

ARREST AND DETENTION OF REFUGEES AND ASYLUM SEEKERS IN BANGLADESH: A CRITIQUE FROM HUMAN RIGHTS PERSPECTIVE

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Abstract

Human rights are the inherent entitlements that a person enjoys simply for being a human, regardless of nationality or any other status. However, once a victim of forced migration crosses an international border, he becomes more susceptible to deprivation of those rights. In particular, refugees or asylum seekers face arbitrary arrest and detention more frequently in the receiving state. The immigration regime of Bangladesh under the Foreigners Act (FA) 1946 treats illegal migrants and refugees in the same manner and may put them in preventive detention. Eventually, this administrative detention may continue for an indefinite period. Moreover, the state is prone to not complying with the procedural safeguards regarding arrest and detention in general. In this context, this article explores the normative framework of human rights protection of refugees and asylum seekers facing arrest and detention. Then it finds that the laws and practices of Bangladesh relating to the arrest and detention of refugees and asylum seekers violate some of the basic principles of human rights.

1. Introduction

Refugees migrate from the country of their nationality or habitual residence owing to a severe violation of human rights. However, with the fresh memory of persecution, they face foreign immigration policies, often without documentation and minimum resources in fundamental

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necessities. In this situation, if a person is arrested and detained, it can only compound his physical and psychological trauma. The human rights regime, which is based on the dignity and worth of a human person, protects refugees and asylum seekers of this situation from arbitrary arrest and detention. However, the immigration laws and policies of many states tend to flout these universal and inalienable rights. Bangladesh hosts one of the most significant numbers of refugees, with more than 8 million people.¹ Therefore, it is timely and necessary to evaluate Bangladesh's relevant laws and practices against its human rights obligations.

This article has two distinct but interconnected parts. The first part describes the existing human rights standards in international and constitutional law relating to the arrest and detention of refugees and asylum seekers. It has considered various sources of international law, including treaty law, customary international law and soft law instruments in doing so. The second part evaluates Bangladesh's ordinary laws and practices regarding the arrest and detention of refugees and asylum seekers on the standards described and analysed in the first part. The evaluation primarily rests on the non-recognition of refugees, the situation of refugee camps, the immigration detention scheme under the FA, and the procedural safeguards. Finally, the conclusion puts forward specific recommendations, including alternatives to detention, to address the issue more efficiently.

2. Definitional Scope of Refugees and Asylum Seekers

The definition of refugee takes a central stage in the discourse of their international and national protection. In common parlance, the word refugee means any victim of forced migration. Thus, Oxford Learner's Dictionary defines a refugee as "a person who has been forced to leave their country or home, because there is a war or for political, religious or social reasons".² However, international law imposes some additional

¹ UNHCR, 'Bangladesh: Key Figures' <<https://reporting.unhcr.org/bangladesh>> accessed on 25 September 2021.

² 'Refugee' <<https://www.oxfordlearnersdictionaries.com/definition/english/refugee?q=refugee>> accessed on 25 September 2021.

requirements for a person to be a refugee. According to Article 1 of the Convention Relating to the Status of Refugees 1951 (Refugee Convention), a person is a refugee who:

- (a) Is outside the country of his nationality or his former habitual residence because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) Is unable or, owing to such fear, is unwilling to avail himself of the protection of that country of his nationality or is unwilling to return to his habitual residence.

The definition only covers the persons crossing an international border and thus excludes internally displaced persons. Furthermore, the persecution must be caused by five discriminatory grounds mentioned above. For example, the people persecuted indiscriminately in civil wars or terrorist activities cannot avail refugee status. Again, the persons persecuted due to their gender or non-Convention grounds will also fail to qualify as refugees. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa³, and Cartagena Declaration on Refugees⁴ have expanded the meaning of refugee to cover the situations. In this article, the author will follow the definition given by the Refugee Convention.

An asylum-seeker is a person who has made an application for refugee status in the host state. In this regard, a pertinent question arises whether a person becomes a refugee after the grant of refugee status by the host state or at any other time. The settled principle is that the determination of refugees is only declaratory.⁵ Once a person fulfils all the criteria of Article 1, he becomes a refugee. Granting refugee status does not make

³ Art 1(2) of the Convention.

⁴ Conclusion and Recommendation III(3) of the Declaration.

⁵ UNHCR, 'Note on Determination of Refugee Status under International Instruments' <<https://www.unhcr.org/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html>> accessed on 25 September 2021.

him a refugee; instead, he is recognised because he is a refugee.⁶ Pending the determination of his status, an asylum seeker will enjoy the protection of the principles of *non-refoulement* and non-penalisation for illegal entry.⁷

3. Human Rights Standards for Arrest and Detention of Refugees and Asylum Seekers

The two terms ‘arrest’ and ‘detention’ have varying definitions by domestic and international authorities. *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*⁸ defines ‘arrest’ as “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”. Also, it defines ‘detention’ as ‘the condition of any person deprived of personal liberty except as a result of the conviction for an offence’. However, the United Nations Working Group on Arbitrary Detention (WGAD) uses the term to include imprisonments after the conviction of an offence also.⁹

As the concept of arrest in international law is expansive, it includes many acts of apprehension which are not considered arrests in domestic law. In the UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, the definition of detention gets even broader. For the Guideline, detention refers to:

[T]he deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will,

⁶ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ <<https://www.unhcr.org/4d93528a9.pdf>> accessed on 25 September 2021.

⁷ ACNUR, ‘Legislation Establishes the Declaratory Nature of Refugee Status’ <https://acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/11348.pdf> accessed on 25 September 2021.

⁸ Adopted by General Assembly resolution 43/173 of 9 December 1988.

⁹ UNODC, ‘Module 10: Arrest and Detention’ in *E4J University Module Series: Counter-Terrorism* <<https://www.unodc.org/e4j/en/terrorism/module-10/key-issues/international-human-rights-instruments.html>> accessed on 25 September 2021.

including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.¹⁰

Therefore nomenclature of the places as ‘holding center’, ‘reception center’ or ‘refugee camp’ is immaterial in determining whether the restriction of liberty is detention within the meaning of international law. Thus the ECtHR has rightly pointed out that “the difference between deprivation of liberty (i.e., detention) and restriction of freedom of movement is merely one of degree or intensity and not one of nature or substance”.¹¹

Refugees and asylum seekers facing arrest and detention get protected by an array of international instruments. Among the binding sources, treaties and customary international law are of utmost importance. Moreover, in recent decades, various soft law instruments have complemented the mainstream sources. Along with these international sources, the Constitution of Bangladesh provides a minimal set of human rights protection. Thus, careful consideration of all the sources is necessary to have a holistic picture.

3.1. Protection under International Treaties

Though Bangladesh has not ratified the Refugee Convention Relating to the Status of Refugees 1951, it is relevant because some of its principles have become customary international law. Two provisions of the Covenant deal with the arrest and detention of refugees. Firstly, Article 26 grants the refugees ‘the right to choose their place of residence to move freely within its territory’. In this respect, they will be subject to the same regulations as aliens in the same circumstances. Secondly, Article 31(1) requires no penalty be imposed on refugees for their ‘illegal entry or presence’. However, they must show good cause for such entry or presence without delay to avail this right. Finally, article 31(2)

¹⁰ UNHCR, ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (Geneva 2012), para 5.

¹¹ European Court of Human Rights, *Guzzardi v Italy* (1980) 3 EHRR 333 (Plenary), paras 92-93.

specifies that restricting the freedom of movement is permissible only when 'necessary' and 'temporary'.

A question arises whether the immigration detention is a penalty within the meaning of Article 31(1) of the Refugee Convention or not. Regarding the interpretation of treaties, the Vienna Convention on the Law of Treaties 1968 (VCLT) states, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".¹² In the second paragraph of the Preamble to the Refugee Convention, it is evident that the object of the Convention is to "assure refugees the widest possible exercise of these fundamental rights and freedoms". The arbitrary detention of refugees or asylum seekers is beyond the spirit of the Refugee Convention. Thus, the author thinks that immigration detention is a penalty and is not permissible in the refugee context. For the same reason, the use of detention to deter prospective refugees is not acceptable. It is submitted that such detention will also amount to the violation of the overarching principle of *non-refoulement*.

The International Covenant on Civil and Political Rights (ICCPR) 1966 applies to all persons, including refugees. Article 9 of the Covenant, which is a non-derogable provision of the Covenant, runs as follows in its clause 1:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Therefore, the deprivation of personal liberty must not violate the principles of legality and non-arbitrariness. As per the Human Rights Committee, the principle of legality entails that the arrest or detention in question is established in domestic legislation.¹³ The Committee has interpreted the Article to permit detention in specific circumstances and

¹² Vienna Convention on the Law of Treaties, art 31.

¹³ C. *McLawrence v Jamaica* Communication No. 702/1996 (26 April 1996), CCPR/C/60/D/702/1996, p 230.

only for a limited time; otherwise, it will be arbitrary.¹⁴ Besides, any limitation on a person's freedom must pass the test of necessity, reasonableness, and proportionality. Furthermore, any aggrieved person in this regard has the right to seek redress in a court that will review the lawfulness of the arrest or detention. Indefinite detention is, for its very nature, against the core principles of Article 9.

Apart from the previous treaties, some specialised and regional treaties protect the refugees. The International Convention on the Elimination of All Forms of Racial Discriminations 1965 (ICERD), in its Article 5, ensures 'security of person and protection' without discrimination. In its interpretation, the UN Committee on the Elimination of Racial Discrimination (CERD) observed that the states should "Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards".¹⁵ The children among the refugees are the most marginalised. Article 37 of the Convention on the Rights of the Child 1989 (CRC) restricts arrest, detention, and imprisonment only as a final resort and for a short period. The Article also grants the following rights:

- (a) to be treated with dignity;
- (b) to maintain contact with family;
- (c) to prompt legal and other appropriate assistance;
- (d) to challenge the legality before a court or other authority; and
- (e) to a prompt decision

Furthermore, Article 11 of the Convention against Torture 1984 (CAT) enjoins that states should systemically review procedural rules relating to the arrest, detention, or imprisonment so that they cannot be used as apparatus of torture.

¹⁴ *AV Australia* Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, p 143.

¹⁵ CERD, General Recommendation No. 30: Discrimination against Non-Citizens (2004) para19.

3.2. Protection under Customary International Law

Customary international law is a potent tool for the refugees in a non-signatory state. A customary international rule comes into existence by the mutual interaction of widespread state practice and *opinion juris sive necessitatis*.¹⁶ Going through this process, some provisions of international legal instruments, including the Universal Declaration of Human Rights (UDHR), have elevated to customary international law.¹⁷ Most of the non-derogable rights in ICCPR also achieved the status.¹⁸ For example, the Working Group on Arbitrary Detention claims in the General Assembly of Human Rights Council that the ban on arbitrary deprivation of liberty:

[C] onstitute[s] a near universal State practice evidencing the customary nature of the arbitrary deprivation of liberty prohibition. Moreover, many United Nations resolutions confirm the *opinio juris* supporting the customary nature of these rules.¹⁹

The Group also maintained that the principle has also turned into *jus cogens* or peremptory norm of international law.²⁰ As per Article 53 of the VCLT, a treaty conflicting with a *jus cogens* norm is void. Apart from it, the principle of non-penalisation is in a grey stage towards customary status. Nevertheless, pending the refugee status determination, this principle is widely accepted as binding.²¹

3.3. Protection under Soft Law and UNHCR Instruments

In recent years, soft legal instruments have become the crucial regulator of international relations. While the instruments may not be binding, they

¹⁶ *North Sea Continental Shelf Cases (Germany v Denmark)* (1969) ICJ Rep 3.

¹⁷ Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 3.2 *Health and Human Rights* 144.

¹⁸ UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (Geneva 1984) p 14

¹⁹ UNGA, 'Report of the Working Group on Arbitrary Detention' A/HRC/22/44, para 43.

²⁰ *Ibid*, para 51.

²¹ ACNUR, n 7.

act as precursors to binding international treaties.²² They also serve as evidence of customary international law.²³ Regarding the detention of a person, an authoritative soft law is the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.²⁴ The Body of Principles sets out 39 detailed principles equally applicable to refugees and asylum seekers. Especially, Principle 16 sets out:

If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means ... with the representative of the competent international organisation, if he is a refugee or is otherwise under the protection of an intergovernmental organisation.

UNHCR works as the ‘guardian’ of the Refugee Convention and its Protocol with the mandate to supervise their application.²⁵ As per the UNHCR Statute, Article 35 of the Convention, and Article II of the Protocol, this organisation issues some Guidelines on international protection.²⁶ Though they are not legally binding on the governments, they operate as an interpretive guide to the rights of refugees. *The Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* is a comprehensive document covering a diverse array of protection for refugees. The ten guidelines regulate arbitrary detention, indefinite detention, procedural safeguards of detention, non-discrimination, detention conditions, and review of the detention order, among others.

²² Michael P. Scharf, ‘Accelerated Formation of Customary International Law’ (2014) 20:2 ILSA Journal of International & Comparative Law 305.

²³ Brian D Lepard, ‘The Role of United Nations General Assembly Resolutions as Evidence of *Opinio Juris*’ in *Customary International Law: A New Theory with Practical Applications* (CUP 2009).

²⁴ UNGA Resolution, A/RES/43/173, 9 December 1988.

²⁵ UNHCR, ‘The 1951 Refugee Convention: 70 years of life-saving protection (28 July 2021) <<https://www.unhcr.org/news/press/2021/7/6100199a4/1951-refugee-convention-70-years-life-saving-protection.html>> accessed on 25 September 2021.

²⁶ UNHCR, ‘UNHCR Guidelines on International Protection – Consultation process’ (November 2019) <<https://www.unhcr.org/protection/globalconsult/544f59896/unhcr-guidelines-international-protection-consultation-process.html>> accessed on 25 September 2021.

3.4. Protections under the Constitutional Scheme of Bangladesh

The Fundamental Rights incorporated in Part III of the Constitution can be divided into two categories depending on their applicability. Some of the articles apply only to the citizens of Bangladesh,²⁷ where others apply to citizens and non-citizens²⁸. Thus, the refugees or asylum seekers in the territory or control²⁹ of Bangladesh can enjoy the rights of the second category. Among them, Arts 31, 32, 33 are of relevance to the issues relating to the arrest and detention of refugees and asylum seekers. Article 31 extends the protection of the law to the citizens and every person for the time being in Bangladesh alike. It includes a ban on any action detrimental to the life and liberty of the person in question. Again, Article 32 guarantees expansive rights to life and personal liberty. However, these two articles do not state any specific safeguards favouring a person, including refugees facing arrest and detention. Finally, Article 33 grants them the following rights:³⁰

- (a) The arrested person in custody has the right to be informed of the grounds of his arrest. He also has the right to consult and be defended by a legal practitioner of his choice.
- (b) He has the right to be produced before the nearest magistrate within twenty-four hours of his arrest.
- (c) He has the right not to be detained in police custody beyond the preceding twenty-four hours.

The rights and freedoms in the Articles are not absolute, and the Government can reasonably restrict them in accordance with the law. As reasonableness is a relative term, it is interpreted contextually and keeping in mind various factors. However, *Abul A'la Moudoodi v West*

²⁷ *Constitution of Bangladesh*, arts 27-30 and 36-43.

²⁸ *Constitution of Bangladesh*, arts 31, 32, 33, 34, 35 and 44.

²⁹ Scholarships regarding extraterritorial application of constitutional rights are emerging recently. For further inquiry see generally, Jane Rooney, "Extraterritorial Application of Constitutional Rights" (2017) <<https://oxcon.oupplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e273>> accessed on 25 September 2021.

³⁰ The guarantees do not apply to the enemy aliens and persons under preventive detention. There is a separate standard for them in art 33(3-6).

*Pakistan*³¹ remains an authoritative guide to the restriction regarding arrest and detention. The principles laid down in the case may be summarised in the following manner:

- (a) The detention must be proportionate to the object sought.
- (b) The restriction should be objective rather than subjective.
- (c) The attribution of reasonableness should be clear and come with a full explanation.

Moreover, in *BLAST v Bangladesh*,³² the Court has pronounced fifteen guidelines on the procedure of arrest and detention, which are equally applicable to refugees.

There is a procedure for the aggrieved person for the violation of his rights. If any law or administrative action infringes his rights, he may apply to the High Court Division under Article 44 of the Constitution. Then the High Court Division may ‘give such directions or orders ... as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.’³³ Under the purview of this power read with Article 26, it can declare a law to be unconstitutional.

Bangladesh is a dualist state where international law is not enforceable directly.³⁴ However, during the last few decades, the Judges of the Supreme Court of Bangladesh are using international law to interpret fundamental rights. It is also indirectly mandated in the Constitution. Firstly, Article 11 of the Constitution declares the Republic as a democracy ‘in which fundamental rights and freedoms and respect for the dignity and worth of human person shall be guaranteed’. Secondly, Article 25 of the Constitution affirms the ‘respect for international law and the principles enunciated in the United Nations Charter’. As both of

³¹ (1965) 17 DLR (SC) 209.

³² (2003) 55 DLR (HCD) 363.

³³ *Constitution of Bangladesh*, art 102(1).

³⁴ *Hussain Muhammad Ershad v Bangladesh* (2001) 21 BLD (AD) 69 states “it is [true] that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts”.

the Articles form part of the Fundamental Principles of State Policy (FPSPs), and Article 8(2) regards them as aids to interpretation, international laws can justifiably be used as an interpretive aid. In *Bangladesh v Sheikh Hasina*,³⁵ the Court confirms the position:

The Courts would not enforce international human rights treaties, even if ratified by Bangladesh unless these were incorporated in municipal laws, but they would have looked into the ICCPR while interpreting the provisions of the Constitution to determine the right to life, liberty, and other rights.

The ingenuity of this method concerning arrest and detention is that the relevant treaties or documents can expand and refine domestic rights. Thus, General Comment 35 prepared by the Human Rights Committee relating to the liberty and security of persons can be used to interpret Article 33 of the Constitution.

One of the main challenges in protecting the rights of refugees in Bangladesh is that it has not ratified the Refugee Convention. As a result, the judges cannot authoritatively employ the treaty in interpreting the fundamental rights. However, some international human rights and refugee law principles have elevated to customary international law and *jus cogens* norm. Customary international laws which form part of the law of the land are directly enforceable in the Court.³⁶ In a recent case, *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*³⁷, the Supreme Court enforced the principle of *non-refoulement* as customary international law. It held that the principle has:

[B]ecome a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention or not.

4. Review of Laws and Practices in Bangladesh

³⁵ (2008) 60 DLR (AD) 90, para 86.

³⁶ *Bangladesh v Unimarine S A Panama* (1977) 29 DLR 252.

³⁷ Writ Petition No. 10504 of 2016, pp 9-10.

The treatment of refugees in Bangladesh is primarily motivated by the fact that it has not ratified the Refugee Convention. Therefore, apart from the 35,519 recognised *Rohingya* refugees³⁸, more than 800,000 people fleeing persecution from Myanmar have been registered as ‘forcibly displaced Myanmar nationals’ rather than ‘refugees’ by the Government of Bangladesh.³⁹ Although the *Rohingya* refugees fulfil all the criteria of being a refugee, the designation ‘forcibly displaced Myanmar nationals’ denies their actual status and rights under the Refugee Convention. However, Bangladesh could not refuse their entry or refool them because the principle of non-refoulement binds it.⁴⁰ As the *Rohingyas* are not given refugee status after their arrival, they fall into a perpetual streak of illegal presence in Bangladesh. For such a refugee, the choice of residence is binary, either in a so-called refugee camp or in a detention center by the operation of the Foreigner’s Act 1946.

Most of the recognised and unrecognized ‘refugees’ reside in 34 refugee camps situated in Cox’s Bazar District.⁴¹ Recently, the Government has relocated around 20,000 *Rohingyas* to *Bhasan Char*, a remote and disaster-prone silt island on the Bay of Bengal.⁴² Freedom of movement of the persons residing in the camps and the *char* is so restricted that any attempt to escape results in arrest and detention.⁴³ The restriction on

³⁸ UNHCR, ‘Refugee Response in Bangladesh’ <https://data2.unhcr.org/en/situations/myanmar_refugees> accessed on 26 September 2021.

³⁹ Bill Frelick, ‘Bangladesh Is Not My Country’ (*Human Rights Watch*, 5 August 2018) <https://www.hrw.org/sites/default/files/report_pdf/bangladesh0818_web2.pdf> accessed on 26 September 2021.

⁴⁰ Article 3 of the Convention against Torture has a binding effect on Bangladesh. Moreover, the principle of non-refoulement is customary in nature.

⁴¹ UNHCR, ‘Bangladesh Operational Update July 2021’ <<https://reliefweb.int/report/bangladesh/unhcr-bangladesh-operational-update-july-2021>> accessed on 26 September 2021.

⁴² ‘An Island Jail in the Middle of the Sea’ (*Human Rights Watch*, 7 June 2021) <https://www.hrw.org/sites/default/files/media_2021/06/bangladesh0621_web.pdf> accessed on 26 September 2021.

⁴³ ‘11 *Rohingyas* detained from *Panchagarh*’ (*The Daily Star*, 2 September 2021) <<https://www.thedailystar.net/news/bangladesh/crime-justice/news/11-rohingyas-detained-panchagarh-2167031>> accessed on 26 September 2021, and ‘18 *Rohingyas* arrested after fleeing *Bhashan Char*’ (*New Age Bangladesh*, 11 July 2021)

freedom of movement is of such degree or intensity that it is tantamount to ‘detention’ within the meaning of UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention. Here, the refugees are the victims of ‘the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will’⁴⁴. The nomenclature of the places as ‘refugee camp’ or ‘*Ashrayan Prokolpo* (Housing Project) is immaterial in determining the condition of detention.

The Foreigners Act 1946 is the core legislation regulating foreigners’ entry, presence, and departure in Bangladesh. In addition to this statute, there are some other statutes and delegated legislation on the subject matter.⁴⁵ As per section 2 of the Act, any person is a foreigner who is not a citizen of Bangladesh. In its regulatory framework, the Act does not make any distinction between illegal entrants and persecuted refugees. The refugees are forced to enter into another state illegally due to persecution. A careful reading of the Act shows that it was framed to preclude the illegal entrants without compelling cause. Although there is an *intelligible differentia* between foreigners and citizens in the legislation, the distinction does not have any rational nexus with the object sought in the provision.⁴⁶ On that account, though Article 27 does not directly apply to non-citizens, the distinction may have violated the right to equality and non-discrimination because the undocumented migrants and refugees are not similarly situated.

Section 3 of the Act empowers the Government to make an order to arrest, detain or confine a foreigner on account of the security of

<<https://www.newagebd.net/article/143451/18-rohingyas-arrested-after-fleeing-bhashan-char> > accessed on 26 September 2021.

⁴⁴ UNHCR, n 10.

⁴⁵ Other legislations include but are not limited to the Foreigners Order 1951, the Registration of Foreigners Act 1939, the Passports Act 1920, the Bangladesh Passport Order 1973, the Bangladesh Control of Entry Act 1952, the Extradition Act 1974, the Citizenship Act 1951, Bangladesh Citizenship (Temporary Provisions) Order, 1972.

⁴⁶ The requirements have been reaffirmed by *Jibendra Kishore v Province of East Pakistan* (1957) 9 DLR SC 21, *Retired Government Employees Welfare Association v Bangladesh* (1994) 51 DLR (AD) 427.

Bangladesh. This restriction of liberty by the administrative order may continue to six months. However, a quasi-judicial Advisory Board may extend the period if, in its opinion, there is sufficient cause for such detention. According to Principle 4 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, any form of restriction of liberty shall be 'ordered by, or be subject to the effective control of, a judicial or other authority'. Moreover, UNHCR Detention Guidelines prescribes that the person has a right to "be brought promptly before a judicial or other independent authority to have the detention decision reviewed". Unfortunately, none of the procedural safeguards in the Act is maintained adequately.

The detention can continue for an indefinite period because the Act prescribes no maximum limit of extension by the Advisory Board. While the respective arrest may not be arbitrary, the consequent detention may be so. When the detention becomes indefinite, it is undoubtedly arbitrary detention within the meaning of Article 9(1) of the ICCPR and the customary international principle against arbitrary detention. It also comes under the purview of 'cruel, inhuman or degrading treatment or punishment' under Article 7 of the ICCPR. The Detention Guideline also categorises indefinite detention as arbitrary and recommends a maximum limit for the detention period.

Moreover, constitutionality of the provision should also be considered. As legislation providing preventive detention, it does not violate Article 33. However, it violates the substantive and procedural due process standards set by Articles 31 and 32 of the Constitution. It has failed to meet the three requirements of *Abul A'la Moudoodi v West Pakistan* in cases of restriction on liberty. Firstly, the reasonableness of the detention (restriction on liberty) does not come with a full explanation. Secondly, the restriction is subjective rather than objective. Finally, the detention is not proportionate to the object sought (in this case, a subjective sense of national security).

The legislation's technicality also produces 'released prisoners' who are detained after serving their period of imprisonment. Section 14 of the Act prescribes the punishment of a person with imprisonment for a maximum

of five years. This provision conflicts with the principle of non-penalisation for illegal entry or presence of a refugee under Article 31 of the Refugee Convention. After serving the sentence, the refugee is kept in detention for an indefinite period because he cannot avail the protection of his home country, and a release will make him an illegal entrant again. This detention is a serious violation of personal liberty and falls within the first category of arbitrary detention categorised by the UN Working Group on Arbitrary Detention.⁴⁷ The violation of international and constitutional standards in the detention in the preceding paragraph is equally applicable in this case of released prisoners.

The procedural safeguards of arrest and detention in Bangladesh are maintained poorly with regard to citizens and non-citizens alike. The situation only worsens for a non-recognised refugee who is under the constant prospect of restriction of liberty. Apart from the deprivation of rights ranging from the right to be informed of the grounds of arrest to the right of legal assistance⁴⁸, they are allegedly tortured during the process.⁴⁹ This treatment towards them violates the obligation of Bangladesh under the CAT and Article 7 of the ICCPR.

5. Conclusion

The immigration detention scheme is not arbitrary *per se* because the Government can restrict freedom on account of national security. However, when the provisions are applied to the refugees and asylum seekers, putting them in the category of other types of undocumented migrants, the arrest may turn into an arbitrary measure. It becomes undoubtedly arbitrary when the detention continues for an indefinite period. The restriction of liberty imposed by the Foreigner's Act on those persecuted people is unreasonable and does not serve the object of the Act. Thus, the Parliament should amend the Act to get rid of its

⁴⁷ Arpeeta Shams Mizan, *Analyzing the Legislative Gaps in the Detention Scheme of the Foreigners in Bangladesh: The Released Prisoners* (National Human Rights Commission, Bangladesh 2014) p 21.

⁴⁸ Ibid.

⁴⁹ 'Bangladesh: Rohingya Refugees Allegedly Tortured' (*Human Rights Watch*, 27 April 2021) <<https://www.hrw.org/news/2021/04/27/bangladesh-rohingya-refugees-allegedly-tortured>> accessed on 25 September 2021.

unreasonableness and unconstitutionality. Firstly, after distinguishing between refugees and other undocumented migrants, the Parliament should grant the refugees a set of substantive and procedural safeguards. Secondly, it should fix a limit on the period of detention for all types of migrants, including refugees and asylum seekers. Finally, it should also replace the Advisory Board with a judicial authority for maintaining neutrality and objectivity.

When national security is concerned, detention should not be regarded as the only resort. However, multiple other measures can serve the interest without encroaching upon personal liberty. The Government may employ the following alternatives to detention as recommended by UNHCR:⁵⁰

- (a) Bail, bond or surety
- (b) Reporting requirements
- (c) Open centres, semi-open centres, directed residence, dispersal, and restrictions to a district
- (d) Registration and documentation
- (e) Release to non-governmental supervision
- (f) Electronic monitoring and home curfew
- (g) Alternatives for children
- (h) Alternatives for other vulnerable persons

On a final note, Bangladesh should take appropriate measures to be a party to the Refugee Convention. It will protect the persecuted people from detention or penalisation for illegal entry and strengthen the position of Bangladesh in gaining international support. Moreover, a human rights-based approach will contribute to a humane and efficient solution to the refugee crisis Bangladesh is going through.

⁵⁰ UNHCR, n 10, p 41.