

Non-refoulement & other Durable Solutions in Refugee Law: *Rohingyas in Perspective*

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Introduction

Generally, an individual feels safe and protected in his own area or country but sometimes situation arise when a person wants to leave his own country for fear of persecution. Ethnic Violence, religious extremism, nationalism and political ideology are the main reason behind this fear of persecution or insecurity. This type of person could recognize him as a refugee. In the same put, a refugee is a person who takes refuge in another country for fear of persecution or threat to his/her life.¹ The legal definition of a 'refugee' is therefore critical throughout its institutional life cycle. There is nonetheless a very limited body of literature which specifically discusses the power and role of this level.²

According to 1951 Convention Relating to the Status of Refugees, the term 'refugee' shall apply to any person who... owing to a well founded fear of being persecuted for reason of race, religion, nationality, membership at a particular social group or political opinion... is unable or owing such fear, is unwilling to avail himself of the protection of that country.³ As a rights-based instrument, the convention is underwritten by three main fundamental principles: non-discrimination, non-penalization, and non-refoulement (non-expulsion).⁴

At this moment, refugee crisis is a major problem and a huge humanitarian exigency. In 2013, the United Nations Commissioner for Refugees (UNHCR) recorded 11.7 million refugees worldwide.⁵ Bangladesh is also suffering from the problem of refugees. Genocide against Rohingya Refugees and the crisis situation is now one of the most discussed matters in world community. Persecution on Rohingya people is not a recent case; this schematic attack of Myanmar army on Rohingya people has started since the 1960s. In recent times, Myanmar army started a new level of persecution on Rohingya people and about seven to eight lakh Rohingya refugees were forced to flee Myanmar and arrive in Bangladesh due to the persecution. There are many historians and Rohingya groups claiming to live in the country known as Myanmar since the 12th century. According to the report of Human Rights Watch, many people from present-day India and Bangladesh went there as workers while Myanmar was under British rule (1824-1948). But since they came into British rule, Myanmar considered them as illegal after independence.⁶

In 1962, there was a military coup in Burma.⁷ After all, citizens were asked to make national registration card, Rohingyas were given foreign identity cards. As a result, educational and employment opportunities for Rohingyas were limited. Torture against Rohingya people was started in 1977 and Rohingyas started to flee Bangladesh form Myanmar. As a result, between

¹ Harun ur Rashid, *Refugee Law* (Anupam Gyan Bhandar 2008) 1

² Georgia Cole, 'Negotiating Durable Solutions for Refugees: A Critical Space for Semiotic Analysis' [2016] *Int. J. Semiot Law* 9, 11

³ Convention Relating to the Status of Refugees 1951, article 1

⁴ Michael A. Peters and Tina Besley, 'The Refugee Crisis and The Right to Political Asylum' [2015] *Educational Philosophy and Theory* 1367, 1368

⁵ Cole (n 2) 10

⁶ Available at <https://www.hrw.org/reports/2000/burma/burm005-01.htm#P116_27103> accessed 16 April 2018

⁷ Syeda Naushin Parnini, Mohammad Redzuan Othman and Amer Saifude Ghazali, 'The Rohingya Refugee Crisis and Bangladesh-Myanmar Relations' [2013] *Asian and Pacific Migration Journal* 133, 136

1977 to May 1, 1978, nearly two lakh Rohingyas fled to Bangladesh.⁸ Later, in July, an agreement was signed between Bangladesh and Myanmar. As a result, Myanmar was forced to take back Rohingyas. In 1982, Myanmar passed their new citizenship act and by this act, they actually made Rohingyas stateless.⁹ Under the law, 135 ethnic groups of Myanmar were recognized except Rohingya. Because of this law, Rohingyas are restricted to get study, jobs, travel, religious, rituals and health care. Besides, the right to vote for Rohingyas was also taken away. In 1991 and 1992, Myanmar started torturing Rohingyas again. As a result, two and a half million Rohingyas fled to Bangladesh. Then these two countries released a joint statement to bring back to their home, Myanmar army launched an operation in Rakhaine against Rohingyas on August 2017 because of one incident. United Nations has already recognized this operation as 'ethnic cleansing'.¹⁰ More than 6, 20,000 Rohingyas fled to Bangladesh to save themselves from persecution. But an agreement has been signed between both countries to bring them back.

This paper will focus on the repatriation process of the Rohingyas and whether this repatriation process will be sustainable or not. With the repatriation process this paper will also discuss regarding the non-refoulement principle. As non-refoulement principle has a significant role in the whole refugee law and in the process of repatriation.

Principle of Non-Refoulement

Protection is always important matter for the refugees. The refugees escapes to another country because, their country of origin can't provide them enough protection. The term non-refoulement affiliated with the protection of the refugees. The principle of non-refoulement prescribes broadly that, no refugee should be returned to any country where he or she is likely to face persecution or torture.¹¹ Non-refoulement is different from expulsion or deportation which is a more formal process whereby a lawfully resident alien maybe required to leave a state or be forcefully removed.¹²

The concept of the non-refoulement was begun to develop in the early-to mid nineteenth century when the concept of asylum and the principle of non-extradition of political offenders began to concretize. At that time the principle of non-extradition reflected popular sentiment that those fleeing away from their own generally despotic governments were worthy of protection.¹³ United Kingdom's Aliens Act 1905 was an act created with the sense of the need to protect the persecuted persons. In this act, section 1 made an exception to refusal of entry in respect of those 'seeking to avoid persecution or punishment on religious or political grounds or for an offence of a political character, or persecution involving danger of imprisonment or danger to life or limb on account of religious belief.'¹⁴

The international practice on the notion of non-return of refugees begun after the First World War in 1933, the principle of non-refoulement first reflected in an international convention. 1933 Convention relating to the international status of refugees was made at Geneva under the auspices of the League of Nations and Article 3 of this convention state that, 'contracting states undertake not to remove resident refugees or keep them from their territory by application of police measures, such as expulsion or non-admittance at the frontier (refoulement) unless dictated by

⁸ Ibid

⁹ Ibid 137

¹⁰ Michael Safi, 'Myanmar treatment of Rohingya looks like 'textbook ethnic cleansing', says UN' *The Guardian* (London, 11 September 2017) <<https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing>> accessed 16 April 2018

¹¹ Guy S. Goodwin-Gill, *The Refugee in International Law* (OUP 1996) 117

¹² Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 174

¹³ Goodwin-Gill (n 11) 117-118

¹⁴ Ibid

national security or public order'.¹⁵ The provisional agreement concerning the status of refugee from Germany in 1936 and 1938 contained some limitations on expulsion or return.

After the Second World War, when the United Nations was established in 1945 then, the theory or the principle of non-refoulement got the solid grounds to stand on. In the United Nations the General Assembly adopted resolution on the question of refugees and stated that, 'refugees or displaced persons' who have expressed 'valid objections' to returning to their country of origin should not be coerced to do so.¹⁶ In 1949, the Ad hoc committee on Refugees and stateless persons which was appointed by the ECOSOC took a resolution 248 (ix) with injunction to 'consider the desirability of preparing a revised and consolidated convention relating to the status of refugees and stateless persons'. After that, Ad hoc committee prepares a Convention Relating to the Status of Refugees which was adopted in 1951. This instrument provides a formal structure to meet the general needs of the refugees and established rules to protect them under the international law.¹⁷

This convention also enshrines the principle of non-refoulement but with an exception in the article 33. But it cannot be ignored that, this principle of non-refoulement actually got its universal acceptance through this convention. According to the article 33 of the 1951 convention, 'no contracting state shall expel or return 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.' This article 33 of 1951 convention is strictly applicable to every parties of this convention. But the principle of non-refoulement has been acknowledged by several other instruments across the world such as in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the United Nations Convention against Torture (UNCAT)).¹⁸ Article 7 of the ICCPR states that, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' And article 3(1) of UNCAT 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.'

In the fourth Geneva Convention 1949, it is defined that the 'Protected Person' in the article 4 and article 45 provides, protected person shall not be transferred to a power which is not a party to the convention... In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. So, by this provision international humanitarian law provides the spare baking for the principle of non-refoulement.

Not only in the international instruments, the principle of the non-refoulement embodied in OAU convention Governing the specific aspects of refugee problem in Africa 1969, African[Banjul] Charter of Human and People's Rights, American Convention on Human Rights, 1964 and also in European Convention on Human Rights 1950. Article II (3) of the OAU convention provides, 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I...' In Banjul Charter

¹⁵ *R (European Roma Right Center) v Immigration officer* [2004] UKHL 55

¹⁶ UNGA Res 8(1) (12 February 1946) para c(ii)

¹⁷ Stefania Barichello, 'The Evolving System of Refugees Protection in Latin America' in Jean-Pierre Gauci, Mariagiulia Giuffr  and Evangelia (Lilian) Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill-Nijhoff 2015)

¹⁸ Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' [2017] *Leiden Journal of International Law* 49, 69

article 12 (3) state that, 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and International conventions.' In European Convention the principle of non-refoulement is partly mentioned. According to the Article 3 of European Convention on Human Rights 1950, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Also the United Nations Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967 in Article 3 (1) declares that, 'No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.'

Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on September 29, 1967 recommends that member Governments should be guided by the following principles, 'They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory; They should, in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.'¹⁹

The 1984 Cartagena Declaration is not only endorsing a broader, regional-specific refugee definition, but also reiterating the importance of non-refoulement and non rejection at the frontier as a 'corner-stone' of the international protection, having the status of jus-cogens.²⁰ And Switzerland also has referred to non-refoulement as norms of jus-cogens.²¹

The Asian African legal Consultative Committee (Bangladesh is a member since late 1973) adopted in 1966 certain 'Principles concerning the Treatment of Refugees' in accordance with the provisions of the 1951 Convention where under its Article 8 (a) refugee shall not be deported or returned to a state where his Life and liberty would be threatened.²² Therefore, Bangladesh also acknowledged the principle of non-refoulement through this declaration.

Article 8 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance 1992, states that, 'no state shall expel, return (refouler) or extradite a person to another state where there are substantial grounds to believe that he would be in danger of enforced disappearance.'

International practice of this principle was started from after the First World War and gradually this notion is accepted by almost all over the world through many treaties, instruments and declaration. The norms which have been stated in the non-refoulement are too fundamental and that's why every country has to accept it as an international principle and practice it. The principle of non-refoulement has long been recognized as the central principle of international refugee law.²³

One of the United Nation's institution United Nations High Commissioner for Refugees (UNHCR) who works for the refugee, they always endorsed the principle of non-refoulement. In 1977, the Executive Committee of UNHCR noted that, the principle of the non-refoulement is generally accepted by states as also reaffirms, 'The fundamental importance of the fundamental importance of the observance of the principle of non-refoulement both at the border and within

¹⁹ Available at <<http://www.refworld.org/docid/3ae6b38168.html>> accessed 17 May 2018

²⁰ Goodwin-Gill (n 11) 126

²¹ Jure Vidmar, 'Rethinking Jus Cogens after Germany v. Italy: Back to Article 53?' [2013] NILR 1, 11

²² Rashid (n 1) 65

²³ Kim (n 18) 50

the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.²⁴

The principle of non-refoulement is now already becoming a part of the Customary International Law. The general consensus on the importance of the principle of non-refoulement at both global and regional level... and the absolute prohibition against torture as a rule of jus cogens confirm that non-refoulement has acquired status as a rule of customary international law by virtue of the relevant State practice, which is itself extensive and uniform.²⁵

In a declaration adopted at the ministerial meeting of state parties of 12th & 13th December, 2001 and subsequently endorsed by the General Assembly, the states party to the 1951 convention and/or 1967 protocol acknowledged ‘...the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law.’²⁶

State practice and observation made this norm as a Customary International Law. The practice of state and consonance about this principle establishes through resolutions, declarations and also the support of the norm. At present it is clear that the norm prohibition refoulement is part of Customary International Law, thus binding on all states whether or not they are party to the 1951 convention.²⁷

Nevertheless, as far as the status of jus cogens is concerned, many scholars consider that the principle has got the status of jus cogens although there is some contrary contemplation. Recognition as a Customary International Law is not enough to contemplate the norm of non-refoulement as jus cogens. Moreover, there is general consensus amongst legal scholars that, non-refoulement has now ‘become binding as a matter of both treaty and customary law if not also as a so called peremptory norm or jus cogens.’²⁸

Durable Solution in Refugee Law

The principle of non-refoulement is a step for the protection of the refugees and also ensures treatment of them in humanitarian way but when the concern is about to solve the problem of refugee then solution is also needed because it is the responsibility of the state of origin to take care and give enough protection to their citizen. Solution for the refugee should be permanent and stable otherwise it will not make any effects on the problem.

In refugee law, this solution is called by ‘Durable Solution’. Durable solution is a process to get back the normal life of refugees. This process is salutary for the refugees to live a normal life like others. In a general view, the solution for the refugee problem is to find out the root cause of the problem and solve it but if it is not possible then focus needs to shift to the refugees and solve their problem. However, traditionally there are three ways of durable solution to solve the refugee crisis: Resettlement, Local integration and Voluntary repatriation.

Resettlement is a process where refugees are resettling themselves in a third country. In ExCom Conclusion no. 90(LII), it was acknowledged that, comparatively small numbers of refugee gets benefit from this resettlement process. According to UNHCR, Resettlement is a protection tool for individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in

²⁴ Executive Committee Conclusion No. 6 (1977)

²⁵ Phil C. W. Chan , 'The protection of refugees and internally displaced persons: Non-Refoulement under customary international law?' [2006] *The International Journal of Human Rights*, 231, 234

²⁶ Available at <<http://www.unhcr.org/419c74d64.pdf>> accessed 17 May 2018

²⁷ Joanne van Selm (ed), *The Refugee Convention at Fifty: A View from Forced Migration Studies* (Lexington Books, 2003) 84

²⁸ Chan (n 25) 235

the country of asylum; a durable solution for larger numbers or groups of refugees and a mechanism for burden and responsibility sharing among states.²⁹

States who have consecutively give donation and other financial support to the United Nation High Commissioner for Refugees have also the right to make the policy and their assistance policies un-surmounted, that is the reason they emphasized or encouraged the ‘voluntary repatriation’ instead of resettlement to extract the refugee problem.³⁰ Now the donor state thinks that, the permanent resettlement process in the third country is not feasible for the refugees and also the third world country. However, few numbers of refugees could be benefited by this process still when the concern is about masses then this process is not suitable or reasonable.

Local integration is another durable solution for the refugees which provides them local residence in the country of asylum and also provides them chances to rehabilitate themselves in a new country. UNHCR statute and 1951 convention on refugee recognized this process as a durable solution and many state have started to practice this solution and allow the refugees in their country. Local integration is a gradual process and takes place on three levels: Legal, Economic, Social and Cultural.³¹ In the process of local integration, some crux can be arisen and could be harmful for the state of asylum. Security concern, unemployment situation, protection of cultural identity and many other matters can arise for the state of asylum. In this context the country of asylum is always looking for the voluntary repatriation.

Government of the state of asylum could object the process of local integration because there are some valid reasons behind it. Repatriation means the way in which the refugees can return to their country of origin in safely and dignity but the return must be voluntary.³² It cannot be disaffirm that, integration is associated with assimilation and permanence.³³ Hence the local citizen and other stakeholders would also need to take into account. The host government also considers the economic benefits because if the refugee population could not create positive impact on the economy of the host country then why should they integrate them (refugees) locally? The 1951 convention indirectly address the voluntary repatriation through the cessation clauses. This involves the return in and to conditions of physical, legal, and material safety, with full restoration of national protection as the end result.³⁴

Organized and spontaneous repatriation these two methods are used to repatriate the refugees. Organized repatriation means when the repatriate process moving forward through agreement between country of origin and country at asylum and assisted by the international community. Spontaneous repatriation means when refugees repatriate themselves to their country of origin by own means.³⁵

The method of organized repatriation is not purely voluntary repatriation because this method is not depended on the consent of the refugees but the agreement between the two countries. Therefore, the country of asylum may forcefully repatriate the refugees to the country of origin without any consent of the refugees. If the situation in the country of origin is not safe then this repatriation could be violation of the principle of non-refoulement. The basic requirements for

²⁹ UNHCR report, ‘An Introduction to International Protection’, [2005] 143

³⁰ Barbara E. Harrell-Bond, ‘Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research’ [1989] African Studies Review 41

³¹ UNHCR report (n 29) 142

³² Ashraful Azad and Fareha Jasmin, ‘Durable Solutions to The Protracted Refugee Situation: The Case of Rohingyas in Bangladesh’ [2013] Journal of Indian Research 25, 28

³³ Harrell-Bond (n 30)

³⁴ UNHCR report (n 29) 139-140

³⁵ United Nations High Commissioner for Refugees, ‘Handbook Voluntary Repatriation: International Protection’ [1996]

return- 'safety and the restoration of national protection' and without this conditions, return may not be sustainable and the refugees concerned may move back to the country of asylum.³⁶

However, it is now generally recognized that the spontaneous repatriation of refugees is often on a much greater scale than organized repatriation.³⁷

Rohingya Crisis: Bangladesh Aspects

Before starting this discussion, it should be noted that Bangladesh is not a signatory state of the 1951 Convention Relating to the Status of Refugees and its 1967 protocol.³⁸ Another matter is Bangladesh has not created any particular domestic law or act in regard to refugees. In this way, there is no obligation upon the government of Bangladesh that how they deal with the refugee situation. For the time being, interestingly the government of Myanmar denies the citizenship of Rohingya people for a very long period. Myanmar government didn't give any respect to the international law and custom and created a terrible situation of persecution, murder, rape which makes the Rohingyas frightened. It is clearly evident that, the persecution done by the Myanmar Army is not a new thing. Rather this persecution has been continuously going on for nearly six decades in the past. Myanmar government also wants to establish the Rohingya people as a citizen of Bangladesh and they are also trying to relocate and establish these refugees in the soil of Bangladesh.³⁹ It is historically proven that, Rohingyas are the second-largest ethnic group in the Rakhine state of Myanmar.⁴⁰

There is no ethnic affiliation of Rohingya with the Bengalis except religion and some linguistic match with Chittagong area. Two different ethnic groups cannot become united only because of religion and some linguistic match. Now in the present situation Rohingyas are coming in the land of Bangladesh to save their life and they being persecuted by their own government. Bangladesh cannot deny to taking them or send back them to their country of origin. Because, Bangladesh is a member of UDHR and also Convention against torture (CAT). According to these two conventions Bangladesh cannot deny Rohingya refugees.⁴¹

Apart from this, the customary value and norm which is called principle of non-refoulement also worked here and because of this Bangladesh cannot send back refugees to their country of origin without ensuring the safety and protection. To save this Rohingya refugee matter Bangladesh choose the organized repatriation method. More than 6, 20,000 Rohingya have crossed the border into Bangladesh since August 2017 and Bangladesh and Myanmar have signed an initial deal for the possible repatriation of hundreds of thousands of Rohingya Muslims who fled violence in Rohingya state.⁴²

As mentioned earlier, in the situation of repatriation two things is most momentous- safety and restoration of national protection. As Bangladesh didn't sign the 1951 refugee convention and do

³⁶ Azad and Jasmin (n 32)

³⁷ John R. Rogge, 'Repatriation of Refugees' in Tim Allen and Hubert Morsink (eds), *When Refugees Go Home: African Experiences* (UNRISD 1994)

³⁸ Muhammad Nawshad Zamir, 'Is Bangladesh violating international law?' *New Age* (Dhaka, 23 December 2016) <<http://www.newagebd.net/print/article/5389>> accessed 20 May 2018

³⁹ Azad and Jasmin (n 32) 25

⁴⁰ Parnini (n 7) 135

⁴¹ Universal Declaration of Human Rights 1948, Article 14 provides: (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 3 (1) provides: 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.

⁴² Oliver Holmes and agencies, 'Myanmar signs pact with Bangladesh over Rohingya repatriation' *The Guardian* (London, 23 November 2017) <<https://www.theguardian.com/world/2017/nov/23/myanmar-signs-pact-with-bangladesh-over-rohingya-repatriation>> accessed 16 April 2018

not have any domestic refugee law, so they are not bound by the Act. But Bangladesh cannot deny the principle of non-refoulement. Now according to the theory of non-refoulement, Bangladesh government cannot coerce the Rohingya refugees to send them back into that place where safety could not be ensured. Although, the principle of non-refoulement is not absolute in nature, national security and the public order of the state of asylum is a justification for degradation of this principle. Under this circumstance, Rohingya refugees are not in that position to frustrate the public order or transgress the national security of Bangladesh. Because of this, Bangladesh authorities have to ensure that, safety and protective measures have been taken by the Myanmar Government. Now, the measures taken by the Myanmar Government is not enough and also not appreciated by the United Nations Refugee Agency. The UNHCR says necessary safeguards for people to return to the homes they fled so recently are absent. Agency spokesman, Adrian Edwards told VOA conditions for voluntary, safe, sustainable returns are not in place.⁴³

Another UN official Ursula Mueller, UN's Assistant Secondary-General for Humanitarian Affairs, said that, 'from what I've seen and heard from people no access- no access to health services, concerns about protection, continued displacements – conditions are not conducive to return. I witnessed areas where villages were burned down and bulldozed...I've not seen or heard that there are any preparations for people to go to their places of origin'.⁴⁴

It is literary evident that, Myanmar is not ready for the repatriation of Rohingya Refugees. If Bangladesh keeps the repatriation process alive in this situation than it will be an involuntary repatriation. Bangladesh was involved in an involuntary repatriation back in 1992 and that was also under a bilateral agreement between the government of Bangladesh and Myanmar but the process was not sustainable. Initial repatriation of the refugees was not voluntary in nature. Both the governments and UNHCR were involved in involuntary repatriation which amounts to refoulement. Between September, 1992 and the end of 1993; virtually all repatriations of Rohingya refugees were forceful ones.⁴⁵

Refugees cannot always be aware of the risks of returning, as there is often insufficient data on the country they are returning to. Current discussions of repatriation tend to overlook this point, focusing on the importance of a safe return.⁴⁶ Therefore, Bangladesh has to create pressure or wait till the situation in Myanmar is suitable for the repatriation of Rohingya refugees otherwise it will be a violation of the principle of non-refoulement. In this matter, legal scholar B.S.Chimni argues that one of the most important principle at voluntary repatriation and non-refoulement is that, refugees cannot be returned against their will to a home country that in their subjective assessment has not appreciably changed for the better. UNHCR insists that decision must be made based on objective facts. Chimni argues that this "objectivism" disenfranchises the refugee voice in decision making about whether or not it is safe to return.⁴⁷

In this circumstances, a dilemma created that whether the organized repatriation have the elements to encourage the violation of the non-refoulement principle. To address this dilemma, repatriation facilitators should gather more information on past returnees, act to counter the effects of survivor bias, and establish a more complete picture of the environment refugees will be

⁴³ Lisa Schlein, 'UN: Myanmar Not Safe for Rohingya Refugees to Return' *VOA News* (Washington D.C., 23 January 2018) <<https://www.voanews.com/a/un-myanmar-not-safe-for-rohingya-refugees-to-return/4220456.html>> accessed 16 April 2018

⁴⁴ Antoni Slodkowski, 'Myanmar not ready for return of Rohingya refugees – UN official' *Reuters* (London, 8 April 2018) <<https://www.reuters.com/article/us-myanmar-rohingya-un/myanmar-not-ready-for-return-of-rohingya-refugees-un-official-idUSKBN1HF04M>> accessed 16 April 2018

⁴⁵ Azad and Jasmin (n 32) 30

⁴⁶ Mollie Gerver, 'Refugee Repatriation and the Problem of Consent' [2016] B.J.Pol.S. 1

⁴⁷ Eileen Pittaway, 'The Rohingya Refugees in Bangladesh: A Failure of International Protection Regime' in Howard Adelman (eds), *Protracted Displacement in Asia: No Place to Call Home* (Routledge, 2016)

returning to.⁴⁸ As a state of asylum Bangladesh and the UNHCR should need to change their approach to deal with this situation. If the government of Bangladesh don't have the information and complete picture of the environment where the refugees returning to, then they cannot encourage the refugees to go back in their country of origin. Under the circumstances, if Bangladesh and UNHCR took the approach what has been taken in 1992-1993 then the problem could not be solved because without safety and protection the Rohingyas could again be persecuted and become refugees.

Conclusion

Given the low uptake of the 1951 convention relating to the status of refugees and its 1967 protocol, the Rohingya refugee crisis raises the issue of whether non-refoulement has attained customary status in this region.⁴⁹ Finding the answer needs further analysis but it is clear that the status of the principle of non-refoulement in greater doubt when the organized repatriation process somehow encourage the refoulement.

In these circumstances, if the world leaders ask to consider the other two durable solutions then it will be difficult for Bangladesh. Because in this process of local integration the host state Bangladesh needs to integrate these Rohingya people in their country. Nevertheless this process of integration is a perplexing process because Bangladesh have to consider the both society and the individual person. As the host nation Bangladesh is overpopulated and economically vulnerable, so the integration is almost impossible for the host nation. On the other hand, resettlement is a challenging process for the host country. Developed countries are not in a position to take refugees. As a result it might be challenging situations for the host nation Bangladesh to negotiate with the developed countries for resettling of these refugees. Data shows that, resettlement is not a common thing for the world. Only 1% of the world's refugees are resettled.⁵⁰

Therefore, there is only one window open for the country of asylum Bangladesh and that is voluntary repatriation. Most of the Rohingya refugees desperately want to go home and will do so voluntarily when it's safe, however voluntary repatriation is clearly not an option here for the Rohingya refugees who thanks to Myanmar, do not have a country of origin and are truly stateless.⁵¹

In this situation, Bangladesh government or authority should take assistance of United Nations and consults of other friendly nations to put pressure on Myanmar government so that, they create conditions which ensure the adequate security and proper rehabilitation for Rohingya refugees in Rakhaine state. In that case, maintaining a friendly relationship with the Myanmar government is also very significant to complete the whole process. After that if the situation in Myanmar well prepared for the voluntary repatriation then the Rohingya refugees will start to return in their country of origin but United Nations and UNHCR should keep their eyes open and also need a continuous monitoring and evaluation system to maintain the security and rehabilitation process subsistent.

Mentioned process in the above is undoubtedly long term procedure and government of Bangladesh and UNHCR needs time to execute this type of procedure. In the meantime many

⁴⁸ Gerver (n 46) 15

⁴⁹ Nikolas Feith Tan, 'The Rohingya and Refoulement in Southeast Asia' (*Middle East Institute*, 12 October 2016) <<http://www.mei.edu/content/map/rohingya-and-refoulement-south-east-asia>> accessed 30 May 2018

⁵⁰ Annabel Mwangi, 'Only 1% of refugees are resettled – why are we so threatened by them?' *The Guardian* (London, 18 February 2017) <<https://www.theguardian.com/global-development-professionals-network/2017/feb/18/only-1-of-refugees-are-resettled-why-are-we-so-threatened-by-them>> accessed 20 May 2018

⁵¹ Kelsey LeBrun Keswani, 'Are there any 'good' options for the Rohingyas?' *The Week* (Kochi, 6 December 2017) <<https://www.theweek.in/news/world/The-Myanmar-Bangladesh-deal-on-Rohingyas-leans-towards-repatriation-or-refoulement.html>> accessed 20 May 2018

Rohingya refugees are still trapped in Myanmar and in Bangladesh border areas, they also need adequate facilities and security. Persecution on Rohingya people is an upshot of complex and historical context. This event is not the aftermath of an individual or a single process but related to hundreds years of history, ethnic conflicts, colonial influence, socio-economic and religious values. There is no doubt that, it is a complicated way to returning the human dignity and citizenship status to the Rohingya people. However, it should be remembered that, this crisis was not created in one day and solution is not possible in short time. Moreover the main focus point should be asserting the rights of the Rohingya people to stay home or return home and enjoy the basic human rights.

In the case of Rohingya refugees Bangladesh take approach towards the organized method of voluntary repatriation but Bangladesh and International community needs to take proper measures to maintain the safety and the restoration of national protection. Because refugees often find themselves in a precarious position, caught between inadequate protection and assistance in the country of asylum and continuing insecurity on their country of origin.⁵² Sustainability or durability of the voluntary repatriation depends on the process of the repatriation. If Bangladesh anyhow repatriates the refugees in involuntary manner then sustainability of that repatriation will not be that consolidated. And that involuntary repatriation can be called as violation of the non-refoulement principle also.

It was mentioned earlier that Bangladesh hasn't signed or ratified the 1951 refugee convention yet and Bangladesh doesn't have any domestic refugee law also. Now, in this situation Bangladesh doesn't have any proper guideline to control or direct the refugees. But in absence of any law, this state could face some legal problem which can be related with the new born child in the refugee camp whether that child would get the citizenship or not.

⁵² Azad and Jasmin (n 32)