International law for Protection of Rohigya Refugees



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1. Introduction

Rohingya refugee problem was created in the course of numerous historical trajectories. After the 1st Rohingya influx in 1978 the Rohingya problem has been a burning issue in the Bangladesh concerns. It has become a bone of contention between Bangladesh and Myanmar and is affecting the bilateral issues severely. The recent incidents of more Rohingyas intruding in Bangladesh have again raised many questions. As the international community try to convince Bangladesh into taking and protecting the Rohingya, is there any liability of Bangladesh government to protect them? Defining who is a refugee the paper describes what the basic international legal instrument for protection of refugees. The paper than gives a overview of the Rohingya problem throughout the years. Than this paper argues that the Rohingyas in Bangladesh have the right, under established principles of international refugee law, human rights law, and humanitarian law, not to return to Myanmar until hostilities have ceased and their safety can be guaranteed and examines the obligations of the Myanmar and Bangladeshi governments under international legal norms, and fundamental principles of refugee, human rights, and humanitarian law .but it also recognizes the right of Bangladeshi authority not to accept any more Rohingyas that creates further problems for Bangladesh.. Finally, the paper offers recommendations for addressing the Rohingya crisis that go beyond a mere enunciation of the obligations imposed by international law.

2. Conceptualization: refugee

The definition of a refugee under the article 1 of the 1951 convention relating to the status of refugees status out the basic elements through which it is determined that whether a person falls under the term "refugee". According to the convention, "A refugee is defined in the Refugee Convention and Refugee Protocol as any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fears, is unwilling to return to it."

Under this definition there are four elements incorporated with being a refugee. These are:-

- a) They are outside of country of origin
- b) They are unable or unwilling to avail themselves to the protection of the country of origin
- c) Inability or unwillingness to return to the country of origin foe well founded fear of persecuted.

d) Persecution has to be based on race, religion, nationality, membership of particular social or political opinion.

The Refugee Convention of 1951 authorized and directed the Office of the UNHCR to seek, with the cooperation of involved states, international protection for refugees and permanent solutions to their problems. so, the basic duty to assist the refugees comes to their hands.

3. Major International legal instruments for the protection of refugee:

the major international legal instruments which provide protection to the refugees include charters, declarations, and also specific convention. Some of them are the UN charter, the universal declaration of human rights 1948, the convention relating to the statue of Refugees 1951 and it's protocol 1967, the Geneva conventions, and specific conventions for particular groups like Convention on the Elimination of All Forms of Discrimination Against Women (1979"), "the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984")," and "the Convention on the Rights of the Child (1989)".

a. UN charter

The UN charter does not have any specific articles about the refugees however it has very strong commitments to protect and promote basic human rights that also cover rights of all people of the world. The preamble of UN charter expresses the determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," bone of the basic purpose of Un is to "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;" (chapter 1,article 1)² under the UN charter article 13(b) the general assembly is given the duty to work on promoting basic human rights and under article 62(2) the Economic and Social Council (ECOSOC) is entitled to make recommendations on the issue. ECOSOC shall also set up commissions for promotion of human rights.

b. Universal Declaration of Human Rights 1948

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights is the basic document in the field of human rights and reserves the right of all the human beings regardless of their legal status.th preamble of the document claims the inherent right of human beings to "enjoy freedom of speech and belief and freedom from fear and want" and affirms the principle that human beings shall enjoy fundamental

¹ Un charter, page 2

² Ibid, page 3

³ Universal declaration of Human rights.

rights and freedoms without discrimination. The document has 30 articles describing the basic human rights; expanding from the "right to live" to "right to freedom of association". Under article 14(1) it states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." And article 15 states that everyone has the right to nationality and that no one should be denied of nationality. More or less these declarations covers major issues of human rights and works as the basic instrument based on which many more instruments have been set up.

c. Convention Relating to the Status of Refugees 1951

To address the question of the millions of refugee in the war torn Europe, the UN organized a conference in the Geneva, the outcome of this conference is the UN Convention Relating to the Status of Refugees 1951, and it came into force in 22 April 1954. The convention is the principal legal instrument for the rights and the obligations of refugees. The 1951 convention is elaboration of the rights of the refugee derived from the 1948 universal declaration of human rights. It has 6 chapter and 46 articles, defining the conditions under which a person will be called refugee the convention discusses the different rights of refugee and put binding obligation parties of the convention to provide those rights.

d. The Protocol Relating to the Status of the Refugees 1967

The 1967 protocol relating to the status of the refugee is basically an instrument to update the 1951 convention, and it sets to remove the limitations of the previous document. The definition of refugees provided by the 1951 convention was focused on the European problems. The 1967 protocol removes the geographical barrier of the convention and provide broader definition of will be considered as refugee.

e. Geneva conventions

The Geneva conventions are the combined name for the four convention 4 conventions each relating to different aspects of human right during the war and wartime behavior. Among them the 4th Geneva Convention relating to "protection of civilian Persons in time of War 1949" is a significant convention for the protection of human rights. This convention defines the humanitarian protections of a civilian in a war zone and outlaws the practice of total war. There are currently of the 4 conventions. Together the Geneva conventions are concluded into customary international law making them binding on the non-signatories when they engage into armed conflicts.

4.The Rohingya story: from past to present

The root of the problem in repatriation of the refugees was their identity. Who were the Rohingyas? The word" Rohingya" is derived from "Rohang", the ancient name of the Arakan province of Myanmar. Around 40% percent of the populations are Muslims in the province. Although Muslims have lived in the Arakan province of Burma since the 13th century with the arrivals of Arab traders

in the Arakan/Bengal coast, the Rohingyas were relatively recent settlers. They were ethnically Bengalis from Chittagong region who had migrated to the Arakan over many decades in search of work and had settled there. They were different from the Arakanese in that they were Muslim, spoke Chittagonian dialect (with some variation), and followed the culture of the land they had migrated from. The local Arakanese, who are called Rakhines and Buddhist by religion, used the migrants as farm workers, and over time allowed them to settle in groups in the villages. More recent migrants maintained links with their extended families in Cox's Bazar region and frequently travelled between two territories. The Burmese treated the Rohingya people differently, terming them as foreigners and sometimes as illegal immigrants.

The crisis of 1978 began when the Burmese government undertook a major campaign against the Rakhine opposition groups, particularly the Arakan Communist Party, the Arakan Independence Organization and the Arakan National Liberation Front, as well as the Rohingya guerrillas, then referred to as the mujahidin. This was followed by a major military operation in Arakan called "King Dragon". People in small villages were uprooted and concentrated in fenced stockades. The result was that we had over 200,000 of the so called Rohingyas in our hands, and we had no way to settle them in our already overpopulated lands.

The tide would turn again a decade later in 1991, and we were back to square one. We would again have an influx of over 250,000 Rohingyas crowding our borders along Cox's Bazar-Teknaf corridor citing the same complaints of forced labour, land confiscation, religious intolerance, rape, and other forms of persecution by the Myanmar military regime. They were accommodated in 17 camps and gradually sent back to Myanmar. The difference between the crisis of 1991 and the one 10 years before was that we were able to solve our 1978 problem tactfully within a year, but we are still struggling with the subsequent adversity even to this day. About a residual group of 21,000 refugees continue to remain in two camps in Bangladesh without any immediate prospect of a durable solution. Rohingyas crossing over into Bangladesh have become a regular phenomenon. Official records show they pushed back at least 200 Rohingyas every month from January to May this year. According to the locals of Teknaf, incidents of Rohingya entering Teknaf increase during three different times a year: January-February, October-November and before the holy month of Ramadan.⁵

Recently, Myanmar's western state of Arakan (Rakhine) is again burning. In Mrauk-U, the former capital of the independent kingdom of Arakan, hundreds of young Rakhine Buddhist men were on the march: packed on the backs of pickups, on motorcycles, on trishaws, tuk-tuks and bicycles, but mostly on foot. They carried spears, swords, cleavers, bamboo staves, slingshots, crossbows and

⁴. On Myanmar refugee question, see for further studies, Muhammad Shamsul Huq, Bangladesh in International Politics, 1993, pp. 135-145, (The University Press Limited, Dhaka).

⁵ .Barua Dwaipayan remarks on Rohingya issue titled "The Debate over the Rohingya Issue" at http://www.thedailystar.net/forum/2011/December/accelerated.htm accessed on 29.10.12

the occasional petrol bomb. Their target: the unarmed Rohingya Muslims. As the Economist (Nov 3, 2012) of the UK noted, one Buddhist terrorist tugged at an imaginary beard and made a grisly throat-cutting gesture. It is feared that in the last week of October, at least 5,000 Rohingya homes were burned to ashes. Satellite imagery shows the utter destruction of a Muslim quarter of the coastal town of Kyaukphyu, from where oil-and-gas pipelines are to cross Myanmar to China. In this latest genocidal campaign, the Muslim villages and localities in townships are cordoned off and fire bombed.

This trend alarms us about further push-in of Rohingyas in our country.

4. Status and Rights of Rohingya Refugees under International law

It has been verified that the Rohingyas are both stateless and refugees. The causes to their refugee hood can be categorized as primary factors (as enumerated in the 1951 Convention), secondary factors (as recognized in the 1969 OAU Convention), and auxiliary factors (such as economic, ecological and demographic change). The rejection of citizenship rights, denial of freedom of movement, expulsion campaigns, forced labour, removal from their lands and property, violence and physical torture contributed to the making of the Rohingyas stateless and refugees. Now we will examine applicable principles of international refugee, human rights, and humanitarian law, for the Rohingya refugees both as stipulated by treaty and as established under customary international law.

a. Refugee law (Convention relating to the Status of Refugees 1951 and its 1967 Protocol)

The most far-reaching instruments to address the plight and defense of refugees are the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol (the Refugee Protocol). Founded on the principle of *nonrefoulement*, international refugee conventions focus on protecting refugees from forcible return to a place-usually the region or state they fled-where they would likely face further harm or persecution.

In addition to defining who is a "refugee," the Refugee Convention stipulates that countries must safeguard the basic human rights of refugees within their control, without discrimination by race, religion, or national origin. The rights most of concern to humanitarian refugees and temporary asylum-seekers relate to religious freedom, property, freedom of association, welfare, administrative assistance, and freedom of movement.⁷

⁶ . Siddiqui, Dr Habib, "CURRENT SITUATION INSIDE ARAKAN :Genocide of the Rohingyas of Myanmar" in *NEW AGE* (Editorial) available at www.newage.com.bd accessed on 5.11.12

⁷Ragland, Thomas K. ," Burma's Rohingyas in Crisis: Protection of "Humanitarian" Refugees under International Law", boston college third world journal, vol 2, issue 1

The most important provision of the Refugee Convention is Article 33(1), which provides that "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." ⁸While this definition of *nonrefoulement* articulates an extremely important guarantee, it suffers from two basic shortcomings. First, Article 33 is binding only on signatories to the Refugee Convention and Protocol. Second, the article fails to grant a specific right to asylum from persecution. Neither Burma nor Bangladesh has signed the Refugee Convention or Refugee Protocol. So, Bangladesh is not bound to give the Rohingyas these protections.

b. Human rights law(UN charter and the universal declaration of human rights)

United Nations Charter provides the primary legal source for many subsequent human rights conventions and agreements, and it is the principal international document that both Myanmar and Bangladesh have signed, so it's the main legal framework the Rohingya refugees can earn protection. The UN Charter requires member countries to work individually and jointly to promote higher living standards, solutions to international humanitarian problems, and universal respect for human rights, without discrimination on account of race, sex, language, or religion. The principal document in this area of law is the Universal Declaration of Human Rights, "a common standard of achievement for all peoples and all nations," which sets forth many of the basic canons of international law. The significance of the Universal Declaration for refugees, asylum seekers, and displaced persons lies in the fact that it aims at unconditional guarantees in contrast to the limited or conditional guarantees under refugee or humanitarian law. The statutes and policies of any single sovereignty, therefore, cannot restrict human rights laws applicable to refugees. In addition, the Universal Declaration recognizes a broader general right to asylum than the one set forth in the Refugee Convention and Refugee Protocol. Several provisions of the Universal Declaration apply to refugees in general, and are relevant to the Rohingyas' situation in particular:

Article 1. All human beings are born free and equal in dignity and rights;

Article 3. Everyone has the right to life, liberty, and security of person;

Article 5. No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment;

Article 13.2. Everyone has the right to leave any country, including his own, and to return to his country;

Article 14.1. Everyone has the right to seek and to enjoy in other countries asylum from persecution;

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⁸ Convention relating to the Status of Refugees,page 9

⁹ Universal Declaration of Human Rights

Article 17. Everyone has the right to own property No one shall be arbitrarily deprived of his property;

Article 18. Everyone has the right to freedom of thought, conscience, and religion . . . [and] to manifest his religion or belief in teaching, practice, worship and observance.¹⁰

Unfortunately, the instrument is neither a constitutional document nor a legally binding treaty, and-absent state cooperation and compliance- its principles lack legal effect. The lack of enforcement power greatly decreases the Universal Declaration's value in an actual refugee crisis. The United Nations adopted two other instruments in 1966 to effectuate the Universal Declaration's aspirational recommendations: "the International Covenant on Civil and Political Rights" and the "International Covenant on Economic, Social, and Cultural Rights". States that are party to the Covenants are legally bound by each document's terms, including the provisions relating to refugee protection. Both Myanmar and Bangladesh have signed the U.N. Charter, thereby pledging to achieve "the promotion of universal respect for and observance of human rights and fundamental freedoms" as set forth in the Universal Declaration of Human Rights. But Neither state has signed the two Conventions that further detail the Universal Declaration's principles. Several other international documents contain terms that pertain to the rights of refugees, such as the "Convention on the Elimination of All Forms of Discrimination Against Women (1979"), "the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984"), "the Body of Principles for the Protection of All Persons Under Any Form of Detention (1988"), and "the Convention on the Rights of the Child (1989)". In 1991, under pressure from the United Nations Children's Fund (UNICEF), Burma signed and ratified the Convention on the Rights of the Child. Bangladesh is party to the CEDAW and therefore have the obligation to protect the Rohingya women. Neither Myanmar nor Bangladeshi authorities, however, have signed most of these international treaties. But the protection under the UN charter and Universal declaration of human rights 1948 are applicable to Rohingya refugees.

c. Humanitarian law (Geneva conventions)

Humanitarian agreements, such as the Geneva Conventions of 1949 and the Protocols Additional to the Geneva Conventions, primarily shield civilian noncombatants who have been displaced by armed conflict. The Geneva Conventions provide widely accepted rules prohibiting violence to physical and mental well-being, torture, mutilation or other cruel treatment, murder, and outrages against personal dignity such as rape or indecent assault. In addition, civilian noncombatants have a legal right to humanitarian assistance, as well as a humanitarian right of *nonrefoulement* and its corresponding guarantee of temporary asylum. Bangladesh is a signatory of the Geneva conventions and is obliged to protect the Rohingyas as human beings. Myanmar also has signed the Geneva Conventions, albeit without the two important protocols relating to the protection of

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¹⁰ Universal Declaration of Human Rights.

victims of international and internal armed conflicts. So, Myanmar can be hold to answer the maltreatment of Rohingyas in their own country.

Customary International Law

Treaty law, although extensive, fails to address many issues of concern to the international community, such as the protection of persons in refugee-type situations who do not satisfy the Refugee Convention's individualized persecution definition¹¹. In order to locate legal protections for refugees in states not party to the international conventions of refugee, human rights, and humanitarian law, we look at the relevant provisions of customary international law. certain human rights may now be regarded as having entered into the category of customary international law in the light of state practice. These would certainly include the prohibition of torture, genocide and slavery and the principle of non-discrimination. ¹²Custom is often called upon to fill the gaps that exist in codified international law. According to the Statute of the International Court of Justice, customary international law is the general practice of states accepted as law, ¹³ and "embodies those general and consistent state practices which states follow from a sense of legal obligation."14 Although regarded as a secondary source of international law, after established treaty rules, custom is more generally applicable to state practices than are the international agreements executed by government or party officials. in the area of human rights, the law has identified a number of specific principles as jus cogens, peremptory norms of conduct from which no deviation is allowed. Hence, a nation may be held to be in breach of inviolable standards of customary international law if it practices, encourages, or condones: "(a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention; or (f) systematic racial discrimination."¹⁵ These fundamental violations of individual physical integrity are legally prohibited even if sanctioned by international agreements or by a country's positive law. Myanmar's military junta has systematically committed each of these violations in army operations directed against the Rohingyas of Arakan. So, Myanmar can be obliged by the international community for violating these laws.

6. Bangladesh's legal obligation towards the Rohingyas

Bangladesh is not a signatory of the 1951 Convention and the 1967 Protocol. However, it is party to a number of international human rights instruments, the four Geneva Conventions of 1949 and International Conventions. Bangladesh is bound to offer protection to the refugees by Article 5 of the Universal Declaration of Human Rights (UDHR); Article 2 of the International Covenant on Civil and Political Rights (ICCPR); Article 22 of the Convention of the Rights of the Child (CRC); Articles 2, 3 (this is paralleled to *non-refoulement* of the 1951 Convention) and 6 of the Convention

¹¹ Of.cit

¹² Shaw, Malcolm N. 2004. "International law". Cambridge University, New York

¹³ Statute of the International Court of Justice, art. 38(1)(b).

¹⁴ ibid

¹⁵ Op.sit page 29

against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment; Article 44 and 45 of the fourth Geneva Conventions. Most importantly, Bangladesh's Constitution in its Preamble pledges to protect fundamental human rights of all. So, Bangladesh has obligation to protect those Rohingyas who are already living in Bangladesh.

But there several issues that needs to be dealt with when it comes to non refoulement. The principle of non-refoulement is the customary international law but there are exceptions as well. Moreover, the Rohingyas who are crossing the border in recent times are boat refugees, and in reality, State practice is different regarding this issue. The theory and practice of the principle of non-refoulement is not the same, particularly in the case of boat refugee. Further, in practice, State sovereignty, State policy, and national security always get privilege over customary international law.

While the principle of non-refoulement is basic, it is recognized that there may be certain legitimate exceptions to the principle. Article 33 (2) of the 1951 Convention provides that the benefit of the non-refoulement principle may not be claimed by a refugee. According to the Article-33(2) refugees can exceptionally be returned on two grounds: (i) in case of threat to the national security of the host country; and (ii) in case their proven criminal nature and record constitute a danger to the community. ¹⁶

Bangladesh being a over populated country cannot have the luxury to invite a large number of refugees into our country. According to UNHCR there are more than 203,000 Rohingyas living in the two camps and outside the camp as well. Only 30000 of them are assisted by UNHCR. The rest has to serve their selves. These people are creating a extra pressure on the local economy and job market. More over there are several cases where the Rohingyas are accused of illegal and criminal activities in those areas. So, an influx of even more refugees will create an extra pressure on the country and Bangladesh has every right to stop the influx.

At the present circumstances we notice, Rohingya refugees are fleeing into territory of Bangladesh by boat. In this scenario, arrival of asylum seekers by boat puts at issue not only the interpretation of non-refoulement, but also the extent of freedom of navigation and coastal State's right to control its territories.

In many countries there are cases where the country have denied the refugees entrance, because of their unwillingness to grant refuge to the people. United states denial of refugee to Haitian refugees and Australia's expel of the incident of the Norwegian ship MV Tampa are proof of this. The Rohingyas who fled to Thailand were also denied of access.

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¹⁶ Of.cit

So, it rather the obligation of Myanmar who have created the Rohingya problem to solve it as soon as possible, the international community should also influence the junta government of Myanmar to stop ethnic cleansing against the Rohingyas of Arakan.

7. Possible ways to solve the issue of the Rohingya refugees

It may be borne in mind that refugee issues have impact on social and economic costs and require pragmatic approach. In dealing with the crisis, the paper focuses on three aspects for the existing Rohingyas:

- (a) Making a proper framework and laws for the management of the refugees in Bangladesh.
- (b) Confining the refugees in designated camps and keeping them under strict security to prevent their melting away into the neighboring villages;
- (c) Ensuring food, shelter and medicine in the camps enough for survival; and
- (d) Arranging the repatriation of the refugees with the Myanmar authorities without internationalizing the issue.

But these are not easy tasks. Many of these efforts have not achieved the desired level of success.

Repatriation is not the only solution for recent trends. It is the problem of Myanmar that they have created, a situation where a section of their people has to flee across the border for saving their life .Bangladesh has so far done very little in my opinion. Bangladesh either should go for a bilateral diplomatic approach or for an international approach. Diplomatically, why can we not talk to our friends who are very influential, to impress upon the Myanmar government to solve the problem once for all? Otherwise this will recur. If again any influx happens due to persecution in Rakhine state then a serious moral question will arise for Bangladesh and the government will have to take a position under the glare of the world media. The Foreign Ministry might consider holding a consultation with the people who have dealt with Myanmar as well as Rohingya issue.

It seems that Myanmar has acknowledged the persecution of its stateless Rohingya Muslim minority and is considering giving citizenship to thousands of members of the group as a first step to finding a solution to the conflict with local Rakhine Buddhists.¹⁸

¹⁷. See for a in depth discussion on Myanmar's current situation available at http://www.samakal.com.bd/details.php?news=20&action=main&menu_type&option=single&news_id=303294& pub_no=1215&type#.UJOcq6d7fko_accessed on 02.11.12

^{18 .}On Myanmar refugee current situation , please see for details http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/9648329/Burma-considers-citizenship-for-Rohingya-Muslims.html accessed on 03.11.12

8. Concluding Remarks

Refugees face multi-pronged psycho-social and human security threats. Four major dimensions of security have been identified in this study—politico-military, economic, social and environmental. While primary responsibility for refugee security rests with the host government, it has been repeatedly stressed that the problem of security should be an issue for which a multiplicity of actors share responsibility—refugees themselves, local populations, country of origin, host country, donor states, regional organizations, the UNHCR its operational partners. For a resolution of the problems faced by the stateless Rohingya refugees, a multi-faceted approach is required. In fact, it is important to materialize a collaborative effort between the government and civil society to contain the social and economic impact of protracted refugee situation. The international community needs to approach the stateless cum refugee issue in the context of broader development agenda and international law. The commitment of all stakeholders, including the government, humanitarian agencies, local communities and donors, is required. Cooperative and combined effort can assist in alleviating problems and assist refugees to participate to the fullest extent possible in their life in Bangladesh and following their return in Myanmar.

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