Civil Liberties v Union of India*, 1997 1 SCC 301.

<sup>856</sup> *Smt Ass Kaur (Deceased) By LRs v Kartar Singh (Dead) By LRs & Ors*, Appeal (civil) 12395 of 1996.

deportation of Rohingyas, the judgment fails to recognize its customary obligations under the international legal instruments.

Further, the court only recognized the right to reside and resettle in any part of the country, available to citizens under Article 19(1)(e) of the constitution,<sup>857</sup> rather than relying on the right to life under Article 21 of the constitution. This is contrary to the previous judgments of the various courts that recognize the principle of *non-refoulement* as inherent under Article 21 of the Constitution.<sup>858</sup>

The judgment, by referring to Rohingyas as ‘illegal immigrants’,<sup>859</sup> treats them as ‘foreigners’, rather than ‘refugees’. In the past, India has differentiated between illegal immigrants and refugees.<sup>860</sup> For example, India has issued registration certificates,<sup>861</sup> identity certificates,<sup>862</sup> and special entry permits<sup>863</sup> to Tibetan refugees residing in India.<sup>864</sup> These documents allow them to reside in India, undertake international travel from India, and to make a safe transit from Nepal to India.<sup>865</sup> India has also granted citizenship to refugees in the past. For instance, the Supreme Court of India in *NHRC v.*

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<sup>857</sup> *Constitution, India, supra* note 27, art 19(1)(e).

<sup>858</sup> *Supra* note 786.

<sup>859</sup> *Mohammad Salimullah v Union of India, supra* note 31.

<sup>860</sup> Nirupama Subramanian, “On refugees and illegal immigrants, how India’s stance changes with circumstances” *The Indian Express* (13 April 2021), online: <<https://indianexpress.com/article/explained/on-refugees-and-illegal-immigrants-how-indias-stance-changes-with-circumstances-7270883/>>.

<sup>861</sup> “Legal Overview of the Status of Tibetans in India”, online: *Tibetan Legal Association* <<https://tibetanlegalassociation.org/en/legal-overview-of-the-status-of-tibetans-in-india/>>.” “Registration certificates are issued to Tibetan refugees in India and allow them with an informal status to live in India.”

<sup>862</sup> *Ibid.* “Identity Cards or ICs allow Tibetan refugees residing in India to undertake international travels. They act like a passport.”

<sup>863</sup> *Ibid.* “Special Entry Permits or SEPs are issued to Tibetans in Nepal before they depart for India. SEPs are issued for 4 purposes: refugees, education, pilgrimage, and other.”

<sup>864</sup> *India: Residency rights of Tibetan refugees, including the requirements and procedures for Tibetan refugees to obtain a Registration Certificate; rights to employment, education, health care, and other social services; consequences for Tibetans without a Registration Certificate, including instances of refoulement*, IND105009.E (Canada: Immigration and Refugee Board of Canada, 2015).

<sup>865</sup> *Ibid.*



*State of Arunachal Pradesh and Another* (1996),<sup>866</sup> and *Committee for C.R. of C.A.P. & Ors. v. State of Arunachal Pradesh* (2015),<sup>867</sup> granted citizenship to Chakma refugees (belonging to Buddhist community) residing in India. India has previously granted citizenship to Tibetan refugees (belonging to the Buddhist community).<sup>868</sup>

It is noteworthy that the judgment in *Salimullah's* case was delivered after the Parliament of India adopted the CAA in 2019.<sup>869</sup> As discussed above, the CAA excludes Muslim refugees from the six religious communities exempted from the definition of 'illegal migrants'.<sup>870</sup> As the majority of the Rohingya refugees are Muslims,<sup>871</sup> the enactment of the CAA and the court's decision to deport Rohingya refugees indicates discriminatory treatment of Rohingya refugees and raises serious questions on India's recognition of *non-refoulement* as customary international law. Therefore, in order to analyze India's stance on the principle of *non-refoulement* and discrimination against Rohingya refugees, the next section discusses decisions by various courts in India on the principle of *non-refoulement*.

#### **4.4. Non Refoulement- A guarantee under the Indian Constitution?**

The principle of *non-refoulement* is customary international law and has also evolved as *jus cogens*, meaning, that no derogation from this principle is permitted.<sup>872</sup> Even the non-contracting states of the 1951 Refugee Convention, like India, cannot

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<sup>866</sup> *Supra* note 786.

<sup>867</sup> 2015:INSC:672.

<sup>868</sup> *Office Memorandum: Grant of Passport facilities to Tibetan Refugees (TRs) born in India between 26/01/1950 and 1/07/1987 and their children who have been declared as Indian citizens by birth under the Citizenship Act, 1955* (Ministry of External Affairs, Government of India, 2018).

<sup>869</sup> "Citizenship Amendment Bill: India's new anti-Muslim law explained" *BBC* (11 December 2019), online: < <https://www.bbc.com/news/world-asia-india-50670393> >.

<sup>870</sup> *CAA*, *supra* note 170.

<sup>871</sup> *Supra* note 820.

<sup>872</sup> Allain, *supra* note 672.

derogate from this principle.<sup>873</sup> While India refuses to ratify the 1951 Refugee Convention, it acknowledges the principle of *non-refoulement* as obligatory.<sup>874</sup> The courts in India have recognized the principle of *non-refoulement* as customary international law.<sup>875</sup> In this regard, reference may be made to the decision made by one of the District courts in India, wherein the court observed,

*The principle of non-refoulement is a part of customary international law in India. This principle binds India, irrespective of the fact whether it is a signatory to the 1951 Refugee Convention or not, inasmuch as it is a party to other conventions which contain non-refoulement.*<sup>876</sup>

Moreover, there are many instances where the Indian courts have interpreted the principle of *non-refoulement* within the ambit of Article 21 of the Indian Constitution. Remarkably the High Court of Gujarat in *Kater Abbas Habib Al Autaifi v. Union of India*,<sup>877</sup> observed,

*the principle of non-refoulement prohibits expulsion of a refugee to a place where his life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion. The principle intends to protect the life and liberty of an individual irrespective of his nationality. The same intention is encompassed in Article 21 of the Constitution, as long as the presence of refugee is not prejudicial to the law and security of the country.*

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<sup>873</sup>*Ibid.*

<sup>874</sup> Omar Chaudhary, "Turning Back: An Assessment of Non-Refoulement under Indian Law" (2004) 39:29 Economic and Political Weekly 3257, online: <<http://www.jstor.org/stable/4415288>>.

<sup>875</sup>*Supra* note 786.

<sup>876</sup>*State v Chandra Kumar*, 2011 SCC OnLine Dis Crt (Del) 1.

<sup>877</sup>*Kater Abbas Habib Al Autaifv. Union of India*, (1997) 3 SCC 433.

Moreover, the High Court of Delhi acknowledged that the principle of *non-refoulement* is considered a part of the right to life enshrined in Article 21 of the Indian Constitution, as the principle protects the life of an individual.<sup>878</sup> In these decisions, Indian courts have reaffirmed the principle of *non-refoulement* as a part of customary international law and recognized it to be encompassed within the ambit of the right to life under Article 21 of the Indian Constitution.<sup>879</sup> These decisions not only affirm India's obligation towards the principle of *non-refoulement*, but also outlines its obligations towards refugees and asylum seekers.

Further, there have been instances where the Indian courts have shown judicial activism and prevented the expulsion of refugees, upholding the principle of *non-refoulement*. As discussed above, in *Gurunathan v. Government of India*,<sup>880</sup> the High Court of Madras held that Sri Lankan refugees should not be forced to return to Sri Lanka against their will.<sup>881</sup> Similarly, in *Syed Ata Mohammadi v. Union of India*,<sup>882</sup> the High Court of Bombay expressed its unwillingness to deport Iranian refugee to Iran. The court observed that, since the refugee is recognized by the UNHCR, he should not be deported against his will.<sup>883</sup> Further, the court acknowledged that the decision of the court was in line with the principle of *non-refoulement*.<sup>884</sup>

However, in 2017, the Indian State Minister of State for Home Affairs announced the government's plan to deport illegal immigrants including Rohingya.<sup>885</sup> The Indian

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<sup>878</sup>*Dongh Lian Kham &Anr vs Union of India &Anr*, WP(CRL) No1884/2015.

<sup>879</sup>*Constitution of India*, *supra* note 27 art 21.

<sup>880</sup>WP No. S 6708 and 7916 of 1992.

<sup>881</sup>*AC Mohd Siddique v Government of India and others*, 1998 (47) DRJ (DB).

<sup>882</sup> W.P No. 7504/1994 at the Bombay High Court.

<sup>883</sup>*Syed Ata Mohammadi v Union of India*, WP No 7504/1994 at the Bombay High Court.

<sup>884</sup>*Ibid.*

<sup>885</sup>"India: Don't Forcibly Return Rohingya Refugees", *Human Rights Watch* (17 August 2017), online: <<https://www.hrw.org/news/2017/08/17/india-dont-forcibly-return-rohingya-refugees>>.

government asserted that it planned to, “deport illegal immigrants including Rohingya, regardless of their registration status of the refugee with the UNHCR or international protection standards.”<sup>886</sup> Subsequently in 2018, India deported seven Rohingya refugees to Myanmar citing the refugees ‘willingness to repatriate’.<sup>887</sup> These actions of the Indian government not only indicate discriminatory treatment of Rohingya refugees, but also its disregard for the principle of *non-refoulement*. Furthermore, the 2021 judgment of the Indian Supreme Court in *Mohammad Salimullah v. Union of India*,<sup>888</sup> to deport Rohingya refugees to Myanmar, demonstrates a significant deviation from the earlier observations of the High Courts on *non-refoulement* and also suggests discrimination against Rohingya refugees in India.

In *Salimullah’s* judgment, it was contended by the government of India (appellant) that Rohingya pose a threat to the national security of the country and therefore they should be deported.<sup>889</sup> In the past, the Indian government has reflected a discriminatory attitude towards Rohingyas alleging the threat of national security.<sup>890</sup> Rohingya were linked to external elements that could endanger country’s security and incite anti-national activities that could lead to communal violence in India.<sup>891</sup>

Apart from its discrimination against Rohingya refugees, the judgment does not clarify India’s position on *non-refoulement*. Rather, the decision asserts that India’s obligation to foster respect for international law and treaties should not be in conflict with

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<sup>886</sup>“India: 7 Rohingya Deported to Myanmar”, *Human Rights Watch* (4 October 2018), online: <<https://www.hrw.org/news/2018/10/05/india-7-rohingya-deported-myanmar>>.

<sup>887</sup>*Ibid.*

<sup>888</sup>*Mohammad Salimullah v Union of India*, *supra* note 31.

<sup>889</sup>*Ibid* at para 14.

<sup>890</sup>SD Pradhan, “Rohingya issue: Problem of ‘illegal foreigners’ in India” *The Times of India* (21 August 2022), online: <<https://timesofindia.indiatimes.com/blogs/ChanakyaCode/rohingya-issue-problem-of-illegal-foreigners-in-india/>>. The article indirectly reflects the opinion of the Indian government as it was authored by a former deputy national security advisor of India.

<sup>891</sup>*Ibid.*

the municipal laws of the country.<sup>892</sup> It did not comment on how the principle of *non-refoulement* came to be recognized as customary international law and evolved to the status of *jus cogens* from which no deviation is allowed. The decision also omitted the previous decisions of various courts in India which recognized India's *non-refoulement* as a customary international law.<sup>893</sup>

A clear analysis of the decisions by various courts in India reveals the ambiguous position of the country's obligation on the principle of *non-refoulement*. The analysis also reveals that, before *Salimullah's* judgment, India not only acknowledged the principle of *non-refoulement* as a customary international law but also recognized it as inherent in the right to life under Article 21 of the Indian Constitution.<sup>894</sup> Undoubtedly, *Salimullah's* judgment marked a significant deviation not only from the country's obligation to foster respect for international law and treaties, but also from its constitutional provisions. Such a deviation points out the uncertainty refugees are facing in non-contracting states.

#### **4.5. Conclusion**

The principle of *non-refoulement* has become one of the most important international provisions that aim to protect refugees and asylum seekers from persecution, human rights violations, and other ill-treatment. Notably, the principle is obligatory on all the states and has evolved as *jus cogens*, due to its adoption in various international legal instruments. Due to its status as both a principal of customary international law and *jus cogens* it is also binding on non-contracting states of the 1951 Refugee Convention. India, being one of the non-contracting states of the 1951 Convention, has also recognized the principle as customary international law. Various courts of India have also

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<sup>892</sup>*Mohammad Salimullah v Union of India*, *supra* note 31 at para 14.

<sup>893</sup>*Supra* note.

<sup>894</sup>*Constitution of India*, *supra* note 27 art 21.

acknowledged the principle as a part of customary international law and inherent in the right to life under the Constitution of India.

However, the decision of the Indian Supreme Court (in *Salimullah's* case) of deporting Rohingya refugees to Myanmar raises questions on India's position on *non-refoulement*. Due to the lack of explicit legislation protecting all refugees from *refoulement* practices in India, the judgment of the Supreme Court sets a dangerous precedent of refouling Rohingya refugees against their will. Further, the CAA legislation enacted by the Indian Parliament excludes Muslim refugees from obtaining a certificate of registration or naturalization, curtailing the possibility of getting Indian citizenship. The legislation impacts Rohingya refugees living in India as it categorizes any refugees belonging to religious communities other than Hindu, Jain, Parsi, Sikh, Buddhist, and Christians (from Bangladesh, Afghanistan, and Pakistan) as 'illegal migrants'.

Under International law, refugees are treated distinctly from an 'illegal immigrants'. But, by declaring Rohingya refugees as 'illegal immigrants', the CAA and the Salimullah judgment, have opened a pathway for the Indian government to deport Rohingyas under the Foreigners Act, 1946 and the Foreigners Order, 1948. Currently, Rohingya refugees are treated as 'illegal migrants' and will be treated on an *ad hoc* basis and remain at the absolute discretion of the Indian government. This leaves them vulnerable to the risk of deportation back to the state of persecution. The case of Rohingya refugees in India reveals that the absence of national legislation for the protection of refugees and non-compliance with international legal instruments in non-contracting states, could set a dangerous precedent that would allow discrimination, and leave refugees to the discretion of the hosting state.

## Chapter 5: Conclusion

Refugees are one of the most vulnerable people in the international community. Due to the fear of persecution on grounds of race, religion, nationality, membership of a particular social group, or political opinion, in their country of nationality or residence, refugees seek protection in other countries (host countries).<sup>895</sup> Since its inception in 1951, the Refugee Convention is the main international instrument that addresses legal protection, rights, and other assistance to refugee in host countries who are contracting to the convention.<sup>896</sup>

However, the convention offers temporary protection for refugees, without any scope of resettlement.<sup>897</sup> This creates problems for asylum seekers and stateless persons because they have limited rights under the convention and are at the discretion of the host state.<sup>898</sup> Rohingya refugee crisis is one such crisis which reveals the vulnerability of refugees in contracting and non-contracting states of the 1951 Refugee Convention. This thesis has attempted to assess the causes behind the Rohingya refugee crisis and doing a comparative analysis of refugee protection framework in contracting and non-contracting states of the 1951 Refugee Convention.

To ascertain the root cause behind the Rohingya refugee crisis I analyzed the colonial policies of British and post-colonial policies of Myanmar after getting independence from the British. This analysis revealed that there are multiple causes behind Rohingya refugee crisis. The Rohingya refugee crisis is rooted not only in the

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<sup>895</sup>*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 1 art 1(2)(A).

<sup>896</sup>*Ibid.*

<sup>897</sup>Heather Alexander & Jonathan Simon, “Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change” (2014) 26:3 Fla J Intl L 532. *See*, Kemal Kirişçi, “The 1951 Refugee Convention is falling short of its mission. Could the Global Compact on Refugees help?”, (26 July 2021), online: *Brookings*<<https://www.brookings.edu/articles/the-1951-refugee-convention-is-falling-short-of-its-mission-could-the-global-compact-on-refugees-help/>>.

<sup>898</sup>“What is a Refugee? Definition and Meaning”, online: *USA for UNHCR*<<https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>>.

‘divide and rule’ policy of the British (which led to a divisive society and communal tensions between the Buddhist majority group of Myanmar and Muslim Arakanese minority group), but also in the post-colonial laws of Myanmar that discriminated against Rohingya in Myanmar. Although, the 1982 Citizenship law played a crucial role in taking away the citizenship of Rohingya in Myanmar, but the Buddhist community also allowed this discrimination by the government. The crisis was further exacerbated due to Military junta, which targeted Rohingya in Myanmar. This discrimination led to persecution and Human Right violations of Rohingya refugees in Myanmar. Due to these reasons the UN referred the Rohingya crisis as a ‘textbook example of ethnic cleansing’.<sup>899</sup>

To flee the violence, human rights violations, discrimination, and persecution, Rohingya fled Myanmar to take shelter in different countries, claiming asylum. Some of the host countries in which Rohingyas took asylum, are non-contracting to the 1951 Refugee Convention. Therefore, this thesis further analyzed the protection framework available to refugees in non-contracting states of the 1951 Refugee Convention. In doing so, the thesis made a comparative analysis with the contracting states of the 1951 Refugee Convention. Although, the comparative analysis is based on the protection mechanism offered by the contracting and non-contracting countries to all refugees, the main focus remained on their treatment of Rohingya refugees.

The comparative analysis is also used to answer the central research question of the thesis as to difference between legal frameworks available to refugees in contracting and non-contracting states. This difference is used to investigate the claims whether contracting countries are better at hosting refugees as compared to non-contracting

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<sup>899</sup>“UN human rights chief points to ‘textbook example of ethnic cleansing’ in Myanmar”, *UN News* (11 September 2017), online: <<https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>>.



countries. To answer these questions, the obligation of states under the 1951 Refugee Convention and international human rights instruments (such as the UDHR, ICCPR, CRC, etc.) were examined.

This thesis identified that non-contracting states rely on international human rights instruments to provide protection to refugees. Further, they also rely on the principle of *non-refoulement*, which is both a part of the 1951 Refugee Convention and important human rights instruments. The non-contracting states host approximately 80% of refugees as compared to contracting states of the 1951 Refugee Convention.<sup>900</sup> Although, the non-contracting states are trying to respect obligations under international human rights instruments and the 1951 Refugee Convention (principle of *non-refoulement*), refugees are suffering from various human rights violations (such as the violation of right to life, right to education, freedom of movement, right to an adequate standard of living, etc.) in non-contracting states. On the other side, contracting states, which have an obligation under the 1951 Refugee Convention to protect refugees, have shown a lack of willingness to accept refugees.

To assess the legal policies and the treatment of Rohingya refugees in contracting and non-contracting states of the 1951 Refugee Convention, the thesis analyzed the refugee protection mechanism in Canada (a contracting state), Bangladesh and India (non-contracting states). The analysis suggested that though some contracting states like Canada are liberal in accepting refugees, they host considerably less number of Rohingya refugees (1000 Rohingya refugees). This trend is followed by other contracting states. Among non-contracting states, the thesis focused on the case study of Bangladesh and India as they are hosting majority of Rohingya refugees. Bangladesh is hosting largest

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<sup>900</sup>Group, *supra* note 513.

number of (approximately 1 million) Rohingya refugees.<sup>901</sup> This is greater than the number of Rohingya refugees hosted by all the contracting states in total.

However, a thorough analysis of treatment of Rohingya refugees in Bangladesh and India suggested that, even among non-contracting states the refugee protection mechanism and treatment of refugees differ considerably. This is confirmed by comparing the treatment of Rohingya refugees in Bangladesh and in India. Where on the one side, Bangladesh is hosting largest number of Rohingya refugees (Among both contracting and non-contracting states) being a non-contracting state, India is deporting Rohingya refugees to Myanmar, against the principle of *non-refoulement*.

This reveals a considerable gap in refugee protection mechanism, specifically in regard to Rohingya refugees, in both contracting and non-contracting countries of the 1951 Refugee Convention. Neither of them offers a long term meaningful solution for Rohingya refugees. This is also because contracting states rely on the 1951 Refugee Convention to provide protection to refugees. While the convention outlines various duties of hosting state and offers rights to refugees, it does not talk about resettlement. Similarly, the non-contracting states rely on international human rights instruments and the principle of *non-refoulement* to host refugees, neither the instrument nor the principle of *non-refoulement* can provide durable solutions for refugees. With regard to Rohingya refugees, they are not considered citizens of Myanmar and are potentially stateless people; the absence of scope of resettlement has put these refugees in a limbo.

Undoubtedly, the lack of provision for resettlement of refugees in the 1951 Convention does not mean that it is ineffective. The importance of the 1951 Refugee Convention in protection of refugees could be analyzed by the fact that its provisions are

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<sup>901</sup>*Ibid.*

respected even by the non-contracting states. In this regard, the thesis focuses on the principle of *non-refoulement*, which prohibits the states from removing refugees from their territories to other place, where the refugee has a well founded fear of persecution. A thorough discussion on *non-refoulement* indicates that the principle is accepted as the norm of customary international law and is therefore complied with by the countries that are non-contracting to the 1951 Refugee Convention. Apart from the 1951 Refugee Convention, the principle of *non-refoulement* has been adopted by various international (For example- ECHR, Convention on Torture, and the ICCPR) and regional legal instruments (For example- African Unity Organization Convention, 1 and the American Convention on Human Rights) and has evolved as *jus cogens*, a customary norm from which no derogation is permitted.

Despite the recognition of *non-refoulement*, as *jus cogens*, the principle has some limitations under the 1951 Refugee Convention. But, the jurisprudence on *non-refoulement* suggests that these limitations are applied by the countries distinctly, irrespective of the fact whether the country is contracting or a non-contracting state to the 1951 Refugee Convention. The jurisprudence also reveals that the limitations are restrictive in nature and therefore, should be applied very carefully, in exceptional cases. As discussed in the thesis that the non-contracting states rely on the principle of *non-refoulement* for extending protection to refugees. So, the part of the thesis emphasizes on India's (a non-contracting state) stance on the principle of *non-refoulement* with regard to Rohingya refugees.

India has a history of hosting different classes of refugees. Despite that India has not ratified the 1951 Refugee Convention or the 1967 Protocol. Consequently, India does

not any domestic legal framework regarding refugees. Based on the jurisprudence of Indian courts, the principle of *non-refoulement* has been recognized as a part of customary international law. The courts have also recognized the principle as inherent to right to life under Article 21 of the Indian Constitution. However, in light of the Citizenship (Amendment) Act, 2019 passed by the Indian government and the decision of the Indian Supreme Court in *Mohammad Salimullah v. Union of India*, this thesis argues that India is discriminating Rohingya refugees in disregard of the principle of *non-refoulement*. Most importantly, the analysis in *Salimullah's* judgment also reveals that India has an ambiguous stance on the principle of *non-refoulement*. India's uncertain stance on *non-refoulement* and discrimination against Rohingya refugees sets a dangerous precedent for other countries to follow.

In conclusion this thesis serves as a reminder that nobody chooses to be a refugee. The Rohingya refugee crisis demonstrates that a refugee crisis can go on for decades. In such circumstances, it is important that the refugees are offered protection from the international community. This thesis reveals that both contracting and non-contracting countries differ in their approach of providing protection to refugees. Where on the one hand, lack of acceptance is inhibiting refugees from getting protection from the contracting states; human rights violations, discrimination, and deportation are the worst fears of refugees in non-contracting states. Evidently, both contracting and non-contracting states suffer from drawbacks in terms of their protection mechanism. Instead of focusing on the question as to whether a contracting or a non-contracting state is providing a better protection framework for refugees, the international community should focus on addressing the gaps in the protection mechanism of both contracting and non-

contracting states and provide a long-term durable solution for refugees' communities like Rohingya refugees who have spent decades waiting for the refugee crisis to end.

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