

INTERNATIONAL HUMAN RIGHTS LAW AND THE IMBIBED PRINCIPLE OF NON REFOULMENT

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ABSTRACT

International Human Rights Law mainly deals with the rights of individuals that an individual must ideally have in order to live a life of dignity in the world and to have at least the rights essential for a person to survive. International Human Rights Law mainly comprises of the Universal Declaration on Human Rights (UDHR) as its principal document along with International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) as its supplementary documents. The UDHR, ICCPR as well as ICESCR have been widely signed and ratified.

The principle of Non Refoulment is elaborately explained in the United Nations Convention Relating to Status of Refugees, 1951 as well as its additional protocols. Only 145 countries are signatories to the convention and 146 are signatories to the additional protocol. The countries which have refused to sign and ratify the 1951 convention but are a party to ICESCR, ICCPR and UDHR claim that the principle of Non Refoulment doesn't apply to them whereas in actuality the principle of Non Refoulment is imbibed in the ICCPR which is a part of customary international law.

The aim of this paper is to examine the implications of International Human Rights Law with special reference to the applicability of the principle of Non Refoulment as per the International Covenant on Civil and Political Rights.

INTERNATIONAL HUMAN RIGHTS LAW

International Human Rights Law is a branch of International Law which mainly addresses the issue of reasonable standards of rights an individual must have to live a life of dignity in the society.

The Universal Declaration of Human Rights along with the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights form the broad outline of International Human Rights Law.

The Universal Declaration of Human Rights is generally agreed to be the foundation of International Human Rights Law. It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights.¹

INTERNATIONAL BILL OF HUMAN RIGHTS

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Human rights had already found expression in the Covenant of the League of Nations, which led, inter alia, to the creation of the International Labour Organisation.

At the 1945 San Francisco Conference, held to draft the Charter of the United Nations, a proposal to embody a "Declaration on the Essential Rights of Man" was put forward but was not examined because it required more detailed consideration than was possible at the time. The Charter clearly speaks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 1, para. 3). The idea of promulgating an "international bill of rights" was also considered by many as basically implicit in the Charter.²

¹ Available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>

² Available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in its third session on 10th December 1948 and has been the landmark document for protection of Human Rights ever since.

For more than 25 years, the Universal Declaration on Human Rights stood alone as an international "standard of achievement for all peoples and all nations". It became known and was accepted as authoritative both in States which became parties to one or both of the Covenants and in those which did not ratify or accede to either. Its provisions were cited as the basis and justification for many important decisions taken by United Nations bodies; they inspired the preparation of a number of international human rights instruments, both within and outside the United Nations system; they exercised a significant influence on a number of multilateral and bilateral treaties; and they had a strong impact as the basis for the preparation of many new national constitutions and national laws.

The Universal Declaration came to be recognized as a historic document articulating a common definition of human dignity and values. The Declaration is a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards everywhere on earth.³

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) are two of the supplementary documents which support the Universal Declaration of Human Rights.

The International Covenant on Civil and Political Rights which empower individuals to appreciate the wide scope of human rights available to them. The main rights outlined in the ICCPR are as follows: -

- freedom from torture and other cruel, inhuman or degrading treatment or punishment,

³ Available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

- freedom from slavery and forced labour,
- arrest, detention and imprisonment,
- movement into, within and out of a state,
- treatment by the judicial process,
- privacy, home and family life,
- freedom of thought, religion and expression,
- peaceful assembly,
- freedom of association, including through trade unions,
- marriage and the rights of children,
- political participation, and
- equality and non-discrimination.⁴

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the nine core United Nations (UN) human rights treaties (seven of which have been ratified by the UK). It forms part of the International Bill of Human Rights alongside the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The UK ratified ICESCR in 1976.

ICESCR rights are crucial to enable people to live with dignity. This treaty covers important areas of public policy, such as the right to:

- work,
- fair and just conditions of work,
- social security,
- an adequate standard of living, including adequate food, clothing and housing,

⁴ Available at <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-civil-and>

- health, and
- education.⁵

PRINCIPLE OF NON-REFOULMENT

Non Refoulment refers to the principle which clarifies that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.⁶ i.e. whenever even though the status of an asylum seeker or refugee has not been granted by the state, if a person who is not a citizen of the country enters the territory of the country illegally, then according to the principle of Non Refoulment the person cannot be asked return.

The principle of Non Refoulment is specifically applicable to the countries which have signed the 1951 Convention on Status of Refugees. It has been defined in Article 33 (1).

Article 33(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.”

ANALYSIS: HOW IS THE PRINCIPLE OF NON-REFOULMENT IMBIBED IN THE INTERNATIONAL HUMAN RIGHTS LAW?

On collective reading of Article 6, Article 7, Article 14 and Article 28 of the Universal Declaration of Human Rights along with Article 6 and Article 7 of the International Covenant

⁵ Available at <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-economic-social>

⁶ Available at <http://www.unhcr.org/4d9486929.pdf>

on Civil and Political Rights, the principle of non-refoulement becomes evident in International Human Rights Law.

Article 6 of the UDHR talks about the right of a person to be recognized as a person before the law. Article 7 of the UDHR talks about equality before law and that there should be Equal Protection from any kind of discrimination in violation of the UDHR. Article 14 of the UDHR talks about the right of a person to seek and enjoy other countries asylum from persecution. Article 28 of the UDHR talks about the entitlement of a person to a social and international order in which the rights are set forth by the UDHR.

Article 6 of the ICCPR talks about the inherent Right to Life of a person and the protection of such right by law. Sub section 3 talks about the obligation that has to be taken up as per the convention on the prevention and punishment of genocide when there is deprivation of life which constitutes the crime of Genocide. Article 7 of the ICCPR talks about the right of a person not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and that no one will be subjected to without his free consent to medical or scientific experimentation.

When we read all these articles together then the principle of Non Refoulment can be easily found imbibed in the roots of International Human Rights Law. The meaning which comes out on the collective reading of the above mentioned articles is that Every person has a right to life which is to be protected and recognized by law; everyone has the right to be protected from torture or cruelty, inhumane or degrading treatment; in protection of such a right, one is entitled to seek asylum in other countries from persecution; there should be equal protection from any kind of discrimination that may lead to deprivation of the right of a person to seek and enjoy asylum in other countries from persecution.

WHAT ARE THE IMPLICATIONS OF THE IMBIBED PRINCIPLE OF NON-REFOULMENT IN THE INTERNATIONAL HUMAN RIGHTS LAW?

International Human Rights Law specifically the International Bill of Human Rights is the most widely signed and ratified set of Declarations/Covenants in the purview of International Law.

When there is an imbibed principle of non-refoulment in the International Bill of Human Rights, it creates an obligation for every state not to deport or repatriate refugees or illegal immigrants or asylum seekers. Even though a state might not be a party to the 1951 UN Convention Relating to Status of Refugees, it cannot do away with practicing the principle of Non-Refoulment.

CASE STUDY: INDIA, THE ROHINGYA REFUGEE CRISIS AND THE DISPUTE REGARDING NON-REFOULMENT

INDIA AND ITS PLAN TO DEPORT THE ROHINGYAS

The Republic of India holds 40,000 people of the Rohingya Ethnicity of which 16,000 people have been granted the status of a refugee.⁷

The Republic of India filed an affidavit in the Supreme Court of India which it asked the Supreme Court to desist from interfering in the deportation of Rohingya refugees, claiming they had links to the Islamic State and Pakistan's intelligence network ISI.

The Republic of India stated in the affidavit that if allowed to stay, the Rohingya refugees would exhaust natural resources meant for Indians that could culminate in hostility towards them and lead to social tension and law and order problems.

It said the plan to deport Rohingya refugees was a policy decision and the court should desist from interfering. In response, the court said it will soon take up the question of whether it has jurisdiction over the matter.

The government's argument was in response to a petition filed by two Rohingya refugees challenging any Indian decision to deport an estimated 40,000 people of the community who fled alleged persecution in Myanmar.⁸

⁷ OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS.

⁸ <https://www.hindustantimes.com/india-news/centre-says-rohingyas-have-links-with-islamic-state-and-isi-urges-supreme-court-to-leave-deportation-decision-to-govt/story-9tNoTHQPTMa082V1bj5UJM.html>

THE RESPONSE OF UNITED NATIONS HUMAN RIGHTS COUNCIL

The United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein while addressing the 36th session of the council stated “I deplore current measures in India to deport Rohingyas at a time of such violence against them in their country, The minister of state for home affairs has reportedly said that because India is not a signatory to the Refugee Convention, the country can dispense with international law on the matter, together with basic human compassion.”

He noted that India cannot carry out deportations of Rohingyas as per International Law. “[By] virtue of customary law, its ratification of the International Covenant on Civil and Political Rights, the obligations of due process and the universal principle of non-refoulement, India cannot carry out collective expulsions, or return people to a place where they risk torture or other serious violation.”⁹

ANALYSIS WITH REGARDS TO THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW

The Republic of India is a party to the Universal Declaration of Human Rights and has also ratified the International Covenant on Civil and Political Rights. The collective understanding of Article 6, Article 7, Article 14 and Article 28 of the Universal Declaration of Human Rights along with Article 6 and Article 7 of the International Covenant on Civil and Political Rights makes it evident that India cannot carry out the deportation of the Rohingyas with a legal justification as there is a legal obligation on the Republic of India due to the implied principle of Non refoulment.

Article 7 of the ICCPR if read alone would also prevent India from legally justifying the repatriation of the Rohingya Refugees as they have been clearly subjected to a form of genocide and persecution in Myanmar. Hence India has an obligation not to repatriate the refugees as per the International Human Rights Law.

⁹ Available at <https://thewire.in/external-affairs/india-hits-back-unhrc-chief-criticism-rohingya-deportation-religious-intolerance>

CONCLUSION

Article 38(1)(b) of the Statute of the International Court of Justice lists “international custom, as evidence of a general practice accepted as law”, as one of the sources of law which it applies when deciding disputes in accordance with international law.¹⁰

For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.¹¹

UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law.¹² As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.

The collective interpretation of relevant sections of the International Covenant on Civil and Political Rights along with Universal Declaration on Human Rights reads as **Every person has a right to life which is to be protected and recognized by law; everyone has the right to be protected from torture or cruelty, inhumane or degrading treatment; in protection of such a right, one is entitled to seek asylum in other countries from persecution; there should be equal protection from any kind of discrimination that may lead to deprivation of the right of a person to seek and enjoy asylum in other countries from persecution.**

¹⁰ Article 38(1) of the Statute of the International Court of Justice, 59 Stat. 1031, 1060 (1945).

¹¹ International Court of Justice, *North Sea Continental Shelf, Judgment*, 1969 ICJ Reports, page 3, para. 74. See also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Reports, page 392, para. 77.

¹² UNHCR, *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