

The potential refugee status of the Rohingya in Bangladesh under International Refugee Law

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Introduction

Finding a solution to the Rohingya refugee crisis has been frequently brought to attention by the international community, humanitarian organisations and academic scholars.¹ As they are affected by the world's fastest growing humanitarian crisis, the Rohingya are one of the most marginalised and persecuted groups, marking one of the most significant events in contemporary world history. The framework within International Refugee Law could potentially offer protection for the Rohingya refugees, under the 1951 Geneva Convention, the main regulation to locate the assistance of refugees. The current refugee crisis will be assessed through a theoretical approach from postcolonialism to understand the complexity of the social and political roots of the persecution in Myanmar. The tensions that arise from the violence and suffering endured by the Rohingya has been relevant since the colonial period.² Accordingly, this essay explores how the Rohingya refugee crisis illustrates the inadequate protection of laws under International Refugee Law, resulting in the construction of postcolonial statehood.³ At face value, the framework of international law should provide an appropriate solution, but the legal enforcement seems to have opposite effect.⁴ To pinpoint the source of the problem would intensify an incremental step closer to providing a long-lasting suitable solution to provide international support to the Rohingya.

The history of the persecution

An effective discussion of the Rohingya refugee crisis requires understanding that it is an embodiment of the consequences of imperialism, which could potentially address

¹ Anas Ansar, 'The Unfolding of Belonging, Exclusion and Exile: A Reflection on the History of Rohingya Refugee Crisis in Southeast Asia' (2020) 40 *Journal of Muslim Minority Affairs* 441.

² *ibid* 442.

³ Mohammad Shahabuddin, 'Postcolonial boundaries, international law, and the making of the Rohingya crisis in Myanmar' (2019) 9 *Asian Journal of International Law* 334, 335.

⁴ *ibid* 334.

Ansar's concern on the lack of historical analysis on its arrival as there is a clear inconsistency in the understanding.⁵ The crisis has been collectively exacerbated by the colonial history, ethnic conflicts, lack of democracy, and removal of the Rohingya community from the Burmese history.⁶ This is because the roots of the persecution of the Rohingya are derived from the 'institutions, rhetoric, and ethnologies' established in Myanmar as a former British colony.⁷ The politics of a post-colonial Burma, enabled by the legacy of British colonialism, deliberately seeks to create a chain of events in Burmese society, that would lead to division, discrimination, and disorder.⁸ It is these discourses that have shaped modern Myanmar, within the post-colonial conditions, that have enabled the struggle of the Rohingya.

The domination of former rulers, at the expense of their civilians, explicitly informs the colonial history of Myanmar, as a former British colony from the 19th century, which mirrors an imbalanced power dynamic.⁹ It is notable that, as Myint asserts, that the language and concepts are not neutral when understanding this conflict. Myanmar officially gained independence in 1948 and it was not until 2016 that a civilian government was officially established, where the land was governed based on the same values within the institutionalism of the British administration. Historically, there is inherent xenophobia that excludes Rohingya people thus rendering them stateless.¹⁰ Accordingly, Eurocentric values were imposed upon Burma, even long after the departure of the British from Myanmar.¹¹ This was reinforced by Shahabuddin's analysis that the implementation of international law creates postcolonial states which results in ethnic minorities being suppressed and the emergence of humanitarian catastrophes. He explores the colonial boundaries which accompany the facilitation of these catastrophes by international law, a notion that seeps into the current legal approach.¹² That Myanmar, a former British colony,

⁵ Wyn Aung Myint, 'Myanmar's Rohingya Crisis: De/constructing Postcolonial Discourses' (Goucher College Symposium, November 2018), 9.

⁶ Ansar (n 1), 441.

⁷ Myint (n 5), 3.

⁸ *ibid* 4.

⁹ *ibid* 8.

¹⁰ *ibid* 8.

¹¹ *ibid* 3.

¹² Shahabuddin (n 2), 334.

continues to cultivate the values and adopt principles of the coloniser demonstrates the long-lasting and sinister impact of colonialism.¹³

Central to the understanding of the postcolonial discourse in the context of contemporary Myanmar is the 'clearance operation', a significant event which took place on 25th August 2017. This was the worst of the military crackdowns. The Rohingya situation is analogous to a 'genocide', and it could potentially be classified as one by the United Nations Human Rights Council, who describes the Rohingya minority as 'a textbook example of ethnic cleansing'.¹⁴ Elements of this include the imposition of statelessness, dehumanising discrimination and segregations, and the forcible and systematic displacement of homes and properties, and the violence and abuse of villages.¹⁵

The Rohingyas in Northern Rakhine are subject to double discrimination by the Rakhine Buddhists. As one of the poorest states in Myanmar, the Buddhist Rakhine conflict with the minority Rohingya communities, most of whom are Muslims, with a small minority who are Hindus. As a result of this, an estimate of around 700,000 Rohingyas fled to Bangladesh.¹⁶ The displacement of the Muslim minority was perpetrated by Buddhist Rakhine people who claim the land as their own and, resultantly, have torched hundreds of Rohingya villages and slaughtered over 1,000 women and children.¹⁷ This entails the widespread violations of human rights in Myanmar against the Rohingya Muslims. Accordingly, the Rohingya have, for years, been recipients of egregious treatment from the Myanmar Government.¹⁸

The engagement of the Rohingya with international law, the norms of which should protect individuals from statelessness, is problematic.¹⁹ The crisis of the Rohingya people in the Rakhine state emerged from the construction of a rigid system which reflects the divisiveness amongst postcolonial conditions, such as ethnic identity and

¹³ Myint (n 5), 3.

¹⁴ 'UN Human Rights Chief Points to "Textbook Example of Ethnic Cleansing" in Myanmar' (United Nations News) <<https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>> accessed 23 August 2023.

¹⁵ Myint (n 5), 2.

¹⁶ Jobair Alam, 'The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution' (2021) 19 *Journal of Immigrant & Refugee Studies* 128.

¹⁷ *ibid.*

¹⁸ M Alvi Syahrin, 'The Rohingya Refugee Crisis: Legal Protection on International and Islamic Law' (2018) 192 *Advances in Social Science, Education and Humanities Research* 94.

¹⁹ Shahabuddin (n 3), 23.

national borders and consciousness.²⁰ This inhumane treatment has resulted in the Rohingya living in statelessness and continuing to do so, as they were excluded from citizenship during the 1960s.²¹ The Rohingyas are not considered to be citizens and are thus, rendered stateless.²² Indeed, this forms one part of the plight of the Rohingya, whose legal status is marginalised, after being continually discriminated against and disenfranchised.²³ Being positioned as an 'other' places them at a significant disadvantage against Burmese nationalism, which is the narrative that is asserted within the nationalist consciousness of Burma.²⁴ Shahabuddin attributes the problem to the lack of legal enforcement, as opposed to the protection under the international law, but a more compelling argument is that international law constitutes 'post-colonial statehood'. He illustrates the connection between the colonial boundaries in post-colonial Myanmar and the Rohingya crisis, from which we can assess the role Europe has played in creating the international legal norms and rules. This provides a lens through which we can understand how these atrocities ensue, and how international law is an amalgamation of these issues.²⁵

The actors of the persecution

The actors who are implicated in shaping the Rohingya people should be reaffirmed in the postcolonial context, to reinforce our analysis.²⁶ The primary contemporary actors are the Rohingya and the Burmese. The presence of the British, who are the former colonial authorities of Myanmar, is at an institutional and territorial level, as they imported the dichotomies and institutions. The central location in which the violent atrocities take place is the Rakhine state, though there is a much wider context, in the application of postcolonial consciousness. This illuminates the discourse under which ethnic and religious identity is valued.²⁷ At present, Burmese postcolonialism embodies the postcolonial presence of the British. The 'minority within a minority state' is embodied in the ethnic Rakhine people. Buddhist-Burmese nationalists project their

²⁰ *ibid* 6.

²¹ Abul Milton et al, 'Trapped in Statelessness: Rohingya Refugees in Bangladesh' (2017) 14 *International Journal of Environmental Research and Public Health* 942, 943.

²² Myint (n 5), 5.

²³ Alam (n 16), 128.

²⁴ Myint (n 5), 7.

²⁵ Shahabuddin (n 2), 336.

²⁶ Myint (n 5), 5.

²⁷ *ibid*.

Islamophobic attitudes onto the Rohingya, who are not formally represented by a state. Examining these actors as symbols of expansion and exploitation after decades of imperialism is critical to effective discussions of the Rohingya crisis.²⁸

Determining the origins of the Rohingya, the history of which dates to the ninth century, highlights a grey area. Some historians have found that Arakan was the origin, and others have found that British colonial authorities encouraged the emigration of the ascendants of the Rohingya to the western regions of Burma from Eastern Bengal.²⁹ Notwithstanding the uncertainty in pinpointing the exact period in which the arrival of the Rohingya in Myanmar took place, their presence in the Rakhine, from the colonial period, proves that the Rohingya were present in Rakhine.³⁰ This demonstrates the test of 'habitual residence', applied in assessing whether the Rohingya fall into the category of refugees. As they are 'outside the country of nationality or habitual residence', a separate provision is provided for them as stateless individuals. This notion of habitual residence, which Hathaway reinforces, bridges the gap between a stateless individual and a state that appraises the relationship between a citizen and their state. Without the recognition of this, the Rohingya would not be able to claim asylum.³¹

Current approach by Bangladesh and challenges

The lack of legal clarity and comprehension in the current international and regional response plan hosted by Bangladesh has led to a more disproportionate responsibility towards Rohingya refugees. As an ExCom member, Bangladesh is reputable internationally as 'a home for the Rohingya refugees.' Bangladesh is a signatory to various human rights instruments and endeavours to uphold the rights of the Rohingya.³² Although the Government and the people of Bangladesh are very welcoming, there is a lot of strain on the local authorities, support systems, and communities due to the multitude and urgency of the humanitarian needs.³³ The

²⁸ ibid 9.

²⁹ ibid 3.

³⁰ Anas Ansar and Abu Faisal Md Khaled, 'From solidarity to resistance: host communities' evolving response to the Rohingya refugees in Bangladesh' (2021) 6 Int J Humanitarian Action 16.

³¹ Myint (n 5), 131.

³² ibid 137.

³³ Ipshita Sengupta, 'An Agenda for a Dignified and Sustainable Rohingya Refugee Response in Bangladesh' (Act For Peace, 2021), 7.

approach to international law, adopted by Bangladesh, is dualist in nature so international law principles are adhered to, as long as they are consistent with domestic law. Notably, the Government of Bangladesh have not signed the 1951 Convention. However, they must protect refugees under national and international laws.³⁴ There is still denial from Myanmar's military who claim that they are fighting militants and civilians are not targeted, which is contradicted by the refugees fleeing to Bangladesh after Myanmar's military government displaced them.³⁵ What distinguishes the Rohingya from the Buddhist Burmese and many other residents of Rakhine, is that they speak Bengali and are, thus, a minority, in terms of language, ethnicity, and religion, in both Myanmar and Rakhine (which was formerly Arakan).³⁶ It is these attitudes which lead to the disproportionate burden on Bangladesh, and the responsibility of the international community being overlooked.

The dilemma for Bangladesh

Upholding the current status quo of the Rohingya refugee does more harm than good, as it is at the expense of the national interests and security of Bangladesh. The Rohingya crisis is more than a humanitarian issue as it also poses a potential threat to the internal stability of Bangladesh. For example, there is forceful repatriation and abuse, combined with the social, political, and economic abuse, despite the efforts of Bangladesh to provide legal protections. This is observed in the denial of basic rights, such a health services and access to education, highlights the inadequate legal protection provided for noncitizen Rohingyas.³⁷ The protraction of the refugee crisis entails many difficulties in determining an appropriate solution.

Potential refugee status under the 1951 UN Convention

When making a successful asylum claim, the initial presumption that nation-states are sovereign and have the right to control their borders must be displaced. Refugee law

³⁴ Nour Mohammad, 'International Refugee Law Standards: Rohingya Refugee Problems in Bangladesh' (2011) 11 ISIL YB Intl Human and Refugee L 401, 419.

³⁵ *ibid* 233.

³⁶ *ibid* 234.

³⁷ Utpala Rahman, 'The Rohingya Refugee: A Security Dilemma for Bangladesh' (2010) 8 Journal of Immigrant & Refugee Studies 233.

provides an exception to this rule, which applies to this situation as Myanmar does not place its citizens as the subject of their political life. Indeed, the Rohingya have been denied citizenship and thus, rendered stateless and should be treated accordingly under International Refugee Law. I welcome the analysis of Alam, who explores the intricacies of the potential status and rights of the Rohingya under International Refugee Law - contrary to Holliday's argument that the question of citizenship should be addressed. The overarching principle within the preamble of the Convention in the UN Charter is that all human beings are entitled to fundamental rights and freedoms without discrimination.³⁸

Definition of the refugee

The starting point to determine the potential status of refugeehood of the Rohingya would be with the definition in Article 1A(2) of the 1951 Convention, which governs refugee status at an international level.

i) Well-founded fear

The first element to establish is a well-founded fear of being persecuted. There is a subjective and objective element to this; the subjective element concerns the frame of mind, and this must be due to persecution and the objective element states that the fear must be evaluated objectively to determine if there is a valid basis for that fear. The risk of persecution is assessed by whether the protection from the claimant's state of origin would be considered insufficient for any reasonable person within the same circumstances.³⁹ The objective element is analogous to the US example, in *Cardoza-Fonseca*,⁴⁰ where it appeared too apparent for one who escapes the country to have a 'well-founded fear of being persecuted' upon their eventual return.⁴¹ Additionally, the standard of proof for this fear would be a 'reasonable degree of likelihood',⁴² which would assess the credibility of the applicant, which asks whether the account is consistent and plausible.

³⁸ Alam (n 16), 128.

³⁹ James Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP 1991), 80.

⁴⁰ *INS v Cardoza-Fonseca*, 480 US 421 (1987), 431.

⁴¹ *ibid* [14].

⁴² *R v SSHD, ex p Sivkumaran* [1988] AC 958.

ii) Persecution

The fear must arise from the persecution, for which there is no fixed definition. This leaves it open to interpretation and thus becomes a 'question of degree and proportion'. There are different ways the treatment of the Rohingya amounts to persecution, which is underlined by the fear which arises from the individuals being deprived of their lives and freedom. Undeniably, the Rohingya are victims to cruel, inhumane and degrading treatment or punishment, economic struggles, and denial of access to basic services to enhance their quality of life – their 'capacity to subsist' is thus threatened.

The Rohingya are cumulatively discriminated against, through being denied access to professions, education, and restrictions on the freedom of speech, assembly, worship, and movement.⁴³ This aligns with Hathaway's definition of persecution as the failure of the State to protect basic human rights which are being systemically and sustainably violated.⁴⁴ While Storey has expressed his disapproval for this human rights approach and is in favour of a universal definition, due to the international human rights law, this approach considers the different factors which determines persecution.⁴⁵ Accordingly, the conditions of a well-founded fear of persecution are satisfied.

iii) Five grounds

Additionally, this persecution must arise due to race, religion, nationality, or membership of a particular social group or political opinion. In this case, nationality entails the origins and the ethnic, religious, cultural, and linguistic communities to which one belongs.⁴⁶ There should be no difficulties in determining whether a refugee is outside the country of nationality or habitual residence. Nationality is not restricted to citizenship as it includes ethnic or linguistic groups, and these may intersect with race.⁴⁷ There must be a causal link to one of these five reasons, applying Lord

⁴³ Alam (n 16), 130.

⁴⁴ Hathaway (n 35).

⁴⁵ Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26 Intl J Refugee L 272.

⁴⁶ Alam (n 16), 130.

⁴⁷ *ibid* 131.

Bingham's contextual approach in *K and Fornah*.⁴⁸ As mentioned previously, belonging to a distinct group, ethnically, linguistically, and racially, constitutes the basis upon which the Rohingya face discrimination. It is when the imposition of restrictions compromises their livelihood, right to practice religion or access to education that this amounts to persecution - demonstrated by the absence of citizenship and habitual residence, resulting in their exclusion which is 'substantially prejudicial'.⁴⁹

iv) Unwillingness to return

The last element to establish is whether the refugees are 'unable or unwilling to avail of state protection or to return there', which refers to the country of nationality, and, for the stateless refugees, the country of their former habitual residence. Under Myanmar's 1982 Citizenship Law, the Rohingyas are not citizens, but they fled to Bangladesh and would not be willing to return to Myanmar. The hostile environment, property being arbitrarily confiscated, and other restrictions economically lead to fear of persecution. The situation has only intensified with reports of crimes against humanity and rape which would reinforce this element.⁵⁰

After assessing all these elements, the Rohingya satisfy the criteria, and thus we can consider *how* they would be protected under international law.⁵¹

The principle of non-refoulement

At the forefront of the international refugee protection within the 1951 Convention is the principle of non-refoulement, under which Bangladesh have generally met their obligations. Non-refoulement serves as a tool to protect the refugees and stateless persons, through which the basic rights and the provision of humanitarian space is upheld.⁵² What distinguishes this principle from the definition of a refugee is that it is

⁴⁸ [2006] UKHL 46

⁴⁹ Alam (n 16), 131.

⁵⁰ *ibid.*

⁵¹ *ibid* 132.

⁵² *ibid.*

a customary law norm that is binding on all states, including Bangladesh, although it is not absolute. The UN General Assembly affirms commitment to the principle of non-refoulement. Under Article 33, if it is reasonably foreseeable that a person that leaves their country would be persecuted upon return, they cannot be sent back. When an asylum-seeker has prima facie claim to refugee status, this principle applies. The rights in the Convention vary and are applicable at different times, as sometimes it coincides with arrival, and sometimes it is dependent on a lawful stay. While Bangladesh declares that they offer *hospitality*, but not protection, which Alam contests as this seems like a counter-intuitive assertion. Protection *is* provided, due to the binding protections under international law, which, under the Convention, would treat the Rohingya as refugees.⁵³

While in theory, this principle seems to provide a satisfactory outcome, it carries the risk of burdens, in a socio-economic context, for example, for the country in question. In the case of the Rohingya, the burdens arise from a mass influx of displaced persons who are yet to determine refugee status. However, regardless of the economic or political impact that the detriment of an influx of refugees may have, under Article 33, refoulement cannot be justified, and this does not necessarily entail the formal recognition of refugee status – a conclusion reached by the ExCom. Accordingly, Bangladesh must adhere to the principle of non-refoulement. The mass influxes can be divided into three phases and the acceptance of many Rohingya refugees highlights the extent to which Bangladesh has met these obligations, with an estimate of 900 in 1978; 250,000 in 1991-1992; and 500,000 in the third phase between August and September 2017, respectively.⁵⁴ The stark contrast with the deportation of the Rohingya from India, a neighbouring country, highlights the risk to the Rohingya population, which challenges the effectiveness of the principle of non-refoulement. India's refusal to implement non-refoulement challenges the Eurocentric nature of refugee conventions. This is consistent with Myint's analysis, from which we can infer that the colonial history of Myanmar played a part in this as, through British colonial rule, Indian people, who were civil servants, were discriminated against. The colonial presence of Indian people became aligned with Rohingya people in Rakhine state, as

⁵³ *ibid.*

⁵⁴ *ibid.*

there was a labelling of a rigid 'Indianness.' This resulted in a colonial legacy that invoked resentment and leads to the Rohingya people being deliberately overlooked.⁵⁵

A durable solution

The inherent relationship between the suppression of the ethnic minorities and colonialism continues to place the future of the States in question, an issue which is reflected in the inconsistent application of International Refugee Law across States.⁵⁶

It is difficult to ascertain what could be addressed to change this as the Rohingya is a representation of States' political manipulation who place them into categories of citizens, stateless or refugees, which does not reflect their original status correctly.

Thus, the fragmentation of global and regional settlements and the flexibility of the authority of IRL on non-State parties entails the status of the Rohingya not being formally recognised as refugees.⁵⁷ The absence of a stringent IRL framework creates a dependence on the States' discretion and the support of the international community. The significant constraint on resources on Bangladesh, as a developing country, hinders the needs and rights from being met. International support is required to share the burden of resources. Although Bangladesh has provided support, there is massive room for improvement to address the Rohingya situation and ending the cycle of Rohingya displacement.⁵⁸

The security problem in Bangladesh could be addressed by a shift towards a solution, that is focused on justice and rights, to prevent further problems arising within refugee camps, for example. The refugee camps would become an unruly place that is not regulated. To address the legal inconsistency, a step taken by Bangladesh could be to find a suitable balance between adhering to its policy which avoids interfering in another state's internal matters, while also defining its role in solving the Rohingya issue. At present, it is testament to the objectives of Bangladesh's foreign policy that friendly relations are maintained with Myanmar.⁵⁹ A long-term solution can be established in the creation of refugee law, which Bangladesh needs, to provide work

⁵⁵ Myint (n 5), 4.

⁵⁶ Alam (n 16), 137.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid* 138.

permits, and offer protection for refugees in the border region with 'short term dual citizenship.'⁶⁰

While refugees are not legally entitled to solutions, a shift from an emphasis on refugee rights to finding a comprehensive solution would be a significant starting point.⁶¹ With the aim of the preamble in mind, the aim should be for an end to displacement and to allow the refugees to freely exercise their human rights. Alam identifies the three means through which 'rights of solutions' are defined: 'repatriation, resettlement or local integration'. Repatriation entails the return of refugees to the country of origin, which is implicitly outlined in Article 1(c) of the Convention, under the principle of 'safe return'. This differs from refoulement due to the emphasis on voluntariness and *sine qua non*. This has been inconsistent with customary international law. We turn to local integration, whereby refugees are granted rights that would enable them to have autonomy over their own lives and live freely without discrimination, and thus become less reliant on State aid and humanitarian assistance. The duty to implement this is implied in treaty obligations, under Articles 1(c)(3) and 34. However, Bangladesh has not cooperated, and this has not been viable. When these solutions are not available, under Articles 20 and 31, the last resort would be resettlement, which entails the transfer of refugees from the host country to another country, which would agree to provide protections. However, due to the costs and the economic value attached to the Rohingya, assessed by their health and education levels, the response to this solution has not worked.⁶²

The principle of solidarity seems to be the most appropriate method of distributing obligations amongst States. Ullah suggests a durable solution would be to share the burden of protection of these refugees amongst the international community. This includes extending diplomatic and material support to implement such policies.⁶³ This could be achieved through increasing concern for the Rohingya to the international community. All State and non-State actors would have to cooperate and try to challenge these issues within their capacity. This could be regulated by the international mediators, such as the UN, asserting their diplomatic effort and getting

⁶⁰ *ibid* 139.

⁶¹ *ibid*.

⁶² *ibid* 136.

⁶³ Akm Ahsan Ullah, 'Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization' (2011) 9 *Journal of Immigrant & Refugee Studies* 139.

actively involved. This is also appreciated in Article 35(1) of the Convention, whereby refugee arrangements and burden sharing are provided.⁶⁴ Accordingly, the rights and protections of the international community can be achieved, through a more thorough enforcement of the international law, a flaw which aligns with Shahabuddin's line of reasoning.

Conclusion

In conclusion, the colonial history of Myanmar continues to permeate the lack of legal enforcement, as, despite satisfying the definition of refugees under Article 1A (2), the status of the Rohingya has been politically manipulated. This does not, nonetheless, infringe upon the rights under the Convention and the obligations of non-refoulement which have generally been met by Bangladesh. The flaws within the current status quo and an evident futility within the focus on the rights of refugees has highlighted the need for international support more than ever. This would necessarily repatriate and rehabilitate refugees in Myanmar, as Bangladesh currently bears a responsibility to meet the needs and rights of the refugees, that is considerably burdensome, for a developing country, with limited resources and facilities to improve security.⁶⁵

⁶⁴ Alam (n 16), 136.

⁶⁵ *ibid* 138.

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