

Returning Rohingya: What Does the “Voluntary” in “Voluntary Repatriation” Mean?

Written by Jonas Skorzak

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JONAS SKORZAK, MAY 13 2019

In what has been called an ‘ongoing genocide’ by the head of the fact-finding mission (Associated Press, 2018), the Myanmar military used severe violence – including arbitrary killings, gang rape, torture, or razing villages (Independent International Fact-Finding Mission on Myanmar [FFM Myanmar], 2018, pp. 179–180) – after 25 August 2017, leading to over 740,000 Rohingya to flee to Bangladesh (UN High Commissioner for Refugees [UNHCR], 2019). Nonetheless, while the ‘clearance operations’ were still ongoing, Myanmar and Bangladesh signed a deal to repatriate the stateless Rohingya, and Bangladesh has since continued to push for their return with the latest attempt made in November 2018 (Siddiqui, 2018). While no Rohingya have been returned yet, as the efforts increase, it is important to ask if their return would be voluntary. The UNHCR (2004, One-2) defines voluntary repatriation as ‘the free and voluntary return to one’s country of origin in safety and dignity’. However, ‘safety and dignity’, primarily relating back to the principle of non-refoulement, needs to be seen as separate from voluntariness, which is inherent to this specific form of return (see Executive Committee conclusions No. 40 and No. 101, UNHCR, 2011, pp. 533, 537). However past failures of the UNHCR in Tanzania and Bangladesh (Long, 2013, pp. 12, 18–19) as well current criticism of the UNHCR’s Memorandum of Understanding (MoU) with Myanmar (McPherson & Siddiqui, 2018) raise doubts if their model of voluntariness is still adequate.

In this essay I will argue that we should use a new definition of voluntariness based on acceptable alternatives and capabilities to examine the voluntariness of voluntary repatriation. Furthermore, I will use the Rohingya refugee situation as an illustrative case and argue that we cannot view their repatriation as voluntary. To do so, I will first discuss and reject the UNHCR’s rights-based understanding of voluntariness, then introduce a new definition of voluntariness based on the work of Olsaretti (1998) and Nussbaum (2013), and finally apply it to the Rohingya case.

The UNHCR’s Understanding of Voluntariness

The UNHCR notes that voluntariness must ‘be viewed in relation to both the conditions in the country of origin (calling for an informed decision) and the situation in the country of asylum (permitting a free choice)’ (UNHCR, 1996, p. 10). Related to former, refugees need to have the necessary information regarding the conditions in their country of origin to make their decision (UNHCR, 1996, p. 32, 2004, Four-11, 2011, p. 532, 2011, p. 552). Regarding the free choice, there should be, as far as possible, an absence of ‘any physical, psychological, or material pressure’ (UNHCR, 1996, pp. 10–11). It may become involuntary, when the host country deprives refugees of any real choice using coercive measures or measures, such as ‘food consolidation’ (i.e. extreme food rationing) or cutting essential services, or when groups pressure refugees by ‘impeding’ their access to factual information or their exercise of their free will (Long, 2013, p. 19; UNHCR, 1996, p. 30, 2011, p. 551). Ideally, voluntariness is established by asking the refugees individually and having them sign a Voluntary Repatriation Form (VRF) (UNHCR, 1980). However, not only has the UNHCR repeatedly failed in practice to ensure voluntary repatriation, or even participated in refoulement (cf. Long, 2013, p. 12), conceptually their view of voluntariness does not meet common expectations either: Because an element of (active) interference, the exercise of pressures (cf. UNHCR, 1996, p. 30), is implied in the condition for non-voluntariness, cutting services might be no problem when it is done in response to repatriation (cf. Long, 2013, p. 20).

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The line between acceptable and undue pressure or promotion, the role of active interference, and the frequent conflation of ‘voluntary’ and ‘free and informed’ (cf. UNHCR, 2011, p. 553, 2011, p. 551, 2011, p. 537), point to a rights-based definition of voluntariness. Such a definition is based on the rights-based definition of freedom, which states that one’s liberty is only limited insofar as one had the right to act the way one did before the restriction was imposed (Olsaretti, 1998, p. 55). Accordingly, one acts voluntarily if the restricted set of choices available only came about as the result of the actions of others that have acted within their rights (Olsaretti, 1998, p. 56). Hence, coercion, i.e. the deliberate interference of one person with another, typically using the threat of force, is seen as a loss of freedom and the only way an involuntary choice may arise (Olsaretti, 2004, pp. 141–142). However, the UNHCR’s definition differs from that of libertarians in two ways:[1] They do not assume all-knowing actors, making factual and comprehensive information crucial to voluntary choices. Additionally, they use the core set of human rights (a larger set of rights), such as the right to life, liberty, and security of the person. Thus, cutting-off food rations would hereby make decisions involuntary because it deliberately interferes with the refugees’ rights to life and security of the person and, thus, like being held at gunpoint, forces them to repatriate. However, cutting services or imposing non-interfering restrictions would not render their decision involuntary because it did not interfere with their rights, was not deliberate, or (this is only an indicator) did not make use of threats (Crisp & Long, 2016, p. 144; Long, 2013, p. 20).

Despite this extension, the UNHCR’s definition retains the fundamental flaw of the rights-based definition: It is false that one acts voluntarily if one is not made unfree, that is, there is no necessary relation between freedom and voluntariness, even though they make voluntariness depend on freedom (Olsaretti, 1998, pp. 59–60). A justly convicted prisoner has no right to leave the prison, so the prisoner is not rendered unfree when a guard prevents him from doing so, but they are certainly not staying in the prison voluntarily. Contrary to what is assumed, (direct or indirect) coercion is not the only type of forcing making decisions involuntary, because it is actually about being forced to act in a particular way while being free to do whatever (Olsaretti, 2004, pp. 142–144). That is why the UNHCR, using the flawed definition, can assume a proactive role in repatriating as long as they do not deliberately infringe on refugees’ rights without raising concerns about voluntariness (cf. Crisp & Long, 2016, p. 144). By distinguishing the primary choice on whether to play the game and the secondary choice of an option within the game (Olsaretti, 1998, p. 66), we notice that the rights-based definition tends to ignore the former. Taking the example of first-wave Burundian refugees in Tanzania, they were free to choose whether to return to Burundi or to apply for citizenship in Tanzania, but they did not voluntarily choose to leave the camp in the first place (Fransen & Kuschminder, 2012, p. 9). However, there are alternative ways of conceptualizing voluntariness that more closely match our intuitions.

An Acceptable Alternative

A voluntariness account needs to deal with the conditions of an individual’s consent to a choice that make it voluntary or involuntary. Olsaretti’s (1998, 2004) definition can accomplish this: Here, a choice is voluntary if and only if it is not made because there is no acceptable alternative to it (Olsaretti, 1998, p. 71) while – retaining the negative definition – one is unfree to do x if and only if one’s doing of x is prevented by another agent (Olsaretti, 2004, p. 8). Hence, freedom is about the available options while voluntariness is about how the options affect one’s choice (Olsaretti, 1998, pp. 53–54). From this, we can derive two cases where a choice may be voluntary: One can have an acceptable alternative or one could choose the option because one prefers it inherently and not because there are no acceptable alternatives (Olsaretti, 1998, pp. 71–72). However, the existence of two acceptable options is an epistemological condition, a way of making more sure that whatever the agent chooses, they choose it voluntarily (Olsaretti, 2004, p. 156). In cases where all choices are unacceptable with a significant gap in their negative effect on well-being, it becomes likely we involuntarily choose the less bad option because the alternative is unacceptable (Olsaretti, 2004, p. 157).[2] Hence, there are two criteria that provide for voluntariness: Individual preferences, the subjective criterion, and the acceptability or unacceptability of the options, which is the objective criterion (Olsaretti, 2004, p. 154). Olsaretti (2004, p. 154) proposes basic needs as a plausible criterion for acceptability but, while intuitive, it lacks grounding in a larger theory of well-being that provides theoretical justification.

Henceforth, I use the capability approach (CA) advanced by Sen (2001) and Nussbaum (2013) as my objective criterion for the acceptability of alternatives. In contrast with other approaches, the capability approach examines what people are actually able to be and do, taking each person as an end and concerned with the opportunities

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available to each person (Nussbaum, 2013, pp. 18–19; Wells, n.d.). *Functionings* are hereby states of being and doing that have actually been achieved while *capabilities* are the set of valuable functionings a person has effective access to (Nussbaum, 2013, pp. 20–21; Wells, n.d.). Nussbaum's (2013) theory of partial justice is based on the principle of human dignity and it proposes a set of ten central capabilities, elaborated in Appendix A, that must be ensured at an ample threshold level (Nussbaum, 2011, p. 25, 2013, pp. 29–31, 32–34). They have a ‘thick-vague’ character, whereby they have universal importance while still being vague enough to enable contextual specification, with nations detailing them as it their duty to secure the capabilities for their people (Nussbaum, 2013, pp. 32–33, 40–42; Wells, n.d.). How can we pragmatically operationalize these central capabilities for our case of refugees, people who need an international specification due to the transnational character of their situation?

Connecting the capabilities approach to human rights is mutually beneficial as we can view former as one approach to latter, which provides theoretical justification and further elaboration or critique to human rights theory and enables us to use existing assessments of human rights to operationalize them. As Nussbaum (2011, p. 24) herself notes, the capabilities approach is one type of human rights approach that can supplement and critique it too, with her list of the ten central capabilities explicitly mentioning certain human rights at times (see Appendix A). Both, human rights theory and CA, view the core entitlements (capabilities or rights) as pre-political or independent of the state and as inherent to humans on account of their human dignity, thereby imposing a duty to secure them, primarily on the state but other organizations too (Nussbaum, 2011, pp. 25–27). Besides theoretically justifying human rights, providing source and duties, CA contributes in one more major way to human rights theory: The ten central capabilities are *combined capabilities*, which merges internal capabilities – the developed internal ability for action and choice – and the outer circumstances – the political, social, and economic environment that make it possible to exercise that function (Nussbaum, 2011, p. 25, 2013, p. 21). For example, one may have the internal capabilities to voice an opinion due to the education one received but cannot exercise it due to a lack of freedom of expression. The big implication of this approach: It specifies the rights language by stating that securing capabilities always involves affirmative material and institutional support, so that the functioning may actually be selected (Nussbaum, 2011, p. 31).

The Case of the Rohingya

By applying this theory of voluntariness to the more than 909,000 Rohingya refugees in Myanmar (UNHCR, 2019), we can examine the utility of this approach for studying voluntary repatriation. Not a single Rohingya has been returned despite Bangladesh's efforts, including an agreement to return 2260 Rohingya reached on 30 October 2018 (Chann, 2018; Ellis-Petersen & Rahman, 2018). Here, the families were not consulted in advance, i.e. they did not consent to their return with many fearing their repatriation to Myanmar and going into hiding with those located by UNHCR refusing (Ellis-Petersen, Rahman, & Safi, 2018; International Crisis Group [ICG], 2018, p. 2). Fortunately, Bangladesh held onto the principle of non-refoulement and did not coerce anyone to return (Ellis-Petersen et al., 2018). Taking the rejected rights-based definitions, the refugees were still not made unfree as they were not coerced, i.e. prevented from staying, and would have, thus, returned voluntarily, as all others stayed within their rights and they were informed on the conditions. However, as the following will show, the Rohingya cannot be assumed to voluntarily choose to stay or leave as neither is an acceptable option under our new definition. Being refugees, we can already point out on the primary choice level that their decision to ‘play the game’ was not voluntary.

In light of both the aforementioned epistemic condition of having two acceptable options and the fact that nobody chose to return, it is sensible to first check whether they voluntarily chose to stay by surveying whether the situation in Myanmar is acceptable. As I do not have the space for a comprehensive capability examination, I will only quickly survey the situation before and during their exodus and then check in how far things have changed. The report by the UN Fact-Finding Mission (FFM Myanmar, 2018) details severe abuse and denial of the human rights of the Rohingya even before August 2017 and confirms the genocidal character of the events following 25 August 2017 (Associated Press, 2018; FFM Myanmar, 2018, pp. 353–366). Even before the genocide, the Rohingya were (and still are) denied sufficient levels of both internal capabilities, which includes severe and deliberate malnutrition, lack of education, or low availability and quality of health care (FFM Myanmar, 2018, pp. 137–138), and the necessary external circumstances, as Rohingya face severe movement restrictions, strict population control measures, or, of course, statelessness which denies them a number of capabilities and rights outright (FFM Myanmar, 2018, pp.

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119–120, 127–128, 141–143). These findings are corroborated by Amnesty International (2018, pp. 269–270), which notes that the Rohingya continue to live in an apartheid-like system, Human Rights Watch (2019, pp. 413–414), which also reports continuing denial of rights and violent abuse, and the U.S. Department of State (2018, p. 1), which adds that Myanmar continues to deny assistance. Besides the head of the fact-finding mission calling it an ‘ongoing genocide’ (Associated Press, 2018) and the above reports, more evidence suggests little has changed: Security forces shelled villages, blocked access to food and assistance, forcibly disappeared, abusively detained, and tortured stayers and returnees; 5,200 Rohingya were newly displaced; and both the UN and human rights groups generally warn that their safety is endangered and that they will still face discrimination (including continued statelessness) (AI, 2019; Chann, 2018; Ellis-Petersen & Rahman, 2018; HRW, 2018).

Finally, let us turn our attention quickly to the conditions in the refugee camps to complete the check necessitated by the epistemic condition and to cover the second, hypothetical case of Rohingya returning to Myanmar. Generally speaking, there are concerns about lack of adequate shelter, water and sanitation, access to basic services, and general safety considerations (UNHCR, n.d.). More specifically, tens of thousands are at risk of landslides and flooding; the camp is severely overcrowded, leading to heightened risk of pandemics, fires, or violence; the education provided is inadequate and adolescents and adults are excluded; and Rohingya are denied their refugee status and the connected rights (Frelick, 2018, pp. 9–11). From these comments alone we can infer that their situation in Bangladesh does not meet the minimum sufficiency threshold for all ten capabilities (cf. Nussbaum, 1998, pp. 33–34, 2007, pp. 23–24). Furthermore, Bangladesh could worsen their current capabilities as it is preparing to transfer 100,000 refugees to the island of Bhasan Char, which, according to Human Rights Watch, is not a suitable accommodation as it is extremely endangered by cyclones, would lack education and health services, provide little livelihood opportunities, and would essentially become a detention center for the refugees (Frelick, 2018, p. 10). Recalling Olsaretti’s comments on the involuntariness resulting from differently unacceptable alternatives, it becomes clear that any choice to stay in Bangladesh, the less bad option, is involuntary. Additionally noting the epistemic condition, as none of the two alternatives is even close to acceptable, it is clear that we cannot speak of voluntary decisions in this case without thorough, individual vetting to ensure they do not choose it because there are no acceptable alternatives.

Conclusion

In this paper, I hope to have shown the utility of my new definition of voluntariness based on acceptable alternatives as measured by human capabilities by, first, arguing against the rights-based definition and, secondly, demonstrating it by application to the case of the Rohingya. One limitation should be obvious: I argued for human rights as a way of pragmatically operationalizing capabilities but, of course, as the MoU and its criticism’s focus on formal legal guarantees show (cf. McPherson & Siddiqui, 2018), human rights and capabilities have not a total overlap with many human rights assessments still focusing on the legal side (cf. DOS, 2018).

Notes

[1] It is difficult to map out their view on voluntariness because the UNHCR does not have a coherent, underlying definition and because, as Olsaretti (1998, 2004) shows, libertarians do neither as they make voluntariness dependent on freedom but the two do not have a necessary connection (see below)

[2] However, a choice is voluntary if both options are acceptable but one option is much better.

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Appendix A

The list of the ten central human capabilities, as reproduced from Nussbaum (1998, pp. 33–34, 2007, pp. 23–24):

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

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4. *Senses, Imagination, and Thought.* Being able to use the senses, to imagine, think, and reason – and to do these things in a ‘truly human’ way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.
5. *Emotions.* Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. *Practical Reason.* Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.
7. *Affiliation.*
 1. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
 2. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
8. *Other Species.* Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. *Play.* Being able to laugh, to play, to enjoy recreational activities.
10. *Control Over One’s Environment.*
 1. *Political.* Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.
 2. *Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason, and entering into meaningful relationships of mutual recognition with other workers.

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