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# **THE INDIAN REFOULEMENT OF ROHINGYA REFUGEES: EQUILIBRIUM BETWEEN NATIONAL SECURITY AND INTERNATIONAL HUMANITARIAN LAWS**

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## **ABSTRACT**

The main aim of this paper is to emphasize the momentousness of balance between national security and the international humanitarian laws in the case of refolement of the Rohingya community. The paper starts with the introduction of who are Rohingya's? Why did the crisis break out? How is India dealing with the Rohingya crisis? Further the paper discusses the legal system governing refugee protection in India, as well as international human rights legislation and the non-refoulement principle and the reason behind India choosing to deport the Rohingya refugees back to Myanmar. The decision taken by the Indian government regarding the refolement of Rohingya refugees offered a platform for contention between national security and international humanitarian laws. The research gap for this paper lies in considering the novel strategies that India can take to mitigate national security issues adhering to international humanitarian law. The paper concludes with addressing the importance of keeping balance between the national security and the humanitarian law for the betterment of the citizens of India as well the refugees.

**Introduction:**

The Rohingya are a Muslim ethnic minority group who have lived for centuries in predominantly Buddhist Myanmar - formerly known as Burma. Despite living in Myanmar for many generations, the Rohingya are not recognized as an official ethnic group and have been denied citizenship since 1982, making them the world's largest stateless population<sup>1</sup>. As a stateless population, Rohingya families are denied basic rights and protection and are extremely vulnerable to exploitation, sexual and gender-based violence (SGBV) and abuse<sup>2</sup>. The Rohingya have suffered decades of violence, discrimination and persecution in Myanmar. Their largest exodus began in August 2017 after a massive wave of violence broke out in Myanmar's Rakhine State, forcing more than 700,000 people - half of them children - to seek refuge in Bangladesh. Entire villages were burned to the ground, thousands of families were killed or separated and massive human rights violations were reported<sup>3</sup>.

**Rohingya crisis in India:**

The UNHCR has validated 16,000 Rohingya refugees in India. According to government estimates, there are more than 40,000 Rohingya refugees living in India, with Jammu and the surrounding area having the highest population<sup>4</sup>. According to estimates by Rohingya rights campaign, there were approximately 1,100 Rohingya living in Delhi as of early this year and another 17,000 elsewhere in India<sup>5</sup>. These individuals primarily worked as manual labourers, hawkers, and rickshaw pullers<sup>6</sup>.

There is no legislation that particularly mentions refugees in India. In actuality, it frequently considers Rohingya refugees along with the category of illegal immigrants that the government may deport in accordance with the Foreigners Act of 1946 and the Foreigners Order of 1948. However, legally speaking, a refugee is a distinct class of immigrant and cannot be combined with an illegal immigrant. International standards and India's commitments under international law are airbrushed in the Supreme Court's ruling on deporting Rohingya refugees. The court relied on the government's arguments regarding national security without challenging the

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<sup>1</sup>USA for UNHRC, <https://www.unrefugees.org> (last visited Apr. 3, 2023)

<sup>2</sup> USA for UNHRC, <https://www.unrefugees.org> (last visited Apr. 3, 2023)

<sup>3</sup> Id

<sup>4</sup> HINDUSTAN TIMES, <https://www.hindustantimes.com> (last visited Apr. 3, 2023)

<sup>5</sup> HINDUSTAN TIMES, <https://www.hindustantimes.com> (last visited Apr. 3, 2023)

<sup>6</sup> Id

purported threats that the refugees might pose. Now this decision of deporting the Rohingya created a channel for arguments. For a country the thing which matters the most is its security. The government would not risk its country for any other thing. But it is also the government's duty that it should adhere to international humanitarian laws.

### **Principle of Non- refoulement:**

The UNHCR urged the countries bordering Myanmar to shelter and safeguard those fleeing violence<sup>7</sup>. The principle of non-refoulment forbids States from expelling people from their territory if there are strong indications that doing so would put them at serious risk of persecution, torture, or other serious human rights violations<sup>8</sup>. It is a crucial safeguard that is recognised under human rights, humanitarian, and refugee legislation as well as customary international law, making it enforceable on States regardless of their express consent. "The principle is characterised by its absolute nature without any exception," the Office of the United Nations High Commissioner for Human Rights (OHCHR) has stated<sup>9</sup>.

### **Indian refugee policy:**

The latest government decision to deport 40,000 Rohingyas has once again brought India's ad hoc refugee management practises into the public eye<sup>10</sup>. The administration appears to have adopted the stance that Rohingyas are illegal immigrants who represent a threat to national security since they are more likely to be radicalised in the absence of a law<sup>11</sup>. The Foreigners Act of 1946, which grants the state-wide authority to find and expel unlawful immigrants, has also been cited by the government. But it's crucial to remember that Indian courts have long recognised refugees as a separate category, and they've been given protection under Articles 14 and 21 of the Indian Constitution. Additionally, India is bound by the non-refoulement principle of customary international law, which prohibits countries from sending people to regions where they may face persecution. Even though the "threat to national security" is an exception to the rule of non-refoulement, the threat must be factually proven in each instance and be backed up by reliable sources.

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<sup>7</sup>THE LEAFLET, <https://www.leaflet.in> (last visited Apr. 6, 2023)

<sup>8</sup> THE LEAFLET, <https://www.leaflet.in> (last visited Apr. 6, 2023)

<sup>9</sup> THE LEAFLET, <https://www.leaflet.in> (last visited Apr. 6, 2023)

<sup>10</sup> THE PRINT, <https://theprint.in> (last visited Apr, 13, 2023)

<sup>11</sup> THE PRINT, <https://theprint.in> (last visited Apr, 13, 2023)

Indian officials have been urged not to deport the Rohingyas by international organisations<sup>12</sup>. However, the government has claimed that the state of security is a factor in its decision to deport Rohingyas. Additionally, neither the 1967 Protocol Relating to the Status of Refugees nor the UN's 1951 Refugee Convention recognise India as a signatory<sup>13</sup>.

India does not have a legislation specifically addressing refugees; instead, the Central Legislative Assembly's 1946 Foreigners Act governs the situation<sup>14</sup>. Unauthorised foreigners' physical presence in India is against the law according to the Foreigners Act<sup>15</sup>. Additionally, it gives the government the authority to hold a foreign national living illegally in the nation in custody until deportation<sup>16</sup>. India maintains that it is not required to provide asylum or be bound by the principle of non-refoulment because it is not a party to the Refugee Convention or the Convention on the Reduction of Statelessness, nor has it ratified instruments like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>17</sup>. It is nevertheless required to uphold human rights principles because it has ratified the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)<sup>18</sup>. The government may forbid, control, or restrict the admission of a class or description of foreigners in accordance with Section 3 of the Foreigners Act of 1946<sup>19</sup>. The government used the provisions of this clause in *Mohammed Salimullah v. Union of India* (2021)<sup>20</sup> before the Supreme Court to support its decision to deport some 160 Rohingya who had been held in Jammu. It asserted that these people posed a threat to national security without offering any supporting data. The Supreme Court accepted the national security justification and the non-application of the non-refoulement principle, despite the fact that it was pointed out that people in a similar situation to those who were being deported had been housed in refugee camps in many Indian states<sup>21</sup>. The court then permitted the government to deport the people, though only on the condition that the deportation procedure is followed. This is again contradictory to the Article 51(c) of the Indian Constitution, which states that the

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<sup>12</sup> INDIA TODAY, <https://www.indiatoday.in> (last visited Apr. 6, 2023)

<sup>13</sup> INDIA TODAY, <https://www.indiatoday.in> (last visited Apr. 6, 2023)

<sup>14</sup> Id

<sup>15</sup> Id

<sup>16</sup> Id

<sup>17</sup> THE LEAFLET, <https://www.leaflet.in> (last visited Apr. 6, 2023)

<sup>18</sup> Id

<sup>19</sup> Foreigners Act 1946, § 3.

<sup>20</sup> Mohammed Salimullah v. union of India, 2021.

<sup>21</sup> THE LEAFLET, <https://www.leaflet.in> (last visited Apr. 6, 2023)

State must endeavour to foster respect for international law and treaty obligations<sup>22</sup>. It is clear that the decision taken by the Indian govt. is wholly tilted towards the national security aspects.

Rohingya refugee and National security:

The main reason for the Indian government's decision on refoulement of the Rohingya refugees is due to the concerning National security. It is no surprise that a country prioritises its security over giving refugees. A government duty lies in safeguarding its people by taking wise decisions. There are many instances which prove national threat. Recent violent acts committed by insurgents operating under the guise of the Arakan Rohingya Salvation Army have exacerbated the Rohingyas crisis. Following the military crackdown, hundreds of insurgents perished and a new wave of Rohingyas fled into the neighbouring Bangladesh<sup>23</sup>. The already complex situation of the Rohingyas has taken on a new and convoluted dimension as a result of this. The security establishment is concerned that larger Islamic terrorist forces may prey on homegrown militants of the ARSA kind. Security risks can arise from the Rohingya migrants' susceptibility to radicalization by forces hostile to India. Studying the strategic fears of a planned and well-executed Rohingya settlement in susceptible areas like Hyderabad and Jammu and Kashmir is necessary. In a strategic scenario analysis, the security establishment's strategies are always based on the worst-case scenario<sup>24</sup>. The Indian government should exercise caution when addressing the issue of Rohingya migrants in this regard. The disproportionate illegal migration of Bangladeshi Muslims tore apart the social fabric of Northeast India. Any new influx of Rohingya migrants, for instance, sneaking into the Northeast from Bangladesh, could destabilise society. Internal security could be seriously threatened by this. The separatist leaders of the Kashmir Valley today organised a protest march against the supposed "persecution" of Rohingya Muslims to demonstrate solidarity with them, despite the fact that the central government has officially said that it is in favour of deporting Rohingyas who are staying in the country illegally<sup>25</sup>. At several locations, the demonstrations turned violent. Earlier, Zakir Musa, the leader of the Kashmir-based Ansar Gazawat-ul-Hind branch of Al-Qaeda, pledged support for the Rohingya community in Jammu. In a 10-minute-long audio clip, Zakir Musa warned the Narendra Modi government against deporting

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<sup>22</sup> Indian constitution, Art. 51 (C )

<sup>23</sup> THE PRINT, <https://theprint.in> (last visited Apr, 6, 2023)

<sup>24</sup> THE PRINT, <https://theprint.in> (last visited Apr, 6, 2023)

<sup>25</sup> INDIA TODAY, <https://www.indiatoday.in> (last visited Apr. 6, 2023)

Rohingyas from India<sup>26</sup>. The government's argument for deporting the unauthorised refugees has been strengthened by separatists and Al-Qaeda offshoots' backing for the Rohingyas. The government has already said that the country faces security dangers because of the existence of such a vulnerable population there<sup>27</sup>. There was some degree of security hazard in this situation, which could have influenced the choice. Jihadi elements were involved to some extent, similar to Arakan. But when there is an influx, it is unavoidable. Along with the real sufferers, some anti-social elements are bound to infiltrate, which causes concern for the government and its citizens. Since we are already overburdened, economics may also be a factor, but this requires careful research.

### **Problems involving in deporting the Rohingya refugees:**

It will be challenging for India to deport the Rohingyas because, in general, the Myanmar government does not acknowledge them as citizens. Additionally, India won't be able to accommodate Rohingyas without a clearly defined refugee policy that is supported by a law approved by Parliament because their presence there will alter the political narrative<sup>28</sup>. The Centre has informed the Supreme Court that numerous Rohingyas have obtained identification cards like Aadhaar, PAN, and voter ID that are only available to Indian citizens<sup>29</sup>. This raises the issue of illegal immigrants being naturalised through deceptive techniques. Given the socioeconomic complexity of Indian politics and society, a discussion about the Rohingyas' rights as a minority group may soon take place<sup>30</sup>. In the absence of a law to deal with refugees, their identification and surveillance will become difficult especially when the intelligence agencies have warned the jihadi terror outfits are looking to exploit the vulnerability of Rohingyas<sup>31</sup>.

### **Navigating the issues relating to refugee crisis while balancing the international humanitarian laws:**

To address concerns over terrorism and other security threats, countries can implement comprehensive screening procedures for refugees seeking entry. This could involve

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<sup>26</sup> INDIA TODAY, <https://www.indiatoday.in> (last visited Apr. 6, 2023)

<sup>27</sup> INDIA TODAY, <https://www.indiatoday.in> (last visited Apr. 13, 2023)

<sup>28</sup> Id

<sup>29</sup> Id

<sup>30</sup> Id

<sup>31</sup> Id

conducting background checks, interviewing refugees to determine their reasons for seeking asylum, and vetting them for potential security risks. Addressing refugee crises often requires a collaborative approach, with countries and international organizations working together to provide humanitarian aid and find durable solutions for refugees. This could involve sharing information and resources, providing financial and logistical support, and working to address the root causes of refugee crises. Instead of refoulement of refugees, countries can provide temporary protection to those who are fleeing persecution and violence in their home countries. This could involve granting them temporary visas or residency permits, allowing them to live and work in the country until they are able to return home safely or find a permanent solution elsewhere.

**Conclusion:**

Though the decision of refoulement of the Rohingya refugees is criticized in many ways, the reason being the national security cannot be unseen. And also just because few among them could be a threat to the country, the government cannot refoul the whole country. The country should take measures towards balancing the national security and international humanitarian laws. Furthermore, alternative measures such as increased international cooperation, improving living conditions in refugee camps, and working towards a peaceful resolution to the conflict in Myanmar should be explored to address the Rohingya crisis. The Indian government should also work towards improving its asylum system and providing legal protection to refugees, including the Rohingya. The legal framework governing the refoulement of refugees provides clear guidelines for ensuring that the principle of non-refoulement is respected, which prohibits the return of refugees to countries where they may face persecution. The Indian government must ensure that its actions are in line with these laws and principles. In conclusion, the Indian government's decision to refoul Rohingya refugees has raised several legal and ethical questions regarding the balance between national security concerns and international humanitarian laws. While India has cited concerns over terrorism and illegal immigration as the reasons behind its decision, it is crucial to ensure that the rights and safety of refugees are not compromised.