



## REFUGEES AND HUMAN RIGHTS: A JURISPRUDENTIAL CONUNDRUM OF ROHINGYA CRISIS

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*To deny people their human rights is to challenge their very humanity.”*

– *Nelson Mandela*

### ABSTRACT:

Rohingyas are known as the world's most persecuted ethnic minority. There has been a mass exodus of the Rohingyas from Rakhine province in Myanmar ever since the ethnic conflict escalated. Most of them have fled from what has been described as a genocide, leaving behind burning homes and all their belongings. By nature, such a helpless community cannot be termed an illegal immigrants but they would fall well within the definition of refugee under the 1951 Convention on the Status of refugees.

Our Constitution confers contains rights on every human being and certain other rights on citizens and non-citizens. Every person is entitled to equality before the Law and equal protection of the laws. Hence, no person can be deprived of his life or personal liberty except according to procedure established by Law.

Order of deportation of Rohingya refugees to be tested against Article 19 of the Constitution, but the challenge is limited to

the non-compliance of the mandate under Article 14 & 21 as well as the requirements of international law and treaties which India has signed and which according to various judgements of Apex Court, must be read into domestic law and is against the preamble of Convention relating to status of Refugees, 1951 and Protocol Relating to the Status of Refugees, 1967. The general principle of right to asylum and right not to be deported is contained in the International Convention of Civil and Political Rights (ICCPR) (Articles 6 and 7) & under the Universal Declaration of Human Rights (Article 14). These are binding since India has both signed and ratified these conventions and India is bound by its obligations under these two conventions.

Thus claim a right against deportation, in keeping with the Constitutional guarantees under Articles 14 and 21 read with Article 51 (c) of the Constitution of India and on the facet of Humanitarian law which protect against arbitrary deportation of Rohingyas refugees who have sought asylum in India after escaping a situation akin to genocide in their home country.

**KEY WORDS:** Universal Declaration of Human Rights (UDHR), International law & Treaties, Convention relating to status of Refugees, 1951, Protocol Relating to the Status of Refugees, 1967, Doctrine of Non-refoulement, Right to Asylum, Constitution of India (Article 14, 21 & 51).

### INTRODUCTION

*“Human right is the right which born’s with birth of the person and dies with the death of the person”*



*-Justice Krishna Iyer*

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.

International human rights law lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

One of the great achievements of the United Nations is the creation of a comprehensive body of human rights law—a universal and internationally protected code to which all nations can subscribe and all people aspire. The United Nations has defined a broad range of internationally accepted rights, including civil, cultural, economic, political and social rights. It has also established mechanisms to promote and protect these rights and to assist states in carrying out their responsibilities.

The foundations of this body of law are the Charter of the United Nations and the Universal Declaration of Human Rights, adopted by the General Assembly in 1945 and 1948, respectively. Since then, the United Nations has gradually expanded human rights law to encompass specific standards for women, children, persons with disabilities, minorities and other vulnerable

groups, who now possess rights that protect them from discrimination that had long been common in many societies.

## **INTERNATIONAL LAW AND HUMAN RIGHTS**

### **Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly resolution 217 A (III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. Since its adoption in 1948, the UDHR has been translated into more than 501 languages. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols (on the complaints procedure and on the death penalty) and the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol, form the so-called International Bill of Human Rights.

### **Economic, social and cultural rights**

The International Covenant on Economic, Social and Cultural Rights entered into force in 1976, and had 164 states parties by the end of October 2016. The human rights that the Covenant seeks to promote and protect include:

- the right to work in just and favourable conditions;



- the right to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being;
- the right to education and the enjoyment of benefits of cultural freedom and scientific progress.<sup>1</sup>

### Civil and political rights

The International Covenant on Civil and Political Rights and its First Optional Protocol entered into force in 1976. The Covenant had 167 states parties by the end of 2010. The Second Optional Protocol was adopted in 1989.<sup>1</sup>

The Covenant deals with such rights as freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections; and protection of minority rights. It prohibits arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred.

### Human Rights Conventions

A series of international human rights treaties and other instruments adopted since 1945 have expanded the body of international human rights law. They include the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All

Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2006), among others.

### International Law Obligations of India

- ❖ India ratified the *Universal Declaration of Human Rights on 10th December 1948. UDHR*, while laying down the basic foundation for Human Rights, protects the Refugees by explicitly recognising the Principle of Non-Refoulement.<sup>1</sup>

Article 14 states the following:

*(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.*

- ❖ International Covenant on Civil and Political Rights

The United Nations High Commission on Refugees, in their Advisory Opinion on Non-Refoulement stated that the ICCPR also “encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [Right to life] and 7 [Right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.” India ratified the ICCPR in 1979.

- ❖ Article 3 of the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 to which India is a



signatory as far back as 1997, states that;

*“1. No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial ground for believing that he would be in danger of being subjected to torture;*

*2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”*

❖ India became a signatory to the Convention of the rights of Child in 1992 and accepted the most of the provisions except that of child labour. Article 22 of the Convention explicitly provides for non-refoulement of children and states:

*i. “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*

*ii. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United*

*Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”*

#### LEGAL FRAMEWORK AND POLICY

India has very liberal policy towards refugees. India is neither a party to the 1951 International Convention on Status of Refugees nor to the 1967 protocol but the refugees are protected under the Constitution of India. There has not been any domestic legislation passed with respect to the entry and status of refugees in India. There is no any word like “refugee” mentioned in Indian Laws. The refugees are considered as “aliens” under Indian laws. The word “alien” has been referred Article 22 of the Constitution of India<sup>1</sup>, Section 83 of the Indian Civil Procedure Code,<sup>1</sup> Section 3(2) of the Citizenship Act, 1955<sup>1</sup> and in some other statutes.

- **The Foreigners Act, 1946**

The Act deals with the regulations regarding all the foreigners due to absence of any specific law dealing with refugees and illegal immigrants. It governs the stay, entry and exit of the foreigners. The Section 2A of the Foreigners Act, 1946 defines “Foreigner” as a person who is not a citizen of India. The Act neither distinguishes



between refugees and illegal migrants nor does it talk about the protection of refugees on humanitarian grounds. It does differentiate even the people willingly visiting India.

In absence of any specific regulation regarding refugees, they are dealt according to the undefined administrative decisions. The asylum seekers from Tibet and Sri Lanka were given status of the refugee by the administration. The asylum seekers from Afghanistan and Myanmar also knocked the doors of the UNHCR (United Nations High Commissioner for Refugees) in Delhi.<sup>1</sup>

• **Illegal Migration Detection by Tribunal (IMDT) Act, 1983**

The UPA Government on 15th October, 1983 passed an Ordinance to set up a tribunal in order to determine the person is an illegal migrant or not. The Ordinance was introduced and passed in the Parliament on 12th December, 1983. This Act was applicable only in the state of Assam. In other states, the detection of illegal migrant would be done under the Foreigners Act, 1946. The irony of the Act was that the burden of proving one's nationality was on the complainant instead of the accused. Unfortunately, there was no member in the Lok Sabha from the Assam's Brahmaputra Valley, when the Act was passed.

The Constitutional validity of the IMDT Act was continuously challenged since its inception in 1983 before the Court on the ground of unreasonable classification under Article 14. Finally, in the case of *Sarbanand Sonowal v. Union of India*,<sup>1</sup> the Supreme Court struck down the Illegal Migration Detection by Tribunal (IMDT) Act, 1983 on the ground that it is biggest

hurdle and main barrier in the identification and deportation of illegal migrants.

The Hon'ble Supreme Court has stated that the Government's right to deport or expel foreigners is absolute and unlimited. The Constitution does not consist of any such provision which can challenge the discretion of the Government. The refugees living in India has only UNHCR card as an identity due to absence any domestic law concerned with it.<sup>1</sup>

**ABUSES AGAINST ROHINGYAS – HUMAN RIGHTS PERSPECTIVE**

Rohingya are an ethnic group, largely comprising Muslims, who predominantly live in the Western Myanmar province of Rakhine. They speak a dialect of Bengali, as opposed to the commonly spoken Burmese language.

Though they have been living in the South East Asian country for generations, Myanmar considers them as persons who migrated to their land during the Colonial rule. So, it has not granted Rohingyas full citizenship. According the 1982 Burmese citizenship law, a Rohingya (or any ethnic minority) is eligible for citizenship only if he/she provides proof that his/her ancestors have lived in the country prior to 1823. Else, they are classified as "resident foreigners" or as "associate citizens" (even if one of the parent is a Myanmar citizen). Since they are not citizens, they are not entitled to be part of civil service. Their movements are also restricted within the Rakhine state.



### Rohingyas as victims of genocide under Genocide Convention of 1948

The most appropriate Law in the context of the human rights violation meted out on the *Rohingyas* is the 1948 *Genocide Convention*. The peculiarity of the convention is that, *Article 1* of the convention enumerates that Genocide could be committed even during peace time.

Secondly, it is a Human Rights Instrument, since the preamble of the convention employs the term humanity. *Article 2* of the Genocide Convention lists down the categories of persons on whom the convention would be binding and one such category is religion. Also, one of the paramount fact is that *dolus specialise* or specific intent as fulfilled which is an essential component of a crime of Genocide<sup>1</sup>.

### SUPREME COURT AND HUMAN RIGHTS VIS-À-VIS CONSTITUTION OF INDIA

Considering that global migration primarily for reasons of persecution, violence, exploitation and denial of human dignity are on the rise, there is an urgent need for global governance on the subject based on customary and international humanitarian law. Further, in relation to nations, the progress of civilization has been from force to law. India has a track record of consistently honouring international humanitarian obligations and has remained steadfast in its commitment to the promotion of human dignity. This commitment is entrenched in Part III of the Indian

Constitution and has been reinforced through a series of decisions of this Hon'ble Court. The evolving constitution and human rights jurisprudence impels an urgent intervention by this Hon'ble Court to protect, preserve and uphold the basic human rights of the Rohingya Muslims by ensuring that they are not deported back to their country of origin to face persecution. Extracts from some of the relevant judgments are;

(i) In *DonghLian Kham v. Union of India*<sup>1</sup>, the Hon'ble Delhi High Court observed as under,

*“30. The principle of “non-refoulement”, which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as “non-refoulement” affects/protects the life and liberty of a human being, irrespective of his nationality. This protection is available to a refugee but it must not be at the expense of national security...*

*Since the petitioners apprehend danger to their lives on return to their country, which fact finds support from the mere grant of refugee status to the petitioners by the UNHCR, it would only be in keeping with the golden traditions of this country in respecting international comity and according good treatment to refugees that the respondent FRRO hears the petitioners and consults UNHCR regarding the option of deportation to a third country, and then decide regarding the deportation of the petitioners and*



*seek approval thereafter, of the MHA (Foreigners Division)."*

The Gujarat High Court in ***Ktaer Abbas Habib Al Qutaifi v. Union Of India***<sup>1</sup>, held as under:

*"This principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of United Nation including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, Article 51(c) of the Constitution also cast a duty on the State to endeavour to respect for international law and treaty obligations in the dealing of organized people with one..."*

By the virtue of customary international law, ratification of the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976) by India, the obligations of due process and the universal principle of non-refoulement, India is obliged to facilitate the persecuted Rohingya community for preserving their basic human rights, including their right to live with dignity as expressed by this Hon'ble Court and as understood internationally.

Article 51 (c),<sup>1</sup> a Directive Principle of State Policy, requires India to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Thus India needs to secure and protect the interest of refugees and save them from being deported back to Myanmar, and to fulfill its international obligation.

The evolving constitutional and human rights jurisprudence impels an urgent intervention by this Hon'ble Court to protect, preserve and uphold the basic human rights of the Rohingya refugees by ensuring that they are not deported back to their country of origin to face persecution. This Hon'ble court has in a series of judgments, held that torture or violence offends human dignity which is a core right that inheres in every individual by virtue of his humanity and this right cannot be taken away by the State.<sup>1</sup>

That India is not bound by the Convention relating to status of Refugees, 1951 and Protocol Relating to the Status of Refugees, 1967, since India is not a signatory to either of them. It is humbly submitted that even though India is not a signatory to 1951 Conventions and its protocols, it has been a member of several international instruments / declarations which provide for right to asylum and against forcible repatriation. As a party to these treaties India is under a legal obligation to protect the human rights of refugees by taking appropriate measures under Article 51(c) which mandates India to foster respect for International treaties and obligations. In keeping with this, India is bound to recognise under the same international laws that it is under the obligation to uphold the principle of non-refoulement which is now an established



principle of customary international law based on a consistent practice combined with a recognition on the part of States that the principle has a normative character. This conclusion is supported by the fact that the principle has been incorporated in international treaties adopted at the universal and regional levels to which a very large number of States have now become parties. India is a member of the Executive Committee of the office of United Nations High Commissioner for Refugees since 1995 which puts a moral, if not legal obligation, on it to build a constructive partnership with UNHCR by following the provisions of the 1951 Refugee Convention. The Hon'ble Supreme Court has in many cases directed that action of the States must be in conformity with international law and conventions.

In *Gramophone Company Of India Ltd vs Birendra Bahadur Pandey & Ors*<sup>1</sup>, the Apex Court had held that the comity of Nations requires that Rules of International Law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. It is respectfully submitted that as per the doctrine of incorporation laid down in the mentioned case, the principle of non-refoulment, a recognized principle of international law, must be incorporated in the law of land since there is no municipal law in India which is in conflict with such principle. Inasmuch even without any express legislative sanction, such principle of non-refoulment shall be applicable to India with reference to the Rohingya refugees. The relevant paragraph of the judgement is produced below for perusal.

'5. There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament...The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament.'

In *Vishaka & Ors vs State Of Rajasthan*<sup>1</sup>, the Apex Court has held that international conventions and norms can be used for construing the fundamental rights expressly guaranteed in the Constitution of India. The relevant paragraphs of the judgement are produced below for perusal.

'6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51 :

"51. Promotion of international peace and security – The State shall endeavour to -  
(c) foster respect for international law and treaty obligations in the dealings of organised people with one another;

Article 253 :



"253. Legislation for giving effect to international agreements - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

Seventh Schedule :

"List I - Union List:

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

In *Nilabati Behera vs. State of Orissa*<sup>1</sup> a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity."

### **RIGHT TO PRIVACY JUDGEMENT AND HUMAN RIGHTS**

The Supreme Court in its landmark judgement on the right to privacy dated 24th August 2017, in, *Justice K.S. Puttaswamy (Retd) and Anr. v. UOI and Ors*<sup>1</sup>, has categorically stated,

"..India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the Human Rights Act by Parliament would indicate a legislative desire to implement the human rights regime founded on constitutional values and international conventions acceded to by India.

..Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation.

Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights. "

Thus, the action of centre in seeking to deport the Rohingya refugees is in violation of their rights guaranteed under the Articles 14 and 21 of the Constitution of India and also international treaty obligations.

### **CONCLUSION**

Illegal refuge infiltration is a global problem now. As on January 01, 2014 there are 6.7 million global refugees, 1.2 million asylum seekers, 33.3 million internally displaced



people in the world. The developed, as well as the developing nations, are facing with the problem of illegal immigrants. Illegal immigration has been a perennial problem for India since independence. India lacks resources as well as concrete legal framework for their sustenance. The global figure for refugees have crossed the 52 million mark since World War II in 2013. It is a human catastrophe and should be dealt effectively by the global community.

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