

Protection in Protracted Refugee Situations: The case of Rohingya Refugees in Bangladesh

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The Case of Rohingya Refugees in Bangladesh**

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Preface

This paper looks at refugee protection in protracted refugee situations and conducts an in-depth exploration of the case of Rohingya refugees hosted in Bangladesh. It should be noted that the responses highlighted in the case study by the host state and international community are not unique. They represent a general pattern by refugee hosting states and the international community towards protracted refugee situations. Focusing on refugees/host/international community by no means aims to detract from the root cause of a protracted refugee situation, which in this instance is long-running persecution of the Rohingya by elements in the Burmese state.

At the time of publication, a recent wave of violence in Burma's Rakhine state – which started 25 August 2017 – caused over 500,000 Rohingya to flee to Bangladesh; a number that is increasing on a daily basis. The situation on the ground is moving at a very fast pace and the Rohingya arriving in Bangladesh have immediate humanitarian needs. The host and international community are in the emergency relief stage, providing food, water, shelter and medical care. It is too early to comment what will happen to the Rohingya that have recently arrived in Bangladesh and how the most recent exodus will affect the already protracted refugee situation. Therefore, this paper does not attempt to address this. However, it is encouraging to witness that Bangladesh has kept its borders open and assigned land for refugees to take shelter on, in addition to the collaboration between the host and international community to provide immediate relief in this humanitarian emergency.

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Abstract

Protracted refugee situations present one of the most complex conundrums facing the global refugee regime. Protracted refugee situations give rise to specific legal and physical protection gaps such as arbitrary arrest, *non-refoulement* and sexual and gender-based violence. Through an analytical framework, this paper tries to explore what determines refugee protection in protracted refugee situations. The host state and international community's responsibility, capacity and power are all presented as interlinking determinants. The case of Rohingya refugees in Bangladesh, which the UNHCR highlighted as a protracted refugee situation that requires attention, is used to explore the question. Originating from Burma, the Rohingya are one of the most persecuted minorities in the world and some have been living in limbo in Bangladesh for over 30 years. The case highlights that the distinction between registered and unregistered refugees significantly affects their level of protection. It concludes that responsibility and capacity are only important determinants of refugee protection in protracted refugee situations when connected to power and political will, which is the most influential determinant. The paper finds that the importance of host state's power is more significant than assumed. It highlights the tension between international law and norms and the difficulty in finding an equilibrium between state sovereignty and universally expected adherence to human rights principles. It concludes that the international refugee regime must be strengthened so that the responsibilities set out in international law become a reality for refugees in protracted refugee situations. Furthermore, the international community must engage with and support host states to develop a positive perspective on protracted refugee situations and refugees in general.

List of Abbreviations

BLAST	Bangladesh Legal Aid and Services Trust
ExCom	Executive Committee
GoB	Government of Bangladesh
HUJI-B	<i>Harkatul Jihad al-Islam</i> Bangladesh
IOM	International Organisation for Migration
JMB	<i>Jama'atul Mujahideen</i> Bangladesh
MFDM	Ministry of Food and Disaster Management
MoU	Memorandum of Understanding
MSF	Doctors Without Borders
NGO	Nongovernmental organisation
PRS	Protracted refugee situation(s)
RRRC	Refugee, Relief and Repatriation Commission
RSO	Rohingya Solidarity Organisation
SGBV	Sexual and gender based violence
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Emergency Fund
WFP	World Food Programme

1. Introduction

Protracted refugee situations (PRS) are defined by the United Nations High Commissioner for Refugees (UNHCR) as situations in which refugees are suspended for 5 years or more without probable end to the situation in the foreseeable future.¹ Currently, over half of the world's refugees are reported to be in PRS averaging 20 years.² Indeed, PRS are becoming the norm, with short-term humanitarian emergencies increasingly being seen as the exception.³ Of these refugees, over two thirds are hosted in developing countries, often living in both official and unofficial camps and in urban areas. In protracted refugee situations, the needs of refugees evolve from the emergency relief stage. Moreover, the international funding well has been running increasingly dry in PRS, with it not appearing at the forefront of international policy or media attention.⁴

PRS present extreme policy challenges to both the host state and the international community in terms of how to resolve the situation, how to provide services, how to avoid security threats and how to protect those refugees suspended in limbo. It is this last challenge mentioned – how to protect refugees – that this piece of research aims to explore. The existing literature focuses on the how PRS can be resolved. However, it largely ignores the fact that many of these PRS have remained static for decades. The concerns that refugees in these situations face need to be addressed in the present, not the future. Therefore, addressing PRS as a human rights challenge, this research examines immediate protection concerns facing refugees in PRS.

For the purposes of this research, it will refer to refugee protection as both legal and physical protection. Legal protection will refer to refugee status determination, access to justice and to the adherence to principles of *non-refoulement*, that is the commitment that no refugee should be returned (unless voluntarily) to their country of origin where they face 'threats to life or freedom'.⁵ Physical protection refers to protection from violence, trafficking and exploitation. The main actors this paper will focus on are the international community and the refugee hosting state.⁶

1.1. Methodology

The guiding research question of this paper is what determines refugee protection in PRS. Its purpose is to collate information on refugee protection in PRS and try and understand what determines protection in this setting. To do this this, the case study method will be used to understand a complex occurrence within a defined context. A single case study has been chosen, which will be explored through an investigative and interpretive approach.⁷ The single case study method was chosen because it allows a deep level of analysis. This method has limitations, namely that its findings are not necessarily applicable in different contexts.⁸ However, internal validity is used to justify the choice of a single case study. The case will focus on the PRS of Rohingya refugees originating from Burma in the neighbouring host country Bangladesh.⁹ This case was identified as a priority situation in an initiative launched by the UNHCR to try and formulate new ways to deal with PRS.¹⁰

1. UNHCR Executive Committee of the High Commissioner's Programme (2009).

2. Aleinikoff and Poellot (2013) p.198.

3. Zetter (2009) p.1.

4. Kelley (2007) p.404.

5. Seltzer (2013) p.283.

6. International community does not have a concrete definition. In an abstract sense, Kofi Annan (1999) defines it as a shared vision of a better world based on the framework of international law, human rights conventions, and treaties. For the purposes of this research, it refers to international organisations, the UN, and donor governments.

7. Lapan, Quartaroli, and Riemer (2011) pp.243–268.

8. Halperin and Heath (2012).

9. Burma's name was changed to Myanmar in 1989 by the military government. The United Kingdom and others still refer to the country as Burma as the legitimacy of the name change is questioned.

10. Milner and Loescher (2011) p.11.

This piece of work will use qualitative data. It will review secondary literature, policy documents, NGO/UN/government reports, and grey literature. As the UNHCR is one of the main actors in the case, it will refer to its documentation. However, much of this relates solely to the registered Rohingya refugees as the Government of Bangladesh (GoB) has historically permitted the UNHCR to have access to the registered refugees. The unregistered Rohingya refugees have proved more difficult to research. Therefore, there are some gaps in the evidence base. It should be noted that although this research looks into the provision of protection to refugees by the host and the international community, it by no means wants to imply that refugees are mere passive, vulnerable victims. At the community level, there is evidence of community protection processes in place, which would be interesting for future research.

1.2. Structure

Section 2 will start by reviewing the existing literature relating to PRS and refugee protection within that context. The latter part of the section will introduce the analytical framework, which will be based around responsibility, relating to law and policy; capacity, relating to institutions and funding; and power, relating to political will. Section 3 gives an overview of the case and then presents the empirical data relating to legal and physical protection. The last section turns back to the analytical framework and analyses the data through this. Some of the main conclusions resulting from the data analysis are presented in the conclusion.

2. Literature review and analytical framework

2.1. Literature review

The first part of the literature review gives a general overview of refugee protection and refugee protection within the context of PRS. It will present some empirical evidence of protection issues in PRS and some existing policy approaches developed to tackle PRS.

2.1.1 Refugee protection

a. General

The basis of refugee protection is formed on a legal framework consisting of international refugee law, international human rights law and at times international humanitarian law and international criminal law.¹¹ As a result of World War II, the United Nations General Assembly formed the UNHCR with the mandate to protect and find solutions for refugees. This was framed through International Law, the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions. The principle of protection of refugees was further enshrined in the 1951 Convention on the Status of Refugees, which forms the basis of International Refugee Law. The 1951 Convention defines a refugee as someone outside their country of origin, who has a well-founded fear of persecution due to their race, religion, nationality, political opinion or membership of a social group, and who are unwilling or unable to return, and who is not receiving adequate protection at home. Moreover, the UNHCR describes refugee protection as granting safe access to a country of asylum, granting of asylum and refugee status, ensuring human rights are upheld, as well as the commitment to *non-refoulement*.¹² As the 1951 Convention was created in the post-World War II European setting, it has been referred to as Eurocentric. Due to the temporal and spatial limits of the 1951 Convention, the 1967 Protocol relating to the Status of Refugees was added to make it more applicable to refugee movements of that time.¹³

11. UNHCR (2005) p.25.

12. Ibid., p.17.

13. Jastram and Achiron (2001) pp.8–10.

b. Refugee Protection in PRS

To what extent the aforementioned rights of refugees to protection are realised in the context of PRS is important. Purkey states that the rights enshrined in the 1951 Convention are not in reality available to refugees in PRS.¹⁴ Moreover, empirical evidence shows that there are significant physical protection risks associated with PRS, including human trafficking, sexual and gender based violence (SGBV), and involvement in militant organisations.¹⁵ Milner and Loescher highlight the sexual and physical violence epidemic in PRS, noting that women, children, elderly and less-able suffer most from the lack of the protection.¹⁶ A reason for this sexual and physical violence epidemic in PRS is proposed by Kelley to be due to idleness, limited resources and frustration, which is exacerbated by stagnant refugee camp environments.¹⁷ This evidence of physical and sexual violence occurring in PRS should place PRS high on both international and domestic agendas. However, the issues surrounding PRS have often been overlooked.¹⁸

As well as physical protection concerns, PRS also generates legal protection issues. A significant issue is refugee status determination and how the host country recognises refugees. Although the evidence suggests that in some cases, refugees are officially registered upon arrival in their country of asylum, and are granted official refugee status, many remain unregistered/unofficial without legal status and protection. Zetter states that it is these unregistered refugees that face the greatest protection risks.¹⁹ As a self-preservation strategy, those refugees outside of the official system, who are not recognised as refugees, try to make themselves ‘disappear’, i.e. they avoid coming into contact with official bodies, for fear of arrest or repatriation.²⁰ This poses significant challenges to the host and international community and it is likely that they will receive little or no protection.

Refugees’ rights to protection are set out in international law. However, the above has highlighted that it can be difficult to enact these protections in PRS, which leaves physical and legal protection gaps. To address the issue of protection in PRS, the host and international community has often focused on the policies of ‘durable solutions’ and encampment.

2.2. Policy approaches

2.2.1 Durable solutions

The literature displays few specific policy approaches to deal with protection in the case of PRS. More generally, however, the UNHCR has proposed three ‘durable solutions’ to deal with PRS, all of which face challenges. These consist of (i) repatriation to country of origin, (ii) resettlement in a third country, and (iii) local integration. While each PRS has its individual root causes, loosely most PRS stem from unresolved political instability preventing repatriation, a host country unwilling to pursue local integration, and an international community not providing resettlement chances.²¹ Therefore, of the three durable solutions, the international and host community tend to favour repatriation. However, if this goes ahead prematurely, it constitutes *refoulement*.²² Moreover, the literature suggests that these solutions have proved unworkable for the various actors involved in PRS, which has left an overwhelming number of refugees suspended in limbo.

The majority of the literature on PRS examines the aforementioned durable solutions. However, of

14. Purkey (2014) p.261.

15. Loescher and Milner (2005) pp.8–9.

16. Milner and Loescher (2011) p.4.

17. Kelley (2007) p.411.

18. Loescher and Milner (2005) p.8.

19. Zetter (2015) p.12.

20. Milner and Loescher (2011) p.5.

21. Aleinikoff and Poellot (2013) p.200.

22. Long (2011) p.10.

the three durable solutions, none specifically addresses the issue of refugee protection in PRS. Long states that the international community is too focused on applying durable solutions rather than reviewing the on-going diminishing level of protection in PRS.²³ From her research, she claims that rather than insisting on finding solutions, the international community needs to concentrate on addressing the insufficient levels of protection while refugees are suspended in PRS.

2.2.2 Encampment

Encampment has been a policy choice traditionally favoured by host states. This is generally due to wanting to discourage *de facto* integration. As the evidence above suggests, camps are often spaces with high levels of physical and sexual violence. Loescher and Milner state that forcing refugees to live in camps for a protracted period of time has severe consequences for their human rights. They claim that the use of encampment in PRS is in breach of the 1951 Convention as often refugees are unable to move freely and employment is prohibited.²⁴

The first part of the literature review has given the principles of refugee protection, which are based around an international legal framework. It has highlighted that these rights to refugee protection may be harder to evoke in a PRS setting, with empirical evidence suggesting a proliferation of physical and legal protection breaches. In addition, it has shown that there are few specific policy approaches to deal with protection in PRS and the durable solutions that are proposed are difficult to implement. Meanwhile, the protection of refugees while in limbo has not received sufficient attention.

2.3. Analytical framework

The second part of the literature review takes a more analytical approach to assess what determines refugee protection in PRS. The literature highlights two main determinants of refugee protection in PRS: responsibility and capacity of both the host state and the international community. A third determinant, power, will also be discussed. Responsibility, capacity and power are all interconnected and each determinant will be looked at from the host state and the international community perspective.

2.3.1 Responsibility

One determinant of refugee protection in PRS identified by the literature is responsibility, i.e. who is *supposed* to do what?

a. Host state

International law stipulates that the normative responsibility to protect refugees falls on the host state.²⁵ Although the western media currently portrays refugees as being an issue facing the global North, the majority of refugees are hosted by neighbouring countries to their country of origin in the global South. The fact that international law states that the primary responsibility falls on the host state is contentious if the host is not party to the 1951 Convention, meaning some states may not consider it is their responsibility to protect refugees. The responsibility as per international law to protect refugees is often thought by the host to be in its disinterest, stating that they are disproportionately shouldering the burden of global refugee movements.²⁶ In addition, what the international community defines as a refugee is not always accepted by the host state. It is often the

23. Ibid., pp.8-9.

24. Loescher and Milner (2005), pp.9-10.

25. Purkey (2013) p.694.

26. Hathaway (2006) p.72.

case that they are treated as illegal immigrants in the eyes of the host country for the duration of their time there.

A moral argument could be invoked that it is the host state's duty to protect refugees. Purkey suggests the notion of 'fiduciary duty' as a way to ensure the responsibilities for refugee protection are fulfilled. This 'fiduciary duty' refers to a legal duty between the host state and the refugees that it hosts. This ensures the refugees rights and protection are equal to those who are citizens of the state, regardless of whether they are party to the 1951 Refugee convention or not.²⁷ This is all well and good, however there are no mechanisms in place to enforce such a duty

Due to the perception of refugees as an unfairly distributed burden, host states frequently attempt to shift their responsibility on to other actors, especially the UNHCR. Slaughter and Crisp state that since the early 1990s, host states have taken limited responsibility in PRS and the UNHCR has become increasingly relied upon to provide emergency and long-term relief for refugees.²⁸ This is taken further by Kagan, who argues that the UNHCR acts as a 'surrogate state' following host countries transfer of responsibility to it. He believes that this shifting of responsibility for refugees originates from the inequality between the Global North and South.²⁹ Although there has been devolution of responsibility by the host state to the UNHCR, it is important to remember that under international law, it is the host state that is responsible to protect refugees.

b. International community

While the main legal responsibility for hosting refugees falls upon the host state, the international community's responsibility cannot be disregarded in a global refugee regime. It is suggested in the literature that the international community has been unable to formulate effective policy in PRS.³⁰ Moreover, the international community is failing to meet the protection needs of refugees in PRS, which has dramatic negative effects on refugee welfare.³¹ However, there has been interest in PRS issues by the UNHCR. It developed a series of Executive Committee (ExCom) Conclusions to address PRS issues. Specifically, the 2009 ExCom Conclusions highlighted that PRS are a result of inaction by the international community. It states 'the need to redouble international efforts and cooperation to find practical and comprehensive approaches to resolving their plight and to realise durable solutions for them', and calls on the international community 'to ensure, in a spirit of burden sharing, timely availability of adequate development and humanitarian funding and other resources'.³² Although this is a step in the right direction, these ExCom Conclusions are merely advisory and do not affect the current legal frameworks. They present an agreement regarding the steps to take for international refugee protection.³³ Thus they do not set out steps for the international community to act upon their responsibility.

Similar to Purkey's notion of state duty – the moral argument – Aleinkoff and Poellot state the moral argument in reference to the international community: its responsibility to alleviate the suffering of refugees. They state that to ensure protection, refugees in PRS have a 'right to a solution', which the international community should provide. Inspired by Responsibility to Protect (R2P), which was developed in response to inaction by the international community during the Rwandan genocide, they propose a Responsibility to Solve (R2S). They argue that the emphasis should be on the responsibility of the international community and the idea of international burden sharing. They

27. Purkey (2013) p.695.

28. Slaughter and Crisp (2009) p.1.

29. Kagan (2011) pp.1–2.

30. Milner and Loescher (2011) p.1.

31. Ibid.

32. UNHCR Executive Committee of the High Commissioner's Programme (2009).

33. Milner and Loescher (2011) p.1.

state that an increase in funding from donors to solve PRS would be better for them in the long run, as funds would not be needed indefinitely. As durable solutions are not working, they claim that R2S can spur new initiatives needed to address PRS.³⁴ However, they do not disregard the difficulty of their proposal, such as the coordination of various actors.

2.3.2 Capacity

In addition to the responsibility (legal and moral) of the host state and the international community, the literature has brought up the issue of capacity – who *can* do what? – when discussing what determines refugee protection. When asking this question, it is important to look at the frameworks, institutional mechanisms and funding models that are in place to facilitate refugee protection.

a. Host state

The majority of refugees living in PRS are in developing countries. The host is most often the neighbouring country to the refugee's origin country and, as argued above, is ultimately responsible for the provision of refugee protection. Betts has coined this the 'accident of geography', as the country responsible for hosting often has less capacity to do so.³⁵ Kelley suggests that protection challenges can stem from the fact that the host country does not have systems in place to deal with refugees and therefore things like refugee status determination and refugee document provision are not provided.³⁶ Moreover, refugee protection can be difficult to ensure in developing countries as they often have limited or no domestic legislation or other institutional frameworks in place relating to refugees and asylum seekers. It is often the case that the officials interacting with the refugee has had no specific training and treats the refugee punitively.³⁷ There are no international standards laid out in international refugee law on how to host refugees.³⁸ Moreover, it could be argued that many hosting countries struggle to protect and ensure the human rights of their own citizens.³⁹

It has been suggested that hosting refugees has the potential to benefit developing host countries, as the international community can invest in the infrastructure of the area that the refugees reside in.⁴⁰ Host states often acknowledge that the international community provides assistance to help them deal with the refugees. However, Kelley claims that there are other less obvious costs to the host state, such as the cost of dealing with polluted water sources or deforestation, which leaves them overburdened.⁴¹ Moreover, developing countries typically have debt, high population growth and unemployment rates. Therefore, they can be expected to have less capacity to deal with refugees.

b. International community

The literature cites an absence of concrete international legal and administrative frameworks to deal with PRS. Therefore, it is difficult to enforce international and human rights law, as there are only weak mechanisms in place to do so.⁴² Academics have collectively critiqued the lack of rigidity and comprehensiveness in the existing frameworks in PRS. Zetter states that the main issue facing the global refugee protection regime is that the frameworks in place do not address the current needs of refugees. He suggests that there needs to be reform by humanitarian/development actors and

34. Aleinikoff and Poellot (2013) pp.202–222.

35. Betts (2015) p.369.

36. Kelley (2007) p.407.

37. Ibid.

38. Czaika (2005) p.104.

39. Betts (2015) p.371.

40. Kelley (2007) p.405.

41. Ibid.

42. Purkey (2013) p.714.

states to address the needs of refugees in their current situation. He adds that many refugees are falling out of the existing net of protection due to how the legal and normative frameworks are worded.⁴³ However, Turk and Dowd suggest that the extent to which refugee protection is successful depends on the state to implement these legal and institutional frameworks.⁴⁴ This places the onus on the host state, not the shortcomings of the international frameworks.

In addition, Purkey states that it is difficult to coordinate existing PRS frameworks. This derives from the number of actors and policies that are in play in PRS: the refugees, host country, international community, UNHCR, international refugee law, domestic law etc. She adds that, intuitively, one would assume that the number of frameworks in place dedicated to refugee protection would assure overlapping and comprehensive levels of refugee protection. However, the ambiguity and contrast between actors and laws means refugees are often left under protected.⁴⁵ This highlights a lack of capacity in the coordination of refugee protection.

Funding is perhaps the most significant factor affecting the capacity to provide refugee protection in PRS. Newland highlights that one of the main reasons for insufficient refugee protection in PRS is the lack of funding.⁴⁶ There has been a pattern of declining donor funding for PRS, known as ‘donor fatigue’. Donor fatigue, or the withdrawal of funding, is said to have direct consequences for refugee protection. For example, in 2005 the World Food Programme (WFP) interventions throughout Africa were forced to reduce food rations due to the lack of funding. Not only did this impinge refugee health, but also there were reports of women and girls having to engage in ‘survival sex’ to get enough food, directly affecting their physical protection.⁴⁷ It appears that the international community has shirked its financial commitment to refugees and this could be viewed as a lack of burden sharing, which could ultimately perpetuate PRS. This indicates a lacking political will to ensure refugee protection in PRS.

As well as the donor fatigue phenomenon, the way international organisations fund their projects has been highlighted as an issue. The international refugee regime is highly dependent on voluntary funding. Whitaker suggests that the decline in funding of the refugee regime directly correlates to declining refugee protection standards.⁴⁸ The most prominent international organisation, which has a specific mandate to protect refugees, is the UNHCR. The way the UNHCR is funded is important because on average 98 per cent of its funding comes from voluntary donations, mainly from donor governments. Only 2 per cent of their funding is received from UN Headquarters.⁴⁹ In addition to this, donors to the UNHCR earmark 80 per cent of their donations in line with their interests.⁵⁰ Therefore, issues associated with PRS are often left out. Thus power over funding is an important point to consider. This concept of power and political will be looked at further in the next section.

2.3.3 Power

The previous sections have outlined two main determinants put forward by the literature for what determines refugee protection in PRS. These are the host and international community’s responsibility and capacity to protect. However, the literature does not seem to touch upon who wants to what do what in PRS, i.e. the *willingness* to protect. The host and international community’s will to protect refugees is something that I have linked to power. Barnett and Duvall define power as

43. Zetter (2015) pp.2–4.

44. Türk and Dowd (2014) p.278.

45. Purkey (2013) pp.693–693.

46. Newland (2015) p.6.

47. Kelley (2007) p.415.

48. Whitaker (2008) p.242.

49. Roper and Barria (2010) p.617.

50. Whitaker (2008) p.243.

‘the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate’.⁵¹ This definition will henceforth be used when referring to power.

a. Host state

It could be assumed that the host state is relatively powerless as they are often developing countries which receive financial assistance from the global North. However, this assumption must be questioned in the context of PRS. It is the host who decides who, and under what terms, refugees or international organisations enter its territory: this introduces the concept of state sovereignty. Indeed, obligations to protect refugees have been highlighted as a possible infringement on state sovereignty in the refugee regime.⁵² There have been increasing instances of rejection of refugees at borders, which is in direct breach of the principle of *non-refoulement*.⁵³ However, the power that the host holds means that this is possible. Hathaway suggests that there will never be an international community member able to force host states to do something that they believe is not in their interest,⁵⁴ i.e., in this case, making a host state provide protection and human rights to refugees in PRS. This means that it is down to the will of the host to provide protection and the level of protection it seeks to ensure. While this may be a strong statement, it is important to consider the power of sovereign host states.

b. International community

Turning to the power of the international community, it could be argued that refugees are largely affected by the decisions and actions of powerful actors from the global North. Ergo the international community has a significant impact on the refugee regime. The outcome of PRS could depend on the willingness of the international community to provide funding for refugees in PRS versus their other foreign policy interests. The UNHCR has been mentioned frequently with regard to refugee protection. Given its prominent role, it could be seen as the embodiment of the international community in PRS. However, Napier-Moore highlights the difficult situation the UNHCR is in: it is in place to protect refugees and, therefore, theoretically should pressure host states to take action to protect refugees in PRS. However, it is funded by mostly developed countries and host states decide whether or not it enters their territory.⁵⁵ Therefore, importantly for this context, its ability to protect refugees is subject to the consent of host states and the international community.

To summarise, the literature has displayed responsibility and capacity of both the international community and the host state as important determinants of refugee protection in PRS. In addition, I have proposed that power is also a very important but under-researched factor in this context. In terms of responsibility in PRS, international law states that it is the host’s responsibility to protect refugees. This obligation is not universally accepted by host states, which believe that they are disproportionately burdened. In many cases, this has caused the responsibility for protection to be shifted to the UNHCR. The international community as a whole has been accused of inaction in providing protection in PRS.

Most PRS are in developing countries, which inherently have less capacity, such as domestic refugee laws, to deal with the situation. The international community also appears to lack capacity in the coordination of refugee protection institutions and frameworks. The lack of funding from the

51. Barnett and Duvall (2005) p.3.

52. Purkey (2013) p.701.

53. Kelley (2007) p.406.

54. Hathaway (2007) p.71.

55. Napier-Moore (2005) pp.3–5.

international community has been highlighted to have direct negative consequences on refugee protection. Finally, the power of the host is important as they decide who enters their territory and under what circumstances. The international community has power to determine funding levels for PRS assistance. However, its actions depend on the host state's permission to allow assistance into the country. The above has shown that responsibility, capacity, and power all contribute to determining refugee protection in PRS. Moreover, these determinants are all closely interrelated.

2.4. Hypothesis

Based on the review of the literature, I argue that both international community and state responsibility and capacity are important factors in determining refugee protection in PRS. However, the extent to which they determine refugee protection in PRS can only be understood when connected to power and political will, i.e. the willingness to protect refugees in PRS.

To investigate the issues brought up in this section and test the hypothesis elaborated above, the case of the PRS involving Rohingya refugees in Bangladesh will be examined. A description of the Rohingya refugees⁵⁶ and a general overview of the main actors, policy approaches and host/international community dynamics will be given. Following this, there will be a more detailed examination of legal and physical protection issues specific to this PRS and responses.

56. I will be referring to all Rohingya in Bangladesh as refugees per the 1951 Refugee Convention definition, regardless of whether the GoB has granted them asylum or not.

3. The protracted refugee situation of the Rohingya refugees in Bangladesh

3.1. Rohingya refugees in Bangladesh

3.1.1 *The Rohingya*

The Rohingya are an under-researched minority originating from Burma. Burma is made up of diverse ethnic groups, of which the Sunni Muslim Rohingya are one. The Rohingya come from the northern part of the Burmese state of Arakan, now known as Rakhine. Within the state of Rakhine as a whole, the Rohingya are the minority, with Rakhine Buddhists being the majority. However, Rohingya are the majority in the northern part of Rakhine.⁵⁷ The origins of the Rohingya are debated amongst historians. Rohingya believe they are native to the northern Rakhine state, however Burma classes them as illegal immigrants from Bangladesh.⁵⁸ The Burmese state's position on the origins of the Rohingya was made concrete following the implementation of the 1982 Burma Citizenship Law, which did not include the Rohingya, therefore officially rendering them stateless.⁵⁹

The Rohingya are and have been subjected to state sponsored religious and ethnic persecution, physical and sexual abuse, and forced labour in what they constitute to be their home.⁶⁰ This has caused the Rohingya to be referred to as 'the world's most persecuted minority', with current investigations over whether genocide has been perpetrated against them in Burma.⁶¹ For this reason, and due to the relative lack of academic interest devoted to them, the Rohingya refugees in Bangladesh were chosen as the case study for this paper.

3.1.2 *Flight to Bangladesh*

The Rohingya in Bangladesh are an example of a long-running PRS. In 2008, the UNHCR Special Initiative on PRS concluded that the Rohingya refugees in Bangladesh is one of five PRS that require attention.⁶² The earliest record of Rohingya refugees fleeing to Bangladesh is in 1948. Following that, there have been five main exoduses of Rohingya to Bangladesh, with a constant trickle of movement in between. The first mass exodus occurred in 1978. It was caused by 'Operation King Dragon', which saw widespread Burmese state sponsored campaigns of anti-Rohingya persecution. At this point, approximately 200,000 refugees fled to Bangladesh.⁶³ The second exodus of approximately 250,000 Rohingya came in 1991-2. This was due to Burma not recognising the Rohingya as citizens, forcing them to do unpaid labour, and the widespread practice of arbitrary taxation and extortion. This was in addition to physical violence, rape, looting, stealing, destroying mosques and murder of religious leaders.⁶⁴

The third exodus was in 2012. The murder of 10 Rohingya men by Rakhine Buddhists in retaliation for the rape and murder of a woman, allegedly by Rohingya men, acted as a catalyst to widespread sectarian violence and destruction towards the Rohingya. Again, the Rohingya were forced to flee on mass to their neighbour Bangladesh.⁶⁵ The fourth exodus followed October 2016, where a group of Rohingya were alleged to have attacked Burma Guard Police bases. This resulted in a crackdown by the Burmese government causing approximately 69,000 Rohingya to flee to Bangladesh.⁶⁶ Following

57. Ullah (2011) pp.139–142.

58. Azad and Jasmin (2013) p.25.

59. Akhter and Kusakabe (2014) p.228.

60. Ullah (2011) p.143.

61. Kingston (2015) p.1163.

62. UNHCR (2011) p.1.

63. Abrar (1998) p.6.

64. Ibid., pp.6-9.

65. Equal Rights Trust (2012) p.6.

66. Alam Khan (2017) p.153.

a new wave of violence directed to the Rohingya in Rakhine, which started on 25 August 2017, over 500,000 Rohingya have fled to Bangladesh. This is the greatest number of Rohingya refugees to have fled to Bangladesh at one time. Currently Bangladesh hosts the most Rohingya. However, others are hosted by Saudi Arabia, the Gulf States, Thailand, Malaysia and Pakistan, sometimes via secondary migration through Bangladesh.⁶⁷

3.1.3 *Main actors in the case*

Following the structure of the previous section, the case will look at both the host country and the international community's involvement in this PRS. Following the Bangladesh Liberation War with Pakistan in 1971, The People's Republic of Bangladesh was declared an independent country. Bangladesh has been both a refugee producing, most recently climate change refugees, and refugee hosting nation. The Liberation War alone produced 10 million refugees who largely sought asylum in India.⁶⁸ Bangladesh is a developing country, which fits the pattern noted in the literature review of the majority of PRS being hosted in neighbouring developing countries. It is one of the most densely populated countries in the world with 156.6 million inhabitants.⁶⁹ The World Bank states that Bangladesh has demonstrated fast economic growth and has shown impressive reductions in poverty over the last 10 years. However, there are still 47 million people living below the poverty line.⁷⁰

In terms of frameworks and institutional mechanisms in place to deal with PRS, Bangladesh has very little. It has no domestic legislation directly relating to refugees/asylum seekers.⁷¹ Crucially, Bangladesh is not part of the 1951 Refugee Convention, nor the 1967 Protocol and it is not part of the 1954 and 1961 Stateless Conventions. All of these international agreements detail the rights of refugees and how to protect them. However, Bangladesh is signatory to the Universal Declaration of Human Rights, the Convention Against Torture, and the International Covenant on Civil and Political Rights.⁷²

Within Bangladesh's Ministry of Food and Disaster Management (MFDM), the Refugee, Relief and Repatriation Commission (RRRC) is responsible for the Rohingya. The MFDM receives significant financial support from the UNHCR. There are few available sources produced by the MFDM with regard to the Rohingya. However, a document produced referring to the work they do with the Rohingya makes reference solely to the registered Rohingya refugees.⁷³ However, since 2014 the Ministry of Foreign Affairs has been more actively involved in policy relating to the Rohingya.⁷⁴

There are a number of organisations from the international community which are involved in providing assistance to the Rohingya in Bangladesh. For example, the WFP has been providing long-running food assistance to the refugees. This research will focus on those organisations within the international community which are mandated to provide refugee protection. As previously mentioned, this largely involves the UNHCR. Furthermore, in this case, the International Organisation for Migration (IOM) will also be looked at as an actor which has more recently assumed responsibility for Rohingya refugee protection in Bangladesh.

67. UNHCR (2011) p.7.

68. Equal Rights Trust (2012) p.20.

69. World Bank (n.d.).

70. UNDP states that there are 63 million people living below the poverty line.

71. Cheung (2012) p.9.

72. Robinson and Rahman (2012) p.17.

73. Ministry of Disaster Management and Relief-Government of the People's Republic of Bangladesh (n.d.).

74. UNHCR (2011) p.9.

Although Bangladesh is not a part of the 1951 Refugee Convention and has expressed concern over the Rohingya presence, it allowed the UNHCR into their sovereign territory on the premise of providing refugee protection.⁷⁵ The UNHCR's mandate is to provide protection and assistance to populations of concern with the objective of finding durable solutions.⁷⁶ In 1993, following the second exodus from Burma, a Memorandum of Understanding (MoU) was signed between the GoB and the UNHCR. This stated that the government's main responsibility was to ensure the safety and security of the Rohingya in and outside the camps, with the UNHCR there to help fulfil its international protection mandate.⁷⁷ The UNHCR is responsible for dealing with refugee protection issues, such as providing registration documents, improving access to justice, and campaigns to improve reporting of SGBV and child rights. In collaboration with its implementing partners, it is trying to provide primary education, basic healthcare, new shelters and community empowerment and self-reliance schemes to the registered, camp-based Rohingya.⁷⁸ The initial MoU between Bangladesh and the UNHCR signed in 1993 was only supposed to last 1 year. However, the UNHCR is currently still in Bangladesh providing assistance to the official, registered refugees. Since the initial MoU was signed, there has not been another agreement, only a series of letters. There is currently no formal agreement between the UNHCR and the GoB, which is not a normal process for the UNHCR.⁷⁹

The IOM is an intergovernmental organisation working on a variety of migration issues. Unlike the UNHCR, which has been working with the registered Rohingya for 24 years, as part of its Humanitarian Compendium work, the IOM signed a 3 year Project Implementation Agreement with the GoB on 8 January 2015. The agreement was to provide basic humanitarian assistance to the unregistered Rohingya.⁸⁰ The project was also aimed at providing capacity building to GoB staff and local NGOs.⁸¹

3.2. Host state/international community dynamics

The preceding section highlighted the main actors within the case. To gain a greater understanding of the determinants that have been identified as contributing to refugee protection in PRS – capacity, responsibility and power – it is interesting to look at the dynamics between the host state and the international community.

With respect to capacity, the literature review highlighted that funding is an important factor contributing to both the host and the international community's capacity to protect in PRS. In addition, the literature states that there has been a lack of interest by the international community in PRS, which has led to 'donor fatigue'. Although there is little historical data on funding, the 2015 published funding requests of the UNHCR and the IOM in Bangladesh demonstrates evidence of a lack of funding: In 2015, the UNHCR received 28 per cent of its requested funding.⁸² In the same year, the IOM received 37 per cent of its requested funding.⁸³ The unprecedented scale of the most recent 2017 exodus has caused the international community to request emergency relief funding.

75. Ullah (2011) p.156.

76. Turk and Eyster (2010) p.163.

77. MSF Holland (2002) pp.24–25.

78. UNHCR (2015).

79. Office of Internal Oversight Services - Internal Audit Division (2010) p.3.

80. Referred to as Undocumented Myanmar Nationals (UMN) in the IOM produced literature.

81. IOM Bangladesh (2015).

82. UNHCR (2015).

83. IOM Bangladesh (2015).

The literature suggested that the host is most often a developing country and therefore has fewer resources and capacity to provide protection for refugees. Bangladesh has presented the Rohingya as an economic burden. However, the financial costs associated with hosting the Rohingya have been largely borne by the UNHCR, donors and NGOs (bar \$2.5 million prior to the involvement of the UNHCR). Moreover, it has been suggested that Bangladesh has benefitted financially from hosting the Rohingya due to the involvement of the international community.⁸⁴ In 2011, the UN proposed a \$33 million project aimed at alleviating poverty in one of the most underdeveloped parts of Bangladesh's south east district, Cox's Bazar.⁸⁵ Bangladesh rejected the \$33 million proposed by UNICEF, WFP, UN Development Programme and UN Population Fund stating that the project was falsely portrayed as relieving poverty, whereas they believed it was actually targeting relief for the Rohingya refugees, not the local community.⁸⁶ Here is one of the most significant determinants raised in the case: Bangladesh has exercised its power over the situation and turned funds away. The international community proposed a project, which they claimed would benefit the Rohingya, as well as Bangladeshis, however the GoB declined it. This suggests that the host has significant power to influence what happens in this PRS and whether or how the Rohingya receive protection from the international community.

Another example of the Bangladeshi state having ultimate power in the situation transpired after the 2012 exodus of Rohingya from Burma to Bangladesh. At this time, Bangladesh ordered Doctors Without Borders (MSF), Action Against Hunger, and Muslim Aid to stop providing humanitarian assistance to the unregistered Rohingya. The Bangladesh government stated that this was due to the fact that they could not host any more Rohingya.⁸⁷ Human Rights Watch accused the Bangladesh government of mistreating the unregistered Rohingya refugees and obstructing the delivery of humanitarian aid, as they actively restricted international organisations from accessing the Rohingya.⁸⁸ This implies that even if the international community had the capacity to assist in refugee protection, the host has the power to stop them if it perceives their actions to be against their interests.

3.3. Policy approaches

The literature review highlighted two main policy approaches to PRS: the UNHCR's proposed 'durable solutions' and the host's preferred policy of encampment. The case has shown that the host has favoured the encampment policy for the refugees that they officially recognise. These UNHCR camps have been hosting the registered refugees for over 2 decades. There are now only 2 official camps, Nayapura and Kutupalong, which according to the UNHCR host 31,759 Rohingya and are located in Cox's Bazar (see Figure 1).⁸⁹ It is these officially recognised refugees that receive the benefits of the UNHCR, who together with the GoB administer the official camps. The remaining 90-94 per cent of Rohingya are unregistered and live in unofficial camps and urban areas.

84. Parnini (2013) p.288.

85. UNHCR (2011) p.12.

86. Allchin (2011).

87. Integrated Regional Information Networks (IRIN) (2012).

88. Human Rights Watch (2007).

89. UNHCR (2015).

90. Office of Evaluation (2012) p.VI.

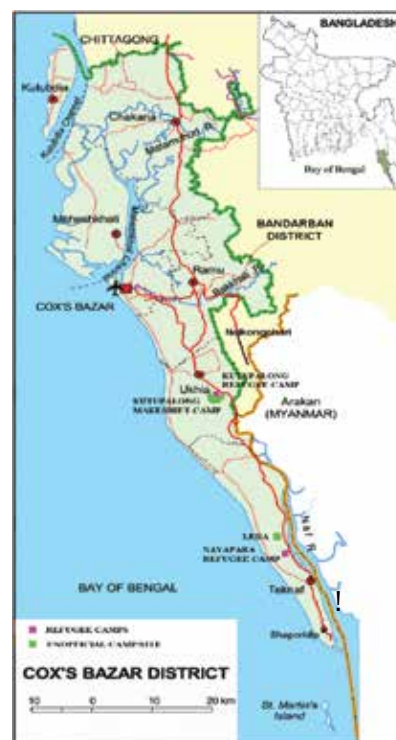


Figure 1. Map of Cox's Bazar District, Bangladesh⁹⁰

3.3.1 Durable solutions

Bangladesh has not favoured the UNHCR's durable solutions of resettlement and local integration and believes that if it engages with any of the durable solutions, it will create a pull factor for more refugees.⁹¹ The issue of repatriation will be discussed in detail in the next section on legal protection.

A comparatively small number of Rohingya were resettled in a safe third country. Between 2006-2010, 920 refugees were resettled, mainly in Canada and Australia (see Table 1). The process was stopped officially in 2010 as the GoB stated that third country resettlement was attracting more refugees.⁹² However, they did later state in 2014 that they might consider third country resettlement again in the future.⁹³

Year	Destination	Submissions	Departures
2006	Canada	28	13
2006 Total		28	13
2007	Canada	204	75
	New Zealand	54	
	United Kingdom	121	
2007 Total		379	75
2008	Australia	151	76
	Canada	212	
	Ireland	112	
	New Zealand	11	
	Norway	12	
	Sweden	19	
	United Kingdom		
	United States	32	
2008 Total		549	156
2009	Australia	120	108
	Canada	3	122
	Ireland		82
	New Zealand	12	27
	United Kingdom	112	109
	United States	302	17
2009 Total		549	465
2010	Australia	108	134
	Canada		17
	New Zealand		6
	United Kingdom	112	47
	United States	272	7
2010 Total		492	211
Grand Total		1997	920

Table 1. Resettlement of Burmese nationals from Bangladesh between 2006-2010⁹⁴

91. UNHCR (2007) p.8.

92. Azad and Jasmin (2013) p.26.

93. Ministry of Foreign Affairs of the Government of the People's Republic of Bangladesh (2014).

94. UNHCR (2011) p.32.

The GoB state that it is unable to integrate Rohingya as Bangladesh faces resource constraints and is already overpopulated. Therefore, it will not consider the durable solution of local integration. However, there has been a certain degree of *de facto* integration of the unregistered Rohingya living outside of the UNHCR camps. This is due to the common religion, culture and in some instances dialect⁹⁵ between the Rohingya and Bangladeshis.⁹⁶ Moreover, there had been integration through the process of marriage to Bangladeshis.⁹⁷ However, in 2014 the GoB stated that all Rohingya marriages be nullified, including marriages between Rohingya and Bangladeshi nationals.⁹⁸ For the Rohingya living in this PRS, this is significant as this was one way to gain citizenship and not be stateless. In addition, similar to Rohingya born in Malaysia and Thailand, Rohingya born in Bangladesh are not given Bangladeshi citizenship at birth, although it could be argued that according to Bangladesh citizenship law, they should.⁹⁹ Therefore, currently Rohingya are unable to gain Bangladeshi citizenship through any means.

3.4. Legal protection

The previous section gave an overview of the case and the actors involved. This section will focus specifically on legal refugee protection, the crux of the refugee regime. It will start by examining refugee status determination, then access to legal justice, and lastly the commitment to *non-refoulement*.

3.4.1 Refugee status determination

This section looks at refugee status determination and the differences in the level of protection for registered and unregistered refugees. The issue of refugee documentation will also be discussed, followed by the possible change in the GoB's stance on unregistered refugees, which is demonstrated by a census of this population. The distinction between registered and unregistered Rohingya has been touched upon previously, however this will now be looked at in more depth.

As previously noted, Bangladesh does not have a system in place for refugee status determination. However, during the 1991-2 exodus, the MFDM hosted approximately 250,000 Rohingya in camps. Due to the mutual religion, this intake of Rohingya was officially recognised as *prima facie*¹⁰⁰ refugees. Shortly after this, an agreement was signed between Bangladesh and Burma to repatriate approximately 200,000 by 2000. Bangladesh ceased recognising *prima facie* refugees in mid-1992 and those arriving after this are not officially recognised.¹⁰¹ As previously mentioned, there are now two official refugee camps.

The officially recognised refugees account for only 6-10 per cent of the total number of Rohingya refugees in Bangladesh. After the GoB officially recognised these refugees from 1991-1992, it subsequently decided not to provide the remaining Rohingya with official status in Bangladesh. Before the most recent influx, which started on 25 August 2017, there were approximately 300,000-500,000 unregistered Rohingya in Bangladesh.¹⁰² These unregistered refugees mainly live in Teknaf and Ukhiya, which is also in the Cox's Bazar district. Those who are not registered and do not reside in the official camps are viewed as illegal entrants and fear being arrested and repatriated.¹⁰³ Many have been suspended in PRS for decades. They lack legal status and therefore legal protection, which leaves them vulnerable to exploitation and other breaches to their protection.

95. Rohingya language is similar to a dialect spoken by Bangladeshis from Chittagong.

96. Cheung (2012) p.4.

97. Azad and Jasmin (2013) p.31.

98. Chakraborty (2015) p.7.

99. Hoque (2016) p.11.

100. Recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin.

101. Cheung (2012) p.3.

102. Ministry of Foreign Affairs of the Government of the People's Republic of Bangladesh (2014).

103. Azad and Jasmin (2013) p.26.

Although the registered refugees are not at risk of arrest as illegal aliens, they are confined to the UNHCR camps, which presents an untenable trade-off: they get basic services and protection at the expense of freedom of movement and employment. However, the official refugees can leave the camp with bribery, though they are exposed to additional risks outside the camps (from the authorities and locals). Most commonly, they leave the camps in order to try and earn money by working illegally or selling their food rations.¹⁰⁴

The UNHCR implemented a photo identification system for official refugees over the age of 5 as documentation to prove the status of the registered Rohingya refugees. It states that this documentation provides some form of protection when the refugees leave the confines of the camp. However, this documentation is not officially recognised by the GoB and thus Rohingya may be arbitrarily arrested, pointing to the conflict between both actors. They are reportedly more likely to be released.¹⁰⁵ Unlike the registered refugees, the unregistered have no documentation. However, it has been noted that neither do a lot of the local Bangladeshi community in the Cox's Bazar area.¹⁰⁶

The GoB actively engaged in the issue of unregistered Rohingya in 2014. In a statement given by the GoB's Ministry of Foreign Affairs, it expressed concern that in some areas in Cox's Bazar, especially the Teknaf area, the number of unregistered Rohingya outweighs Bangladesh nationals. In addition, they stated that there is evidence of involvement of these unregistered Rohingya in illegal activities. Furthermore, they are engaged in and victim to human trafficking. As a result of these concerns, the Ministry of Foreign Affairs decided to develop a *National Strategy Paper on Myanmar Refugees and Undocumented Myanmar Nationals in Bangladesh*. This Strategy Paper listed a number of objectives, the most significant being a census of all the unregistered Rohingya in Bangladesh to produce a database, beginning in April 2016. According to the paper, following the census, the GoB aims to provide basic humanitarian services to unregistered refugees. In addition, it wants to strengthen the Bangladesh-Burma border and engage in diplomatic dialogue with Burma to restart repatriations.¹⁰⁷

The GoB stated that it carried out the census in order to develop ways to help the unregistered Rohingya in the future. However, there have been concerns from international and local organisations over the transparency of the census. Furthermore, the unregistered Rohingya have expressed mixed feelings about the census. Some believe that it is a promising sign that Bangladesh now wants to recognise them, but others worry that after being identified, they may be sent back to Burma.¹⁰⁸ This initiative taken by the GoB seems positive, as the government have previously not addressed the issue of unregistered Rohingya and it could be seen as an increase in the GoB's capacity, and an example of them recognising their responsibility. However, the Strategy Paper clearly states that the GoB aims to repatriate the unregistered Rohingya to Burma. Repatriation and the commitment to *non-refoulement* will be reviewed later.

3.4.2 Access to Justice

One of the most obvious ways in which the distinction between registered and unregistered refugees affects the level of refugee protection is access to justice. As there are no administrative or institutional frameworks in place for dealing with refugees, the Rohingya crossing the border are seen as illegal immigrants and face the possibility of being arrested and detained.¹⁰⁹ They can be arrested under the Foreigners Act of 1946, which states that illegal entrants can be detained for 5

104. Akhter and Kusakabe (2014) p.232.

105. UNHCR (2011) p.14.

106. Cheung (2012) p.12.

107. Ministry of Foreign Affairs of the Government of the People's Republic of Bangladesh (2014).

108. Al Jazeera English (2016).

109. UNHCR (2007) p.16.

years, fined or deported.¹¹⁰ Then comes the paradox: after serving their sentence in detention for illegal entry, there are examples of Rohingya having to remain in detention as ‘Released Prisoners’ in Bangladesh’s overcrowded prison system. This is due to the fact that they cannot be repatriated to Burma as Burma does not recognise them as citizens and Bangladesh will not accept them into the community either.¹¹¹ With no domestic laws relating to the status of refugees, Bangladesh does not have the institutional capacity to deal with the Rohingya refugees, causing significant gaps in protection.

Furthermore, there is anecdotal evidence of the police practicing arbitrary arrest and of corruption within the justice system, especially regarding the unregistered refugees, as they have no legal status or access to legal protection. For example, an unregistered Rohingya was arrested by the police with trafficking charges. He was subsequently released after paying a 20,000 Taka (ca. £200) bribe.¹¹² This exemplifies the lack of protection that the unregistered Rohingya are faced with. With a host exercising its power to practice arbitrary arrest with no recourse to deal with this, it creates a circle of impunity.

However, the Bangladesh Constitution does stipulate some legal protection provisions. Article. 31 of The Fundamental Rights section of the Bangladesh Constitution *Right to Protection of Law* states ‘to enjoy the protection of the law, and to be treated in accordance with law... is the inalienable right of every citizen... and of every other person for the time being with Bangladesh... no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with the law.’¹¹³ This suggests Bangladesh’s responsibility to provide legal protection to the Rohingya.

Although they do not have access to the official judicial system, there are some mechanisms in place for the registered refugees to air their legal grievances through camp-based systems and with the help of the UNHCR.¹¹⁴ The UNHCR partnered with local legal aid organisation Bangladesh Legal Aid and Services Trust (BLAST) to act as counsel on some official refugees’ cases. There is not a lot of information on specific cases. However, BLAST’s website describes the case of BLAST vs. Bangladesh and Others (‘Burmese Prisoners’ Case). This case was brought to the High Court Division of the Supreme Court of Bangladesh in 2006. It challenged the continual incarceration of 338 Burmese nationals in Cox’s Bazar prison. BLAST stated that the imprisonment was arbitrary and unconstitutional. The case shows as still pending.¹¹⁵ A report produced by the UNHCR based on consultations with official camp-based Rohingya, reported that men lived in fear of being detained on false charges. They claimed that the local prison was built for 300 inmates but detains 3500.¹¹⁶ In addition, they stated that they feared reporting any crime or violation by the authorities in charge of the camp, as they believed they would be falsely imprisoned.¹¹⁷

3.4.3 Non-refoulement

Arguably the most important factor contributing to the legal protection of refugees, both in PRS and emergency situations, is the commitment to *non-refoulement*. The case has had a mixed history of *refoulement* of Rohingya to Burma. The introduction to the case highlighted that the Rohingya came to Bangladesh in 5 main waves: 1978, 1991-2, 2012, 2016 and very recently in 2017.

Sixteen months after the initial flight in 1978, the Bangladeshi and Burmese governments signed an agreement to repatriate the Rohingya. The GoB stated that almost the entire 200,000 Rohingya who

110. Cheung (2012) p.9.

111. UNHCR (2012) p.4.

112. United States Committee for Refugees and Immigrants (2008).

113. The People’s Republic of Bangladesh (1972).

114. United States Department of State (2016).

115. BLAST (2006).

116. There is no way of verifying this as the GoB produces very little data on arrests and their prisons.

117. UNHCR (2007) p.20.

came in 1978 were repatriated.¹¹⁸ However, there were reports of the returnees subsequently fleeing back to Bangladesh at a later stage. Reportedly 10,000 Rohingya died during this process due to severe malnutrition and other illnesses.¹¹⁹ In September 1992 following the 1991-2 influx, a bilateral agreement was signed between the Burma and Bangladesh governments to commence the process of repatriation. What followed was a series of repatriations, which both the government and the UNHCR were involved in.¹²⁰ The GoB claim that 236,599 out of 250,877 refugees from the 1991-2 influx were repatriated throughout the 1990s.¹²¹ However, it is claimed that the repatriations between 1992-3 were almost entirely involuntary, which is tantamount to *refoulement*.¹²² Finally, repatriation back to Burma was ended in 2005 as it was not voluntary and there was proof of the persecution of the Rohingya in Burma.¹²³ The UNHCR has acknowledged that the repatriation to Burma in 1991-2 was 'premature and coercive.'¹²⁴

The 2012 and 2016 waves of violence directed towards the Rohingya in Rakhine caused the Rohingya once more to flee to Bangladesh. In response to this, Bangladesh closed its sea and land border and some caught crossing were detained and deported.¹²⁵ In addition, more coast and border guards were deployed to try and reinforce the border.¹²⁶ By closing its border and forcing refugees back into the sea, Bangladesh breached its international obligations and thereby engaged in *refoulement*.¹²⁷

As previously mentioned, Bangladesh has not ratified the 1951 Refugee Convention. Furthermore, the then Bangladesh Foreign Minister Dipu Moni stated in 2012 that Bangladesh is under no obligations to let the Rohingya enter Bangladesh to seek refuge and provide them with protection as it is not part of the 1951 Refugee Convention.¹²⁸ However, there are a number of international laws that compel Bangladesh not to return Rohingya, regardless of whether or not they are party to the 1951 Convention, therefore signifying Bangladesh's responsibility to protect the Rohingya from *refoulement*. For example, Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Bangladesh ratified in 1998, states that 'No State Party shall expel, 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.'¹²⁹ The process of closing its borders and returning persons at risk of persecution is a violation of international law. Furthermore, the act of Bangladesh refusing entry to the Rohingya could be argued to be unconstitutional. Article 25(c) of the Bangladesh Constitution under the Fundamental Principles of State Policy section states that Bangladesh shall have respect for international law and based on the principles of the UN will 'support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.'¹³⁰

The above has explored three forms of legal protections: refugee status determination, access to legal justice and the commitment to *non-refoulement*. The difference between registered and unregistered Rohingya and the impact that this has on legal protection has been highlighted. The unregistered Rohingya have no legal status or protection. The lack of recognition of unregistered

118. Ministry of Foreign Affairs of the Government of the People's Republic of Bangladesh (2014).

119. Abrar (1998) p.6.

120. Azad and Jasmin (2013) pp.30–31.

121. Ministry of Foreign Affairs of the Government of the People's Republic of Bangladesh (2014).

122. Azad and Jasmin (2013) p.30.

123. Ibid., p.26.

124. UNHCR (2011) p.21.

125. Parnini (2013) p.295.

126. Amnesty International (2016).

127. Equal Rights Trust (2012) p.4.

128. ReliefWeb (2012).

129. United Nations (1984).

130. The People's Republic of Bangladesh (1972).

refugees seems to have changed in recent years, with the GoB declaring that a census be carried out of the unregistered refugees. The distinction between registered and unregistered Rohingya and the level of protection this guarantees is clearly visible in the access of justice. The unregistered are arbitrarily arrested and imprisoned in a corrupt legal system. The registered Rohingya fare better, with the UNHCR trying to provide access to justice through legal aid organisations. However, this does not stop them fearing arbitrary arrest. Moreover, the organised repatriation of the Rohingya to Burma by the GoB and the UNHCR was halted in 2005 due to the involuntary nature and circumstances in Burma. However, the act of turning away fleeing Rohingya following the 2012 and 2016 exoduses shows that *refoulement* has taken place, which was in violation of international law.

3.5. Physical protection

This section looks at physical protection. Legal protection and physical protection are inextricably linked as legal protection often ensures physical protection. However, this section will look at some specific physical protection issues in this PRS for both the registered and unregistered Rohingya. Unlike legal protection, physical protection is much harder to ensure, measure and document. The case has highlighted three main physical protection concerns stemming from PRS: SGBV, trafficking and extremism.

3.5.1 Sexual and Gender Based Violence

The literature review highlighted the SGBV epidemic in PRS. As suggested, SGBV is prevalent among the Rohingya refugees in Bangladesh.¹³¹ In a review of its response to the PRS of the Rohingya in Bangladesh, the UNHCR highlighted that there are significant protection gaps with regard to SGBV for both registered and unregistered refugees.¹³² There is more information about SGBV concerning the registered refugees. This is not because this occurs more in the official camps, but because the unregistered refugees are actively trying to avoid the authorities due to their immigration status. Therefore, their physical protection concerns are harder to evaluate.

The official camps are reported to be overcrowded, have poor lighting and high levels of crime and violence.¹³³ These settings give rise to SGBV. SGBV is often perpetrated within the family setting, but also commonly occurs outside in the community. Rape is common in the official camps, especially when collecting firewood. In addition, there are a large number of female-headed households in the official camps. These households are at particular risk of abduction and SGBV.¹³⁴ As previously highlighted, the registered refugees are not permitted to freely leave the camps. The restrictions on movement for the registered refugees, and the inability to earn money has seen women having to partake in 'survival sex'. This often stems from not having enough humanitarian assistance, most commonly, not enough food.¹³⁵ These examples of SGBV are exacerbated by the PRS that the Rohingya are suspended in.

It is reported that there is a tendency on behalf of the UNHCR to overlook the seriousness of SGBV as something inherent to Rohingya culture.¹³⁶ For example, religious leaders in the official camp ordered 100 lashes for a Rohingya woman who was accused of having an adulterous relationship with another refugee.¹³⁷ Furthermore, there is evidence of a prevalence of child marriage within the official camps. In a document produced by the Refugee Studies Centre, it stated that at the time of

131. UNHCR (2007) p.9.

132. UNHCR (2011) p.17.

133. Parnini (2013) p.285.

134. UNHCR (2007a) p.21.

135. UNHCR (2007) p.18.

136. Refugee Studies Centre, Oxford University, (2001) p.66.

137. United States Committee for Refugees and Immigrants (2008).

writing, there were no unmarried girls over the age of 16 in the Kutupalong official camp.¹³⁸ These examples show serious gaps in the protection of women and girls in the registered camps.

The UNHCR has highlighted grave faults in the administration of justice in the camps, especially in relation to physical violence.¹³⁹ Previously, within the camp itself, the everyday management fell upon the unelected refugee leader, the *Mahjee*. The *Mahjee* were powerful and had been accused of exploiting the female camp members, sexually and monetarily.¹⁴⁰ For example, a domestic abuse complaint could not be directed to those who were officially in charge of the camp, but had to go through the *Mahjee*.¹⁴¹ This leads to impunity, as it was reportedly the *Mahjee* who were often perpetrating SGBV. The GoB and the UNHCR decided to dismantle the *Mahjee* system in 2007 and implemented a new refugee and camp management committee.¹⁴² The MFDM now appoint Camp in Charges (CICs), who are rotating civil servants to manage the camps.¹⁴³ The disbanding of the *Mahjee* system shows the host and international community addressing the justice system that was detrimental to the protection of the Rohingya refugees and replace it, signifying joint responsibility to protect.

Moreover, in line with the UNHCR Standard Operating Procedures for SGBV, the UNHCR has made some improvements in the official camps. For example, it claims that the incidence of reported rape in the official camp has declined since the installation of solar lighting.¹⁴⁴ Furthermore, it formed women's centres within the camps to enable women to seek help for SGBV and other issues. However, because of stigma and social norms, these are reportedly not being utilised.¹⁴⁵

The level of SGBV that the unregistered Rohingya are subjected to is harder to ascertain. The unofficial camps, such as Leda camp, have purportedly become increasingly violent places. As the majority of the international and local organisations were ordered to withdraw their services to the unregistered refugees and Bangladeshi security officials were also withdrawn, there have been reports of increased violence against women, including kidnapping. However, due to their unofficial status, victims of such crimes have no avenues to seek justice.¹⁴⁶ As previously stated, the IOM is permitted to work with the unregistered Rohingya. In 2015, of the \$300,000 that the IOM requested for their protection programme, which aimed to strengthen protection and reduce SGBV of the unregistered Rohingya women, specifically by providing solar lighting to reduce SGBV in the unofficial camps, \$0 was received.¹⁴⁷ This displays a lack of donor funding, which signifies a lack of responsibility taking by the international community, in turn reducing the IOM's capacity to protect.

It should be noted that Bangladesh remains a traditional patriarchal society. Although it has developed at a fast pace over the last decade, SGBV is still rife in urban and rural society. The Violence Against Women Survey 2011 reported that 87 per cent of married women experienced violence, including physical and psychological violence, by their current husband.¹⁴⁸

3.5.2 Trafficking

Trafficking and involvement in extremism highlight knock-on consequences of PRS that have the ability to affect the Rohingya's physical protection. Languishing in the PRS in Bangladesh, with no solution in sight has caused many Rohingya to fall into the hands of traffickers and people smugglers.

138. Refugee Studies Centre, Oxford University (2001) p.67.

139. UNHCR (2007) p.24.

140. Akhter and Kusakabe (2014) p.234.

141. Ibid., p.243.

142. Danish Immigration Service (2011) p.21.

143. UNHCR (2011) p.9.

144. Ibid., p.12.

145. Akhter and Kusakabe (2014) p.244.

146. Refugee International (2012).

147. IOM Bangladesh (2015).

148. Bangladesh Bureau of Statistics (BBS) (2013).

These people are able to exploit the desperation of Rohingya, who are suspended in limbo. As highlighted previously, women and girls' physical protection is at risk in PRS. The unregistered Rohingya are especially at risk because there is no way to track them. Due to economic immobility, traffickers have taken advantage of females and sold them into the sex trade.¹⁴⁹ Rohingya women are smuggled out of camps to places like India and Pakistan. They are often coerced or bought by smugglers who inform their families that they wish to marry the woman/girl, but then places her into the sex industry.¹⁵⁰

However, this is not something that only affects women and girls, but has become a phenomenon for the Rohingya as a whole, which has been increasing since the 2000s. In 2015, international media reported on the Rohingya 'boat people'.¹⁵¹ These were mainly Rohingya, but also some Bangladeshi economic migrants, who were trafficked and a large number of them were left abandoned at sea. Human traffickers leave through the Bay of Bengal and Andaman Sea to Indonesia, Thailand and Malaysia. Trafficking is reported to be organised through a syndicate of traffickers, starting on fishing boats and later joining cargo ships.¹⁵² Incidents of 'maritime ping-pong' have occurred, whereby they are not allowed to disembark and get pushed back to sea and are sometimes stranded in the ocean by traffickers.¹⁵³ Deplorable conditions were reported on board the boats, where those trafficked were kept, sometimes for months. There were reports of no food and water, physical violence and throwing overboard for not being able to pay the traffickers.¹⁵⁴ More than 94,000 Rohingya and Bangladesh nationals have left to the sea since early 2014 and there have been over 2,000 known deaths reported at sea between 2012-2015.¹⁵⁵

3.5.3 Extremism

The militarisation of camps in PRS is interesting and has recently received increasing scholarly attention. Although it is beyond the scope of this paper to fully discuss the security issues associated with PRS, a few points relating to refugee protection within the case will be mentioned. Recently, extremism has become more of an issue affecting Bangladesh as a whole and it has seen an increase in domestic extremist organisations, who reportedly receive backing from opposing international terrorist organisations Daesh and Al-Qaeda.¹⁵⁶ The July 2016 attack on Holey Artisan Bakery marked a new type of terrorism in Bangladesh: sophisticated weapons and explosives, and suicide missions.¹⁵⁷ In response, GoB have tried to clamp down on extremism.

There is evidence that Islamist extremist organisations are recruiting from Rohingya camps in Bangladesh. The Rohingya Solidarity Organisation (RSO) formed in the early 1980s as a break off from the less radical Rohingya Patriotic Front. It is claimed to be linked with Al-Qaeda and the Bangladesh based *Jamaat-e-Islami* and *Jama'atul Mujahideen Bangladesh* (JMB), and the Saudi Arabia based *Rabita-al-Alam-al-Islami*.¹⁵⁸ Reportedly Al-Qaeda training materials are produced in the Rohingya language.¹⁵⁹ Another organisation with 15,000 members is the movement for an Islamic war in Bangladesh, *Harkatul Jihad al-Islam Bangladesh* (HUJI-B). They claim to distribute literature and recruit Rohingya refugees from 6 unofficial camps in Cox's Bazar.¹⁶⁰

149. Rahman (2010) p.239.

150. Belak (2002) pp.209–210.

151. Human Rights Watch (2015).

152. Cohen et al. (2017) p.4.

153. Chatterjee (2016) p.65.

154. Amnesty International (2015).

155. Human Rights Council (2016).

156. Khan (2016) p.192.

157. Ibid., p.194.

158. Wolf (2014) p.4.

159. Asian Centre for Human Rights (2015).

160. Rahman (2016) p.80.

In addition, the Rohingya have been accused of spreading Islamic fundamentalism in Bangladesh.¹⁶¹ The RSO specifically are accused of smuggling arms through the Burma-Bangladesh border to distribute to terrorist organisations in Bangladesh.¹⁶² Moreover, there are examples of the Rohingya being involved in some high profile terror attacks outside Bangladesh. For example, the attempted attack on the Embassy of Myanmar in Indonesia in May 2013 and the bomb blast in a Buddhist temple in India in July 2013.¹⁶³ In addition, Lintner argues that extremist organisations have exploited the Rohingya as they are largely excluded from society and used them as ‘cannon fodder’ in places like Afghanistan.¹⁶⁴

Moreover, the GoB has been involved in the facilitation of the relocation of some unregistered Rohingya to the in the volatile Chittagong Hill Tracts region in Bangladesh. Here there have been reports of the unregistered Rohingya refugees carrying out violence against indigenous *Jumma* Buddhists. In addition, the unregistered Rohingya are accused of attacking Buddhists and Hindus and burning down temples in this area.¹⁶⁵ The involvement of the Rohingya in militant activities has provided GoB with some justification to deny them rights in Bangladesh. Stating that refugee camps generate extremists has been given as a reason to try and repatriate Rohingya back to Burma by the GoB.¹⁶⁶

On 9 October 2016, allegedly 200 men crossed the Bangladesh border into Rakhine and killed 9 police guards and stole guns and ammunitions. The organisation claiming to have carried out the attack are *Harakah al-Yaqin*. Subsequently, videos were uploaded to YouTube of Bangladesh-based *Harakah al-Yaqin* militant organisation calling on Rohingya to fight in Burma.¹⁶⁷ This was met by extreme forced by the Burmese national army, including reports of rape and torching of 1,250 buildings. During this time, an allegiance was declared to carry out jihad on behalf of Rohingya from extremists in south and south-east Asia, with some extremists in Indonesia stating online their willingness to carry out suicide attacks on behalf of the Rohingya.

The above has identified some of the most pressing physical protection concerns the Rohingya are faced with. These are SGBV, trafficking and involvement in extremism. These issues derive from the lack of legal protection offered to them. SGBV is rife among the registered Rohingya due to the camp settings, societal norms and lack of justice. It is likely that the unregistered Rohingya are equally faced with SGBV. However, their status makes it difficult to find out any information regarding this. Desperation from living in PRS with poor quality of life, no legitimate work opportunities and no durable solutions likely in the near future has pushed many Rohingya to be trafficked. The conditions on the boats and the unknown setting of their destination pose great physical protection concerns. Moreover, there is evidence of Rohingya being actively involved in extremism, both in Bangladesh and abroad. In this instance, it is clear that the Rohingya are both victims and perpetrators of violence and extremism, which is likely to continue should the situation remain unchanged.

161. Wolf (2014) p.5.

162. Rahman (2016) p.84.

163. Asian Centre for Human Rights (2015).

164. Lintner (2003) p.5.

165. Asian Centre for Human Rights (2015).

166. Sude, Stebbins, and Weilant (2015) p.14.

167. Singh and Haziq (2016).

4. Discussion and analysis

This section looks at the case reflected through the analytical framework to identify the determinants of refugee protection in PRS. It starts by reviewing the international community and then discusses the host state.

4.1. International community

4.1.1 Responsibility

In general, the international community has developed very few specific policies to deal with PRS and none specifically to deal with refugee protection needs in PRS. The 2009 ExCom Conclusions stated that PRS are a result of international community inaction and that the international community is failing to address the protection needs of refugees suspended in PRS. Although these issues have been brought up in the ExCom Conclusions, the case study shows that it is difficult for the international community to enact policy. The case shows that the international community's responsibility to protect refugees in PRS pivots on their compliance with the demands made by the host Bangladesh.

The UNHCR has appeared as the main actor from the international community in the case. The UNHCR's mandate is to provide refugee protection, which signifies their responsibility to refugees. However, this case has highlighted the difficulty for the UNHCR to protect the unregistered Rohingya in this PRS. The UNHCR acquiesced to the GoB's requirement of dealing with the registered Rohingya only and it was involved in the repatriation of the Rohingya to Burma, which it later admitted to be largely involuntary and coerced, therefore facilitating *refoulement*. Moreover, the MoU that was signed between the GoB and the UNHCR in 1993 was only supposed to last a year. However, 24 years later, the UNHCR continues to operate in Bangladesh with no valid terms of reference. For an established organisation used to dealing with refugee situations, this shows a lack of responsibility taking on behalf of the UNHCR. As noted earlier, the UNHCR finds itself in the position of having to cooperate with the host state in order to try and meet its obligations to refugees.

4.1.2 Capacity

In terms of the capacity of the international community to protect refugees, the literature review highlighted the importance of funding in PRS, and that wavering funding had direct negative consequences on refugee protection. This suggests that the case is typical of those in PRS – the international community is suffering from 'donor fatigue'. The case has highlighted a lack of funding for both of the international actors reviewed. For example, no funding was given to the IOM for programmes to increase protection and reduce SGBV of the unregistered Rohingya women. This lack of funding will likely affect the international community's capacity to protect Rohingya refugees.

Refugee camp environments have high levels of SGBV. The case has shown that the Rohingya camps are no exception. The UNHCR has made some positive changes including solar lighting and the introduction of women centres in the registered camps. In addition, the UNHCR has engaged with BLAST to provide legal aid services to the registered Rohingya. However, this only benefits the registered Rohingya.

Being trafficked and involvement in extremism were highlighted as a knock-on effects of the stateless Rohingya being trapped in PRS. This is something that does not just affect the host Bangladesh, but the international community as a whole: a subsequent reason the international community ought to take measures to address PRS. It is worth noting that there has been a lack of regional responses dealing with the Rohingya PRS. Regional responses are important because the

Rohingya refugee crisis affects the whole region, not just Bangladesh. However, compared to PRS in Africa, PRS in Asia lack regional responses.¹⁶⁸ In general, states in South and South-East Asia lack legal frameworks relating to refugees and are reluctant to provide protection, preferring more penal responses instead.¹⁶⁹ This suggests an avoidance of regional responsibility.

4.1.3 Power

In the past, the UNHCR has been criticised for failing to critique the governments of the states it is working within.¹⁷⁰ Although the UNHCR threatened to withdraw from Bangladesh in 1997 as the GoB were not willing to consider any of the durable solutions to the PRS, it has remained operational in the country.¹⁷¹ The case has highlighted a strained relationship between the UNHCR and the GoB. In this situation, the UNHCR does not have sufficient power to fulfil their mandate of protecting refugees.

Although the IOM has only recently been permitted to have access to the unregistered Rohingya, for the majority of the PRS, the UNHCR has been the default actor of the international community to take responsibility for refugee protection. Thus, the UNHCR has acted as a proxy for the international community. However, the international community is much larger than one UN organisation and the case has not shown other members of the international community actively calling for better conditions in the PRS. This raises questions as to the responsibility of the international community at large. The international community – especially influential donors who appear to have done little in this PRS – could, for example, encourage the GoB to sign the 1951 Refugee Convention and provide refugee protection for all Rohingya refugees in Bangladesh.

4.2. Host state

4.2.1 Responsibility

The literature review detailed that the normative responsibility per international law to protect the Rohingya seeking refuge in Bangladesh falls on the GoB. In this case, the MFDM have taken responsibility for the registered Rohingya, which account for a small percentage of the total Rohingya refugees in Bangladesh. The case has highlighted explicitly that the unregistered Rohingya face protection gaps. The decision by the GoB to not register the remaining Rohingya has had consequences for their protection, even though the Constitution states that every person in Bangladesh should be provided with legal protection. A consequence of not registering the majority of the Rohingya has had negative knock-on effects. The case demonstrated that the lack of status and no way of legitimately earning money has played into hands of criminal networks, including traffickers and extremists.

Although Bangladesh is responsible for the protection of the Rohingya on its territory per international law, there is no system in place to enforce said responsibility. Therefore, this demonstrates an example of Bangladesh's power over the protection circumstances in Bangladesh. The 2016 census could be an example of the GoB taking responsibility and showing an improvement in capacity. However, it could also be a sign of them preparing for mass repatriation of the unregistered Rohingya.

Rahman states that Bangladesh is unable to provide the protection needed for Rohingya and that the responsibility is too great and therefore the Rohingya receive very little protection.¹⁷² However,

168. Lui (2007) p.186.

169. Cheung (2012) p.2.

170. Napier-Moore (2005) pp.3–5.

171. UNHCR (2011) p.11.

172. Rahman (2010) p.233.

encouragement of the GoB to accept international assistance has the potential to share responsibility.

4.2.2 Capacity

Bangladesh is a developing country. It is overpopulated and has a large number of people living below the poverty line. It is not party to the 1951 Convention nor the 1967 Protocol and has no domestic legislation or frameworks in place for dealing with refugees. This fits the pattern suggested in the literature review that Bangladesh has limited capacity to deal with refugees in PRS. The case has highlighted that Bangladesh has largely not had to fund assistance to the Rohingya, which has been funded by the international community. Bangladesh is even reported to have benefitted from the investment in the local area. This suggests that Bangladesh may not be faced with a lack of capacity to fund the protection of Rohingya, as it is the international community who are bearing this cost, though funding shortfalls have been noted. In addition, as suggested in the literature review, there are other environmental and socio-economic costs that they have to cover.

Bangladesh has not favoured durable solutions of third country resettlement or official local integration, and prefers the solution of repatriation of the Rohingya to Burma. They specifically state that they cannot integrate the Rohingya as they are over populated and have resource constraints. Historically, local integration is not unprecedented in the Bangladesh context. Bangladesh has shown that it is able to absolve refugees. It did so in the case of the former stateless Urdu speakers – the Biharis – who were granted citizenship in 2008.¹⁷³

In addition, Bangladesh is one of the largest troop contributors to UN Peacekeeping missions, and one their tasks is to ensure the protection of human rights.¹⁷⁴ It could be useful if Bangladesh capitalised on the wealth of knowledge these troops have gained to improve their capacity to protect the Rohingya.

4.2.3 Power

The fact that the GoB only officially registered a small number of refugees could imply that it did not have the capacity to register the others or that it did not believe that it was responsible for doing so, or both. However, the importance of power defined as ‘the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate’ has been clearly demonstrated in the case. Consecutive governments of Bangladesh have taken similar stances towards the Rohingya, stating that the Rohingya’s stay is temporary and that they wish for them to be repatriated to Burma. The GoB does have legitimate domestic concerns and is likely to have pursued this policy because it wanted to deter more Rohingya from entering Bangladesh. In addition, the Cox’s Bazar area is one of the poorest in the country and has a poor local population. Therefore, they could be worried that the Rohingya are working illegally for less than Bangladeshis, which could put a strain on the economy. Bangladesh has seen impressive developments over the last 10 years and may believe that the presence of the Rohingya may dampen this. However, the case has highlighted that over the last five years, the government has engaged more actively with the PRS, for example involving the IOM in dealing with the unregistered Rohingya.

The case has demonstrated that the host has power over the general protection environment of the Rohingya in its territory. The following chain of events highlights this power: In 2011, Bangladesh turned down a \$33 million project targeted to the Rohingya and Bangladeshis living in Cox’s Bazar.

173. UNHCR (2012) p.2.

174. United Nations Peacekeeping (n.d.).

The GoB had the opportunity to improve the protection of Rohingya and the general conditions of the people residing in the area, but declined to do so. This suggests that the host has significant power over the conditions of the PRS. In 2012, they ordered international organisations to stop providing humanitarian assistance to unregistered Rohingya. Following the 2012 and 2016 exoduses, the GoB closed its borders to the fleeing Rohingya, stating they had no obligation to provide protection to the Rohingya. Furthermore, in 2014, they prohibited Rohingya getting married, which quashed any chance of the Rohingya to escape the PRS.

These series of events – including the evidence of arbitrary arrests, ‘released prisoners’ and extortion by the authorities – shows that the host has the power to protect or not protect Rohingya refugees suspended in PRS, regardless of responsibility or capacity. Arguably the most important point this case has demonstrated: they have the power to prevent the international community from providing assistance and protection, which is highly significant.

5. Conclusion

PRS are now averaging 20 years and are presenting increasingly complex policy challenges for the host state and international community alike. The international refugee regime’s frameworks do not address the current protection needs of refugees in PRS. Therefore, this paper asked what determines refugee protection in PRS.

The literature highlighted that refugee protection is difficult to enact in PRS creating protection gaps in respect to both legal and physical protection. Moreover, there are few international community and host state policy approaches that deal specifically with protection in PRS. Based on a review of the existing literature, an analytical framework was developed to explore the question. The analytical framework was formed around the determinants of responsibility, capacity and power. In this context, responsibility refers to legal and policy frameworks as well as moral obligations. Capacity relates to institutions and funding. Finally, power connects to political will.

Regarding responsibility, the literature review highlighted that the host state is responsible by international law to protect refugees. However, host states often feel overburdened therefore shift the responsibility to the UNHCR. The international community has been accused of inaction with regard to protection in PRS, thereby shirking its responsibility. Moreover, both the host state’s and the international community’s capacity determine the level of refugee protection in PRS. Host states are often developing countries, which by definition have less institutional capacity to deal with refugees and provide protection. In addition, a lack of international funding for PRS directly affects the capacity to provide protection. Finally, power and political will were discussed as a determinant of protection. This highlighted that it is the host who decides who enters its territory, and under what circumstances. In addition, the international community has the power to decide if they fund assistance to PRS or exert political pressure.

It was then hypothesised that both responsibility and capacity are important in determining refugee protection in PRS. However, these can only be understood when connected to power and political will i.e. the willingness to protect refugees in PRS. The case of Rohingya refugees in Bangladesh was explored to test the hypothesis. This is a PRS that was highlighted by the UNHCR as needing attention, with some refugees living in a protracted state of limbo for over 30 years. The case discussed three forms of legal protection: refugee status determination, access to legal justice, and commitment to *non-refoulement*. Here one of the most significant issues in the case was brought up: the difference in protection levels between registered and unregistered Rohingya, the former only accounting for 6-10 per cent of the refugees in the PRS. The difference between registered and

unregistered refugees has made an impact on the level of legal protection, especially in terms of access to justice and *refoulement*. In addition, the lack of legal protection has been a causal factor for SGBV, trafficking and terror, which are physical protection concerns.


The international community has demonstrated inaction in providing refugee protection to the Rohingya in PRS. In general, this case has shown that there has been a lack of international funding and the international community has not encouraged Bangladesh to provide greater protection for the Rohingya. However, the case shows that it is difficult to protect refugees in this context, as their actions depend on the host state's decisions. Specifically, the UNHCR has not been able to carry out its mandate to protect refugees as they are only officially permitted to deal with the registered Rohingya. It has not been able to provide protection to the unregistered Rohingya and has had to make compromises with the host state.

Bangladesh has taken responsibility for a small number of Rohingya and does not believe that it is its responsibility to protect the others. This has had a huge impact on the protection of the Rohingya. The basis of refugee protection is formed around a framework that is set out in international law. However, this has proved difficult to enact in PRS. The normative responsibility to protect refugees falls on the host state. However, the case has shown that the host state does not always accept this responsibility, which I have linked to its power and political will. Although international law stipulates the responsibility to protect refugees, there are no institutional standards on *how* to host and protect refugees. Bangladesh was in violation of international law and its responsibility to protect refugees on its territory when it closed its borders and forcibly sent Rohingya back to Burma. However, the case demonstrated that there are no mechanisms in place to enact said responsibility.

Moreover, the case demonstrated that the host has significant power over the conditions in PRS. For example, it declined a \$33 million project aimed at improving conditions in Cox's Bazar as it believed the project was targeting Rohingya not the local community. It has demonstrated the power not to protect Rohingya, but also power over the actions of the international community from providing the Rohingya with assistance and protection. This point homes in on the key factor that underpins this case: the tension between international law and norms. The conundrum is that states are sovereign and have the right to make decisions over what happens within their borders. However, increased universality of human rights and pressure to enforce them encroaches on sovereign space.

In sum, the case showed that the determinants responsibility, capacity and power are interconnected. Interestingly, the case highlighted the importance of host state power and its political will, which are more influential factors than commonly assumed in the literature. The conclusion is thus two-fold: enforcement of international obligations set out in international law should be strengthened to ensure that host states take responsibility to protect refugees. Also, the international community needs to work together with the host state on how they view PRS and refugees in general.

On 25 August 2017, violence directed towards the Rohingya by the Burmese military caused more than 500,000 Rohingya to flee to Bangladesh. This is an unprecedented number of refugees to arrive in Bangladesh and has created a different situation for the host and international community to deal with. This paper does not attempt to include the on-going influx as it is too early to analyse and the situation is rapidly changing. Positively, thus far the host has kept its borders open and not engaged in *refoulement*, provided land for refugees to take shelter on, and collaborated with the international community to provide emergency relief. What is clear is that there will be no quick fixes in this situation and based on previous experiences, it is likely that the more recent arrivals in Bangladesh will become part of the already protracted refugee situation. It is important to reflect on the actions



taken by the host and international community with regard to the existing protracted refugee situation in Bangladesh, not forgetting those Rohingya that have been suspended in limbo for decades. There needs to be long-term protection mechanisms developed and all options need to be explored for example potentially restarting the third country resettlement programme or providing temporary protection status.

Although this piece of research has addressed refugee protection in PRS, the root cause of the PRS, i.e. what caused forced migration in the first instance needs to be addressed by the international community and country of origin. After Burma's long-awaited transition to democracy, Nobel Peace Prize Laureate Aung San Suu Kyi's was hoped to unite the fragmented country. However, her stance on the Rohingya issue has been disappointing. She has continued the anti-Rohingya rhetoric and referred to the Rohingya as unlawful foreigners.¹⁷⁵ In this case, the future does not seem very positive for the Rohingya in Burma.

175. The Interpreter (2016).


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