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# Citizenship Amendment Act 2019 and Rohingya Refugee Crisis: A Critical Analysis

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SUPRIYA MEHTA<sup>1</sup>

## ABSTRACT

*Rohingya Refugee crisis is a major humanitarian crisis faced by international society and is a matter of concern for the United Nations High Commissioner for Refugees (UNHCR). The Rohingya Muslims had been facing discrimination and violence for a long time. On 25 August 2017, the military attacked the Rakhine state of Myanmar to execute the Rohingya Muslims staying there. Approximately 7,45,000 Rohingya Muslims fled from the Rakhine state in Myanmar. The Myanmar government refused to acknowledge the presence of Rohingyas in the Rakhine state. The policies made by the Buddhist majority country were against Rohingyas, as they feared that Rohingya Muslims want the country to be a Muslim majority country. The Rohingyas constitute approximately 7% of the total population, Buddhists 80% and other ethnic minorities 13%. The Rohingyas are denied their citizenship by the government, eventually making them 'stateless'.*

*This paper traces the timeline of discrimination faced by Rohingyas as it dates back to 1948. Further, it analyses the role of India and the approach taken by the Indian government and judiciary for tackling this crisis. Although India is not a party or signatory of the Convention relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967, it provides asylum to several refugees. Domestic legislation and policies have been formulated keeping in mind the refugees hosted by India. The Citizenship Amendment Act (CAA) 2019 is considered to be against International Human Rights, and it limits the definition of 'refugee' as defined in the 1951 Convention.*

**Keywords:** *Human rights, Rohingya Refugees, non-refoulment, Refugee law, Public International law.*

## I. INTRODUCTION

The Rohingya Muslims have always been discriminated against, and as described by United Nations (hereinafter referred as UN) Secretary-General Antonio Guterres as “one of, if not the, most discriminated people in the world”. As of now, the Rohingyas are stateless persons which means a person who is not considered as a national by any state under the operation of its law.

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<sup>1</sup> Author is a student at Alliance University, India.

Rohingyas have been discriminated against by the Myanmar government for a very long time, and all of this is recorded by the international society.

The atrocities committed in August 2017 is the most talked about in international society. The acts led to 745,000 Rohingyas fleeing their homes in Rakhine state, as they had a fear of persecution based on their religion and ethnicity. Most of them are settled in UNHCR refugee camps in Cox Bazaar Bangladesh, and approximately 40,000 fled to India.

India has referred to them as “illegal immigrants” rather than giving them the status of “refugees”. India is known for its hospitality and how they treat the Refugees. India has helped Tibetans when they fled from China; also, helped Bangladesh during its freedom fight. India being an upcoming global power has a responsibility to set an example in the global community.

In 2018, the State of Gambia has filed a case against Myanmar in ICJ and ICC, asking them for taking cognizance of the crimes committed in Myanmar, i.e. Crimes against humanity,<sup>2</sup> genocide,<sup>3</sup> etc. The atrocities committed against Rohingyas by Myanmar is purely put on hatred.

### **(A) Research Problem**

India is not a party to the Refugee convention; hence it is not bound by or has any international obligations against refugees or to implement the 1951 Refugee Convention.

### **(B) Research Question**

1. Whether the decision of India regarding the repatriation of Rohingya refugees consistent with International laws and principles?
2. Analyzing the scope of term “refugee” w.r.t. Citizenship Amendment Act and its impact on Rohingya Refugees.

### **(C) Hypotheses**

India and Bangladesh are not parties to the Refugee Convention, but they have provided asylum to refugees by accepting them as “displaced persons” or under the definition of the term refugee. India has referred to Rohingya refugees as “illegal migrants” and ordered for repatriation and this order by the Indian government in violation of the Principle of non-refoulment.<sup>4</sup>

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<sup>2</sup> Rome Statue of the international Criminal Court, 2002, Art. 7

<sup>3</sup> Rome Statue of the international Criminal Court, 2002, Art.6

<sup>4</sup> Convention relating to Status of Refugees 1951, Art. 33

#### **(D) Review of Literature**

- **Blakemore E, “Who Are the Rohingya People?”**

This article provides basic information regarding the Muslim-ethnic group, namely Rohingyas. It just gives a brief outline of who the Rohingya refugees are, which includes the history and how did they come to Burma.

- **Allard K. Lowenstein, *Persecution of the Rohingya Muslims: Is genocide occurring in Myanmar’s Rakhine State?***

This article provides a very detailed outline of the atrocities which were committed against the Rohingyas. It starts from the events which happened in 1948 and then goes on till 2012. It provides very detailed information and reasoning behind every event. It also explains the political agenda behind those acts and the steps taken by the International organization to ensure about it. The only drawback is that it is not up-to-date with the current events and does not mention how the host states responded to the influx of Rohingya refugees.

- **Rajeev Dhawan, “The ICJ’s ruling on the Rohingya and what it means for India and the CAA”**

This article starts by giving a brief outline of the Rohingya crisis and then moves on to talk about CAA and the judgement giving by ICJ. The article provides a legal view as well as a common view on the CAA and its influence on Rohingyas.

#### **(E) Scope and Objective**

The scope of this paper is to:

1. Understand the history of discrimination faced by Rohingya refugees
2. Analyze the steps taken by UNHCR for the same
3. Analyze the impact of Citizenship Amendment Act 2019 on the status of Rohingya Refugees.

This paper specifically deals with Rohingya refugees and the impact of CAA 2019 on them, This paper does not cover the current Pandemic situation and its impact on Refugees. The paper is only limited to Indian laws and territory only.

#### **(F) Research Methodology**

The research methodology followed is doctrinal and qualitative. The research mainly includes analyzing news articles, the reports and the legal as well as political aspirations behind the Rohingya refugee’s repatriation or their status. The ongoing case in the Indian Supreme Court regarding the deportation of Rohingya refugees will also be referred, to understand their stand

or rights as given in the Constitution (as referred by prosecution advocate i.e., F.S. Nariman).

## II. THE ROHINGYA CRISIS

The Rohingyas are a Muslim ethnic group from Myanmar, which was once known as Burma. They are an ethnic minority group in Myanmar and are subject to discrimination and persecution by Myanmar. As of now, the Rohingyas are stateless persons which means a person who is not considered as a national by any state under the operation of its law.<sup>5</sup>

In the 1430s, Muslim settlers came to Arakan State, now known as Myanmar, and a small population lived in Arakan State when it was conquered by the Burmese empire in 1784. Burma was later conquered by the British in 1824, and until 1948 Britain ruled Burma as part of British India. During that time, Muslims from Bengal entered the territory as a migrant worker, which in turn tripled the population of Muslims in Burma. Muslims had stayed in Burma for centuries, and Britain also promised Rohingya an autonomous state as a return for their participation in World War II, which did not happen.<sup>6</sup>

### (A) Refusal of Citizenship

After Myanmar gained its independence in 1948, the government didn't acknowledge the Rohingya – a name which was adopted by the descendants of Arakan State Muslims and the migrants to Burma. The Rohingyas were given the opportunity to be elected or a position in the government system till 1962. Although, they were not given any citizen status or any such right under the constitution of Myanmar. The 1948 Union Citizenship Act defined Myanmar citizenship and identified some specific ethnicities – which were considered to be 'indigenous races of Burma' and were granted citizenship on that basis.<sup>7</sup> As per the citizenship act, people whose families had lived for two generations in Myanmar could apply for identity cards. Many Rohingyas were provided with citizenship or identification card based on this provision. Still, the Rohingyas were included in the 1961 census of Myanmar. After the start of the military coup in 1962, which was the start of military rule in Myanmar, the government began giving documentation to very few Rohingya children, basically refusing to identify the new generation of Rohingyas as citizens or depriving them of identity cards.<sup>8</sup>

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<sup>5</sup> Convention relating to Status of stateless persons 1954, Art. 1(1)

<sup>6</sup> Blakemore E, "Who Are the Rohingya People?" (*National Geographic*, February 8, 2019) <<https://www.nationalgeographic.com/culture/people/reference/rohingya-people/>> accessed April 10, 2020

<sup>7</sup> Christina Fink, *Living Silence: Burma Under Military Rule* [2001], 56

<sup>8</sup> Irish Centre for Human Rights, *Crimes Against Humanity in Western Burma: The Situation of the Rohingyas*, [2010], 95

In 1974, Myanmar began giving all the citizens National registration cards but allowed Rohingyas to obtain only Foreign Registration cards, due to to which they had limited educational and job opportunities.

The 1984 Citizenship Act recognized 135 ethnic minorities of Myanmar and providing them with citizenship on naturalization. Rohingya was not recognized as one of the ethnic minorities by the government. Due to this law, most of the Rohingyas were rendered stateless, as the government took away their identity cards and they were not able to avail themselves the benefits of the provisions, as they have their own culture and heritage which is different from that of Myanmar people. Rohingyas being stateless was one of the consequences of this act and probably the main intention of the government. With them being stateless, they do not have any standing in front of the Myanmar courts and had limited access and opportunity for health, education, job and property ownership.<sup>9</sup>

Although the proof of Rohingyas staying in the Rakhine state of Myanmar was available and known by all, but this fact was ignored by the Buddhist-majority led country. In 1992, the Foreign Minister of Myanmar had described Rohingyas as “illegal immigrants”<sup>10</sup>

### **(B) Displacement of Rohingya**

The history of the Rohingyas migrating or being displaced from Myanmar to Bangladesh can be traced from 1942. The refugee flux may not have been a major one as seen in 2017.

In 1978, the military began an operation, famously known as “Dragon King” to find and take action against persons the military deemed to be illegal migrants.<sup>11</sup> This operation specifically targeted Rohingya in Rakhine state, the government had claimed that Rohingya were foreigners rather than an ethnic minority of Myanmar. The military had abused, raped and murdered many Rohingya.

The government also occupied the land in Rakhine state which belonged to Rohingya. As being stateless, under the constitution, they don't have any right to occupy the property. The government has made such policies or laws, which indirectly or directly intended to displace the Rohingyas. From 1990 – 2000, the government commissioned such plans which ensured that Rohingyas are being deprived of their homes, forcing them to be displaced. The government made plans regarding settling the recognized ethnic groups regarding settling them

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<sup>9</sup> Irish Centre for Human Rights, *Crimes Against Humanity in Western Burma: The Situation of the Rohingyas*, [2010], 97

<sup>10</sup> Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?* (Sept. 1996) ,9 (April 10, 2020) <<http://www.hrw.org/reports/pdfs/b/burma/burma969.pdf> >

<sup>11</sup> Allard K. Lowenstein, *Persecution of the Rohingya Muslims: Is genocide occurring in Myanmar's Rakhine State?* FORTIFY RIGHTS (April 11, 2020) <[https://www.fortifyrights.org/downloads/Yale\\_Persecution\\_of\\_the\\_Rohingya\\_October\\_2015.pdf](https://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf)>

in Rakhine state establishing 40 villages for their residential purposes.

As a result, more than 2,00,000 Rohingya fled across the border and entered Bangladesh. Others who did not flee to any country were being continuously persecuted by the Myanmar government. In 1992, due to the mass influx of Rohingyas from Myanmar, the host country i.e., Bangladesh was unable to accommodate them and as a result, the country refused to identify Rohingyas as ‘refugees’ in Bangladesh. By 1992, 2 official refugee camps were established to support the influx of refugees – Kutupalong and Nayapara. But after 1992, those who fled from Myanmar were viewed as unregistered refugees and they were left to set up their makeshift camps on the perimeter of the two already established camps.<sup>12</sup>

In the 1990s as a result of closed camp setting and the long-term integration prospects, a repatriation exercise based on a memorandum of understanding (MOU) between the Bangladesh government and the Office of United Nations High Commissioner for Refugees (UNHCR), which took place between 1993-1997, with some 2,30,000 Rohingya returning to Myanmar. Sub-standard living conditions, the absence of legal and human rights protection, political exclusion, questionable voluntariness and returnees being poorly informed of what they would encounter once back in Myanmar resulted in this operation being soundly criticized.<sup>13</sup>

Again in 2012, the Rohingyas were targeted for ethnicity and this led to ethnic hatred. A Buddhist girl was raped, and it was alleged that 4 Rohingya men were behind it. This led to a series of communal hate against the Rohingyas. In August 2017, the same hatred was triggered and led to one of the biggest humanitarian crises as of now.

The events of August 2017 triggered by far the largest and fastest refugee influx into Bangladesh. An estimation of about 745,000 Rohingyas has fled to Cox’s Bazaar. In Myanmar, entire villages were burned to the ground, families were killed and separated, and women and girls were gang raped. The military even started attacking the people fleeing from Myanmar to Bangladesh and other countries. This event is described as a “textbook example of ethnic cleansing” by United Nations.

### **III. ANALYSING INDIA’S RESPONSE**

India is one of the biggest democratic country in the world and is home to many refugees. India provides asylum to Chakmas, Tibetans and other ethnic groups, even though it is not a party to

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<sup>12</sup> Mercy Corps, *The facts: Rohingya refugee crisis*, MERCY CORPS (April 13, 2020) <<https://www.mercycorps.org/blog/rohingya-refugee-crisis-facts>>

<sup>13</sup> Brian Gorlick, *The Rohingya Refugee crisis: Rethinking solutions and accountability*, Refugee Studies Centre, Working Paper Series no. 131

the 1951 refugee convention. India even helped East Pakistan (now known as Bangladesh) during their fight for freedom and accepted the refugees as well. The Post-partition migration, one of the biggest and bloodiest ones in the world was handled with credit. As mentioned in the Constitution<sup>14</sup>, those (including Muslims) who went to Pakistan and came back before July 19, 1948, were entitled to citizenship. In 1968-71, India became a clearinghouse for Kenyan and Uganda refugees of Indian origin who had British passports. It absorbed the Tamil refugees from Sri Lanka and the Bangladesh refugees post-1971 without discrimination. Its record on the mass refugee's crisis has been creditable. Nepalis and Bhutanese are allowed to enter India. As against this, it has admitted the persecuted from Somalia, Sudan, Afghanistan and elsewhere.<sup>15</sup>

### **(A) Citizenship Amendment Act (CAA) 2019 and Rohingya**

Citizenship Amendment Act (CAA) 2019 is one of the most controversial acts and is criticized by Indian citizens and international society at large. Section 2 of CAA states that:

*"2. In the Citizenship Act, 1955 (hereinafter referred to as the principal Act), in section 2, in sub-section (1), in clause (b), the following proviso shall be inserted, namely: —*

*"Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as an illegal migrant for this Act;"*<sup>16</sup>

This section defines the term "refugee" as per Indian laws. Refugee, according to CAA, can be a person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh and Pakistan, who face persecution based on religious grounds. This limits the grounds of persecution to only religion, whereas as per the definition of Refugee, persecution is mainly on 5 grounds, i.e., race, religion, nationality, membership of a particular social group or political opinion.<sup>17</sup>

The grounds for seeking refuge or asylum for the people fearing persecution is being reduced, which is against India's international obligations. Although India is not a party to the Refugee

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<sup>14</sup> The Constitution of India, 1951, Part II Art. 6 and 7

<sup>15</sup> Rajeev Dhawan, "The ICJ's ruling on the Rohingya and what it means for India and the CAA", THE WIRE (April 11, 2020) <<https://thewire.in/law/icj-ruling-rohingya-myanmar-cao-refugees>>

<sup>16</sup> Citizenship (Amendment) Act, 2019, §2, No. 47, Acts of Parliament, 2019 (India)

<sup>17</sup> Convention relating to Status of Refugees 1951, Art. 2(2)

Convention, International Human Rights are still applicable in India. Many human rights lawyers and advocates have claimed that the said legislation is a clear violation of International Human Rights and the Rights provided in the constitution of India.

As mentioned in the section, only religious minorities from Bangladesh, Afghanistan and Pakistan will be provided asylum as refugee or migrant, the said countries have Muslim religion as a majority. Myanmar, Thailand, etc. are not included in the said act, as they don't have any national religion, although it is well known that these countries are Buddhist majority. Now, under the purview of CAA, Rohingyas cannot claim the status of Refugee in India, as they are Muslims hence excluding them from the applicability of the act. While mentioning persecution on religious grounds, the Muslim religion is not included in the act. As Myanmar is excluded from the countries from which India will be accepting "refugees", then Rohingyas cannot claim the status.

This act excludes Rohingyas from claiming the status of Refugee completely. Rohingya are a minority Muslim-ethnic group that is fleeing from Myanmar, which is a Buddhist majority state, due to the atrocities and the attacks against them. As per International law, Rohingyas have every right to be called "Refugees", but the national legislation is discriminating against them based on religion. It can be said that under CAA, Rohingyas cannot be given the status of "Refugees" but are given the status of "illegal immigrants".

### **(B) Violation of Principle of Non-Refoulement**

The principle of non-refoulement is embedded in the 1951 Refugee Convention, and it states as follows:

*"1. 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 on account of his race, religion, nationality, membership of a particular social group or political opinion.*

*2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*<sup>18</sup>

According to this Principle, once a refugee has entered the asylum country that person cannot be forced to return to the country they flee from. The person can only return if the threat is not there anymore, or if it is voluntary repatriation.

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<sup>18</sup> Convention relating to Status of Refugees 1951, Art. 33

In 2017, a Writ Petition was filed against the order of the Indian government to repatriate the Rohingyas back to Myanmar, Rohingya Deportation case<sup>19</sup>. The case is still ongoing. While arguing the prosecution Advocate, i.e., Adv. Fall S Nariman said that deporting them back to Myanmar had discussed the scope of Art. 14 (Right to equality) and Art. 21 (Right to life), he said that these rights applied to any “person” and not only the “citizen”. Hence, to exclude the rights of an entire section of people as being non-justiciable on the sole basis that they were foreigners was an incorrect interpretation of the Constitution. Although, the Supreme Court ordered the deportation of 7 Rohingyas who were accused of the crimes committed and considered as a threat.

In the above-mentioned case, the Rohingya were directed to be deported back as few of them were involved in criminal activities. This meant that even children and women belonging to the Rohingya ethnicity were to be deported back to Myanmar. Deporting or Repatriation of Rohingyas as issued by the government is violative of the principle of non-refoulment. It can be argued that the Principle of non-refoulment is not applicable in India, as it is not a part of the Refugee Convention. The principle of non-refoulment ensures that the rights of the refugees are not be exploited, it can be considered as a part of International Human Right, hence it is a part of International Customary Law. International Customary Law applies to every country, irrespective of them being a party to a particular convention or not. This implies that the principle of nonrefoulement applies to India as well.

Moreover, India has ratified the International Convention on Civil and Political Rights (ICCPR) and must take active steps to fulfil its treaty obligations, as ICCPR encapsulates the principle of Non-refoulement. In particular, any form of removal of a person may not take place if there are substantial grounds to believe that there is a real risk of irreparable harm being caused to their right to life (Article 6) and their right against cruel, inhuman or degrading treatment (Article 7) to any country to which refoulment is to take place. These obligations cannot be derogated from, even in a state of emergency (Article 4).<sup>20</sup>

#### **IV. CONCLUSION**

The Rohingya crisis is not something that happened overnight, it can be considered as a Crisis waiting to happen. The Rohingya were never welcomed by other religious or ethnic groups in then Burma, now Myanmar. The tension between the Rohingyas and other groups is majorly

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<sup>19</sup> Mohammad Salimullah v. Union of India, WP (C) 793/2017

<sup>20</sup> Sanya Samtani, “Deporting Rohingya Refugees: Indian Supreme Court violates Principle of Non-refoulement”, OXFORD HUMAN RIGHTS HUB, 2018 (April 14, 2020) <<https://ohrh.law.ox.ac.uk/deporting-rohingya-refugees-indian-supreme-court-violates-principle-of-non-refoulement/>>

based on the fact that the Rohingyas supported British rule as they had their ulterior motive of having a state of their own. The course of “ethnic cleansing” began after the independence, but it gained motion in 2017 and turned out to be one of the biggest humanitarian crises in the world.

Currently, Rohingyas are residing in the refugee camps set up in Cox’s Bazaar by UNHCR and Bangladesh. Approximately 745,000 Rohingyas reside in that refugee camp. Cox’s Bazaar is a disaster-prone area in Bangladesh. Although Myanmar has signed a memorandum of understanding stating that they will accept the Rohingyas, the events that occurred are haunting enough and there is no voluntary repatriation on their part. Bangladesh is already a developing country and being a host to Rohingya refugees has affected its economy, and there is no proper international funding for the same.

The main reason why any country hesitates from hosting refugees from any country is that there is no proper international funding for maintaining those refugees. In the 2016 New York Declaration for Refugees and Migrants, this was the main issue posed by every state. There should be proper financing for the host country so they can maintain the refugees without any harm done to their economy.

India is not a party to the Refugee Convention, but it has a responsibility and international obligation to which it did not adhere to. India has taken some bad decisions when it comes to the welfare of the Rohingya and was criticized by International society and the organizations’ at large. The new CAA is said to be against accepting Muslim refugees and Rohingya can be seen as the perfect example for proving the same.

In conclusion, it can be said that India approach towards the Rohingya crisis has been viewed as contradicting its traditional position on Refugees. As the crisis unfolds, there is a lot that India can do by contributing to their protection. The actions will determine India’s regional and global standing. India is a rising power with global aspirations, and with the history of accepting refugees, it has a global standard to set. In the end, India may be in a better position to shape regional and global discourses on emerging issues affecting global governance, including refugees.

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