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# HUMAN RIGHTS AT THE CROSSROADS: EVALUATING INDIA'S REFUGEE REPATRIATION POLICIES AND CONSTITUTIONAL OBLIGATIONS

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## ABSTRACT

This research paper, titled *"Human Rights at the Crossroads: Evaluating India's Refugee Repatriation Policies and Constitutional Obligations,"* explores the intersection of international human rights law and India's constitutional framework in the context of Rohingya refugees. It critically examines the legality of India's policy of compulsory repatriation, particularly in light of the 1951 Refugee Convention and the customary principle of non-refoulement, which prohibits returning refugees to countries where they may face persecution or harm. The first section analyzes India's international legal obligations and argues that forced repatriation without ensuring safety and dignity likely violates these standards.

The second section assesses India's constitutional duties to provide essential services, such as food, water, sanitation, and healthcare in refugee camps. Drawing on legal rulings, human rights reports, and case studies, it identifies failures that may constitute breaches of both constitutional rights and international human rights obligations.

The paper concludes by offering policy recommendations that advocate for a rights-based approach to refugee protection and calls for stronger international cooperation. It emphasizes the urgent need for India to reconcile national interests with its legal commitments, ensuring that the rights and dignity of refugees are upheld in accordance with both domestic and international legal frameworks.

**Keywords:** Rohingya; Refugee Repatriation; Human Rights; Humanitarian Aid; Constitutional Obligations; Refugee Camp; Non-Refoulement; Arakan State.

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## **1. INTRODUCTION:**

Imagine a world where every border crossing is marked by compassion, where the plight of migrants evokes empathy instead of contentious debate. In this global landscape, India is at a crossroads in its handling of Rohingya refugees escaping persecution in Myanmar. Despite not being bound by the 1951 Refugee Convention, India maintains principles such as non-refoulement, which ensures refugees aren't forced back into perilous situations.

A pillar of protection for everyone inside India's borders, regardless of legal status, is Article 21, which is ingrained in the country's constitutional ethos. This basic right to life and personal liberty also applies to refugees, requiring the state to provide vital services—shelter, healthcare, and sustenance—with dignity and respect. It emphasises India's commitment to human rights among the complications of addressing refugee situations.

A critical examination of India's response to Rohingya migrants reveals a tapestry woven with ethical quandaries and legal intricacies. The challenge lies in striking a balance between national sovereignty and humanitarian principles. India must craft policies that are not only practical but also sensitive to the human dignity and rights of refugees. This introspection calls for innovative solutions that uphold India's legacy of compassion while navigating the complexities of international relations.

As we delve deeper into these issues, this study seeks to act as a lighthouse in the debate over refugee rights and state duties. It aims for providing solutions that balance national interests with universal human dignity by analysing the ethical dilemmas and legal considerations inherent in managing the refugee flows. By advocating a narrative based on creativity and empathy, it hopes to inspire policies that not only safeguard vulnerable people but also reinforce India's status as a beacon of hope in a world plagued by political instability.

## **2. OBJECTIVE**

The main objectives behind writing this paper are as follows:

- To analyse the present condition of Rohingya Refugees in India
- To examine India's stance on regarding repatriation policy in light of international law

## **3. RESEARCH METHODOLOGY**

This research paper is based on a qualitative method of study, incorporating secondary sources

to conduct a thorough analysis. The qualitative approach allows for an in-depth exploration of Indonesia's refugee repatriation policies and constitutional obligations by analysing existing literature and data.

### 3.1 Data Collection

All information in this study is gathered from secondary sources. These include a variety of materials such as:

- **Books:** Academic and professional books that provide theoretical frameworks and detailed analyses of refugee laws and policies.
- **Newspapers:** Articles and reports from reputable newspapers that offer current and historical perspectives on the Rohingya crisis and Indonesia's actions.
- **Journal Articles:** Peer-reviewed articles that discuss legal precedents, human rights implications, and case studies related to refugee repatriation.
- **Internet Archives:** Digital repositories that contain official documents, reports from human rights organizations, and international legal texts.

### 3.2 Secondary Sources

The secondary sources are carefully selected to ensure reliability and relevance. They provide a thorough insight into the issue's legal, social, and political facets. Specific attention is given to:

- **Legal Documents:** International treaties, conventions, and domestic legal texts that outline the principles of non-refoulement and refugee protection.
- **Case Law:** Judicial decisions from the Supreme Court (SC) and High Courts (HC) of India that establish legal precedents related to non-refoulement and refugee rights.
- **Reports from International Organizations:** Publications from the United Nations, Human Rights Watch, and other organizations that highlight the humanitarian aspects and legal challenges of the Rohingya crisis.

### 3.3 Analysis

The qualitative data is analysed through a thematic approach, identifying key themes such as international legal obligations, constitutional rights, and humanitarian concerns. This method allows for a detailed examination of the interplay between national policies and international norms.

### 3.4 Ethical Considerations

Ethical considerations are addressed by ensuring that all sources are cited properly and that the analysis is conducted with integrity and respect for the subject matter.

By utilizing a qualitative method and relying on secondary sources, this research provides a nuanced and comprehensive understanding of Indonesia's refugee repatriation policies and their implications under both domestic and international law.

## 4. HISTORICAL CONTEXT: THE ROHINGYA JOURNEY TO INDIA.

### 4.1 Who are Rohingyas?

The Rohingya are an ethnic group, largely comprising of Muslim minority population, sometimes seen as threat to national security by the rest of majority,<sup>3</sup> predominantly residing<sup>4</sup> in Myanmar's Rakhine state<sup>5</sup>, with historical and cultural roots that trace back to the region's ancient name of Arakan, known as 'Rohang' in earlier times<sup>6</sup>. Despite their lengthy presence in the region, they have endured systemic discrimination<sup>7</sup> and denial of citizenship<sup>8</sup> under Myanmar's 1982 nationality law. This legal exclusion has left them stateless, denying them basic rights and exposing them to violence and abuse.<sup>9</sup>

### 4.2 Why Rohingyas have to face Legal Exclusion?

The legal exclusion of the Rohingyas from Myanmar's 1982 citizenship law is rooted in a combination of historical, political, and ethnic factors. The law enacted in 1982 outlined three separate forms of citizenship in Myanmar: **full, associate, and naturalized**. Full citizenship

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<sup>3</sup> Anthony Ware and Costas Laoutides, *Myanmar's "Rohingya" Conflict: Security Dilemma, Minority Complex, Greed, and Political Economy* (Oxford University Press, 2018).

Anwary Afroza, "Atrocities against the Rohingya Community of Myanmar" (2018) 31 *International Journal of Asian Affairs* 91.

<sup>4</sup> Aye Chan, "The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)" (2005) 3 *SOAS Bulletin of Burma Research* 396, 398.

<sup>5</sup> T.H.N. Desk, "The Hindu Explains: Who are Rohingya? Why are they Stateless?" (2022) <https://www.thehindu.com/news/international/for-rohingyas-there-is-no-place-called-home/article61476656.ece> (accessed 8 July 2025).

<sup>6</sup> Ba Mwa, *Breakthrough in Burma: Memoirs of a Revolution, 1939–1946* (1968)

<sup>7</sup> Human Rights Council, "Rohingya community had endured progressive intensification of discrimination over the past 55 years," Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar, 5 December 2017. See Manish K. Jha, "'Stateless' Rohingyas: Persecution, Displacement and Complex Community Development" (2020) *Community Development Journal* 1.

<sup>8</sup> Rohan Lee, "Citizenship Laws: Making Rohingya Stateless" (ed), *Myanmar's Rohingya Genocide: Identity, History and Hate Speech* (2021) 55; Nehginpao Kipgen, "The Rohingya Crisis: The Centrality of Identity and Citizenship" (2019) 39 *Journal of Muslim Minority Affairs* 61.

<sup>9</sup> USA for UNHCR, "Rohingya Refugee Crisis Explained" (2023) <https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/> (accessed 5 July 2025).

was granted to those belonging to the recognized "national races" who could trace their ancestry in Myanmar before 1823. This list of acknowledged ethnic communities did not feature the Rohingya, effectively denying them full citizenship.<sup>10</sup> Unfortunately, this community were not included in this list, despite their long history in the region.

This exclusion was partly due to deeply rooted ethnic biases, in which the Rohingya were viewed as outsiders from Bangladesh despite having resided in Myanmar for many years. The Myanmar government made use of this story to deny them citizenship, attempting to establish a national identity that excluded non-Burmese communities. As a result, the Rohingya were left stateless<sup>11</sup> and without basic rights, adding to the ongoing persecution and crisis.<sup>12</sup>

#### 4.3 Why they made their entry in India?

The main reasons why they have to left their home country includes:

- **Persecution and Violence:** The military campaign of 2017<sup>13</sup> in Rakhine State, which has been described by the United Nations (UN) as a *"textbook example of ethnic cleansing,"* resulted in mass killings, sexual violence, and village destruction. This extreme violence leaves the Rohingya with little choice but to escape to survive.<sup>14</sup>
- **Statelessness and Lack of Legal Protection:** Under Myanmar's 1982 citizenship law, the Rohingya are not included among the officially recognized ethnic groups, which effectively leaves them without citizenship and renders them stateless. This lack of citizenship means they do not have legal protection or basic rights, making them highly vulnerable to abuse and exploitation.

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<sup>10</sup> Burmese Rohingya Organisation UK, *Myanmar's 1982 Citizenship Law and Rohingya* (627 Romford Road, Manor Park, London E12 5AD, 2014) <https://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf> (accessed 7 July 2025).

<sup>11</sup> Nasir Uddin, *State of Stateless People in the Rohingya: An Ethnography of 'Subhuman' Life* (2021). Amal de Chickera, "Statelessness and Identity in the Rohingya Refugee Crisis" (October 2018) *Humanitarian Practice Network* <https://odihpn.org/magazine/statelessness-identity-rohingya-refugee-crisis/> (accessed 8 July 2025).

<sup>12</sup> T. Macnamus and K. Ziabari, "The World Must Recognize the Cause of the Rohingya Crisis" (September 2017) [https://www.fairobserver.com/region/asia\\_pacific/rohingya-muslims-myanmar-rakhine-state-violence-asia-pacific-news-54212/](https://www.fairobserver.com/region/asia_pacific/rohingya-muslims-myanmar-rakhine-state-violence-asia-pacific-news-54212/) (accessed 8 July 2025). S. Majumdar, "Inside the Most Urgent Refugee Crisis in the World" (28 September 2017) (accessed 8 July 2025).

<sup>13</sup> Gabrielle Aron, "Reframing the Crisis in Myanmar's Rakhine State" (22 January 2018) *United States Institute of Peace* <https://www.usip.org/publications/2018/01/reframing-crisis-myanmars-rakhine-state> (accessed 5 July 2025).

<sup>14</sup> UN News, "UN Human Rights Chief Points to 'Textbook Example of Ethnic Cleansing' in Myanmar" (11 September 2017) *United Nations* <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar> (accessed 5 July 2025).

As India is one the neighbouring country of Myanmar, it offers them a reachable refuge from extreme violence and persecution which they face at home country. India's geographical proximity, particularly state like Assam, makes it an accessible destination for their safety.

#### 4.4 Current Status of Rohingya Community in India

| Aspect                    | Details                                                                                                                                                                                                                                                                                                                                                             |
|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Population <sup>15</sup>  | An estimated 40,000 Rohingya refugees currently residing in India                                                                                                                                                                                                                                                                                                   |
| Legal Status              | Classified as illegal immigrants since 2017                                                                                                                                                                                                                                                                                                                         |
| Location                  | Predominantly in Haryana, Hyderabad, Delhi, and Jammu. <sup>16</sup>                                                                                                                                                                                                                                                                                                |
| Living Conditions         | Residing in makeshift camps with limited access to basic facilities; often cramped and unsanitary conditions                                                                                                                                                                                                                                                        |
| Employment                | Limited opportunities; many work in informal sectors                                                                                                                                                                                                                                                                                                                |
| Education                 | Access to education is inconsistent; many children lack proper schooling                                                                                                                                                                                                                                                                                            |
| Health                    | Limited access to healthcare services; reliant on humanitarian aid                                                                                                                                                                                                                                                                                                  |
| Government Stance         | The Indian government views them as a security threat, citing involvement in illegal activities and potential ties to terrorism                                                                                                                                                                                                                                     |
| Deportation               | Ongoing efforts to deport Rohingyas to Myanmar or Bangladesh; several deportations have already occurred. In Jammu, for instance, there have been detentions and deportations of Rohingya refugees. As of July 2023, 271 Rohingyas, including women and children, were detained at Hiranagar Jail, used as a holding centre for deportation purposes. <sup>17</sup> |
| Human Rights Issue        | Reports of harassment, arbitrary detentions, and lack of legal protection                                                                                                                                                                                                                                                                                           |
| International Involvement | Human rights organizations and UNHCR advocate for better treatment and protection, but with limited success                                                                                                                                                                                                                                                         |

<sup>15</sup> Shankar IAS Academy, "Status of Rohingyas" <https://www.shankariasparliament.com/current-affairs/status-of-rohingyas> (accessed 6 July 2025).

<sup>16</sup> Ibid

<sup>17</sup> "Rohingya Protest at Holding Centre in J&K Seeking Release", *The Indian Express* <https://indianexpress.com/article/cities/jammu/rohingya-protest-at-holding-centre-in-jk-seeking-release-8631333/> (accessed 8 July 2025).

Overall, the Rohingyas in India live in vulnerable circumstances, dealing with legal uncertainties, social exclusion, and the constant risk of being deported to Myanmar, where they are subjected to intense persecution.

## 5. INDIA'S PROBLMATIC STANCE ON ROHINGYA ISSUE

A joint analysis of the Registration of Foreigners Act 1946<sup>18</sup>, Passport Act 1967<sup>19</sup>, and Foreigners Order, 1948<sup>20</sup> highlights the absence of a distinction in India's approach to legitimate refugees and other foreign individuals. The Rohingya refugees struggle with multiple issues in India, including being termed as "*illegal migrants*". The fear of being deported, whether real or anticipated, has deeply unsettled individuals the Rohingyas, prompting certain members of the group to head back to Bangladesh. International conventions like the International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup> and the Convention on the Rights of the Child (CRC)<sup>22</sup>, impose an obligation on India, under international norms to ensure the Rohingya are not sent back to Myanmar. Following security threats, problem of legal status, political dynamics and humanitarian considerations, India decided to deport Rohingyas back to Myanmar.

### 5.1 Security Threat Concerns

The Supreme Court upheld the government's stance on national security concerns, thereby permitting deportations<sup>23</sup>. The unauthorized influx of foreign nationals poses a threat to the region's integrity and security. Their continued stay in India has led to serious challenges, and the covert attempts by some to present themselves as Indian citizens have made their identification difficult. This situation highlights the urgent need for their prompt detection in the interest of the general public.

### 5.2 Government's Initiative as per their stance

On 20<sup>th</sup> December, 2017, Indian Foreign Secretary S. Jaishankar visited Myanmar where he signed a **Memorandum of Understanding (MoU)** with Myanmar's Ministry of Social

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<sup>18</sup> *The Foreigners Act, 1946*, No. 31, Acts of Parliament, 1946 (India).

<sup>19</sup> *The Passport Act, 1967*, No. 15, Acts of Parliament, 1967 (India).

<sup>20</sup> *Foreigners Order, 1948* under *The Foreigners Act, 1946*, No. 9/9/46-Political (EW), Ministry of Home Affairs (1948).

<sup>21</sup> *International Covenant on Civil and Political Rights*, 23 March 1976 <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (accessed 8 July 2025).

<sup>22</sup> *Convention on the Rights of the Child*, art. 6, 20 November 1989, 1577 UNTS 3.

<sup>23</sup> *Convention Relating to the Status of Refugees*, art. 33(2), 28 July 1951, 189 UNTS 137.

Welfare, Relief and Resettlement.<sup>24</sup> The MoU aimed to facilitate "socio-economic development and livelihood initiatives in Rakhine State"<sup>25</sup> and the agreement featured a project aimed at constructing prefabricated homes in Rakhine State to accommodate returnees. Being a part of the MoU, India committed \$25 million towards a 5-year development initiative in the region. Moreover, On May 10-11, 2018, during visit to Myanmar, External Affairs Minister Sushma Swaraj emphasized the significance of the "*safe, speedy and sustainable return of displaced persons to Rakhine State*". However, it proved to be of no help to the Rohingyas as they are likely to face persecution in Myanmar.

### 5.3 Impact of Citizenship Amendment Act

India lacks a formal asylum framework, and the individuals who enter the country without a valid visa are classified as *illegal immigrants* under the Indian Passport Act and the Foreigner Act. In 2019, the government led by Prime Minister Narendra Modi enacted the Citizenship Amendment Act (CAA), which provides a pathway to Indian citizenship for non- Muslim "*illegal immigrants*" from neighbouring nations like Pakistan, Bangladesh, and Afghanistan. The Citizenship Amendment Act (CAA) offers Indian citizenship to six religious minority groups: Parsis, Jains, Hindus, Christians and Sikhs, who fled religious persecution in Afghanistan, Bangladesh and Pakistan before 2015. However, Myanmar was not included among the countries covered by the Act.

*"We are also the victims of religious persecution, just like the citizens of three other countries that will be granted citizenship. We are also a minority in Buddhist-dominated Myanmar. But the Indian government is not bothered about us simply because we are Muslims,"* an activist supporting the rights of Rohingyas, speaking anonymously out of concern for possible government backlash.<sup>26</sup>

The international community has called on Myanmar to accelerate the repatriation process; however, concerns persist regarding the long-term political challenges, including "*community*

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<sup>24</sup> G. Mohan, "India Signs MOU with Myanmar, to Help Bring Normalcy to Strategic Region amid Rohingya Crisis" (20 December 2017) *India Today* <https://www.indiatoday.in/india/story/india-myanmar-mou-rohingya-1113632-2017-12-20> (accessed 8 July 2025).

<sup>25</sup> "India, Myanmar Sign MOU for Development of Rakhine" (2017) *The Indian Express* <https://indianexpress.com/article/india/india-myanmar-sign-mou-for-development-of-rakhine-4992187/> (accessed 8 July 2025).

<sup>26</sup> G. Singh, "Rohingya in India Accuse Modi of Double Standards on Citizenship Law" (27 March 2024) *Al Jazeera* <https://www.aljazeera.com/news/2024/3/27/rohingya-in-india-accuse-modi-of-double-standards-on-citizenship-law> (accessed 7 July 2025).

*reconciliation*" and "*citizenship status*"<sup>27</sup>

The 2018 and 2019 reports by the Independent International Fact-Finding Mission on Myanmar (IFFM), a panel of experts appointed by the UN Human Rights Council, provide extensive factual and legal evidence supporting claims of genocide and other international crimes committed against the Rohingya. Meanwhile, India stands still on its decision to deport Rohingyas back to Myanmar<sup>28</sup>.

## 6. INDIA'S OBLIGATION UNDER CONSTITUTION

While India is not a party to the 1951 Refugee Convention, it holds, it still holds significant obligations under the Constitution regarding the treatment of refugees, including the Rohingyas. The Indian Constitution enshrines fundamental rights that extend to all individuals within its territory, regardless of nationality. Moreover, India has long embraced the spirit of '*Atithi Devo Bhava*' i.e., treating guests as divine, which reflects its compassionate approach towards those seeking refuge.

The State must seek to (a) maintain just and honorable relations between nations; (b) advocate arbitration as a means of resolving international disputes; (c) promote international peace and security; and (d) cultivate respect for international law, according to Article 51 of the Constitution of India<sup>29</sup>. Promoting the idea of "*Vasudhaiva Kutumbakam*,"<sup>30</sup> or the idea that all people are members of the same family, is the philosophy underlying the provision. The obligation being referred to arises specifically from a treaty and does not fall under customary international law or preemptory norms i.e., *jus cogens*, as is made clear by a combined reading of Article 51 and Article 253 of the COI.<sup>31</sup> Because it violates the Foreigners Act, it can be concluded that the Indian domestic system does not directly include the customary international norm of non-refoulement.

Article 21 of the Constitution of India upholds the right to life and liberty for all individuals, not just Indian citizens, ensuring basic dignity for everyone within its territories<sup>32</sup>. The state

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<sup>27</sup> K. Yhome, "Examining India's Stance on the Rohingya Crisis" (2023) *ORF Online* <https://www.orfonline.org/research/examining-india-s-stance-on-the-rohingya-crisis> (accessed 7 July 2025).

<sup>28</sup> *Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789.

<sup>29</sup> Article 51, *The Constitution of India*, 1949.

<sup>30</sup> Nandita Haksar, "By Turning Away Refugees from Myanmar, India Is Betraying Its Ancient Idea of Vasudhaiva Kutumbakam" *Scroll.in* <https://scroll.in/article/991980/byturning-away-refugees-from-myanmar-india-is-betraying-its-ancient-idea-ofvasudhaiva-kutumbakam> (accessed 7 July 2025).

<sup>31</sup> Article 253, *The Constitution of India*, 1949.

<sup>32</sup> Article 21, *The Constitution of India*, 1949.

cannot arbitrarily deny anyone, including refugees, their life or liberty without following the proper legal procedures, according to this fundamental right. Article 14 reinforces the principle of equality by prohibiting discrimination and ensuring that everyone is treated equally in the eyes of law. Only Tibetan refugees in India are granted genuine passports<sup>33</sup>, but they are not granted property, and refugees from Afghanistan, Bangladesh, and Sri Lanka are not legally considered foreigners.<sup>34</sup> Discrimination against refugees is against the global human rights instrument's equal treatment clause<sup>35</sup>.

As emphasized by Article 19(1)(e) of the COI, the SCI held in *Louis De Raedt and others v. UOI and Ors.*<sup>36</sup> and the case of *Khudiram Chakma*<sup>37</sup> that the fundamental right of foreigners is confined to Article 21 and does not extend to include any entitlement to settle in India. In *Vincent Officer, Anantpur*<sup>38</sup>, the Andhra Pradesh High Court upheld this, reiterating that while foreign nationals are protected under Article 14, they are not permitted to make a claim under Article 19(1)(e). In the Chakma refugee case, the SCI said that no one should be denied their life or freedom without following the proper legal procedures<sup>39</sup>. The high courts and the SCI have often emphasized that refugees should not be sent to a country where their lives are in danger<sup>40</sup>. The SCI's ruling in *Mohammad Salimullah v. Union of India*<sup>41</sup> contradicts its earlier findings; it held that the right to remain in India is connected to Article (19)(1)(e) rather than Article 21, so limiting the protection that refugees are entitled to.

## 7. OBLIGATIONS UNDER INTERNATIONAL LAW

### 7.1 India has *erga omnes* to the principle of non-refoulment

Under the international duty to protect persons from racial discrimination, slavery, and genocide under *erga omnes*, all countries are legally required to address the refugee problem,

<sup>33</sup> T. Ananthachari, "Refugees in India: Legal Framework, Law Enforcement and Security" [2001] *ISIL Yearbook of International Humanitarian and Refugee Law* 7 <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (accessed 8 July 2025).

<sup>34</sup> "Asia – Refugees" in *Migratory Flows at the Borders of Our World* 284 [https://www.comillas.edu/documentos/centros/iuem/Migratory\\_Flows\\_at\\_the\\_borders\\_of\\_our\\_world/12\\_Asia\\_Refugees.pdf](https://www.comillas.edu/documentos/centros/iuem/Migratory_Flows_at_the_borders_of_our_world/12_Asia_Refugees.pdf) (accessed 5 July 2025).

<sup>35</sup> See *supra* note 36.

<sup>36</sup> *Mr. Louis De Raedt & Ors v. Union of India & Ors*, (1991) SCR (3) 149.

<sup>37</sup> *Khudiram Chakma v. State of Arunachal Pradesh*, AIR 1992 Gau 105.

<sup>38</sup> *Vincent Ferrer v. District Revenue Officer*, (1974) 1 SCC 70.

<sup>39</sup> *National Human Rights Commission v. State of Arunachal Pradesh & Anr*, (1996) 1 SCC 742.

<sup>40</sup> Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* (Springer, 2017).

<sup>41</sup> *Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789.

even if this calls for intervention.<sup>42</sup> Since obligation *erga omnes* is positioned similar to non-refoulement with regard to fundamental individual rights in the eyes of the entire international community, it might be extended to the need to forego refoulment in the context of the refugee crisis.<sup>43</sup>

Furthermore, the Responsibility to Protect (RtoP) doctrine strengthens the case for non-refoulment as an *erga omnes obligation* by emphasizing that it is the primary duty of each state to protect its people from serious human rights violations such as ethnic cleansing, genocide, war crimes and crimes against humanity.<sup>44</sup> The international community has a responsibility to support<sup>45</sup> and, if required, take collective action to safeguard populations that are at risk if a state fails to fulfill this duty.<sup>46</sup>

It is concluded that India have an *erga omnes* obligation to the principle of non-refoulment. The last line of defense for international protection<sup>47</sup> must be the principle of non-refoulment, which bars countries from returning individuals to places where they could face persecution or serious harm. Article 33 of the 1951 Refugee Convention and its 1967 Protocol affirms the premise.

The International Court of Justice (ICJ), in the *Barcelona Traction Case* recognised that *erga omnes* partes responsibilities refer to a state's duties towards the international community as a whole, matters that "concern all states" and in which every state has a 'legal interest' in upholding."<sup>48</sup> *Erga Under Article 1(a) of the Institute of International Law Resolution on Obligations and Rights erga omnes in International Law*, omnes obligations are further described as broad principles of international law that a state owes to the international

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<sup>42</sup> *Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, 1970 ICJ Rep 3 (5 February).

<sup>43</sup> G. Goodwin-Gill, *The Refugee in International Law* (1983); D.A. Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (1988); R. Hofmann, "Refugee Law in the African Context" (1992) 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 318–33.; G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993); K. Musalo, "Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms" (1994) 15 *Michigan Journal of International Law* 1179–1241; United Nations High Commissioner for Refugees, *The State of the World's Refugees—In Search of Solutions* (1995); V. Gowlland-Debbas, *The Problem of Refugees in the Light of Contemporary Law Issues* (1995).

<sup>44</sup> *Ibid*, Pillar 1

<sup>45</sup> *Ibid*, Pillar 2

<sup>46</sup> *Ibid*, Pillar 3

<sup>47</sup> Rosemary Byrne and Andrew Shacknove, "The Safe Country Notion in European Asylum Law" (1996) 9 *Harvard Human Rights Journal* 187.

<sup>48</sup> See *supra* note 46.

community as a whole.<sup>49</sup> Accordingly, the petitioner argues that India is obligated by *erga omnes* to uphold the non-refoulement norm.

Moreover, the principle of non-refoulement is observed as a norm of customary international law and is widely accepted as a *jus cogens* norm. In light of this status of the principle of non-refoulement, it has an *erga omnes* character.

## 7.2 Aspect under International Jurisprudence

India has signed the Genocide Convention<sup>50</sup> which binds it to prevent and punish genocide. Since the Rohingya have already been recognized as genocide victims in Myanmar, India must take measures to protect them from any further atrocities and genocide; therefore, they must not be returned to their country of origin.

The principle of non-refoulement is clearly articulated in Article 13(7) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Furthermore, Indian courts have favoured international law for purposes of judicial interpretation. For example, the Indian Supreme Court in *Ram Jethmalani v. Union of India*, referenced the Vienna Convention on the Law of Treaties despite India not being a party to it, as the convention embodies numerous principles that are widely recognized in International Law. Hence, India's non-membership of the 1951 Convention does not mean that India is released from its obligations flowing from international law.

## 8. WAY FORWARD

Many of the challenges confronting the Rohingya in India could be resolved if India's government acknowledged them as refugees seeking asylum, rather than as illegal migrants. This scenario could enhance if India endorsed the Refugee Convention and implemented a national law regarding refugees and asylum, as suggested in the draft bill introduced by Shashi Tharoor in February 2022. The suggested legislation would "clarify and standardize the classification of asylum seekers as refugees and

<sup>49</sup> Institute of International Law, *Resolution on Obligations and Rights erga omnes in International Law*, IDI Resolution I/2005 (2005) 71(2) *Annuaire de l'Institut de Droit International* 286.

<sup>50</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277 <https://www.refworld.org/legal/agreements/unga/1948/en/13495> (accessed 8 July 2025).

their entitlements while residing in the country. " In addition, it will eliminate a system of unpredictability and inconsistency which often results in injustice for this highly vulnerable community." However, no progress has occurred regarding the bill since then. An acknowledgment of residency would go a long way in helping many issues faced by Rohingya (and other refugees) in India.

This could be accomplished by establishing UNHCR cards as adequate for accessing education, work, and basic health care, or they could be issued Aadhaar cards as proof of residency. Initially, the government could recommence the issuance of Long-Term Visas (LTV). At minimum, the Indian authorities should suspend indefinite detention and deportation of Rohingya refugees.

Creating an official policy on refugees would improve the safety of vulnerable groups and enhance the government's national reputation. It would also protect national security interests by ensuring that newcomers are accurately registered, lowering the chances that they would enter without documentation.