

Bhasan Char: How the “Floating Island” Sinks International Refugee Protections

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INTRODUCTION

Without warning, Yusuf Ali’s children were taken from him and transferred to Bhasan Char,¹ a small island in the Bay of Bengal.² Yusuf, a Rohingya refugee living in the Cox’s Bazar district of Bangladesh, learned

¹ *An Island Jail in the Middle of the Sea – Bangladesh’s Relocation of Rohingya Refugees to Bhasan Char*, HUM. RTS. WATCH (June 7, 2021), <https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char> (hereinafter *An Island Jail in the Middle of the Sea*). According to Yusuf, officials told him that his daughters would never be returned to the mainland. *Id.* at 5.

² Lindsay Bremner, *Sedimentary Logics and the Rohingya Refugee Camps in Bangladesh*, 77 POL. GEOGRAPHY 102109 (2020), <https://www.sciencedirect.com/science/article/pii/S0962629818302944>. Bhasan Char is one of several *chars* in the Bay of Bengal—sedimentary islands that develop from silt flowing down from the Himalayas. Because the islands are “free-flowing sedimentary matter-energy, they can emerge from the ocean only to disappear again or change shape from season to season and year to year.” *Id.* at 7.

from his daughters that Bhasan Char felt like “an island jail in the middle of the sea.”³ But if Yusuf wanted to stay with his children, he only had one option: relocate to Bhasan Char himself.⁴

Bhasan Char, or the “floating island,” is a sedimentary island that did not exist twenty years ago.⁵ Today the island is home to thousands of Rohingya refugees—many who are children, like Yusuf’s daughters—and thousands more will be relocated.⁶ Sitting just six feet above sea level⁷ and spanning an area of fifteen square miles,⁸ Bhasan Char frequently experiences extreme weather and intense flooding.⁹ As a result, the island was used only as a brief stopping point for local fishermen for many years after its formation.¹⁰ However, this limited use ended in 2017 when Bangladesh designated Bhasan Char for Rohingya resettlement.¹¹ The designation was part of a refugee relocation plan, proposed by Bangladesh’s government after thousands of Rohingya—who were facing violent persecution in Myanmar—crossed the Bangladeshi border into Cox’s Bazar.¹² These refugees sought shelter at the refugee camps scattered along the eastern border of Cox’s Bazar, joining an estimated 200,000 Rohingya who were displaced during earlier waves of violence.¹³

³ *An Island Jail in the Middle of the Sea*, *supra* note 1, at 30.

⁴ Officials told Yusuf that “[y]ou still have time to choose to go [to Bhasan Char] otherwise forget about your children.” *Id.* at 36. Other refugees reported similar experiences with separations and camp officials who insisted that relocation was the only way for the families to be reunited. *Id.*

⁵ Bhasan Char developed topographical permanence in 2003. Bremner, *supra* note 2 at 7.

⁶ *An Island Jail in the Middle of the Sea*, *supra* note 1 at 36. When authorities began relocating refugees to Bhasan Char, they promised that “there would be schools, teachers, and accredited education on the island.” *Id.* Upon arrival, however, the refugees learned that no such school facilities existed and that there were extremely limited educational resources. *Id.* at 37. Furthermore, the government selected refugees for relocation on a seemingly arbitrary basis. *Id.* Thus, some refugees like Yusuf were stuck on the mainland while their children were relocated to Bhasan Char.

⁷ Moazzem Hossain & Swaminathan Natarajan, *The Rohingya Refugees Trapped on a Remote Island Miles from Land*, BBC NEWS (May 28, 2021), <https://www.bbc.com/news/world-asia-56347139> [https://perma.cc/9HRA-KSM5].

⁸ *Id.*

⁹ Saif Hasnat & Sameer Yasir, *They Were Promised a New Home. Then They Tried to Escape It*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/10/world/asia/bangladesh-rohingya-bhashan-char.html>.

¹⁰ Hossain & Natarajan, *supra* note 7.

¹¹ Bremner, *supra* note 2, at 7-8.

¹² Austin Ramzy, *At Risk in Rohingya Exodus: 230,000 Children, Hundreds All Alone*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/world/asia/myanmar-rohingya-children.html> [https://perma.cc/T5UF-YHM6]. These refugees joined those who fled during earlier waves of persecution and, currently, more than 900,000 Rohingya live in densely populated camps in Bangladesh. *Bangladesh Operational Update – January 2022*, U.N. HIGH COMM’R FOR REFUGEES, https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Bangladesh%20Operational%20Update_January%202022.pdf (last visited Feb. 25, 2022). The Rohingya live in a series of heavily congested and underfunded camps primarily concentrated in the Cox’s Bazar district. More than half of the refugees are children. *Id.*

¹³ *Rohingya Emergency One Year on: Asia’s Most Recent Refugee Crisis Warrants International Solidarity and Progress on Solutions*, U.N. HIGH COMM’R FOR REFUGEES (Aug. 24, 2018), <http://www.unhcr.org/news/briefing/2018/8/5b7fc7174/rohingya-emergency-yearasias-recent-refugee-crisis-warrants-international.html>.

Already one of the world's most densely populated countries,¹⁴ the 2017 influx of refugees drastically strained Bangladesh's resources and caused extensive environmental damage around the refugee camps.¹⁵ Thus, the Bangladeshi government proposed the relocation plan as a sustainable solution to the country's surging refugee population.¹⁶ According to Bangladesh, the Rohingya were being moved to an island with "all modern amenities . . . year-round fresh water, an uninterrupted supply of electricity," and proper infrastructure.¹⁷ But the reality has been a jarring contradiction.

Far from a voluntary or pleasant relocation, refugees report being forcibly separated from their families. This separation is exacerbated by Bhasan Char's remoteness—the island is only accessible by a three-to-five-hour boat ride from the mainland.¹⁸ Moreover, once the Rohingya arrive at Bhasan Char, they face onerous restrictions on their movement and cannot voluntarily leave the island.¹⁹ Furthermore, the refugees in Bhasan Char lack consistent access to education, medical supplies, and food.²⁰ Because of these conditions, international human rights experts have repeatedly called for independent assessments of the island's habitability.²¹ But such assessments have not been completed and humanitarian inspections of the island have been restricted.

Notwithstanding these issues, Bangladesh has relocated thousands of Rohingya to Bhasan Char, where it hopes to house up to 100,000 refugees.²² In response to international condemnation over the Bhasan Char relocation, the Bangladeshi government stated that the choice is exclusively with the Rohingya: go back to Myanmar, or stay in Bangladesh—but with the risk of relocation to Bhasan Char at any time.²³ This choice is especially difficult

¹⁴ *Population Trends*, U.N. POP. FUND, <https://bangladesh.unfpa.org/en/node/24314> (last visited Feb. 25, 2022).

¹⁵ See *Report on Environmental Impact of Rohingya Influx*, UNITED NATIONS DEV. PROGRAMME (Mar. 2018), <https://www.undp.org/sites/g/files/zskgke326/files/migration/bd/REIRI.pdf>. "Rohingya camps are situated near the protected areas . . . [that] have already suffered degradation, and expansion of the camps is likely to result in significant ecological impacts, as [forest and] agricultural land is converted to establish housing, schools, water supply and sanitation facilities." *Id.* at 20.

¹⁶ *An Island Jail in the Middle of the Sea*, *supra* note 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* On Bhasan Char, the Rohingya are unable to move from one part of the island to the other without permission from local authorities. They are not permitted any guests and have strict, non-negotiable curfews. *Id.*

²⁰ *Id.*

²¹ *UN Expert Urges Independent Assessment of Bhasan Char and Verification of Voluntary Relocation*, U.N. HIGH COMM'R FOR REFUGEES (Dec. 10, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26590&LangID=E> (hereinafter *UN Expert Urges Independent Assessment of Bhasan Char*)

²² Hasnat & Yasir, *supra* note 9.

²³ Ruma Paul et al., *Floating Island: New Home for Rohingya Refugees Emerges in Bay of Bengal*, REUTERS (Feb. 21, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-island/floating-island-new-home-for-rohingya-refugees-emerges-in-bay-of-bengal-idUSKCN1G603T>. An advisor to Prime Minister Sheikh Hasina stated that the Rohingya could only leave Bhasan Char if they wanted to go back to Myanmar or were selected for asylum by a third country. *Id.*

for those Rohingya who, like Yusuf, have family living on Bhasan Char and are told that relocation is the only route to reunion.²⁴

This Note examines whether such a choice violates the international principle of non-refoulement by indirectly pressuring the Rohingya to return to Myanmar. Under international human rights law, a State's non-refoulement obligations prohibit it from returning refugees to territories where their lives or freedoms may be threatened.²⁵ Non-refoulement is broad in its scope and encompasses both direct and indirect state actions.²⁶

Part I of this Note provides historical background to the Rohingya conflict and highlights the challenges that the Rohingya face today. Part II considers applicable international law alongside Bangladesh's national law, analyzing the tension between such laws and Bangladesh's Rohingya relocation policy. Part III presents recommendations to cure potential deficiencies in non-refoulement obligations.

BACKGROUND

The “Outsiders”

The Rohingya are an ethnic-minority group that has lived in the Burma/Myanmar²⁷ region since the fifteenth century.²⁸ Despite their long presence there, the Rohingya have been historically portrayed as outsiders and illegal immigrants.²⁹ Since Burma's independence in 1948, the Burmese government has actively refuted the Rohingya's historical ties to the region and launched initiatives targeting the group's political and social well-being.³⁰ One such initiative was launched in 1977 when the Tatmadaw, Burma's military authority, launched Operation Naga Min with the purpose of screening every person within the State and qualifying them as either a citizen or an “illegal immigrant.”³¹ Shortly after this campaign, Burma

²⁴ *An Island Jail in the Middle of the Sea*, *supra* note 1, at 30.

²⁵ *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf> (hereinafter *Advisory Opinion*).

²⁶ *Id.* According to the United Nations, the principle of non-refoulement prohibits countries from directly or indirectly pressuring refugees into returning to countries where they are at risk of being harmed.

²⁷ Burma and Myanmar are still used interchangeably today. For a discussion of the two names and the region's nomenclature, *see infra* note 35.

²⁸ Eleanor Albert & Lindsay Maizland, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELS. (Jan. 23, 2020), <https://www.cfr.org/backgrounder/rohingya-crisis>. The Rohingya are an ethnic Muslim minority, and they differ from Myanmar's dominant Buddhist groups ethnically, linguistically, and religiously. *Id.* The Rohingya live in Rakhine State—which was formerly known as Arakan State but references to the older name persists. This Note refers to the region as Rakhine for uniformity, but some citations, included in their original form, contain references to Arakan.

²⁹ *Id.*

³⁰ *Id.*

³¹ Akbar Ahmed, *The Rohingya: Myanmar's Outcasts*, AL JAZEERA (Jan. 30, 2012), <https://www.aljazeera.com/opinions/2012/1/30/the-rohingya-myanmars-outcasts>. The military junta

passed the 1982 Citizenship Law, which did not list the Rohingya as an official ethnic group and rendered the Rohingya stateless.³²

In 1989, Burma changed its name to Myanmar—a decision that reflected the military’s judgment that the prior name excluded many of the country’s ethnic minorities.³³ But despite the government’s proclamations of inclusivity and ethnic unity, the Rohingya remained excluded in the re-branded Myanmar. Indeed, quickly following the name change, Myanmar launched Operation Pyi Thaya—a violent campaign against the Rohingya that caused a wave of refugees to pour into Bangladesh.³⁴ And shortly after Operation Pyi Thaya, Myanmar’s government established the Nay-Sat Kut-kwey Ye (“NaSaKa”), a security force that operated exclusively in North Rakhine and asserted substantial control over the Rohingya who lived there.³⁵ Meanwhile, Myanmar’s government continued denying the Rohingya recognition as an official ethnic group and, instead, referred to them as “Bengali,”³⁶ reflecting its position that the Rohingya were illegal immigrants from Bangladesh.³⁷

Attempts to repatriate the Rohingya have been unsuccessful. In 1992, following another exodus of Rohingya into Bangladesh, Myanmar and

that rose to power in 1962 under General Ne Win advanced an ultra-nationalist ideology that ostracized the Rohingya and gradually eroded their rights. In some instances, the Rohingya were forced to work on housing projects for settlers that displaced them once the construction was complete. *Id.* Operation Naga Min was an escalation in the military’s aggression towards the Rohingya and Burma’s military used this initiative to sweep through Rakhine State—where the Rohingya were concentrated. *Id.*

Over the course of this campaign, the Rohingya were subjected to arbitrary arrests, widespread rape, destruction of their villages, and confiscation of their lands. *Id.* Consequently, nearly 250,000 Rohingya fled to Bangladesh. *Id.*

³² *III. Discrimination in Arakan*, HUM. RTS. WATCH (May 2000), <https://www.hrw.org/reports/2000/burma/burm005-02.htm>. The 1982 Burma Citizenship Law qualified citizens as persons who belong to one of the national races or whose ancestors settled in Burma before 1823, the beginning of British occupation of the region. *Id.* at 3; *see also* *Burma Citizenship Law*, Ch. 2 (Oct. 15, 1982), <https://www.refworld.org/docid/3ae6b4f71b.html>.

³³ Kim Tong-Hyung & Hyung-Jin Kim, *Explainer: Myanmar, Burma and Why the Different Names Matter*, TAIWAN NEWS (Feb. 3, 2021), <https://www.taiwannews.com.tw/en/news/4118540>. The name “Burma” referenced the dominant Burman ethnic group, and the military claimed that using “Myanmar” was an attempt to foster ethnic unity within the country. *Id.*

³⁴ Akbar Ahmed, *supra* note 31.

³⁵ With the creation of the NaSaKa, “the day-to-day lives of the Rohingya took a dramatic turn for the worse.” Greg Constantine, *Bangladesh: The Plight of the Rohingya*, PULITZER CTR. ON CRISIS REP., <https://pulitzercenter.org/stories/bangladesh-plight-rohingya> (last visited Feb. 25, 2022). Under the NaSaKa, the Rohingya “[were] subjected to forced labor and arbitrary land seizure and forced displacement, endure[d] excessive taxes and extortion, and [were] denied the right to travel safely.” *Id.*

³⁶ *Myanmar Tensions: Dozens Dead in Rakhine Militant Attack*, BBC NEWS (Aug. 25, 2017), <https://www.bbc.com/news/world-asia-41046729> (hereinafter *Myanmar Tensions*). Senior General Min Aung Hlaing, the chief of Myanmar’s army, has expressly disclaimed the Rohingya’s historical roots to Myanmar, instead claiming that “[t]he Bengalis were not taken into the country by Myanmar, but by the colonialists. They are not the natives.” Robert Birsell & Wa Lone, *Myanmar Army Chief Says Rohingya Muslims ‘Not Natives,’ Numbers Fleeing Exaggerated*, REUTERS (Oct. 12, 2017), <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-army-chief-says-rohingya-muslims-not-natives-numbers-fleeing-exaggerated-idUSKBN1CH0I6>.

³⁷ This position, in turn, is used by Myanmar’s government to justify decisions to deprive the Rohingya of their citizenship rights. *Id.*

Bangladesh signed an agreement to repatriate refugees who fled to Bangladesh over the years.³⁸ After signing the agreement, Bangladesh closed off its refugee camps to new arrivals and attempted to move refugees back to Myanmar by truckloads.³⁹ The effort stalled, though, and the United Nations High Commissioner for Refugees (“UNHCR”), which was initially involved in the repatriation effort, formally withdrew from the initiative.⁴⁰ The following year, UNHCR signed new agreements with Myanmar and Bangladesh, emphasizing the “safe and voluntary” repatriation of those Rohingya who wished to return,⁴¹ while also recognizing the difficulty of repatriation due to the hostile conditions facing the Rohingya in Myanmar.⁴²

Tensions escalate in Rakhine and displace thousands of Rohingya.

In 2012, increasing tensions in Rakhine devolved into deadly violence that displaced thousands of Rohingya.⁴³ The situation appeared to improve

³⁸ *Timeline: A Visual History of the Rohingya Refugee Crisis*, DOCTORS WITHOUT BORDERS (Aug. 21, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/timeline-visual-history-rohingya-refugee-crisis>.

³⁹ *Id.* This attempt was quickly confronted with allegations of forced repatriation as refugees asserted that they did not wish to return due to concerns about their rights in Myanmar. See *Bangladesh: Information on the Situation of Rohingya Refugees*, U.S. BUREAU OF CITIZENSHIP AND IMMIGR. SERVS. (Mar. 28, 2001), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/13/MMR01001.pdf>. (“In 1992 and 1993, clashes between refugees and Bangladeshi security forces over allegedly involuntary repatriations resulted in deaths and injuries on both sides. Some refugees interviewed by UNHCR said they did not want to return to Burma.”). Notwithstanding the Rohingya’s protests, most of the refugees who came over during the 1991 were repatriated to Myanmar. *Id.*

⁴⁰ *Id.* UNHCR stated that its withdrawal was prompted by Bangladesh’s policy of restricting access to the camps for humanitarian inspections and the UNCHR’s inability to cure the abuses that it did observe, such as refugee beatdowns and detentions. *Id.*

⁴¹ *Id.*

⁴² *Id.* The UNHCR states that “it has been difficult to reintegrate the returned Rohingyas in Burma because the majority of the Burmese population views them as aliens. This is in part due to the ancient Arab and Persian ancestry of the Rohingyas, Rohingya support for the British during colonialism, fears of illegal immigration from mostly Muslim Bangladesh, and concern about possible security threats posed by two armed Rohingya rebel groups which are said to be supported [or may have been supported] by foreign governments.” *Id.* at 3.

⁴³ *Why is There Communal Violence in Myanmar?*, BBC (July 3, 2014), <https://www.bbc.com/news/world-asia-18395788>. Accusations of sexual violence and local disputes exacerbated relations between the Rohingya and the local government. In June 2012, the rape and murder of a young Buddhist woman sparked widespread rioting and clashes between Rakhine Buddhists and Muslims. In March 2013, an argument in a store led to further violence that destroyed entire neighborhoods. Over the next several months, this pattern of violence continued and tensions in Rakhine climbed while Myanmar’s government deployed security forces to the region. *Id.* However, according to the Human Rights Watch, “while the state security forces in some instances intervened to prevent violence and protect fleeing Muslims, more frequently they stood aside during attacks or directly supported the assailants, committing killings and other abuses.” *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya in Burma’s Arakan State*, HUM. RTS. WATCH <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims#> (last visited Feb. 25, 2022). Instead, the Human Rights Watch portrayed the violence in Rakhine as a “a coordinated campaign to forcibly relocate or remove the state’s Muslims . . . [with attacks] against Rohingya and Kaman Muslim communities [that] were organized, incited, and committed by local Arakanese political party operatives, the Buddhist monkhood, and ordinary Arakanese, at times directly supported by state security forces.” *Id.*

in 2013 when Myanmar's president disbanded NaSaKa,⁴⁴ but the disbandment did not end the persecution of the Rohingya.⁴⁵ New police forces continued to impose abusive detainment conditions on hundreds of Rohingya, including children and the elderly.⁴⁶

Tensions in Rakhine State reached a boiling point in August 2017, when militants in Rakhine attacked several police posts.⁴⁷ In response, the Tatmadaw launched a campaign that killed an estimated 6,700 Rohingya in the first month alone.⁴⁸ To escape the violence, an estimated 745,000 Rohingya crossed the border into Bangladesh and sought shelter at the refugee camps in Cox's Bazar.⁴⁹ These camps are extremely congested;

⁴⁴ Jared Ferrie, *Myanmar President Disbands Controversial Border Force*, REUTERS (July 15, 2013), <https://www.reuters.com/article/us-myanmar-security/myanmar-president-disbands-controversial-border-force-idUSBRE96E0B420130715>. The dissolution came a few months after the United Nations Special Rapporteur Tomas Ojea Quintana urged Myanmar to suspend NaSaKa's operations in Rakhine due to mounting allegations of abuse against the Rohingya. *Id.* International human rights groups hailed the dissolution as "a very positive move," noting that the "removal of an agency created for oppressive purposes, and with an institutional culture of corruption and abuse, can only be a good thing." Jim Della-Giacoma, *Myanmar's "Nasaka": Disbanding an Abusive Agency*, INT'L CRISIS GRP. (July 16, 2013), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmars-nasaka-disbanding-abusive-agency>.

⁴⁵ Instead, Rohingya that lived in towns near the Bangladeshi border continued to be "subject to a campaign of mass arrest and renewed restrictions." Hanna Hindstrom, *Rohingyas Continue To Be Persecuted Despite Nasaka Disbandment*, DEMOCRATIC VOICE OF BURMA (Aug. 24, 2013), <https://reliefweb.int/report/myanmar/rohingyas-continue-be-persecuted-despite-nasaka-disbandment>.

⁴⁶ *Id.* The vast majority of the detained Rohingya were held at the Buthidaung prison, where there were reports of prisoners facing "systematic torture." *Id.* Moreover, international inspections of the prison have been clouded with reports that Rohingya were transferred out of the prison prior to such visits and transferred back only once the visits concluded. *Id.* A UNHCR Flash Report noted that, after NaSaKa's disbandment, the Rohingya experienced substantial communal violence, including the destruction of their schools, housing, storage facilities, and markets. *See Interviews with Rohingyas Fleeing from Myanmar Since 9 October 2016 – Flash Report*, U.N. HIGH COMM'R FOR REFUGEES (Feb. 3, 2017), <https://www.ohchr.org/sites/default/files/Documents/Countries/MM/FlashReport3Feb2017.pdf>.

The Flash Report further noted that the "attacks against the Rohingya population in the area (killings, enforced disappearances, torture, and inhumane treatment, rape and other forms of sexual violence, arbitrary detention, deportation and forced transfer as a result of violence and persecution) seems to have been widespread as well as systematic, indicating the very likely commission of crimes against humanity." *Id.* at 42. The disbanded NaSaKa were replaced by other government security forces were "heavily present in [the] area ever since several hundred men reportedly attacked three border guard posts." *Id.* at 7.

⁴⁷ *Myanmar Tensions*, *supra* note 36.

⁴⁸ Of the dead, at least 730 were children below the age of five years. *MSF Surveys Estimate That At Least 6,700 Rohingya Were Killed During the Attacks in Myanmar*, MÉDECINS SANS FRONTIÈRES (Dec. 12, 2017), <https://www.msf.org/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks-myanmar>. There were also reports that the Rohingya were subject to widespread rape, torture, and indiscriminate shelling. Michael Safi, *'Tied to Trees and Raped': UN Report Details Rohingya Horrors*, GUARDIAN (Sept. 18, 2018), <https://www.theguardian.com/world/2018/sep/18/tied-to-trees-and-raped-un-report-details-rohingya-horrors>. The chairman of the fact-finding mission that presented these accounts to the UNHCR expressed that he had "never been confronted by crimes as horrendous and on such a scale as these." *Id.*

⁴⁹ *Rohingya Refugee Crisis*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, <https://www.unocha.org/rohingya-refugee-crisis> (last visited Feb. 22, 2022).

Kutupalong, the largest settlement, is considered the world's largest refugee camp.⁵⁰

Conditions in the Cox's Bazar camps are horrible.⁵¹ But the Rohingya do not have feasible alternatives. Attempts to repatriate the Rohingya continue to be unsuccessful and recommendations for peaceful solutions have been largely ignored.⁵² One such effort occurred in 2018 when Myanmar signed a new repatriation agreement with Bangladesh.⁵³ This repatriation plan faced international criticism and ultimately fell through.⁵⁴ A second unsuccessful repatriation effort was attempted in 2019.⁵⁵ A third

⁵⁰ *Rohingya Crisis: A Firsthand Look into the World's Largest Refugee Camp*, U.N. WORLD FOOD PROGRAM USA (Dec. 8, 2020), <https://www.wfpusa.org/articles/rohingya-crisis-a-firsthand-look-into-the-worlds-largest-refugee-camp/>. The extremely dense population of the camps have made the Rohingya particularly vulnerable to natural and manmade problems. *Id.* For example, in March 2021, a fire started in an abandoned hut and quickly spread through the nearby dwellings, destroying thousands of homes and killing several refugees. Karan Deep Singh, *Fire Tears Through Rohingya Camp, Leaving Thousands Homeless Once More*, N.Y. TIMES (Mar. 23, 2021), <https://www.nytimes.com/2021/03/23/world/asia/bangladesh-rohingya-fire-refugees.html>.

⁵¹ There is very limited access to education: although approximately 1,200 learning centers operate within the camps, classrooms are "often overcrowded and lacked basic water and other facilities." *Investment in Education Desperately Needed to Avert 'Lost Generation' of Rohingya Children*, U.N CHILD. FUND (Aug. 22, 2018), <https://www.unicef.org/press-releases/investment-education-desperately-needed-avert-lost-generation-rohingya-children> (limited access to education); Porimol Palma, *Human Trafficking: Rohingyas Faced Horrific Crimes*, DAILY STAR (Mar. 28, 2019), <https://www.thedailystar.net/rohingya-crisis/news/human-trafficking-rohingyas-faced-horrific-crimes-1721431> (human trafficking); *Bangladesh: Diphtheria Outbreak Threatens Rohingya Refugees*, MÉDECINS SANS FRONTIÈRES (Dec. 30, 2017), <https://www.doctorswithoutborders.org/latest/bangladesh-diphtheria-outbreak-threatens-rohingya-refugees> (disease).

⁵² The Advisory Commission on Rakhine State released a Report containing a comprehensive list of suggestions aimed at resolving the Rohingya crisis. Specifically, the Commission urged Myanmar to focus efforts on protecting the Rohingya's rights and equality before the law by proposing "a ministerial level appointment to be made with the sole function of coordinating policy on Rakhine State and ensuring the effective implementation of the Rakhine Advisory Commission's recommendations." *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State*, Advisory Commission on Rakhine State (Aug. 24, 2017), <https://reliefweb.int/report/myanmar/towards-peaceful-fair-and-prosperous-future-people-rakhine-final-report-advisory> (hereinafter *Final Report*). Myanmar has not implemented the Advisory Commission's recommendations.

⁵³ Nikita Taniparti, *The Ruse of Repatriation: Why the Current Efforts to Repatriate the Rohingya Back to Myanmar Will Fail*, HARV. KENNEDY SCH. REV. (Nov. 12, 2019), <https://studentreview.hks.harvard.edu/the-ruse-of-repatriation-why-the-current-efforts-to-repatriate-the-rohingya-back-to-myanmar-will-fail/>. Under this deal, the countries agreed to repatriate 1,500 Rohingya every week, with the goal of ultimately repatriating 700,000 Rohingya over two years. *Id.*

⁵⁴ Nasir Uddin, *Ongoing Rohingya Repatriation Efforts Are Doomed to Failure*, AL JAZEERA (Nov. 22, 2018), <https://www.aljazeera.com/opinions/2018/11/22/ongoing-rohingya-repatriation-efforts-are-doomed-to-failure>. The Rohingya also expressed concern about the repatriation plan. As one refugee put it, "[w]e want to return to Burma [Myanmar] as it is our motherland, we were born and brought up there . . . but we experienced nothing but atrocities there since August last year—[the country] turned into a 'death hole' for us." *Id.* While Myanmar agreed to repatriate the Rohingya, there was little evidence that the conditions in the country, which led to the exodus of refugees in the first place, had improved. *Id.* Consequently, the Rohingya were not willing to cooperate with the repatriation due to fears for their safety.

⁵⁵ *Id.*

repatriation effort was announced in 2021,⁵⁶ but Rohingya leaders remarked that, despite feeling like “caged animals in a foreign land,” the conditions in Myanmar were “not at all suitable” for the Rohingya’s return.⁵⁷

The Rohingya’s fears were exacerbated in early 2021 when the Tatmadaw executed a military coup and seized power.⁵⁸ Seeing political power in the hands of the same military that coordinated the vicious crackdown in 2017 has made some Rohingya even more reluctant to return.⁵⁹ Indeed, since the coup, there have been extrajudicial killings,

⁵⁶ The third repatriation effort was attempted with the help of China and international watchdogs. *See* Shaikh Azizur Rahman, *Bangladesh Expects to Start Rohingya Repatriation to Myanmar in June*, VOA NEWS, https://www.voanews.com/a/east-asia-pacific_bangladesh-expects-start-rohingya-repatriation-myanmar-june/6200978.html. Still, the Rohingya felt unsafe about the conditions in Myanmar. As one refugee remarked, “I am sure no Rohingya will be ready to go back to Rakhine if Myanmar does not care to fulfill our demands.” *Id.*

⁵⁷ Faisal Mahmud, *Four Years On, Rohingya Stuck in Bangladesh Camps Yearn for Home*, AL JAZEERA (Aug. 25, 2021), <https://www.aljazeera.com/news/2021/8/25/rohingya-exodus-hopes-are-getting-thin-for-repatriation>. The Rohingya expressed fear that a return to Myanmar would endanger their lives. *See Top UN Court Orders Myanmar to Protect Rohingya from Genocide*, U.N. NEWS (Jan. 20, 2020), <https://news.un.org/en/story/2020/01/1055841>.

Myanmar, however, asserted that the ruling painted a “distorted picture” and declared that “there has been no genocide in Rakhine.” *After ICJ Ruling, Myanmar Denies Genocide Against Rohingya*, AL JAZEERA (Jan. 23, 2020), <https://www.aljazeera.com/news/2020/1/23/after-icj-ruling-myanmar-denies-genocide-against-rohingya>. Furthermore, although the International Court of Justice’s (“ICJ”) ruling simply mandates Myanmar to take action to protect the lives of the Rohingya, Myanmar has actively fought the mandate—filing preliminary objections to the ICJ’s ruling to challenge the Court’s jurisdiction and ability to bind Myanmar with its ruling. *Myanmar Lodges Objections in Rohingya Genocide Case*, AL JAZEERA (Feb. 4, 2021), <https://www.aljazeera.com/news/2021/2/4/myanmar-lodges-objections-in-rohingya-genocide-case>.

⁵⁸ Russell Goldman, *Myanmar’s Coup, Explained*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/article/myanmar-news-protests-coup.html>. Myanmar’s Parliament was expected to endorse the recent election results and approve the transition of power to the next government, led by the National League for Democracy (“NLD”). *Id.* The NLD’s election agenda included reforming the military, which had effectively ruled from 1958 to 2016 and still retained key roles in the government protected by the constitution the military in 2008, and to address ethnic tensions. *See* San Yamin Aung, *Myanmar’s Ruling Party Vows to Reform Military in Election Manifesto*, IRRAWADDY (Sept. 2, 2020), <https://www.irrawaddy.com/elections/myanmars-ruling-party-vows-reform-military-election-manifesto.html>. Specifically, the NLD proposed amendments that decreased the number of parliamentary seats reserved for the military under Myanmar’s current constitution. *Id.* The election, however, excluded Rohingya participation so the NLD, even with its proclamations of inclusivity and ethnic healing, were not representative or inclusive of Rohingya interests. *See* Amit Ranjan, *Myanmar Polls: Here’s Why The Rohingya Have No Reason To Celebrate Suu Kyi’s Victory*, WIRE (Nov. 19, 2020), <https://thewire.in/south-asia/myanmar-election-aung-san-rohingyas-military>.

The military refused to accept the election results and detained NLD leaders. Shortly afterwards, the military announced the coup via military-owned media and declared a national emergency, which in turn statutorily expanded their powers. *See* Goldman, *supra* note 58.

The coup has been condemned internationally, and the United Nations Security Council released a statement expressing its concern that conditions in Myanmar “pose particular serious challenges for the voluntary, safe, dignified, and sustainable return of the Rohingya refugees and internally displaced persons.” Statement by the President of the Security Council, U.N. Sec. Council (Mar. 10, 2021), <https://undocs.org/S/PRST/2021/5>.

⁵⁹ As Ro Khin Maung, the executive director of the Rohingya Youth Association in Cox’s Bazar, put it: “they [the military] have the plan to destroy us...now they are leading our country.” Ashley Westerman, *What Myanmar’s Coup Means for the Rohingya*, NAT’L PUB. RADIO (Feb. 11, 2021), <https://www.npr.org/2021/02/11/966923582/what-myanmars-coup-means-for-the-rohingya>.

political prisoners, and physical intimidation endorsed by the Tatmadaw.⁶⁰ Even the head of Myanmar's junta has explicitly expressed doubt as to whether the Rohingya would be able to successfully return to the country.⁶¹ The prospect of repatriation was further dimmed when, in 2022, the military further downplayed the International Court of Justice's ("ICJ") ruling and ordered all personnel to disregard communications relating to arrest warrants or summons from the International Criminal Court.⁶²

Facing these hostile conditions in Myanmar, many Rohingya have made the difficult decision to stay in Bangladesh despite the squalid conditions of the refugee camps.⁶³ The Rohingya's decision, however, became far more difficult when Bangladesh decided that the solution to their Rohingya problem, if not repatriation, was relocation.

Bangladesh first proposed relocating the Rohingya in 2015, but the proposal was met with substantial international criticism, and the government ultimately abandoned the plan.⁶⁴ However, after the 2017 influx of refugees, the relocation plan was revived.⁶⁵ Prime Minister Sheikh Hasina claimed the relocation plan was a "temporary arrangement" designed to decongest the main camps at Cox's Bazar.⁶⁶ But Hasina's advisors explicitly stated that the Rohingya, once relocated to Bhasan Char, would only be able to leave the island if they agreed to go back to Myanmar or were selected for asylum by another country.⁶⁷ As of 2021, nearly 20,000 Rohingya, including over 8,000 children, have been relocated to Bhasan

⁶⁰ Brian Gorlick, *Rohingya Refugees and The Urgency of Solutions*, GEO. J. INT'L AFF. (Apr. 20, 2021), <https://gjia.georgetown.edu/2021/04/20/rohingya-refugees-and-the-urgency-of-solutions/>. This violence prompted the UN Special Rapporteur to plead for international assistance in stopping what he described as crimes against humanity. *Myanmar Crackdown Has Led to Likely Crimes Against Humanity, Human Rights Council Told*, U.N. NEWS (Mar. 11, 2021).

⁶¹ When Min Aung Hlaing, the chief of Myanmar's army, was asked whether "international appeals on behalf of the Rohingya were to no avail," he nodded. *Myanmar Junta Leader Casts Doubt On Return of Rohingya*, REUTERS (May 24, 2021), <https://www.reuters.com/world/asia-pacific/myanmar-junta-leader-casts-doubt-return-rohingya-2021-05-24/>. Instead, the military chief noted that "after we gained our independence [from the British], the census also registered the words 'Bengali,' 'Pakistani,' and 'Chittagong,' but never the word 'Rohingya,' thus we never accepted it." *Id.*

⁶² *Myanmar Junta Ordered Personnel Not to Respond to ICC Summons: Burmese Rohingya Organisation UK*, DAILY STAR (Jan. 14, 2022), <https://www.thedailystar.net/southeast-asia/news/myanmar-junta-ordered-military-not-respond-icc-summons-burmese-rohingya-organisation-uk-2939021>.

⁶³ See Final Report, *supra* note 52.

⁶⁴ "International aid agencies and the United Nations have vehemently opposed the relocation since it was first proposed in 2015. They fear a big storm could overwhelm the island and endanger thousands of lives." Arafatul Islam, *Bangladesh Rohingya Relocation to Isolated Island Criticized by Rights Groups*, DEUTSCHE WELLE (Apr. 14, 2020), <https://www.dw.com/en/bangladesh-rohingya-relocation-to-isolated-island-criticized-by-rights-groups/a-55822366>.

⁶⁵ *Bangladesh: Reject Rohingya Refugee Relocation Plan*, HUM. RTS. WATCH (Feb. 8, 2017), <https://www.hrw.org/news/2017/02/09/bangladesh-reject-rohingya-refugee-relocation-plan> (hereinafter *Reject Rohingya Refugee Relocation Plan*). According to Bangladesh's State Minister for Foreign Affairs, while the Rohingya would live on Bhasan Char, the ultimate goal was for "the Myanmar government [to] take them back as soon as possible." *Id.*

⁶⁶ Paul, *supra* note 23.

⁶⁷ *Id.*

Char.⁶⁸ Bangladesh plans on continuing relocation until roughly 100,000 refugees live on the island.⁶⁹

Once the Rohingya are relocated, they have no choice but to remain in Bhasan Char. Under Bangladeshi policy, the Rohingya cannot leave Bhasan Char without permission and their movement on the island is restricted.⁷⁰ Many Rohingya risk drowning in the Bay of Bengal or pay smugglers for transportation in attempts to escape Bhasan Char.⁷¹

The Rohingya take these risks because Bhasan Char does not provide the refugees with many reasons to stay. Conditions on the island are sordid, despite Bangladesh's promises that the relocation would provide the Rohingya with a quality-of-life upgrade.⁷² Some refugees even insist that their lives on Bhasan Char are far worse than their experience at Cox's Bazar.⁷³ And because most of the Rohingya remain at Cox's Bazaar, restricted access to the mainland has indefinitely separated the relocated refugees from their families and friends.⁷⁴

The extreme conditions at Bhasan Char, along with the Rohingya's lack of agency in relocating to the island, have prompted suggestions that

⁶⁸ Meenakshi Ganguly, *Bangladesh's Unplanned Relocation of Rohingya Refugees to Bhasan Char Island is Risky*, HUM. RTS. WATCH (June 7, 2021), <https://www.hrw.org/news/2021/06/07/bangladesh-unplanned-relocation-rohingya-refugees-bhasan-char-island-risky#>. The conditions on the island have prompted several protests on the island during international visits—which occurred despite warnings from Bangladeshi security forces urging the refugees to stay inside. *Id.*

⁶⁹ *An Island Jail in the Middle of the Sea*, *supra* note 1. Relocating 100,000 refugees may just be an initial target, however, since Prime Minister Hasina has declared that Bhasan Char had room for up to a million refugees. *Id.*

⁷⁰ Along with the day-to-day operation of the island, the Bangladeshi navy controls all passage to and from Bhasan Char. See Hossain & Natarajan, *supra* note 7. The United Nations has called for Bhasan Char to be transferred from the navy's control to civilian oversight and managed in an "inclusive and consultive manner." *Id.*

⁷¹ Hasnat & Yasir, *supra* note 9.

⁷² The Bangladeshi government promised livelihood opportunities that would provide income for the refugees along with continuous infrastructural improvements. Hossain & Natarajan, *supra* note 7. However, the improvements have not come, and the refugees have grown tired of waiting indefinitely. Meanwhile, the livelihood opportunities are nonexistent.

⁷³ Although they have given up on returning to Myanmar, every refugee interviewed by BBC emphasized their desire to leave Bhasan Char and return to the mainland. *Id.* As Anjul, a refugee on Bhasan Char, put it: "In the camp [in Cox's Bazar], if any of us became sick at least we would be able to go to a doctor or hospital or the NGOs could arrange better treatment, but here when our people are dying, no one cares." See *An Island Jail in the Middle of the Sea*, *supra* note 1. The conditions are so bad on the island that some Rohingya have resigned their selves to "grow old and die [in Bhasan Char] alone." See Hossain & Natarajan, *supra* note 7.

⁷⁴ Zaw Win, *The Rohingya Trapped on a Remote Tropical Island*, DIPLOMAT (Dec. 17, 2021), <https://thediplomat.com/2021/12/trapped-on-a-remote-tropical-island/>. The Bangladeshi government has, to a limited degree, facilitated visits to the mainland for some of the relocated Rohingya. *Id.* On one such recent visit, only about 68 Rohingya were allowed to leave the island and each refugee needed special permission from officials. *Id.* The Bangladeshi government has recently declared an expansion to the mainland visitation program, under which refugees can apply for temporary permission to return to Cox's Bazar. See Abu Azad, *Govt. Likely to Allow Bhasan Char Rohingyas to Visit Relatives in Cox's Bazar*, BUS. STANDARD (Nov. 29, 2021), <https://www.tbsnews.net/rohingya-crisis/govt-likely-allow-bhasan-char-rohingyas-visit-relatives-coxs-bazar-336478>. Despite the application process, however, the government has not yet granted any such permission and it is not clear how the government is evaluating applications for approval. *Id.*

Bangladesh is attempting to indirectly apply pressure on the Rohingya to repatriate back to Myanmar.⁷⁵

DOES RELOCATION COMPLY WITH INTERNATIONAL LAW?

The Bangladeshi government, however, has vehemently denied allegations that Bhasan Char is a backdoor route to repatriation and instead presents the relocation as a solution to a difficult situation. Indeed, Bangladesh's decision to relocate the Rohingya comes in the wake of the country experiencing serious population density issues.⁷⁶ Moreover, the congestion of the refugee camps in Cox's Bazar caused substantial pollution and strained environmental resources.⁷⁷ By relocating the Rohingya, Bangladesh hoped to ease the congestion in Cox's Bazar and simultaneously improve living standards for the relocated Rohingya.⁷⁸ To this end, Bangladesh invested \$300 million towards infrastructural development on the island.⁷⁹ This investment aimed to counter the criticism received during its 2015 relocation proposal.⁸⁰

Despite the investments, substantial questions remain about the island's conditions.⁸¹ Yanghee Lee, the U.N. special rapporteur on Myanmar, visited Bhasan Char alongside Bangladeshi officials and immediately questioned whether "the island is truly habitable."⁸² Lee further highlighted that

⁷⁵ "The government appears to be indirectly forcing the Rohingyas to either return to Myanmar or move to Bhasan Char." Sreeparna Banerjee, *From Cox's Bazar to Bhasan Char: An Assessment of Bangladesh's Relocation Plan for Rohingya Refugees*, OBSERVER RSCH. FOUND. (May 07, 2020), <https://www.orfonline.org/research/from-coxs-bazar-to-bhasan-char-an-assessment-of-bangladesh-relocation-plan-for-rohingya-refugees-65784/>. As the relocation to Bhasan Char started, Bangladesh reduced resources supporting the camps at Cox's Bazar. *Id.*

⁷⁶ "In addition to the consequence of huge population size, the density of population is already five times that of any other 'mega' country (>100 million), a very challenging situation for an agricultural society... the number of older people will increase 10-fold this century, creating a large burden on the health system." Peter Kim Streatfield & Zunaid Ahsan Karar, *Population Challenges for Bangladesh in the Coming Decades*, 26 J. HEALTH, POP., AND NUTRITION 261 (2008), www.ncbi.nlm.nih.gov/pmc/articles/PMC2740702/.

⁷⁷ Hasnat & Yasir, *supra* note 9.

⁷⁸ This decision may also have been an indication that the Bangladeshi government, having experienced several failed repatriation efforts, shifted gears from directly repatriating the Rohingya to accepting the refugees as part of the country's long-term outlook.

⁷⁹ *Bangladesh Is Moving Rohingyas to a Remote Island*, ECONOMIST (Dec. 10, 2020), <https://www.economist.com/asia/2020/12/12/bangladesh-is-moving-rohingyas-to-a-remote-island>.

⁸⁰ Because one of the primary concerns focused on the island's poor soil quality and propensity for flooding, Bangladesh focused its investments on reinforcing the island's foundation and developing facilities to better equip it for hosting refugees—creating concrete housing structures, flood defense embankments, cyclone shelters, storage warehouses, and a solar power grid. Yuriko Cowper-Smith, *The Bhasan Char Relocation Project – Implications for Rohingya Refugees in Bangladesh*, SENTINEL PROJECT (Jan. 17, 2020), <https://thesentinelproject.org/2020/01/17/the-bhasan-char-relocation-project-implications-for-rohingya-refugees-in-bangladesh/>. Bangladesh also engaged consulting and architectural firms to work on coastal stabilization and flood protection measures to counteract erosion. *Id.*

⁸¹ See *supra* Part I.

⁸² Stephanie Nebehay, *U.N. Envoy Fears 'New Crisis' for Rohingya If Moved to Bangladesh Island*, REUTERS (Mar. 11, 2019), <https://www.reuters.com/article/us-myanmar-rohingya-un/un-envoy-fears-new-crisis-for-rohingya-if-moved-to-bangladesh-island-idUSKBN1O01WU>.

Bangladesh's promises regarding the Bhasan Char relocation had been largely unfulfilled.⁸³

Lee's remarks are part of a larger chorus of humanitarian agencies calling for independent assessments of the island's conditions and its suitability to host a substantial number of refugees.⁸⁴ Despite Bangladesh's assurance that it would consider allowing access to Bhasan Char, no such independent assessment has been conducted.⁸⁵ And amidst the international backlash, Bangladesh has relocated 20,000 Rohingya since December 2020, still insisting that the relocation was completely voluntary.⁸⁶

Regardless of Bangladesh's attempts to portray Bhasan Char as a "paradise" for refugees,⁸⁷ the lack of independent assessments makes it difficult to simply accept the assertions, especially while the testimony coming out of Bhasan Char paints a ghastly image of the island. Furthermore, it remains true that at least some Rohingya assert that they were brought to Bhasan Char forcefully,⁸⁸ and others express a desire to return to their families in Cox's Bazar.⁸⁹ Nonetheless, Bangladesh denies relocated refugees the freedom to leave the island—unless they agree to

new-crisis-for-rohingya-if-moved-to-bangladesh-island-idUSKBN1QS147. After visiting Bhasan Char and speaking with relocated refugees, Lee commented that "ill-planned relocation, and relocations without the consent of the refugee concerned, have the potential to create a new crisis." *Id.* Lee called on Bangladesh to "share the feasibility studies it has undertaken and to allow the UN to carry out a full technical and humanitarian assessment." *End of Mission Statement By the Special Rapporteur on the Situation of Human Rights in Myanmar*, OHCHR (Jan. 25, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24114&LangID=E>.

⁸³ Bangladesh promised that refugees "would essentially have access to the same basic rights as those who live in Cox's Bazar . . . children will be able to have primary level education, there will be health facilities, livelihood opportunities including fishing and farming, and freedom of movement on the island." *Id.* As discussed in this Note, however, these promises have gone largely unfulfilled as refugees have not been able to visit their families, access to education has been limited, and the island often lacks essential supplies and resources.

⁸⁴ *UN Expert Wants Scrutiny of Conditions At Bhasan Char*, AL JAZEERA (Dec. 11, 2020), <https://www.aljazeera.com/news/2020/12/11/myanmar-rohingya>. Tom Andrews, the special rapporteur on human rights in Myanmar, noted that the "verifications and assessments are in the best interests of all...they will assure the government of Bangladesh of the suitability of Bhasan Char to host refugees or identify changes that might be necessary. It will also assure that the government's policy of strict voluntary relocation to Bhasan Char is, indeed, being faithfully carried out." *Id.* Others, like Bill Frelick, director of the Human Rights Watch Refugee Rights Program, explicitly declared that "Bhasan Char is not sustainable for human habitation."

⁸⁵ *Id.*

⁸⁶ *An Island Jail in the Middle of the Sea*, *supra* note 1. Voluntary or not, these relocations have happened with limited access to international aid agencies and journalists. Akbar Hossain, *Rohingya Relocated to Remote Island Against Their Will, Rights Group Say*, BBC NEWS (Dec. 4, 2020), <https://www.bbc.com/news/world-asia-55177688>.

⁸⁷ Bhasan Char's lead architect, Ahmed Mukta, claimed that the settlement would be a "paradise" and declared that Bangladesh "will provide something to the Rohingya, they will remember it for their lives." Naomi Conrad et al., *Bangladesh May 'Force' 100,000 Rohingya to Resettle on Uninhabited Island*, DEUTSCHE WELLE (Mar. 09, 2019), <https://www.dw.com/en/bangladesh-may-force-100000-rohingya-to-resettle-on-uninhabited-island/a-50256755>. Despite the magnitude of the project, however, Mukta only had one week to come up with the initial plans for the Bhasan Char project. *Id.*

⁸⁸ "They have taken us here forcefully. Three days ago, when I heard that my family is on the list, I ran away from the block, but yesterday I was caught and taken here." *Id.*

⁸⁹ *Id.*

repatriation.⁹⁰ At the same time, Bangladesh has taken steps to “clear the way for new homes” in Cox’s Bazar—destroying thousands of shops in the camps as the refugee population goes down.⁹¹ Faced with family separation and forced relocation to a remote island, some refugees have felt indirectly pressured to consider a return to Myanmar.⁹²

But because a return to Myanmar would likely endanger the Rohingya, any pressure on the refugees to repatriate would likely violate international law. Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (collectively referred to herein as the “Convention”), contracting States agreed to the principle of “non-refoulement,” under which refugees would not be returned to areas where they may face persecution.⁹³

Despite international requests for Bangladesh to accede to the Convention,⁹⁴ Bangladesh is not a party.⁹⁵ Moreover, Bangladesh does not have national refugee laws.⁹⁶ Therefore, it is not immediately apparent what legal obligations Bangladesh has towards the Rohingya or, in turn, what procedures the refugees could rely on to protect their interests.

Bangladesh’s refugee framework arises under general provisions contained in its constitution. Under its constitution, Bangladesh must accord “respect for international law and the principles enunciated in the United Nations Charter.”⁹⁷ Accordingly, Bangladesh’s commitment to non-refoulement became apparent when, in May 2017, the High Court Division of the Supreme Court of Bangladesh held that the Convention was “a part of customary international law which is binding upon all the countries of

⁹⁰ Paul, *supra* note 23.

⁹¹ Hanh Nguyen & Themba Lewis, *Bhasan Char and Refugee ‘Warehousing’*, Diplomat (Feb. 08, 2022), <https://thediplomat.com/2022/02/bhasan-char-and-refugee-warehousing/>. As soon as the 2022 monsoon season ends, Bangladesh plans to relocate approximately 81,000 Rohingya to Bhasan Char, while demolishing the newly vacant camp buildings to make new homes for Cox’s Bazar residents. *Id.*

⁹² See generally Banerjee, *supra* note 75; see also *An Island Jail in the Middle of the Sea*, *supra* note 1.

⁹³ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. Article 33(1) of the Convention provides: “No Contracting State shall expel or return (“refoul”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.” For a more detailed discussion of the Convention, see generally Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 30 BRIT. Y.B. INT’L L. 478 (1953).

⁹⁴ UNHCR Submission for the Universal Periodic Review: Bangladesh, U.N. HIGH COMM’R FOR REFUGEES (Oct. 2012), <https://www.refworld.org/pdfid/508640242.pdf> (hereinafter *Universal Periodic Review*).

⁹⁵ *Id.*

⁹⁶ Nour Mohammad, *Refugee Protection Under the Constitution of Bangladesh: A Brief Overview*, REFUGEE WATCH (June 2012), http://www.merg.ac.in/rw%20files/RW39_40/12.pdf. In the absence of a national legislative framework supporting the refugees, UNHCR has conducted refugee status determinations of urban asylum-seekers in Dhaka, a function typically carried out by the host government. *Bangladesh – Working Environment*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/4ec231060.pdf> (last visited Feb. 20, 2022).

⁹⁷ Bang. Const., Art. 25. Furthermore, the Constitution guarantees that “no person shall be deprived of life or personal liberty save in accordance with law.” *Id.* at Art. 31. According to the Bangladeshi Constitution, to accord “respect” means to adhere to the law.

the world.”⁹⁸ The court also declared that, as a party to the 1987 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Bangladesh was already committed to the principle of non-refoulement.⁹⁹

Because Bangladesh’s Supreme Court established that the principles contained in the Convention is binding on Bangladesh, the customary principle of non-refoulement—the “core principle” of the Convention—should govern Bangladesh’s treatment of the Rohingya. As the court noted, however, non-refoulement is also rooted in other international treaties to which Bangladesh is signatory. Therefore, having established Bangladesh’s commitment to non-refoulement, the Rohingya are entitled to the principle’s protections throughout the Bhasan Char relocation. Whether Bangladesh’s non-refoulement obligations are triggered in the first place, along with the extent to which such obligations are satisfied towards the Rohingya, is discussed in depth below.

Are Bangladesh’s non-refoulement obligations triggered?

Established under the Convention, the principle of non-refoulement guarantees that refugees and asylum seekers will not be returned, or made to return, to countries where they may face irreparable harm.¹⁰⁰ Importantly, non-refoulement protects not just recognized refugees but also groups without a formal status.¹⁰¹ In determining whether a country’s nonrefoulement obligations are triggered, the UNHCR noted that the “decisive criterion” is whether the refugees are “subject to the State’s effective authority and control.”¹⁰² Bangladesh possesses effective authority

⁹⁸ *Refugee and Migratory Movements Research Unit (RMMRU) v. Government of Bangladesh*, Writ Petition No. 10504 (Sup. Ct., Bangl.) (May 31, 2017), www.refworld.org/cases/BAN_SC,5d7f623e4.html. It has been asserted that non-refoulement has attained *jus cogens* status in international law—a status that indicates the principle is universally accepted and from which there is no derogation permitted. See Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 553 (Oct. 01, 2001), <https://academic.oup.com/ijrl/article-abstract/13/4/533/1516189?redirectedFrom=PDF>.

⁹⁹ *Id.* See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 (hereinafter CAT).

¹⁰⁰ *Advisory Opinion*, supra note 25. Under nonrefoulement, a state cannot apply pressure, whether direct or indirect, on repatriate when their lives are potentially at risk. *Id.* Indirect pressure, as discussed *infra* Part II, can take many forms.

¹⁰¹ The Executive Committee of the UNHCR clarified in its Conclusion No. 6 (XXVIII) “*Non-Refoulement*” (1977), para. (c) that “the fundamental importance of the principle of non-refoulement . . . 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.” *Id.*

¹⁰² *Id.* Effective authority and control, according to the UNHCR, essentially means “physical control.” *Id.* Thus, a country that asserts control over a refugee’s physical residences, freedoms, or rights has “effective authority and control.” *Id.*

and control over the Rohingya, therefore nonrefoulement obligations are triggered.¹⁰³

Bhasan Char's restrictions and poor living conditions may violate Bangladesh's non-refoulement obligations.

Under non-refoulement, countries with refugee populations are required to protect the human rights of the refugees and ensure that the refugees do not feel compelled to repatriate.¹⁰⁴ To this end, states should have mechanisms to properly allocate essential resources and to assess the needs of their refugees individually and with due process.¹⁰⁵ These resources should be sufficient for the refugees to maintain their livelihoods and secure communal stability.¹⁰⁶ Finally, non-refoulement requires states to ensure that living conditions are sufficient so that the host country's poor living standards do not force the refugees to consider repatriation.¹⁰⁷

By relocating the Rohingya to Bhasan Char, and failing to allow for independent assessments of habitability, Bangladesh has likely fallen short of its non-refoulement obligations. This shortcoming is even more glaring since international aid agencies have repeatedly come forward to assist with the proposed relocation and ensure that refugee interests were protected, but Bangladesh has not cooperated. For instance, in 2021, UNHCR signed a Memorandum of Understanding ("2021 MOU") with the Bangladeshi government, establishing a common protection and policy framework for the Rohingya relocation.¹⁰⁸ Under the guidelines of the 2021 MOU and the principle of non-refoulement, Bangladesh needed to ensure that Bhasan Char was capable of supporting the large number of refugees being relocated to the island and that the refugees, once there, had access to

¹⁰³ Bangladesh exercises unilateral control over the Rohingya, including the manner in which they are relocated to Bhasan Char. Rohingya cannot leave assigned camps without permission from Bangladeshi officials and the officials effectively define the Rohingya's freedoms. *An Island Jail in the Middle of the Sea*, *supra* note 1.

¹⁰⁴ "States should put in place mechanisms and allocate resources to ensure that...the protection needs of all migrants can be assessed individually and with due process." *The Principle of Non-Refoulement Under International Human Rights Law*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNonRefoulementUnderInternationalHumanRightsLaw.pdf> (last visited Feb. 20, 2022).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ "The agreement relating to Bhasan Char allows for close cooperation between the [Bangladeshi] Government and the UN on services and activities to the benefit of the increasing numbers of Rohingya refugees living on the island. These cover key areas of protection, education, skills-training, livelihood, and health." *U.N. and Government of Bangladesh Sign Memorandum of Understanding for Rohingya Humanitarian Response on Bhasan Char*, OFFICE OF THE U.N. RESIDENT COORDINATOR IN BANGLADESH (Oct. 9, 2021), https://twitter.com/unhcr_bgd/status/1446743704056700939. The 2021 MOU highlighted specific areas aimed at helping "support the refugees to lead decent lives on the island." *Id.*

resources sufficient to provide a decent life.¹⁰⁹ Bangladesh's Rohingya relocation has not adhered to this requirement. Although the 2021 MOU asserts that Bangladesh should engage with the Rohingya regarding their relocation, the Rohingya allege that Bangladesh has continued to relocate refugees without informed consent or through coercion.¹¹⁰ Thus, the Rohingya's due process rights continue to be compromised in violation of both the 2021 MOU and non-refoulement.

Moreover, while non-refoulement calls for careful allocations of resources to the refugees, Bangladesh has failed to ensure resource stability on Bhasan Char. Instead, resource scarcity on the island is exacerbated by Bangladesh's decision to restrict access to the island for international aid agencies.¹¹¹ Consequently, aid agencies that would usually provide critical resources like food or medicine have been shut out from operating on Bhasan Char.¹¹²

Although non-refoulement requires host countries to provide adequate medical care to refugees, the Rohingya on Bhasan Char only have access to an overwhelmed healthcare system.¹¹³ Because of the limited medical

¹⁰⁹ *Id.*; see also Universal Periodic Review, *supra* note 94.

¹¹⁰ Although the 2021 MOU establishes a U.N. presence on Bhasan Char, the Human Rights Watch has noted that Bangladesh continued to operate its relocation plan independent of the 2021 MOU parameters. Consequently, "many refugees were transferred to the island without full, informed consent, and have been prevented from returning to the mainland." *Bangladesh: Halt Forced Relocation of Rohingya Refugees*, HUM. RTS. WATCH (Nov. 23, 2021), <https://www.hrw.org/news/2021/11/24/bangladesh-halt-forced-relocation-rohingya-refugees>.

Interviewed Rohingya, meanwhile, claim that Bangladeshi security forces are coercing Rohingya community leaders to persuade other refugees to relocate, including by confiscating identity documents and making them contingent on agreements to relocate. *Id.*

¹¹¹ "The U.N. has not yet been permitted to access the island to carry out technical and protection assessments. These assessments would be the concrete next step in determining whether the United Nations can engage operationally with the government's Bhasan Char project." Nazmul Ahsan, *As Bangladesh Moves Rohingya to Bhasan Char, UN and Aid Agencies Face A Dilemma*, DEVEX (Dec. 11, 2020), <https://www.devex.com/news/as-bangladesh-moves-rohingya-to-bhasan-char-un-and-aid-agencies-face-a-dilemma-98757>. International access to Bhasan Char has been so limited that, when Bangladesh finally arranged for a guided tour for NGO personnel, no representatives from international humanitarian and development organizations showed up—decrying the arrangement as a superficial maneuver to pacify international pressure that likely did not represent the island's reality. *Id.* On September 21, 2020, five human rights organizations penned a letter to the Bangladeshi government, requesting unfettered access to the island and its refugees. Syed Samiul Basher Anik, *Rohingya Relocation to Bhasan Char Slated For Next Week*, DHAKA TRIB. (Nov. 30, 2020), <https://www.dhakatribune.com/bangladesh/rohingya-crisis/231940/rohingya-relocation-to-bhasan-char-slated-for>.

¹¹² For instance, the World Food Programme ("WFP") provides food shops for refugees in the Cox's Bazar camps but has not been able to launch any such efforts on Bhasan Char. Ahsan, *supra* note 111. WFP stated that technical and protection assessments were prerequisites for it to launch programs on the island, but Bangladesh has nonetheless denied access. The lack of access has expressly dispelled donors and NGOs who were otherwise willing to help. Caritas Bangladesh, a large NGO that had initially signed on to provide humanitarian aid on Bhasan Char, withdrew its support noting that its "partners and other donors do not agree to fund any operations in Bhasan Char." *Id.* Caritas specifically cited the lack of assessments and restricted access as the primary reasons for its withdrawal. *Id.*

¹¹³ Another consequence of not allowing technical and humanitarian assessments, Bhasan Char's healthcare system was hastily constructed without much input from experts. Consequently, "healthcare facilities on the island are gravely inadequate and there is no capacity for emergency medical care."

supplies and poor healthcare infrastructure, outbreaks are not controlled easily.¹¹⁴ Furthermore, Bhasan Char does not have any capacity for emergency medical care or advanced procedures.¹¹⁵ Moreover, permission to go to a mainland hospital is difficult to obtain and patients needing critical care may experience substantial delays before receiving approval.¹¹⁶ Finally, while non-refoulement calls for host states to ensure food security,¹¹⁷ refugees on Bhasan Char have reported severe food shortages and unreliable water sources.¹¹⁸

In sum, Bhasan Char presents a situation where the Rohingya do not have access to adequate medical care, do not have freedom of movement, are abused politically, have diminished livelihoods with limited economic opportunities, and must deal with serious environmental concerns without any infrastructural support. These cumulative conditions are so bad that the Rohingya are essentially presented with the choice of considering repatriation or compromising their livelihoods and freedoms on Bhasan Char. This indirect pressure likely violates non-refoulement and has been acknowledged through allegations that the Bangladeshi government is forcibly moving refugees without their informed consent.¹¹⁹

While there are exceptions to the application of non-refoulement, no such exception applies to the Rohingya. Indeed, the UNHCR has declared

Meenakshi Ganguly, *Rohingya Refugees Facing Medical Crisis on Bhasan Char*, ASIA TIMES (June 30, 2021), <https://asiatimes.com/2021/06/rohingya-refugees-facing-medical-crisis-on-bhasan-char/> (describing diarrhea crisis that overwhelmed the island's healthcare system).

¹¹⁴ The diarrhea outbreak impacted a quarter of the refugee population in a matter of mere days, and it took weeks before it was completely under control. *Id.* The close quarters of the refugee camps allow for rapid disease transmission.

¹¹⁵ *Bangladesh: Rohingya Refugees on Island Fear Monsoon*, HUM. RTS. WATCH (June 7, 2021), <https://www.hrw.org/news/2021/06/07/bangladesh-rohingya-refugees-island-fear-monsoon>. If the Rohingya need medical care that exceeds the island's capacities, they need a referral by a doctor and subsequent permission from the island authorities before they can embark on a journey that requires, at the minimum, three hours by boat and two hours by road to the nearest mainland hospital. *Id.*

¹¹⁶ One refugee lost his wife during childbirth because it took more than two hours to receive permission to go to the mainland hospital. *Id.* Since Bhasan Char lacks the facilities to provide adequate care during childbirth, pregnant women often have to make the long journey to the mainland. *Id.*

¹¹⁷ Emanuela-Chiara Gillard, *There's No Place Like Home: States' Obligations in Relation to Transfers of Persons*, 90 INT'L REV. RED CROSS 703 (Sept. 2008), <https://www.corteidh.or.cr/tabcas/R22409.pdf>.

¹¹⁸ *An Island Jail in the Middle of the Sea*, *supra* note 1. The food shortages have been substantial to the point where families of ten, who were supposed to receive 2.5 sacks of rice, were instead consistently receiving 1.5 sacks. Sometimes, the rations received contained rotten items. *Id.* The refugees do not receive any fish or meat in their rations—they must purchase it with their own money. *Id.* However, because Bhasan Char presents very limited opportunities for income generation, the Rohingya effectively do not have any money to make purchases in the market. See Takahiro Utsumi et al., *Market Assessment in Bhasan Char, Bangladesh*, WORLD FOOD PROGRAMME (Feb. 2022), <https://reliefweb.int/sites/reliefweb.int/files/resources/WFP%20VAM%20Market%20Assessment%20in%20Bhasan%20Char%2C%20Bangladesh.pdf>. Even when they do have money, the Rohingya are substantially overcharged on the island market as the merchants know they have no competition in the economy. *Id.* In other instances, security officials demand bribes and deprive the refugees of whatever limited funds they possessed. *Id.*

¹¹⁹ *An Island Jail in the Middle of the Sea*, *supra* note 1.

that there are limited exceptions to the obligations of non-refoulement.¹²⁰ Specifically, under Article 33(2) of the 1951 Convention, nations can exempt themselves from non-refoulement obligations when harboring a refugee “constitutes a danger to the community of that country,” presents a “danger to the security of the country,” or if the refugee has been convicted of a particularly serious crime.¹²¹

Violations of Non-Refoulement

Unfortunately, despite its well-established nature, non-refoulement lacks the corresponding enforcement mechanism necessary to ensure compliance.¹²² India, for instance, has hosted a rapidly increasing Rohingya population over the years.¹²³ Unlike Bangladesh and its relocation policy, India opted to address its refugee crisis by systematically deporting refugees back to Myanmar.¹²⁴ Two of the Rohingya, facing deportation, filed a lawsuit in India’s Supreme Court, alleging that the proposed deportations were unconstitutional and conflicted with the principle of non-refoulement.¹²⁵ The court, in deciding *Salimullah v. Union of India (UoI)*, acknowledged that “possibly that is the fear that if [the refugees] go back to

¹²⁰ *UN Expert Urges Independent Assessment of Bhasan Char*, *supra* note 21.

¹²¹ *Id.* Bangladesh may contend that harboring the Rohingya has presented a danger to the country by damaging the environment and straining economic resources. Indeed, the Bangladeshi government has framed the Bhasan Char relocation as an opportunity to decongest the Cox’s Bazar camps which, according to the government, would benefit the refugees but also ease the strain on Bangladesh. See *An Island Jail in the Middle of the Sea*, *supra* note 1. At a Dhaka Global Dialogue event in 2019, Prime Minister Hasina referred to the Rohingya as a “threat to the security” of the region. *Rohingya Refugees in Bangladesh Are “Threat to Security”*: *Sheikh Hasina*, NDTV (Nov. 11, 2019), <https://www.ndtv.com/world-news/rohingya-crisis-sheikh-hasina-says-rohingya-refugees-in-bangladesh-are-threat-to-security-2130945> (hereinafter *Rohingya Refugees in Bangladesh Are “Threat to Security”*). However, absent tangible proof, such an assertion is unlikely to fall into the narrow exceptions envisioned by the UNHCR.

¹²² In instances of state actions that may run contrary to non-refoulement, the acting state has often qualified its actions to fall within one of the exceptions provided under Article 33(2), which stipulates that the protection of non-refoulement may not be claimed by “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

¹²³ Subhradipta Sarkar, *Deporting Rohingyas to the Slaughter House: Dilution of the “Non-Refoulement” Principle*, TIMES OF INDIA (Apr. 18, 2021), <https://timesofindia.indiatimes.com/blogs/sarkari-thoughts/deporting-rohingyas-to-the-slaughter-house-dilution-of-the-non-refoulement-principle/>. After the 2017 crackdown in Myanmar, thousands of Rohingya took refuge in Jammu and, as of 2021, India hosted roughly 40,000 Rohingya. *Id.*

¹²⁴ *Id.* Of the Rohingya living in Jammu, nearly 170 refugees were summoned on March 6, 2021, under the guise of a “verification exercise.” Aakash Hassan, ‘Supreme Court Has Signed Our Death Warrant’: *Rohingya in India*, AL JAZEERA (Apr. 9, 2021), <https://www.aljazeera.com/news/2021/4/9/supreme-court-has-signed-our-death-warrant-rohingya-in-india>. Once the refugees arrived, however, they were subsequently rounded up and taken to holding centers where they were detained without any explanation. *Id.* Following the detention, the Indian government formally began proceedings to deport the refugees they rounded up. *Id.*

¹²⁵ The refugees requested the Court to stop the deportation proceedings and release the detained Rohingya. *Id.* The refugees further asked the Court to recognize that deportation would potentially jeopardize their lives as the conditions in Myanmar were hostile towards the Rohingya. *Id.*

Myanmar, they will be slaughtered...but we cannot control that.”¹²⁶ Nonetheless, the Court ruled that the deportation proceedings were valid.¹²⁷ Like Bangladesh, India is not a party to the Convention, and accordingly, the Court held that the Convention was not binding on India.¹²⁸ Finally, even if the 1951 Convention was applicable, the Court believed that India had properly articulated that its action qualified as an exception to the principle because of the perceived national threat presented by the Rohingya.¹²⁹ This fear therefore qualified India’s response under the exception outlined in Article 33(2) and the principle of non-refoulement was allegedly not violated.

Thus, Bangladesh can point to its neighbor’s actions and justifications as support for its own policymaking.¹³⁰ However, unlike the Indian Supreme Court, Bangladesh’s Supreme Court held that established international law should bind Bangladesh, irrespective of the country’s participation. Therefore, the burden shifts to Bangladesh to assert an Article 33(2) exception to its obligations.¹³¹ Without an Article 33(2) exception, Bangladesh’s Bhasan Char relocation plan likely runs afoul of non-refoulement. Nonetheless, the UNHCR is not likely to take any disciplinary or prohibitive steps against Bangladesh.¹³²

So, it appears up to Bangladesh’s judiciary to hold the country accountable to its refugees. Bangladesh’s Supreme Court already demonstrated its willingness to intervene on behalf of the Rohingya in its May 2017 ruling.¹³³ Moreover, the Court took judicial notice of “the fact that the Rohingya are now being persecuted in Myanmar.”¹³⁴ In addition to affirming Bangladesh’s obligations under the Convention, the Court reasoned that since Bangladesh is a signatory to the Convention Against Torture (“CAT”), it could not reasonably apply pressure to return the Rohingya to a country where they would likely be tortured.¹³⁵ Furthermore, the Court noted that the Bangladeshi government was engaged in “active

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ If anything, Bangladesh has an exponentially higher Rohingya population compared to India. Therefore, the same arguments that India successfully asserted about the Rohingya posing a threat to the security and stability may be applied to Bangladesh’s more severe situation. *Id.*

¹³¹ As discussed earlier in this Note, Bangladesh has not demonstrated that the Rohingya fall into such an exception. *See* Hassan, *supra* note 124.

¹³² UNHCR has already issued several warnings to Bangladesh regarding its treatment of the Rohingya, but the agency has not indicated any additional condemnation related specifically to non-refoulement. *See* *An Island Jail in the Middle of the Sea*, *supra* note 1.

¹³³ *See* *Rohingya Refugees in Bangladesh Are “Threat to Security”*, *supra* note 121.

¹³⁴ *Id.*

¹³⁵ The Court noted that there were substantial grounds for believing that deportation of Rohingya to Myanmar would result in torture, so CAT prevented such an action. *Id.* CAT contains explicit non-refoulement provisions. *See* CAT, *supra* note 99 at Art. 3.

participation and co-operation with UNHCR.”¹³⁶ Thus, whether as part of international custom or under explicitly agreed upon conventions, Bangladesh owes certain obligations to the Rohingya. Because the court system has already expressed its willingness to protect the refugees, Rohingya who fear relocation may be able to pursue judicial recourse. Therefore, Bangladesh has an incentive to figure out an appropriate solution to the Rohingya relocation issue to avoid the potential expense of litigation.

Other international law issues with Bhasan Char

International Covenant on Civil and Political Rights

Bangladesh acceded to the International Covenant on Civil and Political Rights (“ICCPR”) in 2000.¹³⁷ Article 12(1) of the ICCPR provides that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement.”¹³⁸ The Rohingya, however, do not have any freedom of movement on Bhasan Char.¹³⁹ Therefore, the Rohingya lack the liberty of movement guaranteed under the ICCPR’s Article 12.¹⁴⁰

International Covenant on Economic, Social, and Cultural Rights

Bangladesh acceded to the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) on October 5, 1998.¹⁴¹ The ICESCR outlines certain human rights obligations for its signatories, including an affirmative duty to maintain effective healthcare.¹⁴²

¹³⁶ *Id.*

¹³⁷ *JAMAKON Report to the U.N. Human Rights Committee*, U.N. HIGH COMM’R FOR REFUGEES (June 19, 2015), <https://www.ecoi.net/en/document/1110167.html>. However, the National Human Rights Commission of Bangladesh expressed doubts as to whether the domestic legal framework of Bangladesh is fully compatible with the norms of ICCPR and noted that “Bangladesh made some reservations and declaration to the ICCPR to limit the application of ICCPR.” *Id.*

¹³⁸ International Covenant on Civil and Political Rights, *adopted* December 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (hereinafter *ICCPC*).

¹³⁹ While Bhasan Char itself is accessible only by boat, the only boat that goes to and from the island is operated by the Bangladeshi Navy. *An Island Jail in the Middle of the Sea*, *supra* note 1. The only way for the Rohingya to formally depart from the island is to accept repatriation to Myanmar. Refugees can only ask officials for permission to leave but such permission is infrequently granted. *Id.* The Rohingya’s presence on the island is enforced by the police—who keep an eye out for fleeing refugees and arrest them, before bringing them back to the refugee facilities. *See Myanmar Tensions*, *supra* note 36.

¹⁴⁰ *See ICCPC*, *supra* note 138; Article 12 provides that: 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; 2. Everyone shall be free to leave any country, including his own; 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant; 4. No one shall be arbitrarily deprived of the right to enter his own country.

¹⁴¹ International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3. (hereinafter *ICESCR*).

¹⁴² Article 11 of ICESCR recognizes the right to “an adequate standard of living...including adequate food, clothing, and housing, and to the continuous improvement of living conditions.” *Id.* at Art. 11.

The conditions present on Bhasan Char are at odds with the standards articulated by ICESCR. Whereas Article 11 recognizes that an adequate standard of living requires “adequate food, clothing, housing, and . . . the continuous improvement of living conditions,” food supply within Bhasan Char is limited, housing is substandard, and living conditions are subpar at best.¹⁴³ Consequently, the skeletal health care system that exists on the island is incapable of meeting the medical needs of the refugees and outbreaks of disease can overwhelm the island’s healthcare framework.¹⁴⁴ Therefore, the Bhasan Char relocation policy is at odds with Articles 11 and 12 of the ICESCR.

Bangladesh’s National Laws

Apart from the international laws and standards discussed above, Bangladesh’s Rohingya relocation policy may be at odds with its own national laws. Bangladesh lacks a national asylum framework and, therefore, the 1946 Foreigners Act (“Foreigners Act) is the primary piece of legislation addressing the status of refugees in Bangladesh.¹⁴⁵ Section 2(a) of the Foreigners Act defines any person who is not a citizen of Bangladesh as a “foreigner.”¹⁴⁶ As “illegal foreigners,” the Rohingya face substantial restrictions in their rights within Bangladesh, including limits on their ability to freely move around.¹⁴⁷ Consequently, the Rohingya often refrain from exercising their rights out of fear that doing so will end up hurting them.¹⁴⁸

Furthermore, Article 12 recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” *Id.* at Art 12. Under Article 12, states are called on to prevent, treat, and control the outbreak of disease while providing suitable medical services. *Id.* Therefore, under Article 12, states have an affirmative duty to maintain a healthcare system that can support the welfare of the people within their borders.

¹⁴³ *An Island Jail in the Middle of the Sea*, *supra* note 1. Relocation occurred before the government had a chance to confirm that there was a strong infrastructure in place for healthcare and there is no program in place to monitor healthcare administration. *Id.*

¹⁴⁴ See Ganguly, *supra* note 113. Medical supplies are limited, and shipments of supplies can be significantly delayed during monsoon season—causing further shortages to an already limited resource. *Id.* There is little to no capacity for emergency medical care and patients sometimes die because they were unable to be seen or they received inadequate care. HUM. RTS. WATCH, *supra* note 1. Gravely ill patients must be transported to mainland hospitals—an expensive journey that first requires a substantial number of permissions. *Id.*

¹⁴⁵ “In the absence of a national asylum mechanism, the 1946 Foreigner’s Act remains the key legislation governing the status of refugees and other persons under UNHCR’s mandate. *Submission by the United Nations High Commissioner for Refugees: Universal Periodic Review—3rd Cycle, 30th Session*, U.N. HIGH COMM’R FOR REFUGEES (Oct. 2017) <https://www.refworld.org/docid/5b081ec94.html> (hereinafter *Universal Periodic Review—3rd Cycle*).

¹⁴⁶ *Foreigner’s Act, 1946*, Sec. 2(a). Under the Foreigners Act, the Rohingya are considered “illegal foreigners.” Ashraful Azad, *Foreigners Act and the Freedom of Movement of the Rohingyas in Bangladesh*, 5 GRIFFITH J. L. & HUM. DIGNITY 183 (Dec. 2017), <https://griffithlawjournal.org/index.php/gjld/article/view/986>.

¹⁴⁷ The Rohingya are also subject to arbitrary arrests, harassment, and official misconduct. *Id.*

¹⁴⁸ “Consequently, they [the Rohingya] fear arrest under the Foreigners Act of 1946, which bars foreign victims from accessing legal remedies, enabling perpetrators to continue their crimes against this

The Foreigners Act notwithstanding, Bangladesh has used Executive Orders to provide asylum seekers with refugee status.¹⁴⁹ Furthermore, Bangladesh's constitution provides explicit protections for people within Bangladesh's jurisdiction.¹⁵⁰ Therefore, a policy that relocates refugees through coercion or violence is likely at odds with Bangladesh's Constitution.¹⁵¹

RECOMMENDATIONS

As described in Part II, the Bhasan Char relocation appears to conflict with international and Bangladeshi law. Nonetheless, Bangladesh cannot give up on its attempt to find a solution to the refugee crisis. Cox's Bazar is already packed to capacity with refugees and cannot reasonably sustain a growing population.¹⁵² At the same time, Bangladesh does not have the resources available to address the Rohingya crisis on its own, although it already spends more than a billion dollars annually to support the refugees.¹⁵³ Moreover, the area where the refugees are concentrated was already ecologically fragile before the recent exodus of refugees.¹⁵⁴ With the influx of refugees, environmental destruction and loss of forested land has occurred at an alarming pace.¹⁵⁵ Therefore, a solution is needed—it should simply be executed differently than the status quo relocation approach. The following are some recommendations this Note makes for a solution that addresses Bangladesh's national interests while protecting the Rohingya.

population without being prosecuted.” *Universal Periodic Review—3rd Cycle*, *supra* note 145. Bhasan Char refugees interviewed by the Human Rights Watch indicate that they are hesitant to judicially challenge the relocation due to fears of being retaliated against. *See id.*; *see also An Island Jail in the Middle of the Sea*, *supra* note 1.

¹⁴⁹ Mohammad, *supra* note 96. For instance, during the initial waves of Rohingya refugees into Bangladesh, the government issued executive orders to grant the Rohingya *prima facie* refugee status. *Id.*

¹⁵⁰ *Id.* Article 31 of the Bangladesh Constitution guarantees that every person residing within Bangladesh's borders will not suffer adverse actions impacting his life, liberty, body, or property. *See* Bang. Const. Art. 31. Moreover, Article 33 provides safeguards against arrest and detention for both citizens as well as non-citizens. *See* Bang. Const. Art. 33.

¹⁵¹ *Id.*

¹⁵² *See* Final Report, *supra* note 52.

¹⁵³ “Bangladesh’s economy spends an estimated \$1.21 billion a year supporting the Rohingya.” Vaishali Basu Sharma, *The Rest of the World Must Acknowledge the Impact of Rohingya Refugees on Bangladesh*, WIRE (Mar. 26, 2021), <https://thewire.in/south-asia/bangladesh-rohingya-refugees-impact>. Thus, the “influx of refugees has adversely affected not only the Cox’s Bazar area but the national economy. *Id.* Moreover, the area where the refugees are concentrated was already ecologically fragile before the recent exodus of refugees, but the latest influx of refugees has led to environmental destruction and loss of forested land at an alarming pace. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Allow aid agencies unrestricted access to Bhasan Char.

Bangladesh should immediately allow international aid agencies and the United Nations complete access to Bhasan Char.¹⁵⁶ Aid organizations have made clear that a technical and humanitarian assessment is a prerequisite to their operations on Bhasan Char.¹⁵⁷ Once assessments are finished, aid organizations can step in to fill some of the resource scarcity facing Bhasan Char and thus address some of Bangladesh's shortcomings under non-refoulement.¹⁵⁸

Engage third-party countries to host refugees.

While Bangladesh has spent considerable efforts on repatriation efforts with Myanmar, it has not engaged in similar efforts with its other neighbors. Specifically, since the plight of the Rohingya is a relevant issue to the entire region,¹⁵⁹ Bangladesh should approach neighboring countries to consider signing a compact through which they mutually share the costs of hosting refugees.¹⁶⁰ Together, the countries can coordinate to manage the region's refugee population.¹⁶¹

¹⁵⁶ Allowing unfettered access to Bhasan Char would be easy for Bangladesh to do: the current restrictions are based primarily on policies proposed and implemented by local political or navy officials. *An Island Jail in the Middle of the Sea*, *supra* note 1. While the Bangladeshi government would likely contend that international organizations already have access, see Ahsan, *supra* note 111 for a discussion as to why such access has been decried as superficial or limited.

¹⁵⁷ See Ganguly, *supra* note 113.

¹⁵⁸ *Id.* International aid organizations already effectively provide critical resources to the Rohingya in Cox's Bazar. Therefore, the organizations already have the structure to operate on Bhasan Char and their inclusion as part of the island's resources should dramatically improve refugee life. *See* Ahsan, *supra* note 111. Moreover, unrestricted access to the island can lead to confirmation of Bangladesh's humanitarian efforts and deter Rohingya abuse. *Id.* At the same time, Bangladesh may perhaps consider easing restrictions on the Rohingya's access to transportation on and off the island. Such easements would allow the relocated Rohingya to see their family members and friends who are still at Cox's Bazar.

¹⁵⁹ As conditions in Myanmar, Bangladesh, and India decline for the Rohingya, the refugees have begun migrating to other nations. Therefore, Bangladesh's successful management of its refugee is of interest to nations who wish to avoid a spillover effect.

¹⁶⁰ Neighboring countries include India, Pakistan, and Nepal—each of which already hosts a significant amount of Rohingya and may therefore be invested in coordinating a sustainable solution. These countries can turn to the United Nations' Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration (collectively referred to as the "UN Compacts") as a template for creating their own compact. *Global Compact for Safe, Orderly, and Regular Migration*, U.N. GLOBAL COMPACT FOR MIGRATION (July 13, 2018), https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf. The UN Compacts call for the easing of pressure on countries that host a large number of refugees as well as expanded access to third-country repatriation. *Id.* To this end, Bangladesh would certainly qualify as a country hosting a substantial number of refugees.

¹⁶¹ This assistance can take the form of funding aimed at improving the conditions on Bhasan Char. *See* Christoffersen, *infra* note 163 for reasons why other countries in the region would likely be invested in cooperating on a solution to the refugee crisis. Since it would likely be easier for countries to deal with a problem prior to the problem manifesting, the countries may be willing to participate in a compact.

Alternatively, Bangladesh may pursue third-party repatriation.¹⁶² Finding suitable partners may be difficult since a small number of countries currently bear almost all of the global responsibility for refugees.¹⁶³ At the same time, resource rich countries like Spain, the Netherlands, France, and the United Kingdom may be viable options for repatriation since most of their residents have supported taking in refugees.¹⁶⁴ Moreover, these countries have the economic capacity to support an intake of refugees. Such third-party involvement would, ideally, repatriate the refugees into a location more suitable for habitability.

Bangladesh can utilize some of the money currently earmarked towards developing Bhasan Char and attach it as a resource for the third-party country's use.¹⁶⁵ Alternatively, the third-party countries can perhaps negotiate a fee from Bangladesh.¹⁶⁶ In the case of countries like Spain, the Netherlands, and Germany, the countries are economically capable of supporting an influx of refugees so the fee would not be the sole motivator. However, in conjunction with international goodwill, the third-party countries may have incentive to accept refugees, given their citizens' overwhelming interest in doing so.¹⁶⁷ Thus, by agreeing to accept refugees, the third-party countries can generate goodwill both internationally and domestically.¹⁶⁸

¹⁶² A third-party country would be a country with no immediate stake in the Rohingya crisis but with the capacity to host refugees.

¹⁶³ Like Bangladesh, resource limited countries such as Lebanon, Jordan, Uganda, and Liberia have taken in such a large influx of refugees that the refugees constitute substantial fractions of the countries' overall populations. Eirik Christoffersen, *A Few Countries Take Responsibility For Most of the World's Refugees*, NORWEGIAN REFUGEE COUNCIL (June 24, 2021), <https://www.nrc.no/shorthand/fr/a-few-countries-take-responsibility-for-most-of-the-worlds-refugees/index.html>.

¹⁶⁴ Phillip Connor, *These Countries Are Most Supportive of Taking in Refugees*, WORLD ECON. F. (Sept. 26, 2018), www.weforum.org/agenda/2018/09/a-majority-of-europeans-favor-taking-in-refugees-but-most-disapprove-of-eu-s-handling-of-the-issue/.

¹⁶⁵ Given that Bangladesh spends more than a billion dollars a year towards refugee maintenance, Bangladesh can offer at least half of that amount to the third-party country. See Ganguly, *supra* note 113. For example, the \$300 million spent to fortify Bhasan Char's soil could instead have been used to help a third-party country prepare to host a substantial number of refugees. Such a repatriation would potentially prove beneficial to all parties: Bangladesh would no longer have to deal with its population density issues at the refugee camps, the refugees would escape the cramped camps and their accompanying restrictions, while the third-party country would likely gain international goodwill for its role in tackling the refugee crisis.

¹⁶⁶ Bangladesh can offer, for instance, a fee based on the number of refugees considered for third-party relocation and offer a fee proportionate to the amount of money saved.

¹⁶⁷ Connor, *supra* note 164.

¹⁶⁸ "About three-quarters or more of adults in Spain, the Netherlands, France, and the United Kingdom support taking in refugees from countries where people are fleeing violence and war." *Id.* In conjunction with a potential fee or other negotiated monetary resource attached to the Rohingya, these third-party countries may feel motivated to assist as a way to increase constituent approval.

Alternatively, Bangladesh can approach these countries for donations, which would still generate goodwill. As Brad Adams, Human Rights Watch's Asia Director, noted "the Bangladeshi government needs to treat the persecuted Rohingya humanely, but they shouldn't have to go it alone...the government should be seeking immediate donor support to improve existing conditions for the refugees." *Reject Rohingya Refugee Relocation Plan*, *supra* note 65.

CONCLUSION

A decision that compels one to choose between relocating to a remote, underdeveloped island and returning to a hostile country is not truly a decision. Bangladesh understandably wants to alleviate the congestion of the Cox's Bazar refugee camps and perhaps believed that its substantial investment into Bhasan Char was sufficient to resettle the Rohingya there. However, the habitability of Bhasan Char, and the treatment of the refugees there, needs to be assessed by independent organizations with unfettered access to the island. Such access would be easy to provide and would precede greater organizational involvement on the island which, in turn, would improve the lives of the Rohingya there. If Bangladesh decides to continue with relocation, it should invest with an eye towards improvements in infrastructure, healthcare, and education. By doing so, Bangladesh can avoid forcing the refugees to consider returning to Myanmar on account of the poor quality of life that awaits them on Bhasan Char.