

## Survival of the Marginalized: Rohingya Muslims and the Need for a Saarc Refugee Framework

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### Abstract:

*Forced migration and illegal trafficking of refugees has set off a critical human rights issue in our time, resulting in increasing international legal and political concern that deserves but has not yet adequately received enough scholarly attention. One of such forgotten but deserving issues is the extreme violation of human rights in Burma, with Rohingya Muslims. Until recently, thousands of Rohingya Muslims have been killed, in what has been described as “ethnic cleansing”, and it continues to be a “blind spot” for the world in general, and the subcontinent in particular. Even the UN accepts that the “Rohingya are the world’s most ignored and persecuted community.”*

*It won’t be implausible to suggest that, this consistent racist attitude of the state government towards the Rohingya Muslims is aimed at extermination or exodus of the community. As a consequence, most of the Rohingya Muslims try migrating to the neighbouring state of Bangladesh. Notably, facing chronic refugee crisis, Bangladesh has at many instances forcibly deported the Rohingyas by using excessive force. Through this paper, the authors point out the failure of the international law and its enforcing institutions in addressing these “crimes against humanity” and the West’s selective attitude in dealing with Human Rights abuses. The paper seeks to establish the need for a SAARC refugee framework, for dealing with such situations, so that the burden does not fall on some nations alone. We examine the existing regulatory framework dealing with asylum seekers entering the country undocumented and provide recommendations, on the lines of Refugee Convention, 1951 and other international obligations.*

**Keywords:** Rohingya Muslims, SAARC, Refugees, Framework.

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## INTRODUCTION

A Flash Report of the UN was released on the 3<sup>rd</sup> of February 2017, which reports as heinous a crime as “slaughtering of children and babies” in the Rakhine territory of Myanmar. Of 101 women that were interviewed, 88 reported of having been raped, while 63 were sexually abused by the state’s armed forces. While thousands of people have been killed, in what many describe as “ethnic cleansing” of the Rohingya Muslims, it continues to be a “blind spot” for the world, receiving far less attention of international community than its magnitude warrants<sup>1</sup>.

The Rohingyas can be described as stateless Muslims living in Myanmar’s Rakhine state and adjacent areas of neighbouring Bangladesh. From a historical perspective, the ethnic group has survived in Rakhine (earlier Arakan) for centuries<sup>2</sup>. A large number of Muslim population lived in the kingdom known as Mrauk-U, that dominated the Rakhine state for a period ranging from mid fifteenth to late eighteenth centuries and the Buddhist kings there were also accorded with Muslim honorifics. However, the state of Myanmar denies any such claims<sup>3</sup>. With the establishment of Ne Win’s government and the enactment of the Citizenship Act of 1982, nearly 135 national races were recognized for citizenship, excluding muslim minority whose presence stretches back 100 years in the region. Consequently, all citizenship rights were stripped from

Rohingyas<sup>4</sup>, and thousands of them were forced to flee to Bangladesh and neighbouring regions to afford protection, causing major human rights violations.

Arguably, the state of Myanmar has been consistently and systematically targeting the Rohingya civilians with an aim to exterminate or cause the exodus of the community. This blatant abuse of power coupled with its origin from a democratically elected establishment makes it more shocking. Lord Hoffman defines persecution as, “serious harm and failure of state protection.”<sup>5</sup> Without a doubt, the authors’ argue that the Myanmar government has persecuted the community by failing to provide the basic necessities of life to the Rohingyas. The assessment report of World Food Programme conducted in April-May 2017 mentions deteriorating condition of Rohingyas, with severe food security crisis and acute malnutrition amongst lakhs of children<sup>6</sup>. Apart from prevailing anti-muslim and anti- Rohingya sentiment in a Buddhist majority country, the displaced population has also been shut out by neighbouring countries, including the two major economies in the region-China and India.<sup>7</sup>

This paper attempts to posit a solution to the existing refugee crisis in Myanmar through the establishment of a SAARC Refugee Framework. Part I reviews the existing laws pertaining to Rohingyas in Myanmar and refugees under international law. Part II discusses the obligations of destination countries in influx of

<sup>1</sup> Tennery, Amy . "Why is no one helping Myanmar’s Rohingya?" *Reuters*. N.p., 17 June 2017. Web. 5 Mar. 2017..

<sup>2</sup> Poling , Gregory . "Separating Fact from Fiction about Myanmar’s Rohingya." *Center for Strategic and International Studies*. N.p., 13 Feb. 2014. Web. 7 May 2017.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *R v. Immigration Appeal Tribunal and Another*, [1999] 2 AC 629 (UKHL, Mar. 25, 1999).

<sup>6</sup> *Food Security Assessment in the Northern Part of Rakhine State*. Rep. N.p.: World Food Programme, 2017. Print.; See also Revesz, Rachael. "Burma: 80,000 Muslim Rohingya children starving after military violence, warns UN agency." *The Independent* . N.p., 17 July 2017. Web. 21 July 2017.

<sup>7</sup> "Why are so many Rohingya migrants stranded at sea?" *BBC News*. N.p., 18 May 2015. Web. 12 June 2017. See also Ramzy, Austim. "China and India Are Sitting Out Refugee Crisis." *The New York Times*. N.p., 28 June 2015. Web. 19 June 2017.

refugees. Part III analysis the need for a separate Refugee Framework in South Asia and Part IV provides conclusions.

### INTERNATIONAL LAW & THE ROHINGYA ISSUE

Ideally, the goal of the Refugee Convention should be to provide surrogate national protection to persons whose own country is unable or unwilling to protect them from the risk of being persecuted there.<sup>8</sup> To that extent, the duty to consider risk in each country of which the applicant is a national and to recognise status only if a relevant risk is found in each of them is thus mandatory.<sup>9</sup>

There still persists great confusion as to the status of the Rohingya Muslims. Essentially, at present they constitute a class of *stateless citizenry*, because of the Burmese Citizenship Law of 1982. Notably, the Rohingyas were recognised as citizens post Burma's independence; it is only after the military takeover that they were stripped off of their citizenship rights. This, it is argued, is against Article 15 of the Universal Declaration of Human Rights, and violates the principle that a state should grant its nationality to a person born in its territory.<sup>10</sup> On account of being deemed as stateless, Rohingyas cannot afford any protest against discrimination being done by national authorities and lack access to identity, education, movement and employment.<sup>11</sup>

<sup>8</sup> MALCOLM SHAW, *INTERNATIONAL LAW* 64 (6<sup>th</sup> edn., 2008).

<sup>9</sup> Canada (Minister of Employment & Immigration) v. Akl, (1990) 140 NR 323 (Can. FCA, Mar. 6, 1990).

<sup>10</sup> Article 15 (1) says, "Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 1 of the Convention on the Reduction of Statelessness says, "A contracting state shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: a) At birth, by operation of law.." Article 8 of the same convention states, "A

As a consequence, most of the Rohingya Muslims try migrating to the neighbouring state of Bangladesh. Notably, immediate neighbours such as Bangladesh has at many instances forcibly deported the Rohingyas by using excessive force. The plan of the Bangladesh government to "relocate tens of thousands of Rohingya refugees to a remote island that appeared only eight years ago, and floods at high tide, threatens to trigger a humanitarian catastrophe."<sup>12</sup> What is more deplorable, is the lack of interest shown by the West in addressing the 'crimes against humanity' in Myanmar.

### Domestic laws and Impact on Rohingyas-

Black's Law Dictionary defines a citizen as 'a member of a free city or jural society, (civitas.) possessing all the rights and privileges which can be enjoyed by any person under its constitution and government, and subject to the corresponding duties.'<sup>13</sup> The scope of Black's definition of citizen and citizenship encompasses those individuals who have been guaranteed of their rights and privileges as per constitution and government. Notably, the Citizenship Act of 1982 grants citizenship by descent (*jus sanguinis*), and confers citizenship on individuals born out of parents who are themselves nationals. As per the Citizenship Act, an individual can be accorded citizenship if he is (i) belonging to the 135 legally recognized national ethnic groups, or (ii) an individual

Contracting state shall not deprive a person of his nationality if such deprivation would render him stateless."

<sup>11</sup> Abdelkader, Engy. "The Rohingya Muslims in Myanmar: Past, Present, and Future." *Oregoon Law Review* 15 Or. Rev. Int'l L. (n.d.): n. pag. 393 Print.

<sup>12</sup> Sheikh Azizur Rehman. "Plan to move Rohingya to remote island prompts fears of human catastrophe." *The Guardian*. N.p., 2 Feb. 2017. Web. 13 Apr. 2017.

<sup>13</sup> "Citizen." *Black's Law Dictionary*. N.p., n.d. Web. 29 Mar. 2017.

who was previously granted citizenship on the date of enactment of the act. This essentially meant that nearly everybody had citizenship as per the original 1948 Act. However, the 1982 Act provided that citizens reapply for citizenship, and until last year (2016), most of Rohingyas were not accorded citizenship status, even after re-application. Further, Myanmar fails to identify Rohingyas as officially recognized national ethnic group. Rohingyas in Northern Rakhine have been issued Temporary Registration Certificates (TRC) since 1995, which does not mention the place of birth, and hence cannot be used to claim citizenship but denote 'lawful residence' to its holder.

Domestically, Rohingyas are subject to forced labour, face restriction on freedom of movement and are denied right to marry.<sup>14</sup> They are not accorded state protection from internal conflicts and are often at the receiving end of the widespread rancour from government officials and Burmese citizens alike.<sup>15</sup> Sectarian violence is frequent in northern Arakan state and Rohingyas are subjects of intense discrimination and prejudice throughout the country.<sup>16</sup>

### International Law pertaining to Refugees in Myanmar-

<sup>14</sup> "The young and the hopeless in Bangladesh's camps." *RefWorld*. UN High Commissioner for Refugees (UNHCR), 23 Jan. 2013. Web. 14 July 2017. <<http://www.refworld.org/docid/5100ecaf2.html>>.

<sup>15</sup> "The Government Could Have Stopped This"-Sectarian Violence and Ensuing Abuses in Burma's Arakan State." n.d.: n. pag. *Human Rights Watch*. 31 July 2012. Web. 13 June 2017.

<sup>16</sup> *Id.*

<sup>17</sup> Article 55 & 56, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 25 July 2017]

Although an umbrella of laws exists in dealing with crisis relating to refugees, no plausible solution persists in dealing with it. Article 55 and 56 of United Nations Charter obligates member nations to observe and promote universal respect of human rights and fundamental freedoms of all without distinction on the basis of religion, race, sex or language.<sup>17</sup> The United Nations has also adopted a number of conventions on statelessness, viz. 1954 Convention relating to status of Stateless persons and 1961 Convention on reduction of statelessness. General Assembly Resolution 66/290 mandates the member nations to observe human security with full respect in accordance with purposes and principles enshrined in the UN Charter.<sup>18</sup> As per UNDP Report of 1994, human security covers economic, political, food, health, environmental and community security.<sup>19</sup> Sadly, since the denial of citizenship rights to Rohingyas by virtue of Citizenship Law of 1982, Rohingyas live in constant state of insecurity and exclusion. This is a clear violation of GA Resolution 66/290 which provides all individuals 'freedom from fear and freedom from want and right to live in freedom and dignity'.<sup>20</sup>

As per well-established international norms, the nations where refuge is sought, are under an obligation to not expel a refugee lawfully in their territory save on grounds of national security and public order.<sup>21</sup>

<sup>18</sup> ¶ 3(h), General Assembly resolution 66/290, *Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome*, A/RES/66/290 (25 October 2012), available from <http://www.un.org/humansecurity/sites/www.un.org/humansecurity/files/hsu%20documents/GA%20Resolutions.pdf>

<sup>19</sup> United Nations Development Programme. *HUMAN DEVELOPMENT REPORT 1994*. Rep. New York: Oxford Oxford U Press, 1994. Print.

<sup>20</sup> *Supra* 18 at ¶ 4.

<sup>21</sup> United Nations. "Convention on the Status of Refugee" ("**Refugee Convention**"), 40 ILM 384 (2001) / UN Doc A55/383 (Annex III, p. 62) / [2004]

Confusion arises for lack of a proper definition of “national security” and “public order” which are broad enough to bring within their ambit various acts that, under normal situations would fall outside it. Furthermore, the principle of non-refoulement, as enshrined in Article 33(1) of the 1951 Convention and which forms the foundation of international refugee safety is yet another important source of international refugee law.<sup>22</sup>

### International Obligations of Destination Countries-

Any sovereign state being a member of UN is obligated to perform three specific duties towards refugees-

#### (a) Obligation to rescue the boats in distress-

Article 98 of the 1982 United Nations Convention on the Law of the Sea, to which all SAARC countries have ratified, requires a coastal state to ensure the establishment, operation, and maintenance of adequate and effective search and rescue services, and where required, to cooperate with neighbouring states for this purpose<sup>23</sup>. Furthermore, the SOLAS Convention also obliges the government responsible for the search and rescue operations to provide a place of safety or for ensuring that such a place of safety is provided<sup>24</sup>.

ATS 11. Article 31 (1) says that, “The Contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”

<sup>22</sup> Art. 33 (1), United Nations. “*Convention on the Status of Refugee*” (“**Refugee Convention**”), 40 ILM 384 (2001) / UN Doc A55/383 (Annex III, p. 62) / [2004] ATS 11. The principle of non-refoulement is also stated in UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (Article 3), International Covenant of Civil and Political Rights, 1966 (Article 7).

<sup>23</sup> United Nations. “*Convention on the Law of the Sea*” 1833 UNTS 3 / [1994] ATS 31 / 21 ILM 1261 (1982).

<sup>24</sup> “MSC.167(78) - Guidelines on the Treatment of Persons Rescued at Sea.

These conventions apply regardless of the nationality or status of the person being rescued or the circumstances in which that person is found. Hence it applies to asylum seekers and migrants, whether regular or irregular, trafficked or smuggled<sup>25</sup>.

#### (b) Obligation to determine their status-

In consonance of the principle of non refoulement under Article 33(1) of the Refugee convention, Rohingyas need to be granted a status of refugees in order to ensure compliance of international law, which has not been witnessed as such. The principle of non-refoulement has been recognised as a peremptory norm of international law, and is therefore binding on the destination states despite the fact that they are not parties to the Refugee Convention<sup>26</sup>, as it is also a member of United Nations and is obliged to protect human rights.

#### (b) Obligation to grant temporary asylum-

Being a corollary to principle of non-refoulement, this obligation prescribes refugees to be not sent back to their country of origin. Hence, until such human rights violation come to an end, Rohingya Muslims must not be sent back to Myanmar.

Furthermore, Article 14 of the UDHR prescribes right to seek and to enjoy in other countries asylum from

<sup>25</sup> UN General Assembly, “*Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*” (2000). Art 19(1) of the Migrant Smuggling Protocol: Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

<sup>26</sup> UN High Commissioner for Refugees (UNHCR). “UNHCR Note on the Principle of Non-Refoulement” November 1997. <<http://www.refworld.org/docid/438c6d972.html>>



persecution. Under Article 3 of Convention against Torture<sup>27</sup>, SAARC nations have an obligation, for non-return on grounds mentioned Article 3.

A major issue in tackling the crisis of Rohingyas is the passiveness of EU and United States including China to address the situation by imposing pressures with sanctions. This has been done in the past by NATO countries to tackle Russian Crimean crisis<sup>28</sup> and is certainly possible to prevent Rohingya crisis. It can be said without doubt that the abject failure of Myanmar in addressing the problem sanctions interference from regional leaders like China, which has huge economic footprints in Myanmar. In this background, a need for a regional framework like SAARC is necessary, which has been dealt in next section.

#### A REFUGEE FRAMEWORK

Before delving into the question of a SAARC Refugee framework, the present legal framework warrants attention. Currently, the overall population of refugees exceeds 65 million, meaning that one in every 113 persons is a refugee. Yet refugees have no formally recognized international legal protection, thereby falling between the cracks of humanitarian law and assistance. As per the definition of refugee in the 1951 United Nations Convention relating to the Status of Refugees, any person "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country". This definition suffers from glaring defects as an asylum seeker may not be categorized as a

refugee unless the criteria specified in the definition is satisfied.<sup>29</sup> It can be contended that the present 1951 Convention and 1967 Protocol on refugees was developed in and for a different era. Arguably, the Conventions are based on the humanitarian premise, a law terribly insufficient for current times, primarily because such regime is based on individual state responsibility and is propelled by increased role of state in its application and interpretation.<sup>30</sup> The present crisis demands concrete, viable solutions to the refugee crisis is South East Asian Countries, and therefore a new legal framework in view of the Rohingya refugee crisis is a necessity, from both pragmatic and humanitarian perspectives.

UN Refugee Framework signatories of neighbouring states

There are a few loopholes in the current international refugee framework, some of which the authors' have pointed out, particularly in respect of the South Asian region.

1. None of the SAARC countries are signatories to UNHCR Convention of 1951 and the Refugee Protocol of 1967. UNHCR Convention of 1951 makes it binding on the parties to follow the law prescribed under it. However, in the absence of any ratification to a common legal framework, it does not possess a binding effect. Hence, even though grave human rights stand violated in the Indian subcontinent, international law does not specify any concrete solution to the persistent threat of refugee rights violations.
2. Various obligations are imposed regarding protection of refugees arising only on entry of asylum seekers. Current norms in international law prescribe right to assistance to refugees and obligations to countries only upon the entry of that person into the territory

<sup>27</sup> Art. 3.1 The United Nations. *Universal Declaration of Human Rights*. 1948. Print. It says, "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

<sup>28</sup> "How far do EU-US sanctions on Russia go?" *BBC News*. N.p., 15 Sept. 2014. Web. 13 June 2017.

<sup>29</sup> Vevstad, Vigdis. *Refugee Protection: A European Challenge*. N.p.: Oslo: Tano Aschehoug Press, 1998. Print.

<sup>30</sup> *Infra 31*.

of signatory state. It does not impose any obligations \not to expel or persecute their own citizens.

3. UNHCR states that 'Burden-sharing is a key to the protection of refugees and the resolution of the refugee problem'. In the present times, the distribution of increased number of refugees have been highly uneven. Turkey hosts the highest number of refugees, followed by Pakistan and Lebanon. While these countries are quite impoverished themselves, putting the entire burden on some countries seems illogical.

A question arises as to why countries in the existing SAARC framework, if established, would risk their domestic, political and economic motives and accept burden sharing responsibility, especially after the failure of the international law in dealing with the problem? This is possible because of two reasons, currently not found under International law- a) Norm based motivations including strong solidarity among member states, commitment to human rights and distributive justice; b) Interest based motivations such as mutual insurance against similar situations will allow states to accept short term losses to insure protection against long term threat. Furthermore, adhering to international norms to avoid embargoes and achieving efficiencies through joint processing of refugee influx will also assist in acting as strong motivators to burden sharing.

It has also been pointed out by scholars that the refugee exodus serve as an opportunity for human traffickers and human cargo industry to generate revenue.<sup>31</sup> Though conventions such as Protocol against the Smuggling of Migrants by Land, Sea and Air, \_\_\_\_\_ exist to counter such trafficking, countries with massive influxes of refugees (Bangladesh, \_\_\_\_\_) are not signatories to the same.

<sup>31</sup> Ahmed, Nafees. "Contemporary Challenges for International Refugee Law." *Society for Policy Studies* 2/2015 (2015): n. pag. July 2015. Web. 13 July 2017.

Additionally, it is well known that religion and customs play a vital role in the day to day functioning of the societies in the subcontinent. These, unfortunately, have at many times led to gruesome communal violence, causing people to move within the SAARC nations for seeking protection. An example would be the influx of Hindus from Bangladesh, after they were attacked, in reaction to the demolition of Babri Masjid.

Thus, an Executive Body should be constituted, having members from each member state. A 'Charter of Rights of Refugees in SAARC Nations' should be made, laying down the basic fundamental rights of refugees irrespective of the rights conferred by the constitutions of the member states, because of the fact that the constitutions followed in the SAARC nations are very distinct. The Charter should also lay down the broad and general policies, guidelines and schemes in dealing with any refugee crisis arising in future. A refugee should be given free access to courts of the host nation, where the decisions should be based on the local laws and the uniform law laid down in the Charter. Also, matters related to refugees, their registration, providing proofs of residence etc. shall be governed by the Committee, through its officers working in the member states, in accordance with the Charter.

As per the provisions of the Charter, as soon as an individual flees from a nation fearing persecution, or for any reason for that matter, the status of refugee will be granted to him by the Committee. Therefore the state giving refuge will not have the power take away that status. Further, if the nation would have any issues, the same would be presented before the committee, and put to vote. It should be noted, that the

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2875594](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875594)>.

state will not have the power to arbitrarily deport the refugees to any other state, or their home nation.

Furthermore, if the nation wants to send the refugees to another member state, it would put the same as an agenda before the committee, and the same will be decided by the in accordance with the rules laid down in the Convention, thus preventing arbitrary deportation of citizens. Secondly, the question whether the time is ripe for the repatriation of refugees, will not be decided by the nation giving refuge unilaterally, but by the Committee, and the same will be binding on the nation. The Committee, after sending its officers to the home state of the refugees, will determine the question, after a conclusive report is submitted by the officers. It is an underlying assumption of refugee law that, wherever available, national protection takes precedence over surrogate international protection.<sup>32</sup>

A recent example of repatriation is the forcible deportation of Afghani refugees from Pakistan. The host state will make sure that adequate protection is given to the life and liberty of the refugees. Because of the multitude of religions followed in the subcontinent, the host state will ensure that protection is granted to the cultural identity, religion and personal laws of the refugee, and that no refugee will be forced to conform to any other faith, culture, or tradition. This is in consonance with the ideals laid down in the Universal Declaration of Human Rights.

The host nation should also endeavour, in good faith, towards providing basic means of income and living facilities. However, it should be a cardinal rule that if a member state has refused to give asylum on the grounds of national security and public order, it will be an obligation on that state to grant aid and relief to the refugees and provide financial assistance. Also, these two terms shall be clearly defined in the convention, so as to avoid inconsistencies

### **Conclusion**

The deep cultural, religious, and linguistic character, along with a common history shared by members of the SAARC necessitates increased cooperation and concord in matters arising from social, political and economic affairs. A framework among the SAARC nations for dealing with the refugees in a more humane manner, and to ensure that the burden does not fall on one nation alone, would help in fulfilling the objectives laid down in the UDHR, which calls for giving a dignified living to each individual safeguarding their means to a better life.

There is no silver bullet as far as refugee crisis is concerned. Solving it entails a bold response at the regional level and in doing so, the importance of neighbouring countries to direct the action cannot be overemphasized. Hence, establishment of a SAARC Refugee Framework is instrumental in dealing with the crisis, now or ever.

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<sup>32</sup> JAMES C HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 55, (Cambridge University Press, 2015).