

Protection of Refugees in the Non-Signatory States to the 1951 Refugee Convention: Bangladesh Case Study

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1 Introduction

The genesis of international refugee law suggests that protection of humans outside their country or habitual residence is one of the most daunting tasks and subject to diverse approaches of multi-stakeholders. The 1951 Refugee Convention¹ and its 1967 Protocol² (hereinafter jointly referred as ‘Geneva Convention and its Protocol’) are key elements of international law on the protection of refugees across the world.³ A significant number of states have either signed or ratified the Geneva Convention and its Protocol.⁴ However, the world’s largest refugee-hosting countries, mostly from Asia, have not done so. Bangladesh, as a non-signatory state to the Geneva Convention and its Protocol, has been dealing with large and protracted refugee crises since 1972. Importantly, Bangladesh has ratified a number of international human rights conventions and included language in its constitution to ensure that the rights and responsibilities outlined in the UN Charter are respected and that foreign nationals living in the country are afforded the same legal

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1 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter ‘1951 Refugee Convention’].

2 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter ‘1967 Protocol’].

3 The 1951 Refugee Convention is designed to become as universal as possible, constitutes codification of the law relating to the legal status of refugees, defines refugees, and creates obligation upon states to ensure their rights and obligations towards host country. Rights guaranteed under the Convention encompass the right not to be expelled except under certain conditions, right to housing, right to education, right not to be punished for illegal entry into the territory of a contracting State, right to public relief and assistance, right to work, and right to freedom of religion etc.

4 Around 44 states hosting significant number of refugees have not signed or ratified the Geneva Convention and its Protocol. See Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda*, 33 INTERNATIONAL JOURNAL OF REFUGEE LAW 188, 189 (2021).

protections as native Bangladeshis.⁵ Therefore, the Constitution of Bangladesh (CoB) has several clauses on equal protection and safeguards of law for all, regardless of whether they are citizens or not, and it recognizes a body of international law which provides the framework for protecting refugees.⁶ Likewise, among the reasons for many other states not being party to the Geneva Convention and its Protocol are, *inter alia*, state security concerns, fear of the compliance with ‘international humanitarian standards,’ domestic politics, and diplomatic issues.⁷ Hence, mediating between the “humanitarian impulses and obligations with their domestic needs and political realities” of the non-signatory states is extremely challenging for the international community in protecting refugees. Conversely, it would be imperfect to draw the conclusion that membership of the Geneva Convention and its Protocol would inevitably yield better protection for the refugees worldwide.⁸ This article initially delves into the array of protection mandates available in international law and opportunity of constitutionalism of the non-signatory states to 1951 Refugee Convention before analyzing Bangladesh’s state practices within this periphery.

2 **Refugee Protection Interface in International Law and Constitutionalism of the Non-Signatory States to the 1951 Refugee Convention**

Over the years, human rights legislation has been crucial in shaping and improving the Refugee Convention as a whole, as well as refugee law within the protection framework.⁹ Several human rights instruments have expanded the scope of refugee legislation and moved towards safeguarding the rights of refugees.¹⁰ For example, Article 5 of the Universal Declaration of Human Right (UDHR), Articles 2 and 16 of the Convention Against Torture (CAT), and

5 Md. Kamrul Hasan Arif, *The Rohingya Refugees in Bangladesh: Non-Refoulement and Legal Obligation Under National and International Law*, 27 INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 855, 857 (2020).

6 *Id.*

7 Janmyr, *supra* note 4, at 188.

8 B.S. Chimni, *The Legal Condition of Refugees in India*, 7 JOURNAL OF REFUGEE STUDIES 378, 381–383 (1994).

9 Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, in HUMAN RIGHTS AND IMMIGRATION 19 (Ruth Rubio-Marín ed., 2014).

10 UNHCR, Training Module RLD5 – Human Rights and Refugee Protection (Oct. 1995), <https://www.unhcr.org/media/training-module-rld5-human-rights-and-refugee-protection>.

Article 7 of the International Covenant on Civil and Political Right (ICCPR) all provide protection for the human rights of refugees from torture and other cruel, inhuman, or degrading treatment, and they do so through the establishment of congruent principles. Hathaway emphasized that the Geneva Convention was not drafted to address worldwide refugee problems but rather to meet the needs of European countries,¹¹ implying that its provisions were direct results of the interests of traditionally powerful states, leading us to infer as to how the negotiations played out. When it comes to the refugee protection regime, human rights legislation has grown in its applicability and filled in the small vacuums left by the Refugee Convention.¹² Even more crucially, the UN Human Rights Committee's General Comment No. 31 on both ICCPR and ICESCR reiterated that the rights guaranteed by the twin Covenants are extended to individuals of any nationality, including refugees, asylum-seekers, and stateless people, consequently broadening their application in the context of refugees.¹³ Thus, protection of refugees in non-signatory states is nevertheless grounded in premise in both international human rights law and international humanitarian law simultaneously.¹⁴ These two regimes, along with regional refugee protection mechanisms in different continents and global forums on refugee protection, can resuscitate protection portfolio for the refugees around the world.

However, the right to seek and enjoy asylum is elaborately specified in several constitutions.¹⁵ As an example, the right to seek and enjoy asylum is defined in various constitutions in ways that mirror the 1951 Refugee Convention. Some constitutions enshrine the right in terms of people facing persecution, while others emphasize its importance in national liberation, human rights, fundamental freedoms, and the defense of democracy.¹⁶ Allegiance to the 1951

11 James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARVARD INTERNATIONAL LAW JOURNAL 129, 134 (1990).

12 JAMES C. HATHAWAY, *The Evolution of the Refugee Rights Regime*, in THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 75, 120 (2005).

13 UN Human Rights Committee [HRC], General Comment No. 31 (80), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <https://www.refworld.org/legal/general/hrc/2004/en/52451>.

14 Article 73 of the Additional Protocol of the Fourth Geneva Conventions and all relevant International Humanitarian Law (IHL) norms. The IHL protects the refugees, excluding those severely involved in war crimes, irrespective of their status. Only those areas covered by Parts I and III of the Fourth Convention are considered for this purpose.

15 FRANCES NICHOLSON & JUDITH KUMIN, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS: HANDBOOK FOR PARLIAMENTARIANS NO. 27, at 28 (UNHCR Division of International Protection et al. eds., 2017).

16 *Id.* at 29.

Refugee Convention and other international customary law standards, as well as other international rules and treaties, is more broadly stated in certain constitutions as a condition for granting asylum. While some constitutions, like the constitution of Benin, do not specifically include a right to asylum, they acknowledge it indirectly by stating that the UDHR applies or by alluding to regional human rights commitments.¹⁷ Because not all human rights guaranteed by the constitution are exclusive to citizens, the constitution may provide protection to any legitimate asylum seeker.¹⁸

Turning to the function of United Nations High Commissioner for Refugees (UNHCR) in non-signatory States is not impossible. Rather most of these non-signatory nations often resort to the bilateral Memorandum of Understanding (MOU) with UNHCR where 'core refugee protection principles are usually incorporated.'¹⁹ Therefore, arguably MOUs have immense potential to hook an "important link between non-signatory States and the Refugee Convention."²⁰ Although it is primarily the responsibility of states to carry out Refugee Status Determination (RSD), the UNHCR may carry out RSD under its mandate in cases where a state is not a signatory to the 1951 Refugee Convention and/or does not have an effective and equitable national asylum procedure.²¹ RSD is frequently a crucial procedure that helps refugees to realize their rights under international law and gives them an advantage over others who do not have legal refugee status.²² Additionally, non-signatory states have an obligation under customary international law to respect the principle of *non-refoulement*.²³ Nonetheless, derogation from *non-refoulement* is only permissible when the situation precisely matches the criteria specified in the proviso of Article 33 of the 1951 Refugee Convention.²⁴ UNHCR is primarily entitled to intervene with

17 *Id.* at 28.

18 Jobair Alam, *Refugee Protection Under the Constitution of Bangladesh: The Rohingya Refugees in Context*, in *THE CONSTITUTIONAL LAW OF BANGLADESH: PROGRESSION AND TRANSFORMATION AT ITS 50TH ANNIVERSARY* 283, 286 (M Rafiqul Islam & Muhammad Ekramul Haque eds., 2023).

19 Maja Janmyr, *Non-Signatory States and the International Refugee Regime*, *FORCED MIGRATION REVIEW*, July 2021, at 39, 40.

20 *Id.*

21 UNHCR, *Refugee Status Determination*, <https://www.unhcr.org/what-we-do/protect-human-rights/protection/refugee-status-determination#:~:text=Refugee%20Status%20Determination%2C%20or%20RSD%2C%20is%20the%20legal,helping%20refugees%20realize%20their%20rights%20under%20international%20law>.

22 Alam, *supra* note 18, at 286–287.

23 Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 87, 140 (Erika Feller et al. eds., 2003).

24 *Id.* at 133.

relevant authorities in the event of a breach of the non-refoulement obligation, even if by the non-signatory state. UNHCR's Executive Committee (ExCom) has constantly played a vital role in interpreting the emerging concept of refugee protection, with which Bangladesh has been associated since 1995.²⁵

However, in states that have not signed the 1951 Refugee Convention, incidents of maritime pushbacks and refoulment are on the rise due to a lack of legislation, the adoption of stringent regulations (such as refusing secure disembarkation or entry to borders), and the restriction of protection space and accessibility for asylum seekers. Despite the prevalence of such factors, non-signatory states of the 1951 Refugee Convention with their indigenous and homegrown techniques have been handling bigger and protracted refugee crisis of recent times with arguable success. Hence, it is possible to get a more nuanced picture of the relationship between international refugee law and non-signatory states if we look more closely at the practice of, and interaction between, actors on the global, national, and local level.²⁶ However, Cantor argues that state practices of signatory states such as Australia, Canada, New Zealand, the United States, and countries in Europe's western regions receive more coverage in refugee scholarship.²⁷ He points out that these countries only house a small percentage of the world's refugees, and that their legal precedents thus only constitute only a tiny portion of international refugee law.²⁸

The noticeable participation of non-signatory states in the 2016 New York Declaration for Refugees and Migrants, the 2018 Global Compact on Refugees (GCR), and the first Global Refugee Forum in late 2019 is promising for refugee protection in the non-signatory states.²⁹ The New York Declaration, which emphasized states' interest in border control and management, also emphasized that measures at the border must be "without prejudice to the right to seek asylum (para. 27)."³⁰ In contrast, the GCR expands upon the established legal framework affirmed in the Declaration. GCR reiterated that the Geneva Convention and its Protocol are regarded as "the foundation of the international refugee protection regime (para. 65)."³¹ References to international

25 Arif, *supra* note 5, at 861.

26 *Id.*

27 David James Cantor, *The End of Refugee Law?*, 9 JOURNAL OF HUMAN RIGHTS PRACTICE 203, 207 (2017).

28 *Id.*

29 Janmyr, *supra* note 19, at 41 (stating that 181 states are party to the GCR).

30 Guy S Goodwin-Gill, *The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region*, 30 INTERNATIONAL JOURNAL OF REFUGEE LAW 674, 677–678 (2018).

31 *Id.* at 678.

humanitarian law and human rights law can be interpreted as a clear commitment to “ensure ... protection for all who need it” (para. 66). However, it is unclear from the actual implementation of Global Compacts whether this will be sufficient to close any protection gaps faced by individuals or groups who may be displaced.³²

Refugees are entitled to diverse types of protections which can be universal. Some protections are conditional on the submission of an official asylum claim, while others are granted upon receipt of refugee status, and still, others are conditional on the completion of a residency requirement. However, the right to health, education, and medical care guaranteed by the 1951 treaty applies to refugees in all circumstances.³³ Therefore, the following segment of this paper investigates the practices of Bangladesh in protecting refugees as a non-signatory state and the legal regime emanating from both domestic and international law. Additionally, it analyzes the interventions of the Supreme Court of Bangladesh regarding cross-cutting domains of human rights and refugee rights.

3 The Case of Bangladesh

Pre- and post-independent Bangladesh, similar to many other South Asian nations, bears the legacy of fulfilling humanitarian obligations to refugees living in its territory. It has often adhered to customary international law obligations, irrespective of the fact that it does not have any dedicated domestic legislation nor is it a member of any international treaties or conventions. As of October 2023, 967,842 Rohingya refugees³⁴ were registered in 33 camps in Cox’s Bazar district and Bhasan Char of Noakhali district of Bangladesh,³⁵ making it the world’s most densely populated area.³⁶ The refugee influx from Myanmar to Bangladesh has distinctive features and has been characterized by a unique socio-economic reality over the years. The context and contour of a hosting

³² *Id.*

³³ Alam, *supra* note 18, at 287.

³⁴ Officially they are not named as refugees.

³⁵ The number includes 35,519 who arrived in the 1990s and 716,915 who arrived after Aug. 2017. See Operational Data Portal, Bangladesh, <https://data.unhcr.org/en/country/bgd>.

³⁶ Indrajit Sharma, *Indefinite Hosting of Rohingya Refugees a Growing Concern for Bangladesh*, THE DIPLOMAT (July 9, 2021), <https://thediplomat.com/2021/07/indefinite-hosting-of-rohingya-refugees-a-growing-concern-for-bangladesh/> (“About 40,000 to 70,000 people per square kilometer are living in camps side by side, which is more than 40 times the average population density of Bangladesh.”).

state, as a non-signatory state to the 1951 Refugee Convention,³⁷ had been instrumental in dealing with the recurrent exodus of Rohingya refugees. Each of the separate influxes has given rise to a dynamic *modus operandi* in the legal regime of refugee protection inside Bangladesh. With the economic growth and presence of strong civil society organizations along with the evolving role of judiciary and *quasi*-judicial bodies, the protection of Rohingya refugees has ushered in new methods of homegrown formulae in Bangladesh.³⁸ Likewise, neighborhood non-signatory state India's *ad hoc* regime³⁹ on refugee protection, Bangladesh's unique venture of the protection of Rohingya has gotten appropriately timed mixed acceptance from different corners.

One of the visible changes in Bangladesh approach to refugee protection is "relocating Rohingya refugees from Cox's Bazar to a remote island called Bhashan Char."⁴⁰ Apart from such *ex-situ* initiatives, Refugee Relief and Repatriation Commissioner (RRRC) under the Ministry of Disaster Management and Relief of Bangladesh is assigned to administer the registered refugee operation in the Cox's Bazar. In October 2017, the government formed a National Task Force (NTF) to oversee and guide the response to the Rohingya crisis. The NTF was chaired by the Ministry of Foreign Affairs and comprised of 29 other ministries and entities. It was based on the 2013 National Strategy on Myanmar Refugees and Undocumented Myanmar Nationals.⁴¹ District commissioners in Cox's Bazar are primarily responsible for operationally coordinating responses for Bangladeshi host communities, including security and safety measures and disaster risk reduction, after the 2017 influx.⁴² Simultaneously, UN agencies,

37 In this case it is Bangladesh.

38 Refugee and Migratory Movements Research Unit (RMMRU) v. Government of Bangladesh, Writ Petition No. 10504 of 2016 (Bangladesh Supreme Court decided May 31, 2017).

39 Even the Indian Judiciary has interpreted fundamental refugee protection non-refoulement obligation from very narrow and securitized approaches. See Aishwarya Birla, *Evaluating the Indian Refugee Law Regime: How Has the Judiciary Responded to Refugee Claims in Light of International Law Obligations, and How Can It Do Better?*, 35 INTERNATIONAL JOURNAL OF REFUGEE LAW 81, 82 (2023) ("In *Mohammad Salimullah*, the [Supreme] court of [India] ruled that refugees did not have the right to *non-refoulement* and that the government had an unrestricted power to deport.").

40 Recently, some 30,881 Rohingya out of target of 100,000 have been relocated to the island so far to decongest the refugee camps in Cox's Bazar. See Operational Data Portal, *supra* note 35; However, international refugee watchdogs (e.g. UNHCR and other human rights organization) have criticized such relocation. See Sharma, *supra* note 36 (stating that "the island, which emerged from the sea 20 years ago and has never been inhabited, is flood-prone and vulnerable to cyclones.").

41 UNHCR, Refugee Policy Review Framework Country Summary as at 30 June 2020: Bangladesh 4 (Mar. 10, 2022), <https://data.unhcr.org/en/documents/download/91876>.

42 *Id.* at 4–5.

namely World Food Programme (WFP) and UNHCR, are entrusted with coordinating humanitarian assistance for the refugees. For each camp, Camp-In-Charge (CiC) is assigned as the legal and administrative guardian⁴³ of the refugees. Thus, a 'massive humanitarian response' has been developed through the cooperation of Bangladeshi and international NGOs and the UN 'substantial humanitarian' rollout.⁴⁴ On the other hand, regional organizations like SAARC and ASEAN are taking a passive stance, as they believe in the principles of their charter, which include respecting the independence, sovereignty, equality, territorial integrity, and national identity of every nation.⁴⁵

As a non-signatory state to the Geneva Convention, Thailand's civil society efforts for refugee protection are remarkable in this regard. The Coalition for the Rights of Refugees and Stateless Persons (CRSP) in Thailand is engaged in 'raising problems,' 'suggesting solutions,' 'offering expertise and implementation support,' advocating for 'national policy reform' and thereby generating sustainable solutions for refugees.⁴⁶ In addition to hosting Rohingya people, Bangladesh has also been supporting approximately 300,000 Bihari people living in the capital Dhaka since independence.⁴⁷ Thus, some mixed experiences from the past to renewed episodes of Rohingya crises have beckoned in a homegrown framework of refugee protection in Bangladesh. Considering demographic and geographical limitations, hosting a staggering number of refugees has not been an easy path for Bangladesh and thus necessitates a robust legal regime to eliminate any form of discrimination perpetrated against them.⁴⁸

43 Mostly chosen from the Bangladesh Civil Service who is to be chief patron of each camp and work under the supervision of the RRRC in Cox's Bazar. The task of the CiC is to the issue of refugee ration books and travel passes, permission to file a police case, and marriage and divorce etc.

44 Brian Barbour, *Beyond Asian Exceptionalism: Refugee Protection in Non-Signatory States*, FORCED MIGRATION REVIEW, July/Aug. 2021, at 42, 43.

45 Goodwin-Gill, *supra* note 30, at 675.

46 Naiyana Thanawattho et al., *Advancing Refugee Rights in Non-Signatory States: The Role of Civil Society in Thailand*, FORCED MIGRATION REVIEW, July/Aug. 2021, at 61, 64–65.

47 Geoffrey Macdonald, *Bangladesh: Urdu-Speaking "Biharis" Seek Recognition, Respect and Rights*, INTERNATIONAL REPUBLICAN INSTITUTE 3 (Feb. 4, 2021), <https://www.iri.org/wp-content/uploads/2022/01/bangladesh-biharis-3.pdf>.

48 Jobair Alam, *The Contemporary Refugee Surge and the Need for a Refugee Law Framework in Bangladesh*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW IN ASIA 145 (Seokwoo Lee ed., 2021).

4 Bangladesh Legal Regime on Refugee Protection

The current legal regime on refugees in Bangladesh ranges from a series of intertwined laws, by-laws, and directives⁴⁹ and explicitly exhibits the dearth of a comprehensive pro-refugee regime. Protection of refugees is no less encompassing compared to the host country's own nationals and that is why almost every genre of laws, policies, judicial decisions, and executive directives of Bangladesh legal system has a cross-cutting effect within it.⁵⁰ In the following segment, we will first analyze the most relevant statutory laws to map the protection landscape in Bangladesh. This will be followed by a critical study on the Bangladesh judicial engagement.

4.1 *Relevant Statutory Laws*

Since Bangladesh does not have its own asylum and refugee protection law, the 1946 Foreigners Act, which governs the entry, exit, and presence of foreigners in the country, is applied to refugees.⁵¹ The entry, stay, and departure of non-Bangladeshi nationals are regulated by this Act. Since all refugees fall under the definition of “foreigner” in Section 2(a) of the Foreigner Act, the law applies to all those who are not citizens of Bangladesh.⁵² Whether they are seeking refuge or are just visiting, all foreigners are treated under antiquated regulations that are not up to date with modern society. When compared to the rights guaranteed by the Constitution and the ever-developing rules and principles under international refugee law, Bangladesh's inadequate statutory framework dealing with refugees stands in stark contrast. The legal structure does not even recognize refugees as a distinct group deserving of special consideration.⁵³

49 These are the governing laws which are applicable to any aliens who enter into Bangladesh for both lawful and unlawful purposes: The Naturalisation Act 1926; the Naturalisation Rules 1961; the Foreigners Act 1946; the Foreigners Order 1951; the Foreigners (Parolees) Order 1965; the Citizenship Act 1951; the Citizenship Rules 1952; the Bangladesh Citizenship (Temporary Provisions) Order 1972; the Bangladesh Citizenship (Temporary Provisions) Rules 1978; the Bangladesh Control of Entry Act 1952; the Registration of Foreigners Act 1939; the Registration of Foreigners Rules 1966; the Passport Act 1920; the Passport Rules 1955; the Bangladesh Passport Order 1973; and the Extradition Act 1974.

50 Especially when Bangladesh is neither party to 1951 Geneva Convention and 1954 Stateless Conventions and nor to their protocols.

51 Nour Mohammad, *Refugee Protection Under the Constitution of Bangladesh: A Brief Overview*, REFUGEE WATCH, June–Dec. 2012, at 141, 153.

52 *Id.*

53 Cantor, *supra* note 27.

The newly arriving Rohingyas are denied refugee status and the associated benefits since they are formally recorded as “Forcibly Displaced Myanmar Nationals (FDMN).”⁵⁴ Bangladesh has officially recognized just over 30,000 Rohingya as refugees who have been residing in two government-run camps, namely Kutupalong and Nayapara.⁵⁵ Registered Rohingya refugees have the potential to be resettled in a third country facilitated by UNHCR, offering them hope for a better life than them. Conversely, FDMNs are more likely to be arrested and subjected to exploitation if their rights to privacy, access to public services, and access to a formal education⁵⁶ are violated. No legal registration of births, deaths, or marriages is permitted for refugees, and even for those who have access to schooling, no formal certification is permitted.⁵⁷ Whereas, everyone born in Bangladesh must have their birth certificate filed, regardless of their ethnicity, religion, caste, clan, or gender, as stated in the Birth and Death Registration Act (2004, revised in 2013).⁵⁸ During the 2017 influx, Cox’s Bazar area birth registrations were suspended for all, which later resumed in 2020 for Rohingyas but through a continuous registration process.⁵⁹ Hence, such “absence of legal recognition of refugee status and a national regulatory framework for handling refugee crises” can potentially be counterproductive in manifold for the countries like Bangladesh.⁶⁰

The Muslim Family Laws Ordinance 1961 (MFLO) applies to all Muslim citizens of Bangladesh and extends throughout the entire territory of Bangladesh. Hence, it incorporates two factors in its jurisdiction: Muslim citizens of Bangladesh and territorial jurisdiction across all of Bangladesh. Thus, it may appear that the MFLO cannot be applied to non-citizen Muslim refugee

54 “Bangladesh is Not My Country”: *The Plight of Rohingya Refugees from Myanmar*, HUMAN RIGHTS WATCH (Aug. 5, 2018), <https://www.hrw.org/report/2018/08/05/bangladesh-not-my-country/plight-rohingya-refugees-myanmar#:~:text=Tens%20of%20thousands%20of%20Rohingya,relocate%20refugees%20to%20safer%20ground>.

55 UNHCR, *Two Camps of Thought on Helping Rohingya in Bangladesh* (Jan. 28, 2013), <https://www.refworld.org/docid/5107aa752.html>.

56 Most recently in 2022, UNHCR is allowed to run primary education services in Myanmar curriculum in limited scale. By expanding access to education, the Myanmar Curriculum was scaled up in Cox’s Bazar and on Bhasan Char, improving literacy and numeracy skills in 2022 and enrolling an additional 37,415 students in formal primary education. The UNHCR and its partners persisted in offering 6,871 students who have not yet switched to the Myanmar curriculum informal schooling.

57 UNHCR, *supra* note 10.

58 The Births and Deaths Registration Act, 2004 (Act No. 29/2004), ch. 2, art. 5(1) (Bangl.).

59 UNHCR, *supra* note 41, at 5.

60 Sumaiya Khair, *Refugee Policy Context Analysis: The Case of Bangladesh*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW IN ASIA* 147 (Seokwoo Lee ed., 2021).

populations living here. However, the MFLO does not determine the jurisdiction of the family court to hear cases related to family matters. The family court has jurisdiction to hear all cases regarding family matters in Bangladesh, regardless of the parties' citizenship or religious belief.⁶¹ As the MFLO does not determine the jurisdiction of the family court, the non-applicability of the MFLO to non-citizens does not affect the court's jurisdiction to hear cases on family matters involving Muslim refugee populations living here. According to the UNHCR factsheet (UNHCR, 'Bangladesh fact sheet', Refugee Policy Review Framework, Country Summary as to 30 June 2020), the wording used in the MFLO has been interpreted as limiting the authority of local courts to consider civil matters involving refugees. Consequently, issues pertaining to family matters filed by refugees are typically not heard by the courts. However, it is submitted that there is actually no legal bar to hear cases regarding family matters, as the jurisdiction of the family court is determined by the Family Court Act, not the MFLO. The Family Court Act allows such jurisdiction, as stated above. In instances where the court must address cases regarding Muslim non-citizens, it may very well make use of laws other than the MFLO to settle disputes and provide remedies.

Bangladesh has enacted many national legislations specifically aimed at preventing gender-based violence, with a particular emphasis on violence against women and girls. The Prevention of Oppression Against Women and Children Act (*Nari o Shishu Nirjatan Damon Ain 2000*, as amended in 2003) criminalizes acts such as dowry kidnapping and rape committed against women and children. Similarly, the Domestic Violence Act 2010 penalizes various forms of abuse, including psychological, physical, sexual, and economic, inflicted upon women and children by their family members. These laws, along with other significant domestic legislation such as the Child Marriage Restraint Act 2017 and Children's Act 2013, apply to all individuals within the country's jurisdiction. However, there are challenges in effectively implementing these laws, and Rohingya refugees face specific obstacles in accessing their protections.⁶²

Similarly, the right to work is regulated through the Bangladesh Labour Act (2006), which does not preclude refugees from claiming legal recourse in case of any violations of rights recognized by it. However, the Bangladesh government restricted FDMNs from participating in the formal labor market or engaging in other forms of wage-earning activities.⁶³ Hence, even laws

61 The Family Courts Ordinance, 1985 (Ordinance No. XVIII/1985) (Bangl.), *repealed by* The Family Court Act, 2023 (Act No. 26/2023) (Bangl.).

62 UNHCR, *supra* note 41, at 6.

63 *Id.* at 2.

governing contracts,⁶⁴ registration,⁶⁵ and property⁶⁶ do not debar refugees to take legal recourse, but Rohingya individuals cannot enjoy them due to their legal status issues.⁶⁷ Conversely, the Legal Aid Act of 2000 has been used to a certain degree to provide refugee protection in Bangladesh.⁶⁸

Another very important statutory law regarding refugee protection is The Prevention and Suppression of Human Trafficking Act 2012 and its Rules 2017, which prescribes spontaneous rescue, rehabilitation and protection by the host state irrespective of citizenship.⁶⁹ Along with this national obligation, Bangladesh is a party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁷⁰ and the 1974 Safety of Life at Sea (SOLAS) Convention,⁷¹ both of which require the rescue of refugees who are being trafficked or dissented at sea. Additionally, the international human rights regime obligates Bangladesh to undertake comprehensive measures based on the principles of equality, non-discrimination, and human dignity, regardless of nationality, race, ethnicity, gender, or political opinion.⁷²

4.2 *Judicial Interpretation of Constitutional Provisions Relevant to Refugee Protection in Bangladesh*

Nevertheless, the ‘*ad hoc*, arbitrary and discretionary system’ of refugee protection in Bangladesh is not devoid of constitutional and human rights mandate. Article 25(c) of the Constitution of Bangladesh obliges the state to “support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism,” which albeit a fundamental principle

64 The Contract Act, 1872 (Act No. 1X/1872) (Bangl.).

65 The Registration Act, 1908 (Act No. XVI/1908) (Bangl.).

66 The Transfer of Property Act, 1882 (Act No. IV/1882) (Bangl.).

67 UNHCR, *supra* note 41, at 6.

68 Tarazi Mohammed Sheikh & Anurodh Koirala, *Responsibilities of States in International Refugee Law: A Retrospective Study in South Asia*, JOURNAL OF GLOBAL RESEARCH & ANALYSIS, Dec. 2022, at 6, 15.

69 UNHCR, *supra* note 41, at 7.

70 U.N. Convention on the Law of the Sea art. 98, Dec. 10, 1982, 1833 U.N.T.S. 397 (“Every State shall require the master of a ship carrying its flag ... to proceed with all possible speed to rescue [of] persons in distress [at sea].”).

71 International Convention for the Safety of Life at Sea, Annex, ch. V, reg. 10, Nov. 1, 1974, 1184 U.N.T.S. 3 (providing that states are under obligation to rescue at sea any ship, similar to the rule provided in UNCLOS 1982).

72 Bangladesh is member of the following Human Rights treaty; ICCPR, ICESCR, CERD, CRC, CEDAW, CMW and CRPD along with Four Geneva Conventions of 1949 and their two Additional Protocols.

of state policy, which is judicially unenforceable, can be applied through negative enforcement.⁷³ It is evident that Article 25 and the framework are products of the country's unique history and its geopolitical, economic, and security-related interests. However, in the *Saiful Islam Dilder v. Government of Bangladesh* case,⁷⁴ the Supreme Court rejected the petitioner's claim that Article 25 of the Bangladesh Constitution imposes an obligation upon the State to respect the right to self-determination of a foreign group and harbor them as refugees. By rejecting this contention, the court noted that the extradition of a foreign leader would strengthen the two countries' relations. Conversely, in the case of *Professor Nurul Islam v. Government of Bangladesh and Others*, the petitioner Professor Islam asserted that Article 25(1) of the Constitution of Bangladesh casts an obligation upon the State to respect international law and the principles enunciated in the United Nations Charter and the World Health Organization (WHO) resolutions. In this case, the Court, in a unanimous judgment, invoked international law and international obligations enunciated in the WHO resolutions as an instrument to cast a duty upon the state to take prohibitive measures in the absence of domestic legislation.⁷⁵

Hence, judicial invocations of international law by the Supreme Court of Bangladesh are not beyond doubt. Here, Hart observes that in their denial of asylum requests, national courts across the world have made direct reference to a legislative aim to limit international protection in comparison to other forms of protection existing elsewhere.⁷⁶ The second point is that judges, according to Benvenisti, have a "parochial concern" since they do not want to limit the power of their own government in a way that other courts cannot.⁷⁷ While assessing complementary protection scheme in signatory states, Benvenisti further asserts that in the realm of refugee law, courts have "coordinat[ed] a judicial position" that enables them to "strike down restrictive

73 THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH NOV. 4, 1972, art. 25 (Bangl.).

74 The writ petition was filed to stay an executive order of extradition of Anup Chetia, an Assamese leader of self-determination, on ground of Customary International obligation under article 25 (c) of Bangladesh Constitution. See *Saiful Islam Dilder v. Government of Bangladesh*, Writ Petition No. 405 of 1998 (Bangladesh Supreme Court decided Feb. 16, 1998).

75 *Nurul Islam v. Government of Bangladesh*, Writ Petition No. 1825 of 1999 (Bangladesh Supreme Court decided Feb. 7, 2000).

76 Naomi Hart, *Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom?*, 28 INTERNATIONAL JOURNAL OF REFUGEE LAW 171, 188 (2016).

77 Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 159, 175 (1993).

governmental policies” while upholding favorable circumstances for personalized applicants.⁷⁸ Some critics have been more receptive, arguing that courts from different countries have worked to establish a “universal law of human rights” and a “global jurisprudence” to safeguard basic liberty not only of the refugee but also human in general.⁷⁹ The Bangladesh constitutional mandate to address refugee issues is not clear enough, rather principle of international law emanating from human rights doctrine plays a complimentary role in the protection of refugees.⁸⁰ This is because the application of international law by domestic courts is influenced by a number of factors: the legal tradition that a country adheres to, constitutional provisions on international law in that country, and the degree of receptiveness of its judges towards international law. Constitutional provisions on international law may clearly provide guidance to the domestic courts regarding the primacy of international law over national law or vice versa in case of a conflict between the two legal orders.⁸¹

“Among the judges in the Supreme Court of Bangladesh, there has been a general tendency of not applying [Customary International Law (CIL)] directly, but of referring to domestic legislation containing similar norms.”⁸² When there is clear and distinct domestic legislation on the contested topic, the court will give effect to the domestic law rather than referencing the customary rules of international law, according to the principle that has been evolved through several judicial decisions.⁸³ Hence such collaborative judicial endeavor to augment the refugee protection scheme in Bangladesh is inconsistent. The Supreme Court of Bangladesh in *Refugee and Migratory Movements Research Unit (RMMRU) v. Government of Bangladesh*, Writ petition no. 10504 of 2016, found that “continued detention of five Rohingya who had served their sentences to be a violation of article 31 of the Constitution which prohibits deprivation of liberty without the authority of law, and found that *non-refoulement* obligations under customary international law and the UN

78 Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 264 (2008).

79 Hélène Lambert, *Transnational Judicial Dialogue, Harmonization and the Common European Asylum System*, 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 519, 520 (2009).

80 Mohammad, *supra* note 51, at 149, 151.

81 Vladlen S. Vereshchet, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 29, 35, 41 (1996).

82 Emraan Azad, *Customary International Law*, in BANGLADESH AND INTERNATIONAL LAW 61, 65 (Mohammad Shahabuddin ed., 2021).

83 M. SHAH ALAM, ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW BY DOMESTIC COURTS 107 (2007).

Convention against Torture both prevented expulsion".⁸⁴ This finding of the apex court of Bangladesh tend to show how important it is to comply with the CIL obligations for a sovereign state.

Hence, the right to equality before the law, equal protection under the law, and non-discrimination, which are pillars of international human rights law, demand for the prohibition of discrimination against refugees based on their status as such everywhere in the world,⁸⁵ and Bangladesh is not an exception to this regard. Refugees who are not citizens in and of themselves are granted certain rights by the 1972 Bangladeshi Constitution. Rights to life and personal liberty, protection from arrest and detention, and the right to be free from forced labor are guaranteed to refugees in Bangladesh by the country's Constitution in Articles 31, 32, 33, and 34. Unlike Bangladeshi nationals, refugees can exercise their rights by bringing a case in the High Court Division in accordance with Article 102. The jurisprudence against preventive detention established in *Abdul Latif Mirza v. Bangladesh* reflects the enforcement of Article 31 of the Bangladeshi Constitution. The High Court ruled that refugees had an unalienable right to the application of rights under Article 31.⁸⁶ Bangladesh is also a signatory to the International Labour Organization's Convention No. 118, which under Article 10 offers social security to refugees and stateless people living on the territory of the signatory state.⁸⁷

5 Conclusion

The elements of refugee protection, whether in signatory or non-signatory states, indicate a holistic framework to ensure efficient and effective functioning of refugee governance across multiple levels of institutions, sectors, and actors. Protecting the most persecuted refugee communities in the world involves adopting fair, clear, and implementable laws that adhere to the principle of equality and non-discrimination, accountability to the law, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. The best practices in refugee protection integrate critical refugee needs with essential human rights elements, providing a basis for enhanced constitutionalism within diverse geographical settings. This article sheds light on both the institutional and legal structures of Bangladesh, concluding that, among other

84 Lauterpacht & Bethlehem, *supra* note 23, at 117.

85 Mostafa Mahmud Naser & Tanzim Afroz, *Protection of Refugees in Bangladesh: Towards a Comprehensive Legal Regime*, DHAKA UNIVERSITY LAW JOURNAL, June 2007, at 109, 120.

86 Mohammad, *supra* note 51, at 148.

87 Arif, *supra* note 5, at 861.

factors, refugees in non-signatory states to the 1951 Refugee Convention can find hope in the steady and progressive constitutionalism achievable through judicial interpretations to close the protection gap and fulfill respective Customary International Law (CIL) obligations, despite Bangladesh's non-recognition of Rohingya as "refugees," since this poses a significant road block to any sort of "steady and progressive constitutionalism" or "judicial interpretations." Additionally, civil society organizations aligned with the UNHCR may ease the heavy burdens on host states and ensure basic human rights such as birth registration and education in the refugees' mother tongue. Incorporating institutions like the Refugee Relief and Repatriation Commissioner (RRRC) in Cox's Bazar primarily raised hopes for comprehensive recognition in the Bangladesh legal regime. However, this hope was short-lived as the government officially designated the Rohingya as Forcibly Displaced Myanmar Nationals (FDMN). Despite the seemingly paradoxical stances and situation of Bangladesh, its state practices continue to commendably ensure the protection of refugees and deserves international burden sharing obligations to be observed by developed countries.