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The Status of the *Bihari* Community in Bangladesh under Domestic and International Law

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Abstract

The problems concerning the *Bihari* community is one of the oldest long-standing issues between Bangladesh and Pakistan. In 1971, after the independence of Bangladesh, the *Bihari* lost their citizenship. Presently, they are stateless and living in various camps in different parts of Bangladesh. This community wanted to be repatriated to their own country, Pakistan, but it denied them citizenship status, although a large number have been repatriated to Pakistan as their country of origin. Recently, in March 2015 the Supreme Court of Pakistan rejected the issue of stranded Pakistanis in Bangladesh regarding repatriation or taking these people back. This article has tried to determine the status of the *Bihari* community, what a lasting solution might be, and what the role is of international organisations in helping this community under domestic and international law.

Keywords

Bihari – recognition – repatriation – stateless – stranded Pakistani

1 Introduction

Bangladesh achieved independence from Pakistan in 1971 after the long Liberation War.¹ After independence, a considerable number of non-Bengali

1 The Liberation War between East Pakistan (now Bangladesh) and West Pakistan lasted nine months. It is estimated that Pakistani army forces killed 3 million people during the conflict. Some 10 million fled the country as refugees to India, 30 million were internally

citizens known as *Bihari*, a non-Bangladeshi, stranded Pakistani or Urdu-speaking community were left in Bangladesh, waiting to be repatriated to Pakistan.² *Bihari*, originally a Hindi word, means a person from the state of Bihar, India.³ The *Bihari* community is also referred to as *Muhajirs*⁴ (refugee), a linguistic minority, a camp-based Urdu-speaking minority, or non-locals.⁵ The *Bihari* community in Bangladesh does not refer to a distinct group of people easily identifiable by race, religion or physical characteristics.⁶ They cannot be regarded as a minority because they do not constitute part of the Bangladeshi nation.⁷ Yet, they exist outside their country, Pakistan, and form a stateless community in Bangladesh. This stateless community lives in refugee camps without proper nutrition, drainage and sanitation systems, education, or healthcare facilities.⁸ It should be mentioned that a large number of *Bihari* have been repatriated to Pakistan under the Tripartite Agreement between Bangladesh, India and Pakistan.⁹ Pakistan, as the country of origin, cannot avoid the responsibility of taking them back. In this regard, both Bangladesh and Pakistan need political honesty and willingness to restart the repatriation program to bring about a lasting solution.

After the partition of British India in 1947, there was communal violence throughout India.¹⁰ This communal violence included the so-called 'great Bihar killing' of 30,000 Muslims¹¹ in October/November, resulting in the large-scale

displaced, and 200,000 to 400,000 women were victims of rape. See further, 1971 *Bangladesh Genocide*, <en.wikipedia.org/wiki/1971_Bangladesh_genocide>, visited on 5 January 2018.

2 Iqthyer Uddin Md Zahed, 'A Theoretical Analysis of Stranded Biharis in Bangladesh: Seeking for nationality since four decades', 1 *International Journal of Advanced Research* (2013) p. 429.

3 *Ibid.*

4 The word '*Muhajir*' is defined in the Pakistani census of 1951 as a person who has moved into Pakistan as a result of partition or out of fear of disturbance.

5 Iftekharul Bashar, 'Unresolved Statelessness: The Case of Biharis in Bangladesh', 10 *Journal of International Affairs* (2006) p. 1.

6 *Note on the Nationality Status of the Urdu-speaking Community in Bangladesh*, UNHCR, p. 1, <www.refworld.org/docid/4b2b90c32.html>, visited on 3 April 2015.

7 Kazi Fahmida Farzana, 'The Neglected Stateless Bihari Community in Bangladesh: Victims of Political and Diplomatic Onslaught', 2 *Humanities & Social Sciences* (2008) p. 1.

8 Zahed, *supra* note 2.

9 Under the Tripartite Agreement there are 170,000 *Biharis* have already been repatriated to Pakistan as country of origin. See further Delhi Agreement, *infra* note 40.

10 Zahed, *supra* note 2.

11 In the aftermath of the communal violence in which 30,000 Muslims were killed, 1.3 million *Bihari* Muslims migrated to Pakistan, of them 700,000 to East Pakistan and the rest to West Pakistan. See also Abrar *infra* note 13.

movement of Muslims into the newly created province of East Pakistan (now Bangladesh).¹² It was estimated that 96 per cent of those refugees came from the East Indian states of Bihar, West Bengal, Assam, Orissa, Nagaland, Manipur, Tripura and Sikkim.¹³

Since 1947, around 40 million people have crossed international borders in the South Asia region as displaced persons or refugees.¹⁴ In 1947, two historic events took place, the partition of India and creation of Pakistan, and the mass migration of Hindu, Muslim and Sikh communities.¹⁵ The partition resulted in the migration of Hindus and Sikhs from the new state of Pakistan to India, and Muslims from India to Pakistan (both East and West Pakistan).¹⁶ The movement of the *Bihari* community to East Pakistan was due to a desire to escape from communal bloodshed and 'to preserve their Islamic way of life'.¹⁷ They supported the adoption of Urdu as the official language in East Pakistan, where the language of the majority was Bengali, and opposed the Bengali Language Movement¹⁸ in 1952.¹⁹ The *Bihari* community never assimilated into the local people of East Pakistan, and maintained an alliance with the West Pakistani regime against the interests of the Bengali people.²⁰ During the Liberation War in Bangladesh, the *Bihari* community was active in East Pakistan. They were

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- 12 Sumit Sen, 'Stateless Refugees and Right to Return: The Bihari Refugees in South Asia—Part 1', 11 *International Journal of Refugee Law* (1999) p. 625.
 - 13 Chowdhury R. Abrar, 'Issues and Constraints in the Repatriation/Rehabilitation of the Rohingya and Chakma Refugees and the Biharis', Paper presented to the Conference of Scholars and other Professionals Working on Refugees and the Displaced Persons in South Asia, Dhaka, Bangladesh on 9–11 February 1998, <repository.forcedmigration.org/pdf/?pid=fmo:1808>, visited on 2 June 2017.
 - 14 Nafees Ahmed, 'The Right to Nationality and the Reduction of Statelessness—The Responses of the International Migration Law Framework', 5 *Groningen Journal of International Law* (2017) p. 16.
 - 15 Khalid Hussain, 'Association of Young generation of Urdu Speaking Community and Council of Minorities', *Bangladesh Universal Periodic Review* (2012), <lib.ohchr.org/HRBodies/UPR/Documents/Session16/BD/JS5_UPR_BGD_S16_2013_Jointsubmission5_E.pdf>, visited on 2 June 2017.
 - 16 Abrar, *supra* note 13.
 - 17 Farzana, *supra* note 7.
 - 18 This movement ultimately ended in the adoption of Bengali as one of the state languages of Pakistan. However, the movement was not isolated to this as it sowed the seeds for the independence movement of the Bangladeshi people which resulted in the liberation of Bangladesh as an independent state in 1971. See further *Language Movement*, <en.banglapedia.org/index.php?title=Language_Movement>, visited on 5 January 2018.
 - 19 Papiya Ghosh, 'The Changing Discourse of the Muhajirs', 28 *India International Centre Quarterly* (2001) p. 57.
 - 20 *Ibid.*

involved in anti-independence activities and perpetrated violence against Bengalis.²¹ Following the creation of Bangladesh, many *Biharis* were persecuted because of their alleged involvement in war crimes and crimes against humanity.²² Article 1(2) of the Stateless Persons Convention 1954 states that:

This Convention shall not apply to persons with respect to whom there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes.²³

The issue of the *Bihari* has not noticeably been brought up at the International Crimes Tribunal of Bangladesh in recent advocacy and actions in the prosecution of alleged war criminals in Bangladesh.²⁴

This article focuses primarily on the legal issues relating to the *Bihari* community in Bangladesh under domestic and international law. Section 2 deals with the history and present status of the *Bihari* community. Section 3 deals with the Tripartite Agreement between Bangladesh, India and Pakistan and role of the judiciary in Bangladesh and Pakistan. The last section of the article emphasises the right of return and repatriation under international law, and the role of the international community in providing a lasting solution to this long-standing issue between Bangladesh and Pakistan, concentrating on the responsibilities of both countries.

2 Present Status of the *Bihari* Community

The Universal Declaration of Human Rights (UDHR) states that “Everyone has the right to a nationality” and “No one shall be arbitrarily deprived of his

21 Bina D’Costa, ‘Borders, Boundaries and Stateless’, in Ali Riaz and Sajjadur Rahman (eds.), *Contemporary Bangladesh* (Routledge, New York, 2016) p. 402.

22 *Ibid.*

23 See Article 1(2) of the Convention Relating to the Status of Stateless Persons, 1954.

24 The International Crimes Tribunal of Bangladesh (ICT) was set up in 2009 for the investigation, detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes (under ‘The International Crimes (Tribunal) Act, 1973’ with following international law) committed in 1971 by the Pakistani Army and their local collaborators, Razakars, Al-Badr and, Al-Shams during the Liberation War of Bangladesh. See further *International Crimes Tribunal, Bangladesh*, <www.ict-bd.org/>, visited on 4 January 2018.

nationality nor denied the right to change his nationality".²⁵ Unfortunately, the *Bihari* community in Bangladesh has been without citizenship status since 1971. The stateless are denied access to fundamental rights, access to protection and to expression as persons under the law all over the world. It is accepted that all people should be adequately assisted and protected under international law and institutions.²⁶ However, the *Bihari* community in Bangladesh has mostly been denied national and international assistance.

The definition of a stateless person is provided by the 1954 Convention as "A person who is not considered as a national by any State under the operation of its law".²⁷ The 1961 Convention on the Reduction of Statelessness defines stateless persons in a similar manner as in the 1954 Convention.²⁸ Prior to the 1954 Convention, statelessness was viewed merely as an indication of one's status as a refugee. It is obvious that the *Bihari* community in Bangladesh falls under no conventional identity or category of such an international standard.²⁹ They cannot be called refugees, because they were not displaced from their country of origin.³⁰ Their peculiar status proves that the conventional definitions of the terms 'refugee' and 'minority' have limitations in describing the *Biharis* in Bangladesh.³¹ Due to their uncertain citizenship status, they are sometimes subject to discrimination by government institutions, especially in relation to employment and access to public services.³²

It is difficult for anyone to live without effective citizenship, and life in the camps is often difficult, cramped and unsafe. The poor way of life for the *Bihari* community consists of wage labour, rickshaw pulling, small business enterprise, unemployment, lack of citizenship amenities, absence of land ownership and limited access to education.³³

25 See Article 15 of the Universal Declaration on Human Rights (UDHR), 1948. UDHR is a UN General Assembly Resolution, no-217A, 1948.

26 Luke T. Lee, 'Legal Status of Internally Displaced Persons', 86 *American Journal of International Law* (1992) p. 630. In this regard Sir Humphrey Waldock, former President of the International Court of Justice (ICJ) stated 'Rights which attach to all human beings equally, whatever their nationality'.

27 See Article 1 of the 1954 Convention Relating to the Status of Stateless Persons (entered into force 1960).

28 See Article 1 of the 1961 Convention on the Reduction of Statelessness (entered into force 1975).

29 Farzana, *supra* note 7.

30 *Ibid.*, p. 16.

31 *Ibid.*

32 Eric Paulsen, 'The Citizenship Status of the Urdu Speakers/Biharis in Bangladesh', 25 *Refugee Survey Quarterly* (2006) p. 54.

33 *Ibid.*

Living conditions are unhygienic due to dirty and inadequate sources of drinking water and poor sanitary systems, which spread contagious water-borne diseases. According to Article 25(1) of the UDHR, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”, but the *Bihari* community has been deprived of such a standard of living in Bangladesh. Living in the camps makes the residents vulnerable and the group fragile since there is no security.³⁴ Not only are they denied positions in government, but since their residential address is a refugee camp and their status is undefined, wider discrimination in the job market remains a prime concern.³⁵ Refugee International has noted that it will need dedicated action from the Bangladesh Government and the international community for the *Bihari* community to gain proper access to the job market.³⁶ Although they are a stateless community in Bangladesh, many scholars consider them as having been *de facto* stateless since 1971. The 1982 Geneva Conference referred to them as non-Bangladeshi or stranded Pakistani in Bangladesh, who expressed their strong desire to be repatriated to Pakistan as their country of origin.³⁷

3 Tripartite Agreement between Bangladesh, India and Pakistan

3.1 *Simla Agreement*

The Simla Agreement, signed in Simla, India, by Indian Prime Minister Indira Gandhi and Pakistani President Zulfikar Ali Bhutto on 2 July 1972, was much more than a peace treaty seeking to reverse the consequences of the 1971 war.³⁸ It was an agreement to settle their differences by peaceful means through bilateral negotiations. The agreement also paved the way for the diplomatic recognition of Bangladesh by Pakistan and to withdrawal of troops and an exchange of prisoners of war (PoWs).³⁹ It created the opportunity for

34 Zahed, *supra* note 2.

35 The *Biharis* are mainly located in largely urban areas in the Dhaka, Rajshahi, Khulna and Chittagong divisions of Bangladesh. Most of the settlements are established on public land.

36 *Refugee Review Tribunal in Australia*, 7 July 2009, Research Response on Bangladesh, <www.refworld.org/pdfid/4f40e6c42.pdf>, visited on 8 June 2017.

37 Shahnawaz A. Mantoo, ‘Bihari Refugees Stranded in Bangladesh since in 1971’, 1 *Journal of South Asian Studies* (2013) p. 126.

38 Simla Agreement, The Ministry of External Affairs, Govt. of India, <mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972>, visited on 12 June 2017.

39 *Ibid.*

talks between Bangladesh, India and Pakistan, which were finally conducted in Delhi in 1974.

3.2 *Delhi Agreement*

The Delhi Agreement was signed on 28 August 1973 between Bangladesh, India and Pakistan in Delhi, India, in an effort to solve humanitarian problems. In the absence of the recognition of Bangladesh by Pakistan, it was not possible to hold tripartite talks to settle the humanitarian problems, as Bangladesh could not participate in such a meeting except on the basis of sovereign equality.⁴⁰ Sheik Mujibur Rahman⁴¹ had declared that he would not take part in any meeting, bilateral or trilateral, unless Bangladesh was recognised by Pakistan.⁴² In February 1974, the recognition took place, thus facilitating Bangladesh's participation in the tripartite meeting envisaged in the Delhi Agreement, on the basis of sovereign equality.⁴³ Accordingly, the Foreign Minister of the Government of Bangladesh, the Minister of External Affairs of the Government of India, and the Minister of State for Defence and Foreign Affairs of the Government of Pakistan met in New Delhi from 5 to 9 April 1974, and discussed various issues mentioned in the Delhi Agreement, in particular the question of the 195 PoWs and the completion of the three-way process of repatriation involving Bengalis in Pakistan, Pakistanis in Bangladesh, and Pakistani PoWs in India.⁴⁴

The remaining Bangladeshi nationals in Pakistan would also be repatriated without delay. Pakistan agreed to the Delhi Agreement to transfer non-Bengalis in Bangladesh who had opted for repatriation to Pakistan, in exchange for Bengalis in Pakistan and the return of PoWs.⁴⁵ Bangladesh had decided to

40 Delhi Agreement, Bangladesh, India and Pakistan: Agreement on the Repatriation of Prisoners of War and Civilian Internees, The Agreement was signed in New Delhi on 9 April 1974, <casebook.icrc.org/case-study/bangladeshindiapakistan-1974-agreement>, visited on 5 April 2015.

41 Sheik Mujibur Rahman (1920–1975) was the father of the Bangladeshi nation who led the war of independence and declared independence for Bangladesh. He was also elected as a first President of the People's Republic of Bangladesh. See further Rahman, *Sheik Mujibur*, <en.banglapedia.org/index.php?title=Rahman,_Bangabandhu_Sheikh_Mujibur>, visited 10 January 2018.

42 Ghulam Mustafa and Qasim Shahzad Gill, 'The Issue of Prisoners of War (POWs), 1971 and Recognition of Bangladesh', 4 *International Journal of Business and Social Research* (2014) p. 117.

43 Delhi Agreement, *supra* note 40.

44 *Ibid.*

45 *Ibid.*

punish 195 Pakistani PoWs who were detained in India, and had been accused of genocide, crimes against humanity, war crimes and other crimes committed in 1971.⁴⁶ Furthermore, Bangladesh agreed that the no trials of the 195 PoWs shall take place during the entire period of repatriation of non-Bengalis in Bangladesh.⁴⁷

Concerning non-Bengalis in Bangladesh, Pakistan stated that its Government had already issued clearance for the movement to Pakistan for those non-Bengalis who were either domiciled in former East Pakistan, were employees of the Central Government and their family members, or were members of divided families, irrespective of their original domicile.⁴⁸ After the Tripartite Agreement, a large number of the *Bihari* community were repatriated to Pakistan under the supervision of the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC).⁴⁹ The repatriation process (that included numerous obstacles) began in 1974 and the last batch of repatriations took place in 1993.⁵⁰ After several repatriation programs during that period, the Urdu-speaking community's numbers had swelled in Bangladesh,, but they continued to face human rights violations with regard to their nationality and citizenship.⁵¹ Later, Pakistan felt no legal obligation to grant citizenship to those in the *Bihari* community who did not fall into the categories enumerated in the Tripartite Agreement.⁵² The repatriation programme has stopped for more than two decades.

46 K. Sellars, 'International Crimes Tribunals, Bangladesh', *Dictionnaire Encyclopedique de la Justice Penale internationale* (2017) p. 1, forthcoming, <www.law.cuhk.edu.hk/userfiles/people/kirstensellars/K_Sellars_Bangladesh_tribunals_201016.pdf>, visited on 12 June 2017.

47 Agreement on Repatriation of Persons, <www.mea.gov.in/bilateral-documents.htm?dtl/5868/Agreement+on+Repatriation+of+Persons>, visited on 8 June 2017.

48 Delhi Agreement, *supra* note 40.

49 Naimul Muquim, 'Strangers to Citizenship: An Analysis of the Deplorable Conditions of the Urdu-Speaking Community in Bangladesh', Master of Laws Thesis, Faculty of Graduate and Postdoctoral Studies of Law, University of British Columbia, Vancouver, Canada, 2017, <open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0343565>, visited on 14 June 2017.

50 Tasmia Persoob, 'Social Identity and Its Impact on the Camp Based Urdu Speaking Community in Bangladesh', 19 *Osaka University Knowledge Archive* (2014) p. 23, online at <ir.library.osaka-u.ac.jp/dspace/handle/11094/53813>, visited on 11 June 2017.

51 Muquim, *supra* note 49, p. 16.

52 Gerrard Khan, 'Citizenship and statelessness in South Asia', (2001), working Paper No. 47, <www.ecoi.net/file_upload/1226_1272465707_3bfoffi24.pdf>, visited on 7 April 2015.

4 Role of the Judiciary of Bangladesh and Pakistan for the *Bihari* Community

4.1 *Role of the Supreme Court of Bangladesh*

The *Bihari* community wished to exercise their right to recognition of their status as Pakistanis.⁵³ The Pakistan Citizenship Act 1951 remained and continues to remain in force in Bangladesh, as does the Bangladesh Citizenship (Temporary Provisions) Order 1972.⁵⁴ The Citizenship Act confers Bangladeshi citizenship on every person born in Bangladesh after independence, or born to a father who is a citizen of Bangladesh.⁵⁵ The Citizenship Order considers the situation at the time of independence; every person who was born there (or whose father or grandfather was born there) at that time, or who was a permanent resident at the time of independence and continues to be a resident, is a citizen of Bangladesh.⁵⁶

The High Court Division (HCD) of the Supreme Court of Bangladesh has delivered two significant verdicts concerning the Urdu-speaking community who are now living throughout Bangladesh. On 5 May 2003, in the landmark *Abid Khan* decision, the Supreme Court of Bangladesh directed the Government to “register them as voters”.⁵⁷ The Court held that “according to the Citizenship Act of Bangladesh, they are eligible to become citizens of Bangladesh”.⁵⁸ The ten Urdu-speaking petitioners, who were born both before and after 1971, were Bangladeshi nationals pursuant to the Citizenship Act 1951 and the Bangladesh Citizenship (Temporary Provisions) Order 1972.⁵⁹ These petitioners were residents of the Geneva camp, the single largest concentration of *Bihari* in Bangladesh. The Election Commission of Bangladesh (ECB), however, issued

53 Sumit Sen, ‘Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia Part-2’, 12 *International Journal of Refugee Law* (2000) p. 41.

54 Ninette Kelly, ‘Ideas, Interests, and Institutions: Conceding Citizenship in Bangladesh’, 60 *University of Toronto Law Journal* (2010) p. 349.

55 *Ibid.*, See also the Order 2 (I, II) of the Bangladesh Citizenship Order (Temporary Provisions), 1972 (President’s Order no. 179 of 1972).

56 Kelly, *supra* note 54.

57 *Md. Abid Khan and others v. The Government of Bangladesh and others*, 5 May 2003, the High Court Division (HCD) of the Supreme Court of Bangladesh, the Writ Petition No. 3831 of 2001 of the Supreme Court (HCD) under Article 102 of the Constitution of Bangladesh, 1972, <www.lawyersnjurists.com/Cases/714/md-abid-khan-and-others-vs-government-of-bangladesh-and-others-55-dlr-2003-318.html>, visited on 9 April 2015.

58 *Ibid.*

59 *Ibid.*

no official instructions to its officials to register the *Bihari* camp dwellers as voters, but unofficially directed local officers of the Commission to visit the *Bihari* camps for the enrolment of eligible *Bihari* on the voters' list.⁶⁰

Subsequently, on 18 May 2008, in the *Md. Sadaqat Khan* decision, the Supreme Court of Bangladesh reaffirmed that all members of the Urdu-speaking community were nationals of Bangladesh in accordance with its laws, and directed the ECB "to enrol the petitioners and other Urdu-speaking people who want to be enrolled in the electoral rolls and accordingly, give them a National Identity Card without any further delay".⁶¹ However, a number of eligible Urdu-speakers allegedly chose not to register as voters, fearing that it would undermine their long-standing call to be repatriated to Pakistan and that they would consequently lose other benefits in Bangladesh.⁶²

4.2 *Role of the Supreme Court of Pakistan*

In 2009, a petition was filed by Advocate Rashid-ul-Haq Qazi as a representative of the Stranded Pakistanis General Repatriation Committee and the Organisation for Repatriation of Stranded Pakistanis in Bangladesh.⁶³ Five years later, in May 2014, the Supreme Court of Pakistan admitted the petition for hearing. However, the approach of the Government was to postpone this humanitarian issue, as the Attorney General of Pakistan (AGP) Salman Aslam Butt, sought more time from the Court to file a reply claiming that he was unaware of the court notice issued in this regard.⁶⁴ The Ministry of Foreign Affairs said that the remaining stranded Pakistanis in Bangladesh, a majority of whom are *Biharis*, are not the responsibility of Pakistan, as the country has already repatriated a large number of non-Bengalis. Deputy Attorney General Sohail Mahmood submitted a report on behalf of the Foreign Office, stating that there were currently around 400,000 to 500,000 stranded Pakistanis residing in Bangladesh, and that these remaining people are the responsibility

60 UNHCR, *supra* note 6., p. 2.

61 *Md. Sadaqat Khan (Fakku) and 10 others v. The Chief Election Commissioner*, 18 May 2008, the High Court Division of the Supreme Court of Bangladesh, the Writ Petition No. 10129 of 2007 of the Supreme Court of Bangladesh (HCD) under 102 of the Constitution of Bangladesh, <clcbd.org/judgment/3770.html>, visited on 15 April 2015.

62 UNHCR, *supra* note 6, p. 4.

63 Abdus Sattar Ghazai, 'Bring the Stranded Pakistanis in Bangladesh Home', *The Milli Gazette*, 23 January 2015, <www.milligazette.com/news/11611-bring-the-stranded-pakistanis-in-bangladesh-home>, visited on 19 November 2015.

64 *Ibid.*

of the Bangladesh Government.⁶⁵ Under the 1974 Tripartite Agreement, more than 170,000 *Biharis* have already been repatriated to Pakistan.⁶⁶ The Pakistan Foreign Office also mentioned that the Supreme Court of Bangladesh had declared them citizens, and directed the Government to issue National Identity Cards.⁶⁷ Mr Qazi stressed that they were still Pakistani citizens, and despite the inhuman conditions they had been subjected to, they still proudly hoisted the Pakistani flag.⁶⁸ Although they were offered Bangladeshi citizenship, they refused to accept it.⁶⁹

The attitude of the Pakistani rulers, political stalwarts and army generals regarding the issue of stranded Pakistanis has been deplorable.⁷⁰ After the hearing on 31 March 2015, the Supreme Court of Pakistan (three-judge bench, headed by Justice Mian Saqib Nisar) rejected the plea regarding repatriation of stranded Pakistanis in Bangladesh on the grounds of having no *locus standi*.⁷¹ The Court ruled that the petitioner had no *locus standi* as the organisation was unregistered and the counsel for the petitioner, Mr Qazi, failed to justify his arguments.⁷² In this regard, Mr Qazi said that the Pakistani Government had misinterpreted the Bangladeshi Supreme Court's judgment, as "the stranded Pakistanis cannot be declared citizens of Bangladesh until they apply for citizenship".⁷³ Mr Qazi also said he had advised his clients to approach international courts regarding the implementation of the Tripartite Agreement between Pakistan, India and Bangladesh.⁷⁴

65 Hasnaat Malik, 'Stranded Pakistanis in Bangladesh not Pakistani's Responsibility FO tells HC', *The Express Tribune*, 30 March 2015, <tribune.com.pk/story/861364/stranded-pakistanis-in-bangladesh-not-pakistanis-responsibility-fo-tells-sc>, visited on 19 November 2015.

66 *Ibid.*

67 *Ibid.*

68 Hasnaat Malik, 'Bring them Home: Stranded Pakistanis in Bangladesh again Spotlight', *The Express Tribune*, 19 February 2015, <tribune.com.pk/story/840575/bring-them-home-stranded-pakistanis-in-bd-again-in-spotlight/>, visited on 19 November 2015.

69 *Ibid.*

70 *Ibid.*

71 Hasnaat Malik, 'HC Rejects Plea Regarding Repatriation of Stranded Pakistanis in Bangladesh', *The Express Tribune*, 31 March 2015, <tribune.com.pk/story/861834/sc-rejects-plea-regarding-repatriation-of-stranded-pakistanis-in-bangladesh>, visited on 20 November 2015.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*, see also Delhi Agreement, *supra* note 40.

5 Right to Return and Repatriation under International Law

The rights of minorities and the issue of self-determination are two sides of the same coin.⁷⁵ The *Bihari* community's right to return and self-determination has been ignored by Pakistan. Former Bangladesh President Sheikh Mujibur Rahman requested the United Nations (UN) to arrange repatriation of the *Bihari* community.⁷⁶ He also agreed to exchange Bangladeshis in Pakistan for the *Bihari* community in Bangladesh.⁷⁷ According to the ICRC, which works alongside the UNHCR, about 170,072 refugees were repatriated to Pakistan under the Tripartite Agreement.⁷⁸ Later, the Bangladesh government requested restarting the repatriation program several times because Bangladesh was not the country to which they had freely migrated or chosen to live in.⁷⁹ Before the creation of Bangladesh, they had backed the integrity of Pakistan, were Pakistani nationals, and to date have not renounced their Pakistani nationality.⁸⁰

The right of the *Bihari* community to return will be approached from the perspective of international law, drawing on the *Bihari's* right to a nationality, the international legal norms relating to the right to repatriation and recognition of their legal personality.⁸¹ Since the right to return has been recognised in numerous human rights provisions, constitutions and the jurisprudence of various countries, resolutions of the UN and the wide operational experience of the UNHCR, it has been argued that the right exists in customary international law, although its precise nature are difficult to define. The right to return to one's own country is provided in Article 9 of UDHR, which "prohibits arbitrary arrest, detention or exile", and in Article 13(2) of UDHR, which provides that "Everyone has right to leave any country, including his own, and to return to his country".⁸² The right to return is incorporated as an absolute entitlement in Article 12(4) ICCPR, which states that "No one shall be arbitrarily deprived of the right to enter his own country". In this regard, the process of denationalisation by Pakistan continues to violate the international norm that "no one

75 Sen, *supra* note 53.

76 Zahed, *supra* note 2, p. 431.

77 *Ibid.*

78 *Ibid.*

79 Sen, *supra* note 53.

80 *Ibid.*

81 *Ibid.*

82 Article 14(1) of the UDHR might be applicable for the *Bihari* community in Bangladesh because they have often been persecuted since the creation of Bangladesh for their active involvement against the 1952 Bengali Language Movement and in the war of independence of Bangladesh in 1971.

shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country".⁸³ This human rights dimension is important for refugees, since repatriation is premised upon their right to return to their own country under conditions of security.⁸⁴ Under international humanitarian law, Articles 133 and 134 of the Fourth Geneva Convention 1949 is very clear about the "right to leave and repatriate to the last place of residence", which might be applied to this community. This legal provision states that all protected person who may desire to leave the territory outside or during a conflict shall be entitled to do so. In this regard, the contracting parties are mandated to ensure all internees passage "to their last residence or to facilitate their repatriation".

6 Role of International Community on the *Bihari*

6.1 Role of UNHCR

The UNHCR has a worldwide responsibility for solving refugee problems⁸⁵ and pursuing repatriation agreements.⁸⁶ It is also responsible for protecting refugees and reducing the number of refugees through resettlement.⁸⁷ Without repatriation, international assistance is often used to maintain refugees in countries of asylum rather than finance repatriation operations.⁸⁸ There is clearly a wide gap between the ideal of voluntary repatriation and its realisation in practice.⁸⁹

The UNHCR first became involved in the repatriation programs of the *Bihari* community in 1974.⁹⁰ The ICRC worked alongside the UNHCR and registered the *Biharis* for repatriation to Pakistan, keeping them in settlements for their protection.⁹¹ Since international protection is premised on lasting solutions, the first of which is repatriation, the *Bihari* community's right to return

83 Sen, *supra* note 53.

84 *Ibid.*

85 See UN General Assembly Resolution no. 428 (V) of 14 December 1950 on the Statute of the Office of the UNHCR.

86 Lester A. Zeager and Johnathan B. Bascom, 'Strategic Behavior in Refugee Repatriation: A Game-Theoretic Analysis', 40 *Journal of Conflict Resolution* (1996) p. 460.

87 See the UNGA Resolution, *supra* note 85.

88 Zeager and Bascom, *supra* note 86.

89 *Ibid.*

90 Muquim, *supra* note 49.

91 *Ibid.*

justifies the UNHCR's direct involvement.⁹² The UNHCR is also the agency concerned with the reduction and elimination of statelessness, within the context of its protection role.⁹³ The nature and extent of the UNHCR's institutional responsibilities are relative to their duty to provide international protection during voluntary returns.⁹⁴ In accordance with its mandate, UNHCR should continue to play an effective role to promote measures to reduce statelessness.

6.2 *Role of the ICRC*

During the period of turmoil, chaos, confusion and disorder, the ICRC took the responsibility for providing food, shelter and healthcare to the uprooted and displaced people of the *Bihari* community.⁹⁵ The ICRC began to register *Bihari* families who wanted to leave Bangladesh to settle in the remaining part of Pakistan. The Urdu-speaking non-Bengalis decided to preserve their cultural and linguistic identity by registering with the ICRC for repatriation to Pakistan.⁹⁶ According to the Tripartite Agreement in 1974, all three countries agreed to take back their stranded nationals through repatriation under the supervision of the ICRC and UNHCR.⁹⁷ In the first phase, Pakistan took large numbers of *Biharis*, having registered them with the ICRC for repatriation to Pakistan. Now 400,000 to 500,000 *Biharis* live in the various camps in different parts of Bangladesh without proper treatment from either Bangladesh or Pakistan.⁹⁸

7 Conclusion

After rejection by the Supreme Court of Pakistan, the issue of repatriation has become more complex and controversial. However, the Supreme Court of Bangladesh has declared the *Bihari* community as eligible to become citizens of Bangladesh. After these decisions, two questions remain. First, how effective has the role taken by the Government of Bangladesh been? Secondly, are the *Bihari* community interested in becoming citizens of Bangladesh or not? Unfortunately, a large proportion of the *Bihari* community are uninterested

92 Sen, *supra* note 53, p. 63.

93 *Ibid.*

94 *Ibid.*

95 Hussain, *supra* note 15.

96 *Ibid.*

97 *Ibid.*

98 Malik, *supra* note 65. See also 'Stranded Pakistanis in Bangladesh', <en.wikipedia.org/wiki/Stranded_Pakistanis_in_Bangladesh#cite_note-Express_Tribune-2>, visited on 10 January 2018.

in Bangladesh citizenship and have refused a National Identity card. On the other hand, the Government of Bangladesh has not implemented the Supreme Court decisions or made its policy clear. If the *Bihari* community are to be citizens of Bangladesh, they must be treated equally with other ordinary Bangladeshi citizens.

In order to provide a lasting solution for the *Bihari* community, political honesty and willingness are the most important elements from both the Bangladeshi and Pakistani sides. Bangladesh should try to restart repatriation dialogue with Pakistan, as Bangladesh is the one who has been suffering from this issue since 1971. Most of the *Biharis* undoubtedly want to return to Pakistan as their country of origin. Moreover, neither Bangladesh or Pakistan are party to either the 1951 Convention Relating to the Status of Refugees, the 1954 Stateless Persons Convention, or the 1961 Convention on the Reduction of Statelessness. However, the UDHR, ICCPR, CRC and 1951 Refugee Status Conventions and many other national and international legal instruments, do recognise that 'everyone has a right to a national identity'. Therefore, the UN and other international organisations should work hard to make this happen, and Bangladesh and Pakistan must come forward to settle this long-standing issue between the two nations.