

INDIA'S REFUGEE POLICY & ROHINGYA CRISIS

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Abstract

The refugee policy of India is one of the most debated topics in the entire country. The related issues have to be addressed with great concern for any arbitrary changes will put the national security in threat. India, in the contemporary times, is widely affected due to the massive influx of Rohingyas from the neighbouring state of Myanmar. They are considered as the most persecuted populations in the world & are denied citizenship by the government of Myanmar. Rohingyas are mostly muslim majority population who are facing problems to get the citizenship of that country due to the presence of Buddhism majority & rise of Myanmar nationalism. This Rohingya issue has not evolved recently but is going on for decades but it came into limelight in the recent years due to the eruption of communal violence in Rakhine state of Myanmar back in 2012 wherein they were tortured, murdered, looted and businesses shut.

This paper emphasises whether it is the right time to look after the refugees, specifically Rohingyas, or a time has come to fulfill the national needs and then respect international sentiments. History is witness that India has a soft corner for the refugees because of which it has been highly acclaimed by the UN for providing food, shelter, local jobs and security despite not being a signatory to the international convention. This paper traces the history of Rohingyas and how they came to be called as 'the most persecuted populations of the world.' The paper further examines their inhumanely treatment and enumerate the reason for not giving the status of 'Citizens' in Myanmar. The paper will then enquire whether India should have a specific Refugee Law by keeping in context, the extent to which these refugees (Rohingyas) violate the laws of the land and spread terrorism. This paper concludes by suggesting that it's time for India to give utmost importance and priority to nation and national security and not compromise at the cost of Rohingyas.

Keywords: Refugees, Rohingyas, Human Rights, Non Refoulement, National Security.

PROLOGUE

India's tryst with refugees has not evolved recently but has continued for many decades & given birth to a lot of upheaval within the territory. Refugees are such disturbed and fear stricken people who are compelled to abandon their homeland and take shelter in some foreign country, obviously at the mercy of the latter. The country is witnessing massive influx of refugees till date despite its own population crossing 130 crores, having a huge poverty level who rarely have access to basic necessities of life¹ and unemployment rate for the year 2018 being 2.6%². Time and again the issue of refugees erupt, leaving the whole government, its diplomatic and bilateral relations with the concerned countries into dilution whether that be when we gave shelter to the Tibetans or Chakma refugees from Bangladesh or Tamilians from Sri Lanka or Ugandan refugees or refugees from East Pakistan or say the Rohingyas from Myanmar, which is the sole concern for this paper. These are not any arbitrary, sudden and miniature issues but are complex and delicate ones which hold grave and utmost importance for any slight error may change the regional & world politics and put the future of the nation alongwith its citizens in jeopardy.

The primary bone of contention of India with that of China is because of providing asylum to Dalai Lama, way back from 1959 till date, and to many other refugees from Tibet.³ It was one of the reasons which led to the Sino-Indian War in 1962 and the subsequent presence of Central Tibetan Administration (so called Tibetan

¹ M.K. Sinha, Legal Framework of Protection of Refugees in India, 14 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 199, 202 (2014-2015).

² ASIAN DEVELOPMENT BANK (Oct. 20, 2019, 10:08 AM), <https://www.adb.org/countries/india/poverty>.

³ Mike Sanderson, The Role of International Law in Defining the Protection of Refugees in India, 33 WIS. INT'L L.J. 46, 65 (2015).

government in exile) has worsened the bilateral relationship.⁴ Those people were even accorded with Registration Certificate, a legal document in consonance with the Registration of Foreigners Act 1939 & SRO (Statutory Rules and Orders) 1108 of 1950 “Regulating Entry of Tibetan Nationals into India”, which recognized their rights with that of the Indian citizens apart from right to vote & job in the government offices.⁵ Since the beginning of civil war in Sri Lanka in 1983, the Tamilians have been taking refuge here & India showing its magnanimity, had registered them as “refugees” alongwith giving them the right of public health and education at par with the Indian citizens.⁶ The incidents do not stop here but some 10 million people were compelled to leave their homeland (East Pakistan) and came to India as refugees between April and December, 1971; it became the largest single displacement of refugees in the second half of the 20th century.⁷ Majority of the people (refugees) returned to the newly formed nation called Bangladesh but Indian government had to spend a hefty amount for their food, cloth and shelter.⁸

The above instances rightly depict that India had a positive outlook and perception with the refugees wherein all were well treated & accorded a number of rights at the cost of infuriating the bilateral relationship (for instance, China). This paper mainly deals with the mass exodus of Rohingyas from Myanmar into India and India’s stance towards them for the global order is not the same as it was two or three decades ago. The domestic and international economic instability, changing geopolitics throughout the world and terrorism are some of the deep concerns to be given attention to and on the addition to it if extra burden of the refugees is incurred, how is India going to deal with them while working for its citizens simultaneously? Or is it the other way round that this dilapidated condition with respect to refugees is continuing because India lacks a uniform refugee law and it is the appropriate time to enact the same.

IMPORTANT DEFINITIONS

REFUGEES- Refugees are such persons who are in need of immediate assistance from the international community because of serious threat to their lives, physical integrity or freedom in their origin country due to persecution, armed conflict, violence or serious public disorder.⁹

FOREIGNER- According to sec. 2(a) of the Foreigner’s Act, any person who is not a citizen of India is a foreigner.¹⁰

MIGRANT- There is hardly any uniform definition for it but some organizations define it as “any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence.”¹¹ There is an alternate definition for it as well which states migrants cover a broad set of persons, including refugees as a specific level category under international refugee law.¹²

ILLEGAL MIGRANTS- According to sec. 2 (1) (b)¹³ of the Citizenship Act, “illegal migrant” means a foreigner who has entered into India— (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time.

ROHINGYAS CRISIS: A HISTORICAL PERSPECTIVE

Rohingyas, as is widely said, are the most persecuted communities in the world¹⁴ who have been forcefully dispersed from Myanmar to Bangladesh and henceforth to India. It is also said that they are the victims of the state sponsored genocide, ethnic cleansing and brutal crimes against women and children in the 21st century.¹⁵ Taking refuge to some other place is a natural phenomenon when the question of one’s survival is at stake; these persecuted people, in this context, have done what is obvious and expected. Figures say that 200,000 Rohingyas have moved to Bangladesh from 1978 onwards while more than 250,000 had entered only in the year 1991.¹⁶ The United Nations High Commissioner of Refugees (UNHCR) at Cox’s Bazar, Bangladesh gives shelter to almost 20,000 refugees.¹⁷

⁴ Sanderson, supra note 3, at 65.

⁵ Sanderson, supra note 3, at 66.

⁶ Sanderson, supra note 3, at 62.

⁷ Sinha, supra note 1, at 203.

⁸ Sinha, supra note 1, at 203.

⁹ The Refugee Concept Under International Law, UNHCR (Oct. 20, 2019), <https://www.unhcr.org/5aa290937.pdf>.

¹⁰ The Foreigners Act, 1946, No. 31, 1946 (India).

¹¹ H.O. Gieseken, The Protection of Migrants under International Humanitarian Law, 99 INT’L REV. RED CROSS 121, 122 (2017).

¹² Gieseken, supra note 11, at 124.

¹³ The Citizenship Act, 1955, No. 57, 1955, (India).

¹⁴ J. Alam, The Rohingya of Myanmar: Theoretical Significance of the Minority Status, 19 ASIAN ETHNICITY 180, 180 (2018).

¹⁵ Alam, supra note 14, at 180.

¹⁶ S.N. Parnini, The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh, 33 JOURNAL OF MUSLIM MINORITY AFFAIRS 281, 281 (2013).

¹⁷ Parnini, supra note 16, at 281.

Myanmar had been witnessing a heated tension between the major ethnic groups to protect their interests, rights and sovereignty from the majoritarian rule.¹⁸ After its independence in 1948, the autocratic military rule persisted; in addition to it the majoritarian Buddhist and extremist groups started evolving their own means to preach & propagate the majoritarian principle with the help of violence which ultimately led to the birth of massive conflict between Arakanese or Rakhine Muslims or Rohingyas and the majority Buddhists.¹⁹

The roots of Rohingyas is debateable due to the presence of different opinions, perspectives and claims thereby. According to one of the views their existence dates back to the seventh century when Arab Muslim traders came here to do business and ultimately settled.²⁰ That's the reason they are physically, linguistically and culturally similar to the South Asians, especially Bengalis.²¹ The contemporary Rohingyas claim that they are the descendants of Muslim population who resided at western Rakhine State, bordering Bangladesh today, since the pre British era.²² However the historical evidence reveals that there were small Muslims present in the pre-colonial Arakan region; many others specify that people from Bengal had arrived in large numbers during the era of Britishers when Myanmar (then Burma) was part of India.²³ Myanmar also witnessed migration from East Pakistan/Bangladesh and hence their relation to the Rakhine State are somewhat traced but there are others who emphasise that Rohingyas arrived during and after the British rule.²⁴

The other view projects that Rohingya became known as an ethnic identity around 1950s and henceforth came to be recognized as a revolution for the rights of the Muslim groups in the Arakan region.²⁵ Yegar, one of the Israeli diplomats, states that Muslims in the Arakan region dates back to 8th century A.D., the said area was ruled by an Islamic kingdom which is now part of Bangladesh.²⁶ Subsequently Muslims from Arab, Persia & India emerged who established a kingdom which was annexed by Burmese kingdom at the start of 18th century and during the colonial period there was massive influx of Muslims from India.²⁷

The contrasting views do not stop and there are some others who claim that Arakan is the birthplace of Rohingyas and [they] do not have their traces to Bangladesh.²⁸ One of the historians named Tonkin even went on to claim that there was no such term called "Rohingyas" which the Britishers were aware of until 1937 and later of its separation from India.²⁹ Others who contrast Tonkin admit that even though there might be no familiarity with the term "Rohingyas" but there is a possibility that they might had been recognized as "Kalar" or "Arakanese Muslims".³⁰

When the Britishers were leaving Burma (as it was then) way back in 1948 some of the Rohingya leaders had requested the then British authorities to include them in East Pakistan (now Bangladesh).³¹ This appeal was least entertained and as a matter of fact they found that their citizenship was also put into question. U Nu, the then Prime Minister of Burma (now Myanmar), had convinced those disgruntled Rohingyas that their current plight is a temporary one and will soon be sorted out, but to fate's dismay he was ousted by the military coup in 1962 and their depriving situation worsened instead of getting any better.³²

Rohingyas, being mostly Muslims, are being opposed by the majority population there, generally Buddhists. The military government of Myanmar claimed that they are not indigenous people & have migrated from Bangladesh but in contrast the Rohingyas had government issued identity cards prior to 1962 & even had ration cards issued by the British which established their citizenship.³³ These identity cards were torn into pieces by the government authorities and subsequently denied any kind of valid legal identity.³⁴ The military government of Burma (as it was known then) had initiated mass killings of these indigenous Arakani Muslims (Rohingyas) with an operation named "operation Dragon King" on charges of violating nationality laws which not only led to the loss of innocent lives but also forced expulsion from their homeland.³⁵ Tens of thousands were brutally killed while over two hundred thousand were expatriated to Bangladesh with charges that they did not belong to the indigenous race of Burma.³⁶ When the Ne Win's military government took over in the year 1982, they officially recognized the 135 ethnic groups as Myanmarese only excluding the Rohingyas, whom they treated as illegal Bengali immigrants from Bangladesh and they could only be officially recognized if they

¹⁸ Kaveri, Being Stateless and the Plight of Rohingyas, 29 PEACE REVIEW 31, 32 (2017).

¹⁹ Kaveri, supra note 18, at 32.

²⁰ Parnini, supra note 16, at 281.

²¹ Parnini, supra note 16, at 281.

²² Ashley South, Myanmar's "Rohingya" Conflict, JOURNAL OF CONTEMPORARY ASIA 1, 1 (2018) (book review).

²³ Id.

²⁴ South, supra note 22, at 1.

²⁵ Alam, supra note 14, at 195.

²⁶ Alam, supra note 14, at 195.

²⁷ Alam, supra note 14, at 195.

²⁸ Alam, supra note 14, at 195.

²⁹ Alam, supra note 14, at 196.

³⁰ Alam, supra note 14, at 196.

³¹ S.B. Ahsan, The Rohingya Crisis: Why the World Must Act Decisively, 49 ASIAN AFFAIRS 571, 574 (2018).

³² Ahsan, supra note 31, at 574.

³³ Parnini, supra note 16, at 285.

³⁴ Parnini, supra note 16, at 285.

³⁵ Parnini, supra note 16, at 286.

³⁶ Parnini, supra note 16, at 286.

could prove that their ancestors lived in Myanmar prior to 1823.³⁷ The government of Myanmar have adopted different Constitutions at different times viz., 1947, 1974 & 2008 which have either conferred or restricted or shifted the status of Rohingyas over a period of time.³⁸ Apart from the 1974 Constitution, the Citizenship Law of 1982, a conservative one, has put a hold on the rights and claim of citizenship of the Rohingyas. This law makes provision which states that any Rohingyas who have come after 1824 won't be considered as the indigenous species and hence won't be considered as citizens but again this one has to prove that their ancestors belonged to Myanmar prior to 1824.³⁹

Rohingyas in India are acknowledged as foreigners, muslims, illiterates, stateless and often Bangladeshis who are scattered throughout the country especially in the states Delhi, Uttar Pradesh, West Bengal, Haryana, Andhra Pradesh, Tamil Nadu, Rajasthan, Maharashtra, Jammu & Kashmir & Andaman & Nicobar Islands in some of the camps exclusively made for them.⁴⁰ As per UNHCR records there were 10,088 Rohingya refugees & 2,682 Rohingya asylum seekers in India as of 1st January, 2016.⁴¹

Identity politics has played a major role in this ongoing Rohingya crisis for this is all about recognizing them, giving them their deserved identity which is being denied to them by the majority population in Myanmar. The Citizenship Law of 1982 of Myanmar acknowledges eight major 'national ethnic groups' viz., Bamar, Chin, Kachin, Kayah, Kayin, Mon, Rakhine & Shan which further got divided into 135 'national ethnic groups' but not the Rohingyas.⁴² Excluding them from recognizing as one of the ethnic groups, is a kind of 'exclusionary ideology' adopted by Myanmar. Such other methods adopted include permission for marriage, compulsory birth control, exclusion from positions of power, government jobs, etc.⁴³ Seizing their citizenship and many other rights (Constitution of Myanmar, 2008 & Citizenship Law, 1982) gave them an unwanted identity of stateless persons & persecuted people.⁴⁴

These Rohingyas are so much into news in the current times after the June 2012 communal violence in the Rakhine State. The violence was so harsh and brutal that 98 innocent people lost their lives & over 5338 homes were burnt into ashes; there were subsequent incidents of looting homes, villages and businesses amongst all the communities.⁴⁵ Members of the Arakan Rohingya Salvation Army (ARSA), an unknown outfit usually called as "terrorists" by the Myanmar government had attacked the security outposts and killed twelve soldiers, in retaliation of which on 25th August, 2017, the army alongwith the extremist Buddhist group attacked the Rohingya villages of the Rakhine State, which was later termed as anti-terrorist activity by them.⁴⁶ The Advisory Commission on Rakhine State, which was headed by Kofi Annan and alternatively known as the Annan Commission, had released a report on 24th August, 2017 on the plight of the Rohingyas in Myanmar and recommended to review the Citizenship law 1982 and take all such necessary and concrete steps which would lessen their pain and pathetic condition.⁴⁷

INTERNATIONAL CONVENTIONS

CONVENTION RELATING TO THE STATUS OF REFUGEES, 1951- This is the most important convention with respect to refugees worldwide, giving a variety of rights to them in the host country & which India is not a party of.

Article 1 (A) (2)⁴⁸: For the purpose of the present Convention, the term refugee shall apply to any person who-
As a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 31: Refugees unlawfully in the country of refuge⁴⁹-

1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of*

³⁷ Kaveri, supra note 18, at 32.

³⁸ Alam, supra note 14, at 183.

³⁹ Ahsan, supra note 31, at 575.

⁴⁰ Kaveri, supra note 18, at 35.

⁴¹ Kaveri, supra note 18, at 35.

⁴² Alam, supra note 14, at 188.

⁴³ Alam, supra note 14, at 193.

⁴⁴ Alam, supra note 14, at 194.

⁴⁵ C. Win & T. Kean, Communal Conflict in Myanmar: The Legislature's Response, 2012-2015, 47 JOURNAL OF CONTEMPORARY ASIA 413, 421 (2017).

⁴⁶ Ahsan, supra note 31, at 571.

⁴⁷ Ahsan, supra note 31, at 573.

⁴⁸ The Refugee Convention 1951, UNHCR (Oct. 20, 2019), <https://www.unhcr.org/4ca34be29.pdf>.

⁴⁹ Id.

Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 33: Prohibition of expulsion or return⁵⁰-

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 judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 33 is 'doctrine of non-refoulement' and all the Contracting parties have to respect it but India not being a party to this Convention still respects the underlying doctrine.

PROTOCOL RELATING TO THE STATUS OF REFUGEES- The 1951 Convention relating to the refugees deals with those who have become refugees prior to 1st January, 1951 but this protocol deals with any refugees irrespective of date.⁵¹

UNIVERSAL DECLARATION OF HUMAN RIGHTS- This document holds utmost importance in the field of human rights which is followed by all the nations. Some of the provisions from which inference could be drawn with respect to the protection of the refugees can be drawn are articles 5, 13, 14 & 15.

Article 5⁵²- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 13⁵³-

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, & to return to his country.

Article 14⁵⁴-

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15⁵⁵-

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS-

Article 13: An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.⁵⁶

THE CONSTITUTION OF INDIA AND PROTECTION OF REFUGEES

India is one of the countries in South Asia which has been hosting millions of refugees since its independence. The journey which India has experienced with respect to the refugees till date has been rewarding despite the massive migration of people and looking after their resettlement.⁵⁷

The Constitution of India contains various provisions viz., articles 13, 14, 15, 20, 21, 22, 23, 24, 25, 27, 32 and 51 wherein refugees exercise a basket of protection due to the presence of international law.⁵⁸ It states that- "The State [India] shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another."⁵⁹ The provision supra is placed under the Directive Principles of States Policy of the Indian Constitution which is not enforceable by any court in India.

⁵⁰ Supra note 48.

⁵¹ Protocol Relating to the Status of Refugees, OHCHR (Oct. 21, 2019), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>.

⁵² Universal Declaration of Human Rights, UN (Oct. 21, 2019), <https://www.un.org/en/universal-declaration-human-rights/>.

⁵³ Id.

⁵⁴ Supra note 52.

⁵⁵ Supra note 52.

⁵⁶ International Covenants on Civil and Political Rights, OHCHR (Oct. 21, 2019), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁵⁷ Rahmatullah Khan, India: India and its Refugees, p. 106.

⁵⁸ INDIA CONST. art. 51.

⁵⁹ INDIA CONST. art. 51, cl. c.

Article 253 of the Constitution lays down that Parliament has the 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. This constitutional provision lays down that in times of urgency Parliament can incorporate any international law into its own domestic law. Justice Chinapa Reddy had pointed out in a case⁶⁰ that according to 'doctrine of incorporation' international laws can be incorporated into national laws and will be considered part of the latter only if the previous laws are not in conflict with any Acts of Parliament. Contrary to its historical traditions of hospitality,⁶¹ openness, and generosity, India is not a contracting party to either the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol. Despite that it is part of other international instruments whose provisions are in consonance to the rights of refugees. In April 1979, India acceded to the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights. However, Article 13⁶² of ICCPR deals with the expulsion of a person lawfully present in the territory of a state. India has secured its right according to the above mentioned Article to apply its own domestic law relating to aliens. Article 22 of Conventions on the Rights of the Child deal with refugee children and family reunification which was acceded by India in the December of 1992.⁶³ The 1963 Convention on the Elimination of all Forms of Racial Discrimination was ratified in 1969 and the 1979 UN Convention on the Elimination of all Forms of Discrimination against Women in 1993.

The primary Indian laws which are relevant to refugees, directly or indirectly, are: The Foreigners Act, 1946 (Section 3, 3A, 7, 14); the Registration of Foreigners Act, 1939 (Section 3, 6); the Passport (Entry into India) Act, 1920; the Passport Act, 1967; and the Extradition Act, 1962. Jurisdiction over issues of citizenship, naturalisation and aliens rest with the Union Legislature.⁶⁴

THE ROLE OF THE INDIAN JUDICIARY ON THE PROTECTION OF REFUGEES

In the case of *Louis De Raedt v. Union of India*, the Supreme Court confirmed that Article 21 of the Indian Constitution,⁶⁵ the right to the protection of life and liberty, applies to foreign nationals.⁶⁶ The obvious next step for the court would be to find that this Article prohibits the removal of foreign nationals to situations in which their life or liberty would be threatened. This would be consistent with India's obligations at international law and faithful to the substance of the Article itself. In partial reliance on *De Raedt*, the Supreme Court has been requested on some occasions to rule on the forced displacement of foreign nationals in India. In the case of *State of Arunachal Pradesh v. Khudiram Chakma*,⁶⁷ the state government of Arunachal Pradesh had ordered the mandatory shifting of Chakma families that originated from the former East Pakistan (now Bangladesh)⁶⁸ and had settled in a "protected area" for purposes of the Foreigners (Protected Areas) Order 1958.⁶⁹ Their settlement in the area was accorded as illegal and their demand to be the natural citizens of India (and resulting entitlement to enhanced constitutional protection) was denied.⁷⁰ Because of this reason court did not want to intervene and stop the forceful removal by the state government.⁷¹ In the slightly later case of *National Human Rights Commission v. State of Arunachal Pradesh & Others*,⁷² the Supreme Court was requested to pass an order which would protect the rights, granted under Article 21, for a large group (approximately 65,000) of Chakmas in Arunachal Pradesh. They feared exposure to violence and harassment by a student group, All Arunachal Pradesh Students Union, which sought the expulsion of all "foreigners" from the state. The court made an implied order to protect the vulnerable group against the non-state actors. While the court also ordered the government of Arunachal Pradesh to refrain from removing any of the individuals concerned, this was done on the understanding that they were in the process of applying for Indian citizenship. The order itself was limited to the period "while the application of any individual Chakma is pending consideration." In *Ba Aung and Another v. Union of India and Others*⁷³ the petitioners were Burmese refugees who were held guilty for violating section 14 of the Foreigners Act 1946 by the trial court. The Act evinces various conditions which must be adhered by the non-citizens who are residing in India, like: registration with the concerned authorities and holding valid passports. Since they were held guilty and were illegally present in the Territory of India, the

⁶⁰ *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*, AIR 1984, SC 667 (India).

⁶¹ Nafees Ahmad, *The Constitution-Based Approach of Indian Judiciary to the Refugee Rights and Global Standards of the UN Convention*, 8 KING STUDENT LAW REVIEW 30, 46 (2017).

⁶² *Supra* note 56.

⁶³ *Convention on the Rights of the Child*, OHCHR (Oct. 25, 2019), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

⁶⁴ INDIA CONST. art. 246.

⁶⁵ INDIA CONST. art. 21.

⁶⁶ *Louis De Raedt v. Union Of India*, 1991 AIR 1886 (India).

⁶⁷ *State of Arunachal Pradesh v. Khudiram Chakma*, 1994 AIR 1461 (India).

⁶⁸ *REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000* 249 (Ranabir Samaddar ed., 2003).

⁶⁹ *Foreigners (Protected Areas) Order, 1958*.

⁷⁰ *Supra* note 67.

⁷¹ *Supra* note 67.

⁷² *National Human Rights Commission v. State of Arunachal Pradesh*, 1996 AIR 1234 (India).

⁷³ *Ba Aung and Another v. Union of India and Others*, SC AIR 2006.

trial court had ordered for detaining them and hence issued an order for their deportation. Later, UNHCR resettled the petitioners at Sweden. Further they approached the High Court requesting to grant them permission to travel Sweden and argued that they being refugees should not be deported and be allowed to travel Sweden in order to resettle. No response was given by the State Government when the court had asked them to prepare an affidavit and report, regarding the number of appellants detained by the government. The court opined that the continuing detention of the asylum seekers was against the law and infringement to their personal liberty. The court was of the view that conclusive reason not being given regarding the detention, the government should set them free. The petitioners were, henceforth, allowed to travel Sweden when the State authorities were given direction to do so. Most recently, the Rohingya immigration crisis has resulted in a Public Interest Litigation (PIL) being filed before the Supreme Court of India in *Mohammad Salimullah v. Union of India*.⁷⁴ The petitioners approached the court under Article 32⁷⁵ of the Indian Constitution to "prevent the deportation of the petitioners and other Rohingya refugees in India and to take steps for the recognition of these refugees in India in keeping with the constitutional guarantees" under Articles 14, 21, and 51(c) of the Indian Constitution.⁷⁶ Articles 14 and 21 of the Indian Constitution guarantee judicially enforceable fundamental rights.⁷⁷ Article 14 provides, "The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India" (the "Equality Clause"). Article 21 provides that, "No person shall be deprived of his life or personal liberty except according to procedure established by law" (the "Life and Liberty Clause"). Article 51(c), a non-justiciable "directive principle of state policy" inter alia provides, "The State shall endeavour to . . . foster respect for international law and treaty obligations in the dealings of organised peoples with one another." The petitioners, refugees registered under the United Nations High Commission of Refugees argue that the deportation of the Rohingya refugees by the Indian government violates the principle of "non-refoulement", which they assert is a principle of customary international law. The Indian government, petitioners assert, is bound by the principle of non-refoulement since the Equality Clause, the Life and Liberty Clause, and Article 51(c) of the Indian Constitution obligate India to respect international law. As a matter of law, the petitioners categorically assert, "The principle of non-refoulement--or not sending back refugees to a place where they face danger--is considered [a] part of customary international law and binding on all states whether they have signed the [1951 United Nations Convention on Status of Refugees]⁷⁸ or not." Article 33(1) of the 1951 United Nations Convention on Status of Refugees (the "1951 Refugee Convention"), its "central normative and operational core",⁷⁹ enacts the principle of non-refoulement as a part of international treaty law.⁸⁰ As a matter of fact, the petitioners assert that they are covered by the definition of a refugee as provided in Article 1A(2) of the 1951 Refugee Convention. Even though the fact that India has not ratified the 1951 Refugee Convention is not contested by the petitioners, their stand is that the principle of non-refoulement, being a principle of customary international law, binds India anyway. They further argue that India's non-ratification of the 1951 Refugee Convention is not determinative of the issue since India has ratified the Universal Declaration of Human Rights ("UDHR"),⁸¹ the International Covenant on Civil and Political Rights ("ICCPR"), and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICEFRD"). The reliance on ICCPR is however slightly surprising because the ICCPR does not provide "a right to seek and enjoy asylum ... [it only provides] the right to leave any country and the right to enter one's own country."⁸² In addition, they argue that India being a signatory to several other international conventions against use of torture, inhuman or degrading treatment, and prohibition of forced disappearances, for example, makes the fact of non-ratification of the 1951 Refugee Convention irrelevant as these international treaties and conventions that India has ratified or signed "explicitly or otherwise, lay down the Principle of Non-Refoulement." The petition also relies on two High Court opinions where the principle of non-refoulement has been read into the Life and Liberty Clause of the Indian Constitution.⁸³ On these grounds, they argue that the right of non-refoulement must be read into the Equality Clause and the Life and Liberty Clause of the Indian Constitution. The Indian government seems to be defending the case on three grounds: (i) the traditional separation of powers argument; (ii) on the specific facts; and (iii) by questioning the binding nature of the 1951 Refugee Convention and its subsequent 1967 Protocol Relating to the Status of Refugees (the "1967 Protocol"). On the first ground, the government is claiming that the subject-matter of the writ-petition is "essentially a core executive function in the realm of policy making for the country, namely with respect to dealing with illegal immigrants." This defense goes more to the maintainability of the petition rather than the merits of the claim based on international law presented by the petitioners." On the second ground, the government argues that it has intelligence that indicates that several of the illegal Rohingya immigrants have connections with "Pakistan-

⁷⁴ *Mohammad Salimullah v. Union of India*, Writ Petition (Civil) No. 793 of 2017.

⁷⁵ INDIA CONST. art. 32, cl. 1.

⁷⁶ *Supra* note 74.

⁷⁷ INDIA CONST. art. 32; INDIA CONST. art. 226.

⁷⁸ *Supra* note 48.

⁷⁹ Joan Fitzpatrick, Revitalizing the 1951 Refugee Convention, 9 HARV. HUM. RTS. J. 229, 235 (1996).

⁸⁰ *Supra* note 48.

⁸¹ *Supra* note 52.

⁸² Fitzpatrick, *supra* note 79, at 235.

⁸³ *Dongh Lian Kham v. Union of India*, 226 DLT 208 (Delhi High Court 2016).

based and other terror organisations and similar organisations operating in other countries." The government categorically claims that several Rohingya immigrants have been able to fraudulently secure identity papers in India and that it has "also found that some of the Rohingyas figure in the suspected sinister designs of ISIS (Islamic State of Iraq and Syria) and other extremist groups who want to achieve their ulterior motives in India including that of flaring up communal and sectarian violence in sensitive areas of the country." This defense goes more to the facts of the case rather than the question with which this article engages. These two grounds have been restated more or less in the same form while responding to some intervention briefs. On the third ground, particularly pertinent to this article, the government states:

India is not a signatory to the [1951 Refugee Convention] and the [1967 Protocol] issued thereunder. The [1951 Refugee Convention and the 1967 Protocol] are therefore not binding upon India and no other Declaration/Resolution/Convention/international treaty or instrument of any kind is in force which prohibits India, as a sovereign nation, to exercise its right of deporting illegal immigrants in accordance with laws of India and thereby protecting the fundamental rights of its own citizens more particularly in the interest of national security."

The government's broad stand before the Court (both in the main and the supplemental response brief) is that the entire gamut of international law relied upon by the petitioners does not bind the Indian government with the principle of non-refoulement. The logical conclusion thereof is that key fundamental rights provisions of the Indian Constitution (such as the Equality Clause or the Life and Liberty Clause) cannot be interpreted so as to include within their scope the principle of non-refoulement. With respect to the 1951 Refugee Convention, the government's categorical claim is that it "does not confer any legally enforceable rights either upon the petitioners or anyone else which can justify prayers for issuance of a writ of this Hon'ble Court under Article 32 of the Constitution of India."

INDIA'S REASON FOR NOT ACCEDING TO UN CONVENTION

One needs to ponder what are the possible reasons because of which India has not acceded to the UN Refugee Convention and Additional Protocol? The primary concern being security and terrorism and India's porous borders which are loosely managed for dealing with such critical conditions which lead to mass influx. Secondly, India argues that refugee migration may immensely disturb its already fragile demographic settings as it is a flashpoint in South Asia. Thirdly, India neither has acceded the 1951 UN Refugee Convention nor receives any financial assistance from the UNHCR but has been piously discharging its refugee protection obligations. Fourthly, India's stance is that the existing International Refugee Laws are not appropriate to look after the refugee issues of the third world countries as these are totally different with that of European and Western countries. Fifthly, India doesn't have good experience with respect to the policies of repatriations by UNHCR during the liberation war of Bangladesh in 1971 when people were fleeing to India because of atrocities committed by Pakistan.

ECONOMIC & SECURITY ASPECT OF INDIA

India is the world's second fastest growing economy lagging behind China just by 0.1 percent⁸⁴ and has maintained a poor GDP growth rate of 5% in the first quarter of the fiscal year 2019-20.⁸⁵ The fear also looms that recession could as well hit by 2020 or 2021⁸⁶ which itself is a big setback for a nation's national treasure, employment rate and overall growth. When the country itself is not standing on a rock solid surface, how is it supposed to carry extra burden of say, thousands and thousands of refugees and look after their security, health, shelter, employment and other daily needs? India is not duty bound to give shelter to the refugees who are looking for some refuge as against their own country, the reason of which has already been stated earlier.

On the other side, Indian government is also claiming that Rohingyas are a threat to the national security and too much of their presence may case internal disharmony.⁸⁷ Further it is also claimed that a terrorist outfit of the Rohingya Muslims has links with Inter-Services Intelligence (ISI) Pakistan, Jaish-e-Mohammed (JeM) & Lashkar-e-Taiba (LeT).⁸⁸ Subsequently it is also claimed that Rohingyas, who are illegally settled in Jammu and

⁸⁴ India's Economy to be World's 2nd Fastest Growing at 6%, ECONOMIC TIMES (Oct. 21, 2019, 10:08 AM), <https://economictimes.indiatimes.com/news/economy/indicators/indias-economy-to-be-worlds-2nd-fastest-growing-at-6/articleshow/71322804.cms?from=mdr>.

⁸⁵ Meter Down: At 5%, GDP Growth Falls to 6-yr Low in June Quarter, ECONOMIC TIMES (Oct. 21, 2019, 10:08 AM), <https://economictimes.indiatimes.com/news/economy/indicators/indias-gdp-growth-slows-to-5-in-april-june-2019/articleshow/70910682.cms>.

⁸⁶ Should India Worry as Global Recession Fear Spreads?, INDIA TODAY (Oct. 22, 2019, 11:00 AM), <https://www.indiatoday.in/news-analysis/story/should-india-worry-as-global-recession-fear-spreads-1596088-2019-09-06>.

⁸⁷ B. Kamdar, Indian Refugee Policy and the Rohingyas, THE DIPLOMAT (Oct. 22, 2019, 11:10 AM), <https://thediplomat.com/2018/10/indian-refugee-policy-and-the-rohingyas/>.

⁸⁸ J.K. Verma, Rohingyas: A Security Threat, THE PIONEER (Oct. 22, 2019 09:00 AM), <https://www.dailypioneer.com/2018/columnists/rohingyas-a-security-threat.html>.

Kashmir, have helped JeM to carry out terrorist activities on the Indian army.⁸⁹ It is absolutely not that they are a threat only to the Indian government and sovereignty but a fundamentalist political organization of the Rohingyas named Jamaat-e-Islami has its deep presence in the South-East region of Bangladesh, place where most of them are sheltered.⁹⁰ This outfit has been deregistered now due to its role in helping the Pakistan army during the 1971 war of Independence of Bangladesh.⁹¹ Infact, many of the leaders of this Jamaat have been convicted for committing war crimes.⁹²

SUGGESTIONS

Following are the suggestions which can be adopted:

- India must have a national refugee law to deal with the sudden influx of refugees.
- The refugees who are already sheltered in India must be properly registered and proper procedures should be taken care to send them back to their home countries.
- They can't be given all the rights which the natural citizens enjoy, only those which are required for their survival and meeting the daily needs.
- India should resist the burden of Rohingyas and start their repatriation gradually.

EPILOGUE

- A legislative framework would clearly be beneficial in ensuring the protection of refugees. The challenge in drafting a regional declaration is that it takes cognisance of two imperatives the need to provide adequate, encompassing protection to asylum seekers and refugees and the simultaneous need to allow governments some measure of administrative discretion in their management of refugees.
- Voluntary repatriation of refugees is the preferred solution to the refugee problem, particularly in the situation of mass influx of refugees to developing countries which are not in a position to carry the burden of refugees for a long period, unless the international community shares that burden.
- Post return monitoring of returnee refugees is also very important. In many situations, the host countries and the countries of origin prefer bilateral arrangement for refugee repatriation and there is no direct involvement of the UNHCR and its role is reduced to the status of an observer only. Repatriation of refugees under bilateral arrangements without full involvement of the UNHCR can always be questioned. In the bilateral arrangement, despite the best of intentions of the country of origin and of the host country, doubts about the voluntary aspect of the repatriation can always be raised and it can always be said that the refugees have been forced to repatriate contrary to the principal of non-refoulement. Therefore, full involvement of the UNHCR is a necessary prerequisite in any refugee repatriation situation.
- Confidence building measures like mass information campaign, visit by refugee, etc. help refugees in taking decisions regarding repatriation.
- The international community also has to address the causes of the refugee flow and adopt a proactive role to bring about peace and reconciliation. Adequate and timely reintegration assistance plays a very important role in the successful repatriation and therefore, should get the due attention of the international community.

⁸⁹ Id.

⁹⁰ Ahsan, supra note 31, at 580.

⁹¹ Ahsan, supra note 31, at 580.

⁹² Ahsan, supra note 31, at 580.