

The Rohingya Refugees in Bangladesh: A Vulnerable Group in Law and Policy

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Abstract. Bangladesh is an over populated country of South Asia. India and Myanmar are the closest neighboring states of Bangladesh with whom it shares its borders. Right after her independence in 1971, Bangladesh has started experiencing the constant refugee flight of Muslim *Rohingya* from Myanmar because of the fear of religious as well as ethnic persecution. Bangladesh has mostly welcomed them and provided them protection under the ad hoc decisions, notwithstanding there is no statutory law for the refugees. But till 2013, no solution has been found and the numbers of refugee flights have been gradually increasing to the extent it is said, *Rohingya* refugees are spoiling the reputation of Bangladesh in the international arena besides committing various crimes under the guise of fake Bangladeshi passport. Bangladesh is in a quandary over the refugee issues: firstly being the human rights issue and secondly the national security issue. I am of the positive and proactive opinion that it is now the appropriate time that Bangladesh should enact strict domestic laws to prevent the indirectly forced entrance of the *Rohingyas* from Myanmar. Qualitative and analytical research methods have been applied primarily; besides, non-doctrinal method has also been applied in this research.

Keywords: Refugee, *Non-Refoulement*, *Rohingya*, State Policy, National Security.

Introduction

Bangladesh has started experiencing the problems of the issues of Refugees since 1978; almost 200,000 refugees came into Bangladesh and took shelter. These refugees fled from Myanmar and known as "*Rohingya*". Again in 1991-92 approximately 250,000 refugees fled from Myanmar's western Rakhine state and this ethnic, linguistic and religious minority of the Myanmar community started living in the south east district of Cox's Bazaar. That was just the beginning of the journey of the refugees and it is still proceeding unabated. But this *Rohingya* issue has now assumed an alarming proportion in Bangladesh which being a densely populated state faces various social and economic difficulties while giving them the needed refuge. In fact, legally Bangladesh is not bound to be the final sanctuary for the refugees from Myanmar or from any other state. As with many other countries in Asia, Bangladesh is not a party to the 1951 Refugee Convention or its 1967 Protocol. Neither is it a party to the 1954 and 1961 Statelessness Conventions.¹

Even though Bangladesh is not a member of the 1951 Refugee Convention, yet Bangladesh has quite often widely opened its arms to welcome these refugees only on humanitarian ground, and no more no less. But the reality of the scenario is that Bangladesh still has not the luxury to afford these refugees the political neither the economic comfort of accommodation as a political asylum. In the absence of any strict domestic law, to save its image in the international arena, Bangladesh is struggling very hard indeed to overcome this refugee issue.² The vision of this write-up is to highlight the problems of *Rohingya* refugees and also to recommend the framing of a strict domestic law to specifically handle this situation.

Definition of Refugee

The United Nations High Commissioner for Refugees, the Office of the (UNHCR), was established on Dec. 14, 1950 by the General Assembly which is also known as The UN Refugee Agency. Since its establishment till now the UNHCR is one of the specialized organs of the United Nations which deals with the refugee issues. It

seeks permanent solutions to the refugee problems, offers international protection to refugees, coordinates the activities of voluntary agencies, and assists the most needy refugee groups, particularly, in their voluntary repatriation, local integration or resettlement to a third country. The UNHCR is a voluntary organization of the United Nations that works all over the world.³

In July 1951, a diplomatic conference in Geneva adopted the Convention relating to the Status of Refugees⁴ ('1951 Convention'), which was later amended by the 1967 Protocol. The 1951 Convention Relating to the Status of Refugees is the key legal document in defining who are termed as the refugees, their rights and legal obligations of states.⁵ Initially, the 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II, but the 1967 Protocol expanded its scope as the problem of population displacement spread around the world.⁶ The 1967 Protocol removed the geographical and temporal restrictions from the convention.⁷

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol has become the preliminary instruments in the development of international refugee law. At present, there are 148 countries that subscribe to one or both of these instruments, expressing a worldwide consensus on the definition of the terms refugee and the fundamental rights to be granted to the refugees.⁸ According to the 1951 Refugee Convention, a refugee is defined as a person who:

Owing to a well-founded fear of being persecuted 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 to or, owing to such fear, is unwilling to avail himself of the protection of that country or to return there because there is a fear of persecution...⁹

The reasons of persecution must be one of the five grounds listed in article 1 A(2) of the Refugee Convention, namely: race, religion, nationality, membership of a particular social group or political opinion. Persecution based on any other ground will not be considered as this is the limitation of the definition. Lately, it has been observed that other numerous reasons cause or, to be exact, force the person to flee due to the existence of critical situational circumstances, such as, civil war, natural disaster, unmitigable poverty, mass unemployment and multifarious other causes which need additional inclusion under the definition of a refugee.¹⁰ According to the definition, certain person will not get the status of refugees if he/she- a) has a record to commit a crime against humanity or any other crime defined under international instruments; b) has committed a non-political crime; c) or has connectivity or allegation to commit any other crime which is contradictory with the provision of the United Nations.¹¹

A refugee has to prove four elements of situational circumstances according to the definition of Article 1A(2) of the 1951 Refugee Convention, i.e., i) “well founded fear of persecution”, ii) “flee across the border of one's country”, iii) “discriminations based on race, sex, and religion” and iv) “unwilling to return to one's country unless safety is guaranteed”. Firstly, the term *well founded fear of persecution* usually indicates a state of mind which means there must be a reason of fear to be persecuted and of course with the reality of its existence. This implies that it is not only the fear of the person seeking the status of a refugee but this fear must be supported by an objective situation. Secondly, the refugees flee from their own nationality or from the place they are residing to seek refuge in another country, i.e., one must cross the border of the state from which he/she fled. Thirdly, the refugees are forced to flee because they are being unfairly discriminated on the basis of his/her race, sex, religion or membership in a social or political group. And finally, the refugees are not willing to return until and unless they get an assurance of the ending of that unrest situation which makes them bound to flee from their own

place until it is satisfied by the UNHCR that there exists a reasonableness in the situation which makes it possible for these refugees to go back to their own state.¹²

International Instruments and Supportive Authority of Refugees

The international refugee law is a part of the human rights law the aim of which is to promote human rights. In simple words, human rights are those basic rights of human which they own from the very moment of their birth (mostly) and without which a human cannot survive and among the human rights are right to life and equality before the law social security. Hence, states, instead of not being part of 1951 convention relating to the status of refugees, still provide shelter to refugees whenever it is needed as a respect under the obligations of the international law and the humanitarian ground. According to the Universal Declaration of Human Rights (UDHR) 1948 of Article 14(1), "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The UDHR is the first ever international human rights document which represents the rights which are entitled to all human beings. It was adopted by the United Nations General Assembly on 10th December, 1948.¹³ Article 3 of the 1984 Convention against Torture states,

No state parties shall expel, repel, return (refouler), or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.¹⁴

Article 26 of the International Convention on Civil and Political Right, 1966 states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law". In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion of national or social origin, property, birth or other status."¹⁵

As per the principle of *non-refoulement*, a state is obliged to provide shelter to a refugee as customary international law. The principle of *non-refoulement* is often referred to as the cornerstone of asylum and of international refugee law.¹⁶ Article 33 (1) of the 1951 Convention relating to the Status of Refugees, states:

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.

In fact, the respect for the principle of *non-refoulement* requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A (2) of the 1951 Convention (the “inclusion” criteria) and does not come within the scope of one of its exclusion provisions as per Article 1A (2) of the 1951 Convention.¹⁷

The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the 1951 Convention and/or the 1967 Protocol as well as any other person or entity acting on its behalf.¹⁸ Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, in which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted.¹⁹

While the principle of *non-refoulement* is basic, it is recognized that there may be certain legitimate exceptions to the principle. Article 33 (2) of the 1951 Convention provides that the benefit of the *non-refoulement* principle may not be claimed by a refugee. Article 33 (2) states that:

The benefit of the present provision may not, however, be claimed by a refugee to whom there are reasonable grounds for regarding him/her as a danger to the security of the country in which he/she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

According to Article 33(2), refugees can exceptionally be returned on two grounds: (i) in case of threat to the national security or public order of the host country; and (ii) in the case that their proven criminal nature and record constitute a danger to the community.²⁰

Non-refoulement has been defined in a number of international refugee instruments, both at the universal and regional levels, notably the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa,²¹ the 1969 American Convention on Human Rights,²² the 1984 Cartagena Declaration on Refugees,²³ and the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967.²⁴

Bangladesh and Refugee Issues

Bangladesh has the familiarity to deal with this refugee issue both as a sending state as well as a receiving state. In 1971, during the liberation war between Bangladesh (East Pakistan) and Pakistan, where approximately 10 million people fled from Bangladesh and to India as refugees. The Indian government reported that around 8 to 9 million migrants took refuge in 829 refugee camps. It can also be added that around 20 million people were displaced within the country.²⁵ Just after

the ending of the liberation war, all those Bangladeshi nationals staying in India as refugees came back to Bangladesh voluntarily. Upon independence, around 300,000 *Biharis* who considered themselves as “Stranded Pakistanis” were stuck in Bangladesh. However, these *Biharis* could not be considered as Refugees because they did not comply with the requirements provided under Article 1 of the 1951 convention, i.e., *Bihari* people did not cross the border and they did not flee from their habitual residence.²⁶ In May 2003, in *Abid Khan and Others vs. the Government of Bangladesh*,²⁷ a significant ruling was given by the honorable High Court Division of Bangladesh which allowed 10 *Bihari* voting rights and declared that they were still the citizens of the country in Bangladesh.²⁸

Refugees coming from Myanmar are called *Rohingyas* who are an ethnic group of people and considered as a minority community living in North Arkan in Myanmar. This minority community is not regarded as the citizen of Myanmar in spite of their residence in Myanmar for centuries. *Rohingyas* have no freedom of movement and need to apply for passes (even for traveling purposes in their country of domicile) which are not free of charge, limited marketing access and limited employment opportunities.²⁹

Rohingya Refugees in Bangladesh

Recently, the plights of the Muslim *Rohingya*³⁰ refugees have caught the attention of the world community. Suddenly hundreds of people from neighboring Myanmar State were fleeing by boat through Naf River, which is the common coastal area between Bangladesh and Myanmar, into the south coasts of Bangladesh, particularly, St. Martin Island, Teknaf, Shahpori Island and Cox's Bazar areas because of persecution. A state of emergency was declared in Rakhine on June 2012 after deadly clashes between the Buddhist and the Muslim communities. Violence flared after the rape and murder of a Buddhist woman in May 2012, followed by an attack on a bus carrying Muslims. Communal unrest continued for weeks as Muslims and Buddhists were engaged in attacks and reprisals, leaving many dead

and forcing thousands of people on both sides to flee their homes.³¹ According to the Myanmar government, 211 people had been killed in Rakhine since June 2012; although *Rohingya* activists estimated the number to be closer to 1,000. There were 140,000 internally displaced persons (IDPs) 94% of whom were Muslims.³²

Beginning of the Journey of Rohingya to Bangladesh at Present

Rohingya issue is not, however, a new phenomenon for Bangladesh. The first wave of *Rohingya* refugees fleeing from Arakan to the area of Cox's Bazar occurred in 1784 when the Burmese King Bodawpaya invaded and annexed Arakan to the then Kingdom of Ava in central Burma. Apart from the inflow of refugees in 1942, two major influxes of *Rohingya* people took place in Bangladesh in 1978 and during the warring period from 1991 to 1992 to escape the Myanmar governed backed systematic genocidal and ethnic cleansing programme. Now around 0.5 million documented and undocumented *Rohingya* people are living in Cox's Bazaar, Bandarban and its adjacent areas under the generosity of Bangladesh for over 30 years.³³

Most notably, during 1991 and 1992, more than 270,000 *Rohingya* refugees crossed the border from Burma into Bangladesh. However, the most detestable part of it is their characteristic evil habit of bringing along with them their experiences of horrible violence in the repulsive form of forced labour, rape, executions and torture. As a persecuted group of refugees from Myanmar who shares a similar Muslim identity, Bangladesh initially welcomed them with open arms as fellow Muslims. There was no domestic law in Bangladesh to regulate the administration of refugee affairs or to guarantee refugee rights. UNHCR's legal status in the country was based solely on a Memorandum of Understanding that was concluded in 1993 and which was originally intended to remain valid for a year, with a second year's extension if required.³⁴ Initially Bangladeshi Government welcomed the UNHCR, the Red Cross and various other international agencies to assist the refugees.³⁵ By then about 258,000 *Rohingyas* were registered by the government of Bangladesh

and granted refugee status through an executive order, however, without any proper legal sanction. In addition to that, more thousands of *Rohingyas* arrived in Bangladesh and allowed to freely mix with the local population over the years.³⁶

The Cause of Flight of Rohingyas from Myanmar

The *Rohingya*, an ethnic minority of Myanmar (previously known as Burma) is one of the most persecuted groups of people in the world.³⁷ They speak a version of *Chittagonian*, a regional dialect of Bengali which is also used extensively throughout south-eastern Bangladesh. The *Rohingyas* are virtually friendless amongst the Myanmar group of other ethnic, linguistic and religious communities. They were not formally recognized as one of the country's official national groups when the country gained independence in 1947, and they were excluded from both the full and the associate citizenship when these categories were introduced by the 1982 Citizenship Act. As well as being stateless, Myanmar's *Rohingyas* are confronted with other forms of persecution, discrimination and exploitation.³⁸

The 1982 Citizenship law of Myanmar left the *Rohingyas* as stateless and rendered them illegal migrants in their own country. According to the new citizenship law, there were three categories of citizens, namely, i) full, ii) associated, and iii) naturalized citizens. The *Rohingyas* do not fulfill any of these three criteria.³⁹ They are the only ethnic group in Myanmar restricted from marriage, traveling beyond their village or building as well as maintaining religious structures. In addition, they are subject to frequent forced labor, arbitrary taxation, and sexual violence and land confiscations by the *Nasaka*. Even, *Rohingya* women cannot become pregnant without official permission. Some deliver their babies secretly in Bangladesh and many young couples flee to Bangladesh because of the inability to obtain permission to marry in Myanmar.⁴⁰

It has been criticized that the effect of the Burma Citizenship Law 1982 is to make it almost impossible for the *Rohingya* to gain citizenship. This violates the

Universal Declaration of Human Rights, the Convention on the Rights of the Child and international norms prohibiting discrimination of racial and religious minorities. The legal and practical constraints imposed by the Burma Citizenship Law 1982 render it “almost impossible” for the *Rohingyas* to be recognized as the legitimate citizens of Burma.⁴¹

As a result of such discrimination, large numbers of *Rohingyas* have left Myanmar and taken up residence elsewhere. While there is a general lack of precision with respect to the number of people involved, they are estimated to be up to 400,000 in Bangladesh, a similar number in the Gulf States, some 200,000 in Pakistan, 20,000 in Thailand and 15,000 in Malaysia. UNHCR estimates some 750,000 *Rohingyas* remain in northern Rakhine state and other parts of Myanmar.⁴²

The Discreetly Rational Reasons of Refusal by the Bangladeshi Government to Accommodate Rohingya Refugees

In 2012, for the first time Bangladesh refused to accommodate the *Rohingyas*. The Government of Bangladesh decided not to welcome the *Rohingya* refugees in the territory of Bangladesh because of national security and unmitigatingly overburdening the country due to the *Rohingya* refugees, who have been staying in Bangladesh for more than 20 years without contributing any economic and social benefit to the host country.⁴³ In June 2012, Bangladeshi security forces turned back 16 boats carrying more than 660 Rohingya people, most of them women and children as they tried to enter from neighboring Burma a crossing the Naf River.⁴⁴ A senior official of the Foreign Ministry said, "Our position is clear that we won't accept any more refugees in Bangladesh. There are already 400,000 Rohingyas here and we cannot allow anymore. Rather, we are in a process to send back the existing refugees."⁴⁵ It was criticized that “on June 10, 2012, Myanmar declared a state of emergency in the western state of Rakhine after clashes between the Buddhists and the Rohingyas that left 50 people dead. Ten days later, on June 20, 2012, more than

90,000 Rohingya refugees fled Myanmar to the Bangladeshi border, only to be denied access. The irony is that June 20 is coincidentally the World Refugee Day.”⁴⁶ On June 2012, the Foreign Minister of Bangladesh, Dipu Moni, expressed anxiety that it would be a serious problem for Bangladesh if there was any fresh influx of Rohingyas, as there were already a huge number of them in the country. The Foreign Minister also pointed out, "Bangladesh is a densely populated country and the Rohingyas have seriously impacted on our society, law and order, and environment. Considering all aspects, it will create serious problems for us," adding, "We are not interested in more people coming to Bangladesh.”⁴⁷

On 9 August 2009, Foreign Minister Dipu Moni, in a statement said that around 400,000 illegal Rohingya refugees in Bangladesh have been causing law and order to slide including environmental damage in the form of illegal clearing of forested land for habitation and that statement was released after a meeting between Dipu Moni and Raymond Hall, the regional representative of the United Nations High Commissioner for Refugees (UNHCR).⁴⁸

On 17 August 2012, the Foreign Minister further said that Rohingyas would definitely be sent back to Myanmar soon, categorically adding, ‘We have finalised to send them back to their homeland through discussion with the Myanmar authority but could not do so due to the occurrence of a riot there,’ Dipu Moni further said, ‘We have already urged Myanmar about the safe return of the Rohingyas so that they can come back to their homeland voluntarily with their rights and dignity,’ she said.⁴⁹

On 29 August 2013, Foreign Minister Dipu Moni continued further, “Bangladesh was already hosting a huge population of Rohingya refugees from Myanmar and cannot take in any more,” to newly appointed country representative of the UN refugee agency UNHCR, Stina E Ljungdel.⁵⁰ Bangladesh turned down the requests made by some international agencies, NGOs and friendly countries to open its

border to Rohingyas fleeing sectarian violence in Myanmar. Foreign Minister Dipu Moni in a statement in Parliament requested those agencies and friendly countries to request the Myanmar government to resolve their internal problem without overspilling it into its peaceful neighbouring countries. She also advised the donor agencies to extend their help to the Rohingya victims in Myanmar instead of in Bangladesh.⁵¹

Refugees and National Security

The Myanmar refugees and undocumented nationals are posing a serious threat to the security, stability, prosperity, welfare and image of the country through their involvement in serious crimes including drug and human trafficking, smuggling, robbery and other organized crimes. There have also been confirmed reports that these illegal Myanmar nationals are obtaining Bangladeshi passports to go to Saudi Arabia through fraudulent means, falsification of national ID cards and birth certificates and are causing huge embarrassments to the Bangladeshi community living in Saudi Arabia following their arrests of unruly and unethical behavior and practices all of which are summarily blamed on the Bangladeshi nationals. Recently some Myanmar refugees had been arrested, while they were trying to go abroad using forged Bangladeshi passports. The Rohingyas offer services at a much lower rate than the local population and such practices are upsetting the job market in the region. About 90% of the lower skilled laborers and staff employed in local hotels, motels, ports and small business are all of Rohingya origin. They also work as rickshaw pullers and day laborers. As a result, Bangladeshi workers are losing out on their jobs. The *Rohingyas* refugees are adding extra pressure on the existing crisis of the land and forests in the Cox's Bazar region. Bangladesh has lost considerable area of reserve forest for providing land to the refugees for construction of their shelter. Moreover, the refugees and undocumented Myanmar nationals are regularly cutting off valuable trees and destroying woods in the reserve forests in the Bandarban and Cox's' Bazar areas causing serious harm to Bangladesh's environment, ecology and bio-diversity.⁵²

Rohingya refugees impose quite a heavy burden on Bangladeshi economy and scant resources. It is reported that many local people do not want to accept Rohingya refugees, some of whom are allegedly involved in undesirable activities either within the local area or on the border, posing a threat to peace and security of the local people.⁵³

Imtiaz Ahamed, Professor of International Relations of Dhaka University, identified that Rohingya refugees are a serious threat to the security of Bangladesh. He pointed out four dimensions of security threat caused by the Rohingyas, namely, i) Politico-Military Dimension of Security, ii) Economic Dimension of Security, iii) Social Dimension of Security and iv) Environmental Dimension of Security.⁵⁴

Politico-Military Dimension of Security includes Insurgency and Islamic Militancy, Drugs and Arms Smuggling, Terrorism and Refugee Camp related security measures.⁵⁵ Economic Dimension of Security includes Illegal Trade/ Smuggling and Employment Issue.⁵⁶

The Rohingya camps in Cox's Bazar District are fertile ground for recruitment of dissident members by the Islamic militants. With little love for Myanmar, and alienated from Bangladesh, the stateless Rohingyas are vulnerable and desperate, and likely become militant themselves in an effort to uphold their interests. The militancy of the Rohingya Solidarity Organization (RSO) and the Arakan Rohingya Islamic Front (ARIF) are well known for their militant activities. They were fighting for an autonomy or independence for the Rohingyas. When founded, the activities of both organizations were restricted to Arakan, but following a series of pushes and the disappointment of not finding a refuge in Bangladesh, they have expanded their operations well beyond the Southeastern region of Bangladesh. Illegal small arms trade, a flourishing business along the border, is also a security concern for Bangladesh whose Border Guard has only one border outpost (BOP) to

keep vigil on the 129-km border. Those pushed back refugees live in the border jungle and get involved in smuggling.⁵⁷

Constitutional Provisions, Role of Judiciary & State Policy

Bangladesh does not have any domestic or national law which can cover the issue of asylum seekers. In Bangladesh, foreigners irrespective of asylum seekers or simply visitors are treated under some old laws (e.g., The Passport Act, 1920; The Naturalization Act, 1926; The Registration of Foreigners Act, 1939; The Foreigners Act, 1946; The Registration of Foreigners' Rules, 1966; The Bangladeshi Citizenship Act, 1951; The Bangladeshi Control of Entry Act, 1952; The Bangladeshi Citizenship (Temporary Provision) 1972; The Bangladeshi Passport Order, 1973; and the Extradition Act, 1974).⁵⁸ This is particularly caused by Bangladesh's refusal to be a party to the UN Convention Relating to the Status of the Refugees, 1951 or its 1967 Protocol.⁵⁹ Thus, Bangladeshi government has irrefutably valid reason to refuse the Rohingya refugees.

In 2003, in the landmark judgment of *Abid Khan* decision,⁶⁰ the Supreme Court of Bangladesh (High Court Division) held that the ten Urdu-speaking petitioners, born both before and after 1971, were Bangladeshi nationals pursuant to the Citizenship Act of 1951⁶¹ and the Bangladeshi Citizenship (Temporary Provisions) Order of 1972,⁶² and thereby directed the Government to register them as voters. The Supreme Court further stated that residents of the camps and settlements had not “attained any special status so as to be excluded from the operation of the laws of the land”, and hence “mere residence” in the camps could not be deemed as allegiance to another State.

The effect of the 2003 decision was limited to the ten petitioners. Subsequently, on 18 May 2008, in the case of *Md. Sadaqat Khan*, the Supreme Court of Bangladesh (High Court Division) reaffirmed that all members the Urdu-speaking community were nationals of Bangladesh in accordance with its laws and directed the Election

Commission to “enroll the petitioners and other Urdu-speaking people who want to be enrolled in the electoral rolls and accordingly, give them National Identity Card without any further delay.”⁶³

However, the Rohingya issue is entirely different from the Urdu-speaking Bihari issue. The Bihari people were already in Bangladesh and have been living there since 1947 and afterwards. On the other hand, the Rohingyas are foreigners as they were being pushed back by the Myanmar Government.

Article 27 of the constitution of Bangladesh states that “All citizens are equal before the law and are entitled to equal protection of the law.” The Citizenship Act 1951 provides details on the procedure to be a citizen of Bangladesh. The Rohingya people do not fall within the categories.⁶⁴ According to Article 25 of the constitution of Bangladesh:

“The state shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter....”

It is pointed out that probably Article 25 of the constitution of Bangladesh is the only reason of obligation for Bangladesh to continue with the refugee issue coming from other states. International commitment mentioned in the decision merits to be interpreted not only as a commitment arising out of the obligation under the UN charter but also as commitments and obligations under the customary international law which Bangladesh is a party to.⁶⁵ But the question is how far should a country abide by the international law? And in the case where obligation arises under the terms of treaties, it depends on the internal policy which literally means the domestic law of the land.

*Bangladesh v. Unimarine S.A. Panama and Others*⁶⁶ relates to the Bangladeshi position on the international custom. The court in this case declared that the customary international law is binding on the state, and generally gives effect to the rules and norms of the customary international law. The court cited the rule of immunity of foreign missions, envoys, etc., as good examples of the customary international law which would be binding on the states. The question arises in this case whether private foreign companies enjoy immunity from arrest and seizures. The court denied such immunity to be accorded to the private foreign companies and denied to protect them from arrest and seizures. The court observed, "Immunity is available under the public international law to persons and properties of classified companies as mentioned in the list which is usually filed by foreign missions and international agencies."⁶⁷

However, where there is a clear domestic legislation on a disputed issue, the court gives effect to the domestic law, not to the customary norms of the international law.⁶⁸ This particular aspect of the domestic law is vis-à-vis an international custom which was raised in *Bangladesh and Others v Sombon Asavhan*.⁶⁹ Bangladeshi navy captured three Thai fishing trawlers for illegal entrance and fishing in the territorial waters of Bangladesh. The question was whether the trawlers were within the territorial waters or the exclusive economic zone of Bangladesh. Instead of applying the existing international law regarding the territorial waters, the Supreme Court settled the issue on the basis of Bangladeshi Territorial Waters and Maritime Zones Act, 1974, which laid down specific provision for maritime boundaries for Bangladesh. The Appellate Division of the Supreme Court observed, "it is well settled that where there is a municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute'.

In *Saiful Islam Dildar v Government of Bangladesh and Others*⁷⁰ the High Court Division considered the issue of the customary international law's right to self determination vis-a-vis the provision of the Constitution of Bangladesh. Justice A.M. Mahamudur Rahaman interpreted Article 25 of the Constitution of Bangladesh, and opined that the fundamental principle of the State Policy cannot be enforced by the court.⁷¹

A significant judgment regarding the implementation of the international human rights law by the domestic courts in Bangladesh was given by Justice Bimalendu Bikash Roy Chowdhury.⁷² In *Hussain Muhammad Ershad v. Bangladesh and Others*, Justice Chowdhury observed, "True it is that the universal human rights norms, whether given in the universal declaration or in the covenants, are not directly enforceable in the national courts. But if their provisions are incorporated into the domestic law, they are enforceable in the national courts. The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national court should not, I feel, straightway ignore the international obligation, which a country undertakes. If the domestic laws are not clear enough or there is nothing there in the national courts, only then should the national courts draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies."⁷³

Therefore, in the light of the discussion, it could be concluded that the Bangladeshi government has had a legitimate security concern regarding the Rohingya issue. By denying the Rohingya to cause a refugee influx, Bangladesh did not violate the principle of the *non-refoulement* as per Article 33 (2); rather Bangladesh gave priority to its national security. However, Bangladesh is not only the states who 'push back' the Rohingya refugees as the same treatment was also meted out by

Thailand and Malaysia to the Rohingya. It is said that the Rohingya refugees are ‘a threat to and a burden for Thailand.’⁷⁴ In 2009, the Malaysian Prime Minister has called for the repulsion of the Myanmar's Muslim boat people to be pushed back if they attempted to land on any Southeast Asian shores in search of asylum.⁷⁵

Conclusion

There is no refugee law and policy in Bangladesh which, incidentally, is not a party to the 1951 Refugee Convention/1967 Protocol. The provisions of the municipal law have always been given priority over the customary international law where the existence of domestic law is present. Bangladesh has been criticized for not opening its doors to the Rohingya refugees in recent times. If Bangladesh wants to overcome the situation regarding these refugee issues, firstly, it has to enact a strong domestic legislation on the refugee and the immigration law, which may restrict the flow of refugees. Secondly, it has to find out all the unlisted and unregistered refugees living within its territory. Thirdly, Bangladesh can go for some bilateral or multilateral treaties with its neighbor countries as well as other countries of Asia for dealing with the refugee influx. And finally, Bangladesh will have to convince the international communities to put pressure on Myanmar to resolve the Rohingya refugee problem that Bangladesh has been carrying for the last 20 years without any foreseeable economic and social benefits whatsoever.

Nonetheless, it is to be seriously and rationally viewed through the economic and social perspectives that it is mainly because of the large Rohingya refugee influx into Bangladesh for over 20 years that has critically over spilled its disastrous effect on the social economic stability of the home citizens who have been situationally displaced due to the pressure brought about by the Rohingya refugees that ultimately causes the Bangladeshi citizens themselves to seek better livelihood elsewhere, especially into Malaysia and the Middle East countries. This phenomenon is brought about by the fact that as the Rohingya refugees are critically desperate to earn a living for their very survival, they would quote a much

lower fee or salary for any job offered to them and this, incidentally, has seriously upset the wage pattern in the labor market of the host country. A similar analogy could be drawn in the form of water being constantly poured into a glass of milk in which the milk would ultimately be spilled out of the glass by the water which would then ultimately occupy the glass. Before the situational circumstances can be fully dictated by the external influence of the Rohingya refugee influx and possibly develop into immitigable proportion, it is highly timely for Bangladesh to take a convincingly effective proactive and preventive measure to restore the viability of its national economy, prosperity, welfare and security so as to curtail the brain drain of Bangladeshi specialists from exploring further afield in the international labor market.

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¹¹Article 1 (F), 1951 Convention Relating to the Status of Refugees.

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¹⁵ International Covenant on Civil and Political Rights 1966, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

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¹⁸ Article I (1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

¹⁹ Ibid, supranote 21, p – 5.

²⁰Goodwin Gill, *The Refugee in International Law*, 2nd edition, Oxford Press, 139

²¹OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, entered into force 20 June 1974 [“1969 OAU Convention”]. Article II(3) reads: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion,

which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].”

²²1969 American Convention on Human Rights “Pact of San José, Costa Rica”, 1144 U.N.T.S. 123, entered into force 18 July 1978 [hereinafter, “ACHR”]. Article 22(8) reads: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”

²³ Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85) [hereinafter, “Cartagena Declaration”]. The Conclusion set out in section III(5) reads: “To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees...” While not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of numerous States in Latin America.

²⁴A/RES/2312 (XXII), 14 December 1967, at Article 3 (“No person referred to in Article 1, para. 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”).

²⁵Bangladesh Genocide Archive: Refugees Escaping from the Genocide:

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²⁷Abid Khan and Others vs. Government of Bangladesh and Others, (2003) 55 DLR (HCD) 318

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(a) who or any of whose parents or grandparents was born in the territory now included in Bangladesh and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Bangladesh; or

(b) who or any of whose parents or grandparents was born in the territories included in India on the thirty-first day of March, 1937, and who, except in the case of a person who was in the service of Bangladesh or of any Government or Administration in Bangladesh at the commencement of this Act,

has or had his domicile within the meaning of Part II of the Succession Act, 1925, as in force at the commencement of this Act, in Bangladesh or in the territories now included in Bangladesh; or (c) who is a person naturalised as a British subject in Bangladesh; and who, if before the date of the commencement of this Act he has acquired the citizenship of any foreign State, has before that date renounced the same by depositing a declaration in writing to that effect with an authority appointed or empowered to receive it; or (d) who before the commencement of this Act migrated to the territories now included in Bangladesh from any territory in the Indo-Pakistan sub-continent outside those territories with the intension of residing permanently in those territories. Section 4 provides citizenship by birth. Section 5 states about citizenship by descent, and section 6 provide citizenship by migration.

⁶⁵ Shah M. Alam, *Enforcement of International Human Rights Law by Domestic Court*, New Warsi Book Corporation, Dhaka, Bangladesh, 2007, p-108

⁶⁶ *Bangladesh v. Unimarine S.A. Panama and Others*, 29 DLR (1977) p. 252.

⁶⁷ *Ibid.* p. 259.

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