

Critical Analysis of Mohammad Salimullah v. Union of India: Has the Supreme Court of India acted as Executive?

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The Supreme Court of India (SCI), in the recent case of *Mohammed Salimullah v. Union of India* pertaining to the deportation of Rohingya refugee, observed that the Rohingya refugees be deported from India according to the procedure prescribed for deportation. This decision of the SCI brings to the forefront India's International Refugee Law obligations. The aftermath of the case opens up several questions which inter-alia include a) Whether India is bound by the principle of non-refoulement, b) Whether the Rights guaranteed under Article 14 and 21 of the Constitution of India (COI) is available against non-citizens, and c) Whether India is bound by non-refoulement obligation although not a signatory to the 1951 Convention Relating to the Status of Refugees (Refugee Convention). The author, through this research, attempts to evaluate the observations of the SCI in light of India's practice towards refugees. The study concludes that the SCI decision reflects the Indian administration's seventy-year attitude towards refugees rather than the assertion of judicial precedent. This analysis assumes significance in the light of the recent military coup in Myanmar and its implication on the Rohingya minorities. Despite the aberration in the present case, the author argues that the SCI could have acted as a surrogate to the executive to expand the fundamental rights of the refugees, asserting the customary and *jus cogens* nature of the principle of non-refoulement and directing the United Nations High Commission for Refugees (UNHCR) to represent the genuine cases involving fear of persecution.

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Introduction

The Rohingya are ethnic Muslim minorities from Myanmar; the Rohingya minorities have been fleeing Myanmar since the 1970s because of the State-sponsored persecution in Myanmar's Rakhine State.¹ The Junta in Myanmar amended laws to strip the basic rights with the political motive of persecuting these minorities.²

Most of the Rohingya minorities travel to the neighbouring States of Bangladesh and India as refugees. It is estimated that there are 40,000 Rohingya refugees residing in India; as per the 2019 report,³ 18,000 Rohingya refugees registered with the UNHCR.⁴ The majority of these refugees are lodged in Bangladesh; the Government of Bangladesh, to mitigate the Rohingya crisis, struck a deal in 2017 with Myanmar to repatriate Rohingya.⁵ However, the deal did not yield any significant outcomes. Further, the harsh conditions in Bangladesh have pushed lakhs of Rohingya refugees from Bangladesh to India.⁶ Most of these refugees migrated to India through family and community members, and few with

¹ Eleanor Albert and Lindsay Maizland, WHAT FORCES ARE FUELING MYANMAR'S ROHINGYA CRISIS? COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/rohingya-crisis> (last visited Jun 16, 2021)

² MYANMAR: POST-COUP LEGAL CHANGES ERODE HUMAN RIGHTS HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2021/03/02/myanmar-post-coup-legal-changes-erode-human-rights> (last visited Jun 16, 2021)

³ROHINGYAS IN INDIA.PDF, <https://www.ohchr.org/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/RitumbraM1.pdf> (last visited Jun 16, 2021)

⁴UNHCR - UNHCR SEEKING CLARIFICATION FROM INDIA OVER RETURNS OF ROHINGYA, <https://www.unhcr.org/news/press/2019/1/5c2f2a374/unhcr-seeking-clarification-india-returns-rohingya.html> (last visited Jun 16, 2021)

⁵MYANMAR AND BANGLADESH STRIKE A SHAMEFUL DEAL ON ROHINGYA REFUGEES THE CONVERSATION, <http://theconversation.com/myanmar-and-bangladesh-strike-a-shameful-deal-on-rohingya-refugees-88041> (last visited Jun 16, 2021)

⁶BANGLADESH SENDS MORE ROHINGYA REFUGEES TO NEW ISLAND HINDUSTAN TIMES, <https://www.hindustantimes.com/world-news/bangladesh-sends-more-rohingya-refugees-to-new-island-101613388466998.html> (last visited Jun 16, 2021)

the assistance of the smugglers.⁷ After entering the Indian soil, the refugees settle largely in Hyderabad, Delhi, West Bengal etc.⁸ As these refugees do not possess any travel-related documents, they are deprived of the basic necessities and are often victimised.⁹ The abysmal plight of the Rohingya refugees can be attributed to the lack of any legal framework regulating refugees in India, as the refugees are protected through ad-hoc administrative measures, in short at the mercy of the Government.¹⁰ The UNHCR, to some degree, attempts to safeguard these refugees from the wrath of the State. The UNHCR refugee card or the under consideration certificate is granted after a three-stage interview process.¹¹ However, Indian authorities seldom acknowledge the documents issued by the UNHCR as valid papers. Devoid of any valid documents, these refugees are turned back from government school and thereby struggle to make ends meet.¹² The COVID-19 has further aggravated the plight of the Rohingya refugees; the World Bank estimates that COVID-19 will push 71 million people into extreme

⁷ Patrick Brown, *This study was carried out by the Development And Justice Initiative (DAJI), commissioned by MMC Asia. This briefing paper has been developed by MMC Geneva and is a shortened version of the original research report which was written by DAJI. The author of this briefing paper is Yermi Brenner.*, 13

⁸ THE REST OF THE WORLD MUST ACKNOWLEDGE THE IMPACT OF ROHINGYA REFUGEES ON BANGLADESH THE WIRE, <https://thewire.in/south-asia/bangladesh-rohingya-refugees-impact> (last visited Jun 16, 2021)

⁹ “BANGLADESH IS NOT MY COUNTRY” HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2018/08/05/bangladesh-not-my-country/plight-rohingya-refugees-myanmar> (last visited Jun 16, 2021)

¹⁰ Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 ECONOMIC AND POLITICAL WEEKLY 71–75 (2008), <https://www.jstor.org/stable/40277209> (last visited Jun 16, 2021)

¹¹ MESSAGE FROM UNHCR TO ASYLUM SEEKERS AND REFUGEES UNHCR INDIA, <https://help.unhcr.org/india/urgent-message-from-unhcr-india-to-asylum-seekers-and-refugees/> (last visited Jun 16, 2021)

¹² “ARE WE NOT HUMAN?” HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2019/12/03/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh> (last visited Jun 16, 2021)

poverty.¹³ The Covid-19 outbreak has forced the States to tighten their national borders and impose strict immigration measure to tackle illegal immigrants. Since 2018, India has deported 12 Rohingya refugees to Myanmar by stating that they left voluntarily.¹⁴

On 8th April 2021, petitioners Mohammad Salimullah and Mohammad Shaqir approached the SCI, relying on the Reuters report that had claimed the Government is planning to deport 40,000 refugees, filed a petition challenging the decision to deport the Rohingya refugees to Myanmar.¹⁵ The SCI refused to grant interim relief and directed the Government to deport the Rohingya refugees according to the procedure followed for deportation.¹⁶ The focus of this paper is to dissect observations of the SCI. The author has split this analysis into three portions; in the first segment, the author attempts to decode the observations of the SCI, the second section provides an insight into India's refugee policy vis-à-vis its attitude towards the Rohingya refugees, the final portion investigates India's international law obligation with special focus on the principle of non-refoulement.

Examining Supreme Court's Decision

The case arose in the backdrop of the petitioner registered with the UNHCR approaching the SCI and presenting an interlocutory application seeking the release of the detained Rohingya refugees and directing the Indian Government not to deport the refugees, who have

¹³UPDATED ESTIMATES OF THE IMPACT OF COVID-19 ON GLOBAL POVERTY: THE EFFECT OF NEW DATA, <https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-effect-new-data> (last visited Jun 16, 2021)

¹⁴INDIA: HALT ALL FORCED RETURNS TO MYANMAR HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2021/03/10/india-halt-all-forced-returns-myanmar> (last visited Jun 16, 2021)

¹⁵SUPREME COURT OBSERVER - ROHINGYA DEPORTATION, <https://www.scobserver.in/court-case/rohingya-deportation-case> (last visited Jun 16, 2021)

¹⁶ MOHAMMAD SALIMULLAH VS UNION OF INDIA ON 8 APRIL, 2021 15, <https://indiankanoon.org/doc/10486034/> (last visited Jun 17, 2021)

been detained in the sub-jail in Jammu.¹⁷ The petitioners were represented by Prasant Bhushan and Colin Gonsalves and the Government by senior counsel Harish Salve and solicitor general Tushar Mehta.¹⁸ The contentions of the petitioners were a) The principle of non-refoulement is part of the right to life guaranteed under Article 21 of the COI, b) Rights guaranteed under Article 14 and 21 of COI are available to non-citizens, c) Principle of non-refoulement creates a binding obligation on India although India being a non-signatory to the Refugee Convention, d) Principle of non-Refoulement is part of International Covenant on Civil and Political Rights (ICCPR), 1966, Convention on the Right of the Child (CRC), 1989 and Universal Declaration of Human Rights (UDHR), 1948, Convention against Torture (CAT), 1984 and e) The recent decision (provisional measures) of the International Court of Justice (ICJ) in *Gambia v Myanmar*¹⁹ to maintain that if the refugees are deported to Myanmar, the risk of Genocide is manifest. The respondent countered the claims of the petitioners as; a) The refugees are foreigners under Article 2(a) of the Foreigners Act, 1946, b) India is not a party to the 1951 Refugee Convention therefore not bound by the principle of non-refoulement, c) The influx of refugees pose a significant threat to the national security, d) Section 3 of the Foreigners act, 1946 essentially entitles the central Government to prohibit, regulate, restrict the entry of foreigners into India or their departure therefrom and e) Reliance on a similar application which challenged the deportation of Rohingya from State of Assam, which High Court dismissed on 2018.²⁰ The Judgment was rendered by Justice SA Bobde, AS Bopana and V Ramasubramanian; in essence, the Justices made the following observations, i.e., the decision

¹⁷ MOHAMMAD SALIMULLAH VS UNION OF INDIA ON 8 APRIL, 2021 1, <https://indiankanoon.org/doc/10486034/> (last visited Jun 17, 2021)

¹⁸ *Id.* at 2

¹⁹ For a detailed analysis of the case, See Rizwanul Islam & Naimul Muquim, *The Gambia v. Myanmar at the I.C.J.: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya*, 51 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 55 (2020)

²⁰ MOHAMMAD SALIMULLAH VS UNION OF INDIA ON 8 APRIL, 2021, <https://indiankanoon.org/doc/10486034/> (last visited Jun 17, 2021)

of the ICJ does not influence the present application and thereby the Government of India ought to notify the Government of origin of the foreigners and subsequently deport to the country of origin. In terms of Article 51(c) of the Constitution of India (COI)²¹, the Judge concluded that national courts could draw inspiration from treaties or Convention unless it is not in contravention of the municipal law; in other words, international law applies to the extent that it does not conflict with municipal law.

Interestingly the SCI, rather than relying on Article 21 of COI, banked on Article 19(1) (e), i.e., right to reside or settle, and this right applies to citizens and not foreigners.²² The SCI did not grant interim relief and thereby ordered the deportation according to the procedure prescribed for such deportation. Following inferences could be gathered from the Judgment, i.e. refugees are treated akin foreigners in India. Hence, special treatment is not guaranteed to the refugees as enshrined under the refugee convention, and it is evident from the observation of the SCI that Article 19(1)(e) is the applicable law, the application of non-refoulement vis-à-vis right to life was not deliberated upon by the SCI. Having discussed the judgement, the author would, in the subsequent section, gauge India's attitude towards refugees and evaluate whether the judgement aligns with India's policy on refugees.

India's Position on Refugees

A combined reading of the Passport Act, 1967, Registration of Foreigners Act, 1946 and Foreigners Order, 1948 makes it conspicuous that India does not distinguish between genuine refugees and other category of foreigners.²³ In the absence of valid documents, the refugees

²¹ ARTICLE 51(C) IN THE CONSTITUTION OF INDIA 1949, <https://indiankanoon.org/doc/346437/> (last visited Jun 17, 2021)

²² MOHAMMAD SALIMULLAH VS UNION OF INDIA ON 8 APRIL, 2021 10, <https://indiankanoon.org/doc/10486034/> (last visited Jun 17, 2021)

²³ *Passports Act, 1967*, (1967), <http://indiacode.nic.in/handle/123456789/1372> (last visited Jun 17, 2021); *Foreigners Act, 1946*, (1946), <http://indiacode.nic.in/handle/123456789/2259> (last visited Jun 17, 2021)

risk getting arrested and subsequently deported to their place of origin. In India, only the Tibetan refugees are issued valid passport²⁴ but not property, while refugees from Afghan, Bangladeshi and Sri Lanka are not regarded as foreigners under law.²⁵ The discrimination of refugees violates equal treatment of refugees under the global human rights instrument.²⁶ The Foreigners Act, 1946 confers powers upon the Government to arrest and detain any foreigners on mere suspicion and for the non-compliance of the act.²⁷ Meanwhile, the Foreigners Order, 1948, authorises the Government to grant or refuse the entry into the territory of India on several grounds.²⁸ Despite the wide discretion conferred upon the Government to regulate the refugees in India, refugees are protected and treated compassionately from a humanitarian perspective.²⁹

Further in the absence of any domestic legislation on refugees coupled with India being a non-signatory of the 1951 Refugee Convention means that refugees can only avail administrative recourse and not appropriate legal remedies.³⁰ The administrative role is

²⁴ T. Ananthachari, REFUGEES IN INDIA: LEGAL FRAMEWORK, LAW ENFORCEMENT AND SECURITY - [2001] ISILYBIHRL 7, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (last visited Jun 17, 2021)

²⁵ 12_ASIA_REFUGEES.PDF 284, https://www.comillas.edu/documentos/centros/iuem/Migratory_Flows_at_the_borders_of_our_world/12_Asia_Refugees.pdf (last visited Jun 17, 2021)

²⁶ T. Ananthachari, REFUGEES IN INDIA: LEGAL FRAMEWORK, LAW ENFORCEMENT AND SECURITY - [2001] ISILYBIHRL 7, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (last visited Jun 17, 2021)

²⁷ POWER TO MAKE ORDERS | FOREIGNERS ACT, 1946 | BARE ACTS | LAW LIBRARY | ADVOCATEKHOJ, <https://www.advocatekhoj.com/library/bareacts/foreigners/3.php?Title=Foreigners%20Act,%201946&STitle=Power%20to%20make%20orders> (last visited Jun 17, 2021)

²⁸ FOREIGNERS ORDER, 1948, <http://www.bareactslive.com/ACA/ACT130.HTM> (last visited Jun 17, 2021)

²⁹ Dr Nafees Ahmad, INDIA MUST HAVE A SUSTAINABLE REFUGEE POLICY REFUGEE LAW INITIATIVE BLOG, <https://rli.blogs.sas.ac.uk/2019/07/01/india-must-have-a-sustainable-refugee-policy/> (last visited Jun 17, 2021)

³⁰ Saurabh Bhattacharjee, *India Needs a Refugee Law*, ECONOMIC AND POLITICAL WEEKLY 7–8 (2015), <https://www.epw.in/journal/2008/09/notes/india-needs-refugee-law.html> (last visited Jun 17, 2021)

undertaken by the UNHCR, which work in tandem with the Government to offer support to the refugees.³¹ The UNHCR has provided documentation to the refugees, by which the refugees can obtain temporary residence permits. The UNHCR collaborates with civil society partners like the Mahanirban Calcutta Research Group and the ministries to support refugees.³² Besides the UNHCR, the National Human Rights Commission (NHRC) has also played a pivotal role in the rescue of the refugees. For instance, the NHRC had given direction to the Government of Tamil Nadu to provide immediate medical treatment³³; the NHRC interfered to protect the Chakma refugees from eviction.³⁴

Several attempts were made to formulate a model law on refugees; however, these attempts were futile.³⁵ Considering that India has embraced the philosophy ‘Atithi Devo Bhava’³⁶, laws infract this stance. It is clear that in the absence of any legislative framework and sound administrative template providing a permanent solution to the plight of the refugees, the mantle shifts to the judiciary. The judiciary in India has adopted a constitutional-based approach towards the refugees.³⁷

³¹ ASHMORE - UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES.PDF, <https://www.refworld.org/pdfid/520a419a4.pdf> (last visited Jun 17, 2021)

³² MAHANIRBAN CALCUTTA RESEARCH GROUP UNHCR, <https://www.unhcr.org/en-in/partners/ngodirectory/48fdec5d21/mahanirban-calcutta-research-group.html> (last visited Jun 17, 2021)

³³ Nimrat Kaur, PROTECTION OF REFUGEES IN INDIA: A CRITICAL ANALYSIS (social science research network) (2013), <https://papers.ssrn.com/abstract=2214274> (last visited Jun 17, 2021)

³⁴ FROM THE ARCHIVES OF HUMAN RIGHTS CASES | NATIONAL HUMAN RIGHTS COMMISSION INDIA, <https://nhrc.nic.in/press-release/archives-human-rights-cases> (last visited Jun 17, 2021)

³⁵ Arjun Nair, *National Refugee Law for India*, 14, 5.

³⁶ INDIA THRIVES ON “ATITHI DEVO BHAVA,” <https://www.consultantsreview.com/cxoinsights/india-thrives-on--atithi-devo-bhava--vid-1207.html> (last visited Jun 17, 2021)

³⁷ Nafees Ahmad, *The Constitution-Based Approach of Indian Judiciary to The Refugee Rights and Global Standards of the UN Convention*, 27, 30

In *Louis De Raed and Other v UOI and Ors*³⁸ and the *Khudiram Chakma's case*³⁹, the SCI took the stance that the fundamental right of the foreigners are limited to Article 21 and does not in any way envisage the right to settle in India- as underscored under Article 19(1)(e) of the COI. This was affirmed by the Andhra High Court in *Vincent Ferrer v District Revenue Officer, Anantpur*⁴⁰ it was reiterated that foreign national enjoy protection under Article 14 but not entitled to assert their claim under Article 19(1)(e). The SCI in the *Chakma refugee's case* categorically declared that no one should be deprived of life and liberty without due process of law.⁴¹ The SCI and the high courts have continuously pointed out that the refugees shall not be deported to a State where his/her life is at risk.⁴² The present Judgment of the SCI runs contrary to its previous observation; the SCI took the standpoint that the right not to be deported is linked to Article 19(1) (e) and not Article 21, thus truncating the protection guaranteed to the refugees.

India's Non-refoulement Commitment under International Law

The principle of non-refoulement has garnered wide acceptance in international law. The principle is defined by the UNHCR (1977) as "Protection against return to a country where a person has reason to fear persecution".⁴³ The principle is accepted as customary international law

³⁸ MR. LOUIS DE RAEDT & ORS VS UNION OF INDIA AND ORS ON 24 JULY, 1991 13, <https://indiankanoon.org/doc/488726/> (last visited Jun 17, 2021)

³⁹ STATE OF ARUNACHAL PRADESH VS KHUDIRAM CHAKMA ON 27 APRIL, 1993, <https://indiankanoon.org/doc/473806/> (last visited Jun 17, 2021)

⁴⁰ VINCENT FERRER VS DISTRICT REVENUE OFFICER, ... ON 27 FEBRUARY, 1974 2, <https://indiankanoon.org/doc/1818981/> (last visited Jun 17, 2021)

⁴¹ NATIONAL HUMAN RIGHTS COMMISSION VS STATE OF ARUNACHAL PRADESH & ANR ON 9 JANUARY, 1996 7, <https://indiankanoon.org/doc/767216/> (last visited Jun 17, 2021)

⁴² SHUVRO PROSUN SARKER, REFUGEE LAW IN INDIA: THE ROAD FROM AMBIGUITY TO PROTECTION (Springer) (2017)

⁴³ NOTE ON NON-REFOULEMENT (SUBMITTED BY THE HIGH COMMISSIONER) UNHCR, <https://www.unhcr.org/en-in/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> (last visited Jun 17, 2021)

and as *jus cogens* norm.⁴⁴ The principle is codified under Article 33 of the 1951 Convention Relating to the Status of Refugees⁴⁵. The provision reads as: “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 judgement of a particularly serious crime, constitutes a danger to the community of that country”.⁴⁶

Further, the provision’s significance is evident from the fact that States are barred from making reservations to the said provision;⁴⁷ however, States can limit its application citing national security.⁴⁸ Additionally, States, which are signatories to the 1951 Refugee Convention, retain the margin of appreciation to restrict the flow of refugees in cases of espionage, sabotage, and terrorist activities. In short,

⁴⁴ Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INTERNATIONAL JOURNAL OF REFUGEE LAW 533–558 (2001), <https://doi.org/10.1093/ijrl/13.4.533> (last visited Jun 17, 2021); Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEORGETOWN IMMIGRATION LAW JOURNAL 1 (2008), <https://heinonline.org/HOL/Page?handle=hein.journals/geoimlj23&id=3&div=&collection=>

⁴⁵ OHCHR | CONVENTION RELATING TO THE STATUS OF REFUGEES, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx> (last visited Jun 17, 2021)

⁴⁶ *Id.*

⁴⁷ See Article 42(1) of the 1951 Refugee Convention which reads as “1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.”

⁴⁸ This is reflected in Article 33(2) of the 1951 Refugee Convention which reads as “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 judgement of a particularly serious crime, constitutes a danger to the community of that country.”

security threats can trump States obligation to comply with non-refoulement commitment.⁴⁹

Unlike the standard of proof required to prove refugees, the threshold for the application of non-refoulement is lower. Although India might contend that conferring asylum is the State's discretion, non-refoulement is an obligation that transcends treaty-based commitment.⁵⁰ The salience of the principle is evident from its drafting history of the Refugee Convention. The United States (U.S) delegate Louis Henkin in the ad committee Statelessness and Related Problem suggested that State could send the refugees to the third person and not return to a country where the refugee is likely to be persecuted.⁵¹

Moreover, the principle extends extraterritorially where the States exercise 'effective control'.⁵² The question that is required to be answered is whether this principle binds India in the absence of its endorsement of the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees. Although customary international law status of non-refoulement is widely acknowledged, it does not create a

⁴⁹ SURESH V CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) | CASE BRIEF WIKI | FANDOM, [https://casebrief.fandom.com/wiki/Suresh_v_Canada_\(Minister_of_Citizenship_and_Immigration\)](https://casebrief.fandom.com/wiki/Suresh_v_Canada_(Minister_of_Citizenship_and_Immigration)) (last visited Jun 17, 2021)

⁵⁰ Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 708–725 (2020), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/protecting-people-displaced-by-the-impacts-of-climate-change-the-un-human-rights-committee-and-the-principle-of-nonrefoulement/4B8E9EBB4FE37ABEB74608742FEAD946> (last visited Jun 17, 2021)

⁵¹ Andrew I Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEORGETOWN IMMIGRATION LAW JOURNAL 21, 80

⁵² THE PRINCIPLE OF NON-REFOULEMENT IN THE MIGRATION CONTEXT: 5 KEY POINTS - WORLD RELIEFWEB, <https://reliefweb.int/report/world/principle-non-refoulement-migration-context-5-key-points> (last visited Jun 17, 2021)

binding obligation on non-parties⁵³; the lofty stature of the principle is also well documented through series of regional conventions on refugees coupled with the UNGA resolutions.⁵⁴ The UNHCR Executive Committee (ExCom) went a step further to endorse non-refoulement as a *jus cogens* norm.⁵⁵ *Jus cogens* bind states irrespective of their acceptance to a particular treaty, and any action that contravenes *jus cogens* is void.⁵⁶

Interpreting Supreme Court’s Verdict: Can it fill the vacuum?

The observation of the SCI in the case under discussion is interesting as it categorically stated that “the national courts could draw inspiration from International Conventions, as long as it is not opposed to municipal laws.”⁵⁷ Therefore, the interpretation of the SCI logically underscores that non-refoulement violates the municipal law of India, therefore, does not apply to the present case.⁵⁸ This understanding of the SCI might be sturdy as India follows a dualist system, i.e. unless a treaty gets the backing of the legislature, it cannot create a binding obligation. Infact, several attempts have been made to pass a bill on refugees, one such being Member of Parliament from Kerala, Mr Shashi Tharoor

⁵³ Atul Alexander & Saiesh Kamath, *The Persistent Objector Rule in International Law* James A. Green Oxford University Press, 2016, 352 pp, £90, ISBN 9780198704218, 54 ISRAEL LAW REVIEW 135–139 (2021), it is argued that States can circumvent customary international law obligation through ppersistent objector.

⁵⁴ REFWORLD | ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL REFWORLD 13, <https://www.refworld.org/docid/45f17a1a4.html> (last visited Jun 17, 2021)

⁵⁵ Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law*, SSRN ELECTRONIC JOURNAL , 10 (2020), <https://www.ssrn.com/abstract=3733019> (last visited Jun 17, 2021)

⁵⁶ Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*,(2005), 3 28

⁵⁷ MOHAMMAD SALIMULLAH VS UNION OF INDIA ON 8 APRIL, 2021 12, <https://indiankanoon.org/doc/10486034/> (last visited Jun 17, 2021)

⁵⁸ Aparna Chandra, *India and international law: formal dualism, functional monism*, 57 INDIAN JOURNAL OF INTERNATIONAL LAW 25–45 (2017), <http://link.springer.com/10.1007/s40901-017-0069-0> (last visited Jun 17, 2021)

introduced a private bill in this regard, in the word of Tharoor “We are dealing with the refugee policy on an ad hoc basis. We must have a uniform policy”⁵⁹ but his efforts proved futile. Therefore the absence of specific legislation on refugees does not compel India to offer any legal assistance to the refugees. Can it be inferred that SCI can draw inspiration from International Conventions to which India is not a signatory, provided it is not opposed to India’s municipal law? Can SCI rely on customary international law and *jus cogens* to fill the void left by the legislature? To the former, it is pertinent to revisit Article 51 of COI, Article 51 of COI states: “The State shall endeavour to (a) promote international peace and security; (b) maintain just, and honourable relations between nations; (c) foster respect for international law and (d) encourage settlement of international disputes by arbitration.”⁶⁰ The philosophy behind the provision is to promote the notion of ‘Vasudhaiv Kutumbakam’, i.e., the universality of mankind as one family.⁶¹ Article 51, despite being part of Directive Principles of State Policy, can be read in consonance with Fundamental Rights.⁶² Article 51 of COI can be applied in word and spirit, provided it does not conflict with India’s municipal law.⁶³ A combined reading of Article 51 and Article 253⁶⁴ of COI clarifies that the obligation in contention is treaty obligation and

⁵⁹ SHASHI THAROOR CALLS FOR A REFUGEE POLICY | BUSINESS STANDARD NEWS, https://www.business-standard.com/article/current-affairs/shashi-tharoor-calls-for-a-refugee-policy-116092400745_1.html (last visited Jun 17, 2021)

⁶⁰ ARTICLE 51 IN THE CONSTITUTION OF INDIA 1949, <https://indiankanoon.org/doc/854952/> (last visited Jun 17, 2021)

⁶¹Nandita Haksar, BY TURNING AWAY REFUGEES FROM MYANMAR, INDIA IS BETRAYING ITS ANCIENT IDEA OF VASUDHAIVA KUTUMBAKAM, <https://scroll.in/article/991980/by-turning-away-refugees-from-myanmar-india-is-betraying-its-ancient-idea-of-vasudhaiva-kutumbakam> (last visited Jun 17, 2021)

⁶² MINERVA MILLS LTD. & ORS VS UNION OF INDIA & ORS ON 31 JULY, 1980, <https://indiankanoon.org/doc/1939993/> (last visited Jun 17, 2021)

⁶³ Vivek Sehrawat, *Implementation of International Law in Indian Legal System*, 31 FLORIDA JOURNAL OF INTERNATIONAL LAW (2021), <https://scholarship.law.ufl.edu/fjil/vol31/iss1/4>

⁶⁴ ARTICLE 253 IN THE CONSTITUTION OF INDIA 1949, <https://indiankanoon.org/doc/741672/> (last visited Jun 17, 2021)

does not extend to customary international law or *jus cogens*. Albeit the treaty obligation (Refugee Convention) does not bind India, India's position on customary international law is to be investigated, which transcends the treaty commitment under Article 51 and 253 of COI. Although customary international law is not directly incorporated into the Indian courts. In the context of non-refoulement, as reflected in a catena of cases, the courts have interpreted the customary character of non-refoulement to thwart the deportation of refugees,⁶⁵ however, India's state practice demonstrates 'persistent objector' to the principle of non-refoulement.⁶⁶ In the landmark case of *Gramophone Co of India Ltd v. Birendra Bhadur Pandey*,⁶⁷ it was observed by the SCI that customary international law is recognised in the Indian context unless it is excluded from forming part of India's domestic law. It is clear from the Birendra Bhadur Pandey jurisprudence that customary international law is excluded if it contradicts India's domestic law.

Further, it is self-evident that the principle of non-refoulement is at loggerheads with the Foreigners Act, 1946; this is because section 3(1) of the said Act grants wide discretion to the Central Government to prohibit, regulate and restrict the entry of foreigners.⁶⁸ Moreover, the Foreigners Act, 1946 per se does not impose a mandatory obligation to respect the principle of non-refoulement. Therefore it can be inferred that customary international law of non-refoulement is not directly incorporated into the Indian domestic system as it contravenes the Foreigners Act; hence the present observation of the SCI in *Mohammad*

⁶⁵ Jay Manoj Sanklecha, EXAMINING THE SUPREME COURT'S APPROACH TO ROHINGYA DEPORTATION HINDUSTAN TIMES, <https://www.hindustantimes.com/opinion/examining-the-supreme-court-s-approach-to-rohingya-deportation-101618324727697.html> (last visited Jun 17, 2021)

⁶⁶ AMAN KUMAR, SITUATING THE PRINCIPLE OF NON REFOULEMENT IN THE INDIAN LEGAL SCENARIO (Social Science Research Network) (2018), <https://papers.ssrn.com/abstract=3316317> (last visited Jun 17, 2021)

⁶⁷ GRAMOPHONE COMPANY OF INDIA LTD VS BIRENDRA BAHADUR PANDEY & ORS ON 21 FEBRUARY, 1984 8, <https://indiankanoon.org/doc/383397/> (last visited Jun 17, 2021)

⁶⁸ SECTION 3(1) IN THE FOREIGNERS ACT, 1946, <https://indiankanoon.org/doc/1524641/> (last visited Jun 17, 2021)

Salimullah v. Union of India is in sync with India's attitude towards refugees. However, the paradox is that several previous observations of the judiciary indicate the customary international law principle of non-refoulement is clubbed with Article 21 of COI,⁶⁹ notwithstanding the state practice to the contrary. Hence, it can be unequivocally stated that the present judgement reflects the mindset of the executive rather than the judiciary.

Whether India is bound by non-refoulement as a *jus cogens* obligation, this stance can be overzealous as there are hardly sufficient literature to indicate the same. Despite the scholarly contributions and endorsement of UNHCR on the *jus cogens* nature of non-refoulement, there is a dearth of actual state practice or any positive affirmation by the International Law Commission (ILC) in this direction.⁷⁰ In fact, it was solely on one occasion, i.e., in the *Delhi district Court in Of Nurenburg vs Superintendent Presidency*, wherein the *jus cogens* nature of non-refoulement was put to interpretation, unsurprisingly, the position taken by the Delhi district court was in line with India's state practice. According to the court, "It is not in dispute that the deliberations of the meetings of ExCom are not binding on member States; however, time and again State parties and other countries attending the meetings of ExCom have reiterated their commitment towards upholding the rights of refugees and have acceded to the fact that the principle of non-refoulement is an essential part of the customary international law which ought to be followed in letter as well as in spirit by all States for whom human life is of paramount importance. Thus, it cannot be gainsaid that

⁶⁹ KTAER ABBAS HABIB AL QUTAIFI AND ... VS UNION OF INDIA (UOI) AND ORS. ON 12 OCTOBER, 1998, <https://indiankanoon.org/doc/1593094/> (last visited Jun 17, 2021)

⁷⁰ See the ILC report on CHP5.PDF, <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> (last visited Jun 17, 2021). The ILC identified the following norms as *jus cogens* norms "(a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination." There was no reference to non-refoulement as a *jus cogens* norm (annex).

nonrefoulement has assumed the character of a peremptory norm.”⁷¹ The court relied on the statement in the ExCom of UNHCR and India’s participation in the same to show how *jus cogens* was positively asserted, however in the same vein, the court seems to suggest that although non-refoulement is customary international law, it fails to fulfil the *jus cogens* standards.⁷²

Conclusion

It is clear from this study that refugees in India are protected on an ad-hoc basis. This means that refugees in India are constantly at the mercy of the administrative authorities. As rightly argued by doyen third world scholar Prof. B.S Chimni the refugees in India are required to be protected from a rights-based approach rather than a charity-based approach.⁷³ More specifically, the author contends through this research that the principle of non-refoulement is hit by the Foreigners Act, 1946. Hence India is not bound to comply with the non-refoulement obligation as it is hit by municipal law. However, it is observed that despite the lackadaisical attitude of the administration, the judiciary in India historically has been forthcoming to tag non-refoulement under Article 21 of COI. Notwithstanding the proactive role and antecedent of the judiciary, the observation of the judiciary in the present case seems to depart from its earlier observations as the court took recourse to Article 19(1)(e), which is apparently available only to citizens. Hence, it can be concluded that the mindset of the judiciary, at least in terms of Rohingya refugees, seem to reflect the policy of the executive.

⁷¹ OF NURENBURG VS . SUPERINTENDENT, PRESIDENCY ... ON 20 SEPTEMBER, 2011 58, <https://indiankanoon.org/doc/37056325/?type=print> (last visited Jun 17, 2021)

⁷² *Id.*

⁷³Bansari Kamdar, INDIAN REFUGEE POLICY: FROM STRATEGIC AMBIGUITY TO EXCLUSION?, <https://thediplomat.com/2020/02/indian-refugee-policy-from-strategic-ambiguity-to-exclusion/> (last visited Jun 17, 2021)