

A SANSKRITIC RESPONSIBILITY OF NON-REFOULEMENT: INDIA'S ROHINGYAN CRISIS

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India has never shirked off its Sanskritic philosophy and responsibility of '*Atithi Deva Bhava*', which means the guest is equivalent to God. Looking after guests selflessly is considered a divine duty for many Indians. Ironically the threat of deportation of the oppressed Rohingya community in India stands to change this age old practice. The Rohingya's are stateless people from the Rakhine State of Mynamar that face serious persecution which has forced them to flee in pursuit of greener pastures, where the fear of **ethnic cleansing** doesn't loom large over their heads. The question that greatly troubles the international community today is that, who will restore a status of decent standard of living for the **displaced Rohingyas**? The role of international pressure being built to the extent of Mynmar taking back their nationals needs to be seriously considered. However it seems, that with **the devil-may-care attitude of Mynmar**, it is on its way to join the likes of the other **pariah states** like that of Syria and North Korea. Moreover the silence of the country's de-facto leader Aung San Suu Kyi, a robust apostle of democracy and **human rights** is not only shocking, but is quite a blemish to her Nobel Peace Prize status-quo, considering the fact that the Rohingya crisis is a **glaring human rights catastrophe**, in her own backyard. Hence this paper has been written with the objective to ascertain the position of the highly hunted ethnic group with respect to the **principle of non-refoulement**, and the responsibility that India owes towards it in lieu of the same.

ROHINGYAS

The Rohingyas are an ethnic community, whose home country has been Myanmar for several centuries before they were forced to flee, and have now been declared as the most persecuted minority community by the UNHCR. The majority of the community is Muslims and there are about 1.1 million of Rohingyas in the Buddhist country.¹

Myanmar does not consider the Rohingyas as a part of the official 135 ethnic groups.² Denial of citizenship since 1982 has left them in a limbo of statelessness. The exit gates out of the hapless situation in the country for the Rohingyas have been shut as the government does not let them leave the country without its permission. This forces the hounded community to undertake grave risks of taking the land and sea route to escape to neighboring countries, where they may be free from the psychological fears of being hunted down.

The Rohingya crisis has been gathering quick momentum however; many are still unaware of the basic premise or the reason why this minority community is on the run from its own government. This calamity is being categorized as the worst humanitarian crisis that South Asia has ever witnessed and the suffering that this community is undergoing was not freshly brewed but a saga of decades of torment. Despite several generations of Rohingyas subsisting on Burmese soil, the Buddhist nation of Myanmar characterizes them as 'illegal Bengali immigrants' instead of their rightful identity of being a distinctive Burmese ethnic group. The misrepresented xenophobic attitude of hardcore Buddhist monks and other such anti-Rohingyan groups have furthered communal disharmony targeting the minority community of whom the majority, are Muslims. The plight of these people can be attributed to the idea of nationalism-fuelled racism. The Burmese ultra-nationalists cogitate upon the notion of the Rohingya's not fitting into their idea, of appearance and religion, making them susceptible to genocide. The birth of Myanmar from the ashes of the British colonial relics of Burma in 1948,

¹ Ratcliffe, R. (2017). *Who are the Rohingya and what is happening in Myanmar?*. The Guardian. Available at: <https://www.theguardian.com/global-development/2017/sep/06/who-are-the-rohingya-and-what-is-happening-in-myanmar> [Accessed 11 Nov. 2017].

² Taylor, A. (2017). *Analysis | How Burma's Rohingya crisis went from bad to worse*. Washington Post. Available at: https://www.washingtonpost.com/news/worldviews/wp/2017/09/06/how-burmas-rohingya-crisis-went-from-bad-to-worse/?utm_term=.3e5ef162ad7d [Accessed 11 Nov. 2017].

brought political rights for the Rohingyas and with it statehood status for Rakhine in 1974. Their good fortune was however short-lived as 1977-78 witnessed a surge of violence against “illegal immigration” beginning the first of many mass-exoduses to Bangladesh. The Rohingyas who returned to their homeland a year later were in a rude shock, as the tyrannical military regime in 1982 stripped them of their citizenship rights and ethnic minority status. The nail in the coffin was hammered in 1994 when issuance of birth certificates were denied to babies born of Rohingya parents. Aung San Suu Kyi status underwent a reformation from a political prisoner to that of the matriarch of the country, however the plight of the Rohingyas two decades later, still remained deplorable.

INDIA: THE PRESENT ABODE OF THE REFUGEES

The piping hot debate in the country at present is the deportation of the Rohingyas. Union Minister Kiren Rijju has not even flinched an inch before declaring the highly persecuted community as ‘illegal immigrants’ are being perceived as having ties to radical jihadists organizations. The government claims that around 40,000 are said to be residing in India illegally.³ Following an outbreak of inter-communal violence, in 2012, this community was faced heightened degrees of sexual and gender-based violence⁴, ultimately triggering their mass exodus to India. Doing odd jobs like carpentry, rag-picking etc., became the means of subsistence for this vulnerable community. For those who were lucky enough to flee the blazing land of Myanmar, India was their once chance at survival. Although the community has time and again pleaded their innocence of being free from terror links threatening the security of their shelter-country, the Narendra Modi government has declared that national security is to be compromised at no cost. If it continues to be so, even grave humanitarian crisis too will have to take a back-seat. Several foreign policy analysts are of the view that the Rohingya crisis is a crucial determinant for shaping New Delhi’s place in global politics.

³ Bose, T. (2000). *Protection of Refugees in South Asia: The Need for a Legal Framework*. Kathmandu: South Asia Forum for Human Rights.

⁴ UNHCR Global Report 2012, Myanmar. (2013). Myanmar: UN High Commissioner for Refugees (UNHCR). Available at: <http://www.refworld.org/docid/51c01cc01.html> [Accessed 12 Nov. 2017].

India needs to take deft action, swift but thoughtful, and consider not only its plight but also that of Sheikh Hasina's country. Dhaka is packed with refugees and despite its repeated requests to Yangon to take back its people, Aung San Su Kyii has blatantly refused to. The inhuman gesture comes in the wake of the continuing de-recognition of Rohingyas as a registered ethnic group or a citizen of Myanmar. According to several independent think-tanks and their analysis, the iron is hot for India to strike and don the cape of a good Samaritan, just like it has done in the past, be it for the Sri-Lankans, Afghans or Tibetans. India has always opened her arms and warmly welcomed any persecuted community however without worrying about its legal consequences. Currently aliens are governed under the Foreigners Act, 1946 and the Passport Act, 1967. While the former confers upon the Central Government certain powers with regards with 'foreigners', their entry, presence and finally departure from India⁵, the latter deals with issuance of passports and travel documents, to regulate the departure from India of citizens of India and for other persons and for matters incidental or ancillary thereto.⁶ The Apex Court is now caught in a tough spot as the Centre pleads the lack of legislation as a reason strong enough to deport the 40,000 Rohingyas. However the highest embodiment of justice in the country cannot ignore the India's past practices of granting asylum to those in lamentable conditions. The Narendra Modi government have declared the Rohingyas, as 'illegal immigrants'. Illegal immigration is a means by which a person or a group tends to illegally enter upon a foreign soil for better economic opportunities, traditionally from a poorer country to a rich country. However Rohingyas cannot be classified as illegal immigrants since the circumstances under which they fled to India was completely different. Lack of documentation when a person is fleeing war or persecution and crosses into an international border does not discredit his/her status as a refugee under International Law.

The term 'refugees' does not find a place in any of the statutory laws of India, however due consideration needs to be given to the Rohingyas who cannot go back to their home country in the wake of the mass genocide warrant being carried out against them. Ever since they have left behind their strife-stricken homelands the Rohingyas have been

⁵ *The Foreigners Act, 1946.*

⁶ *The Passport Act, 1967.*

fighting tooth and nail to be provided with refugee status by the Indian Government and the United Nations Human Rights Commission (UNHCR). Long Term Visas (LTV) have been provided to the Rohingyas which secures their stay in the country for the time being till a drastic executive decision forces them out. Nevertheless India's reluctance to accede to 1951 UN Refugee Convention is problematic for the displaced persons of various ethnicities currently seeking refuge in the country. India is neither a signatory to the convention nor a likely participator in the protocol that stems from it, which holds the rights and facilities that the host nation is required to provide to the refugees. The reason India is not keen on officiating its intrinsic way of dealing with refugees is two-fold, the first being border safety. The borders in South Asia are extremely porous.⁷ In the event of any conflict in which there is a possibility of a mass movement of people triggering tension at an indigenous level in terms of internal substructure.

An additional argument from India's end is that, she is already discharging her responsibility and sees no reasonable justification to put it down on paper. India has branded the Rohingyas as illegal migrants⁸ and continues to hold the ground that they need to be turned back to where they come from. However this assertiveness is innately against the principle of non-refoulement. This principle of international law forbids a country accepting asylum seekers, from returning them to a country where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".⁹ Even if a country is a non-signatory to the 1951 Convention or Protocol, the principle of non-refoulement is required to be followed as a part of customary international law.¹⁰

⁷ Chandran, D. and Rajamohan, P. (2007). *Soft, Porous or Rigid? Towards Stable Borders in South Asia*. South Asian Survey. Journals.sagepub.com. Available at: <http://journals.sagepub.com/doi/10.1177/097152310701400109> [Accessed 12 Nov. 2017].

⁸ Staff, T. (2017). *MEA Speaks of Rohingya Refugees, Rajnath Singh Calls Them 'Illegal Immigrants'*. The Wire. Available at: <https://thewire.in/179857/rajnath-singh-rohingya-refugees-illegal/> [Accessed 15 Nov. 2017].

⁹ Convention Relating to the Status of Refugees. (1951). United Nations, Treaty Series, vol. 189, p. 137. Geneva: UN General Assembly. Available at: <http://www.refworld.org/docid/3be01b964.html> [Accessed 5 Nov. 2017].

¹⁰ The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93. (1994). [online] UN High Commissioner for Refugees (UNHCR). Available at: <http://www.refworld.org/docid/437b6db64.html> [Accessed 15 Nov. 2017].

THE PRINCIPLE OF NON-REFOULEMENT

The principle of non-refoulement as provided for in Article 33(1) of the 1951 Convention obliges a contracting state to not turn back refugees when it is common knowledge that the returning of them back to their home-country will be detrimental to their survival. Even if States are not equipped to grant refuge to people who are looking for international shielding on their land, they must implement a way that does not result in their elimination, directly or indirectly, to a dwelling where their lives or freedom would be in peril due to their race, religion, nationality, social group or political opinion.¹¹

The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement which, as will be seen below, is widely accepted by States.¹² The principle of non-refoulement is a cardinal shielding armament in refugee protection. India doesn't require to be signatory to any convention or treaty to be bound by this principle. The historical practice of shielding refugees through decades is reflective of India's acceptance.¹³ Hence it becomes inherently contradictory when talks of deporting an endangered community become the backbone of refugee treatment in India. Besides it is not practical in any sense as the Rohingyans do not hold passports¹⁴ and due to the limited intervention, allowed to the United Nations High Commissioner for Refugees (UNHCR), in refugee crises in the country. The UNHCR does not have formal agreement with the Government of India but instead operates under the agreement of the United Nations Development Programme (UNDP).¹⁵

¹¹ Lauterpacht, S. and Bethlehem, D. ed., (2003). *The Scope and Content of the Principle of Non-Refoulement: Opinion*. In: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. Cambridge University Press.

¹² Note on Non-Refoulement (Submitted by the High Commissioner) Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2. (1977). EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME. [online] Geneva: UNHCR. Available at: <http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> [Accessed 15 Nov. 2017].

¹³ VIJAYAKUMAR, V. (2000). Developments. *Judicial Responses to Refugee Protection in India*. *International Journal of Refugee Law*, 12(2), pp.235-243.

¹⁴ Dey, A. (2017). *In Delhi's Rohingya camp, a refugee couple describe their 40-year search for a place to call home*. Scroll.in. Available at: <https://scroll.in/article/847476/the-news-of-mass-deportation-has-left-delhis-rohingya-refugees-anxious-and-perplexed> [Accessed 16 Nov. 2017].

¹⁵ Wilson, N. (2016). *Urban Refugees: Challenges in Protection, Services and Policy*. Edited by Koichi Koizumi and Gerhard Hoffstaedter. *Journal of Refugee Studies*, 29(3), pp.416-418.

The Constitution of India in Article 51 provides for both 'treaty obligations' and 'international law', and the latter has synonymously often been interpreted as customary international law.¹⁶ The principle of non-refoulement has been amalgamated into the domestic law by the virtue of the Constitution. India has always been in the frontline to safeguard the interests of the refugees and past practices are a testimony to it. Tamil Nadu government undertook rehabilitation programs and awarded land grants till March 2001 to Burmese refugees that had taken shelter in the state.¹⁷

India is a signatory to the Convention against Torture (UNCAT) and International Covenant and Civil and Political Rights (ICCPR). Article 3 prohibits parties from returning, extraditing, or re-fouling any person to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁸ As a signatory to a convention which has direct links with the welfare of refugees, India needs to realize that even if it takes the defense of lack of legislations to monitor the influx of refugees, it cannot certainly overlook the obligations it is bound by, by the virtue of the UNCAT. Having ratified the ICCPR which forms a branch of the International Human Rights Bill, India as a State Party in accordance with the multilateral treaty is under the obligation to no expose the Rohingyas to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country (Myanmar in this case) by way of, expulsion or refoulement.¹⁹

¹⁶ *Statute of the International Court of Justice*. Article 38(1)(b).

¹⁷ Samāddāra, R. (1995). *Refugees and the State: Practices of Asylum and Care in India, 1947-2000*. New Delhi: Sage Publications, p.192.

¹⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (1984). United Nations, Treaty Series, vol. 1465, p. 85. New York: UN General Assembly. Available at: <http://www.refworld.org/docid/3ae6b3a94.html> [Accessed 18 Nov. 2017].

¹⁹ CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment). (1992). UN Human Rights Committee (HRC). Available at: <http://www.refworld.org/docid/453883fb0.html> [Accessed 18 Nov. 2017].

THE EXIGENCY OF A REFUGEE LAW

States have the responsibility to protect refugees by reason of their accession to international instruments, by reason of their own legislation, by reason of their political and moral commitments, or by reason of customary international law.²⁰ India does not have a domestic legislation for refugees and/or asylum seekers. Not only is this reflective of poor refugee-management skills but also deficiency of irrepensible political will. In its ninth session in 1954, the United Nations General Assembly recognized that 'the ultimate responsibility for the refugees within the mandate of the High Commissioner fall in fact upon the countries of residence'.²¹ Many of the Rohingyas who made it to India via Bangladesh did not have any legal documents with them, considering the conditions under which they fled Myanmar were inexplicable.²² However post making it to the country the biggest hurdle in the paths of the Rohingyas is to seek shelter and find sustainable means of livelihood. Most stay in slums that also double as refugee camps. Scrap-collection, security-guard services, construction work are common means of subsistence for this community, as the locals' skepticism keeps them from getting regular jobs.²³ This situation prevails merely due to the fact that the living conditions of the Rohingyas are un-regulated if not checked by any uniform law.

The refugees in India have faced several adversities due to the lack of a uniform law that governs them. The conditions under which they flee their home countries to lands that provide them refuge is often unspeakable and a traumatizing experience in itself. In tumultuous conditions it is expected of the host country to provide immediate relief and acquaint the refugees with their rights. However the ground reality is dark and shameful.

The Rohingyas are not the only ones who have sought refuge in the country. India has welcomed different refugee groups in the past, but the Indian government's stance towards each group has been different. Different groups have been granted different

²⁰ Charkraborty, M.(2001). *Human Rights and Refugees-Problems, Law and Practices*. p. 119.

²¹ Zieck, M. (1997). *UNHCR and voluntary repatriation of refugees: A legal analysis*. Hague: Martinus Nijhoff, p.79.

²² Mushtaq, S. (2017). *Rohingya refugees in India fear being forced back to Myanmar*. TRT World. Available at: <https://www.trtworld.com/magazine/rohingya-refugees-in-india-fear-being-forced-back-to-myanmar-10873> [Accessed 20 Nov. 2017].

²³ Hussain, S. (2017). *The Life Rohingya Muslims Are Forced To Live, In Hyderabad's Refugee Camps*. Youth Ki Awaaz. Available at: <https://www.youthkiawaaz.com/2016/09/life-of-rohingya-muslim-refugees-in-hyderabad/> [Accessed 22 Nov. 2017].

rights and privileges, and accorded different legal statuses, in accordance with the closest existing domestic legislations and policy. However this very diversity is causing a strife between the government, the refugees and the international community. Keeping India's benevolent past in mind, there are high expectations from the land of Gandhi to shelter those who are in need of protection and care.

The Human Rights Watch has come up with a set of guiding principles for governments and non-governmental organizations to deal with the Rohingya crisis, which involve 'refugee registration' and setting up of 'safe zones', amongst others.²⁴ India could take a leaf or two out of these suggestions, at least until the refugees are ready to relocate to their homelands, out of their own free will and with dignity. The absence of a uniform legislation for refugees creates a problem when it comes to safety, security and lodging of these people. Unregulated they are often exploited and made to live in deplorable conditions where basic sanitation and other facilities are missing. There is no body to check these violations of human dignity and no law to reprimand the wrongdoers.

CONCLUSION

The Parliament needs to discuss the issue of Rohingyas, on a special case basis, considering the magnanimity of the crisis. Playing a hegemonic role in South-Asia, now is the time for India to wield its influence in its backyard to re-shape Burma's ideology towards this community. The Rohingyas cannot flee forever, they have a right to their homeland as much as the other communities living there do, but that cannot happen unless there is a change in attitude on the part of the Burmese government. Apart from taking this as an opportunity to develop an indigenous refugee law, India needs to paint an good geo-political image in the face of this crisis and turning the Rohingyas away will only tarnish it.

²⁴ Human Rights Watch (2017). *Ten Principles for Protecting Refugees and Internally Displaced People Arising from Burma's Rohingya Crisis*. Available at: <https://www.hrw.org/news/2017/11/07/ten-principles-protecting-refugees-and-internally-displaced-people-arising-burma> [Accessed 22 Nov. 2017].

Regional platforms like ASEAN, SAARC, BRICS, need to be used to deal with this primary issue over other agendas, instead of hiding behind obsolete principles like that of ‘non-interference’²⁵, to ensure immediate relief and assistance is available to the stricken community. There is lack of empathy on the part of the Indian government for the Rohingyas due to the apparently perceived radicalism that they tag around. Instead of attacking them with chilli sprays²⁶ and asking to get rid of them in the most crude and apathetic ways, the government should work towards monitoring the mass influx, by systematically registering them on touching Indian soil. Adopting legal methods of and issuing them permits to stay in the country reduces the probability of security threats.

It is natural that the refugees will want to return to their homelands but till that passage can be ascertained their present needs need to be taken care of by the sheltering governments. India along with its immediate neighbors need to start a Rapid Action Dialogue (RAD) where the heads of the countries along with powerful allies can get together on a short intimation to join forces and resources to facilitate the Rohingya crisis. This can be done by the ‘Umbrella Method’. By this proposed method, powerful countries like the UK, USA, Russia, France, China and Japan, can choose to fund countries like India and Bangladesh whose borders are being percolated by these refugees, so that they can be rehabilitated till a safe passage can be created to initiate their return home. As reflected in the words of the wise Henry Ford, “Coming together is a beginning; keeping together is a progress; working together is a success”²⁷. In tumultuous times like this all countries great and small should come under the identity of humanity to spread their arms open to the broken community who is being hunted for existing.

²⁵ Reuters. (2017). *Southeast Asia summit draft statement skips over Rohingya crisis*. Available at: <https://in.reuters.com/article/asean-summit-myanmar/southeast-asia-summit-draft-statement-skips-over-rohingya-crisis-idINKBN1DD0CT> [Accessed 22 Nov. 2017].

²⁶ Jain, R. (2017). *India Using Chilli Spray, Stun Grenades to Stop Rohingya from Entering Country*. The Wire. Available at: <https://thewire.in/180490/rohingya-chilli-spray-stun-grenades/> [Accessed 22 Nov. 2017].

²⁷ Goodreads.com. (2017). *A quote by Henry Ford*. Available at: <https://www.goodreads.com/quotes/118854-coming-together-is-the-beginning-keeping-together-is-progress-working> [Accessed 22 Nov. 2017].