

## SELF-DECEPTION OF HUMAN RIGHTS AND THE STATE SOVEREIGNTY IN CASE OF ROHINGYA CRISIS

—*Swati Singh Parmar\** & *J.P. Yadav\*\**

*Abstract*—Myanmar's Rohingya conflict foregrounded in the identity, culture and history of the minority Rohingya Muslims has drawn global attention. The picture of the crisis presents complex politico-legal contours from the international human rights law, and international criminal law which was, in the year 2019, addressed to the International Court of Justice and International Criminal Court respectively. Invoking universal jurisdiction to file a case against the military leaders of Myanmar for human rights violations at an Argentinian domestic court has attempted to debunk the self-deception of human rights to an extent. This attempt is furthered by a particular form of jurisdiction via another state at ICC, as Myanmar is not a signatory of the Rome Statute. ICJ issuing provisional measures against Myanmar on a plea filed by an African nation, Gambia, against Myanmar also has important lessons regarding the permeability of the veil of sovereignty. These legal addressal to the Rohingya crisis invoking universal jurisdiction, specific jurisdictions by Bangladesh and Gambia are path-breaking in the human rights discourses. These jurisprudential innovations challenge the archaic comfort of the statist arguments based on sovereignty for the avoidance of obligations to protect the human rights of subjects. This article attempts to present a critical assessment of the paradigms of global human rights discourse involved in the Rohingya crisis. The first part of the article will address the issue of self-deception of Human Rights and how it weakens the existing international

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\* Assistant Professor in International Law, Dharmashastra National Law University, Jabalpur. <swatiparmar@mpdnl.ac.in>.

\*\* Professor (Law) & Director, Amity Law School, Amity University, Lucknow.

*human rights protection system. In the second part, the Human Rights-state sovereignty interaction being conflicting or complementary will be dealt with. The third part will analyse the redefined Sovereignty that allows for a neo-liberal view of state sovereignty that can be integrated into the universal ideal of human rights.*

**Keywords:** Rohingya, Human Rights, Sovereignty, ICJ, ICC, Universal jurisdiction, International Law

## I. THE PROBLEM

Systematic mass atrocities, mass exodus, extra-judicial killings and the unprecedented violence led to the fleeing of individuals from their homelands to the neighbouring states. The concern then does not merely extend to the protection of the people in their home state but also their protection in the state of refuge. This crisis shows how the realpolitik concerns relegate the ideal politik human rights concerns to the margins. Classical realpolitik with state sovereignty at its centre has offered ease of manoeuvred unwillingness at Myanmar's end to protect the human rights of its subjects to be renewed understanding of sovereignty in the terms of responsibility could ease the perceived tensions between state sovereignty and human rights. Myanmar's Rohingya crisis is a textbook example of state-sponsored genocide<sup>1</sup> and coordinated group actions putting the lives of thousands at stake with a disregard to the basic human values, human rights, and human dignity. It becomes complex when there is the active involvement of the state or through a consented third party, the state conspired in the violations of human rights and restricts the international community to intervene in the crisis, taking the plea of its national sovereignty. On one side, there is national integrity and sovereignty from the statist perspective and on the other, there are human rights concerns from the internationalist perspective. Invoking the shield of sovereignty, States paralyse the international community to interfere in such a crisis, as in the State-sponsored killings of the Jews by Nazi Germany, and genocides in Cambodia, Rwanda and Srebrenica.

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<sup>1</sup> Myanmar has been called an "Apartheid State". See Wade Francis, "Apartheid State: Camps, Ghettos and the New Architecture of Control" in *Myanmar's Enemy Within Buddhist Violence and the Making of a Muslim "Other"*, (2017).

*Rohingya*, the most persecuted minority in the world<sup>2</sup> face multi-dimensional human rights violence. *Rohingya* is a Muslim minority community, sometimes seen as a threat to national security by the rest of the majority<sup>3</sup>, residing<sup>4</sup> in the western coastal *Rakhine* state of Myanmar<sup>5</sup>. Their existence in Myanmar is met with discrimination<sup>6</sup>, denial of citizenship<sup>7</sup>, and various kinds of human rights violations ranging from genocide<sup>8</sup>, ethnic cleansing<sup>9</sup>, gang rapes<sup>10</sup>, naked parades, torture<sup>11</sup>, burning of entire *Rohingya* villages<sup>12</sup>, other crimes against humanity<sup>13</sup> and brutal security oppression.<sup>14</sup> Thousands of them have fled from their homeland to save their lives and dignity and have lately

<sup>2</sup> Moshe Yega, *Between Integration and Secession: The Muslim Communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar* (2002); Azeem Ibrahim, *The Rohingyas: Inside Myanmar's Hidden Genocide*, (2016); Francis Wade, *Myanmar's Enemy within: Buddhist Violence and the Making of a Muslim "Other"*, (2017).

<sup>3</sup> See Anthony Ware and Costas Laoutides, "Security Dilemma, Minority Complex, Greed, and Political Economy" in *Myanmar's "Rohingya" Conflict*, (2018); Anwary Afroza, Atrocities against the Rohingya Community of Myanmar, 31 IJAA 91, (2018).

<sup>4</sup> Aye Chan, "The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)", 3 SOAS Bulletin of Burma Research 396, 398 (2005).

<sup>5</sup> Ba Mwa, *Breakthrough in Burma, Memoris of a Revolution, 1939-1946*, (1968).

<sup>6</sup> "Rohingya community had endured progressive intensification of discrimination over the past 55 years", Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar, 5th December 2017. See Manish K. Jha, " 'Stateless' Rohingyas: Persecution, Displacement and Complex Community Development", *Community Development Journal* 1, (2020), showing the role of identity, ethnicity, and politics in pushing the minority community at the margin.

<sup>7</sup> For an account of the, see Rohan Lee, "Citizenship Laws: Making Rohingya Stateless" in *Myanmar's Rohingya Genocide: Identity, History and Hate Speech* 55 (2021). See Nehginpao Kipgen, "The Rohingya Crisis: The Centrality of Identity and Citizenship", 39 *Journal of Muslim Minority Affairs* 61 (2019), arguing that an addressal to the core issues of ethnic identity and citizenship is needed, in absence of which there is a danger of recurrence of violence.

<sup>8</sup> *Report of the Independent International Fact-finding Mission on Myanmar*, Human Rights Council, Thirty-ninth Session, 10–28 September 2018, Agenda Item 4, <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_HRC\\_39\\_64.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf)>.

<sup>9</sup> See generally Gibson, Trevor, et al., *Rohingyas Insecurity and Citizenship in Myanmar*, (2017).

<sup>10</sup> *Submission to CEDAW Regarding Myanmar's Exceptional Report on the Situation of Women and Girls from Northern Rakhine State*, May 2018.

<sup>11</sup> See generally A. H. Raja, *The Plight and Persecution of the Rohingyas in Myanmar*, Global Research, June 17 (2015), available at <<https://www.globalresearch.ca/the-plight-and-persecution-of-the-rohingyas-in-myanmar/5456287>>, visited on 10th February 2019.

<sup>12</sup> *Rohingya Refugee Crisis*, available at <<https://www.unrefugees.org/emergencies/rohingya/>>, visited on 27th March (2019); *Rohingya People in Myanmar: What You Need to Know*, DW, available at <<https://www.dw.com/en/rohingya-people-in-myanmar-what-you-need-to-know/a-40340067>>, visited on 11th March 2019.

<sup>13</sup> Human Rights Watch, "Crimes against Humanity by Burmese Security Forces against the Rohingya Muslim Population in Rakhine State since August 25, 2017," September 26, 2017, available at <[https://www.hrw.org/sites/default/files/supporting\\_resources/burma\\_crimes\\_against\\_humanity\\_memo.pdf](https://www.hrw.org/sites/default/files/supporting_resources/burma_crimes_against_humanity_memo.pdf)>, visited on 15th February 2019.

<sup>14</sup> "Myanmar Rohingya Crackdown: 'A Textbook Example of Ethnic Cleansing,' Says UN", DW, available on <<https://www.dw.com/en/myanmar-rohingya-crackdown-a-textbook-example-of-ethnic-cleansing-says-un/a-40445121>>, visited on 11th March 2019.

been emerged as stateless<sup>15</sup>. “Since October 2016, nearly 75,000 of Myanmar’s *Rohingya* have fled across the border to Bangladesh, as a United Nations (hereinafter, UN) international probe investigates accusations of rape and murder committed by Myanmar security forces”.<sup>16</sup> The situation is described as the most urgent refugee crisis.<sup>17</sup> They have largely been side-lined in the nation-building process<sup>18</sup> and often face State-sponsored persecution. “As an ethnic minority, they have been steadily ostracised from the nation-building process, progressively persecuted<sup>19</sup> and became subject to strident state-sponsored abuses.”<sup>20</sup> There also is a competing narrative from the state’s end of national security being threatened allegedly by the attacks of the Arakan Rohingya Salvation Army on Myanmar’s military.<sup>21</sup> The known reason for the conflict is rooted in various factors ranging from historical provenance<sup>22</sup>, discriminatory laws and policies by Myanmar’s Government<sup>23</sup>, restrictive naturalisation of *Rohingyas*, to their exclusion in the nation-building process. Off late, there have been waves of human rights violations and mass exodus in the years of 2012, 2016 and 2017. COVID-19 crisis adds to their maladies.<sup>24</sup> Recently, the International Court of Justice (hereinafter, ICJ) ordered provisional measures

<sup>15</sup> See Nasir Uddin, State of Stateless People in *The Rohingya: An Ethnography of ‘Subhuman’ Life*, (2021); Amal de Chickera, “Statelessness and Identity in the Rohingya Refugee Crisis”, Humanitarian Practice Network, <<https://odihpn.org/magazine/statelessness-identity-rohingya-refugee-crisis/>>, October 2018.

<sup>16</sup> Aung San Suu Kyi: Turning her back on Rohingya?, 12 June 2018, <<http://www.rohingyablog.com/2017/06/aung-san-suu-kyi-turning-her-back-on.html>>.

<sup>17</sup> T. Macnamus and K. Ziabari, The World Must Recognize the Cause of the Rohingya Crisis, September 2017, available at <[https://www.fairobserver.com/region/asia\\_pacific/rohingya-muslims-myanmar-rakhine-state-violence-asia-pacific-news-54212/](https://www.fairobserver.com/region/asia_pacific/rohingya-muslims-myanmar-rakhine-state-violence-asia-pacific-news-54212/)>, visited on 22nd February 2019; Majumdar, S., “Inside the Most Urgent Refugee Crisis in the World”, 28 September 2017, visited on 10th March 2019.

<sup>18</sup> J. Leider, “Rohingya: The History of a Muslim Identity in Myanmar”, Oxford Research Encyclopaedias, available on <http://oxfordre.com/asianhistory/abstract/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-115?rskey=x6gPbA&result=3>, visited on 12th March 2019.

<sup>19</sup> “‘No Other Conclusion,’ Ethnic Cleansing of Rohingyas in Myanmar Continues – Senior UN Rights Official”, UN News, 20th March 2019, <<https://news.un.org/en/story/2018/03/1004232>>.

<sup>20</sup> Jobair Alam, The Rohingya of Myanmar: Theoretical Significance of Minority Status, 19 *Asian Ethnicity* 180, 189, (2018). See also “ ‘We will Destroy Everything’ Military Responsibility for Crimes against Humanity in Rakhine State”, Myanmar, Amnesty International, ASA 16/8630/2018.

<sup>21</sup> See Gabrielle Aron, “Reframing the Crisis in the Myanmar’s Rakhine State”, United States Institute of Peace, 22 January 2018, <<https://www.usip.org/publications/2018/01/reframing-crisis-myanmars-rakhine-state>>.

<sup>22</sup> The History of the Rohingya community has been retold. The conflicting historical narratives raise serious concerns. For details, see Rohan Lee, *Conflicting Historical Narratives in Myanmar’s Rohingya Genocide: Identity, History and Hate Speech* 117 (2021)

<sup>23</sup> The Rohingya Crisis, Council on Foreign Relations, 5th December 2018, available on <<https://www.cfr.org/backgrounder/rohingya-crisis>>, visited on 11th March 2018.

<sup>24</sup> Naful Mehedi and Md. Ismail Hossain, “COVID-19 Crisis and the Necessity for the Quick Response to the Rohingya Refugees in Bangladesh”, *Disaster Medicine and Public Health Preparedness*, 2021, 1-2; Md. Bayezid Islam, Tahmina Sultana, Marzia Marium, Mahzabeen Mahfuz, Syed Mahbubur Rahman, “COVID-19 Response During the Winter Season in Rohingya Refugee Camps in Cox’s Bazar, Bangladesh”, *Journal of Travel Medicine*, 2021.

regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide, but the manner of implementation of the order will have an immense bearing on the theory and practice of human rights and the sovereignty discourse.

This article attempts to present a critical assessment of the paradigms of global human rights discourse involved in the *Rohingya* crisis and any crisis of such nature. The first part of the article will address the issue of self-deception of Human Rights and how it weakens the existing international human rights protection system. In the second part, the Human Rights- state sovereignty interaction being conflicting or complementary will be dealt with. The third part will analyse there defined sovereignty that allows for a neo-liberal view of State sovereignty that can be integrated into the universal ideal of human rights.

## II. THE SELF-DECEPTION OF HUMAN RIGHTS

Amid the eschatology of World Wars, the conceptual framework of human rights was developed and instilled in the world community with Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights. Eventually, to further the philosophy of human rights embodied in the International Bill of Human Rights, a series of nine core International Human Rights Instruments<sup>25</sup> were enacted and their committee of experts was established. The philosophical goals of human rights gained firmness so much that they are elevated to the ‘status of ethical *lingua franca*’<sup>26</sup>.

Through the works of thinkers like John Rawls<sup>27</sup>, the debates on the philosophy of human rights gathered much attention. Insinuating egalitarianism<sup>28</sup> through universal human rights met with criticisms for lack of pragmatism- the conceptual framework lacked an equally strong implementation mechanism. A strong implementation design was required<sup>29</sup> to realise the goals of human rights in the matrix of limits that states’ sovereignties placed. This was even realised in the criticism of the role of the UN in the Rwanda and Kosovo crisis owing to the inherent constraints of the UN Charter<sup>30</sup>. The intellectual capital invested in building the human rights ideology has been much more than

<sup>25</sup> Core International Instruments, United Nations Human Rights Office of the High Commissioner, <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>.

<sup>26</sup> John Tasioulas, “The Moral Reality of Human Rights”, In Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* 1 (2007).

<sup>27</sup> Rawls, John, *The Law of Peoples*, (1999).

<sup>28</sup> See Allen Buchanan, *The Egalitarianism of Human Rights*, 120 *Ethics* 679, (2010).

<sup>29</sup> Steger, B., Manfred, *The Rise of Global Imagery: Political Ideologies from the French Revolution to the Global War on Terror*, (2008).

<sup>30</sup> See William H. Thornton, “Back to Basics: Human Rights and Power Politics in the New Moral Realism”, 14 *Int. J. Politics Cult. Soc.* 315, 315 (2000).

the political-will capital that was needed to bring those ideals into reality. This deficiency in the holistic composure (of human rights- in concept as well as instrumentality) has contributed to the disfavour of humanitarian intervention<sup>31</sup> and scepticism in viewing humanitarian intervention as a ‘right’<sup>32</sup>. Human rights have been cleaved into developed conceptual clarity and a still-developing mechanism to ensure its protection, one that is sometimes plagued with Sovereignty backed claims. This cleavage, among other reasons, has led to human rights being loathed with self-deception. This philosophical and operational gap<sup>33</sup> in the human rights idea strengthens the self-deceptive<sup>34</sup> hues and tones of human rights. Under-realisation of the need for an effective implementation framework, the continuance of human rights discourse on the idealist rationale and lack of a doctrinaire realists’ approach, has made human rights self-deceptive. This even reflects the imbalance of human rights rhetoric in the Charter on one hand, and its explicit embodiment in charter provisions, to ensure an effective mechanism to achieve the human rights ideology sought by it, on the other.

The UN Charter envisions establishing and maintaining ‘international peace and security’<sup>35</sup> and promises to promote and encourage ‘respect for human rights and for fundamental freedoms’<sup>36</sup> as well as ‘to take appropriate measures to strengthen universal peace’.<sup>37</sup> Despite the theoretical existence of the protection of human rights, the United Nations Security Council (hereinafter, UNSC) has been gridlocked on several such occasions.<sup>38</sup> The collective conscience of states towards human rights standards reflects theoretically placed in the UN Charter but when it comes to the praxis, there also is diverse individual moral attitudes that the (ab)use of the veto power reveals. The provisions

<sup>31</sup> See Shashi Tharoor and Sam Daws, Humanitarian Intervention, Getting Past the Reefs, 18 *World Policy J.* 21, 21 (2001).

<sup>32</sup> See Adam Roberts, “The So-called ‘Right’ of Humanitarian Intervention”, 3 *Yearbook of International Humanitarian Law* 3, (2001).

<sup>33</sup> See Geoff Dancy, “Human Rights Pragmatism: Belief, Inquiry and Action”, 22 *Eur. J. Int. Relat.* 512, 512 (2015); Gaymon Bennett, *Technicians of Human Dignity: Bodies, Souls, and the Making of Intrinsic Worth*, (2016); James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, (1987).

<sup>34</sup> Joseph Raz, “Human Rights without Foundations”, Oxford Legal Studies Research Paper 14/2007.

<sup>35</sup> UN Charter, Art. 1, para 1.

<sup>36</sup> UN Charter, Art. 1, para 3.

<sup>37</sup> UN Charter, Art. 1, para 2.

<sup>38</sup> France and United States threatened to use their veto powers to any resolution that uses the word ‘genocide’ during the Apartheid in South Africa and the 1994 Rwanda genocide. UNSC was scuttled by veto power and could not respond to the crises in Iraq and former Yugoslavia during 1998-1999. In 2017, Russia and China abused veto power on a draft resolution for the accountability for the use of chemical weapons in Syria. Human rights abuses in Sudan, Sri Lanka and Myanmar could not be addressed by UNSC due to China’s veto. See generally Allen S. Weiner, “The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?” 59 *Stan. L. Rev.* 415, 419-20 (2006); Kyle Beardsley, “Following the Flag or Following the Charter? Examining the Determinants of UN Involvement in International Crises, 1945-2002”, 56 *Int. Stud. Q.* 33, (2012).

of the Charter emphasising Human rights is merely a group subscription of the UN member states, while the individual subscriptions of the states to the same are often juxtaposed.

While briefing the members of the UNSC, António Guterres claimed “The situation has spiralled into the world’s fastest-developing refugee emergency and a humanitarian and human rights nightmare.”<sup>39</sup> Regional stability, security and peace, as a result, are at stake. Given the gravity of the situation and its overreaching effects in South Asia, it has become pertinent for the international community to intervene and arrive at a durable solution.<sup>40</sup> Any international action in Myanmar would entail serious ramifications. Any such international help or intervention will be met with the argument of the national integrity and sovereignty of Myanmar. The concept of state sovereignty has undergone changes, but still, the remnants of a strict conception of Sovereignty often limits the potential of any international action within the domestic sphere of the state.

The crisis is a potent threat not only to the peace and security of South Asia but also that to the entire international community. Bangladesh has already been dealing with a large influx of *Rohingya* refugees. Other already populated neighbouring countries have shown their inability to open their borders to the refugees, sometimes even in defiance of the refugee laws and the existing international morality.<sup>41</sup> Despite the extreme fear of persecution for *Rohingyas* in their home state, Bangladesh is engaging in forceful repatriation, in violation of the principle of non-refoulement.

### III. HUMAN RIGHTS AND THE SOVEREIGNTY RHETORIC

There have been two basic viewpoints to the relationship that human rights and state sovereignty share. One regards that they exist in separate spheres and are contradictory to each other, while the other viewpoint holds them in a conceivable complementary relationship.

One of the major challenges to the prevention of human rights violations lies in the inherent tensions in the philosophy of state sovereignty and human rights- which is often regarded as a zero-sum relationship<sup>42</sup>. Unresolved and unsettled Human rights’ violations remain active even after decades. New-born crises may have such old issues at their centre. The *Rohingya* crisis in

<sup>39</sup> Security Council, 8060th Meeting, SC/13012, 28th September 2017.

<sup>40</sup> See Remarks by Kofi Annan, Chairman of the Advisory Commission on Rakhine State, Press Conference.

<sup>41</sup> *Mohd. Salimullah v. Union of India*, 2021 SCC Online SC 296.

<sup>42</sup> Christian Reus-Smith, “Human Rights and the Social Construction of Sovereignty”, 27 Rev. Int. Stud. 519, 519 (2001).

Myanmar is one such old issue that is recurring again and again. If not settled or reconciled properly, it may, in future, serve as a major sensitive playground, for other powers of the world, in South Asia.

Concerns of national interest, sovereignty and integrity are of paramount interest for a state, but in situations of state-sponsored genocide and ethnic cleansing of a community, do human rights' concerns outweigh the idea of state sovereignty? History has chapters of occasions where state-sponsored gross human rights violations have met no international help because of the state's reversion and resistance<sup>43</sup> to arrive at a solution.

Human rights and state sovereignty had long been perceived to be fundamentally opposing paradigms.<sup>44</sup> Human rights lay down universal standards to limit the excess of sovereign order. Sovereignty, as a principle, bestows supremacy to the state and allows even compromising the universal standards of human rights<sup>45</sup>. States are considered sovereign in their domestic spheres to design their human rights policies. This tension is often seen as a tension between the two principles that sustain international order.<sup>46</sup>

Howbeit, jurists opine that proclamation of human rights, even while being not strictly obligatory, are 'strong ethical pronouncements'<sup>47</sup> that ought to be followed. On the same lines, UN Decade for Human Rights Education popularised the term "a culture for human rights"<sup>48</sup>, to inculcate the ethos of respect and protection of human rights amongst the states<sup>49</sup>. The crux of the problem of the non-obligatory nature of human rights mandates lies in the state centred arguments of citizenship entrenched in the idea of state sovereignty. The statist stance might be diluted with a redefinition of citizenship. There have been thinkers urging to rethink the definition<sup>50</sup>, to ease the reaching out of the protection of human rights without the impedimental arguments of state sovereignty.

<sup>43</sup> For instance, declassification for military archives, Marie-Eve Monette, "Embodied Knowledge of the Bolivian Disappeared in Wara Cajlas and Adriana Montenegro's Desaparecidos" (2008), 27 J. Lat. Am.Cul. Stud. 197, 211 (2018).

<sup>44</sup> See Christian Reus-Smith, "Human Rights and the Social Construction of Sovereignty", 27 Rev. Int. Stud. 519, 519 (2001). See also Kofi Annan, Two concepts of Sovereignty, The Economist, (1999), <<https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty>>.

<sup>45</sup> *Supra* note 21 at 26 (2001).

<sup>46</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1995).

<sup>47</sup> See Amartya Sen, *The Idea of Justice* (2009).

<sup>48</sup> Peace Proposal, 2011, *Toward a World of Dignity for All: The Triumph of the Creative Life: 2011 Peace Proposal*. See also UNGA, 2005, World Programme for Human Rights Education, A/59/525/Rev.1. Revised draft plan of action for the first phase of the World Programme for Human Rights Education.

<sup>49</sup> See Oliver Urbain, *A Forum for Peace: Daisaku Ikeda's Proposals to the UN*, (2014).

<sup>50</sup> Karen O'Shea, Education for Democratic Citizenship 2001-2004. Developing a Shared Understanding: A Glossary of Terms for Education for Democratic Citizenship, Council of Europe, 8 (2003).



Modern international legal order, predominant by the concerns of international peace and order, views the protection of individuals as the primary concern. It presupposes the severe violations of human, as well as fundamental rights, may create a threat to international peace and security.<sup>51</sup> This is also supported by the view of monists- like Kelsen, Kunj, Wright - that the individuals are, directly or indirectly, the subject of international law.

#### IV. THE RESHAPED SOVEREIGNTY

The idea of sovereignty has been open to interpretation across time and space<sup>52</sup>. It is an idea in abstraction and required dialectic probing. The Treaty of Westphalia, a series of Peace Treaties signed between the Westphalian cities of Osnabrück and Münster, has been regarded by Europe as the earliest documents to have instilled the ideas of sovereignty. As the concept of 'city states' slowly paved the way for the idea of 'nation state', the Westphalian sovereignty transformed (through a series of varying conceptions) to national sovereignty or territorial sovereignty. The international community came to be organised in terms of sovereign states. Luke Glanville notes that the states have "enjoyed 'unfettered' rights to self-government, non-intervention and freedom from interference in internal affairs."<sup>53</sup>

With ideas of nationalism and nationhood gaining importance, sovereignty came to be construed more strictly, close to a nation's identity and power<sup>54</sup>. Soon it came to be associated with the territory of the nation and so grew the idea of 'Territorial sovereignty'. Absolutist conception of sovereignty and non-interference of foreign entities was strongly established by then. With these varying conceptions of sovereignty, the absolutist element has largely remained constant. From a statist view, states' authority is absolute and independent, thereby leaving no space for international law to breathe in the domestic sphere. Practically, the judgements of international courts and organisations were not considered binding upon the states as they were seen as an encroachment on sovereignty.

For international law to develop and evolve and for the establishment of international organisations, the absolutist conception of sovereignty had to be reshaped. This was significantly done by the drafting of the UN Charter in its first principle of the Charter. Article 2(1)<sup>55</sup> talks about 'sovereign equality' that is an amalgamation of two basic tenets of law – sovereignty and equality. This marked a paradigm shift in the interpretation of sovereignty, where

<sup>51</sup> UN Charter, Ch. VII.

<sup>52</sup> Jens Bartelson, "The Concept of Sovereignty Revisited", 17 *Eur. J. Int. L.* 463, 469 (2006).

<sup>53</sup> Luke Glanville, "The Antecedents of 'Sovereignty as Responsibility'", 17 *Eur. J. Int. Rel.* 233, 243 (2011).

<sup>54</sup> Nico Swartz, *State Sovereignty and Environmental Law*, 3 *Eur. J. Bus. Soc. Sci.* 34 (2014).

<sup>55</sup> "The Organization is based on the principle of the sovereign equality of all its Members", UN Charter, Art. 2, para 1.

Westphalian sovereignty gave the states an inviolable right of non-interference and independence, ‘sovereign equality’ evolved an alternative for international law to regulate the states’ conduct in the international matrix.

The internationalist argument was weakened by the unfettered state sovereignty, but the situation changed in the 1990s when some of the major humanitarian crises occurred like those of Iraq in 1991, Kosovo in 1998, and others.<sup>56</sup> These humanitarian crises and the anarchical nature of the state led to the reconsideration of the idea of sovereignty. No more could, theoretically, a state violate the human rights of its subjects and resist the international community from interfering in the name of sovereignty. At the same time, another state could intervene in the affairs of a state, after the permission of the UNSC, in cases of mass human rights violations.

## V. LEGAL PROCEEDINGS AND THE QUESTIONED SELF-DECEPTION OF HUMAN RIGHTS

The month of November 2019 had been an important point for the ongoing crisis. On November 11, Gambia filed an application at ICJ alleging the human rights violations of Rohingya.<sup>57</sup> On November 13, in a landmark event, a universal jurisdiction’s case was filed at Buenos Aires Court, a domestic court of Argentina.<sup>58</sup> The case was filed by the Burmese Rohingya Organisation UK (BROUK) invoking the universal principle. The principle is developed on the understanding that certain crimes are so egregious that they can be tried anywhere irrespective of the place where they were committed. The UN Fact-Finding Mission on Myanmar had already in 2018 brought a report<sup>59</sup> urging the member states of the UN to bring universal jurisdiction cases in their domestic courts. The court remarkably admitted the petition to probe the role of leaders of Myanmar in the Rohingya genocide and persecution. On

<sup>56</sup> See S. Pandiaraj, “Sovereignty as Responsibility: Reflections on the Legal Status of the Doctrine of Responsibility to Protect”, 15 *Chin. J. Int. L.* 795, 795 (2016). He remarks, “There has been an attempt to redefine the meaning of sovereignty in international legal discourse in the post-Cold War era. This attempt was essentially necessitated by a series of high-profile instances (including Somalia, Bosnia, Rwanda, Kosovo, Darfur) in which the United Nations/ international community was seen as doing too little or (occasionally) too much when faced with grave humanitarian emergencies”.

<sup>57</sup> *The Gambia v. Myanmar*. Available at <<https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>>, visited on 1 July 2021

<sup>58</sup> Argentinian Courts urged to Prosecute Senior Myanmar Military and Government Officials for the Rohingya Genocide, Nov. 13, 2019). Available at <<https://www.brouk.org.uk/argentine-an-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide/>>, visited on 10 July 2021.

<sup>59</sup> Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar, to the Government of Myanmar, Armed Organizations, the UN Security Council, Member States, UN Agencies, the Business Community and others, Human Rights Council, Forty-second Session, 9-27 September 2019, Agenda item 2, available on <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A\\_HRC\\_42\\_CRP.6.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.6.pdf)>, visited on 20th August 2020.

November 14, International Criminal Court Pre-trial Chamber III approved full investigation for the international criminal responsibility for alleged crimes against the Rohingya Muslims.<sup>60</sup> This involved a significant jurisprudence where the jurisdiction of the Court was invoked via another state. Myanmar is not a signatory to the Rome Statute. The jurisdiction of ICC in this case was invoked via Bangladesh as a result. The underlying argument is that the court may exercise territorial jurisdiction (even in absence of Myanmar as a state party) over the crimes of alleged deportation of minority Rohingyas from Myanmar to Bangladesh. The court noting the elements of crime being present in Bangladesh<sup>61</sup> (which is a state party) is an interesting stance. For this, an interpretation of Article 7(1)(d) for the nature of the crime of deportation and Article 12(2)(a) for the nature of the territorial jurisdiction was required. For the interpretation of Article 7(1)(d) to understand the nature of the crime of deportation, the prosecution argued for the literal, contextual and purposive interpretation principles embodied in the Vienna Convention of Law of Treaties. Recourse to customary international law was taken by the prosecution for understanding the intentions of the drafters regarding Articles 7 and 8 of the Convention. For the interpretation of Article 12(2)(a) for the nature of the territorial jurisdiction, the prosecution relied on the objective territorial jurisdiction from the Lotus case<sup>62</sup> and from the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime. The alleged deportation of civilians across the international border between Myanmar and Bangladesh clearly established the territorial link for the application of Article 12 (2)(a). State practice as well as examples from domestic laws including Argentina, Canada, China, England and Wales, etc., were made to establish the acceptance of the objective territorial jurisdiction. To address the concern of forced deportation over international borders, it was argued that we must move beyond our traditional notions of Westphalia.

This whole situation has a far-reaching symbolic significance. It sets a strong precedent on the peculiar kind of jurisdiction of ICC in such grave situations and on the invoking of it by a state, other than the one espousing it. The messaging of this bold interpretation is significant for the human rights discourse. This interpretation is bold in the sense of its unconventionality and rarity. The interpretation of principles of international criminal law in this manner is an opportunity for the international community to rethink state sovereignty and adopt constructive measures for the protection of human rights.

Later in December 2019, the Court of First Instance in Buenos Aires rejected the petition to avoid duplication of the investigation launched by the

<sup>60</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, International Criminal Court Pre-Trial Chamber III, Decision.

<sup>61</sup> Bangladesh Ratified the Rome Statute on 23 March 2010.

<sup>62</sup> S.S. Lotus (*France v. Turkey*), 1927 PCIJ (ser. A) No. 10 (Sept. 7).

ICC. In May 2020, an Appeal Court overturned the decision of the Court of First Instance in Buenos Aires.

Gambia's filing of an application at ICJ alleging the human rights violations of Rohingya has been unique in its process and spirit. The Gambia showed a conscience mirror to the international community and highlighted the *erga omnes* obligation involved. This is the first time when *erga omnes* obligations were used in front of ICJ in connection to the genocide Convention.<sup>63</sup> Before this, *erga omnes* obligations had been invoked at the International Court of Justice on two occasions, first about relation to the Convention against Torture (hereinafter, CAT) in Belgium v. Senegal case and second, in relation to right of peoples to self-determination in Portugal v. Australia.<sup>64</sup> Out of the two occasions, the ICJ accepted the *erga omnes* obligations concerning to the CAT. The Gambia v. Myanmar is the second instance where the ICJ has accepted the *erga omnes* obligations. Interestingly, the Gambia argued for the jurisdiction of ICJ not only under Article 36 (1) of Statute of ICJ but also under Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>65</sup> The Gambia and Myanmar both are parties to the Genocide Convention, and both have no reservations to Article IX of the 1948 Convention. The states that experienced refugee flows and were directly experiencing the consequences of the Rohingya crisis took no legal recourse regarding the crisis, while a distant state like the Gambia, took the matter to ICJ against Myanmar. Even while the implementation framework of human rights is paralysed by the statist argument of sovereignty, the naturalist appeal of human rights is such that such a peculiar jurisprudence could evolve as a safeguard against human rights abuses.

In addition, a new dimension had been added to this picture when sovereignty was linked with responsibility.<sup>66</sup> Responsibility to Protect established a sense of responsibility of the international community where the states fail to protect their citizens' human rights.<sup>67</sup> The changes in the conception of sovereignty from Westphalian to Popular sovereignty and then to sovereignty as

<sup>63</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422.

<sup>64</sup> *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90.

<sup>65</sup> See also D. We Rist, What does the ICJ decision on The Gambia v. Myanmar Mean?, Vol. 24, No. 2, American Society of International Law Insights, 2020.

<sup>66</sup> Roberta Cohen, Humanitarian Imperative are Transforming Sovereignty, Brookings, available at <<https://www.brookings.edu/articles/humanitarian-imperatives-are-transforming-sovereignty/>>, visited on 8th March 2019. He notes, "This emerging international responsibility to protect and assist persons within their own countries reflects new and evolving concepts of sovereignty."

<sup>67</sup> Lucas Bento, "Sovereignty Cannot Hold Back the Power of Humanity", Har. Int. L. J.(2015). Available at <<https://harvardilj.org/2015/09/sovereignty-cannot-hold-back-the-power-of-humanity/>>, visited on 10th March 2019. He argues, "In practice, the right to sovereignty entails significant responsibilities, and must thus be counterbalanced by values such as respect for human rights and the protection of minorities."

responsibility,<sup>68</sup> gave impetus to the protection of human rights. Sovereignty is now understood as an assemblage of privileges as well as responsibilities.<sup>69</sup>

Although even after the ICJ's ruling, the violence against *Rohingya* has continued.<sup>70</sup> The ICJ significant ruling in the *Gambia v. Myanmar* case should not be treated by Myanmar in the way the South China Sea Award was treated by China.<sup>71</sup>

## VI. CONCLUSION

Peace and avoidance of conflict is the aim of human societies. The International community through international treaties, customs, and organisations aims at establishing peace and security. Given the seriousness and sensitivity of the crisis faced by *Rohingyas*, post-conflict peace building is to be discussed and done meticulously. Despite multiple legal solutions, the *Rohingya* crisis could not be addressed till November 2019 when Gambia filed an application at ICJ. UNSC has on several occasions called to restore civil administration in the region of *Rakhine*.<sup>72</sup>

The atrocities on *Rohingyas* by the military and other state authorities of Myanmar has been confirmed and documented by several international agencies including the sub-committees of the UN, Human Rights Watch, and others. However, it is argued by the authorities of Myanmar that there were several attacks on Myanmar Military forces by the Arakan Rohingya Salvation Army. Also, it is argued that the measures taken by the Myanmar military forces were counter-terrorist measures.

<sup>68</sup> Roberta Cohen and Francis M. Deng, "Sovereignty as Responsibility: Building Block for R2P, The Oxford Handbook of the Responsibility to Protect"; Francis M. Deng, et al., "Sovereignty as Responsibility: Conflict Management in Africa", Brookings Institution Press (1996); Hannes Peltonen, "Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility", *Communal Crime Prevention and International Law*, 7 *Uluslararası İlişkiler* 59, 65(2011).

<sup>69</sup> See United Nations, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 2004, p. 17, stating "Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community".

<sup>70</sup> Reuters, Myanmar village burned after fighting; residents blame security forces, 16th June 2021, available at <<https://news.trust.org/item/20210616173151-48std>>, visited on 18th June 2021; Reuters, "Two Rohingya Women Killed as Myanmar Army Shells Village", 25 January 2020, available at <<https://news.trust.org/item/20200125062902-9ittm/>>, visited on 30 January 2020.

<sup>71</sup> Bill Hayton, "Denounce but Comply: China's Response to the South China Sea Arbitration Ruling." *Georgetown Journal of International Affairs*, Vol. 18, No. 2, 2017, pp. 104–111.

<sup>72</sup> Security Council Presidential Statement Calls on Myanmar to End Excessive Military Force, Intercommunal Violence in Rakhine State, Security Council, 8085th Meeting (PM), SC/13055, 6 November 2017, available at <<https://www.un.org/press/en/2017/sc13055.doc.htm>>, visited on 15th March 2019.

There are allegations against *Rohingyas* as being a threat to the national security<sup>73</sup> by Myanmar and by states of refuge like Bangladesh. Also, it is alleged that a series of radical groups are observing and focussing on the languishing state of *Rohingyas* in the camps like *Cox's Bazaar* of Bangladesh. Such a large ethnic group, which has disturbing stories of human rights abuses, can be intelligently instilled with radicalism by the radical groups that are willing to help them on the face of it.

The atrocities suffered by *Rohingyas*, their unfolding stories of terror and their continued plight at refugee camps portray a sad picture of human rights. This has led to a large influx of refugees in the neighbouring states. Once a situation like this erupts, it no more has national boundaries. Often such localised disputes adversely affect the neighbouring countries, which, as a result, raise international peace and security concerns.

Fears of Military mobilisation and alleged radicalisation of the refugees in the camps by radical groups have alarmed the international community. Due to the complex drivers involved in the crisis and the nature of the conflict, any durable solution has not been reached. If not redressed now, it might become a deep wound in the ethnicity of *Rohingyas*, which may anytime erupt in a further extreme crisis. With China blocking the passage of a resolution by the UNSC in this regard, and Russia backing it, the possibility of humanitarian intervention is unlikely. Although there are concerns for redressing the humanitarian catastrophe, the passivity of the UNSC could prove to be an addition to the already worsened situation.

The failure in the prevention of such human rights violations is reasoned in the perceived conflicting regimes between the state sovereignty and Human Rights as well as the human rights being 'principled' rather than 'pragmatic'. State's human rights policy is within a state sovereign authority and this premise hits the basic universality argument of Human Rights.

In the light of redefined sovereignty where sovereignty is interpreted in terms of responsibility (under the doctrine of Responsibility to Protect), there is a responsibility of the international community to protect the individuals from human rights violations where their state is incapable or unwilling to do

<sup>73</sup> Rohingyas are national security threat: Government in Supreme Court, *The Economic Times*, 19th September 2017, available at <<https://economictimes.indiatimes.com/news/politics-and-nation/rohingyas-are-national-security-threat-government-in-supreme-court/articleshow/60737138.cms>>, visited on 16th March 2019. See "India Joins Myanmar Attack on Rohingyas, Says They are Threat to National Security", *The Citizen*, 18th September 2017, available at <<https://www.thecitizen.in/index.php/en/NewsDetail/index/1/11768/India-Joins-Myanmar-Attack-on-Rohingyas-Says-They-Are-Threat-to-National-Security>>, visited on 16th March 2019. See also Security Council Presidential Statement Calls on Myanmar to End Excessive Military Force, Intercommunal Violence in Rakhine State, Security Council, 8085th Meeting (PM), SC/13055, 6th November 2017, available at <[www.un.org/press/en/2017/sc13055.doc.htm](http://www.un.org/press/en/2017/sc13055.doc.htm)>, visited on 15th March 2019.

so. The pragmatic approach to deal with such a situation seems to be lost in the self-deception of Human rights, incoherent implementation framework, and the viewpoint that holds human rights and state sovereignty in a strained relationship.