

PROTECTION OF REFUGEES: A LEGAL STUDY IN HUMAN RIGHTS PERSPECTIVE

THESIS

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2020



**THIS THESIS IS DEDICATED
TO MY FAMILY AND
TEACHERS**



DECLARATION

I, **PRAMOD KUMAR**, hereby declare that this research work embodied in this Ph.D. thesis titled “**PROTECTION OF REFUGEES: A LEGAL STUDY IN HUMAN RIGHTS PERSPECTIVE**” has been carried out by me under the supervision of **Dr. RASHIDA ATHER, (Assistant Professor)**, Department of Human Rights, School For Legal Studies, Babasaheb Bhimrao Ambedkar University (A Central University) Lucknow, 226025.

This Research work is an original work and it has not been previously submitted in part or full for any other degree or diploma in this or any other university.

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CERTIFICATE

This is to certify that the thesis titled “**PROTECTION OF REFUGEES: A LEGAL STUDY IN HUMAN RIGHTS PERSPECTIVE**” submitted by **Mr. PRAMOD KUMAR** is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other university.

This thesis submitted to Babasaheb Bhimrao Ambedkar University, Lucknow satisfies all the requirements as stipulated in the *Doctor of Philosophy (Ph.D.) regulations, 1999 as amended in 2013* and it is fit for submission and evaluation for the award of the degree of Doctor of Philosophy of the University.

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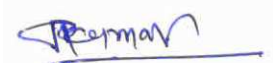
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Dated: 09/11/20


(Pramod Kumar)

PREFACE

Every year millions of people have forced to leave their homes and seek refuge from conflicts, violation of human rights, persecution, and human-made and natural disasters. In the contemporary world, the issues of the refugee remained as one of the most politically contested in international affairs as well as in international law. This problem had become more serious due to the impact of Second World War. Thus to deal with the problem after the five years of the Second World War the Office of the United Nations High Commissioner for Refugees (UNHCR) was established in 1950 at Geneva of Switzerland

The UNHCR has begins to work as an organization to help and resettled the European Refugees with the mandate of three years who have forced to survive their lives as dispossessed in the aftermath of World War II. Since the date of its establishment, the previously mentioned organization continually has expanded to meet the growing needs of refugees and other displaced people. At present, more than 22 million people have assisted by the office of the United Nations High Commissioner for Refugee across the world.

At the institutional level, the office of the UNHCR has now become a major international agency, which is concerned with the assistance and protection of refugees. Though we have entered the era of the millennium, but the fact is that more than 90.7 million people are still the victim of ethnic and political conflict and forced to migrate in other countries as a refugee.

In such a worst condition, the international neighbouring country should come forward to create an environment where the laws and policies related to refugees must be seriously enacted and sincerely implemented and they could live their lives with at least minimum assistance. Unfortunately, in the age of modern human rights, much attention has paid to protect the human rights of a citizen, but not to protect the human rights of refugees or not citizens of the states. While all states suffering from the refugee problem.

At present Syria, Afghanistan, South Sudan, Myanmar, and Somalia are five topmost countries, which are producing more than 80 per cent of the world refugee, and they have hosted by the neighbour countries. This example makes it clear that the

problem of forced displacement has not gone away and remained a major concern with the international community in the 21st. Thus there is a need for international political commitment to do something better and concrete for the protection of the human rights of refugees. Along with the mandate of UNHCR certain other laws are attributed to the protection of the human rights of refugees. These laws are Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, and International Covenant on Economic, Social, and Political Rights 1966. Apart from these international Covenants, the UN Convention Relating to the Status of Refugee 1951 and its Protocol 1967, for protection for rights of refugees are available.

However, these laws are not efficient enough to control and stop the violations of the rights of refugees. For example from African to European to Asian countries too, the lack of regional charter for the protection of refugees can be seen.

In India, many rights have endorsed through the Constitution and judicial interpretation for the refugees but it has true that India has not yet ratified the refugee convention 1951 and its 1967 protocol, and not have specific laws for the protection of refugees.

In this country, the refugee has generally treated as foreigner and governed by the Foreigner Act, 1946, Citizen Act 1955, and Passport Act 1965. However, there is no specific law for the protection of rights of refugees in India but this country has cultural respect for human rights since from the beginning of Indian civilization. However, on the national and international level, the necessity of law relating to the protection of the human rights of refugees has been felt deeply.

In this research, the researcher has tried to explain the concept of refugees and has also tried to examine the role of national as well as international laws for the protection of human rights of refugee, and as well as how the available laws are beneficial for the survival of refugees in the different countries including India. It is hoped that this research will help to analyse the political commitment of various states whether they should constitute legal mechanisms in favour of refugees within their boundaries. In this reference, the present research also suggested the way to ameliorate the worst condition of refugees in India as well as across the world.

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LIST OF ABBREVIATIONS

AALCC	Asian-African Legal Consultative Committee
CAA	Citizenship Amendment Act
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COFEPOSSA	The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act
CRC	Convention on the Rights of the Child
CSP	Community Support Program
DGMM	Directorate-General for Migration Management
EC	European Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
edn	edition
EU	European Union
ExCom Programme	Executive Committee of the High Commissioner's
FRO	Foreigner Registration Officer
UNHRC	UN Human Rights Committee
HRL	Human Rights Law

ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IM (DT)	The Illegal Migrants (Determination by Tribunals) Act,
IOM	International Organization for Migration
IPC	Indian Penal Code
IRL	International Refugee Law
IRO	International Refugee Organization
LFIP	Law on Foreigners and International Protection
MNLR	Model National Law on Refugees
NEFA	North-East Frontier Agency
NHRC	National Human Rights Commission
NSA	The National Security Act,
OAS	Organization of American States
OAU	Organization of African Unity
OCHA	UN Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
PDPA	People's Democratic Party of Afghanistan
PNG	Papua New Guinea
POC	Protection of Civilians
QD	Qualification Directive

RP&RC	Residential Permit and Residential Certificate
RSD	Refugee Status Determination
SoR	Statement of Objects and Reasons
TPR	Temporary Protection Regulation
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSC	United Nations Security Council
Vs	Versus

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*“The violation of Human rights is an essential factor in the displacement of refugees and an obstacle to their voluntary and safe return to the country. Protection of human rights in countries of origin is, therefore, critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum.”*¹

Generally, the term refugee has been used to describe a person who has been forced to escape his native place for some unfavourable conditions and reasons such as civil war, starvation, infringe of public order, earthquake and gender discrimination as well as environmental degradation, in which an individual cannot be responsible for his persecution. It is significant to know that over the past decades, the global population of forcibly displaced people grew significantly.

According to the global trends of displacement, there are 25.9 million refugees in the year 2018, in which 20.4 million refugees have come within the mandate of the United Nations High Commissioner for Refugee, while 5.5 million refugees have registered as Palestinian refugees by the United Nations Relief and Works Agency.²

In the past few years, the population of refugees has been increased because of the Syrian conflict. However, conflicts in other areas have also contributed to this growth. It included the area of the Middle East, such as Iraq and Yemen, the area of sub-Saharan Africa such as the Democratic Republic of the Congo (DRC), and South Sudan. It also has included the massive flow of Rohingya refugees from Bangladesh at the end of 2017.³ In 2018, the number of refugees also increased due to displacement in Ethiopia and new asylum claims from people fleeing the Bolivarian Republic of Venezuela.⁴

¹ Human Rights and Refugee Protection (RLD 5) October 1995, *available at*:
<https://www.unhcr.org/3ae6bd900.pdf> (last visited on January 22, 2020)

² UNHCR: The UN Refugee Agency, Global Trends Forced Displacement in 2018, *available at*:
<https://www.unhcr.org/globaltrends2018/> (last visited on January 22, 2020)

³ *Ibid.*

⁴ *Ibid.*

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Refugee Population by UNHCR Regions 2018⁵ can be understood by the following table:

Table-1.1 Refugee Population by UNHCR Regions

UNHCR, Region	Refugees, 2018
Central Africa and Great Lakes	1,449,400
East and Horn of Africa	4,348,800
West Africa	326,300
Total Africa*	6,335,400
Americas	643,300
Asia and Pacific	4,214,600
Europe	6,474,600
Turkey	3,681,700
The Middle East and North Africa	2,692,700
Southern Africa	211,000
Total	20,360,600

Source: UNHCR: The UN Refugee Agency, Global Trends Forced Displacement in 2018, <https://www.unhcr.org/globaltrends2018/>

The above table shows the population of refugees in different countries at the global level in 2018. It has demonstrated that a massive population of displaced persons who suffer from the problem of human rights violations at large measures. It can be seen that day by day; the population of the refugee is significantly increasing.

India is also suffering from refugee problems like other countries that affect the socio-economic and legal conditions of the country. The problem of refugees began since the partition of the country in 1947 and continued to 1983 in an ever-increasing manner, which continues.

⁵ *Supra* note 2

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The refugees in India coming from different countries (2016)⁶ can be seen in the following table:

Table 1.2: Refugee population in India coming from different countries, (2016)

Country	Country of Origin	Year	Refugees	Refugee Assisted by UNHCR	Total Refugees and people in refugee-like Situations	Total Refugees Assisted by UNHCR
India	Afghanistan	2016	7693	7693	7693	7693
India	Angola	2016	1	1	1	1
India	Bosnia and Herzegovina	2016	1	1	1	1
India	Burundi	2016	2	2	2	2
India	Cameroon	2016	1	1	1	1
India	China	2016	110098	3	110098	3
India	Congo	2016	1	1	1	1
India	Cote d'Ivoire	2016	7	7	7	7
India	Dem. Rep. of the Congo	2016	50	50	50	50
India	Egypt	2016	1	1	1	1
India	Eritrea	2016	38	38	38	38
India	Ethiopia	2016	21	21	21	21
India	Iraq	2016	363	363	363	363
India	Islamic Rep. of Iran	2016	65	65	65	65
India	Kazakhstan	2016	1	1	1	1
India	Leo People's Dem. Rep.	2016	1	1	1	1

⁶ UNHCR Statistical Data, Link, *available at*: <http://popstates.unhcr.org> (last visited on 05, August 2019)

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India	Libya	2016	3	3	3	3
India	Maldives	2016	3	3	3	3
India	Myanmar	2016	15561	15561	15561	15561
India	Pakistan	2016	1	1	1	1
India	Rwanda	2016	3	3	3	3
India	Saudi Arabia	2016	3	3	3	3
India	Somalia	2016	554	554	554	554
India	South Sudan	2016	2	2	2	2
India	Sri Lanka	2016	63162		63162	
India	State of Palestine	2016	68	68	68	68
India	Sudan	2016	78	78	78	78
India	Syrian Arab Rep.	2016	65	65	65	65
India	Yemen	2016	4	4	4	4

Source: UNHCR Statistical Data, Link, <http://popstates.unhcr.org>

Now until 31 January 2020, in India there are 210,201 asylum seekers and refugees, Including 108005 Tibetans, 95230 Sri Lanka, 21079 Myanmar, 18333 Afghanistan, and refugees from 37 other countries.⁷ Refugees are the victims of gross Human Rights violations. They are different groups of persons without the protection of the National State. The protection of the Refugee is a tragic phenomenon, which has always been a matter related to international, regional, and national levels. The Protection of refugees is primarily the responsibility of states. When governments are unwilling or unable to protect their citizens, the individuals may suffer severely such violation of their human rights that they are forced to leave their homes and often even their families to seek safety in another country. The government of their home countries no longer protects refugees; the international community then steps in and ensures that those fundamental rights have been respected.

The contemporary world is facing the problem of influx of the refugee. The refugee crisis has been considered one of the greatest challenges to the international

⁷ UNHCR, The UN Refugee Agency: Fact Sheet of India(31 January 2020), *available at*: <http://reporting.unhcr.org/sites/default/files/UNHCR%20India%20factsheet%20-%20January%202020.pdf> (last visited on August 10, 2020)

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community. The 1951 Geneva Convention is the principal international instrument of refugee law. The convention spells out who a refugee is and the kind of legal protection, other assistance, and social rights she or he should receive from the countries who have signed the document. The convention has also defined the refugee's obligations for the host government and specific categories of people, such as war criminals who do not qualify for refugee status. The 1967 Protocol expanded the scope of the Convention on the Status of Refugees. Due to the worldwide spread of the refugee problem, as well as at the regional level, the organization of African unity convention governing the specific aspects of the Refugees Problem in Africa and the Cartagena Declaration on refugees is also available for the protection of refugees.

In Asian countries, they do not have any regional binding legal instruments for them. Thus, the lack of a legal framework for the protection of refugees has made the condition of refugee miserable. Almost all Asian countries consider providing a refugee status based on the ad-hoc⁸ system. However, this system often creates confusion and injustice towards the protection of the rights of refugees. Among all refugees, non-citizen women and children are the most vulnerable group, and they have been more affected due to ethnic conflict and political or economic crises. They suffer a lot of physical torture and abuse, which makes them severely disturbed. Unaccompanied children live in a terrible situation. In the Indian perspective of the human rights protection of refugees, there is no direct legal instrument except the UNHCR.

The protection of the refugee means protection of the human rights of the refugees. The protection of refugees is the core mandate of the States and the United Nations High Commissioner for Refugee in accordance with the 1951 refugee convention and the 1967 protocol as well as Human Rights instruments. Protection has been broadly defined as a set of activities aimed at fully respecting the human rights of individuals under the human rights law, international humanitarian law, and refugee law. The protection of citizens is mainly the duty of states. In the case of a

⁸ Learner's Dictionary, *available at*: <http://www.learnersdictionary.com/qa/what-does-ad-hoc-mean> (last visited on May 05, 2020)

Ad hoc is a word that originally comes from Latin and means "for this" or "for this situation." It is used to describe something that has been formed or used for a special and immediate purpose, without previous planning.

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state or government that for any reason is disinclined or incapable to protect its citizens, those citizens have the right to seek asylum elsewhere, which is prescribed in the refugee definition of the 1951 Geneva Convention.

Legal protection for refugees does not begin when individuals are granted refugee status. It starts from the moment the person arrives at the borders of the probable asylum country. In addition, the principle of non-refoulement, which specifies that no asylum-seeker shall be forcibly returned to his country of origin or a third country where life may be in danger while everyone, has the right to take refuge.⁹

However, it is significant to mention that since independence, India has been facing a terrible inflow of refugees and asylum seekers in several waves. With the time, many refugees have entered India from different countries with a massive number of Indo-Pakistani refugee came from Pakistan, Burmese and Sri Lankan Indian have forced come in Indian soil, East Pakistani refugees, Chakmas, Bhutanese, Afghan, Iranian, Somalia, and Iraqis have come to India in search of a safe and secure place. Still, India is getting the regular flow of undocumented and illegal immigrants, mainly from Bangladesh and other neighbouring countries, due to religious and political persecution. It has been observed that the treatment of these refugees, asylum-seekers, and undocumented immigrants in India are not equal in any respect. It is different in terms of relief, rehabilitation, and general treatment.

There are specific provisions to protect the fundamental rights as well as basic human rights of the non-citizens in our Constitution, which included in Part III of the Indian Constitution. Part III of the Indian Constitution attributes some rights as fundamental rights to the non-citizens, including refugees. The Indian Judiciary also has been taken the stand in the protection of the human rights of non-citizens. India has not ratified the convention relating to the status of refugee 1951 and its protocol 1967. It has not made any distinct law for the protection of the human rights of refugees.

⁹ Human rights carrier, *available at*: <https://www.humanrightscareers.com/magazine/what-is-refugee-protection/>(last visited on January 12, 2020)

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1.1 MEANING OF HUMAN RIGHTS

Human rights are a set of norms governing the treatment of individuals and groups by states and non-state actors, as moral principles regard society as fundamental to civilized life. These criteria have been incorporated into national and international legal systems, which specify mechanisms and procedures to hold duty-bearers accountable and provide redress for alleged victims of human rights violations.¹⁰

Human rights are rights that are equally enjoyed by all of our humanity. It has grounded in an appeal to our human nature. Christian Bay defined human rights as any claims that ought to have legal and moral protection to make sure that basic needs will have met.¹¹ These rights are inalienable because the enlightened conscience of the community would not permit the surrender of them by any person on his own volition.¹²

There are various contemporary definitions of human rights. The UN defined human rights such as those rights which are in-built in our state of nature and without which we cannot live as human beings.¹³

According to D.D. Basu, The rights that each person gets against a state or other public authority by being members of a human family have called human rights.¹⁴

Shree P. P. Rao said that human rights are the in-built dignity and certain rights of all members of the human being, recognizing them as the basis of liberty, justice, and harmony in the world.¹⁵

The Protection of Human Rights Act, 1993 defines Human Rights, which means the rights relating to life, liberty, equality, and dignity of the individual

¹⁰ Human Rights: A Brief Introduction, available at:

[https://dash.harvard.edu/bitstream/handle/1/23586712/Human%20Rights-](https://dash.harvard.edu/bitstream/handle/1/23586712/Human%20Rights-A%20Brief%20Introduction,%202014%20ed.pdf?sequence=1)

[A%20Brief%20Introduction,%202014%20ed.pdf?sequence=1](https://dash.harvard.edu/bitstream/handle/1/23586712/Human%20Rights-A%20Brief%20Introduction,%202014%20ed.pdf?sequence=1) (last visited on January 22, 2020)

¹¹ R. J. Vincent, *Human Rights and International Relations* 12-14 (Cambridge University Press. 1986)

¹² Dr. D.S. Bajwa, *Human Rights in India: Implementation and Violations* 2 (Anmol Publications, New Delhi 1995)

¹³ Pramod Mishra, *Human Rights Global Issues* 4 (Kalpaz Publications, Delhi. 2000)

¹⁴ D. D. Basu, *Human Rights in Constitutional Law* 5 (Prentice Hall of India Pvt. Ltd., New Delhi. 1994)

¹⁵ Mamta Rajawat, *Burning Issues of Human Rights* 33-47 (Kalpaz Publications, Delhi 2001)

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guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.¹⁶

Human rights are essential for the development of a person, to protect his personality and honour, without which his life becomes like animals. Human rights are not rights, which derive from a particular State: they are rights, which belong to a man simply because he is a man.¹⁷ Therefore, human rights are the natural, inherent, and inalienable rights without which a man cannot exist, and are positive obligations on the part of the State. It is universal; do not differ with geography, history, culture, economic system or stage of development, gender, race, class, or status, and these bare to protect by the State.

1.2 HUMAN RIGHTS OF REFUGEES

The governments of any country are generally obliged to provide basic human rights and guarantee their physical security to their citizens. However, when citizens become refugees, this guarantee of security disappears. Whereas in this situation there is a great, need for the protection of the human rights of refugees. Where UNHCR works closely with states for international protection of the human rights of refugees and ensures that states are performing their obligations for the protection of refugees and asylum seekers. However, it is not a supernatural organization and cannot be seen as an alternative to government responsibility.

No country can forcibly return refugees to an area where they face threats or discrimination between groups of refugees. They have to confirm that refugees benefit from economic and social rights, at least to the same degree as other foreign residents of the country of asylum. For humanitarian reasons, states should allow a spouse or dependent children to join persons to whom temporary refuge or asylum has granted.¹⁸

¹⁶ The Protection of Human Rights Act, 1993, sec. 2(d)

¹⁷ Maurice & Cranston, *Human Rights Today* 16 (P.C. Manaktala and Sons Pvt. Ltd., Bombay. 1962)

¹⁸ Protecting Refugees: questions and answers; UN Refugee Agency-India, *available at*: <https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html> (last visited on January 25, 2020)

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There are some rights, which have been protected by the international as well as national instruments as follows:

1.2.1 Right to Non-Refoulement

When a person has been compelled to flee his country of origin or nationality, his immediate concern is protection against refoulement. Such protection is necessary, and at the time, the only means of preventing further human rights violations. As his forcible return to a country where he has reason to fear of persecution may endanger his life, security, and integrity, the international community has recognized the principle of non-refoulement under Article 33(1) of the 1951 refugee convention.¹⁹ This right has prohibited the rejection of refugees at the frontier and expulsion after entry. This rule derives its existence and validity from the twin concept of the international community and humanity. It must see as an integral part of that foundation of freedom, justice, and peace in the world, which is a human right.²⁰

There are three international human rights instruments, namely the UN Convention against Torture and other Cruel, Inhuman or Degradation Treatment or Punishment, the UN declaration on the protection of all personnel from enforced disappearance, and the UN principles on the active inhibition and examination of extra-legal arbitrary and summary performance have included unambiguous prevention of refoulement. The international instruments may seek to stop it if a person is at risk of violations of human rights.²¹

1.2.2 Right to Seek Asylum

Asylum is a term used in everyday language, but despite its use, there is still a lack of clarity about the concept. The word '*asylum*' is the Latin form of the Greek word '*asylon*,' which translated into English means "freedom from a seizure" at its most basic level, asylum is the protection accorded in a place to a person who seeks it.²² It has often been believed that in international law, the concept of asylum has

¹⁹ The United Nations Convention relating to the status of refugees, 1951. Art. 33(1)

²⁰ *Ibid.*

²¹ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen: Law and Reality* 47(Deep & Deep Publication, New Delhi. 2007)

²² "Atle Grahl-Madsen (ed.), *The Land Beyond: Collected Essays on Refugee Law and Policy* 280 (Martinus Nijhoff Publishers, Leiden. 2001)

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commonly been used in other related issues. Still, specifically the terms "asylum" and "refuge" and "asylum seeker" and "refugee" are often substitutable and the same.²³

When a person fleeing due to persecution enters a country other than their country of origin or nationality, they are most in need of asylum.

Asylum is a type of protection that a state allows in its territory or elsewhere under the certainty of its organs when the person demands it. Asylum is necessary not only for safeguarding his right to life, security, and integrity but also for preventing other human rights violations. Thus, the grant of asylum in the case of refugees who constitute a unique category of human rights victims is an essential aspect of human rights protection and hence should be considered in the light of the United Nations. The United Nations Charter provides as a general principle of international law and primary consideration of humanity. No, wonder that not only the right of a person to leave others or his country has been recognized in several human rights instruments, but even his right to seek and to enjoy asylum in other countries from persecution has been proclaimed as human rights. Under international law, asylum is the right of the state, not of the individual who can only seek it and, if granted, enjoy it²⁴

1.2.3 Right to Equality and Non-Discrimination

A refugee is entitled to be treated with humanity by the state of asylum. The obligations of the state of refugees on this count have been derived from the rules and principles, which direct the respect and protection of fundamental human rights, general international law, and elementary considerations of humanity and founded on the international community's interest in and concern for refugees. Refugees under the Refugee Convention are entitled to relatively higher standards of treatment than those belonging to the status category or mandate refugees. Since, as a rule, rights, and freedoms recognized by international human rights law apply to all, including refugees, the latter is also entitled to respect for, and protection of their fundamental human rights like nationals of the state of refuge. Of crucial importance to the protection of human rights and fundamental freedoms of refugees is the rule of non-discrimination laid down in several global and regional human rights instruments, because being foreigners in the asylum country they are most vulnerable to

²³ Rafiqul Islam and Jahid Hossain Bhuiyan (ed.), *An Introduction to International Refugee Law* 133 (Martinus Nijhoff Publishers, Leiden. 2013)

²⁴ B. C. Nirmal, "Refugee and human rights," 1 *ISIL YEARBOOK OF IHRL* 100 (2001)

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discrimination. It must be recognized that refugees often lack proper identification and official documents and, as such, might encounter problems with the authorities. Their presence in a foreign country might resent, or they might be received with suspicion because of their religion or ethnicity. They face difficulties due to the lack of adequate provisions of national laws for refugees or uncertainty about the extension of the benefits of laws to refugees.²⁵

The right to equality before the law, equal protection of the law, and non-discrimination, which form a cornerstone of international human rights law, appear to ban discrimination against refugees based on their status as such. Besides, all guarantees protecting specific categories of discrimination, such as race and gender-specific discrimination are also applicable to refugees.²⁶

1.2.4 Right to Peaceful Assembly

The right to peaceful assembly is the most fundamental civil right. This right is protected in various international and regional human rights instruments. This right is guaranteed to both citizen and non-citizen, including refugees in international refugee law. There is no provision in the 1951 convention regarding freedom of assembly. Nevertheless, this right is protected under Article 20(1) of the Universal Declaration of Human Rights, 1948,²⁷ and Article 21 of the international covenant on the civil and political right, 1966.²⁸

1.2.5 Right to Freedom of Religion

The United Nations Convention relating to the refugee status, 1951, guaranteed to refugees equality of treatment with nationals as regards freedom of religion. Article 4 of the 1951 convention provides that; the contracting states shall accord to refugees within their territories treatment at least as favorable as that granted to their nationals concerning the freedom to practice their religion and

²⁵ *Id.* at 102

²⁶ *Ibid.* 102-103

²⁷ The Universal Declaration of Human Rights, 1948. art. 20(1) stated that everyone has the right to freedom of peaceful assembly and association.

²⁸ The International Covenant on the Civil and Political Right, 1966. art. 21 stated that the right of peaceful assembly should be recognized. No restriction may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others.

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freedom as regards the religious education of their children. If national law restricted religious freedom for citizens, then the 1951 convention would not prohibit similar restrictions on refugees. The guarantees of freedom of religion are provided in article 18 of the universal declaration of human rights;²⁹ and Article 18 of the international covenant on civil and political rights.³⁰

Further, the convention on the rights of the child, Article 14, and declaration on the elimination of all forms of intolerance and discrimination based on religion and belief, Article 1, has ensured the most significant possible protection of religious freedom.³¹

1.2.6 Right to Education

Seeing the importance of elementary education of children, the Refugee Law and Human Rights law guarantee the elementary education of children. Article 22 of the 1951 refugee convention guarantees elementary education. The right to education is also guaranteed in various international human rights laws. Article 26 of the UDHR states- everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Article 13 of the ICESCR wherein it laid down that the state parties to the present Covenant recognize the right to education and achieve this goal for everyone. Primary education shall be compulsory and available free to all, and secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to

²⁹ Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

³⁰ The International covenant on civil and political rights protects theistic, non-theistic and atheistic belief, as well as the right not to profess any religion or belief. The term religion and belief are to be broadly construed. Article 18 is not limited in its application to traditional religion or to religion and belief with institutional characteristics or practices analogous to those of traditional religions. However, article 18(3) provides some restrictions on the ground of public safety, public order, health, and morals.

³¹ Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice and freedom, individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

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all because of capacity. Article 28 of the convention on rights of the child provides the right to education to every child.³²

In reviewing state reports under the Convention on the Rights of the Child, the Committee on the Rights of the Child emphasized the need to provide the right to primary education to asylum seekers and refugees.³³

1.2.7 Right to Life and Personal Security

According to article 3 of the Universal Declaration of Human Rights, everyone has the right to life, liberty, and security of person". The right to life and security of a person is made up of distinct but strongly interconnected elements. The right to life is the supreme right of human beings. It is essential to all human rights, and without it, all other rights are meaningless. The right to security is closely associated with the right to liberty. Individual security is how the State protects the physical integrity of its citizens from abuse by official authorities and other citizens. The right to security of the person protects physical integrity, which has traditionally taken the narrow focus of protection from direct physical trauma. However, emerging standards are beginning to include providing for the necessities of life (such as sustenance or healthcare), the right to social security, and the protection of health and safety, particularly in employment.³⁴

The International Covenant on Civil and Political Rights (ICCPR),³⁵ the UN Convention on the Rights of the Child (CRC),³⁶ the Convention on the Rights of Persons with Disabilities (CRPD),³⁷ and the Convention on the Elimination of All

³² The Convention on the Rights of child, 1989. Art. 28 contained that the state parties recognize the right of the child to education and this right can be achieved progressively and based on equal opportunity in all respect.

³³ *Supra* note 21 at 31-32.

³⁴ Life, Liberty and Security of Person, *available at*:

https://www.hrc.co.nz/files/8214/2388/0502/HRNZ_10_Life_Liberty_and_Security.pdf (last visited on January 15, 2020)

³⁵ Art. 6(1), every human being has the inherent right to life, Law shall protect this right. No one shall be arbitrarily deprived of his life." Further, article 9(1) "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

³⁶ Article 6(1) States Parties recognize that every child has the inherent right to life."

³⁷ Article 10(1) "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal

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Forms of Racial Discrimination (CERD) contain provisions relevant to the right to life, liberty, and security of person.³⁸

1.2.8 Right to Freedom of Movements

Freedom of movement in a refugee context has traditionally been understood mainly to concern the right to freedom to move within the country of asylum and to choose one's place of residence. However, issues about freedom of movement are present in all phases of the refugee movement from the forced uprooting through flight asylum and eventual return. In the 49th session of the commission on human rights, the high commissioner for refugee noted the complexity and scope of freedom of movements and said that:

“In speaking of the right to remain, it means to underline the need to protect the basic right of the individual not to be forced into exile and to emphasize an aspect of human right that deserves further development in connection with our efforts to address the cause of refugee flight. The right to remain is implicit in the right to leave one's own country”.³⁹

Article 26 and 31 of the 1951 refugee convention has laid down certain principles, which are obligatory to the contracting states. Article 26 states that each contracting state shall accord to refugees lawfully in its territory and the right to choose their place of residence and to move freely within its region. Further Article 31 said that; the contracting state shall not impose penalties because of their illegal entry or presence on a refugee who is coming directly from a territory where their life of freedom has been threatened or are present in their territory without authorization.

basis with others.” Article 14(i) “States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.”

³⁸ Article 5, “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;”

³⁹ *Supra* note 21 at 38.

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Article 13(1) of UDHR⁴⁰ and 12 (1) of ICCPR recognized and supported the free movement of non-nationals, including refugees, in the territory of a country.⁴¹

1.2.9 Right to Work

The Right to work, one of the most fundamental economic rights, is crucial for refugees. The 1951 refugee convention has devoted specific provisions to ensure refugees' right to work. Article 17, 18, and 19 of the 1951 refugee convention in its combined effect contains that every refugee who enters into the host country lawfully has the right to get wage-earning employment, the scope of self-employment, or the scope for practicing of a liberal profession. The restriction on working rights may also apply to refugees. However, there are two notable exceptions to this general rule. The first exception related to wage-earning employment is that no restriction imposed on non-citizens under Article 17 will be imposed on refugees, if they have completed three years of residence in the country, or if they are married to a national of the country, or if they have a child who is a national of the country. The second exception is that under articles 18 and 19, for a refugee who wants to be self-employed or practice a liberal profession, states undertake to accord treatment as favorable as possible. It imposes a positive obligation on states to make every effort to lift restrictions on the right of refugees to start their own business, or to practice a profession. International human rights law also contains several provisions on the right to work which are relevant to refugees.⁴²

1.3 KEY TERMS RELATED TO REFUGEES

In international law, there are some similar terms have been continuously and frequently used while discussing issues related to refugees, and they can create confusion to understand the problem in a holistic manner and also to understand the various related aspects like asylum, internally displaced persons, stateless persons, immigrant, or economic migrants. These terms are also related to the problem of displacement, which is very important to understand, that is why are discussing as follows:

⁴⁰ Everyone has the right to freedom of movements and residence within the border of each state.

⁴¹ Everyone lawfully within the territory of a state shall have the right to liberty of movement and freedom to choose his residence.

⁴² Rathin Bandyopadhyay, *Human Rights of the Non-Citizen: Law and Reality* 48-49(Deep & Deep Publication, New Delhi. 2007)

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1.3.1 Asylum

The asylum word is Latin and derives from the Greek word '*Asylos*,' which means sacred place,⁴³ which means "freedom from seizure."⁴⁴ Asylum is a place of refuge, retreat, and security. Asylum is the protection given to a person seeking it in a territory of another state.⁴⁵

The term has referred to those cases where the national state declines to surrender a person to the requesting country and provides shelter and protection in its territory. Thus, asylum involves two elements. Firstly, housing, which is more than a temporary refuge; and secondly, a degree of active protection on the part of the authorities in control of the territory of asylum.⁴⁶

A state has a right to grant asylum to a person on the principle that it has a sovereign right to control over the individuals found on its territory, and a person has a right to get asylum in another state.⁴⁷ A person is genuinely seeking refuge from persecution have often referred to as asylum seekers. The Universal Declaration of Human Rights says under article 14 that everyone has a right to seek and enjoy in other countries asylum from persecution.⁴⁸

Any person can seek and enjoy asylum only when the state granted it. The right to enjoy asylum, therefore, means no more than the right to enjoy it if it has issued.

Further, if asylum has been regarded as the right of a person, it would mean that the state has a corresponding duty to grant asylum. However, it is not valid. States have no such responsibility to give asylum to persons. It exercises complete discretion in this regard subject to specific commitments made by way of the conclusion of extradition treaties.⁴⁹

⁴³ H. O. Agarwal, *International law & Human Rights* 284(Central Law Publications, Allahabad. 16th edn., 2009)

⁴⁴*Id.* at 274

⁴⁵ Abdul Qadir , Asylum, *available at*: <http://internationallawu.blogspot.in/2012/11/asylum.html> (last visited on December 08, 2019).

⁴⁶ *Starke's International Law* 323(Oxford University Press, New Delhi, 11th edn., 1994).

⁴⁷ The Caracas Convention on Territorial Asylum 1954, art. 1

⁴⁸ The Universal Declaration of Human Rights, 1948 art. 14

⁴⁹ H. O. Agarwal, *International Laws & Human Rights* 284(Central Law Publications, Allahabad. 16th edn., 2009).

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A state may provide asylum to a person in two ways. They are territorial asylum and extraterritorial asylum. When a country grants asylum on its territory, it is called provincial asylum. The right to grant asylum to a person on its territory depends on the state where it exercises national sovereignty over its territory, irrespective of its national or foreign affairs. A nation has a right to admit or expel any person found in its region. The grant of territorial asylum, therefore, depends upon the discretion of a country, which is not under a legal obligation to grant asylum to a fugitive.⁵⁰ When a state provides asylum at a place outside its territory, it is called extra-territorial asylum.⁵¹

1.3.2 Internally Displaced Persons (IDPs)

Internally displaced persons mean any person or groups of persons who have been forced or obliged to flee from their home or places of habitual residence, in particular as a result of armed conflict, situations of generalized violence, violations of human rights, or natural or human-made disasters, and who have not crossed an internationally recognized border.⁵²

There are two essential elements of internal displacement, which is coercion and other is domestic or civil movement. It is necessary to note that, rather than a strict definition, the Guiding Principles offer "a descriptive identification of the category of persons whose needs are the concern of the Guiding Principles."⁵³ In this way, the documents "intentionally steers toward flexibility rather than legal precision" as the words "in particular" indicate that the list of reasons for displacement is not exhaustive.⁵⁴

⁵⁰ *Id.* at 286-287

⁵¹ *Id.* at 288

⁵² OHCHR | Questions and answers about IDPs, *available at*: <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Issues.aspx> (last visited on December 10, 2019).

⁵³ G. Kalin, Guiding Principles on Internal Displacement: A notation- The American Society of International Law and the Brookings Institution Project on Internal Displacement-Studies in Transnational Legal Policy, No. 32, (2000) *available at*: www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid. (last visited on August 18, 2018)

⁵⁴ M. Vincent, "IDPs: rights and status", *Forced Migration Review* 30 (2000). *available at*: www.fmreview.org/sites/fmr/files/FMRdownloads/en/...displacement/vincent.pdf (last visited on August 18, 2018)

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From an international law perspective, the primary responsibility for the protection of and assistance to internally displaced persons rests with the territorial state, in virtue of its sovereignty and the principle of non-intervention.⁵⁵

In 1998, Guiding Principle in Internally Displacement sought to address these lacunae by identifying the rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. They guide states as well as authorities, groups, and persons irrespective of their legal status and apply to all internal displacement contexts.⁵⁶

The Guiding Principles are not binding but reflect and are consistent with international human rights, humanitarian law, and analogous refugee law. Guiding Principles acknowledgment of internally displaced persons right to protect against forcible return to resettlement in any place where their life, safety, liberty, and health would be at risk.⁵⁷

1.3.3 Statelessness

According to Article 1 of the Convention relating to the status of stateless persons, 1954 defines statelessness. The term Statelessness person means a person who is not considered a national by any state under the operation of its law.⁵⁸ It is concise and to the point. It defines a specific group of people, the de jure stateless person because it delineates a particular, quantifiable fact, either one is, or one is not a national by operation of state law.⁵⁹

A person who is stateless following the definition in article 1 of the 1954 Convention has commonly known as de jure stateless. A distinct concept of de facto statelessness has also emerged, describing the situation of people who formally hold a nationality, but they have similarly situated as de jure stateless because their citizenship is in some way ineffective. Traditionally, de facto statelessness is considered referring to persons outside the country of their citizenship who are unable

⁵⁵ Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* 481(Oxford University Press, New Delhi, 3rd edn., 2007).

⁵⁶ I Brownlie and Guy S. Goodwin-Gill, *Basic Documents on Human Rights* 220(5th edn., 2005).

⁵⁷ Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* 484-485(Oxford University Press, New Delhi, 3rd edn., 2007).

⁵⁸ The Convention Relating to the Status of Stateless persons, 1954, art. 1(I)

⁵⁹ B. S. Chimni, *International Refugee Law: A Reader* 72-73(Sage Publications, New Delhi, 8th edn., 2012).

or for valid reasons, are unwilling to avail themselves of the protection of that country.⁶⁰

However, there is no agreed international definition of de facto statelessness, nor is there any treaty regime dedicated to addressing this phenomenon. The 1954 convention relating to the status of stateless persons and the 1961 convention on the Reduction of statelessness, developed under the auspices of the United Nations have taken on new relevance and political significance. The 1954 and 1961 conventions are now tools by which the international community can seek to address emerging and weighty problems relating to nationality.⁶¹

1.3.4 Immigrants

Human spatial mobility has best conceptualized as a complex system of short term and long term or short-distance and long-distance movements. Those people who cross boundaries between places and regions within states and between states called immigration or migration. There are two types of migration one is internal migration which refers to the movement of people within countries, and the second one is international migration which refers to the movement of people across states' boundaries.⁶²

One theory of immigration distinguishes between push factors and pull factors. Push factors refer primarily to the motive for emigration from the country of origin. Moreover, it says that escape from poverty (personal or for relatives staying behind) is a push factor, and the availability of jobs is related to pull factors.⁶³

1.3.5 Economic Migrants

Often refugees are confused with economic migrants. A person who has left her country of origin solely to improve her economic prospects is not a refugee, as there is no element of persecution related to departure from the country of origin. An economic migrant leaves her country typically voluntarily, to seek a better life, and

⁶⁰ Alice Edwards and Laura Van Waas (ed.), *Nationality and Statelessness under International Law*, 248-249(Cambridge University Press, UK, 1st edn., 2014)

⁶¹ Manish Chatuavedi, *Human Rights of Refugees: Issues & Concerns in the Globalization Era* 55(swastika Publication, New Delhi, 1st edn., 2011).

⁶² Brian Opeskin, Richard Perruckoud et. al. (eds.), *Foundation of International Migration Law* 18 (Cambridge University Press, New Delhi, 1st edn., 2012).

⁶³ Ramesh Thakur, *International Human Rights of Refugees: A Factual Analysis* 188-189(Cyber Tech Publications, New Delhi, 1st edn., 2013).

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they should elect to return home. They would continue to receive the protection of her government.⁶⁴

The same migrant may consider a refugee only if she can prove that she has been denied employment in her country of origin because of her race, religion, nationality, and that it amounted to persecution. Refugees flee because of the threat of persecution and cannot return safely to their homes in the prevailing circumstances. Refugees move for a safe life and economic migrant for a better experience.⁶⁵

1.4 REVIEW OF LITERATURE

The literature review plays a very important role in the research process. A review of the selected and useful studies related to the research problem has been identified that served as a basis and useful for understanding and developing for the researcher to evolve his vision on the topic. Various similar research studies related to the present research problem “**Protection of Refugees: A Legal Study in Human Rights Perspective**” have been done in India and other countries of the world.

The main purpose of the literature review is to know research studies related to the refugee problem and incorporate their variable views into the present study. The researcher has gone through the following research work as follows:

Refugee in India: Legal framework, Law Enforcement, and Security Written by T. Ananthachari. In this article, the writer talks about the refugee problems and what is the legal protection of refugees in India. The writer also tells that refugee protection is essential for security reasons. In India, there are many laws for refugee protection, but there is no uniform law that exercises for refugee protection and security of India.

Further, we have reviewed an article written by **Bhairav Acharya** on ***The Law, Policy, and Practice of Refugee protection in India***. In this article, the author mentioned human rights violations related to refugees in India and the Refugee Protection Act and its functions for refugee protection. In this article writer also tells about India which is not a signatory of the UN Convention 1951, and how to protect the rights of refugees in India.

⁶⁴ Ragini Trakroo Zutshi, and Jayshree Satpute, (*et al.*), *Refugees and the Law* 12(Human Rights Law Network, New Delhi. 2nd edn., 2011)

⁶⁵ *Ibid.*

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Another article reviewed by the researcher is written by **Prafulla Kumar Nayak** on *Protection of Refugees: A Humanitarian Crisis in India (2013)*. In this article writer tells about the refugee's problems and gross violation of human rights in India and many domestic laws like those of the Foreigner Act and the Passport Act have used for the exercise of refugee problems and protection as provided in the Constitution of India.

Arun Sagar & Farrah Ahmed, *The model law for refugees: A vital step forward*, in this article writer tells about a model law. India is not a signatory of the UN Convention 1951, and there is no uniform law relating to refugee protection in India, so in 2006, Justice P.N. Bhagawati has recommended a model law for refugee protection in India. This model law is very important for the implementation of a uniform status determination regime and the incorporation of rights for refugees.

The researcher has reviewed a book *Texts and Materials on International Human Rights, Routledge Taylor & Francis group London and New York 3rd edn., 2013*, written by **Rhona K.M. Smith**. This book is divided into fourteen chapters. Each chapter includes various issues relating to international human rights and conceptual principles, particularly those primary sources like treaties, other instruments, and jurisprudence, which elaborate on the fundamental rights, and freedom to which they are all entitled. All the chapters cover the fundamental of international human rights and the rights accorded to critical vulnerable groups. Chapter 13 is related to the refugee's protection. In this chapter, the author tells about who is a refugee, what is the status of refugees and how to determine a refugee's status, and what is the difference between refugees, stateless persons, and displaced persons.

Guy S. Goodwin-Gill, *The Refugee in International law, Oxford University Press, New York, 2nd edn., (1998)*. This book is divided into three parts with nine chapters. The first part is divided into three chapters like definition, determination, and loss of refugee status and gave information about the principle of non-refoulement and the concept of asylum, third part is also divided into four chapters. In this part, the author says about the protection mechanism in national and international laws. In the last part, the author gives the solution and prevention of refugee problems.

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Akanksha Malhotra & Akshay Kumar, *Indian perspective on the protection of refugee*, Sereals Publications New Delhi, Edited by S. Shri Krishna & Anil Kumar Samudrala- *Refugee and Human Rights*, 1st edn., (2008). In this article, the author explains and defines how the refugee can be protected in India and what are the reasons for making a refugee. There have been international and national instruments relating to refugee protection from the Indian perspective. There are many laws like the Constitution of India, the Foreigner Act, and the Passport Act, but there is no uniform law for refugee protection in India.

Dr. Marghoob Alam, “*Role of the National Human Rights Commission of India in Protection and Promotion of Human Rights*,” *International Journal of Multifaceted and Multilingual Studies*, Volume-I, Issue-3 May (2015). In this article, the writer attempts to highlight the useful role and contribution of the National Human Rights Commission and underline the essential need for such a Commission in India. Because individual as human beings enjoys certain fundamental rights, which are necessary for all-round development of human personality and in the absence of which no individual would be able to lead a happy moral and civilized human life. The commission has played a tremendous and commendable role in the promotion and protection of Human rights violations, and discriminatory treatment towards the weaker sections of society including refugees.

Fernando M. Marino Menendez; “*Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugee*” *Refugee Survey Quarterly*, 2015, This article analyses some of the latest decisions and recommendations of the Committee and identifies their relevance to note its contribution to the protection objectives of refugee law. The United Nations Committee against Torture, established under the 1984 United Nations Convention against Torture, has adopted a series of decisions on individual claims which may be considered relevant for the development and deepening of certain aspects of international and domestic law on the protection of refugees. The precision and nuance developed by the Committee on concepts such as torture, ill-treatment, non-refoulement, investigation of torture, or “substantive” risk of torture shed light and promote best practices by state authorities on questions such as the existence and proof of “well-founded fear of persecution,” the limits of extradition, and the usefulness of diplomatic assurances in the field of refugee law.

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Brian Gorlick and Sumbul Rimi Khan; *Refugee Protection as Human Rights Protection: International Principles and Practice in India*; in this article writer focuses on the relationship between international human rights standards and refugee protection. The foundational status of the Universal Declaration of Human Rights and other human rights treaties have been surveyed in light of India's international legal obligations. The authors argue that international human rights law and practice have had a significant impact on the protection activities of the Office of the United Nations High Commissioner for Refugees. In this article, the writer says that courts and national human rights institutions are essential players in safeguarding the rights of refugees. None of the countries of South Asia is a party to the international refugee instruments, nor have any of them adopted a national refugee law or procedure.

Guy S. Goodwin-Gill, *The Refugee in International Law*, (Oxford University Press, New Delhi. Reprint 1998). This book is divided into three parts and ten chapters. Every chapter is important for the study of refugee protection and its issues. The researcher took help from chapter two, Determination of refugee status: Analysis and application, and from chapter three, Loss and Denial of Refugee Status, which is very beneficial to write chapter three, Determination and Termination of Refugee Status in International Refugee Regime of the thesis.

Further, we have reviewed **Rajiv Dhavan, *Refugee Law, and Policy in India* (PILSARC, New Delhi, and Reprint 2005).** This book is divided into six chapters; chapter I of this book is about the background of the book. Chapter II of this book outlines the history of India's refugee law and policy; delineates the discomfiture, discontents, and concerns about refugee issues, and outlines the scope of present and future possibilities. Chapter III probes into the evolution of the policy framework of refugee protection in India and its relationship with the global refugee protection regime, including the UNHCR. Chapter IV looks at the legal predicament of refugees in India under various statutory, judicial, constitutional, and international law framework applicable to, and recognized by the legal and constitutional system. Chapter V gives a view of the practice of refugee protection in India, both by the Government of India and the UNHCR. Chapter VI explores the potions for the future; including the initiatives to enact a national refugee protection law.

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Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford University Press, New York. 3rd edn., 2007). This book is divided into three parts and ten chapters on different topics. Part one of this book gives an outline about the legal framework of refugee protection in the practice of the United Nations and the context of international and national law and also how the refugee definition has evolved, analyses its constituent parts, and the circumstances leading to the cessation or denial of refugee status. Part second is related to asylum, including non-refoulement. Lastly, part third is relevant to the internally displaced person and the legal responsibilities of international organizations in human rights matters.

Ragini Trakroo Zutshi, Jayshree Satpute, (et al.), *Refugees and the Law* (Human Rights Law Network, New Delhi. 2nd edn., 2011). In this book, the authors say about the legal protection of refugees in India and holistically analyses refugee law, international, foreign, and domestic concerns with humanitarian issues of the increasing need for a broader conceptual framework. This book is divided into four chapters, and all chapters are essential. The researcher takes help from chapter one, namely, Refugees: Definition, Rights and Protection, and chapter three, namely, Legal Dimension: Case Laws, Judgments, and Complications to write his thesis.

Manish Chaturvedi, *Human Rights of Refugee: Issues & Concerns in the Globalization Era* (Swastik Publications, New Delhi; 1st edn., 2011). In this book, the author endeavors an attempt to portray the real picture of refugee problems, its magnitude and impact on socio-political and economic world order in the era of globalization and relevant national and international instruments for the protection of fundamental human rights of refugees, various views also given in this book. This book is divided into ten chapters; all chapters are too useful for the researcher to write his thesis.

B. S. Chimni (ed.), *International Refugee Law* (Sage Publications New Delhi. 8th edn., 2012). This book is divided into eight chapters. The first four chapters deal with the definition of refugee, the law of asylum, the rights and duties of refugees, and the mandate and functions of the UNHCR, respectively. The subsequent three chapters consider the issue of the root causes of refugee flow and the law of state responsibility, durable solutions to the refugee condition, and the international law and about internally displaced persons. These chapters address concerns, which

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go beyond the 1951 Convention but are crucial to understanding and solution of the global refugee problem.

The final chapter deals with the legal condition of the refugees in India, which is not a party to the 1951 Convention or the 1967 Protocol. However, since 1995 it has been a member of the Executive Committee of the UNHCR.

Rafiqul Islam and Jahid Hossain Bhuiyan (ed.), *An Introduction to International Refugee Law* (Martinus Nijhoff Publisher, Boston 2013). It is an edited book. The author has collected many articles on different topics which are written by different writers related to the refugees like; International Legal Protection for Refugees: Articulating Challenges and options, The Origin and Evolution of International Refugee Law, Refugee Status Determination: Analysis and Application, Loss and Denial of Refugee Status and many more.

Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection*, (Palgrave Macmillan Publication Singapore, 1st edn., 2017). In this book, the author speaks about the Indian refugee protection situation, especially in the case without ratification of the 1951 Refugee Convention. This book is divided into eight chapters, and all chapters are so useful for the researcher to know about refugee protection and their issues from the Indian perspective.

Frances Nicholson and Judith Kumin, *A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians N° 27*(published by the Inter-Parliamentary Union and the United Nations High Commissioner for Refugees. 2017)

This book is divided into nine chapters. Each chapter itself contains essential topics. International and regional mechanisms related to the legal protection of refugees, the obligations of the United Nations High Commissioner for refugees related to refugee security, and their role has been explained.

Additionally, it includes and explains the procedures to manage the border and controlling the entry of refugees and described how any person can acquire asylum and the status of refugees. Further, this book has provided information about the determination that needs international protection, how to make the asylum seeker process fair and efficient, respecting the rights and dignity of refugees, and how to achieve a durable solution.

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Partha S. Ghosh, *Migrants, Refugees and the Stateless in South Asia* (Sage Publication, New Delhi. 1st edn., 2016). This book is divided into seven chapters. The situation of south Asia regarding the refugee has been discussed in chapter one, and chapter two of this book has explained the connection between politics and migration. Chapter three focused on the migration–security interconnection. Issues about the relief and rehabilitation of refugees have been discussed in Chapter 4. Chapter 5 addresses the question of whether it is desirable to have a regional refugee regime to replace the existing system of handling the problem through national legal mechanisms. Cultural and psychological aspects involved in the phenomenon of South Asian migrations have been discussed in Chapter 6, and the last chapter of this book chapter seven is the conclusion.

Stellina Jolly and Nafees Ahmad, *Climate Refugees in South Asia: Protection under International Legal Standards and State Practices in South Asia* (Springer Nature Publication, Singapore. 2019). This book is divided into seven chapters. Chapter one is introductory, provides a conceptual background of climate change refugees, and brings out the issue of climate change and its relationship with climate refugees' migration/displacement in South Asia.

Chapter two examines the fundamental debate of whether and how far climate change acts as a push factor in climate change migration. This chapter also provides an overview of climate impacts, which acts as a driving factor of human mobility and emphasizes the problem of recognition and protection of climate refugees and migrants.

Chapter third explain various approaches and conceptions relating to the climate refugee and provide information to identify the core legal principles and legal regime applicable to solve the constitutional issues of climate refugees and discusses whether rights violated during climate migration are a human rights issue.

Chapter four addresses the legal protection of the climate-induced displaced population and the extent of protection granted under international climate law and international refugee law and international human rights norms and attempts to recommend an appropriate legal framework under which the issue of climate change displacement could be addressed.

Chapter five examines the existing domestic laws and policies regarding climate change-induced displacement in South Asia. It also emphasizes the specific

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climate legislation, national refugee laws, human rights laws, disaster management laws, and other environmental laws operating in the sphere of climate change-induced displacement and migration.

Chapter six critically analyses the position of the judiciary in South Asian jurisdictions concerning the reception of international refugee law and international climate law in South Asian jurisdictions.

Chapter seven evaluates the role of SAARC regarding protecting the rights of climate refugees. Energy concerns motivated the initial focus of SAARC on climate change.

1.5 STATEMENT OF PROBLEM

India has seen a massive influx of refugee populations throughout history but does not have specific domestic law governing the treatment of refugees and asylum-seekers. Despite being a non-signatory to the refugee convention, India has an obligation under international law to protect asylum-seekers, which it has traditionally honoured.

However, India does not have a national framework related to a refugee while the Supreme Court has said in its many decisions that the right to life and personal liberty as enshrined in the Indian constitution protects refugees from forced repatriation.

There is a need for the protection of the rights of refugees and improve their situation in India with a mission to assist asylum seekers in realizing fundamental human rights and accessing the justice system.

The refugee problem in India today is a global issue. At the international level, the situation of refugees is not good. Refugees have been forced to count a life without dignity. Their standard of living is deficient. Their health, education, and employment levels are also horrible. Fundamental human rights such as health, education, and employment have very much needed for the development of any person. However, the fulfilment of these fundamental human rights is also complicated. At the same time, the system of durable solutions to protect refugees at the international level has not been adequately followed. For the protection of the human rights of refugees at both the national and international levels, it is necessary to adopt durable solutions, asylum security, and the principle of the non-refoulement present.

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Therefore, socio-legal, economic, medical, psychological, educational, vocational protection of the refugees is the need of the hour to make their life dignified and secured.

1.6 OBJECTIVES OF THE STUDY

The main objective of the present study is to examine and evaluate the law, policy, and mechanism of the protection of refugees in India in particular and at the international level in general. To achieve the main objective of the present study, several other objectives have also been framed which are as follows:

- To discuss and understand various human rights related to the refugees.
- To explore the conceptual and historical development of the definition of a refugee.
- To discuss and analyse the grounds for the determination and termination of the status of refugees.
- To study the international legal framework for the protection of refugees.
- To study and explore the national legal framework for the protection of refugees.
- To emphasize upon contemporary issues and challenges relating to the protection of refugees in India.
- To review the national and international judicial decisions relating to the refugees.
- To conclude, the whole work with the analysis of the condition of refugees.
- To give suggestions to be the part of the policymaking for improving the status of refugees both at national and international levels.

1.7 HYPOTHESIS

- The increasing refugee crisis is the result of a very narrow and confined definition of the United Nations Convention Relating to the Status of Refugees, 1951.
- Law relating to the protection of refugees in India is not capable enough to stop the violation of the human rights of refugees.
- NHRC and the Indian judiciary are playing a vital role in the protection of the rights of refugees.

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- Lack of national and international political will to improve the socio-economic and legal status of refugees creates hindrances to impose their situation.

1.8 RESEARCH METHODOLOGY

The present work is a doctrinal study where the qualitative method has been used, besides descriptive, exploratory, and analytical methods have also been applied, mainly to analyse the legal provisions and judicial decisions. The information has been collected through both primary and secondary sources. The secondary data is availed from various journals, internet, government publications, earlier studies, media reports, and books.

For collecting the information from primary sources, international documents like conventions, declarations, and various resolutions have been studied. Similarly, various national acts, statutes have also been analysed by the researcher.

1.9 SCHEME OF CHAPTERS

The Ph.D. thesis on “*Protection of Refugees: A Legal Study in Human Rights Perspective*” is based on the doctrinal study. The whole thesis is divided into seven chapters.

Chapter I: INTRODUCTION

Chapter one is introductory and endeavours to summarize the entirety of the thesis, which has been discussed at length in the chapters to follow. This chapter includes refugee crisis at the global and national level, causes of refugee problems, meaning of refugee and human rights of refugees, which are provided by the international refugee law and the international Human Rights law, and discusses the other keywords relating to displaced population like asylum seekers, migrants, immigrants, and stateless.

Lastly, the researcher has discussed the literature review, statement of the problem, objectives of the study, hypothesis, research methodology, and scheme of chapters.

Chapter II: EVOLUTION OF DEFINITION AND DETERMINATION OF REFUGEE STATUS

This chapter looks into the meaning and definition of refugee given by various academicians and jurist and provides a historical overview of the evolution of the definition of refugee in international refugee law before and after 1950. It also

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discussed the definition of refugee given in regional instruments along with the definition of refugee in Asian perspective. This chapter also provides information about the criteria for the determination of refugee status according to the 1951 Refugee Convention, United Nations High Commissioner for Refugees and different states in their own territories.

Chapter III: INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF REFUGEES

Chapter III describes various international instruments for refugee protection, given in international human rights law, international humanitarian law, international refugee law and regional instruments relating to the protection of refugees. The chapter also discusses some international institutions, which are working for the protection and assistance of the refugees across the world. It further discussed the various laws and policies related to refugees from seven countries representing different continents including South Africa, Australia, Canada, Brazil, Germany, Turkey, and China.

Chapter IV: NATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF REFUGEES

In this chapter, the researcher has explored and examined the legal provisions related to refugee protection in India specially the Constitution of India and other statutes, which apply to the persons and foreigners. The chapter further discussed the international Human Rights instruments ratified by India that imposed India's international obligations to protect refugees. The working of the United Nations High Commissioner for Refugees in India and the role of the Human Rights Commission for the protection of refugees was also discussed in this chapter. Finally, the current stands of India in terms of refugees were also described.

Chapter V: JUDICIAL RESPONSE TO REFUGEE PROTECTION

In this chapter, the researcher deals with the various judicial decisions given by both the international and national judiciary for the protection of refugees. At the international level it discusses the various international cases related to the refugee such as Cruz-Varas v. Sweden and others, Pashupanathan v. Canada (Minister of Citizenship and Immigration) and another, Babar v. Secretary of State for the Home Department, Alex Ruta v. Minister of Home Affairs. The international court's decisions have been discussed in some headings like the right to seek asylum, well-

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founded fear of persecution, racial persecution, religious persecution, persecution related to nationality, membership of a social group, political persecution, 'sur place' refugee, non-refoulement, and detention.

The chapter further discussed the various decisions of the Indian Supreme Court, High Court, and some non-registered cases of refugees like Luis De Raedt v. Union of India, Dr. Malavika Karlekar v. Union of India, Dongh Lian Kham, and others v. Union of India and Others, Zothansegpur v. the State of Manipur, National Human Rights Commission v. The State of Arunachal Pradesh, State of Arunachal Pradesh v. Khudiram Chakma, Chairman Railway Board and others v. Chandrima Das and others. These decisions of the national courts are explained under the some headings such as Deportation and protection of civil rights for the refugees; the principle of non-refoulement and refugee status, right to equality, right to life and personal liberty including personal security, acquisition of citizenship, deemed citizenship of refugees, application of international law, and judicial interpretation for protection of non-citizen's rights, repatriation or resettlement of refugees, humanitarian assistance, detention, Chakma refugees, other nationalities, and unreported cases.

Chapter VI: STATUS, ISSUES, AND CHALLENGES OF REFUGEES

Chapter VI provides the information about the status, issues, and challenges of refugees both at international and national levels. The problem of forced displacement including refugees was thoroughly discusses. The chapter further discussed the topmost refugees' origin countries and condition of refugees in the European, African, Asian regions that also includes India. This chapter also discusses the issues and challenges faced by the refugee in India as well as across the world.

Chapter VII: CONCLUSION AND SUGGESTIONS

In this chapter sum up all the chapters and mentioned some findings based on research work and tested the hypothesis on the ground of findings, and, gave some suggestions for the improvement of refugee's problems, and the protection of the human rights of the refugees in the word in general and in India particular.

CHAPTER - II
EVOLUTION OF DEFINITION AND
DETERMINATION OF REFUGEE
STATUS

CHAPTER II

2.1 INTRODUCTION

The migrations of the population have immensely enriched the history of human civilization. However, such movement came under severe restrictions as the desire to settle, consolidate, and expand territorial boundaries gained increasing recognition in practice and law. The mass migration of the human population increased tremendously due to the fear of their lives and property destroyed in the countries. The refugee problem, which started to crop up in the aftermath of World War I, grew enormously in the post Second World War era. Moreover, after that wherein millions of people fled their nations to save their lives from the tragedy of Wars and political persecutions, civil, ethnic, and racial conflicts or other natural or human-made disasters have forced this exodus to turn the inhabitants into refugees.

Every year millions of people are forced to leave their homes and seek refuge from conflicts, violence, violations of human rights, persecution, and human-made or natural disasters. The number of displaced people continued to increase and called for more humanitarian aid worldwide. According to the United Nations High Commissioner for Refugees (UNHCR) Global Trends Report 2018, says that around 80% of the forced displaced people find refuge in those countries that are already struggling with low poverty and middle-income such as Turkey, which is the world's leading refugee-hosting country with a population of 6.7 million refugees, mainly Syrians. Lebanon meanwhile hosts the most significant number of refugees relative to its national population. The survival of displaced persons depends on the availability of assistance provided by local communities and international organizations.¹

However, there are a significant percentage of stateless persons at the end of 2018. Over 70.8 million people worldwide require protection and assistance as a consequence of forced displacement according to UNHCR, the UN Refugee Agency. It is the equivalent of a person becoming displaced every two seconds. Forcibly

¹ Forced displacement: refugees, asylum-seekers and internally displaced persons (IDPs), *available at*: [\(https://www.ec.europa.eu/echo/files/aid/countries/factsheets/thematic/refugees_en\)](https://www.ec.europa.eu/echo/files/aid/countries/factsheets/thematic/refugees_en). (last visited on August 10, 2019)

EVOLUTION OF DEFINITION AND DETERMINATION OF REFUGEE STATUS

displaced populations include refugees, internally displaced persons (IDPs), and asylum-seekers.²

According to the Global Overview Report of the International Displacement Monitoring Centre (IDMC), 2018, over 41.3 million people have internally displaced because of conflict and persecution, while 25.4 million are refugees, and 3.5 million are asylum seekers.³ Refugees are a particular group of people who are not like the natural citizens of a country that receive them.⁴ A refugee is also a person who has been removed from their home and seeks refuge elsewhere.⁵ The main problem with the refugee is that they are a persistent embarrassment to the international legal community. The tension between the refugees and the standard international order is the distinctive political dynamic of refugee status. It renders the protection of refugees a unique challenge for law and legal process, particularly once the refugee is in the state where he seeks refugee protection.⁶

The present chapter deals with the historical outline of the evolution of the refugee definition in the international refugee regime. The purpose of the present chapter is to understand and explore, who is a refugee as defined in various international instruments, organizational mandates, and in the writing of different scholars.

2.2 MEANING OF REFUGEE

The term refugee derives from the root old French word 'refuge,' which means "hiding place," and it also refers to "shelter or protection from danger or distress," comes from the Latin word '*refugere*', says "to flee," and Latin word '*refugium*,' which means "a taking of refuge or place to flee back to."⁷

² Global Trans forced displacement in 2018, *available at*: <http://www.unhcr.org/globaltrends2018/> (last visited on March 5, 2019)

³ Global Report on Internal Displacement-IDMC GRID 2018, *available at*: http://www.internal_displacement.org/global-report/grid2017 (last visited on March 2, 2017)

⁴ Sanjay K. Roy (ed.), *Refugees and Human Rights* 41(Rawat Publications, New Delhi, 2001)

⁵ Ramesh Thakur, *International Human Rights of Refugees: A Factual Analysis* 2(Cyber Tech Publications, New Delhi, 1st edn., 2013)

⁶ Manish Chaturvedi, *Human Rights of Refugees: Issues & Concerns in the Globalization Era* 3(Swastik Publication, New Delhi, 1st edn., 2011).

⁷ Refugee: Online Etymological Dictionary, *available at*: www.etymonline.com/index.php?term-refugee (last visited on January 6, 2017)

According to a layman's point of view, a refugee is a person who has left home and seeks refuge elsewhere because of war or persecution or natural and human-made disaster.⁸

However, in the general term, a refugee is a person compelled to flee his state of origin or residence or driven from his or her home to seek refuge, especially in foreign countries due to war, political trouble, religious persecution, or natural disaster.⁹ Moreover, the ordinary meaning of the word refugee described as a person who has forced to flee his or her country for any reason for which the individual is not responsible, be it persecution, public disorder, civil war, starvation, earthquake, or environmental degradation.¹⁰ The ordinary meaning of the refugee lies in an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the cause and consequences of flight.

According to international law, a refugee is a person who has been forced to leave his country for reasons that pose a threat to his life and has no protection from his country.¹¹

2.3 DEFINITIONS OF REFUGEE

It's very important to have a proper understanding of the definition of a refugee, as the determination of the status and the further protection of refugees depends on the definition of a refugee.

2.3.1 Refugee Defined by Different Jurists

Many jurists have given several definitions of refugees. These definitions are discussed as follows.

2.3.1.1 Guy S. Good Win-Gill

*"The term refugee is a term of art that is a term with content verifiable according to principles of general international law."*¹²

⁸ Refugee, available at: <https://www.nationalgeographic.org/encyclopedia/refugee/7th-grade/> (last visited on May 14, 2020)

⁹ Tapan, K. Bose, *Protection of refugees in south Asia need for legal frame work* 5 (SAFHR paper series 6, 2000)

¹⁰ B. S. Chimni (ed.), *International refugee law: A Reader* 1 (Sage publication, New Delhi 8th edn., 2012).

¹¹ *Ibid*

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In ordinary usage, it has a broader meaning, signifying someone in flight, which seeks to escape condition or personal circumstances found to be intolerable. The destination is not relevant; the trip is to freedom, to safety. Likewise, the reasons for the flight may be many; flight from oppression, from a threat to life or liberty, flight from prosecution; flight from deprivation, from grinding poverty; flight from war or civil strife; flight from natural disaster, earthquake, flood, drought, famine.¹³ The purpose of any definition of refugees will vary depending on its function in any particular organization or state context. The meaning or explanation may facilitate and justify aid and protection while satisfying the relevant criteria ought in practice to indicate entitlement to the appropriate right or benefits. Therefore, when determining the international law content of the category of refugees, traditional sources, contracts, and state practices must also be examined internationally taking into account the education and procedure of the various statutory bodies, to deal with refugee issues.¹⁴

2.3.1.2 Prof. Goodhart

The refugee is not a concept of customary international law. Therefore, the refugee has not defined thereunder. The refugee has been the subject of treaties and other international agreements. So, it is impossible to give one single definition, which could use in all circumstances. As Prof Goodhart rightly observed that:

*"A sociological meaning of the term "refugee" differs from a legal one; the definition drafted for the binding international agreement will look very different from the definition adopted by an association with the humanitarian aid."*¹⁵

The movement of refugee law away from the principle of humanitarianism intensified between 1938 and 1950. In particular, the determination of refugee status based on a broadly defined lack of protection ended.¹⁶ No longer was it sufficient to

¹² Guy S. Goodwin Gill, "The Benigno Aquino Lecture in Human Rights Refugee and Human Rights: Challenges for the 1990's" 2 *IJRL* 29 (1990).

¹³ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 15(Oxford University Press, New Delhi. 3rd edn., 2007)

¹⁴ *Id.* at 16

¹⁵ Manish Chaturvedi, *Human Rights of Refugees: Issues & Concerns in the Globalization Era* 4(Swastik Publication, New Delhi, 1st edn., 2011).

¹⁶ Nafees Ahmad , Refugee: The Semasiology of Definitional Dilemma, *available at*: https://www.academia.edu/4050467/Refugee-The_Semasiology_of_Definitional_Dilemma (last visited on April 28, 2019)

be a member of a group of displaced or stateless persons; instead, a particularized analysis of each claimant's motives for the flight was requisite to recognition as a refugee.¹⁷ A refugee status of a person has initially determined by some factors that led to his conditions, expatriation, and separation of relationship linked him to the nationality.¹⁸

2.3.1.3 Sir John Hope Simpson

*"The essential quality of a refugee is that he has sought refuge in a territory other than that in which he was formerly resident as a result of political events which render his continued residence in his former territory impossible or intolerable."*¹⁹

The main problem with refugees is that they are a persistent embarrassment to the international legal community. The tension between the refugees and the predictable international order is the distinctive political dynamic of refugee status. It renders the protection of the refugees a unique challenge for law and legal process, mainly once the refugee is in the state where he seeks refuge and protection. Moreover, a large number of population movements because of the problem likes climate change is also a huge problem and could not ignore people who have to leave their homes and communities in the coming years because of the effects of climate change. Some will leave because of the increasing severity and frequency of sudden-onset disasters. Others will move as long-term processes of environmental degradation intensify, including desertification and rising sea levels. Still, others are likely to be relocating by their governments when the areas where these are life declared uninhabitable. While much remains unknown about the scale, timing, and nature of such population movements, it seems clear that present normative frameworks will be inadequate to deal with future large-scale campaigns of people because of climate change.²⁰

¹⁷ James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" 31 *HILJ* 139 (1990).

¹⁸ Jacques Vernant, *The Refugee in the Post-war World* 13 (George Allen and Unwin Ltd, 1953)

¹⁹ *Supra* note 16

²⁰ *Ibid.*

2.4 DIFFERENT APPROACHES TO REFUGEE DEFINITION

The evolution of the definition of a refugee can be based on three different views or approaches that existed in different periods. There are three internationally accepted deferent approaches to explain the meaning of refugees in international law. These are Judicial, Social, and Individual approaches or views that can be discussed as follow:

2.4.1 Juridical View of Refugee Definition

This approach defined refugee in broad juridical terms, which means that because he belongs to a group of people who have been effectively deprived of the formal protection of their home country, and they were treated as refugees.²¹ The purpose of refugee status conceived in a juridical term is to help the international movement of persons who find themselves abroad and unable to resettle because no nation is ready to take responsibility for them. These first refugee definitions have been formulated in response to the international legal dilemma caused by the denial of state protection. The withdrawal of de jure protection by a state, whether by way of denaturalization or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system. Because then existing international law did not recognize individuals as subject of international rights and obligations, the determination of responsibilities on the international plane fell to the sovereign state whose protection enjoyed. When the bond of protection between citizen and state has severed, no foreign entity would stand accountable for the individual action. The result was that states were reluctant to admit to their territory individuals who were not the legal responsibility of another country.²²

The refugee definitions adopted during 1920 to 1935 have been designed to correct this breakdown in the international order and accordingly embraced persons who wished to have freedom of international movement but found themselves in an abnormal situation. The definition of this era contained a criterion of ethnic or territorial origin coupled with a stipulation that the applicant did not enjoy de jure

²¹ L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations*, 311(1956)

²² James C. Hathaway, *The Law of Refugee Status* 2-6(Butterworth's Publication 1991)

national protection. The only person applying from outside their country of origin was eligible for refugee recognition.²³

2.4.2 Social View of Refugee Definition

In contrast to the initial juridical view, the refugee agreements adopted during 1935-1939 embodied a social approach to refugee definition. Refugee defined from the social perspective is the helpless casualties of broadly based social or political occurrence, which separate them from their home civilization. The essence of this second definition approach has continued to assist persons without formal national legal protection, but to assist as well the victims of social and political events, which resulted in a de facto, if not a de jure, loss of state protection. For the most part, these agreements sought to protect persons caught up in the upheaval and dislocation caused by the national socialist regime. The substantive scope of these eras' definition of a refugee has been defined by an en bloc reference to general, situation-specific categories of persons affected by adverse social or political phenomena.²⁴

2.4.3 Individualistic View of Refugee Definition

A refugee by individualistic standards is a person in search of an escape from perceived injustice or fundamental incompatibility with her home state. He distrusts the authorities who have rendered continued residence in his country of origin, either impossible and desires the opportunity to build a new life ahead.²⁵ The third phase of international refugee protection comprising the accord of the 1939 to 1950 era was revolutionary in its rejection of group determination of refugee status. Refugee status viewed from this perspective is a means of facilitating international movement for those in search of personal freedom. This individualist approach first affected the determination procedure. The decision as to whether or not a person was a refugee has not been made strictly based on political and social categories. The essence of refugee status came to discord between the individual refugee applicants' characteristics and convictions and the tenets of the political system in his country of origin.²⁶

²³ *Ibid.*

²⁴ B. S. Chimni, *International Refugee Law: A Reader* 11-12 (Sage publication, New Delhi 8th edn., 2012).

²⁵ *Ibid.*

²⁶ *Id.* at 12.

2.5 PHASES OF REFUGEE DEFINITION

The evolution of the concept of a refugee can be broadly divided into two important phases before and after the establishment of the United Nations.

2.5.1 Refugee Definition before 1950

Before the creation of the League of Nations, there was no international body charged with refugee issues. Even the term refugee has been restored to the municipal legislation or bilateral agreement; there was, as such, no generally accepted refugee definition. Nevertheless, the use of the term refugees has traced back to an arrangement such as a treaty of 1283 B.C. between Pharaoh Ramses II and the Hittites on the return of a refugee to Egypt. the Edict of Nantes in 1598, the Edict of Potsdam in 1685, British Act concerning the naturalization of protestants in the colonies in America in the eighteen century, French law concerning foreign refugee living in France in 1832, extradition treaty since 1830 and resolution of the international institute of international law.²⁷ In this context, refugees became a more prominent matter of inter-state concern. The regime has characterized the element of the modern refugee regime system, established at the treaty of the Peace of Westphalia in 1648, firmly entrenching the concept of refugees within the territorial notion of boundaries.²⁸

During this time, however, grants of asylum to refugees were mainly ad hoc and based on feelings of some religious or political affinity for those seeking refuge.²⁹ The first genuine refugees recognized as such in the modern state system were the Huguenots; French Protestants fleeing France 1685, King Louis XIV provoked this flight by revoking the Edict of Nantes, a proclamation issued by Henry IV in 1598 tolerating religious minorities under the Catholic rule. Hence, with

²⁷ Pirkko Kourula, *Broadening the edge: Refugee Definition and International Protection revisited*, 49 (Martinus Nijhoff Publishers, London, 1997) available at: https://books.google.co.in/books?id=hSEl9tjPCMYC&pg=PA14&dq=Concept+and+definition+of+%22refugee%22legal+and+humanitarians+aspects&hl=en&sa=X&redir_esc=y#v=onepage&q&f=false (last visited on November 10, 2017)

²⁸ Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, available at: <http://www.unhcr.org/research/working/3c7529495/global-governance-evolution-international-refugee-regime-laura-barnett.html> (last visited on November 15, 2017)

²⁹ Gil Loescher, Alexander Betts and James H. S. Milner, *The United Nations High Commissioner for Refugee- The Politics and Practice of Refugee Protection into Twenty-First Century* 6 (Routledge Global Institutions, New York, 2008).

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revocations of the Edict of Nantes came Protestant Britain and several other neighbouring European states accepted royal decrees against emigration and harsh punishment for those who attempted escapes, the revocation of the Edict of Nantes in 1685 as religious confreres.³⁰

Through the Revocation, however, Louis XIV not only made Protestantism illegal in France but also denied the Huguenots the right to leave the country on pain of forfeiture of all property and (for men) sent to work on the galleys for life. While this was an ineffective bar, Louis's revocation abrogated the *jus emigrandi*,³¹ who has granted it to religious minorities in Germany under the Treaty of Osnabruck and had gained a status of the regional norm. In the international arena, the Revocation has been regarded as illegitimate.³²

However, borders may have been open for refugees to cross, but each nation remained in territorial isolation ignoring the collective and international implication of the refugee's issue. No groups or policies have been established to deal with refugees, and each nation reacted to them in its way and on an entire ad hoc basis. There was no definition for a refugee in this international system and the phrase has rarely been used, although the Huguenots have been considered a classic version of what the term represented.³³ The aristocrats fleeing the French revolutions have been referred to as émigrés, a signal of the dignity and respect accorded to their position and one that seemed to refuge their desperate situation.³⁴ The term refugee first used in 1798 in the revision of Encyclopaedia Britannica, which applies to the Huguenots and extends to everyone who leaves their country in the event of mourning. However, this extension remained generally unrecognized in widespread usage. The refugee regime is based on the almost lassies-faire attitude of nation's who forwards the fugitives that crossed

³⁰ *Ibid.*

³¹ *jus emigrandi* means, the right under imperial law to emigrate for religious reasons.

³² Phil Orchard, The Dawn of International Refugee Protection: States, Tacit Cooperation and Non-Extradition, *available at*: <http://jrs.oxfordjournals.org> (last visited on November 10, 2017)

³³ *Supra* note 28

³⁴ émigrés means, a person who has left their own country in order to settle in another, typically for political reasons. Sited from Lexico, *available at*: <https://www.lexico.com/definition/emigre> (last visited on February 22, 2020)

their borders. They did not distinguish between immigration and refugees treating all equally and applying little restriction to entry.³⁵

2.5.1.1 League of Nations, 1919

The League of Nations was the first international organization to address refugee issues, founded in 1919 out of the Treaty of Versailles;³⁶ the League of Nations has faced the problem caused by around a million refugees who left Russia after the Bolshevik revolution. The international Red Cross committee appealed to the Council of the League of Nations in February 1921 to take action on behalf of the Russian refugees scattered throughout Europe without legal protection. The decision of the Red Cross to address the refugee crises in a juridical manner rather than strictly humanitarian terms prompted a positive response from the council.³⁷ The Council of the League of Nations decided to appoint Dr. Fridtjof Nansen as a High Commissioner for Russian Refugees on 27th June 1921, and his duty would be to co-ordinate the assistance given to those refugees by various countries and responsible for taking care of following responsibilities likes;

- a) To define the legal status of refugee,
- b) To organize their repatriation on their allocation to various countries and
- c) To undertake the relief works amongst them with the aid of philanthropic societies.³⁸

The League of Nations identifies the categories of persons within their scope. The first such instrument was the arrangement relating to the issue of identity certificate to Russian and Armenian refugees of 12 May 1926, defined Russian refugee as - Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the government of the USSR and who has not acquired another nationality. Accordingly, an Armenian refugee has defined in a term as any person of Armenian origin formerly a subject of the Ottoman Empire, who does not

³⁵ *Ibid.*

³⁶ Peace Treaty of Versailles, Covenant of the League of Nations, arts. 1-30, June 28, 1919. *available at:* https://en.wikisource.org/wiki/Treaty_of_Versailles (last visited on November 12, 2017).

³⁷ James C. Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950" 33 *ICLQ* 351 (1984)

³⁸ Tapan K. Bose, "Protection of refugee in South Asia need for legal framework", 6 *SAFHR* 9, paper series

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enjoy or who no longer enjoys the protection of the government of the Turkish republic and who has not acquired another nationality.³⁹

Even then, the social and political disorder has been accepted as giving content and meaning to refugee definitions. These remained restricted by particular crises and linked to ethnic or national origin. The High Commissioner focused on Russian refugees, then the most prevalent group of displaced people. As well as other nationalities of people who have identified as being part of the influx of refugees from the Soviet Union, The League of Nations arranged to include Armenians, Assyrians, and others as refugees.⁴⁰

In 1933, the rise of Hitler sparked a flood of new refugees, mostly Jews, from Germany. This latest crisis pushed the League of Nations to direct the focus of its refugee protection and appoint an independent High Commissioner for Refugees coming from Germany. The first Convention relating to the International Status of Refugees had been adopted in October 1933 (1933 Convention) but had been ratified by only a few states.⁴¹

The League of Nations consequently in 1936 took a Provisional Arrangement concerning the Status of Refugees coming from Germany (1936 Provisional Arrangement), whereby governments were authorized to issue travel documents to Germans and stateless persons coming from Germany.⁴² With the adoption of the provisional agreement in 1936, the term refugee covered all persons coming from Germany. However, a person did not qualify for convention refugee status, if he had left Germany for the reason of purely personal convenience. Two years later, in 1938, this arrangement had developed into the Convention concerning the Status of

³⁹ Antonio Fortin, "The Meaning of Protection in the Refugee Definition" 12(4) *IJRL* 548-549(2000)

⁴⁰ Isabelle R. Gunning, "Expanding the International Definition of Refugee: A Multicultural View", 13 (I)1 *FILJ* 141 (1989), available at: <https://academic.oup.com/ijrl/article/12/4/548/1511053/The-Meaning-of-Protection-in-the-Refugee> (last visited on November 09, 2017).

⁴¹ *Id.* at 6-7

⁴² Shauna Labman, Looking back, Moving forward: The History and future of refugee protection, 10 *chi.- Kent J. Intl &Comp. L.* 6(2010) available at: www.studentorgs.kentlaw.iit.edu/jic/slabman (last visited on November 10, 2017).

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Refugees coming from Germany, 1938 Convention.⁴³ Article 1 of the 1938 convention, the term refugee, defined, as:⁴⁴

a) Persons are possessing or having possessed German nationality and not possessing any other nationality that proved not to enjoy, in law or fact, the protection of the German government.

b) Stateless persons not covered by previous conventions or agreements who have left German territory and established therein and who has proved not to enjoy, in law or fact, the protection of the German government. Article 1(2) excluded from the definition persons who left Germany for reasons of purely personal convenience.

In 1938, the definition restricted to only such persons who left their country of origin from fear of persecution and except those persons who had left their homeland for an only personal reason. It was also determined to reject the sufferers of natural disasters, as the governments of their home states did not forcibly expel them.

Nearby were legal lacunas in the efforts of the League of Nations time. The framework for the refugees in the inter-war period has criticized issues of definition, scope, and strength. Nevertheless, these efforts to develop refugee law in the inter-war period helped to establish refugee as a particular category of migrant. The 1933 Convention and the 1938 Convention set standards for the treatment of refugees and, in some cases, influence the form of national law and practice.

2.5.1.2 United Nations Relief and Rehabilitation Administration (UNRRA), 1944

The UN Relief and Rehabilitation Administration (UNRRA), established in 1944, administered refugee camps and catered for the needs of refugees. UNRRA undertook a large-scale repatriation program whereby some eight million refugees have returned to their state of origin. UNRRA was not a refugee organization in any meaningful sense as it was not mandated and resourced to arrange for the resettlement of displaced persons to third countries. It served the interest of the international community of states more than a refugee in alleviating the prevailing refugee crisis without committing to a universal and long-term structure of refugee protection.⁴⁵

⁴³ *Ibid.*

⁴⁴ Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* 17(Oxford University Press, New York, 3rd edn., 2007)

⁴⁵ M. Rafiqul Islam (ed.), *An introduction to International Refugee Law* 18(Martinus Nijhoff Publication. Leiden-Boston 2013)

2.5.1.3 International Refugee Organization (IRO), 1946

In 1946, the United Nations established a new body, the International Refugee Organization (IRO) through the general assembly of the United Nations in its first session adopted through a resolution by the Economic and Social Council on 16 February 1946.⁴⁶ It mandates to protect those refugee groups that have been recognized by the League of Nations. The UN also created a new category to include the displacement of millions of people or refugees scattered throughout Europe in World War Second.⁴⁷

The IRO Constitution defined the refugee as follows-⁴⁸

(1) The term refugee applies to a person who has left, or who is outside of his country of nationality, or former permanent residence, whether or not he retained his citizenship, belongs to one of the following categories:

a) Victims of the Nazi or fascist regimes or a regime which took part on their side in the second world war, or similar schemes which assisted them against the United Nations, whether enjoying international status as a refugee or not;

b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying global status as a refugee or not;

c) Persons who were considered as a refugee before the outbreak of the second world war, for the reasons of race, religion, nationality, or political opinion.

(3) The term refugee also applied to persons who, having resided in Germany or Austria and being of Jewish origin. They were also victims of National Socialist persecution and were arrested or forced to flee, and then returned to one of these countries due to hostile actions or the circumstances of the war. They have not done so and have not firmly resettled therein.

(4) The term refugee also applies to unaccompanied children who are war orphans or whose parents have disappeared and who are outside their countries of origin. Such children, 16 years of age or under, should be given all possible priority

⁴⁶The Constitution of International Refugee Organization, 1946, general principle (b)

⁴⁷ Ragini Trakroo Zutshi (ed.), *Refugees and Law* 31(Human Rights Law Network, New Delhi, 2008)

⁴⁸ The Constitution of the International Refugee Organization, Section A, Definition of refugee, available at: Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International Law* 560-561 (Oxford University Press, New York, 3rd edn., 2007)

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assistance, including, usually, aid for repatriation in the case of those whose nationality can be determined.

Some more specific criteria have emerged after the Second World War about the protection of refugees. Because of that, IRO continued to assist the refugees as its previous criteria and certain specific categories to have protection. In this instrument, the term refugee also includes victims of the Nazi, Fascist, or Quisling regime, which had opposed the United Nations. Besides, the international refugee organization added as refugees those unable or unwilling to avail themselves of the protection of the government of their country of nationality or former residence. It has expressly recognized that individuals might have valid objections to returning to their country of origin, including persecution or fear based on reasonable grounds of abuse because of race, religion, nationality, or political opinion and objections.⁴⁹ This definition used the word persecution first time as a part of the refugee definition.

However, in 1949, the United Nations began to look forward to a past IRO period. Several states were opposed to the adoption of a broad approach, considering it essential clearly to identify refugees who required international protection. The United States favoured a narrow definition of those who would fall within the competence of a new temporary agency, a de-emphasis of resettlement, and concentration on legal protection pending integration in countries of refuge as opposed to assistance or similar activities, and the primary purpose was to prevent refugee becoming a liability to the international community. Other refugee categories such as those created by population transfers were mostly entitled to rights afforded by their countries of residence and thus in no need for international protection. Apart from those countries having to deal with a large population of national refugees, a consensus emerged that such refugees were not a global problem and did not require international protection.⁵⁰

2.5.1.4 United Nations High Commissioner for Refugees (UNHCR), 1950

The International Refugee Organization was soon replaced by the United Nations High Commissioner for Refugees (UNHCR). The General Assembly

⁴⁹ *Supra* note 44 at 19.

⁵⁰ *Id.* at 20.

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established it under resolution 428 (V),⁵¹ Article 22 of the United Nations Charter on 14 December 1950.⁵² The objective of the UNHCR is to provide international protection and to seek permanent solutions for the problem of refugees by way of voluntary repatriation or assimilation in new national communities.⁵³ These two aspects of UNHCR's mandates are the aim of international protection. UNHCR's efforts to find durable solutions to improve the plight of refugees stem from the needs and rights of the individual.⁵⁴

According to his statute, the Office work must be completely non-political, humanitarian, and social and as a rule, affect groups and categories of refugees with two functions.⁵⁵ The provisions of international protection are one of primary importance for without protection, such as intervention by the office to secure the admission of refugees; there can be no possibility of finding lasting solutions. The UNHCR statute prescribes the relationship of the High Commissioner with the general assembly, and the Economic and social council makes provision for organization and finance and identifies ways in which the High Commissioner is to provide for protection. These develop the functions engaged in by predecessor organizations and include:

(I). Promoting the conclusion of the international convention for the protection of refugees, supervising their application, and proposing an amendment too;

(II). Promoting through exclusive agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; and

(III). Promoting the admission of refugees.⁵⁶

⁵¹ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 168 SAHRDC (Oxford University Press, New Delhi, 1st edn., 2008).

⁵² B. S. Chimni (ed.), *International Refugee Law: A Reader* 234-235(Sage publications, New Delhi, 8th edn., 2008).

⁵³ *Supra* note 50

⁵⁴ Ragini Trakroo Zutshi (ed.), *Refugee and the Law* 35(Human Rights Law Network, New Delhi, 2008)

⁵⁵ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 20-21(Oxford University Press, New York, 3rd edn., 2007)

⁵⁶ *Supra* note 52 at 234.

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The Statute first brings within UNHCR's competence refugees covered by various earlier treaties and arrangements. It next includes refugees resulting from an event occurring before 1 January 1951, who are outside their country of origin and unable or unwilling to avail themselves of its protection, owing to a well-founded fear of being persecuted or for reasons other than personal convenience. The Statute of the office of the United Nations High Commissioner for refugees finally extends to the definition of refugees.⁵⁷

According to this statute, refugee means any person who is outside the country of his nationality, or if he has no citizenship, the state of his former habitual residence because he has a well-founded fear of persecution because of his race, religion, nationality, or political opinion. Besides, he is unable or unwilling to seek state protection of the volunteer of his nationality or, if he is not a national, return to the country from his previous habitual residence.⁵⁸

This description is a universal application, containing neither temporal nor geographical limitations. The substantive or ideological criteria are nevertheless a significant restriction on the scope of refugees strictly so-called, who must establish a well-founded fear of persecution on one or more of the stated grounds. Whether they must also prove, a lack of protection is debatable.⁵⁹

The High Commissioner shall cease to apply to any person defined in section A above if:

(a) He has voluntarily re-availed himself to the protection of the country of his nationality; or

(b) Having lost his citizenship, he has voluntarily re-acquired it; or

(c) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(d) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

⁵⁷ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 20-21(Oxford University Press, New York, 3rd edn., 2007)

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

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(e) He can no longer continue to refuse to claim the protection of the country of his nationality because the circumstances for which he has recognized refugee status no longer exist, reasons other than personal convenience.

The UNHCR definition is differed from previous descriptions and set the standard for the question of who would be entitled to UN protection by the inclusion of two significant features. Firstly, a refugee is someone who lacks the welfare of his or her state of origin or nationality. Secondly, place significant restrictions on the scope of who could be considered a refugee for UNHCR purposes.⁶⁰

UNHCR's statutory definitions remain a critical point of departure in determining who entitled to the protection and assistance of the United Nations, for it is the lack of security by their government, which has traditionally distinguished refugees from ordinary aliens, the United Nations treated refugees as equivalent to stateless person de facto.⁶¹

The definition of the refugee, according to UNHCR as well as international instruments, emphasizes individual persecution and reflects the strictly individualistic thinking, which prevailed at the time it has drafted, claiming personally to be the victim of oppression, which he is required to prove that each refugee must have screened to be eligible for assistance under the High Commissioner mandate.⁶²

The work of the office has evolved to take into account the changing nature of refugee flows in recent decades in a typical contemporary scenario; UNHCR provides protection and assistance to groups of refugees fleeing combinations of persecution, conflict, and widespread violation of human rights. In such circumstances, UNHCR usually bases its interventions on a general assessment of the conditions in the country, giving rise to refugees rather than on an examination of each person's claim to refugee status.⁶³

⁶⁰ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 168(Oxford University Press, New Delhi, 1st edn., 2008).

⁶¹ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 20-21(Oxford University Press, New York, 3rd edn., 2007).

⁶² Sadruddin Aga Khan, *Lecture on the Legal Problem relating to Refugees and Displaced Persons delivered at the Hague Academy of international Law*, 4-6 August, available at: B. S. Chimni (ed.), *International Refugee Law: A Reader* 239(Sage publications, New Delhi, 8th edn., 2008).

⁶³ *Supra* note 54 at 35-36

2.5.2 REFUGEE DEFINITION AFTER 1950

The refugee problems have not been solved even after the Second World War. It has felt to have new international instruments from defining the legal status of refugees. Instead of ad hoc agreements adopted concerning specific refugee situations, there was a call for a tool containing a general definition of who was to consider a refugee.⁶⁴

2.5.2.1. Definition of Refugee in the United Nations Convention Relating to the Status of Refugee, 1951

The primary standard of refugee protection today is the Convention Relating to the Status of Refugees 1951.⁶⁵ This Convention was the first, and indeed remains the only binding refugee protection instrument of a universal character. It was an instrument of somewhat limited intent, addressed mainly to the question of the status of refugees, not to solutions or causes. While it traced its origins broadly to human rights principles, it was more about states' responsibilities than individuals' rights.⁶⁶ The convention sets the minimum standards of treatment of refugees, including the fundamental rights to which they are entitled.⁶⁷ It embodies principles that promote and safeguard refugee's rights in the field of employment⁶⁸, education⁶⁹, residence⁷⁰, freedom of movement,⁷¹ access to Courts,⁷² naturalization, and protection

⁶⁴ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 convention, and 1967 Protocol relating to the Status of Refugees 5 (Reissued Geneva, December 2011). *available at:* <https://www.refworld.org/docid/4f33c8d92.html> (last visited on September 12, 2018)

⁶⁵ Brian Opeskin, Richard Perruchoud, et.al. (eds.), *Foundation of International Migration Law* 178 (Cambridge University Press, 1st edn., 2012).

⁶⁶ Erika Feller, "The Evolution of the International Refugee Protection Regime", 5 *Wash. UJL. & Pol'y* 131 (2001), *available at:* http://openscholarship.wustl.edu/law_journal_law_policy/vol5/iss1/11/ (last visited on May 1, 2019)

⁶⁷ Human Rights and Refugees, *available at:* [www.ohchr.org/ Documents /Publications /FactSheet20en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet20en.pdf) (last visited on November 17, 2017)

⁶⁸ The United Nations Convention Relating to the Status of Refugees, 1951 arts. 17 & 18

⁶⁹ *Id.*, art. 22

⁷⁰ *Id.*, art. 10

⁷¹ *Id.* at art. 26

⁷² *Id.* at art. 16

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against refoulement.⁷³ The essential purpose of the convention is to provide for a legal regime, which ensures protection to a group of persons who are in a particularly vulnerable situation.

When masses of people were uprooted after World War II, it was perceived that the refugee problem was not a temporary one and that an instrument with a broader approach would more effectively address emerging refugee crises.⁷⁴ Thus, the 1951 Convention Relating to the Status of Refugees was adopted by the General Assembly of the United Nations resolution 429(V) in Geneva, a Conference of Plenipotentiaries on 28 July 1951, and entered into force on 22 April 1954.⁷⁵ It was drafted between 1948 and 1951 by a combination of United Nations organs, ad hoc committees, and a conference of plenipotentiaries, at which twenty-six states are represented.⁷⁶

For the present convention, according to Article 1, the term refugee shall apply to any person:⁷⁷

A. (1) who has been considered a refugee under the arrangements of 12 May 1926 and 30 June 1928 or under the conventions of 28 October 1933 and 10 February 1938, the protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

(2) As a result of 'events occurring before 1 January 1951' and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his citizenship and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the state of his former permanent residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

B. (1) for this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, should be understood to mean either,

⁷³ *Id.* at art. 33

⁷⁴ John Vrachnas, Kim Boyd, *et. al.*, *Migration and Refugee Law: Principles and Practice in Australia*, 173 (Cambridge University press, New York, 1st edn., 2005).

⁷⁵ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 569 (Oxford University Press, New York, 3rd edn., 2007).

⁷⁶ *Supra* note 74

⁷⁷ *Supra* note 68 art. 1

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(a) "Events occurring in Europe before 1 January 1951"; or

(b) "Events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for its obligations under this Convention.⁷⁸

If any person who has more than one nationality, then the term "the country of his nationality" shall mean each of the countries of which he is a national.

Furthermore, a person shall not be deemed to be lacking the protection of the state of his nationality if, without any valid reason based on well-founded fear, he has not availed the security of one of the countries of which he is a national.⁷⁹

According to Article 1, the refugee definition of the UN convention relating to the status of refugee, 1951 covers two groups of person who are considered refugees for its application. The first group is called statutory refugees, i.e., a person who has already been recognized as refugees under previous international agreements or the Constitution of the IRQ.

The second group embraces a person who has accorded the status of a "refugee" for the first time. It consists of two sub-groups, one possessing a nationality and the other without citizenship. There are two conditions which apply to both groups:

(a) They must be outside the country of their nationality or of their permanent residence, and

(b) They must be there because of events, which took place before January 1, 1951.

The Refugee Convention has excluded two groups of a refugee like those people who accept protection or support from agencies of the United Nations, and other than the High Commissioner, for the duration of the time of the existence of such security or assistance, some persons who, although they would generally come under the definition of a "refugee" are not deemed precious of international protection.⁸⁰

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Manish Chaturvedi, *Human Rights of Refugees: Issues & Concerns in the Globalization Era* 10-11 (Swastik Publication, New Delhi, 1st edn., 2011).

2.5.2.2 Definition of Refugee in Protocol Relating to the Status of Refugees, 1967

At the global level, the most critical legal development since the refugee convention was the advent of the protocol relating to the status of refugees, 1967.⁸¹ A Protocol relating to the Status of Refugees was prepared and submitted to the United Nations General Assembly in 1966. In Resolution 2198 (XXI) of 16 December 1966, the General Assembly took note of Protocol and requested the Secretary-General to submit this text thereof to states to enable them to accede. The authentic version of the Protocol signed by the President of the General Assembly and the Secretary-General in New York on 31 January 1967 was transmitted to Governments. Protocol relating to the status of refugees was adopted in 1967 and came into force on 4 October 1967.⁸² The most significant aspect of this convention is that it updated the convention by removing the temporal and geographical limitations of the term refugee under the 1951 refugee convention⁸³.

When the removal of these restrictions was discussed, there was no accompanying discussion or review of the fundamental requirements for the determination of refugee status in the refugee convention.⁸⁴ This treaty eliminated the option for States to restrict protection efforts to pre-1951 refugees, or European refugees, or both.⁸⁵

Even after the universalization effect of the 1967 convention and elimination of temporal and geographic limitations, only a person whose migration is encouraged by a fear of persecution on the ground of civil or political status comes within the scope of the convention-based protection system. It means that most third world refugees remain de facto excluded, as their flight is more often encouraged by a natural disaster, war, or broadly based political and economic turmoil and tribulation

⁸¹ Brian Opeskin, Richard Perruchoud, *et. al* (eds.), *Foundation of International Migration Law* 179(Cambridge University Press, New Delhi 1st. edn. 2012)

⁸²Protocol Relating to the Status of Refugees, *available at*:
<https://www.refworld.org/docid/3ae6b3ae4.html> (last visited on May 21, 2019)

⁸³ United Nations High Commissioner for Refugee, *available at*:
<https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>
(last visited on May 21, 2019)

⁸⁴ *Human Rights and Humanitarian Law: Development in Indian and International Law*; South Indian Human Rights Documentation Centre 175(Oxford University Press; 1st edn., 2008).

⁸⁵ *Supra* note 81

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than by "persecution," at least as that term has been understood in the western context. The adoption of the Protocol was, therefore, something of a Pyrrhic victory for the less developed world.⁸⁶ The protocol has been introduced to solve the problem of restricting the personal scope of the 1951 Convention since it appeared desirable that all refugees who fall under the Convention's definition, regardless of the Convention's definition, have the same status as of January 1, 1951.

This definition contained in the 1951 Convention does not include everyone who is outside his country in a situation of distress and unable to return home. People may be unwilling or unable to return to their own country due to circumstances such as national disasters - famines, floods, and earthquakes -, which have rendered life impossible. These circumstances, however, are not included within the criteria specified in the Convention definition. Hence, people in these situations are not refugees within the ambit of that definition.⁸⁷

Of Course, it is to be impressed upon that the 1951 Convention has primarily examined to deal with the condition of displaced persons in Europe immediately after the Second World War and to provide protection for those persons. The States acceding to the Convention were anxious to make their obligations specific and to ensure that those obligations cannot extend indefinitely. Today, circumstances have changed, and many people who need international protection of the kind provided by the Convention do not fall within its ambit. Thus, the 1967 Protocol achieved the formal but not the substantive universalization of the Convention definition of refugee status.⁸⁸

2.6 DETERMINATION OF THE STATUS OF THE REFUGEE

The determination of refugee status is an essential part of the definition. For recognition of a person as a refugee, the refugee status determination is a vital part; it is the administrative and legal procedure, which conducted by UNHCR and the State. If a person is considered as a refugee, then he takes international protection according

⁸⁶ James C. Hathaway, "A Reconsideration of the Underlying Premise of refugee Law", 3 *HJIL* 162-164, (1990)

⁸⁷ Dr. Nafees Ahmad, *Refugee: The Semasiology of Definitional Dilemma*, available at: https://www.academia.edu/4050467/Refugee-The_Semasiology_of_Definitional_Dilemma(last visited on April 30, 2019)

⁸⁸ *Ibid.*

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to the international refugee law.⁸⁹ To qualify for refugee status, those displaced must pass through the process of refugee status determination (RSD), provided by the United Nations High Commission of Refugees and along with fulfilling the criteria given in the Convention related to the status of the refugee, 1951 and the Protocol, 1967 of refugee status.

When the people qualify the criteria of refugee definition then they became a refugee. Refugee status determination is a declaratory and constitutive process, but the States of refuge determine the refugee status or the status is determined differently by the States or UNHCR then the problems arise.⁹⁰

There are two phases of the Refugee status determination procedure. Phase one is compulsory to establish the relevant facts of the case, and phase second is, the definition of a refugee that has to be applied to the facts accordingly determined in the UN Refugee Convention, 1951, and the Protocol relating to refugee, 1967.⁹¹

2.6.1 DETERMINATION OF REFUGEE STATUS ON THE BASIS OF THE REFUGEE CONVENTION, 1951

It is the responsibility of the country or UNHCR in which the refugees take refuge, to adopt the process of refugee status determination and to provide the status of refugees legally. There are three essential clauses of Article 1 of the UN refugee convention, 1951 that are directly relevant to the procedure of refugee status determination. Firstly, 'Inclusion clause' (the definition of a refugee), secondly, 'cessation clause' (this phrase is related to the situation of a person where the refugee status has to cease) and lastly, 'exclusion clause' (this phrase has associated with the situation where a person has excluded from refugee status).⁹²

⁸⁹ Refugee Status Determination, *available at*: <http://www.unhcr.org/refugee-status-determination.html> (last visited on December 23, 2017)

⁹⁰ S. Goodwin- Gill Guy, *The Refugee in International Law* 32(Oxford University Press, New York, 2nd edn., 1998)

⁹¹ Handbook on Procedures and Criteria for Determining Refugee Status: under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reissued Geneva, December 2011), para-29 *available at*: <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> (last visited on January 14, 2018).

⁹² Refugee Status Determination Handbook, Republic of Nauru Department of Justice & Border Control 15(August 2013), *available at*:

2.6.1.1 Inclusion Clause

The inclusion clause provides the criteria that a person has to satisfy to be a refugee.⁹³ Accordingly, the 1951 convention definition contains five elements to be established in the determination of refugee status for security, such as the first essential element of interpretation, comprehending a range of contextual concern, is referred to here as alienage. The convention definition includes only persons who have left their country of nationality or, in the case of stateless persons, their state of former habitual residence. Second, the refugee claimant must be genuinely at risk. It is not enough that she truly believed herself to be in jeopardy. Instead, there must be an objective facet to provide a concrete foundation for the concern, which induced her to seek protection in another state. Third, the claimant's flight must have been motivated by the prospect of persecution, which is the risk of serious harm against which the country of origin is unwilling or unable to offer protection. Fourth, the risk faced by the refugee claimant must have some nexus to her race, religion, nationality, membership in a particular social group, or political opinion. Fifth and finally, there must be a genuine need for any legitimate claim to protection.⁹⁴ So we can say that a refugee is a person who:

- Is outside the country of his or her nationality
- Has a well-founded fear of persecution
- is genuinely at risk of persecution in his country of origin, which is unwilling to offer protection;
- The oppression is on account of that person's race, religion, nationality, membership of a particular social group, or political opinion; and
- He has a legitimate claim and needs protection.⁹⁵

The definition of refugees under the Convention comprising of the following essential elements, each of which must establish before the status is appropriately recognized, are discussed below.

www.Naurugov.nr/media/33067/nauru_rsd_handbook_august_2013.pdf (last visited on January 14, 2018).

⁹³ *Supra* note 91 at para-31.

⁹⁴ B. S. Chimni (ed.), *International Refugee Law: A Reader* 14-15 (Sage publications, New Delhi, 8th edn., 2008).

⁹⁵ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 169 (Oxford University Press, New Delhi 1st edn., 2008).

A. Outside The Country of His or Her Nationality

In this context, “nationality” refers to “citizenship.” The phrase “is outside the country of his nationality” relates to persons who have a nationality, as distinct from stateless persons. In the majority of cases, refugees retain the citizenship of their country of origin.⁹⁶

Anyone who is outside their nationality is only qualified as a refugee under the 1951 Refugee Convention. The Refugee Convention does not protect all people who have immigrated violently, but a specific group of people who are outside their country and do not have the security of a government. The Convention distinguishes refugees from other displaced people not to signal that refugees are more important or more deserving, but only in recognition of the distinctiveness of their needs.⁹⁷

For a refugee claim, being outside the country of the claimant nationality is a general requirement, and there is no international protection for a person as a refugee within the jurisdiction of his state of nationality or permanent residence. The fear of persecution of an asylum seeker must link to his country of citizenship or, in the event of uncertainty about the nationality of an asylum seeker, to the person's previous permanent residence will be taken into account instead of his nationality.⁹⁸

According to the UN Convention for the status of refugee general requirement is that a person who has to flee from his country of origin or crossed the international border for well-founded fear of persecution. However, the convention does not necessarily require that the situation, which turns to a well-founded fear of being persecuted or the event of abuse happened, must be present at the time when the person leaves the country.⁹⁹

A person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on

⁹⁶ *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 convention and 1967 Protocol relating to the Status of Refugees*, 18 (Reissued Geneva, December 2011)

⁹⁷ J. Hathaway and M. Foster, *The Law of Refugee Status* 17 (Cambridge University Press, 2nd edn., 2014).

⁹⁸ *Supra* note 96 at 19.

⁹⁹ Urmi Acharjee, *Case law study on the Refugee Status Determination of ‘Tamil’s’ in Australia and New Zealand and the interpretation of the Refugee Convention* (2016) (Faculty Of Law, Lund University)

account of a well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who is not a refugee, when he left his country but who becomes a refugee later, is called a refugee “*sur place*.”¹⁰⁰

Refugees ‘*sur place*’ means those refugees who are living outside of their country of origin are an immigrant or in other words, they are having valid legal documents but due to subsequent occurrence become refugees.¹⁰¹

Therefore, the requirement “outside the country of origin or habitual residence” is essential for determining refugee status under the 1951 Refugee Convention.

B. Well-Founded Fear

The 1951 convention relating to the status of refugees' definition states that the person-seeking refuge must have a well-founded fear of persecution. The phrase “well-founded fear of being persecuted” is the key phrase of the definition. It replaces the earlier method of defining refugees by categories (i.e., persons of a specific origin not enjoying the protection of their country) by the general concept of “fear” for a relevant motive. Since fear is a subjective element that is relevant in the person applying for recognition as a refugee.¹⁰² The item of fear – a state of mind and an individual condition – has added the qualification “well-founded.” It implies that it is not only the frame of mind of the person concerned that determines his refugee status but that an objective situation must support the structure of thought. The term “well-founded fear” therefore contains a subjective and an actual element, and in determining whether well-founded fear exists, both parts must be taken into consideration.¹⁰³ The term ‘fears’ do not refer only to a person persecuted primarily but also to those who hope to avoid a situation where there is a risk of persecution.

¹⁰⁰ *Supra* note 98

¹⁰¹ Refugee SUR PLACE, available at: <http://bajaurtimes.com/en/opinion/refugee-sur-place/> (last visited on May 21, 2019)

¹⁰² B. S. Chimni (ed.), *International Refugee Law: A Reader* 15(Sage publications, New Delhi, 8th edn., 2008).

¹⁰³ *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 convention and 1967 Protocol relating to the Status of Refugees*, 11(Reissued Geneva, December 2011)

C. Persecution

According to article 33 of the 1951 convention, persecution means a threat to life or freedom, on the grounds of race, religion, nationality, political opinion, or particular social group.¹⁰⁴ Other serious human rights violations or detrimental or discriminatory actions that fall short of threats to life or freedom may also amount to persecution.¹⁰⁵ Along with the well-founded fear criterion, the 1951 convention definition includes the requirement that the persecution is because of membership of one of the enumerated categories: race, religion, nationality, political opinion, or social group. To qualify for refugee status, an applicant must demonstrate that they fall into one of these categories, and satisfaction of the causal element by demonstrating persecution is due to their association with the following categories.¹⁰⁶

a. Race

Race in the existing connection has to understand in the broadest sense to include all kinds of ethnic groups that are referred to as race in common usage.¹⁰⁷ The category of race encompassed all groups of common descent, including those forming a minority within the broader population. In many instances, ethnicity is treated as if it were a racial classification for purposes of refugee status. Discrimination based upon race is universally condemned and is perhaps the most recognized and frequently encountered form of discrimination.¹⁰⁸

Article 1 of the Convention on the Elimination of all forms of racial discrimination 1966, has prohibited discrimination based on race, colour, descent, or national or ethnic origin.¹⁰⁹ Discrimination for reasons of race has found worldwide condemnation as one of the most striking violations of human rights. Racial

¹⁰⁴ *Ibid.*

¹⁰⁵ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 171(Oxford University Press, New Delhi 1st edn., 2008)

¹⁰⁶ *Ibid.*

¹⁰⁷ B. S. Chimni (ed.), *International Refugee Law: A Reader* 31(Sage publications, New Delhi, 8th edn., 2008).

¹⁰⁸ *Ibid.*

¹⁰⁹ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 70(Oxford University Press, New York, 3rd edn., 2007).

discrimination, therefore, represents an essential element in determining the existence of persecution.¹¹⁰

b. Religion

Persecution for the reason of religion can assume various forms, such as prohibiting a person from worshipping in private or public forbidding membership of a religious community or imbibing religious instruction, taking seriously discriminatory measures against a person because they practice their religion or belong to a particular religious community.¹¹¹ A person is also at risk of being persecuted because of religion, where he does not believe in religion.¹¹²

In the case, *Prashar v. Minister for Immigration and Multicultural Affairs*,¹¹³ the court held that the convention protects the person with the subject matter of religious belief. It does not protect believers and leave non-believers to the wolves.

Religion has been the basis upon which governments and people have singled out others for persecution. In 1685, thousands of Huguenots fled from France to England, and Prussia, after the revocation of the Edict of Nantes, opened the way to massacre and oppression. The late nineteenth century witnessed pogroms of Jews in Russia and Armenian Christians in Ottoman Turkey.¹¹⁴

Article 18 of the 1966 covenant on civil and political rights elaborating article 18 of the universal declaration of human rights, prescribes that everyone shall have the right to freedom of thought, conscience, and religion, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest such religion or belief.¹¹⁵ The term belief and faith are to be broadly constructed. Article 18 is not limited in its application to traditional religions or religions and

¹¹⁰ *Supra* note 107

¹¹¹ Ragini Trakroo Zutshi (ed.), *Refugee and the Law* 5(Human Rights Law Network, New Delhi)

¹¹² J. Hathaway and M. Foster, *The Law of Refugee Status* 402(Cambridge University Press, 2nd edn., 2014).

¹¹³ (2001) FCA 57 (Aus. FC, Feb. 7, 2001)

¹¹⁴ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 71(Oxford University Press, New York, 3rd edn., 2007).

¹¹⁵ *Ibid.*

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beliefs with institutional characteristics or practices analogous to those of traditional religions.¹¹⁶

Violation of the right to religious freedom under the universal declaration or the ICCPR may constitute persecution under the 1951 convention definition. The definition of religion adopted in the European Union's Qualification Directive echoes the Human Rights Committee's approach in affirmation. The concept of religion shall include, in particular, the holding of theistic, non-theistic, and atheistic beliefs.¹¹⁷

In a similar view, the UNHCR explains that claims based on the ground of 'religion' may involve one or more of the elements "religion as belief (including non-belief), religion as identity, and religion as a way of life."¹¹⁸

In the case, *Wang v. MIMA*,¹¹⁹ the full bench court of the federal court of Australia held that religion includes the practice of religious faith in community with others and that a law regulating such method, or applying only to those practicing religion, is not a law of general application. Fear of prosecution or punishment for breach of such rules can, therefore, give rise to a well-founded fear of persecution for a Conventional reason. The fact that an applicant has brought or intends to bring into existence circumstances that give rise to a fear of persecution by an unnecessary or unreasonable voluntary act (such as worshipping at a nonregistered church) may be relevant to assessing the genuineness of the claim but is not determinative of whether the fear is well-founded.

Minister for Immigration and Multicultural Affairs v. Darboy,¹²⁰ in this case, the federal court of Australia held that risk of being of persecution on the ground of religion might assume in various forms, including prohibition or disproportionate or unjustified limitation of religious freedom as well as other types of harm such as a risk of violation, imprisonment, or deprivation of fundamental human rights have also been included.

In 1962, the General Assembly requested the commission on human rights to draw up a draft declaration and draft convention on the elimination of all forms of

¹¹⁶ *Supra* note 112 at 400

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ (2000) 105 FCR 548

¹²⁰ (1998) 52 ALD 44 (Aus. FC, Aug. 6, 1998)

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intolerance based on religion or belief. Moreover, after that in 1967, it took note of the Preamble and article 1 of a proposal convention, in which the third committee had suggested that the expression religion or belief should include theistic, non-theistic, and atheistic beliefs.¹²¹ The declaration on the elimination of all forms of intolerance and discrimination based on religion or belief adopted in 1981 by the General Assembly,¹²² reiterated the right to protect, and the infringement of the reasons listed in the declaration may be indicative of persecution for the 1951 convention definition.¹²³

In the case of *Syndicate North crest v. Amselem*, the Supreme Court of Canada explained that the essence of religion is about freely and deeply. Which held personal convictions or belief connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practice of which allow individuals to foster a connection with the divine or with the subject or object of the religious faith.¹²⁴

c. Nationality

Another recognized ground of persecution is nationality. It is interpreted, in a broad sense; the word nationality in this perspective is not understood only as citizenship.¹²⁵ It also refers to the origin and membership of a particular as an ethnic, religious, cultural, or linguistic group and may occasionally overlap with the term race. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority. In certain circumstances, the fact of belonging to such a minority in it may give rise to a well-founded fear of persecution.¹²⁶

¹²¹ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 71(Oxford University Press, New York, 3rd edn., 2007).

¹²² I. Brownlie & G. S. Goodwin-Gill, *Basic Documents on Human Rights* 74(Oxford University Press, New York, 5th edn., 2006).

¹²³ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 172(Oxford University Press, New Delhi 1st edn., 2008).

¹²⁴ (2004)2 SCR 551 (Can. SC, Jun 30, 2004)

¹²⁵ Ragini Trakroo Zutshi, (ed.), *Refugee and the Law* 5(Human Rights Law Network, New Delhi, 2008)

¹²⁶ B. S. Chimni (ed.), *International Refugee Law: A Reade*, 32(Sage publications, New Delhi, 8th edn., 2008).

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Persecution for the reason of nationality can be interpreted as persecution against nationals or citizens of a specific state or members of a particular social, linguistic, or racial group. It intends to protect persons who become refugees due to conflicts stemming from the disputed boundaries within states.¹²⁷

Whereas in most cases, persons belonging to a national minority fear persecution because of nationality, there have been many cases in various continents where a person belonging to the majority group may fear persecution by a dominant minority.¹²⁸

Accordingly, "Persecution for the reason of nationality is also understood to include persecution for lack of nationality that is the persecution of stateless person." Of course, statelessness, per se, does not give rise to refugee status, but a risk of being persecuted can follow from the fact of being stateless.¹²⁹ Besides, people who have been denied full citizenship in their state have been encompassed within the nationality ground insofar as their inferior political status has shown to put them at risk of persecution.¹³⁰

Overall the common ground of nationality is appropriately invoked both by reference to legal notions of citizenship and statelessness, when a risk of being persecuted is due to a person's identification as a member of a culturally, ethnically, linguistically, or otherwise distinct "national" group.

d. Member of a Social Group

Member of a social group may also be a ground of persecution under the 1951 convention.¹³¹ The category of membership of a particular social group has interpreted broadly to include a group of persons not covered by the more restricted classification of race, religion, nationality, and political opinion.¹³² In 'a particular

¹²⁷ *Supra* note 123

¹²⁸ *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 convention and 1967 Protocol relating to the Status of Refugees*, 16 (Reissued Geneva, December 2011). available at: <https://www.refworld.org/docid/4f33c8d92.html> (last visited on September 22, 2018)

¹²⁹ J. Hathaway and M. Foster, *The Law of Refugee Status* 397 (Cambridge University Press, 2nd edn., 2014).

¹³⁰ *Id.* at 398.

¹³¹ *Supra* note 125 at 6

¹³² *Supra* note 123

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social group' includes any group of persons or an individual associated with a particular group¹³³ who usually comprises 'person of similar background, habits, or social status.'¹³⁴

Membership of such a specific social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents, or economic activity of its members or the very existence of the social group as such, have held to be an obstacle to the Government's policies.¹³⁵

These common characteristics must be immutable or fundamental to a person's identity, such that the person should not be able to change it. A particular social group may be a person's family, trade union, social organization, or have individuals with an alternative sexual orientation. Membership of a particular social group has been interpreted to include gender.¹³⁶

In the House of the lords, the decision in *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal*,¹³⁷ the court held that women in Pakistan have been considered a social group for the convention definition. The central issue was, therefore, whether the persecution suffered by women could say to be on the ground of membership of a particular social group. The Court said that women in Pakistan could constitute a social group; it was sufficient that the group in question shared a common mutable characteristic, and the group did not need to be cohesive or interdependent. Court further stated that whether a specific group can classify a social group for the convention, members of the group do not need to be cohesive, organized, or connected as such. Still, members must share a common mutable or immutable characteristic, which identified the group, other than the persecution itself.

¹³³ *Supra* note 131

¹³⁴ B. S. Chimni (ed.), *International Refugee Law: A Reader* 32(Sage publications, New Delhi, 8th edn., 2008).

¹³⁵ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 convention and 1967 Protocol relating to the Status of Refugees (Reissued Geneva, December 2011), para-78

¹³⁶ Ragini Trakroo Zutshi (ed.), *Refugee and the Law* 6(Human Rights Law Network, New Delhi, 2008)

¹³⁷ (1999) 2 AII ER 545

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In the case of *Cheung v. MEI*,¹³⁸ the Canadian federal court of appeal held that 'women in China who have more than one child and faced with forced sterilization satisfy enough of the criteria to be considered a particular social group. In principle, membership of a particular social group is based on sex. By way of Australian illustration, the court has accepted that single woman in India,¹³⁹ and married women in Tanzania.¹⁴⁰ Moreover, young Somali women may constitute a particular social group for the convention.¹⁴¹ Thus, it is well accepted that the size of the group should be irrelevant; a tiny group (family) or a considerable group (women) may constitute a social group.¹⁴² According to the UNHCR, there are two steps required for stating that a group is considered a social group, first, the members of that group share an innate characteristic or a common background that cannot change. Besides, share a component of the belief that is so fundamental to identity or conscience that a person shall not force to renounce it. Secondly, that group has a distinct status in the relevant country because it is perceived as being different from the surrounding society.¹⁴³

In the case of *Ward v. Canada*,¹⁴⁴ the Supreme Court recognized the process of interpreting a particular social group should reflect a specific theme, namely, human rights and anti-discrimination. It considered that there were three possible categories of the social group:

1. Those defined by an innate or unchangeable characteristic, for example, individuals fearing persecution because of gender, linguistic background, and sexual orientation;
2. Those whose members voluntarily associated for a reason so fundamental to their dignity that they shall not be forced to renounce the association, for example, human rights activists;

¹³⁸ (1993) 2 FC 314

¹³⁹ *Thalary v. Minister for Immigration and Ethnic Affairs* (1997) FCA 201

¹⁴⁰ *Minister for Immigration and Multicultural Affairs v. Ndege* (1999) FCA 783

¹⁴¹ *Minister for Immigration and Multicultural Affairs v. Coli* (2000) FCA1026

¹⁴² J. Hathaway and M. Foster, *The Law of Refugee Status* 425 (Cambridge University Press, 2nd edn., 2014).

¹⁴³ *Id.* at 429

¹⁴⁴ 5 IJRL 183 (1993)

3. Those associated by a prior voluntary status, unalterable due to its historical permanence.

Since one's past is a permanent part of the person, the third category belongs mostly to the first. Moreover, in *Ward*, the Supreme Court was clearly of the view that an association of people should not be characterized as a particular social group, merely because of their collective victimization as the objects of persecution.

e. Political Opinion

Lastly, the convention presents the fear of persecution for reason of political opinion. Article 19 of the 1948 Universal Declaration of Human Rights provides that, everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinion without interference and to seek, receive and impart information and idea through any media and regardless of frontiers. The basic principle has restated in article 19 of ICCPR, but the right to freedom of expression is qualified there by reference to special duties and responsibilities.

In the 1951 convention, the political opinion understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any notice on any matter in which the machinery of State, government, and policy may engage.¹⁴⁵

The drafter of the refugee convention noted that in addition to diplomats thrown out of office and persons whose political party outlawed, even individuals who fled from revolutions ought to encompass by the political opinion category.¹⁴⁶

When considering inclusion in the refugee definition on this ground, the person does not need to express his or her political opinion, he or she may have refrained from doing so as a result of the well-founded fear of persecution due to evidence of mistreatment of others holding similar views. The political opinion may include holding beliefs contrary to those held by the majority of people in the country in question. For example, the belief that non-heterosexual orientation is acceptable

¹⁴⁵ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 86-87(Oxford University Press, New York, 3rd edn., 2007).

¹⁴⁶ J. Hathaway and M. Foster, *The Law of Refugee Status* 405(Cambridge University Press, 2nd edn., 2014).

may constitute a political opinion in a situation where the dominant religion condemned homosexuality in the state.¹⁴⁷

Merely having relationships with each of these categories is not enough to come under the definition of a refugee. The elements of a well-founded fear of persecution and the danger of refoulement (forcible return) must have also been considered in designation as a refugee. Additionally, in practice, there is a significant overlap between these categories, and one person may be able to claim persecution because of more than one ground.

2.6.1.2 Procedure Related to the Determination of the Status of Refugees

As mentioned earlier, international refugee instruments do not specifically regulate procedures concerning refugee status determination. It is not detailed in the international refugee instruments whether such procedures must, necessarily be administrative or judicial, adverbial, or inquisitional. Whatever procedures may establish for ascertaining refugee status, the adjudicator makes the final decision based on an assessment of the claim submitted by the applicant to determine whether the individual has developed a ‘well-founded fear of persecution.’¹⁴⁸

Recognition of refugees is necessary for the implementation of the provisions of the Refugee Convention and the Protocol by the State parties. Such recognition is that the determination of the status of refugees, even though declared in the UN Refugee Convention, is not correctly structured. It is therefore left to the contracting State to establish the procedures for the determination of the status of refugee that it deliberates most suitable conferring to its specific statutory and governmental construction.¹⁴⁹

Because of the fact, it is very considerable to the state parties, which is adopted in the procedure related to the determination of refugee status.

¹⁴⁷ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 173 (Oxford University Press, New Delhi, 1st edn., 2008).

¹⁴⁸ UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, Para- 2

¹⁴⁹ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva, DECEMBER 2011, HCR/1 P/4/ENG/REV. 3, Para 189, *available at*: <http://www.refworld.org/docid/4f33c8d92.html>(last visited on January 14, 2018)

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The refugee status determination is a formal process in a number of countries. In individual other nations, the procedure for the determination of refugee status considers the admission of aliens within the basis of the general method. However, the refugee status determination is determined on the ad hoc basis and in the informal arrangement for specific purposes like issuance of travel documents in the other.¹⁵⁰

In the matter of the full and inclusive application of the 1951 Refugee Convention, it has generally been recognized that fair and efficient procedures have been followed in determining individual refugee status. Countries would not be able to fulfil their obligations under the international refugee law without any such procedures. When any person who claims his application must submit the evidence to prove that his claims are correct, this is only a general principle of the law of evidence. The burden of proof is on the claimant that all the statements are accurate.¹⁵¹

The asylum-seeker must provide a reliable and complete interpretation of the facts, which are substantial to his application. It is essential to take into account the particular condition of applicants in the asylum context. Many times, asylum-seekers give the circumstances of his departure as well as the nature of the claim made, they are not able to provide the document or other evidence related to their identity. Thus, the responsibility for the establishment of the evidence has been shared between the decision-maker and the applicant.¹⁵²

2.6.1.3 Requirements for Procedures to Determine the Eligibility of Refugee Status

Some basic requirements must be followed to determine refugee status.

a. The Examination of Refugee Claims

Under the international protection principles, all asylum applications should examine under established procedures for the asylum claims must be non-discriminatory, fair, and appropriate to nature. Refugee status claims or other forms of protection should preferably be assessed in a single procedure.¹⁵³

¹⁵⁰ *Id.* at para-191

¹⁵¹ M. Rafuqul Islam and Jahid Hossain Bhuiyan (eds.), *An Introduction to International Refugee Law* 61(Martinus-Nijhoff, Publisher, Leiden. Boston, 2013)

¹⁵² *Ibid.*

¹⁵³ *Id.* at 63.

b. Specialized Asylum Authority

All requests for asylum and cases in which there is qualified personnel who have the necessary skills and knowledge on refugee and asylum matters should perform any indication that an asylum request might be involved.¹⁵⁴

c. Access to Determination of Refugee Status

International refugee protection requires who should permit entry in the territory to all the applicants who claim asylum at the border and given temporary rights to remain there until a final determination has been made on their application. If an applicant does not have any personal identification documents or any travel documents, then their permissibility should not be denied on grounds related to the claim of substance or nor solely based ground.¹⁵⁵

d. The Use of Translators and Interpreters

Refugee status claimants must secure the assistance of interpreters and translators when they present their claim, both oral and written, before the decision-makers. The competence of the assistance received can have a tremendous impact on the apparent credibility of claims.¹⁵⁶

e. Fair Hearings

In a refugee status determination, fair hearings should apply. Article 14 (1) of the 1966 ICCPR stipulates that in determining their rights and obligations in judicial proceedings and the independent, impartial, and competent court set up under the law, they must hold a public and fair hearing to all candidates. The Human Rights Committee (HRC) states that the rights contained in the 1966 ICCPR apply to all, without regard to reciprocity, nationality, or statelessness.¹⁵⁷ However, the HRC has never mentioned whether or not the fair trial provisions of Article 14(1) of the 1966 ICCPR cover the determination of the refugee status. According to the European Court of Human Rights, a fair hearing requires that a party be permitted to consult the relevant evidence available to authorities.¹⁵⁸

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Id.* at 64

¹⁵⁷ Human Rights Committee, General Comment No. 15, The position of aliens under the Covenant, UN doc. HRI/GEN/1/Rev.1 at 18 (1994), para-1.

¹⁵⁸ *Feldbrugge v Netherlands*, Application No. 8562/79 [1986] ECHR 4 (29 May 1986).

f. Access to Legal Services Provided by an Independent Legal Profession

The country to which the refugee approaches at all stages of the process relating to refugee status determination must provide him independent legal advice and representation. It is necessary because asylum seekers often have no knowledge of the existing relevant law in the country where their asylum application is under consideration. Further, they may not be aware of the intricacies of the procedure and issues concerning evidence as well as the burden of proof.¹⁵⁹ The UN Basic Principles on the Role of Lawyers state that adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have adequate access to legal services provided by an independent legal profession.¹⁶⁰ It further states that governments shall ensure that all persons within their territory and subject to their jurisdictions, without distinction of any kind, are to provide adequate procedures and responsive mechanisms for sufficient and equal access to lawyers. It also declares that governments shall provide sufficient funding and other resources for legal services to poor people and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall coordinate in organizing and providing services, facilities, and other resources. In the Council Resolution of the European Union (EU) of 20 June 1995 on Minimum Guarantees for Asylum Procedures¹⁶¹ it provided that, in accordance with the rules of the member state concerned, a legal adviser or another counsellor may be called call to assist with the procedure.¹⁶²

g. Allowing the Presence of Legal or Other Counsel

The UNHCR's Training Manual on Interviewing Applicants for Refugee Status (RLD 4) states that interviews related to refugee status determination that are carried out exclusively by the UN personnel in the field would not usually allow legal or other counsel to attend the interview. Nevertheless, representative of the applicant's or refugee support group has written, or the UN often receives other communications. Such information often assists the interviewer. In such cases where

¹⁵⁹ European Legal Network on Asylum, Survey on Legal Aid for Asylum Seekers in Europe, October 2010, at 34.

¹⁶⁰ International Covenant on Civil and Political Rights, 1966, article 14 and The European Convention on Human Rights, 1950, article 6

¹⁶¹ M. Rafuqul Islam and Jahid Hossain Bhuiyan (ed.), *An Introduction to International Refugee Law* 65(Martinus-Nijhoff, Publisher, Leiden. Boston 2013).

¹⁶² Para 13, EU's Resolution on Minimum Guarantees for Asylum Procedures.

participation of legal or other counsel provided to assist an applicant with his claim, the council must take part in the interview. The presence of a legal representative or other counsel who understands refugee criteria as well as local jurisprudence and the applicant's claim is helpful both to the applicant and to the interviewer.¹⁶³

h. Assessment of Each Application on the Individual Basis and Personal Interview

The applicant should allow a thorough examination of his claim in the procedure of refugee status determination. It takes individual interview decision-makers, and an explanation of his case, submission of evidence regarding his circumstances, and the situation in the country of origin.

i. Confidentiality

The applicant must receive the assurance that no information revealed to the authorities during the asylum procedure will pass on to the authorities of the country of origin or any other third party without his express consent.

j. Giving Written Reasons if the Application has Rejected

The reasons for the rejection of asylum applications must communicate to the asylum-seeker. In this context, the EU's Resolution on Minimum Guarantees for Asylum Procedures states that the decision that has been made on the asylum application must give to the asylum-seekers in black and white. If the applicant's application is rejected, the applicant will be eligible to know the reasons for the rejection and the possibility of re-examining the decision. As much as national law provides, the asylum-seeker must be able to acquaint him with or informed of the main purport of the decision in such language that he understands.

k. Appeal or Review

The UN Handbook states that the applicant should give a reasonable time to appeal if his application is not recognized. The appeal can make, according to the prevailing system, to the different authority or the same authority, whether they are judicial or administrative. According to the UNHCR Refugee Status Determination, if the claim has been rejected, the applicant is entitled to appeal and review on their merits.

Moreover, they also have the right to remain in the country when the hearing and appeal are proceeding by an independent body having first instance decision-

¹⁶³ UNHCR's Training Manual on Interviewing Applicants for Refugee Status (RLD 4), Geneva, 1995.

making authority. The asylum-seeker must be granted adequate time to appeal and to prepare his case when requesting a review of the decision. These period limits shall be communicated to the asylum-seeker within a good time. An asylum seeker may remain in the territory of the state concerned until a decision has been made on his appeal.

I. Manifestly Unfounded Applications

The UNHCR holds that national procedures for refugee status determination may usefully provide for dealing in an accelerated procedure with manifestly unfounded applications for refugee status or asylum. The same applies to manifestly well-founded claims and ‘fraudulent claims,’ which could reasonably cover situations where the applicant deliberately attempts to deceive the authorities determining refugee status in seeking approval of his application.

2.6.1.4 Termination of Refugee Status

Refugee status, as conceived in international law, is temporary. When a refugee safely returns to the nation and re-establishes in the nation of origin or habitual residence, or acquires full protection as a citizen of other nations, international protection is no longer acceptable. In this condition, the asylum country or the United Nations High Commissioner for Refugee may decide that the refugee status of the claimant shall end. The 1951 Refugee Convention exhaustively enumerates the situations in which such a result may be acceptable.

2.6.1.4.1 Cessation Clauses

There are circumstances where an individual will lose their refugee status, and these are prescribed under the UN Convention relating to the status of refugees, 1951 article 1 (C), and its 1967 Protocol.¹⁶⁴ Article 1 (C) provides six situations in which a person recognized as a refugee status may cease to have such a refugee status; these include:¹⁶⁵

1. He has voluntarily re-availed himself of the protection of the country of his nationality; or
2. Having lost his nationality, he has voluntarily reacquired it; or

¹⁶⁴Rafiqul Islam and Jahid Hossain Bhuiyan,(ed.) *An Introduction to International refugee Law* 74 (Martinus Nijhoff Publisher Leiden. Boston, 2013)

¹⁶⁵ United Nations Convention relating to the status of refugee 1951, Article 1 (c),

3. He has acquired a new nationality, and enjoy the protection of the country of his new nationality; or
4. He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
5. Because the circumstances in connection with which he has recognized as a refugee have ceased to exist, he can no longer continue to refuse to avail himself of the protection of the country of his nationality;
6. Being a person who has no nationality he is, because the circumstances in connection with which he has recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

Firstly, the status can be lost through the personal circumstances and decisions of the refugees themselves. Secondly, refugee status may be lost because of a change in circumstances in their state of origin.¹⁶⁶

a. Voluntary Re-Availment of National Protection

Cessation based on re-availment of national protection generally involves the consideration of efforts by a refugee to secure diplomatic or consular protection¹⁶⁷ from the authorities of the state of which he is formally a citizen.¹⁶⁸ For the re-availment of protection, the refugee must not only act voluntarily but must also intend to and obtain protection. Protection comprises all actions by the refugee indicate the establishment of normal relations with the authorities of the country of origin, such as registration at consulates application for and renewal of passports or certificates of nationality.¹⁶⁹

¹⁶⁶ Rafiqul Islam and Jahid Hossain Bhuiyan, *An Introduction to International refugee Law* 74 (Martinus Nijhoff Publisher, Leiden/Boston, 2013).

¹⁶⁷ Consular protection refers to help provided by a country to its citizens who are living or travelling abroad and are in need of assistance, such as in cases of: arrest or detention, serious accident, serious illness or death natural disaster or political unrest loss of passport or travel documents

¹⁶⁸ Manish Chaturvedi, *Human Rights of Refugees: Issues & Concern in the Globalization Era* 143 (Swastik Publications, New Delhi, 1st edn., 2011).

¹⁶⁹ Guy S. Goodwin-Gill, *The Refugee in International Law* 80-81 (Oxford University Press, New Delhi, 2nd edn., 1998)

b. Voluntary Re-Acquisition of Nationality

According to the Cessation clause under Article 1 (c) 2 of the UN refugee convention, 1951, if a refugee having lost his nationality has voluntarily required it.¹⁷⁰ This clause is as Article 1 (c) 1 has predicated on the view that refugee status ends if a refugee declines the surrogate protection of refugee status in favour of the national protection of her country of origin.¹⁷¹ The main difference between the two cessation clauses is that the precipitating act under Article 1 (c) 2 the voluntary re-acquisition of the home country's nationality is a more straight-forward indicator of the refugee's decision to relinquish her entitlement to protection as a refugee.¹⁷²

Article 1 (c) (2) states re-acquisition of nationality, this cessation class does not apply to the person who is stateless from birth, but only to those who have of some point been denationalized or who have successfully renounced their citizenship, and who then go on to have their status as citizens reinstated.¹⁷³

c. Acquisition of A New Nationality¹⁷⁴

Article 1 (c) 3 deems refugee status to end when the refugee has acquired a new nationality and take the protection of the country of his new nationality. The cessation clause is not related to the standardization of relations between refugees and his nation of origin. Still, to the establishment of relations between the refugee and a new country, this country is a permanent country of the refuge, but it can also be another nation.¹⁷⁵

¹⁷⁰ U. N. convention on Refugee Status, 1951, article, 1(c)

¹⁷¹ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 convention and 1967 Protocol relating to the Status of Refugees (Reissued Geneva, December 2011), para-126, available at: <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> (last visited on January 14, 2018)

¹⁷² James C. Hathaway and Michelle Foster, *The Law of Refugee Status* 470 (Cambridge University Press, U. K. 2nd edn., 2014).

¹⁷³ Manish Chaturvedi, *Human Rights of Refugees: Issues & Concern in the Globalization Era* 147 (Swastik Publications, New Delhi, 1st edn., 2011).

¹⁷⁴ Convention relating to the status of refugees 1951 Article 1 (c) (3) , And, The Statute of the Office of the United Nations High Commissioner for Refugee 1950, chapter II, Article 6 A (c). He has acquired a new nationality, and enjoys the protection of the country of his new nationality.

¹⁷⁵ UNHCR, The Cessation Clauses: Guidelines on their Application, Geneva, April 1999, para-15 available at: www.refworld.org/pdfid/3c06138c4.pdf (last visited on January 22, 2018)

Cessation under Article 1(c) (3) occurs most commonly when a refugee becomes a citizen of her host state. When a refugee is fully enfranchised as a citizen of the country which has afforded her protected status, the need for the surrogate or substitute protection of refugee status no longer exists.¹⁷⁶

d. Voluntary Re-Establishment in The Country in Which Persecution Has Feared

Voluntary Re-establishment in the state of origin is perhaps the most unambiguous indication that a refugee has chosen to rely on the protection of her home state and hence no longer views herself as being at risk.¹⁷⁷ Re-establishment requires more than mere physical presence, but it also requires a more significant commitment to the country of origin to remain in than is displayed.¹⁷⁸

Article 1 (c) (4) recognizes that a refugee may opt for the protection of her home country by the act of voluntarily returning to and reintegrating in that state. If the refugee's decision to go home is genuinely voluntary, her presence there either prolonged or on-going, and the nature of the stay indicative of a genuine normalization of relations with the country of origin, there is no longer a case to make for the surrogate protection of refugee status.¹⁷⁹

e. Change of Circumstances

The change of circumstances is also a condition in which the status of refugees is ceased. Articles 1C (5) and (6) state that those conditions, where they exist as refugee status, have been abolished and he can no longer remain a refugee status because the conditions accepted and the benefits of the protection of the original nation are rejected.¹⁸⁰

Article 1C (5) and (6) provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

¹⁷⁶ James C. Hathaway and Michelle Foster, *The Law of Refugee Status* 495 (Cambridge University Press, U. K. 2nd edn., 2014).

¹⁷⁷ 1951 convention on the status of refugee, Article 1 (c) (4) stated that, this convention shall cease to apply to any person falling under the term of section A if he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Supra* note 176 at 476.

¹⁸⁰ United nation convention on the status of refugees, 1951, article 1 (C) (5)

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1. He can no longer because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who can invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;¹⁸¹

2. Being a person who has no nationality he is because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who can invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.¹⁸²

Article 1C(5) and (6) provides for the cessation of a person's refugee status where "the circumstances in connexion with which he [or she] has been recognized as a refugee have ceased to exist". To assist in assessment of how and to what extent conditions in the country of origin must have changed before these "ceased circumstances" clauses can be invoked, UNHCR's Executive Committee has developed guidance in the form of Executive Committee Conclusion No. 69 (XLIII) (1992), which reads in part: in taking any decision on application of the cessation clauses based on "ceased circumstances", States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.¹⁸³

An essential element in such assessment by States is the fundamental, stable and durable character of the changes, making use of appropriate information available

¹⁸¹ GUIDELINES ON INTERNATIONAL PROTECTION: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), *available at*: <https://www.unhcr.org/3e637a202.pdf> (last visited on August 17, 2020)

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

in this respect, inter alia, from relevant specialized bodies, including particularly UNHCR.¹⁸⁴

2.6.1.4.2 Exclusion Clauses

This section considers when a person may be excluded. The refugee convention's exclusion clauses are contained in Article 1D, 1E, and 1F. Whereas Article 1 D and 1 E exclude from the convention's benefits those persons who are already receiving either United Nations based or quasi-national protection, and Article 1F excludes individuals who are considered undeserving of international protection due to their suspected criminal activity or behaviour different from the purposes and values of the United Nations.¹⁸⁵

a. Persons Already Receiving United Nations Protection or Assistance

Article 1D of the UN Convention relating to the status of refugees eliminates certain persons from the assistance of the convention who are getting protection or assistance from the United Nations agencies and other than the Office of the United Nations High Commissioner for refugees.¹⁸⁶ This clause applies to persons related to the Palestine Refugee in the Near East, who are the concern of the United Nations Relief and Works Agency (UNRWA).¹⁸⁷

The second paragraph of Article 1D provides protection or support of the United Nations that has been finished without the position of the person finally settled with the pertinent determination of the United Nations. Those excluded from the *ipso facto* to be entitled to this convention. It is a commitment that if no solution exists when the UN in region response ends, members of the group excluded by Article 1D

¹⁸⁴ *Ibid.*

¹⁸⁵ Jane McAdam, *Complementary Protection in International Refugee Law* 221(Oxford University Press, New Delhi, 1st edn., 2007).

¹⁸⁶ The UN Convention relating to the Status of Refugees, 1951, Article 1D para I; This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

¹⁸⁷ The UN Convention relating to the Status of Refugees, 1951, Article 1D para II; When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention. The meaning of the sentence of Article 1D: *ipso facto* entitlement of Palestinian refugee to be treated in accordance with the 1951 convention.

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may automatically claim in any state party the protections due to refugees under Article 2-34 of the convention.¹⁸⁸

The argument has variously advanced that persons seeking to benefit from the ipso facto residual clause must still meet the usual inclusion criteria of the refugee definition. That they must at the very least not fall afoul of the convention's cessation or exclusion clause or that they are not really entitled to the rights of refugees, but only to some amorphous variant of international assistance. However, none of these interpretations could reconcile to the unambiguous and emphatic language of the second paragraph of Article 1D, which employs the unconditional '*ipso facto*' language to define how residual access to the benefits of the refugee convention is to conceive.¹⁸⁹

Article 1D Para (I) may more fittingly be described as a suspense clause than as an exclusion clause because firstly, we note that the provision refers to persons who are at present receiving protection or assistance from other United Nations organs and agencies than the UNHCR. If the word 'at present' has any meaning at all, they must refer to a specific time, and the choice of wording suggests that the reference is to the date of signature of the convention: 28 July 1951. It is consequently only organs or agencies of the United Nations existing on 28 July 1951 and their possible successor bodies, which come within the scope of Article 1D.¹⁹⁰

b. Peoples Who Do Not Deserve Protection As A Refugee

That applicant found to fall within 1951, the UN refugee convention's article 1F is excluded from refugee status.¹⁹¹ Article 1F identifies three subgroups not deemed to be deserving of international protection.¹⁹² This clause bars those who have committed the following types of crimes:

¹⁸⁸James C. Hathaway and Michelle Foster, *The Law of Refugee Status* 517-518(Cambridge University Press, U. K. 2nd 2014)

¹⁸⁹ *Ibid.*

¹⁹⁰Atle Grahl-Madsen, *The Status of Refugees in International Law* 263-264(A. W. Sijthoff-Leyden, Volume I, 1966).

¹⁹¹ Geoff Gilbert, "Current issues in the application of the exclusion clauses" in Erika Feller, Volker Turk *et. al.*, (eds.), *Refugee Protection in International law: UNHCR's Global Consultations on International Protection* 426(Cambridge University Press, U.K. Reprint 2003)

¹⁹² Ragini Trakroo Zutshi (ed.), *Refugees and the Law* 9(Human Rights Law Network, New Delhi, 2008).

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Firstly, the international mechanisms defined and drawn up to make provision in respect of such crime as a war crime, a crime against humanity, or crime against peace, which is committed by any person.¹⁹³

Secondly, offenses committed outside a refugee country have been committed as a severe non-political crime before entering that country as a refugee.¹⁹⁴

Thirdly, he has been liable for acts in opposition to the reasons and standards of the United Nations.¹⁹⁵

c. Article 1F (a), He Has Committed, A War Crime, A Crime Against Peace or A Crime Against Humanity

According to Article 1 F (a), a war crime is broadly conceived to involve the failure to protect non-combatants and their property in the context of armed conflict.¹⁹⁶

War crimes are defined as a violation of the law or customs of war.¹⁹⁷ Such violation has included, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian of the occupied territory.

Moreover, this definition also includes the; killing of hostage, ill-treatment of prisoners of war or persons on the seas, the loot of public or private property, malevolent demolition of towns, villages, or cities, or damage not justified by military requirement.¹⁹⁸

In the case *Gonzalez v. Minister of Employment and Immigration* court held that; the crimes mentioned in Article 1F (a) are necessarily grave, to the extent that there is no room for any weighing of the severity of potential persecution against the gravity of the conduct which amounts to a war crime, a crime against peace or a crime against humanity. Being integral to the refugee definition, the claimant cannot be a

¹⁹³ UN convention Relating to the Status of Refugees, 1951, art. 1 F (a)

¹⁹⁴ *Id.*, art. 1 F (b).

¹⁹⁵ *Id.*, art. 1 F (c) .

¹⁹⁶ James C. Hathaway and Michelle Foster, *The Law of Refugee Status* 575(Cambridge University Press, U. K. 2nd edn., 2014)

¹⁹⁷ War Crimes has defined in Article 6 of the London Charter of the international Military Tribunal, annexed to the agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

¹⁹⁸ Atle Grahl-Madsen, *The Status of Refugees in International Law* 274 (A. W. Sijthoff-Leyden, Netherlands. Vol-1, 1966)

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conventional refugee, if the exclusion applies whatever the other merits of his or her claim.¹⁹⁹

The first subcategory of Article 1F (a), a crime against peace, is the exclusion ground least likely to arise in practice. In general terms, a crime against peace is a form of aggression involving the planning or direction of international criminal law.²⁰⁰

As a result, the interpretation of the terms applied in Article 1F (a) are fluid, and a range of international instruments serve as contemporary aids to interpretation.²⁰¹ Particularly relevant at present are provisions in the UN Convention on the Protection and Punishment of Genocide, 1948 and the other four Geneva Conventions for the Protection of Victims of War, the Rome Statute of the International Criminal Court, 1998, and the Statute of the International Criminal Tribunal for the former Yugoslavia, 1993²⁰²

Importantly, though, the notion of a crime against peace does not embrace the most common form of contemporary war- that being civil or other domestic war, given the requirement of an unlawful international (rather than internal) conflict.²⁰³ Crimes against peace are thought to involve only those in a position of authority or decision making in respect of an act of aggression—leaders, rather than soldiers and civilians following orders, intended to exclude from refugee protection.²⁰⁴ The most contemporary understanding of a crime against peace imposing significant qualitative requirements beyond the pure illegality of the

¹⁹⁹ Gonzalez V. Minister of Employment and immigration (1994) 3 FC 646 (FCA), *available at*: http://www.refworld.org/cases,CAN_FCA,47260ab12.html, (last visited on January 29, 2018).

²⁰⁰ *Supra* note 196 at 573.

²⁰¹ Erika Feller, Volker Turk, *et. al.*, (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 433-434 (Cambridge University Press, U. K. Reprint 2005)

²⁰² Access to these Conventions, *available at*: <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>. (last visited on December 14, 2017).

²⁰³ Geoff Gilbert, "Current issues in the application of the exclusion clause" in Erika Feller, Volker Turk, *et. al.*, (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 435 (Cambridge University Press, U. K. Reprint 2005).

²⁰⁴ Rafiqul Islam and Jahid Hossain Bhuiyan, (ed.) *An Introduction to international Refugee law* 81 (Martinus- Nijhoff Publishers, Leiden-Boston, 2013).

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international war, Article 1 F exclusion should not be predicated on the older IMT standard, which treated illegality as a foundation for liability per se.

According to the statutes, for the international criminal court 1998, the following acts are included in crime against peace; torture, willful killing or inhuman treatment, intentional acts causing great suffering, severe injury to body or health for any biological experiments. Further, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power. Besides, wilfully depriving a prisoner of war or other protected persons or the rights of fair and regular trial; unlawful confinement of civilians; and taking hostages for illegal deportation or transfer.²⁰⁵

The third and most inclusive basis for exclusion under Article 1F (a) is the commission of a crime against humanity requiring evidence of fundamentally inhumane conduct that intentionally causes great sorrow or serious injury to body or mental or physical health.²⁰⁶ Crime against humanity, in international law, is not defined as precisely as domestic criminal law, but differences in interpretation seem to be limited to discrete judicial subsystems. Crime against humanity under Article 1 F is the crime of genocide, which altered from its 1948 convention definition in any of the recent statutes and inspired the international convention on the suppression and punishment of the crime of Apartheid, 1973.²⁰⁷ Term Crime against humanity includes annihilation, murder, deportation, enslavement, or harassment due to inhuman acts before or after the war, or against political, racial, or religious grounds in connection with any crime in the jurisdiction of the tribunal, regardless of whether infringing upon the domestic law of the nation executed.²⁰⁸

²⁰⁵ Guy S. Goodwin-Gill, *The Refugee in international Law* 98-99(Oxford University Press, New Delhi. 2nd edn., Reprint 1998).

²⁰⁶ James C. Hathaway and Michelle Foster, *The Law of Refugee Status* 577(Cambridge University Press, U. K. 2nd edn., 2014).

²⁰⁷ The international convention on the suppression and punishment of the crime of Apartheid 1973, article 1 stated that, state parties declare apartheid to be crime against humanity, undertake to adopt appropriate legislative and administrative measures to prosecute and punish those responsible, and agree that the acts constituting the crime shall not be considered political crimes.

²⁰⁸ Atle Grahl-Madsen, *The Status of Refugees in International Law* 274(A. W. Sijthoff-Leyden, Netherlands, Vol-1, 1966)

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The range of crime against humanity is both broad and still unsettled and the Rome statutes for international criminal court under Article 7, listing some eighteen different examples for such crimes as a crime against humanity.²⁰⁹

Within the international criminal court jurisdiction, the crimes of genocide are expressly included.²¹⁰ However, beyond genocide, the content of crime against humanity is less uniform.²¹¹ It is clear that a crime against humanity may be committed during war or otherwise, and critically defining characteristics is that such acts are not only inhuman, but it is committed directly with the awareness of the attack against the civilian population as a part of a widespread or systematic attack.²¹²

d. Article 1F (b), Committed A Non-Political Serious Crime in outside the Country of Refugee

This clause would apply in conditions where there are severe reasons for seeing that the probable refugee has committed a serious non-political crime outside the nation of refuge and earlier to his entrance to that state as a refugee.²¹³ Moreover, the objective of this exclusion clause is to enable receiving countries to ensure the

²⁰⁹ The Rome statutes for international criminal court, 2002; Article 7 provided that (crime against humanity): For the purpose of this statutes, crime against humanity means any of the following acts when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavements; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or any other grounds that are universally recognized as impermissible under international law; enforced disappearance of persons; crime of apartheid; other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

²¹⁰ Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in international Law* 167-168(Oxford University Press, New Delhi, 3rd edn., 2007).

²¹¹ Geoff Gilbert, "Current issues in the application of the exclusion clause" in Erika Feller, Volker Turk, et. al., (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 435(Cambridge University Press, U. K. Reprint 2005).

²¹² James C. Hathaway and Michelle Foster, *The Law of Refugee Status* 578(Cambridge University Press, U. K. 2nd edn., 2014).

²¹³ Rafiqul Islam & Jahid Hossain Bhuiyan, (ed.) *An Introduction to international Refugee law* 82(Martinus- Nijhoff Publishers, Leiden-Boston. 2013)

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security of its population by denying an asylum seeker refugee status where he has committed a common-law crime before entering the receiving state.²¹⁴

However, it constitutes a severe non-political offense not defined, and this exclusion clause should read in the context of extradition law upon which it is based. In determining whether a crime is political or non-political, what needs to be determined is the nature of the crime, its alleged purpose, and the causal connection between the crime and the claimed political use. Thus, crime will not be considered as a political crime if the act in question is grossly disproportionate to its alleged political objective.²¹⁵

The definition of non-political crime committed before admission as a refugee or outside the country of refuge, which means the time of issuing a residence permit based on the granting of refugee status, particularly cruel actions, even if committed with an allegedly political objective, may classify as severe non-political crimes. The UN Convention relating to the refugee status does not enumerate serious crimes. Still, the reflection of Article 1F (b) has been seen in article 12 (2) (b) of the Qualification Directive and which expends the definition of severe non-political crime.²¹⁶

In the case *T v Secretary of State for the Home Department*,²¹⁷ the House of Lords stated that; If any person is involved in the terrorist activity, then Article 1F (b) would be applied, which rejected the argument that the acts were political and killed innocent people. Furthermore, those people are excluded by article 1F (b) who is engaged in individual acts of terrorism as most terrorist acts are wholly disproportionate to any political motive, and such acts of terror may not necessarily be excludable under Article 1F(c).

²¹⁴ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva, DECEMBER 2011, HCR/1P/4/ENG/REV.3, Para 151, *available at*: <http://www.refworld.org/docid/4f33c8d92.html> (last visited on January 14, 2018)

²¹⁵ Mark Gibney, *Global Refugee Crisis: A Reference Handbook* 23 (ABC-CLIO, LLC. California 2nd edn., 2010).

²¹⁶ Exclusion (Article 1F) and Article 33(2) of the Refugee Convention, *available at*: <http://www.refworld.org/pdfid/58b017e4391.pdf> (last visited on January 10, 2018).

²¹⁷ *T v Secretary of State for the Home Department (SSHD)*, [1996] 2 All ER 865, *available at*: http://www.refworld.org/cases,GBR_HL,3ae6b70f4.html (last visited on January 10, 2018).

Wagner v. Federal Prosecutor and the Federal Justice and Police Department,²¹⁸ in this case, the Swiss Federal Tribunal stated that “a common crime or an offense constitutes a relationship with political offense if the act has given the circumstances and in particular the motivation and goals of the perpetrator has a predominantly political character. It suppresses all opposition if the crime is "committed in the context of a power struggle within the state or it has committed the removal of someone from state power." There must be a close, direct, and clear link between such acts and their intended goal”.

As Article 1 F (b) has worded, it is clear that it does not matter whether the person concerned is wanted for any specific crime, and it matters even less whether there exists an extradition treaty between the countries in question under which his extradition may be requested.²¹⁹

e. Act opposing to the Principles and Purposes of the United Nations

The final exclusion clause requires exclusion from refugee status if any person has been guilty of the acts contrary to the United Nations principles and purposes. As initially conceived, this provision was part of the clause, excluding persons who had committed the crime against peace and a war crime.²²⁰

The present text of Article 1F(c) was adopted based on a draft submitted by the Yugoslav representative, nothing withstanding doubts about using the terminology of Article 14(2) of the Universal Declaration as a basis for exclusion. The British representative had supposed that act was conflicting to the resolutions and values related to the United Nations covered war crimes Genocide and the subversion or overthrow of the democratic regime with other possibilities as suggested by the various states.²²¹

Article 1F(c) is vague and is open to abuse by the state. It is clear that there is state practice interpreting it widely, but there is yet no internationally accepted understanding of all those acts opposing to the resolutions and values of the United

²¹⁸ *Wagner v. Federal Prosecutor and the Federal Justice and Police Department*,

²¹⁹ *Atle Grahl-Madsen, The Status of Refugees in International Law* 291(A. W. Sijthoff-Leyden Netherlands. Vol-1, 1966)

²²⁰ *James C. Hathaway and Michelle Foster, The Law of Refugee Status* 586(Cambridge University Press, UK 2nd edn., 2014).

²²¹ *Ibid.*

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Nations. Article 1F(c) is a limitation on fundamental rights, there is a strong reason to restrict its ambit, and since acts contrary to the purposes and principles of the United Nations as those perpetrated by states. It would promote consistency within international law to confine the scope of Article 1F (c) to acts committed by persons in high office in government or in a rebel movement that controls territory within the state or in a group perpetrating international terrorism that threatens international peace and security.²²²

2.6.2 Determination of the Status of Refugee by UNHCR

The Executive Committee of the High Commissioner's program in October 1977 suggested that procedures should satisfy specific basic requirements according to the provisions provided at the 21st session of this program. This essential requirement reflects the particular condition of the applicant for refugee status. Therefore, the states could bind to establish identical procedures for refugee status determination, according to the UN refugee Convention and the Protocol. Thus, the Office of the High Commissioner has specified minimum criteria to follow in developing appropriate policies for declaring refugee status.²²³ The basic requirements follow:

(i) The applicant addresses himself to the competent authority to the border or in the territory of a contracting country, which might come with the preview of the relevant international instruments. They should be clear and such cases also refer to the higher authority to act following the principle of non-refoulement.

(ii) The applicant must be receiving the essential direction for the procedure to follow.

(iii) For examining requests for refugee status and taking a decision in the first instance, the authority should be a clearly identified authority with responsibility.

(iv). The applicant should give an opportunity duly informed and contact UNHCR's representative and also provide essential facilities, such as; for submitting his case to the authorities concerned and services of a competent interpreter.

(v). He should be informed accordingly and issued with documentation certifying his refugee status when the applicant is recognized as a refugee.

²²² Erika Feller, Volker Turk, et. al.,(ed.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 457(Cambridge University Press, UK. Reprint 2005)

²²³ *Supra* note 147 at para-192

(vi). When the applicant status is not accepted as a refugee, then they should give a reasonable time to appeal to the authority, whether judicial or administrative, for a formal reconsideration of the decision according to the prevailing system.

(vii). If a decision is pending on the initial request or appeal of the High Administrative Authority court, the applicant should be allowed to remain in the country in terms of Para third.

The Executive Committee also articulated the expectation that all the contracting States parties to the UN refugee Convention, 1951 and the Protocol, 1967 that had not yet done as such would find a way to set up such systems sooner rather than later and give good thought to UNHCR investment in such methods in proper shape.²²⁴

2.6.3. Determination of the Status of Refugee by States

States have the primary responsibility to determine the status of individuals arriving on their territory. In several countries, UNHCR plays a formal role in national status determination procedures. In some cases, the Office of the High Commissioner is a full-fledged member of national committees of refugee status determination. At the same time, in other situations, UNHCR is involved in the procedure in its capacity as an observer.²²⁵

The 1951 convention defines refugees and provides for specific standards of treatment to accord to refugees. It says nothing about procedures for determining status and leaves to the states the choice of implementation at the national level.²²⁶

Following the guidelines of the UNHCR, the UNHCR has played an advisory role, and all the contracting country being responsible for creating rules concerning asylum and granting refugee status to vulnerable people, we would analyse the

²²⁴ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva, DECEMBER 2011, HCR/1P/4/ENG/REV. 3, Para 192, *available at*: <http://www.refworld.org/docid/4f33c8d92.html> (last visited on January 14, 2018).

²²⁵ UNHCR, Measuring Protection by Numbers, 2005, *available at*: www.unhcr.org/refworld (last visited on December 15, 2017).

²²⁶ Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* 53-54(Oxford University Press, New Delhi, 3rd edn., 2007).

discriminations of the refugee status determination procedures in the law systems in the world.²²⁷

2.6.3.1 United State of America

In the United States of America for the protection of the country from entry into the United States by the foreign terrorist, they are implementing new security measures and procedure on a joint inter-agency review of the United States Admission Program by the United States Citizenship and Immigration Services (USCIS) on the Executive order 13780 on March 6, 2017.²²⁸

For determination of refugee status, eligibility is dependent on a case, which is determined by a USCIS officer on a personal interview. This interview should be related to getting the information on which person who claims for refugee status and resettlement to the United States.

In the period of the interview, the officer inspects wholly appropriate evidence, including determining and authentication of the application, if the claimant:

- Capable under selected processing precedence.
- Qualified the requirement of the refugee definition.
- Does not settle in another country.
- Permissible under the law of the United States or otherwise.

They also consider the circumstances in the nation of origin and calculate the individual's reliability for the implementation of the determination of refugee status. Before the approval, they check and review the result and confirm that security checks have been completed.²²⁹

2.6.3.2 United Kingdom

Contrary to expectations, the British government has been somewhat conservative concerning the United Kingdom's asylum policy. UK's perspective is regarded by many EU leaders, analysts, and even British legal professionals as

²²⁷Refugee Status Determination Procedures across the World, *available at*: <https://www.lawyr.it/index.php/about-us/lawyr-it-blog/753-refugee-status-determination-procedures-across-the-world> (last visited on January 29, 2018).

²²⁸Refugees, *available at*: <https://www.uscis.gov/humanitarian/refugees-asylum/refugees> (last visited on January 08, 2018).

²²⁹ Refugee Eligibility Determination, *available at*: <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/refugee-eligibility-determination> (last visited on January 29, 2018).

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inappropriate. However, the British authorities have promised to take in a few tens of thousands of refugees in the following five years.²³⁰

The people who came into the United Kingdom or who already live in the United Kingdom, they must give an application after becoming eligible under UNHCR criteria for the registration at the border officer. This procedure intends to identify the person making the application and the candidate will be screened. For the period of the screening, the fingerprints and photographs will be taken.

Moreover, at the time of the interview, the applicant should bring some documents like identity certificates, passports, travel documents, police registration certificates, birth or marriage certificates, and other written evidence to support the application, if the applicant is not incapable of speaking English, then an interpreter will be provided.²³¹

After the screening, sometimes the applicant or the asylum seeker receives a standard acknowledgment letter or an application card. Still, in some circumstances, they might be detained at an immigration removal centre.²³²

After the screening, the applicant will be interviewed by the caseworker and has to answer the caseworker's question on the information given by the applicant or asylum seeker about the asylum claim. The applicant or the asylum seeker may also demand a legal representative for legal advice.²³³

The decision related to an application for refugee status almost takes in the six months by the authorities, and if they permit to stay in the United Kingdom, then the refugee has the right to stay and settle for five years.

However, if the application is rejected, then the applicant should leave the state or is forcefully moved from the country. However, the applicant can appeal against the decision of the caseworker.²³⁴

²³⁰ Refugee Status Determination Procedures across the world, *available at*: <https://www.lawyr.it/index.php/about-us/lawyr-it-blog/753-refugee-status-determination-procedures-across-the-world> (last visited on January 29, 2018).

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

2.6.3.3 Australia

In Australia, the refugee status determination process has ruled that only those asylum seekers who have arrived with a valid visa will be evaluated in this process and those who come into the country without a valid visa or by boats will not be entitled to the refugee status determination process.

All unauthorized maritime arrivals have been prohibited according to the Migration Act 1958 since June 1, 2013, and they do not take any protection relating to the visa. Still, if the Immigration Minister chose to lift the bar on his discretion, then the refugee status determination process will be applied in the period between August 13, 2012, and January 1, 2014, a new fast-track process was used to the applicant or asylum that had arrived without a valid visa.²³⁵

A person (asylum seeker) may be recognized as a refugee according to the procedure related to the refugee status determination. If asylum seekers are removed from Australia, then they have the chance to give the reason for the fear that of persecution. The government official will consider the application or claim on an essential stage. The applicant has a right to appeal if the application is denied and then they may appeal to the migration and refugee division of the administrative appeal tribunal and an independent decision-maker will review that claim or application.

Whether any person is entitled to complimentary protection in Australia based on severe human rights violations under the Convention against Torture and International Covenant on Civil and Political Rights, 1966, then a similar procedure would be adopted for determination of refugee status in Australia.²³⁶

The UN Refugee Convention has not provided any type of processes related to the refugee status determination that must monitor in an RSD system. It is clear that for Australia to obey its requirements under the UN Refugee Convention, and other binding international instruments it must have a strategy set up that empowers it to distinguish precisely the general population to whom it owes assurance commitments.

The refugee status determination process states that they do not make refugees to someone. Still, they only declare or recognize any person as a refugee where he or

²³⁵ Refugee status determination in Australia: Fact sheet, *available at*: http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_RSD_in_Australia.pdf (last visited on January 21, 2018).

²³⁶ *Ibid.*

she fulfils the condition related to the refugee definition according to the refugee Convention under international law.²³⁷

In Australia, there are some essential steps for refugee status determination. These are as follows:²³⁸

- The asylum seeker or applicant produces an application, under Form 866 and submits it to the Department of Immigration and Border Protection.
- Whether an asylum seeker is entitled to protection as a refugee or beneficiary of complementary protection, is decided by the officer of the Department
- The asylum seeker may apply for merits review by the MRD-AAT if the officer has rejected the application of the claimant.
- If an officer rejects the application, the applicant may appeal to the Federal Court or the High Court.
- At the last stage, the asylum seeker may request to intervene with the Minister of Immigration to provide a visa personally.

2.6.3.4 Germany

The rules related to the admission of refugees and the handling of refugee claims in Germany by two prestigious national laws, one is the Asylum Act²³⁹ and the second one is the Residence Act²⁴⁰. “The Asylum Act codifies the process and consequences of asylum and denial, while the residency act provides rules relating to entry, stay, exit, and employment of foreigners in general.” Whether, an Asylum seeker seeking protection from persecuted for political reason, then he would be allowed to stay in Germany, and incorporates displaced person status and auxiliary

²³⁷ Guy S Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* 51 (Oxford University Press, 3rd ed, 2007)

²³⁸ *Supra* note 238

²³⁹ Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 2 of the Act of 11 March 2016 (Federal Law Gazette I, p. 394) *available at*: https://gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html (last visited on January 29, 2018).

²⁴⁰ In the version published on 30 July 2004 (Federal Law Gazette I, p. 1950), last amended by the Act on Implementation of Residence- and Asylum-Related Directives of the European Union of 19 August 2007 (Federal Law Gazette I, p. 1970), taking into account the amendments required by the Act Amending the Passport Act and Other Legislation of 20 July 2007 (Federal Law Gazette I, p. 1566), which affect sections 48, 49, 71, 89, 95. *available at*: <https://germanlawarchive.iuscomp.org/?p=281> (last visited January 22, 2018).

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assurance, or if the office pronounces an expulsion denial. On the off chance that the application denied, the candidate must leave Germany or will be liable to expulsion procedures.

The Asylum Act provides refugee status in the Geneva Convention on humanitarian reasons includes the criteria for political asylum and a broad range of other humanitarian basis.²⁴¹

If any person gets a status of refugee or political asylum, then he would be obtaining a permit to the residence of three years.

- a) A settlement permit with no time limit shall be an issue after the first three years,
- b) If the Federal Office does not object to the refugee's stay or
- c) If an application for asylum is rejected or
- d) There is no prohibition against deportation or
- e) If the application is withdrawn, or
- f) The asylum application is rejected because another member state of the European Union (EU) is responsible for processing the application (Dublin process), or
- g) The deportation order is issued, and the applicant must leave Germany.
- h) If the application has rejected as, without merit, the period for departure is either thirty days or one week.”²⁴²

Employees of this reception facility issue a certificate of registration to the asylum seeker, which includes personal details, and a photo of a refugee is registered as an asylum seeker in the country or border of that country.²⁴³

After the submission of an application, the applicant-seeking asylum is invited to an in-person interview, but they are no personal interviews. It is necessary if the applicant is younger than six years of age. The applicant provides his identity and evidence of harassment and all information related to severe harm suffered, at the time of the interview.²⁴⁴

²⁴¹ The Asylum Act article 3a and 3b, of the paragraph 1

²⁴² Refugee Law and Policy: Germany, *available at*; <http://loc.gov/law/help/refugee-law/germany.php#Steps> (last visited on January 20, 2018).

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

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After the emphasis on the personal interview and the assessment of all relevant finding the caseworker should decide on the consult of the Federal Office's Asylum and Migration Information Centre and its Migration Info Logistics (MILO) database; send individual queries to the German Foreign Office; and obtain language and text analyses, physical-technical document examinations, and medical or other expert advice. The decision related to asylum application is given to the applicant in writing and details the reasoning and the legal options for appeal.²⁴⁵

2.6.3.5 France

The French procedure for determining refugee status presents many similarities to the German one. Though its main features date back to 1952, it has undergone significant administrative "adjustments" in recent years. Undocumented aliens seeking asylum at a port of entry are usually admitted into France.

If he/she arrives from a third country where asylum could have been requested, and where the alien does not run the risk of being returned to the country of origin.

If the person has already been granted asylum in a third country, he/she can be denied admission by the Minister of the Interior after a claim and clandestine entry can be declared unfit by police or municipal authorities for the same reasons.²⁴⁶

Once these obstacles have been cleared, the asylum seeker must register with the Office Français pour la Protection des Réfugiés Apatrides (OFPRA) and file an affidavit documenting his claim. The OFPRA is an independent office headed by a Director, who makes decisions on all refugee claims. While OFPRA frequently makes its decisions based on written documentation, the applicant may be invited for an interview.²⁴⁷

If the claimant has not notified of OFPRA's decision within four months of his application, he/she is entitled to bring the claim to the Commission des Recours, which also deals with appeals against adverse determinations by OFPRA. The Commission des Recours, a highly specialized quasi-judicial appellate body chaired

²⁴⁵ *Ibid.*

²⁴⁶ Refugee Status Determination Procedure in Germany, France, the U.S.A. and Australia by Jean-Francois Durieux, available at: <https://refuge.journals.yorku.ca/index.php/refuge/article/viewFile/21460/20135> refugee status determinations by UNHCR (last visited on January 29, 2018).

²⁴⁷ *Ibid.*

by a member of the Council of State. Moreover, it is further composed of a representative of the OFPRA Board and the UNHCR representative in France. The appellant is always entitled to a personal hearing and may be represented by counsel. The further appeal, to the Council of State, is only possible in cases of principle. During the pre-asylum period, an asylum seeker receives a temporary residence permit, usually valid countrywide, and a provisional work authorization - both of which the person will remain until a final decision has made on his or her claim.²⁴⁸

2.6.4 Critical Analysis of the Definition of Refugee under Convention Relating to the Status of Refugee, 1951

The 1951 convention definition reflects a conception of ‘refugee’ forged by the forced mass migrations resulting from the first, second world wars. It is rooted in the politics of the cold war era. Many commentators argued that the definition constitutes a Eurocentric conception of refugee and criticized its reliance on persecution as the essential determinant of refugee statuses its meaning and the de-facto interpretation of ‘persecution’ to involve a violation of civil & political rights.²⁴⁹

Another critique is the individualistic nature of the definition requiring determinations of refugee status to conduct on an individual basis. It creates difficulties in situations such as mass population flows arising from conflict or otherwise; such a situation is the norm for many countries, particularly in the developing world.²⁵⁰

More recent efforts to define ‘refugee’ have called for a definition that takes into account the economic, social, and cultural conditions—not merely civil & political- that may lead a person to flee his or her country of origin. However, many argue that refugee status is not based on the problem of poverty and deprivation. There are millions of people around the globe who suffer from these problems, and such a definition would result in a dramatic and unmanageable expression of potential refugee populations. In response, it is argued that the distinction between civil, and political & economic reasons for claiming refugee status is an artificial one &

²⁴⁸ *Ibid.*

²⁴⁹ *Human Rights and Humanitarian Law: Development in Indian and International Law*; South Indian Human Rights Documentation Centre 173(Oxford University Press; 1st edn., 2008).

²⁵⁰ *Ibid.*

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challenging to maintain in many cases where the political and economic causes for flight have inextricably intertwined.

One of the most conspicuous categories missing from the enumerated list of a protected class is that of gender. Although it is read into the type of social group in some cases, including the **Islam case**, it is not the same as having the gender listed as a protected ground in the text of the 1951 convention. Where persecution exists in the state based on gender, feminist commentators argue that the lack of distinct categories for gender implies a male paradigm in which the mistreatment of women often goes unrecognized. Refugee status determination is conducted on an individual basis & in each case, it must assess whether 'women' in the state in question could constitute a social group for the definition. Treating the claims of women who have been persecuted because of gender on an individual basis in this way marks the systematic nature of discrimination of women in some states, which may result in well-founded fear of persecution. The inclusion of women as a separate category would potentially acknowledge the widespread & systematic element of discrimination against women in some states. It had noted that in implementing obligations under the 1951 Convention by way of national legislation, countries are not restricted to the limited categories of the convention definition but are free to go beyond the obligations & incorporate additional types of protected persons if they wish. Many states have opted to address the issue of the lack of 'gender' as grounds of persecution definition contained in national legislation.²⁵¹

There are some grounds for criticism of the definition of refugee-like-

- Internally displaced persons are not covered by the 1951 convention.
- Natural disasters are excluded from the definition of the refugee convention, which may be a substantial cause of persecution.
- There is no specific definition of persecution.
- The group application is overlooked.
- Victims of civil war are not covered
- Economic migrants are excluded from this definition.
- The Refugee convention 1951, is not binding upon the state to provide the refugee status.

²⁵¹ *Human Rights and Humanitarian Law: Development in Indian and International Law*; South Indian Human Rights Documentation Centre 174(Oxford University Press; 1st edn., 2008).

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- There is no specific provision to determine refugee.
- There are only a limited five grounds for persecution.
- This instrument of refugee protection did not make any difference between male and female persecution.
- There is no difference between private and public persecution.
- Violence against women is not mentioned.

2.7 DEFINITION OF REFUGEE IN REGIONAL INSTRUMENTS

The 1951 Convention and the 1967 protocol remain the principal international instruments benefiting refugees, and their definition was expressly adopted in a variety of regional arrangements aimed at further improving the situations of recognized refugees.

2.7.1 African Continent

The refugee problem in Africa was the product of the 1960s, the decade of maximum decolonization, and the intensification of the struggles for independence by African nations. Refugee came from two main groups of state, the colonial and dependent States, and the independent states. Refugees are often the product of clashes between these groups.²⁵²

The flow of refugees to Africa in the years 1950-60 was an acute problem, which accorded with the struggle for the independence of African states, since the establishment of the Organization of African Unity.²⁵³ The Organization of African Unity was established on 25 May 1963 to promote regional cooperation through policy harmonization among newly independent African States.²⁵⁴

The 1969 Convention, attribute the OAU's initial interest in a regional refugee instrument to the failure of the Eurocentric persecution based 1951 convention refugee definition to reflect African realities, work on the 1969 convention began in 1964, and the OAU had two other concerns. First, the dateline contained in the 1951 convention refugee definition prevented the instrument from applying to new refugee

²⁵² Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The lessons of Pragmatism*, 185-186 *IJRL*, Vol-3 (1991)

²⁵³ Recommendation II of the conference on the legal, economic and social aspect of African refugee problem, 1967

²⁵⁴ Helene Lambert, Jane Mc Adam, *et. al.* (eds.) *The Global Reach of European Refugee Law* 180 (Cambridge University Press, United Kingdom, 1st edn., 2013).

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situations that had arisen in Africa.²⁵⁵ Secondly, the OAU concern was with the security and peaceful relation among OAU member states, particularly in cases where the presence of refugees causes internal tension.²⁵⁶

Accordingly, the first draft of the 1969 convention known as the Kampala Draft because the OAU's first drafting committee met in the Ugandan capital employed the form and much of the working of the 1951 refugee convention. However, it eliminated the dateline contained therein.²⁵⁷ The subsequent draft was also mostly reflective of the 1951 convention and included just the refugee definition borrowed from the international refugee instrument, without the dateline. This approach was rejected because the newly formed committee of legal experts felt bound by the mandate conferred upon it by the OAU council of minister.²⁵⁸

Subsequently, in July 1965 Leopoldville draft had come before the OAU's council of the ministers, and it began to recognize that the regional instrument should not duplicate its international counterparts, but relatively should deal with refugee problems particular to Africa. In October 1965 executive committee statement that most delegations at the Accra meeting had agreed that rather than creating a convention covering all aspects of the problem of refugee in Africa and the OAU should recognize the universal principle of the 1951 convention. The third draft convention that followed it in 1966, known as the Addis Ababa draft, still tended to cover the same ground as the 1951 convention. The Addis Ababa draft even included only on refugee's definition, replicating that of the 1951 convention.²⁵⁹

The fourth draft convention presented came before the OAU's council of the ministers by the OAU Secretariat in Kinshasa in September 1967. OAU member state agreed in Kinshasa that in light of its now corresponding character, the regional convention remained necessary to address refugee situations specific to Africa. Still, the council of the minister did not accept the draft and send it back to work on the

²⁵⁵ *Id.* at 182.

²⁵⁶ Jacob Van Garderen and Julie Ebenstein (eds.), *Regional Development: Africa*, in Andres Zimmermann: *The 1951 Convention relating to the status of refugees and Its 1967 Protocol* 188 (Oxford university Press, 2011).

²⁵⁷ Philip Chatrand, *The Organization of African Refugees: A Progress report* (1975)

²⁵⁸ Helene Lambert, Jane Mc Adam, et. al. (eds.), *The Global Reach of European Refugee Law* 183 (Cambridge University Press, United Kingdom, 1st edn., 2013).

²⁵⁹ *Id.* at 184-185

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fifth and final draft of the regional refugee convention. In June 1968, the committee of legal experts met in Addis Ababa, and the OAU secretariat provided the committee with a draft convention. This draft included the 1951 convention refugee definition plus, for the first time, a second definition and it also consists of a conflict clause governing the regional instrument's relationship to the 1951 convention²⁶⁰

The African Union Administers the Convention Governing the Specific Aspect of the Refugee Problem in Africa, which is known as the OAU Convention,²⁶¹ the OAU convention was adopted on 10 September 1969 and come into force on 20 June 1974 after ratification by one-third of the Member States. It was signed or ratified by 50 of the 53 Member States of the AU.²⁶² It was the first regional instrument for the protection of refugees in Africa.

For this Convention, the term refugee shall mean every person who, owing to a well-founded fear of being persecuted for the reason of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his citizenship and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside the state of his former permanent residence as a result of such event is unable or, owing to such fear, is unwilling to return to it.²⁶³

The term of a refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or event seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or citizenship.²⁶⁴

The refugee definition of OAU permits *prima facie* group determination, eradicating the requirement that an individual establishes a personal and individual risk of persecution. It is the first internationally accepted agreement, which issues absolute and unqualified provisions stipulating that no refugee should be subject to

²⁶⁰ *Id.* at 185-186

²⁶¹ Brian Opesskin, Richard Perruchoud, *et. al.* (eds.), *Foundation of International Migration Law* 180 (Cambridge University Press, New Delhi 1st edn., 2012).

²⁶² Marina Sharpe, African Union refugee definition, *available at*: <http://www.refugeelegalaidinfor mation.org/african-union-refugee-definition> (last visited on November 18, 2017)

²⁶³ Convention on the Specific Aspects of Refugee Problems in Africa, 1969, art. I

²⁶⁴ *Ibid.*

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measures, such as rejection at the frontier, which might compel him to return or remain in a territory where life, physical integrity, or liberty is threatened.²⁶⁵

The most exciting aspect of the OAU Convention is its two-fold definition of a "refugee." It incorporates the same meaning as in the 1951 convention without the dateline and the possibility of geographical limitation. At the same time, it includes explicitly persons who are victims of human-made disasters like international armed conflicts or civil wars, whether or not fear of persecution exists. The first time, the legal term 'refugee' albeit at the regional level, was extended to individuals forced to leave their countries owing to aggression by another state and as a result of an invasion—the O.A.U. Convention marked the beginning of a refugee protection system, which directly addressed the cause of refugee influxes, by emphasizing objective conditions in the country of origin.²⁶⁶

Moreover, the OAU convention extends international protection to persons who seek to escape severe disruption of public order "in either part of the whole" of their country of origin.²⁶⁷ The definition of refugee adopted by the 1969 OAU Convention contained many unique stipulations. Paragraph 2 of Article I made the term 'refugee' applicable to asylum seekers also who left their country of origin owing to external aggression, occupation, foreign domination, or event seriously disturbing the public order. Individuals in this situation would acquire, *ipso facto*, the status of refugee. They would not have to justify their fear of persecution, as would have been required under the 1951 convention.²⁶⁸

The terminology utilized in the refugee definition of the OAU Convention, which reflected the urgency of responding to the African reality, established an important precedent in international law. The new terminology responded to obvious

²⁶⁵ Gunther Beyer, "The Political Refugee: 35 Years Later", 15 *IMR* 32 (1981), available at: <https://www.jstor.org/stable/2545321> (last visited on August 18, 2018)

²⁶⁶ Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lesson of pragmatism", 3 *IJRL* 205 (1991), available at: <https://academic.oup.com/ijrl/article/3/2/185/1602063> (last visited on August 18, 2018)

²⁶⁷ Dr. Nafees Ahmad, Refugee-The Semasiology of Definitional Dilemma, available at: http://www.academia.edu/4050467/Refugee-The_Semasiology_of_Definitional_Dilemma (last visited on November 18, 2017)

²⁶⁸ B. S. Chimni (ed.), *International Refugee Law: A Reader* 65 (Sage Publications, New Delhi, 8th edn., 2008).

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humanitarian concern and sought to provide a practical solution to the problem of determining refugee status, the massive migration occurring at the time made individual determinations quite impractical.²⁶⁹

The OAU Convention is silent on international displacement is a major legal lacuna. This problem, however, concerns three times as many people and is potentially even more explosive than the refugee crisis. Although the protection of refugees in Africa is far from complete, it is at least in principle more inclusive than in many, if not all, other regional systems. One of the most significant aspects of this relatively new model of protection is that it has prompted other regional systems, in particular, the Inter-American system, to emulate its positive factors and minimize its inadequacies.²⁷⁰

2.7.2 European Union

The United Nations refugee regime, which was ushered in by the adoption of the 1951 convention and the establishment of the High Commissioner for refugees, has been crafted in large part by the European Union and was designed to deal with a European refugee problem.²⁷¹ The substantial number of European states are bound together in a powerful union, equipped with a universal asylum system, a similar process of diffusion is a distinct possibility, the European Union is bound to export its own devices, at times aggressively, to preserve the internal system.²⁷²

At the European level, the Council of the European Union adopted, in 1976, a joint position based on Article K.3 of the Treaty of Maastricht/Treaty on European Union on the harmonized application of the definition of the term “refugee” under the 1951 Refugee Convention. This document aimed to ensure that Member States process an asylum application in compliance with Article 1 A (2) of the 1951 Refugee Convention and with its interpretation found in UNHCR’s documents.²⁷³

²⁶⁹ *Ibid.* 65-66

²⁷⁰ Fernando González-Martín, *The African Approach to Refugees*, available at: <https://www.wcl.american.edu/hrbrief/v2i2/africanrefugees.htm> (last visited on November 22, 2017)

²⁷¹ Helene Lambert, Jane Mc Adam, et. al. (eds.), *The Global Reach of European Refugee Law* 184-185 (Cambridge University Press, United Kingdom, 1st edn., 2013)

²⁷² *Ibid.*

²⁷³ Harmonised application of the definition of the term “refugee” under the Geneva Convention, available at: http://europa.eu/legislation_summaries/other/l33060_en.htm (last visited on November 22, 2017)

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Moreover, either the council of Europe expressed its concern about the situation of the de facto refugee is a person who is not formally recognized as a conventional refugee (although they meet the convention's criteria) or who are unable or unwilling for other valid reasons to return to their countries of origin. Members of governments have invited to apply the definition of refugee liberally in the convention and not to expel de facto refugees unless they have been admitted by another country where they do not run the risk of persecution.²⁷⁴

All 27 EU Member States are also parties to both the 1951 Refugee Convention and the 1967 Protocol. Article 78 of the Consolidated Versions of the Treaty on the Functioning of the European Union, emphasized the creation of a standard European policy on asylum under these two documents. “The Union shall develop a common policy on asylum, subsidiary protection, and temporary protection to offer appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be following the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.”²⁷⁵

It means that when examining a refugee application, the Member States act by the Convention definition. What the European Union adds to the 1951 Refugee Convention is the notion of a subsidiary and temporary protection, another way of offering protection to those who do not qualify as refugees because of the refugee definition set out in the Geneva Convention.²⁷⁶

The European Union refugee legal system is based mainly on the relevant provisions of the Charter of Fundamental Rights of the European Union and EU asylum regulations and directives (collectively referred to as the ‘asylum acquis’). Convention on Status of Refugee, 1951, and the Protocol on the Status of Refugee, 1967, has incorporated into EU law in the Treaty on the Functioning of the European Union (TFEU) (Article 78) and the Qualification Directive. However, EU law is

²⁷⁴ Kathleen Marie Whitney, Does The European Convention on Human Rights Protect Refugees From "Safe" Countries? *available at*: www.digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1483&context=gjicl (last visited on December 02, 2017)

²⁷⁵ The protection of refugees and their right to seek asylum in the European Union, *available at*, <https://www.unige.ch/gsi/files/6614/0351/6348/Bacaiian.pdf> (last visited on November 08, 2017)

²⁷⁶ *Ibid.*

continuously evolving, and EU states are not legally bound by all parts of the asylum which are acquired or obtained. The Court of Justice of the European Union (CJEU) is the authoritative body for interpreting the EU laws, who has considered the jurisprudence of the European Court of Human Rights on human rights issues and has generally developed its jurisprudence along similar lines, recognizing various human rights as ‘general principles’ of European law, based on the first national constitutions and regional human rights treaties.²⁷⁷

The EU established the Common European Asylum System (CEAS) in 1999, under the TFEU, Article 78, and various steps have since been taken towards this objective, including the creation of the EU’s European Asylum Support Office (EASO), which has been operating since 2011, as well as the recent recast of the Dublin Regulation. The mission of the EASO is to provide expertise on asylum issues for member states; enhance cooperation on these issues; help member states comply with international and EU obligations vis-à-vis refugees, and support EU countries experiencing pressure on their asylum systems.²⁷⁸

2.7.3 Latin America

Latin American countries include espoused²⁷⁹ with the diplomatic asylum with the concepts of ‘asilado’²⁸⁰ and refugees throughout their history as independent states.²⁸¹ Latin American nations have a long tradition of providing humane treatment to persons seeking protection and asylum. The legal concept of asylum dated back to the Montevideo Treaty on International Penal Law has signed on 23 January 1889 on the first South American Congress on Private International Law.²⁸²

²⁷⁷ Cynthia Orchard and Andrew Miller, Protection in Europe for refugees from Syria, Refugee Studies Center, Oxford Department of International Development University of Oxford, *available at*: <https://www.rsc.ox.ac.uk/files/files-1/pb10-protection-europe-refugees-syria-2014.pdf> (last visited on November 11, 2017)

²⁷⁸ *Ibid.*

²⁷⁹ B. S. Chimni (ed.), *International Refugee Law: A Reader* 66 (Sage publications, New Delhi, 8th edn., 2008).

²⁸⁰ Asilado is a Spanish word, which means inmate refer to a person confined to an institution such as a prison or hospital.

²⁸¹ *Supra* note 344.

²⁸² Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin

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This instrument is devoted to asylum, which has affirmed as an inviolable right of those persecuted for their political belief, and the treaty reflected the political instability of Latin America at the time and the need to protect the inevitable victims of political persecution.²⁸³ Besides, the agreement acknowledged that political refugees should accord an inviolable asylum.²⁸⁴ It contains the first provision on the refuge in international treaty law with a stipulation (Article 16) to the effect that asylum for persons persecuted for political crime is inviolable.²⁸⁵

The 1889 Montevideo Treaty had followed by a series of regional conventions dealing specially with the subject. Convention concluded in February 1928 in Havana; December 1933 and March 1940 in Montevideo.²⁸⁶

After that in 1954, an essential instrument on asylum was signed at Caracas, which is known as the Caracas Convention on Territorial Asylum, the Caracas Convention on Territorial Asylum expressly refers to persons coming from a State in which they are persecuted for their beliefs, opinion, or political affiliations or for acts, which may have been considered as political offenses.²⁸⁷

In 1980, the outbreak of violence throughout the Central American region forced hundreds of thousands of people to flee their homes, and the established rules of asylum were ill-suited to handle this massive regional displacement. The Latin American instrument focused primarily on the relationship between the states concerned, not on the individuals in need of protection.²⁸⁸

America, available at: www.acnur.org/fileadmin/Documentos/BDL/2005/3668.pdf (last visited on August 18, 2018)

²⁸³ B. S. Chimni (ed.), *International Refugee Law: A Reader* 66 (Sage publications, New Delhi, 8th edn., 2008).

²⁸⁴ Guy S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* 37 (Oxford University Press, New Delhi, 3rd edn., 2007).

²⁸⁵ Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, available at: www.acnur.org/fileadmin/Documentos/BDL/2005/3668.pdf (last visited on August 18, 2018)

²⁸⁶ *Supra* note 348 at 67.

²⁸⁷ *Supra* note 349

²⁸⁸ B. S. Chimni (ed.), *International Refugee Law: A Reader* 68 (Sage Publications, New Delhi, 8th edn., 2008).

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The Central American crisis, which has created severe problems for both the displaced people and the countries trying to absorb them, in 1981, brought interested nations to Colloquium in Mexico.²⁸⁹ The primary purpose of this Colloquium on Asylum and the International protection of refugees in Latin America was to discuss the most immediate and delicate problem presented by the regional crisis and examine the inadequacies of international refugee law and the respective national refugee legislation in Central America.²⁹⁰ In 1981 the first time a broader definition was proposed by Colloquium in a regional forum for Latin America. The Colloquium conclusion reiterated the language of the 1969 OAU Convention and added a massive violation of human rights to the conditions defining a refugee. The broader definition of refugee, given by the 1981 Colloquium, was not restricted only in Central America but also was offered for all Latin America.²⁹¹

After three-years, the Cartagena Declaration on Refugee was adopted by delegates from 10 Latin-American countries in 1984. Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela met in Cartagena, Colombia. The declaration is the result of the "Colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico, and Panama," which was held in Cartagena, Colombia, from the 19th to 22 November 1984. The "Contadora Act influenced the Declaration on Peace and Cooperation," which itself was based on the 1951 Refugee Convention and the 1967 Protocol.²⁹²

The Cartagena Declaration, on refugee, 1984 has recommended for use of the element of the 1951 convention and the 1967 protocol, includes among refugees, persons who have fled their country because their lives, safety, or freedom was threatened by generalized violence, foreign aggression, internal conflicts, massive

²⁸⁹ *Id.* at 69

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² Cartagena Declaration on Refugees, Refugee Legal Aid Information for Lawyers Representing Refugees Globally, Rights in exile Program. *available at* :<http://www.Refugeelegalaidinformation.org/cartagena-declaration-refugees>, (last visited on September 25, 2017)

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violation of human rights or other circumstances which have seriously disturbed public order.²⁹³

This definition added new elements to the causes of flight enumerated in the OAU Convention, namely 'generalized violence,' 'internal aggression,' and 'massive violation of human rights,' thus extending, even more, the scope of protection for refugees. Although the definitions of a refugee set out in the OAU Convention and the Cartagena Declaration are not precisely similar, they adopt the same paradigm. They both refer to the traditional definition of the 1951 Convention and add new provisions, extending the definition of a refugee to diverse circumstances of generalized violence.²⁹⁴ This definition allows a broader temporal and geographical scope for the risks refugees find themselves in, and additionally covers some of the indirect effects such as poverty, economic decline, inflation, violence, disease, food insecurity, malnourishment, and displacement.²⁹⁵

Mexico is the first country, which follows all requirements of the Cartagena Declaration, which means that they ratified the declaration and enacted domestic law accordingly. The regional refugee concept contained in the Cartagena Declaration calls for examining the objective situation in the country of origin and the particular situation of the individual or group of persons who seek protection and assistance as refugees. This definition calls for the affected persons who justify these characteristics: firstly, that a threat to the life, security, or liberty is in existence and, secondly, that this threat results from one of the five grounds like generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order. These grounds were purposely written in a broad and encompassing manner to ensure that persons who are

²⁹³ *Collection of International instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR* 1196(Volume 1, 2007)

²⁹⁴ José H. Fischel De Andrade, "Regional Policy Approaches and Harmonization: A Latin American Perspective" 10 *IJRL* 389, 402.

²⁹⁵ United Nations High Commissioner for Refugees (UNHCR) - Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration, *available at*: www.unhcr.org. (last visited on November 12, 2017)

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clearly in need of international protection also be protected and assisted as refugees.²⁹⁶

However, the Cartagena Declaration has taken only the individual's need for international protection. The need for the protection of the physical integrity of the person is the starting point for developing the refugee definition; it is the right to life, security, and liberty of a person including the right not to be subject to arbitrary arrest or detention or torture as defined in international instruments, which are the protected rights.²⁹⁷

Even the Cartagena declaration is not legally binding for states. The Cartagena Declaration is nevertheless of fundamental importance as it reflects consensus on particular principles and criteria, and it has guided the countries in their treatment of refugees.²⁹⁸ It is also introduced new and realistic policies for the nation at an appropriate moment.

2.7.4 Asia

There is no universally adopted definition of refugee in the 'Asia-Pacific region.' Unless otherwise stated, the definition adopted for this page is the Office of the United Nations High Commissioner for Refugees (UNHCR) operational definition of "Asia & the Pacific" which consists of Central Asia, East Asia and the Pacific, South Asia, South East Asia, and Southwest Asia. Likewise, UNHCR operational definitions of sub-regions will use. In the Asia region, there are neither such regional initiatives nor virtually any appropriate domestic legislation relating to refugees protection, except, of course, that imposes restrictions on unwanted new arrivals. The Asian region is a large share of the global refugee problem. Many Asian countries have not ratified the 1951 Refugee Convention or the 1967 Protocol for one reason or another. Within Asia, a region that witnessed the largest of the population movements

²⁹⁶ Hector Gros Espiell, Sonia Picado, and Leo Valladares Lanza, Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, *available at*: www.acnur.org/t3/fileadmin/Documentos/BDL/2005/3668.pdf (last visited on August 18, 2018)

²⁹⁷ *Ibid.*

²⁹⁸ Report of the Advisory group on possible solution to the problems of the central American refugees, 2(Geneva, May 1989)

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over the last 60 to 70 years has not become parties to the international instruments relating to refugees.²⁹⁹

Many countries, which do harbour a large number of refugees, and are concerned with refugee problems, are not parties to the refugee conventions. The states of the Asian region insulate extensively after those of other areas of the world. So far, in Asia, 25 out of 52 countries are state parties of the refugee convention 1951 and protocol 1967 like China, Iran, Japan, and the Philippines (and Iran Israel, and Yemen) the Kazakhstan Kyrgyz Republic Tajikistan Turkmenistan are states parties. Whereas other regions in the world for the protection of refugees, they adopted binding regional instruments. There is no such instrument to protect the refugees of the Asian region. Still, some of these countries are at least parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. These treaties impose non-refoulment obligations, which are not limited in application to “refugees” within the meaning of the Refugee Convention and Protocol and are not subject to exceptions.

Moreover, the principle of non-refoulement has been generally regarded as being part of customary international law and thus binding even on states, which are not parties to any of the treaties previously mentioned.³⁰⁰

While the grant of asylum is widespread in Asia, the protection accorded by host states for most refugee groups remains ad hoc and unpredictable, and Asia suffers from a general lack of refugee policy. The treatment is primarily based on administrative directives and national discretion rather than found on the provisions of the 1951/1967 convention and principles of international law relating to the protection of the human rights of refugees.³⁰¹

²⁹⁹ Veerabhadran Vijayakumar, A Critical Analysis of Refugee Protection in South Asia, *available at*: www.mcrg.ac.in/WC_2015/Reading/D_Refugee_Protection.pdf (last visited on December 08, 2017)

³⁰⁰ James Hathaway, *The Rights of Refugees under International Law* 363 (Cambridge University Press, 2005).

³⁰¹ Joanne van Selm, Khoti Kamanga, et. al. (eds.), *The Refugee Convention at fifty: A view from forced migration studies* 206 (Lexington Book, USA, 2003).

2.7.4.1 The Asian-African Legal Consultative Organization (AALCO), 1966

The Asian-African Legal Consultative Organization (AALCO) has adopted the Bangkok Principles in 1966, on the Status and Treatment of Refugees, which is a very important document to deal with the situation of refugees in Asia.³⁰²

2.7.4.2 The Bangkok Principles, 1966

A person who is owing to persecution or a well-founded fear of persecution for reason of race, colour, religion, political belief or membership of a political, social group: (a) leaves the state of which he is a national, or the country of his nationality, the state or country which he is a permanent resident, or

(b) Being outside such a state or country is unable or unwilling to return to it or to avail him of its protection.³⁰³

There are two explanations which are given in the definition, firstly- the dependents of a refugee are deemed as a refugee, and secondly, the expression 'leaves' include voluntary as well as involuntary leaving. The Bangkok principles for the right of return adopted an addendum in 1970, and in 1987 further addendum was required that dealt with the principles of burden-sharing. Moreover, after that between 1996 and 2001, the AALCO Secretariat, UNHCR, and member states devoted substantial time and resources to discussing and settling upon a revised consolidated text of the Bangkok Principles. The process culminated in the adoption of the legally non-binding Revised Bangkok Principles at AALCO's 40th session held in June 2001. The aims of approval have been specified as being, among other things, to inspire member states to adopt national legislation relating to the status and treatment of refugees and to provide a guide to dealing with refugee problems. Unfortunately, neither the original nor the revised Bangkok Principles have had much impact on state practice to date.³⁰⁴

³⁰² Dr Savitri Taylor, Refugee Protection In The Asia Pacific Region, *available at*: <http://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region> (last visited on November 28, 2017)

³⁰³ The Principle Concerning Treatment of refugees, 1966, Adopted by Asian- African Legal Consultative Committee, Art. 1

³⁰⁴ Dr Savitri Taylor, Refugee Protection In The Asia Pacific Region, *available at*: <http://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region>, (last visited on November 28, 2017)

2.7.4.3 The Almaty Process in Central Asia, 2011

The Almaty Process was informally inaugurated at a Regional Conference on Refugee Protection and International Migration in Central Asia held in Almaty, Kazakhstan, in March 2011.³⁰⁵ UNHCR organized the Conference, the International Organization for Migration (IOM) and the UN Regional Centre for Preventive Diplomacy for Central Asia and funded by the European Commission. The five Central Asian republics participated in the conference along with Afghanistan, Azerbaijan, China, Iran, the Russian Federation, and Turkey. Civil society representatives were also present. At the end of the March 2011 conference, the state participants adopted the legally non-binding Almaty Declaration. The Declaration emphasized the need to enhance cooperation to control irregular migration in a manner, which “preserves the asylum space and is consistent with international law, notably the principle of non-refoulement.” It also foreshadowed the possible creation of a Regional Cooperation Framework.³⁰⁶

2.7.4.4 Asean Human Rights Declaration (AHRD), 2012

The Association of Southeast Asian Nations, or ASEAN, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam then joined on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN.³⁰⁷ The ASEAN has governed by the ASEAN Charter, which is a legally binding treaty since 15 December 2008.³⁰⁸

In 2009, the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights to promote human rights

³⁰⁵ Almaty Process on Refugee Protection and International Migration, *available at*: <https://www.iom.int/almaty-process>, (last visited on November 11, 2017).

³⁰⁶ Almaty Declaration, *available at*: <http://www.unhcr.org/4ddfb7cd6.html> (last visited on November 25, 2017).

³⁰⁷ The Association of Southeast Asian Nations, 8 November, 1967. *available at*: <http://asean.sorg/asean/about-asean/overview/> (last visited on November 23, 2017)

³⁰⁸ ASEAN Charter 2008, *available at*: <http://asean.org/asean/asean-charter/> (last visited on November 23, 2017)

in the ten ASEAN countries. By mid-2012, the Commission had drafted the ASEAN Human Rights Declaration. The Declaration was adopted unanimously by ASEAN members at its November 2012 meeting in Phnom Penh.³⁰⁹

In November 2012, the ASEAN Heads of State adopted the legally nonbinding ASEAN Human Rights Declaration. Article 16 of the Declaration states, “Every person has the right to seek and receive asylum in another State following the laws of such State and applicable international agreements.” However, ASEAN members have been reluctant to put asylum seeker issues on ASEAN’s formal agenda because of the perception that it would involve a breach of the Charter principle of non-interference in the internal affairs of member states.³¹⁰

2.7.5 Definition of Refugee in South Asia

The states of South Asia have provided temporary protection to a large number of refugees and have generally demonstrated their support for the basic principles of security. While states have granted refuge to asylum seekers from individual countries on a *prima facie* basis, other asylum-seekers have tolerated at the request of UNHCR. In the absence of international ratification and national legislation on refugees, protection is dependent on the policy of the successive governments of the host state. In such cases, security based on the complete discretion of governments often becomes inconsistent, with its attendant risks and uncertainty.³¹¹

In the absence of national and international legal protection in South Asia, the government of the region adopted the theory of push back. It imposed repatriation while dealing with refugees and their problems.

The National Law on refugees adopted at the fourth regional consultation on refugees and migratory movement in South Asia, held in Dhaka on 10-11 November 1997, is the main instrument to define and protect refugees in Asia. According to this

³⁰⁹ ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD, *available at*: www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (last visited on November 29, 2017)

³¹⁰ Article 16 of the ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD, *available at*: www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (last visited on November 27, 2017)

³¹¹ Joanne van Selms, Khoti Kamanga, *et. al.* (eds.), *The Refugee Convention at fifty: A view from forced migration studies* 206 (Lexington Book, USA 2003).

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definition refugee means, any person who is outside his or her country of origin and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of that country because of the well-founded fear of persecution on account of race religion, sex, nationality, ethnic, identity membership of a particular social group or political opinion, or

any person who is owing to external aggression, occupation, foreign domination serious violation of human rights or other events seriously disrupting public order in either part or whole of his or her country of origin, is compelled to leave his or her place of permanent residence to seek refuge in another location outside his or her country of origin.³¹²

2.8 CONCLUSION

In this chapter, the researcher has discussed the various definitions of refugees given from a different point of view. A refugee is a very vulnerable person in the world who is compelled to live a disastrous life outside of their country or leave the permanent residence. Thus refugees are immensely mentioned to get protection thoroughly. Therefore it is also necessary to have a proper legal definition of refugee that can be applied universally for which the first. There is a need for their protection so that they can spend their life with dignity.

This definition is defined as refugees in a narrow term. According to the 1951 UN convention refugee, is a person with well-founded persecution because of race, religion, and nationality, membership in a particular social group, or political opinion, which is outside the country of his or her citizenship and is unable or unwilling to return. However, the term has often popularly understood in far broader terms encompassing persons fleeing war, civil strife, famine, and environmental disasters.

The 1951 UN Convention relating to the status of refugees, not only limited the definition of refugees to persons fearing a relatively narrow range of human rights abuses but also restricted its scope to migrants in Europe who fled because of events occurring before 1951. The Convention's definition of a refugee is out-dated. It confers no right of assistance on refugees unless and until they reach a signatory

³¹² C. R. Abrar and Shahdeen Malik, Towards National Refugee Laws in South Asia, Refugee and Migratory Movement research unit, October 2000, *available at*: <https://www.fmreview.org/unhcr-convention-50/abrar> (last visited on May 1, 2019)

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country, it imposes no obligation on countries not to persecute or expel their citizens, and it imposes no requirement for burden-sharing between states.

The protocol was adopted in 1967 that dropped the convention's geographical and temporal limitations. Although the protocol universalized the applicability of the convention, it did not expand the definition. For those in the way in the developing world, the convention and protocol's definitions have often seen as inadequately encompassing the many reasons due to which people fled their homelands to seek protection elsewhere.

A more comprehensive definition of refugees was adopted by the organization of African unity in 1969, extending its definition of refugee to include persons compelled to leave their place of permanent residence because of external aggression, occupation, foreign domination, or event seriously disturbing public order. Similarly, representative of Central American states in 1984 issued the Cartagena declaration, which includes refugee persons fleeing from generalized violence, International conflicts, and severe disturbances of public order. However, these are the regional document and defined to their region, only meaning thereby could be still waiting for a comprehensive and universal definition of a refugee.

Therefore, for proper protection of the refugee, the scope of the refugee should be expanded by amending the definition of refugee given in the 1951 Refugee Convention, in the same way as the definition of refugee given in the African Unity Organization 1969 and the Cartagena Declaration 1984. The UN Convention on refugees, 1951, only protects persons who meet the criteria for refugee status. Certain groups of people are considered not to deserve refugee protection and should be excluded from such protection. Its includes persons for whom there are grave motives to suspicion that; they have committed a war crime, a crime against peace, a crime against humanity or they are guilty of acts conflicting to the resolutions and ideologies of the United Nations or serious non-political crimes which are committed outside their country of refuge.

International refugee instruments do not specifically regulate procedures concerning refugee status determination. It is not mentioned in the international refugee instruments whether such procedures must, whatever procedures may establish for ascertaining refugee status, the adjudicator makes the final decision

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based on an assessment of the claim submitted by the applicant to establish whether the individual has developed a ‘well-founded fear of persecution.’

Protecting refugees is primarily the responsibility of States. It may be done by an individual or group assessment as to whether they meet the definition in the Convention. Although the 1951 Convention does not prescribe a particular procedure for the determination of whether a person is a refugee, where an individual assessment is a preferred approach, any procedures followed must be fair and efficient. It would require that States designate a central authority with the relevant knowledge and expertise to assess applications, ensure procedural safeguards are available at all stages of the process, and permit appeals or reviews of initial decisions. UNHCR has tasked to assist States to establish such procedures.

There are some requirements for procedures to determine the eligibility for refugee status:

- Specialized procedure for the examination of asylum claims should be accepted,
- There should be a Specialized asylum authority
- Access to refugee status determination
- The use of translators and interpreters
- Fair hearings
- Access to legal services provided by an independent legal profession
- Allowing the presence of legal or other counsel
- Individual valuation of each claim,
- Confidentiality
- Giving written reasons if the application is rejected
- Appeal or review
- Manifestly unfounded applications



CHAPTER - III
INTERNATIONAL LEGAL
FRAMEWORK FOR THE PROTECTION
OF REFUGEES



CHAPTER III

3.1 INTRODUCTION

The problem of refugees and forced migration of the people is one of the worst and biggest problems of the contemporary world. The history of the forced migration and influx of refugees has been very painful where the people have been forced to flee from their nations and take asylum in another country. The main factor behind the forced migration and continuous increase in the refugee population is a well-founded fear of persecution and the violation of human rights by their states.¹

The states are responsible for protecting the rights of their citizens. When governments are unable or unwilling to do this, people have to forcefully leave their country and seek safety elsewhere. If this happens, another country has to step in to ensure that the refugees' fundamental rights are respected.²

Human rights violations often cause the flight of the refugees as well as obstruct their safe home return. Safeguarding human rights in countries of origin is, therefore, critical both for the prevention and for the solution of the refugee problem. Human rights are also essential for the protection of refugees in the countries of their asylum. It is necessary to ensure that the action in favour of refugees should be non-partisan, non-political, with the sole concern being the safety and welfare of the refugees. The most crucial protection given is the protection against refoulement. Some rights of the refugee may be protected under international law, such as not to have to be subjected to restriction on their movement, not to be subjected to cruel, inhuman, or degrading treatment, no discrimination on the ground of race, religion, and a person is to consider before the law, family unity should be protected.³

The international legal framework for protection is consisting of branches of international laws i.e.; (i) International Human Rights Law (ii) International Humanitarian Law and (iii) International Refugee Law. Besides, customary international law, which has arisen out of frequent practice by states rather than a legal text, also includes certain essential rights and prohibition acts, for example,

¹ UNHCR, *The State of the World's Refugees*, 11 (Oxford University Press, 1995).

² A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians N° 27, 2017

³ Sanjay Kumar Roy(ed.), *Refugees and Human Rights* 86-87(Rawat Publication, Jaipur. 2001)

arbitrary detention, extra-judicial killing, slavery, and torture.⁴ International Human Rights Law, International Humanitarian Law, and International Refugee Law are complementary bodies of law that share a common objective, such as protection of the individual's life, health, and dignity. They form a complex network of equal protections, and we must understand how they interact.⁵

The legal protection starts from the moment of receiving the individuals and registering them with the relevant authorities, by the government or UNHCR. Registration as an asylum of any person is one of the first legal protections guarantees that the person is under the responsibility of the registration authority, which means they will not return to their home country unless on their file action is being taken, and as well as they can now live legally in that area. Legal protection provided continues through the phase of Refugee Status Determination, where the relevant authority uses international refugee law instruments to decide whether refugee seekers should be granted refugee status, the reasons why they leave their country.⁶

3.2 INTERNATIONAL HUMAN RIGHTS LAW AND REFUGEES

Human rights are an essential condition for any person to live his life in a dignified way. A refugee is a person who has forcibly fled to another country because of the violation of human rights and fear of persecution. Refusal of the human rights of refugees continues from their own country and remains during their visit. Furthermore, the human rights of a refugee can also be violated in a hosting country too. To end the hellish experiences of refugees and to protect the refugees, their human rights guarantee is necessary.

3.2.1 REFUGEE PROTECTION WITHIN THE FRAMEWORK OF UNITED NATIONS

The United Nations provisions that can be directly and indirectly applicable to the protection of the refugee are discussed below.

⁴ The International Legal Framework for Protection, *available at*: <http://www.ungei.org/02.pdf> (last visited on January 22, 2020)

⁵ Humanitarian Law, Human Rights and Refugee Law – Three Pillars ICRC, *available at*: <https://www.icrc.org/en/doc/resources/documents/statement/6t7g86.htm> (last visited on January 22, 2020)

⁶ What is refugee protection, *available at*: <https://www.humanrightscareers.com/magazine/what-is-refugee-protection/> (last visited on January 22, 2020)

3.2.1.1 United Nations Charter, 1945

The concept of providing international protection to refugees and viewing it as a solution to human rights abuses has been developed with the establishment of the UN. The UN Charter proclaims in its preamble that the primary purpose of the UN is “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”⁷

3.2.1.2 Universal Declaration of Human Rights (UDHR), 1948

The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the UN on 10 December 1948⁸. The declaration was established “as a common standard of achievement for all peoples and all nations.”⁹ It states that human rights and fundamental freedom should universally be recognized and be observed by all member States.¹⁰ It is pertinent to note that the UDHR is not a treaty. It has agreed by the drafters that its provisions would further elaborate on in agreements that would create a binding, legal obligation for the States that are signatories to them.

However, it does not reduce the importance of the Declaration, as its purpose was to provide a sound understanding of human rights guaranteed in the UN Charter. It is also the most well-known UN catalogue of human rights; its significance has consistently reaffirmed in various resolutions of the General Assembly. Many national constitutions and other domestic laws have been referred to the UDHR or have been incorporated in its provisions.¹¹ The UDHR preamble recognizes the inherent respect, equal, and unforgivable rights of all members of the human family and the basis for freedom, justice, and peace in the world.¹²

The rights and freedoms defined in the UDHR have been applied to all persons without any distinction of any grounds, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or

⁷ Ragini Trakroo Zutshi, and Jayshree Satpute, *et al* (eds.) Refugee and the Law 41(Human Rights Law Network, New Delhi, 2nd edn., 2011)

⁸ Adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948

⁹ The Universal Declaration of Human Rights, 1948. Preamble

¹⁰ *Ibid.*

¹¹ Ragini Trakroo Zutshi, and Jayshree Satpute, *et. al.* (eds.), *Refugees and the Law* 43(Human Rights Law Network, New Delhi. 2nd edn., 2011)

¹² The Universal Declaration of Human Rights, 1948. Preamble

another status.¹³ Every person has the right to life, liberty, and personal security.¹⁴ Furthermore, no one shall hold in slavery or servitude; as well as slavery and the slave trade shall prohibit in all their forms.¹⁵ Besides, no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.¹⁶

Universal Declaration of Human Rights grants rights and freedom to all people, including refugees; there are specific provisions such as Articles 13, 14, and 15 regulating the protection of refugees.

Article 13 states, “*Everyone has the right to freedom of movement and residence within the borders of each state and everyone has the right to leave any country, including his own and to return to his country.*”¹⁷

Article 14 states that “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*” This right cannot apply in the case of prosecutions contrary to the objectives and principles of the United Nations or arising out of non-political offenses.¹⁸ Furthermore, Article 15 states that *everyone has the right to a nationality, and no one shall be arbitrarily deprived of his citizenship nor denied the right to change his nationality.*¹⁹

The UDHR has considered *jus cogens*, these rights are universally accepted and enforced by all State Parties, regardless of whether they have signed the 1951 Convention or the 1967 Protocol. Other essential rights that the Declaration advocates are the right to life, protection of the law, movement and employment, as well as rights against torture, slavery, and arbitrary arrest and detention.²⁰

There is also a unique interrelationship between the UDHR and the Refugee Convention. Around eighty-six per cent of the refugees in the world live in states that have signed or ratified the Universal Declaration of Human Rights. Furthermore, the human rights agreements and the Refugee Convention set covering ensure. Therefore,

¹³ *Id.*, art. 2

¹⁴ *Id.*, art. 3

¹⁵ *Id.*, art. 4

¹⁶ *Id.*, art. 5

¹⁷ *Id.*, art. 13(1) & 13(2)

¹⁸ *Id.*, art. 14(1) & 14(2)

¹⁹ *Id.*, art. 15(1) & 15(2)

²⁰ Ragini Trakroo Zutshi, and Jayshree Satpute, *et. al.* (eds.), *Refugees and the Law* 43-44(Human Rights Law Network, New Delhi. 2nd edn., 2011)

as a rule, refugee rights include a mix of standards coming from both the Refugee Law and the International Bill of Rights. Besides, the standard way to deal with deciding critical parts of the refugee definition is known as the "human rights approach" and draws widely on the UDHR.²¹

The universal declaration is the contemporary Magna Carta of the rights, and it was one of the first significant achievements of the United Nations in the field of human rights. The declaration has not intended to be legally binding, and therefore, it did not impose any legal obligations on the state to give effect to its provisions. However, it provides a common standard of achievement for all people and all nations.²²

3.2.1.3 Convention on the Prevention and Punishment of the Crime of Genocide (CPCG), 1948

Resolution No-260 (III) A of the United Nations General Assembly on 9 December 1948 adopted the Convention on the Prevention and Punishment of the Crime of Genocide.²³ The Convention makes genocide a crime under international law. It allows perpetrators of the crime to be punished, regardless of whether they are acting in a public or private capacity. It must be done keeping in mind that the act of genocide has always resulted in massive refugee flows—some so large that the international community has severely stretched in its attempts to cope with them. From a legal standpoint, while this convention does not directly relate to refugee protection, it certainly deals with mechanisms that prevent the problem of refugees from arising in the country of origin. The perpetrators of the crime of genocide and related crimes now held accountable; the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as the International Criminal Tribunal for Rwanda (ICTR) are prime examples. Further development in the effort to bring war criminals to justice is the creation of the International Criminal Court

²¹ Adrienne Anderson, "On Dignity and whether the Universal Declaration of Human Rights remains a place of refuge after 60 years", *American University International Law Review*, available at: <http://www.auilr.org/> (last visited on December 5, 2019)

²² Dr. H. O. Agarwal, *International Law & Human Rights*, 762(central Law Publication, Allahabad. 16th edn., 2009)

²³ Convention on the Prevention and Punishment of the Crime of Genocide, available at: https://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf (last visited on October 10, 2019)

(ICC), which is competent to try genocide, crimes against humanity and crimes of war, as well as various related crimes.²⁴

3.2.1.4 Convention Relating to the Status of Stateless Person, 1954

The problem of stateless people is related to the problems of refugees and asylum seekers because a stateless person also becomes a refugee. Non-citizens or stateless are severely disadvantaged in terms of human rights. Their legal status is in danger. In many ways, the right to citizenship is a fundamental element of the right to identity.²⁵ This convention provides for the protection of stateless persons. Rather, this convention can also apply to those refugees who, being stateless, have refugee status in another country. The Convention Relating to the Status of Stateless Persons was adopted on 28 September 1954 and entered into force on 6 June 1960. It establishes a framework for the international protection of stateless persons and is the most comprehensive codification of the rights of stateless persons yet attempted at the international level.²⁶

For those who qualify as stateless persons, the Convention provides important minimum standards of treatment. It requires that stateless persons have the same rights as citizens, and the contracting state shall apply the provisions of this convention to stateless persons as well as stateless refugees without discrimination as to race, religion, or country of origin concerning freedom of religion and education of their children. For several other rights, such as the right of association, the right to employment, and housing, it provides that stateless persons are to enjoy, at a minimum, the same treatment as other non-nationals.²⁷

The Convention upholds the right to freedom of movement for stateless persons lawfully on the territory and requires States to provide them with identity papers and travel documents. The Convention also prohibits the expulsion of stateless persons who are lawfully on the territory of a State Party. Because protection as a stateless person is not a substitute for possession of nationality, the Convention

²⁴ *Ibid*

²⁵ Rhona K.M. Smith, Text and Materials on International Human Rights 509(Routledge London and New York 3rd edn., 2013)

²⁶ CONVENTION RELATING TO THE STATUS OF STATELESS PERSON, 1954, *available at*: https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf (last visited on May, 16, 2020)

²⁷ *Ibid.*

requires that States facilitate the assimilation and naturalization of stateless persons. Like the 1951 Convention relating to the Status of Refugees, the 1954 Convention explicitly excludes individuals when there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or a serious nonpolitical crime abroad. The Office of the United Nations High Commissioner for Refugees has been also mandated to assist stateless refugees since it was established on 1 January 1951.²⁸

3.2.1.5 Convention on the Reduction of Statelessness, 1961

The convention categorically emphasized the reduction of statelessness. This is necessary because if one person is not declared as citizen or alien, including even especially a refugee then the determination of rights enjoyable by that person becomes confusing, which ultimately leads to gross violation of human rights.²⁹

The Convention on the Reduction of Statelessness was adopted on 30 August 1961 and entered into force on 13 December 1975.³⁰ The 1961 Convention is the main international instrument that sets out rules for granting and not depriving citizenship to prevent statelessness. Statelessness limitation rules apply to Article 15 of the Universal Declaration of Human Rights, which recognizes that "everyone has the right to citizenship". The 1961 Convention is based on the idea that if states retain the right to develop the content of their citizenship laws, they must do so in accordance with international citizenship standards, including the principle that statelessness should be avoided. By accepting the guarantees of the 1961 Convention to Prevent Statelessness, States are helping to reduce statelessness over time. The Convention aims to strike a balance between the rights of individuals and the interests of states by laying down general rules to prevent statelessness, with certain exceptions to these rules.

The 1961 Convention establishes safeguards against statelessness in many different contexts. A central focus on the need for states to grant citizenship to

²⁸ *Ibid.*

²⁹ Rathin Bandyopadhyay, *Human Rights of Non Citizen: Law and Reality* 56 (Deep & Deep Publication, New Delhi 2007)

³⁰ CONVENTION ON THE REDUCTION OF STATELESSNESS, 1961, *available at*: https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf (last visited on May 16, 2020)

children born in their region, or the prevention of statelessness in the state at the time of the birth of their citizens abroad, which would otherwise be stateless. To prevent statelessness in such cases, States may grant nationality to children either automatically at birth or subsequently upon application. The Convention further seeks to prevent statelessness later in life by prohibiting the withdrawal of citizenship from States' nationals – through loss, renunciation, or deprivation of nationality – when doing so would result in statelessness. Finally, the Convention instructs States to avoid statelessness in the context of the transfer of territory. For all of these scenarios, the 1961 Convention safeguards are triggered only where statelessness would otherwise arise and for individuals who have some link with a country. These standards serve to avoid nationality problems, which might arise between States. According to article 11 of the Convention, in 1974 the United Nations General Assembly designated the Office of the United Nations High Commissioner for Refugees as the body to which individuals who claim the benefit of the Convention may apply for examination of their claims and for assistance in presenting them to the relevant authorities

3.2.1.6 International Covenant on Civil and Political Rights (ICCPR), 1966

The International Covenant on Civil and Political Rights, 1966³¹ is a multidimensional arrangement adopted by the United Nations General Assembly on 16 December 1966, and it came into force from 23 March 1976.

The preamble of the ICCPR applicable to all people and all nations and the language of right themselves. They are referring to all human beings, everyone, and no-one.³² The provisions of this covenant that could be applied explicitly to refugees include Articles 12(2), 12(4), and 13. Article 12(2) states that each person shall be free to leave any country, including his own. It is, of course, subject to any restrictions that are provided by law.³³ Article 12(4) states that no one should be arbitrarily denied the

³¹ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200

A (XXI) of 16 December 1966

³² *Human Rights and Humanitarian Law: Developments in Indian and International Law* 3(South Asia Human Rights Documentation Center, Oxford University Press, New Delhi. 1st edn., 2008)

³³ International Covenant on Civil and Political Rights, 1966. art. 12(2)

right to enter their country.³⁴ The greater importance is Article 13, which states that aliens (including refugees) who are lawfully residing in the territory of a State Party may be expelled only in pursuance of a decision reached per the law. The refugee has the right (unless issues of national security are involved) to be allowed to submit reasons against her expulsion, have the case reviewed, and be represented before a competent authority.³⁵ This right is essential in the refugee context as it relates to Article 33 of the 1951 refugee Convention.

It established the right to non-refoulement, granting the right against the expulsion of a refugee to the front of a territory where his life or liberty will be threatened.³⁶ These rights in the covenant are not absolute, and they are subject to certain limitations.

Besides, the ICCPR also discusses the right to life³⁷ freedom against torture,³⁸ and the prohibition of slavery and arbitrary arrest.³⁹ It also addresses the right to fair criminal proceedings,⁴⁰ access to public employment and the right to an opinion, and expression,⁴¹ assembly,⁴² association,⁴³ and equal protection of the law.⁴⁴ This all-important in determining every bodied right, including the rights of refugees. While the ICCPR does not directly deal with asylum and refugee protection, it can, mandate, refer to the asylum policies of signatory States if such a need arises.

³⁴*Id.*, art. 12(4)

³⁵ *Id.*, art. 13

³⁶ Ragini Trakroo Zutshi, and Jayshree Satpute, *et. al.* (eds.), *Refugees and the Law* 45-46(Human Rights Law Network, New Delhi. 2nd edn., 2011)

³⁷ International Covenant on Civil and Political Rights, 1966, art. 6

³⁸ *Id.*, art. 7

³⁹ *Id.*, art. 8

⁴⁰ *Id.*, art. 14

⁴¹ *Id.*, art. 19

⁴² *Id.*, art. 21

⁴³ *Id.*, art. 22

⁴⁴ *Id.*, art. 26

3.2.1.7 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

The International Covenant on economic, social, and cultural rights was adopted and opened for signature, ratification, and accession by UN General Assembly Resolution 2200 A (XXI) of 16 December 1966. This covenant provides for the right to work, just conditions for employment, medical care, and primary education, amongst other related rights. Article 2(3) states that developing countries, with due regard to human rights and their national economy, may determine to what extent they can guarantee the economic rights of non-nationals. By implication, this means the social and cultural rights envisaged in the ICESCR are available to all persons legally residing in the territory of the State Party.

Arguably, one of the essential rights that the Covenant secures is the right to self-determination contained in Article 1(1). In the refugee context, if the country of asylum is a signatory to this covenant, they allow persons residing in its territory to practice their own culture and social habits as well as to educate themselves and pursue economic activities, imposing only the reasonable restrictions provided for in the instrument.⁴⁵

3.2.1.8 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1969

It defines racial discrimination as follows: Any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin. It has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the economic, political, social, and cultural or any other field of public life. While the Convention does not prevent a State from discriminating between citizens and non-citizens residing within its territory, it does not allow a State to violate the human rights of non-nationals. The ICERD sets out a regime against discrimination that creates refugees in the first place, as well as problems for the refugees where they have in the country of asylum.⁴⁶

⁴⁵ Ragini Trakroo Zutshi and Jayshree Satpute, *et. al.* (eds.), *Refugees and the Law* 47 (Human Rights Law Network, New Delhi, 2nd edn., 2011)

⁴⁶ *Id.* at 49-50

3.2.1.9 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

From a close examination of this instrument, it is evident that many of the articles confer rights on women that already exist in other legal instruments, such as ICCPR, ICESCR, ICERD, and CAT. This Convention was adopted in 1979 by the General Assembly.⁴⁷ It has often been described as an International Bill of Rights for Women. Consisting of a Preamble and thirty articles, it defines what constitutes discrimination against women and sets up a plan for national action to end such discrimination.⁴⁸ However, these rights have emphasized keeping in mind that despite these various instruments, discrimination against women continues to exist. Of course, special provisions are recognizing the additional and essential role that women hold in the State, the community, and the family.

The Convention requires that State Parties ensure the protection of women from sexual exploitation,⁴⁹ their proper medical care,⁵⁰ and the right to education and employment.⁵¹ These rights are fundamental in the refugee context since refugee women are especially vulnerable. Besides, Article 9 addresses the right of women to change or retain their nationality. The concern is that after marriage to an alien, a woman may be rendered Stateless, acquire new citizenship against her own volition, or automatically have her nationality changed. In this context, many countries ensure that the woman's nationality does not automatically change after marriage or under other such circumstances⁵² Similarly, Article 9(2) allows women equal rights with men concerning the nationality of their children.⁵³ Article 15 again ensures that the law concerning the movement of persons and the freedom to choose one's residence

⁴⁷ Convention on the Elimination of All Forms of Discrimination against Women, Dec 18, 1979, available at: <http://www2.ohchr.org/english/law/cedaw.htm> (hereinafter CEDAW). (last visited on October 2, 2019)

⁴⁸ The UN Committee on the Elimination of Discriminations Against Women", available at: <http://www.refworld.com/> (last visited on October 2, 2019)

⁴⁹ The Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 6

⁵⁰ *Id.*, art. 12

⁵¹ *Id.*, arts. 10, 11.

⁵² *Id.*, art. 9

⁵³ *Ibid.* art. 9(2)

and domicile should have been equally accorded to men and women.⁵⁴ CEDAW also establishes a committee that consists of 23 experts serving in their capacity. State Parties are required to submit an initial report within one year of becoming a signatory to the Convention, and then periodic reports to the committee every four years. While an individual petitioning mechanism has not been incorporated, the committee can study the issue of refugee women.⁵⁵

3.2.1.10 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984

The United Nations General Assembly adopted the content of the Convention on 10 December 1984, and it came into power on 26 June 1987.⁵⁶ There are two valuable articles relating to refugees under this Convention, Articles 2 and 3. Article 2 calls on State Parties to take effective legislative, administrative, judicial, or other measures to prevent acts of torture. The regime envisaged under this convention is strict in that there are no exceptions to the obligation imposed on the State Party.⁵⁷ It makes it one of the most effective human rights instruments.

CAT is often used where the 1951 Convention has failed. Article 3 of the CAT is one of the most critical provisions in international human rights law relating to refugees. It is one of the few articles, apart from Article 33 of the 1951 Convention, to provide for non-refoulement. The provision states that no State Party shall expel, return, or extradite a person to another State where there are significant grounds for believing that she would be in danger of being subjected to torture.⁵⁸ Here are such grounds to determine, competent authorities are required to take into account various relevant considerations, such as consistent patterns of gross, flagrant, or mass violation of human rights given that refugees often flee from persecution in the form

⁵⁴ *Id.*, art. 15

⁵⁵ Ragini Trakroo Zutshi, Jayshree Satpute (eds.), *Refugees and the Law* 48 (Human Rights Law Network, New Delhi. 2nd edn., 2011)

⁵⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10, 1984, *available at*: <http://www2.ohchr.org/english/law/cat.htm> (last visited on October 2, 2019)

⁵⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, art. 2

⁵⁸ *Id.*, art. 3

of torture, this provision is exceptionally relevant in protecting their rights of non-refoulement.⁵⁹

The application of Article 3 is necessarily limited to act, which meets the definition of torture in Article 1 of the CAT, 1983. The term torture refers to acts that cause severe pain or suffering physically or mentally. It is intentionally achieved on a person for purposes such as obtaining information about him or a third person or punishing him for an act done by him.

Torture is a confession in which a person committed, bullied, coerced, or suspected of any person for any reason. When such pain or suffering is inflicted by the consent or acquaintances of a government official or any other person or other person acting in an official capacity, they subject to torture. The meaning of torture does not include any pain or suffering arising only from, inherent or incidental to lawful sanction.⁶⁰

The meaning of torture, and accordingly, the non-refoulement obligation under Article 3, is circumscribed by three requirements. Firstly, only returns to torture have prohibited. Secondly, torture encompasses only activities that have been carried out or acquiesced in by the state. Thirdly pain or suffering arising out of lawful sanction has exempted from the definition of torture. It is not clear from the text of the treaty whether legal sanctions refer to an international or national standard of lawfulness.⁶¹

3.2.1.11 Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, 1985

This Declaration on the Human Rights of Individuals who are not nationals of the country in which they live was adopted by General Assembly resolution 40/144 of 13 December 1985.⁶² While this is not a binding instrument, it nevertheless articulates the various rights and obligations of the State and foreigners. For instance, Article 4 States that alien shall observe the laws of the State in which they reside and respect

⁵⁹ *Ibid.*

⁶⁰ *Id.*, art. 1

⁶¹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 302-303 (Oxford University Press, New Delhi. 1st edn., 2007)

⁶² Geneva Convention relative to the protection of civilian persons in time of war of 12 august 1949. available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf (last visited on November 10, 2019)

the customs and traditions of the people in that State.⁶³ Article 5 states that the domestic and relevant international obligations shall treat aliens of the State in which they reside equally.

Furthermore, aliens are protected against arbitrary arrest or detention; they are given the right to be equal before the courts and other judicial and administrative authorities; have freedom of thought, opinion, conscience, and religion; and have the right to retain their language, culture, and tradition. Aliens also have the right (subject to various restrictions) to leave the country. Article 7 speaks of expulsion only under the law and reflects the spirit of Article 13 of ICCPR.⁶⁴

3.2.1.12 Convention on the Rights of the Child (CRC), 1989

The General Assembly adopted the Convention on the Rights of Child on November 20, 1989, which came into force on September 2, 1990.⁶⁵ The CRC is the first globally binding treaty for the protection of children including refugee children. CRC protected children's civil, political, economic, social, and cultural rights. According to the CRC, a child means every human being below the age of eighteen years.⁶⁶

The Convention on the Rights of the Child is based on three fundamental principles, namely (i) non-discrimination, (ii) the 'best interests' of the child; and, (iii) participation of the child in decisions regarding his/ her welfare. In the refugee context, non-discrimination implies that child refugees have access to fair and efficient determination procedures and implementation of protection measures. Besides, the principle of "best interests of the child" implies that:

- i. a key consideration to ensure that children are fully protected in the country of asylum;
- ii. a useful policy for evaluating possibilities for repatriation or family reunification;

⁶³ Declaration on the human rights of individuals who are not nationals of the country in which they live, 1985, art. 4

⁶⁴ Ragini Trakroo Zutshi and Jayshree Satpute, *et. al.* (eds.), *Refugees and the Law* 52(Human Rights Law Network, New Delhi, 2nd edn., 2011)

⁶⁵ United Nations General Assembly resolution 44/25, 20 November 1989; 1577UNT3

⁶⁶ The convention on the rights of the child, 1989, art. 1

- iii. An essential safeguard to ensure that, the child expresses his/ her views concerning all decisions affecting his/ her interests.⁶⁷

Article 2 of the Convention clearly states, “States parties respect and guarantee the rights set out in this Convention for every child in their area of responsibility, without discrimination against the child or his parents.

Further, his legal guardian should also not discriminate on the ground of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth, or another status.”⁶⁸ The CRC confers the inherent right to life⁶⁹ and the right to acquire nationality to any child, and it guarantees the implementation of these rights following their national laws and obligations from relevant international instruments, mainly if the child is stateless.⁷⁰

The Specific provision to the refugee context, the Convention provides that a child seeking refugee status (either unaccompanied or otherwise) shall receive appropriate protection and humanitarian assistance in the enjoyment of rights outlined in the Convention and other international human rights or humanitarian instruments.⁷¹ In other words, a state that is a party to the CRC but is not a signatory to any instrument relating to refugees, and which has not enacted any national legislation on this subject, is still obliged to provide adequate protection and assistance to the refugee child. Article 22(2) also provides for the State Party to cooperate with the UN, or any related organization to protect and assist such a child and to trace the parents or other family members of the refugee child to facilitate family reunification.⁷² Besides, this Convention establishes the various rights of children, including the freedom of expression,⁷³ religion,⁷⁴ association,⁷⁵ privacy,⁷⁶ the right against sexual

⁶⁷ M Rafiqul Islam(ed.), *An Introduction to International Refugee Law* 263(Martinus Nijhoff Publication, Bostan, 2013)

⁶⁸ *Supra* note 66, art. 2

⁶⁹ *Id.*, art. 6

⁷⁰ *Id.*, art. 7

⁷¹ *Id.*, art. 22(1)

⁷² *Ibid.* art. 22(2)

⁷³ *Id.*, art. 13

⁷⁴ *Id.*, art. 14

⁷⁵ *Id.*, art. 15

⁷⁶ *Id.*, art. 16

exploitation,⁷⁷ medical care,⁷⁸ education⁷⁹, protection against torture or other cruel, inhuman, or degrading treatment or punishment,⁸⁰ and many more other rights guaranteed by the convention on the rights of the child.

3.2.2 REFUGEE PROTECTION IN REGIONAL HUMAN RIGHTS INSTRUMENTS

Regional human rights provisions for the protection and assistance of refugees have become increasingly popular over the past few decades. Europe, America, and Africa all have established regional human rights protection instruments.

3.2.2.1 Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

This Convention for the Protection of Human Rights and Fundamental Freedoms 1950, also known as The European Convention on Human Rights, was accepted by the members of the Council of Europe, with the consideration of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948.⁸¹ The European convention on human rights come into force in September 1953 and represent the minimum standard of human rights protection of a state party of citizens and non-citizens.

According to the convention, the rights can be absolute, derogate, or qualified. The state may never derogate from its obligation to uphold absolute rights. In absolute rights, it includes the right to life, except the event of death due to legitimate acts of war,⁸² the prohibition of torture,⁸³ and slavery.⁸⁴ The prohibition of a punishment without the law is also, prohibited.⁸⁵ Other articles in the Convention may be

⁷⁷*Id.*, art. 19

⁷⁸*Id.*, art. 24

⁷⁹*Id.*, art. 28

⁸⁰*Id.*, art. 37

⁸¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. *available at*: https://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited on November 12, 2019)

⁸²*Id.*, art. 2

⁸³*Id.*, art. 3

⁸⁴*Id.*, art. 4(1)

⁸⁵*Id.*, art. 7

derogated from, in some circumstances, if this is not 'inconsistent with other obligations under international law.'⁸⁶

Article 15 permits the abolition of all absolute rights from the time of war or other public emergency threatening the life of the country, derogate rights may also be expressly qualified in the Convention. Rights containing express limitations are termed 'qualified',⁸⁷ and include the 'right to respect for private and family life',⁸⁸ 'freedom of thought, conscience, and religion'⁸⁹ and 'freedom of expression'.⁹⁰ A state may only limit qualified rights if the qualifications imposed 'are prescribed by law and are necessary for a democratic society.' Limitations must also be proportionate to the legitimate aims pursued. Legitimate objectives include 'international security, territorial integrity, public safety, prevention of disorder or crime, disclosure of intrusions received in the faith, and health, morality, protection of the dignity or rights of others, and upholding the fairness and impartiality of the judiciary.'⁹¹

Six subsequent protocols have further expanded the substantive protection offered by the ECHR. However, applications alleging violation of rights contained in the protocols can only be brought against states that have ratified them.

The rights contained in the ECHR (including the additional protocols) are mainly civil and political. Most of the rights protected offer security to the individual, with few rights about groups. It is exemplified by the lack of protection granted to minority groups as groups under the Convention. However, individual rights, such as freedom of assembly and association, do enhance the protection of 'groups' to some extent.⁹²

3.2.2.2 American Convention on Human Rights, 1969

The American Convention on Human Rights (the 'American Convention') was adopted in San Jose, Costa Rica on 22 November 1969, and come into force in July

⁸⁶ *Id.*, art. 15(1)

⁸⁷ *Human rights and humanitarian law: Developments in Indian and international law* 99(Oxford University Press, New Delhi, 1st edn., 2008)

⁸⁸ *Supra* note 81, art. 8

⁸⁹ *Id.*, art. 9

⁹⁰ *Id.*, art. 10

⁹¹ *Human rights and humanitarian law: Developments in Indian and international law* 100(oxford university press, new Delhi. 1st edn., 2008)

⁹² *Ibid.*

1978.⁹³ According to this Convention, the States Parties to this Convention undertake to respect the rights and freedoms to all persons subject to their jurisdiction. Any person can enjoy their human rights and freedoms, without any discrimination on the ground of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth, or any other social condition.⁹⁴ For this Convention, "person" means every human being including refugees.⁹⁵

In this convention, there are some human rights which applies to the protection of refugee as follow: Right to Life,⁹⁶ Right to Humane Treatment,⁹⁷ Freedom from Slavery,⁹⁸ Right to Personal Liberty,⁹⁹ Freedom from Ex Post Facto Laws,¹⁰⁰ Right to Privacy,¹⁰¹ Freedom of Conscience and Religion,¹⁰² Freedom of Thought and Expression,¹⁰³ Right of Assembly,¹⁰⁴ Freedom of Association,¹⁰⁵ Freedom of Movement and Residence,¹⁰⁶ and Right to Equal Protection.¹⁰⁷

These rights are equally applicable to the refugees like a citizen because according to this convention 'person' means every human being and refugee is included in human beings.

⁹³ Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, *available at*: <https://www.refworld.org/docid/3ae6b36510.html> (last visited on October 12, 2020)

⁹⁴ American Convention on Human Rights, 1969, art. 1: Obligation to Respect Rights

⁹⁵ *Ibid.*, art. 1(2)

⁹⁶ *Id.*, art. 4

⁹⁷ *Id.*, art. 5

⁹⁸ *Id.*, art. 6

⁹⁹ *Id.*, art. 7

¹⁰⁰ *Id.*, art. 9

¹⁰¹ *Id.*, art. 11

¹⁰² *Id.*, art. 12

¹⁰³ *Id.*, art. 13

¹⁰⁴ *Id.*, art. 15

¹⁰⁵ *Id.*, art. 16

¹⁰⁶ *Id.*, art. 22

¹⁰⁷ *Id.*, art. 24

3.2.2.3 African Charter on Human and People's Rights, 1981

The African Charter on Human and People Rights was created under the auspices of the OAU in 1981, which come into force in 1986¹⁰⁸, and the African Union later adopted it. The ACHPR expended the OAU from a body with a primarily political and economic alliance-building focus to an organization with a human rights promotion and protection role. This African Charter has described a substantial number of individual, collective, and community rights, as well as non-exhaustive rights such as equality before the law;¹⁰⁹ equal protection of the law;¹¹⁰ right to life;¹¹¹ freedom from exploitation and degradation;¹¹² right to liberty and security;¹¹³ freedom of conscience, the profession and free practice of religion;¹¹⁴ and freedom of movement.¹¹⁵

In its preamble, the ACHPR recognizes the relationship between rights and duties, the importance of civil and political rights, and the equal importance and legitimacy of economic, social, and cultural rights. The charter contains a mixture of civil, political, economic, and social rights, many of which have uniquely been framed to address the problem in African society or to protect the rights of the marginalized and non-citizen, including refugees.¹¹⁶

The ACHPR creates duties for both member states and the individuals. The significant obligation of state parties to the African Charter is the undertaking to adopt legislative or other actions to give effect to the rights contained in the charter. States also have to promote respect for the rights and freedoms protected by the ACHPR through teaching, education, and publication.¹¹⁷

¹⁰⁸ The African Charter on Human and People's Rights, 1981. *available at*: <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (last visited on December 10, 2019)

¹⁰⁹ The African Charter on Human and People's Rights, 1981, art. 3

¹¹⁰ *Id.*, art. 3

¹¹¹ *Id.*, art. 4

¹¹² *Id.*, art. 5

¹¹³ *Id.*, art. 6

¹¹⁴ *Id.*, art. 8

¹¹⁵ *Id.*, art. 12

¹¹⁶ *Human rights and humanitarian law: Developments in Indian and international law* 124(Oxford University Press, New Delhi. 1st edn., 2008)

¹¹⁷ *Ibid.*

The legal framework set out in the Charter offers refugees and asylum seekers the opportunity to ask the ACHPR to apply for the protection of violated rights. This includes specific rights based on the status of refugees and asylum seekers as well as more general human rights guarantees set out in the Charter. In performing its central supervisory role, the ACHPR takes into account the UN and OAU conventions as well as other regional agreements in which refugees in the regions have free movement and freedom of residence.¹¹⁸

Recourse to the ACHPR allows refugees and asylum seekers to file a complaint against the host country where the Refugee law is inadequate or insufficient and opens up the prospect of claims against the countries of origin due to constant violations of their rights due to the fact of persecution and theft other states. African governments must also ensure that the protection of the Charter is available to all under their jurisdiction, whether national or non-national. Governments are therefore not only responsible for the way they treat refugees in this system but also IDPs and migrants generally.¹¹⁹

The guarantee of non-discrimination can thus be used to protect refugees from discrimination on a wide variety of grounds including their status as refugees, their race, ethnic group, colour, or gender. The principle of equality and equal protection of the law offers refugees additional protection against mistreatment by the legal and institutional system of the State.¹²⁰

3.3 INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is the body of international law that protects those who are involved in the war or not. These include civilians, wounded, sick, ships, and combatants, as well as individuals who control the means and methods of war. International humanitarian law applied in both international and non-international armed conflicts. This method is binding on all states, armed opposition

¹¹⁸ Refugees and the African Commission on Human and Peoples' Rights, *available at*: <https://www.fmreview.org/african-displacement/zard-beyani-anselmodinkalu> (last visited on May 14, 2020)

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

groups, and soldiers participating in multilateral peacekeeping and enemy enforcement operations if they are involved in the war.¹²¹

There is a parallel connection between International Humanitarian Law (IHL) and International Refugee Law (IRL) for both originate from the need to address the protection of persons within the territory of a State of which they are not nationals. Refugees caught up in an armed conflict at the same time, can be under the protection of both the international humanitarian law as civilians and the refugee law as refugees.¹²²

International Humanitarian Law complements international refugee law in that breaches of International Humanitarian Law may inform the interpretation of persecution. UNHCR acknowledges that: ‘If someone is forced to flee armed conflict in their country because of human rights violations and breaches of humanitarian law, these factors would be part of what determines that person’s refugee status.’¹²³ International humanitarian law provides for two-tiered protection to refugees. First, if they are not directly participating in the war, they are entitled to protection from the effects of war as a civilian. Secondly, international humanitarian law gives refugees

¹²¹ Women, Girls, Boys and Men Different Needs – Equal Opportunities- Inter-agency Standing Committee, Gender Handbook in Humanitarian Action, *available at*:
<https://www.unhcr.org/protection/women/50f91c999/iasc-gender-handbook-humanitarian-action.html>
(last visited on December 10, 2019)

¹²² M Rafiqul Islam(ed.), *An Introduction to International Refugee Law* 160 (Martinus Nijhoff Publication, Bostan. 2013)

¹²³ Vanessa Holzer, The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and other Situations of Violence, division of international protection September 2012, PPLA/2012/05, *available at*:
<https://www.google.com/search?q=Vanessa+Holzer%2C+The+1951+Refugee+Convention+and+the+Protection+of+People+Fleeing+Armed+Conflict+and+other+Situations+of+Violence%2C+division+of+international+protection+September+2012%2C+PPLA%2F2012%2F05%2C&oq=Vanessa+Holzer%2C+The+1951+Refugee+Convention+and+the+Protection+of+People+Fleeing+Armed+Conflict+and+other+Situations+of+Violence%2C+division+of+international+protection+September+2012%2C+PPLA%2F2012%2F05%2C&aqs=chrome..69i57.6391j0j4&sourceid=chrome&ie=UTF-8> (last visited on December 12, 2019)

additional rights and asylum because of their status as an alien in a war zone. As a result, they fall into a very vulnerable category.¹²⁴

Besides, a few provisions of international humanitarian law have specifically aimed at protecting refugees in international armed conflict. The Fourth Geneva Convention indeed lays down explicit rules concerning the relationship between refugees and their host state, on the one hand, and between refugees and their country of origin, on the other side. The specific protection afforded to refugees has subsequently extended the Protocol I of the Geneva Conventions.¹²⁵

As non-nationals in the hands of a party to international conflict, refugees should, in principle, benefit from the status of ‘protected persons’ under Article 4 of Geneva Convention IV. However, the second paragraph of Article 4 states that: Nationals of a State, which are not bound by the Convention, are not protected by it. Citizens of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons. In contrast, the State of which they are citizens has usual diplomatic representation in the State in whose hands they are.

Accordingly, refugee nationals of an enemy state on the territory of a belligerent state are entitled, as ‘protected persons,’ to the full protection of the Fourth Geneva Convention. In the case of refugees, allegiance to a host country would seem more relevant as a criterion than their formal nationality.¹²⁶

If a refugee is in the territory or the hands of a State party to the First Protocol, Article 73 of the Protocol automatically applies if the person is recognized as a refugee "according to the relevant international instruments" or state or asylum law before hostilities begin. Under Article 73, refugees ‘shall be protected persons within the meaning of Parts I and III of the Fourth Convention’ and will benefit from the protection provided by more than 120 articles devoted to ‘protected persons,’ in addition to that of Part II, which already applies to them as part of the civilian

¹²⁴ Humanitarian Law, Human Rights and Refugee Law – Three Pillars, *available at*:

<https://www.icrc.org/eng/resources/documents/statement/6t7g86.htm> (last visited on December 2, 2019)

¹²⁵ M’elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 159 (Cambridge University Press, New Delhi, 1st edn., 2012)

¹²⁶ *Ibid.*

population. Refugees are protected by the Geneva Conventions, regardless of their nationality and the part under whose power they fell.¹²⁷

If, on the other hand, the refugee is in the hands of strength, not a party to the First Protocol, Article 73 will not apply. In this case, the extent of the protection afforded by IHL to the refugee will depend on their nationality and whether they can be considered as ‘protected persons’ within the meaning of Article 4 of the Fourth Geneva Convention. They will only get benefit from the specific protection of Article 44 or Article 70(2) of the Fourth Convention, as well as the general protection afforded to the civilian population. And certain norms of customary international law regarding the treatment of civilians in time of war, the fundamental guarantees of Article 75 of Protocol I, and relevant rules of international refugee law.¹²⁸

Article 73 eliminates the restrictions contained in Article 4(2) of the Fourth Convention. Refugees are protected whether or not diplomatic representation exists between the two countries. The fact that they are recognized as refugees takes precedence over any consideration due to nationality or country of origin. However, to benefit from the protection afforded to protected persons under Parts I and III of the Civilians Convention, two criteria must be fulfilled.¹²⁹

First, they must have been considered as refugees ‘under the relevant international instruments ‘or ‘under the national legislation of the State of refuge or State of residence.’ Besides, these instruments must have been ‘accepted by the Parties concerned.’ Second, refugees must have been considered as such ‘before the beginning of hostilities.’ The extension of the protection offered by Article 73 thus only applies to refugees who have fled from persecution or threat of persecution, rather than persons displaced by the conflict itself.¹³⁰

International law does not object to measures of control against enemy aliens, as it presumes that enemy nationals will incline to help their country because of their

¹²⁷ M’elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 162 (Cambridge University Press, New Delhi, 1st edn., 2012)

¹²⁸ *Id.* at 163

¹²⁹ M’elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 161 (Cambridge University Press, New Delhi, 1st edn., 2012)

¹³⁰ *Ibid.*

allegiance.¹³¹ However, in the case of refugees, even if their nationality defines them as the enemy, they relinquished all links with their state of origin when they fled persecution and sought refuge in another state.¹³²

The Convention recognizes the fact that refugees are victims of the country of origin and cannot treat as enemies based solely on their nationality. Article 44 thus invites belligerents to take into consideration ‘a whole set of circumstances,’ other than the nationality of the person.¹³³

Article 44 does not make any distinction between refugees recognized before the beginning of hostilities and those recognized during the hostilities.

Consequently, Article 44 is the only provider of international humanitarian law, which protects refugees displaced by war from arbitrary treatment. Article 44 of the Civilians Convention served as a precedent for a related provision in the 1951 Refugee Convention, on account that if this rule was to apply in the time of war, a similar law should a fortiori be implemented in the time of peace.¹³⁴

The Geneva Conventions have protected individuals against arbitrary treatment by the enemy. Therefore, the whole population in occupied territory benefits from the status of ‘protected person’ under Article 4, and Article 70 has protected against abuse from the occupant.¹³⁵

Since refugees are nationals of the occupying power, they do not fall within the definition of ‘protected persons.’ However, conscious of the necessity to protect individuals who, refugees, had relinquished all links with their country of origin, the drafters of the Geneva Conventions adopted a provision to remedy the inconsistency.¹³⁶ According to Article 70(2) of the Fourth Geneva Convention, nationals of the occupying power, before the outbreak of the hostilities have sought

¹³¹ *Id.* at 167

¹³² *Id.* at 168

¹³³ *Ibid.*

¹³⁴ *Id.* at 169

¹³⁵ Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

¹³⁶ M’elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 174 (Cambridge University Press, New Delhi, 1st edn., 2012)

refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted, or deported from the occupied territory. They will be except arrested, prosecuted, convicted, or deported from the occupied territory for an offence committed after the outbreak of hostilities, or offence committed before the outbreak of hostilities under common law. According to the law of the occupied State, would have justified extradition in a time of peace.¹³⁷

This article is the only provision in the whole of the Geneva Conventions, which directly departs from the fundamental principle of non-interference in a state's internal affairs and aims to protect an individual against his nation. Article 70(2) is based on the idea that the right to asylum enjoyed by refugees before the occupation began 'must continue to be respected by their home country when it takes over control as Occupying Power in the territory of the country of asylum.'¹³⁸

The occupying power may not arrest, prosecute, convict, or deport refugees from the occupied territory. The purpose of this article is to prevent trials for political or military offences and instances of racial or religious discrimination.¹³⁹ However, this rule contains some limitations.

First, the occupying authorities are permitted to arrest, prosecute, convict, or deport refugees when they commit an offence against their country of origin after the outbreak of hostilities. The second exception concerns the arrest, prosecution, conviction, or deportation of refugees for ordinary common offence, committed before the war, provided they are extraditable under the law of the occupied state in time of peace. The purpose of this exception is to draw a clear distinction between genuine refugees and common criminals who sought refuge in the occupied territory to avoid the consequences of their actions.¹⁴⁰

In addition to these two exceptions, Article 70(2) is only applicable to nationals of the occupying power who sought refuge 'before the outbreak of the hostilities.'

¹³⁷ GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949, art. 70(2), *available at*:

https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf (last visited on January 10, 2019)

¹³⁸ *Supra* note 136 at 159.

¹³⁹ *Id.* at 175

¹⁴⁰ *Ibid.*

Articles 70(2) and 44 of the Civilians Convention are complementary. Article 44 deals with the refugees' relations with the authorities of the country of asylum, Article 70(2) govern their position vis-à-vis their country of origin when it becomes the occupying power.¹⁴¹ Like Article 44, which is restricted to measures of control towards refugees, Article 70(2) does not cover all situations affecting refugees in occupied territory. It offers even limited protection, as it deals with arrest, prosecution, conviction, and deportation. No reference is made to other measures, which may be taken against refugees, such as the confiscation of property or denial of religious freedoms.

Nevertheless, under Article 73 of the First Protocol, refugees in the occupied territory now benefit from the protection of the whole of the Fourth Geneva Convention. Among other improvements, refugees will, therefore, enjoy the immunity provided by the first paragraph of Article 70 against arrest, prosecution, or conviction for acts committed before the occupation, except for breaches of the laws and customs of war.¹⁴² Besides, Article 73 does not allow refugees to subject to violence,¹⁴³ torture,¹⁴⁴ and collective sanctions or reprisals against people or property.¹⁴⁵ They may be

¹⁴¹ *Id.* at 176

¹⁴² *Ibid.*

¹⁴³ GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949, art. 27 stated that: Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity

¹⁴⁴ ART. 32. — The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

¹⁴⁵ ART. 33. — No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

entitled to receive individual relief consignments.¹⁴⁶ They should not be forcibly displaced or deported from the occupied territory.¹⁴⁷ This provision is an essential safeguard for refugees against deportation in the case of the occupying power being an ally of their country of origin.¹⁴⁸

The Geneva Convention is also prohibited from the *refoulement* of refugees. Article 45(4) of the Fourth Geneva Convention provides that: In no circumstance shall a protected person be transferred to a country where he or she has reason to fear persecution for his or her political opinion or religious beliefs.

This provision establishes, in international humanitarian law, the fundamental principle of *non-refoulement*, according to which 'no refugee shall return to any country where he or she is likely to face persecution, other ill-treatment or torture.'¹⁴⁹

The cornerstone principle of international refugee law has enshrined in Article 33(1) of the 1951 Refugee Convention, which declares that no Contracting State shall expel or return a refugee in any manner. Whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.

The wording corresponds to the definition of "refugee" in Article 1A (2) of the Convention. It has been argued that the nature of the rejection threat should be clarified, including an unrestricted risk of persecution and threats to life, physical integrity or freedom, and their use in situations of widespread violence and armed conflict.¹⁵⁰ Article 45(4) prohibits *refoulement* only when the protected person has reason to fear political or religious persecution.

According to the 1951 Refugee Convention, the principle of *non-refoulement* protects a refugee from expulsion or return if his life or freedom is threatened based on race, religion, nationality, a particular social group, or political opinions. While the

¹⁴⁶ ART. 62. — Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

¹⁴⁷ Geneva convention relative to the protection of civilian persons in time of war, 1949, art. 49

¹⁴⁸ *Id.*, art. 51

¹⁴⁹ Goodwin-Gill and McAdam, *Refugee in International Law* 201 (Oxford University Press, New Delhi, 3rd edn., 2007)

¹⁵⁰ M'elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 176 (Cambridge University Press, New Delhi, 1st edn., 2012)

international human rights law prohibits the transfer of people to risk being tortured or subjected to cruel, inhuman, or degrading treatment or punishment.¹⁵¹

However, Article 45 paragraph 4 is supplemented by Article 45 paragraph 3, which although not expressly referring to the non-refoulement. Article 45(3) not only prohibits the transfer of a protected person to a state that is not a party to the Fourth Geneva Convention, but also to one that is unwilling or unable to apply and respect all the protections in the Convention.¹⁵²

Provided that if refugees are not directly participating in hostilities, refugees in non-international armed conflicts are protected as civilians and, as such, benefit from the fundamental guarantees of humane treatment, as set out in Common Article 3 of the Geneva Conventions and elaborated in Article 4 of Protocol II. Thus, refugees ‘shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria.’¹⁵³

In particular, they shall not be subjected to acts of violence, torture, and other cruel treatments. The prohibition of collective punishment in Article 4(2)(b) of Protocol II is also relevant for refugees, as it prohibits the imposition of sentence on an entire group of persons for acts that they are not personally committed.¹⁵⁴

As the above example shows, refugees have protection from multiple displacements and forced repatriation to their country of origin by government forces or armed rebel groups. As civilians, all refugees on the territory of a country should have the right to protection under the four Geneva Conventions, their protocol, and customary international law, and should prohibit violence against life and individual freedom, especially cruel treatment and torture, and human rights violations, personal dignity, including degrading and degrading treatment.

¹⁵¹ *Id.* at 181

¹⁵² *Ibid.*

¹⁵³ *Id.*, at 156.

¹⁵⁴ *Ibid.*

3.4 INTERNATIONAL REFUGEE LAW

For over 68 years, the 1951 Convention relating to the Status of Refugees (1951 Convention), complemented by its 1967 Protocol, has served as the foundation of the refugee protection regime. It provides a universal code for the treatment of refugees uprooted from their countries because of persecution, including serious human rights violations or other forms of serious harm, as well as in the context of violence or armed conflict. Its key elements include a definition of the term refugee (with provisions for inclusion, exclusion, and cessation); a guarantee of protection against refoulement; and a set of minimum civil, political, economic, social, and cultural rights. The General Assembly is complemented by the resolution, which created UNHCR, and made it functionally responsible for providing international protection and seeking durable solutions for refugees, as well as in regional instruments. The 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees and the Common European Asylum System, the 1951 Convention, and its 1967 Protocol have been lifesaving instruments for some of the world's most vulnerable people. The centrality of the 1951 Convention and its 1967 Protocol to the refugee protection regime has reinforced in two seminal texts: the 2016 New York Declaration for Refugees and Migrants, and the Global Compact on Refugees, affirmed by the General Assembly in 2018.¹⁵⁵

Refugee protection is an international obligation to States in International Law because of their membership of the United Nations and signature or accession to Refugee Instruments. Refugee protection begins in the form of admission of persons to the territory of a State and granting asylum, followed by the determination of status by complying with the principle of natural justice.¹⁵⁶

¹⁵⁵ Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Reissued Geneva, February 2019,

¹⁵⁶ V. Seshaiiah Shasthri, "Application of International Human Rights Principles and Standards for the Effective Refugee Protection" 5 *ISIL YEARBOOK OF IHRL* 174 (2005)

3.4.1 Statute of the Office of the United Nations High Commissioner for Refugees, 1950

The General Assembly adopted statutes, namely Statute of the Office of the United Nations High Commissioner for Refugees, according to Resolution 428 (V) on 14 December 1950.¹⁵⁷ The mandate of the UNHCR, as stated in Article 1 of chapter I of the UNHCR statutes, includes the task of finding durable solutions for recognized refugees.¹⁵⁸

The statutes of the UNHCR give the responsibility on UNHCR to provide international protection to refugees and to seek a permanent solution for the problem of refugees by assisting the government and subject to the approval of the government concerned, private organizations to facilitate the voluntary repatriation of refugees or their assimilation within new national communities.¹⁵⁹

The detailed function of UNHCR related to the protection of refugees has been discussed further in heading international institutions/bodies/organizations for refugee protection.

There are three options available as permanent solutions and one temporary solution to the refugee problem. Article 1 of the UNHCR statutes above explicitly includes the permanent solutions of voluntary repatriation and local assimilation as part of the UNHCR mandate. The third permanent solution is resettlement in a third country. The temporary solution is that of settlement in so-called protective zones, which are camps of refugee holding areas, often close to international borders.¹⁶⁰

The permanent solution, which is known as durable solution, discussed as follows:

¹⁵⁷ Statute of the office of the united nations high commissioner for refugees, *available at*:

<https://www.unhcr.org/4d944e589.pdf> (last visited on December 15, 2019)

¹⁵⁸ The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

¹⁵⁹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 489-490(Oxford University Press, New Delhi. 3rd edn., 2007)

¹⁶⁰ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 185(Oxford University Press, New Delhi, 1st edn., 2008)

A. Voluntary Repatriation

Repatriation is now commonly regarded by UNHCR as the solution of choice where the return is genuinely voluntary and sustainable. In the situation where repatriation has undertaken, it is vital to ensure that return is genuinely voluntary; to repatriate otherwise would involve a breach of the principle of non-refoulement in violation of international law.¹⁶¹ The UNHCR is obliged to facilitate voluntary repatriation by organizing agreements between its offices and rehabilitation for returned refugees as well as covering the costs of return and assisting in it. In countries where voluntary repatriation has undertaken, the UNHCR carries out the return programme under the framework for a durable solution or 4Rs approach proposed by the high commissioner genuinely voluntary repatriation, reintegration, rehabilitation, and reconstruction.¹⁶²

B. Local Assimilation

However, potentially a permanent solution to refugee status, local assimilation is a challenging and complicated process involving social, economic, and cultural adaptation on the part of both the refugee and the host community. It is also dependent on legal recognition within the country of asylum, which, as UNHCR recognizes, can only be done with the agreement of the government of the host country concerned.¹⁶³

Where the possibility of voluntary homecoming has not been seen shortly, the best solution would be to integrate the refugee into the host country itself.

C. Third Country Resettlement

If refugees do not return to their country of origin and do not have a refugee who can live safely in the country, the only solution is that they will have to be relocated to a third country. The feasibility of resettlement is dependent on the willingness and ability of third countries to accommodate refugees. In implementing resettlement as a solution, the UNHCR works in partnership with central and local authorities in the country concerned. Criteria used by the UNHCR in determining resettlement as an appropriate solution include the person under consideration being at risk in the state of refuge or having special needs warranting consideration of

¹⁶¹ *Id.* at 186.

¹⁶² *Id.* at 187

¹⁶³ *Id.* at 188

resettlement. Particular attention is paid to people with special needs in terms of legal, medical, or physical protection, people who have survived violence and torture. These are considered being at risk of violence and aggression, family reunification, children and adolescents, older refugees, and refugees without them have prospects for local integration.¹⁶⁴

3.4.2 Convention Relating to the Status of Refugee, 1951 and its Protocol of 1967

The primary standard of refugee protection today is the convention relating to the Status refugee protection instrument of a universal character. It was an instrument of somewhat limited intent, addressed mainly to the question of the status of refugees, not to solutions or causes. While it traced its origins broadly to human rights principles, it was more about states' responsibilities than individuals' rights.¹⁶⁵ The convention sets the minimum standards of treatment of refugees, including the necessary rights to which they are entitled.¹⁶⁶

The essential purpose of the convention is to provide for a legal regime, which ensures protection to a group of persons who are in a particularly vulnerable situation.

The 1951 Convention Relating to the Status of Refugees was adopted by the General Assembly of the United Nations resolution 429(V) in a Conference of Plenipotentiaries¹⁶⁷ on 28 July 1951 in Geneva and entered into force on 22 April 1953. It was drafted between 1948 and 1951 by a combination of United Nations organs, ad hoc committees, and a conference of plenipotentiaries, at which twenty-six states were represented.¹⁶⁸

¹⁶⁴ M'elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 186 (Cambridge University Press, New Delhi, 1st edn., 2012)

¹⁶⁵ Erika Feller, "The Evolution of the International Refugee Protection Regime", 5 *Wash. UJL. & Pol'y* 131 (2001), available at: http://openscholarship.wustl.edu/law_journal_law_policy/vol5/iss1/11 (last visited on May 1, 2019)

¹⁶⁶ Human Rights and Refugees, *available at:* www.ohchr.org/Documents/Publications/FactSheet20en.pdf (last visited on May 1, 2019)

¹⁶⁷ Guy S. Goodwin Gill & Jane Mc Adam, *The Refugee in International law* 569 (Oxford University Press, New York, 3rd edn., 2007).

¹⁶⁸ John Vrachnas, Kim Boyd, *et. al. Migration and Refugee Law: Principles and Practice in Australia*, 173 (Cambridge University press, New York, 1st edn., 2005).

The 1951 Convention is the foundation for international practices of refugee protection mechanisms in various parts of the world. The preamble of the UN convention relating to the status of refugees in 1951 provides a concept of Burden Sharing. The preamble of the 1951 refugee convention states that the grant of asylum may place unduly heavy burdens on specific countries and that a satisfactory solution of a problem of which the United Nations was recognized, the international scope and nature cannot, therefore, be achieved without international co-operation.¹⁶⁹ It is interpreted as requiring two primary sorts of action. The first has been providing financial assistance for countries of asylum- usually less developed states to help them with the care and maintenance of refugees, mainly through funding the activities of the United Nations High Commissioner for refugees in countries of asylum. The second type of action is involved in what might be termed physical as opposed to financial burden sharing, i.e., the dispersal of refugees among states.¹⁷⁰

The principle of international solidarity and burden-sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of standards of treatment of refugees, support to states in protecting and assisting refugees, the provision of durable solutions, and the support of international bodies with responsibilities for the protection and assistance of refugees.¹⁷¹

Burden sharing for refugees requires a balancing of the rights of the state to control their policies regarding receiving the resettlement of new populations with their global duties under international law. The existence of legal and political instruments stressing the importance of burden sharing reflects a commitment to creating a cooperative partnership to deal with refugee issues within the international community.¹⁷²

However, there is a need to formalize arrangements for the practical implementation of a burden-sharing partnership, which has generally thus far been carried out on an ad hoc basis.

¹⁶⁹ The United Nations convention relating to the status of refugees, 1951, Preamble, para 4

¹⁷⁰ Christina Boswell, Burden sharing in the new age of immigration, *available at*: www.migrationpolicy.org (last visited on December 10, 2019)

¹⁷¹ The burden sharing concept is also included in the 1987 Addendum to the 1966 Bangkok Principles Concerning the treatment of refugees, Paragraph III of the Addendum, 1987

¹⁷² *Human Rights and Humanitarian Law: Developments in Indian and International Law* 189(Oxford University Press, New Delhi, 1st edn., 2008)

The preamble of this Convention at the outset refers to the equality principle enshrined in the Universal Declaration of Human Rights. A wish was expressed that, all states, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem. Article I of this convention defines the term "refugee." Article 2 of the Convention imposes a general obligation on refugees in conformity with measures and laws taken for the maintenance of public orders. Article 3 puts a burden on contracting states to treat the refugees without any discrimination as to race, religion, or country of origin.

The 1951 Refugee Convention was the first instrument for refugee protection to include an essential provision on non-discrimination. The provision stated, "The contracting parties shall apply the provisions of this Convention to refugees without discrimination as to race, religion, and country of origin. This particular provision was inspired by Article 2 of the Universal Declaration of Human Rights; however, the protection against discrimination in the 1951 Refugee Convention is limited in that it only prohibits discrimination between refugees."¹⁷³ There are several essential views of Article 3 of the 1951 Refuge Convention the non-discrimination norm relates only to the provisions of the 1951 Refugee Convention; as per this norm states cannot differentiate between racial, religious, or national groups among refugees; and the grounds on which non-discrimination is based are exhaustive.¹⁷⁴

Chapter II of this convention discussed the juridical status of the refugee,¹⁷⁵ and the refugee's status must be governed by the law of the country of residence and, if not resident, by the law of the country of residence.¹⁷⁶ In granting him right to property,¹⁷⁷ artistic rights¹⁷⁸ and right of forming the association,¹⁷⁹ he is accorded as

¹⁷⁴ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 112(Palgrave Macmillian, Singapore. 2017)

¹⁷⁵ The Convention relating to the Status of refugees, 1951 Chapter II

¹⁷⁶ *Id.*, art. 12

¹⁷⁷ *Id.*, art. 13, stated that: the contracting state shall accord to a refugee treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regard the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contract relating to movable and immovable property.

¹⁷⁸ *Id.*, art. 14 stated that, in respect of the protection of industrial property, such as inventions, designs, or models, trademark, trade name, and of right in literary, artistic, and scientific works, a refugee

favourable treatment as possible, in any event not less favourable than the granted to aliens generally in the same circumstances. Article 6 of this convention defines the term in the same conditions.

The provisions related to "access to courts" as contained in the 1951 refugee Convention uphold the right to a legal remedy for refugees.¹⁸⁰ It is sometimes the case that despite having the right to access the courts, refugees lack the necessary financial means in terms of *caution judicatum solvi* and require legal aid. Thus, this provision is an attempt to address such situations. All three provisions of Article 16 of the 1951 Refugee Convention extend to refugees the right to legal remedy by the court, for which purpose they should have assimilated to nationals of the country in which they have their habitual residence.¹⁸¹ Article 16 should have included some additional attributes within its scope, such as the right to a free and fair hearing, the assistance of an interpreter, the right against self-incrimination, and subsequently forth.¹⁸²

Chapter III of the convention deals with 'Gainful Employment,' the contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.¹⁸³

The 1951 Refugee Convention codified three substantial provisions concerning refugees earning a livelihood. The convention relating to the status of refugee, 1951, has imposed a mandatory obligation on the state to allow refugees to engage in wage-earning employment.¹⁸⁴ The provision of self-employment of

should be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other contracting state, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

¹⁷⁹ *Id.*, art. 15 stated that, as regard non-political and non-profit making association and trade unions contracting states shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to the nationals of a foreign country, in the same circumstances.

¹⁸⁰ *Id.*, art. 16(1) A Refugee shall have free access to the court of law on the territory of all contracting state.

¹⁸¹ Shuvro Prosun Sarker, *Refugee Law in India: the Road from Ambiguity to Protection* 113(Palgrave Macmillan, Singapore, 2017)

¹⁸² *Ibid.*

¹⁸³ The Convention relating to the Status of refugee, 1951, art. 17(1)

¹⁸⁴ *Ibid.* art. 17

refugees is codified in this Convention.¹⁸⁵ It is the first time that a refugee protection instrument has included a provision on self-employment to supplement the need of refugees for a wage-earning method apart from Article 17. Article 19 is far more progressive about extending the possibilities of employment for refugees as it includes the practice of liberal professions.¹⁸⁶ In this provision, the word "profession" suggests that the person concerned must possess specific qualifications from some institution. On the other hand, the term "liberal" means that the person concerned acts alone, not as a representative of the state or as an employee.

Under chapter IV of this convention, the welfare program is provided by the UN refugee convention like rationing, housing, education, public relief, labour legislation, and social security. Article 20 obligates states with rationing systems to include refugees in the scheme. Article 20 stated, "Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees should have accorded the same treatment as nationals."¹⁸⁷ The provision related to housing necessitates states to provide refugees with similar housing assistance or access to housing schemes as provided to nationals.¹⁸⁸ The spirit of Article 26(1) of the Universal Declaration of Human Rights, has reflected in Article 22 of the 1951 Refugee Convention, obligates states to treat refugees as nationals in cases of elementary education.¹⁸⁹ This article also provides for the remission of fees in non-elementary education, awarding of scholarships, and recognition of foreign degrees and diplomas in cases of admission.

Further, the 1951 Refugee Convention added Article 23 for the provision of public relief to refugees¹⁹⁰ and Article 24 for the inclusion of refugees in labour protection and social security schemes. The provisions discussed in this section are of

¹⁸⁵*Id.*, art. 18

¹⁸⁶*Id.*, art. 19

¹⁸⁷*Id.*, art. 20

¹⁸⁸*Id.*, art. 21, as regards housing, the contracting states, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible, and in any event not less favourable than that accorded to aliens generally in the same circumstances.

¹⁸⁹*Id.*, art. 22(1)

¹⁹⁰*Id.*, art. 23, the contracting states shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

great importance for the day-to-day life of a refugee in the country of refuge, along with the provision dealing with employment; without these fundamental rights to access, the lives of refugees could not have protected in the land of asylum.¹⁹¹

Article 26 grants refugees' freedom of movement by declaring that they have the right to choose their place of residence and move freely within their territory, subject to any provisions that apply to foreigners in general in the same circumstances. Article 31 provides safeguard to refugees who illegally enter an area when his life or freedom had been threatened in the country from which he has migrated. He is not to be punished only due to such illegal entry provided within a reasonable period; he shows good cause for his unauthorized entry. Article 32 states that a refugee shall not be expelled and save on the grounds of national security or public order and that his expulsion shall only be in pursuance of a decision reached under due process of law. Under article 35, each member state is asked to provide information and statistical data concerning the condition of refugees and the implementation of this convention.¹⁹²

The prohibition against *refoulement* is at the centre of all the provisions of the 1951 Refugee Convention. The provision states that "no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would have threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁹³ This provision becomes a part of customary international law, which means it applies to a refugee who is present in the territory of any state irrespective of whether the entry of the refugee was lawful or unlawful. This provision in the 1951 Refugee Convention is further supplemented by Article 31, which stipulates that no penalties should be imposed on a refugee for illegal entry or presence in the country of refuge. However, in cases of expulsion of refugees, the state has to follow due process, and removal is permissible only on the grounds of national security or public order. Another essential provision regarding administrative measures is to provide refugees with assistance in

¹⁹¹*Id.*, art. 24

¹⁹² Sanjay Parikh, "Refugees in the International and National Framework", 1 *ISIL Year book of international Humanitarian Law and Refugee Law* 266 (2001)

¹⁹³ The UN Convention relating to the status of refugee, 1951. Art. 33(1)

assimilating in the country of refuge, and becoming naturalized and thus to no longer have the status of refugee.¹⁹⁴

A. Principle of Non-Refoulement

The principle of non-refoulement is the cornerstone of the international refugee law that means no refugee should return to any country where he or she is facing persecution or torture. The term non-refoulement comes from the French word 'refouler,' which means to drive back or repel. Refoulement should distinguish from the processes of expulsion and deportation, which refer to the legal means by which a person may be removed from a state.¹⁹⁵

The principle of non-refoulement applies to any form of forcible removal, including extradition, exclusion, deportation, unceremonious transfer or renditions, and non-admission at the border.¹⁹⁶ The principle of non-refoulement arisen the first time in Article 3 of the 1933 Convention Relating to the International Status of Refugees and the contracting parties to the Convention extended 'not to return refugees across the frontiers of their country of origin. The principle again found use in the 1936 Provisional Arrangement Concerning the Status of Refugees Coming from Germany. Unfortunately, these agreements did not receive full recognition, being signed by only eight and seven states, respectively.¹⁹⁷

By the close of World War II, it was said that non-refoulement has been observed to gain significant acceptance in different states. After the war, a large population has spread throughout most areas of Europe, especially in the western regions. The United Nations (UN) in February 1946 expressly accepted that refugees or displaced persons who had expressed their valid objections to going back to their country of origin should not be forced to do so. In the same year, the International Refugee Organization (IRO) was established with the responsibility of providing

¹⁹⁴ Shuvro Prosun Sarker, *Refugee Law in India: the Road from Ambiguity to Protection* 116(Palgrave Macmillan, Singapore. 2017)

¹⁹⁵ *Human Rights and Humanitarian Law: Developments in Indian and Indian Law* 177(SAHRDC, Oxford University Press, New Delhi. 1st edn., 2008)

¹⁹⁶ Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, *available at*: <https://www.unhcr.org/4d9486929.pdf> (last visited on March 15, 2019)

¹⁹⁷ M. Rafiqul Islam and Jahid Hossain Bhuiyan, *An Introduction to International Refugee Law* 101(Martinus Nijhoff Publication, Leiden- Bostan, 2013)

solutions to displaced people who had to undergo this problem after the war was over.¹⁹⁸

The United Nations had appointed an Ad hoc Committee on Refugees and Stateless Persons in 1949, which proposed that no Contracting State shall expel or return a refugee in any manner where his life or freedom would threaten on account of his race, religion, nationality, or political opinion.¹⁹⁹

Article 45 of the 1949 Geneva Convention IV related to the Protection of Civilian Persons in Time of War states that a protected person shall not be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.²⁰⁰ Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) also incorporates the principle of non-refoulement. The United Nations General Assembly (UNGA) in 1950 established the UNHCR. The mandate of the UNHCR included overseeing protection activities; for example, the UNHCR was responsible for ensuring that no refugee is returned to a country in which he will be in danger.²⁰⁰

The principle of non-refoulement was embodied in the 1951 refugee convention. Article 42(1) of the Refugee Convention confirms that the provision relating to *non-refoulement*, contained in Article 33, is non-derogable.²⁰¹ Article 33 of the convention relating to the status of refugee, which is official, recognizes the rights of non-refoulement, which stated that:

*“No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”*²⁰²

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Id.* at 102

²⁰¹ Aoife Duffy, Expulsion to Face Torture? Non-refoulement in International Law, *available at*: <http://ijrl.oxfordjournals.org/> (last visited on March 22, 2019)

²⁰² The UN Convention Relating to the Status of Refugee, 1951

The protection against rejection provided for in Article 33 (1) applies to all refugees under the 1951 Convention and the 1967 Protocol.²⁰³ It does not come within the exclusion provisions.²⁰⁴ The doctrine of non-refoulement does not depend on any formal application of the determination of refugee status by a state or international organization.²⁰⁵

A person does not become a refugee because of recognition but is recognized because he is a refugee. The principle of non-refoulement applies not only to recognized refugees but also to those whose status is not declared. The principle of non-refoulement is also particularly relevant for asylum seekers.²⁰⁶

The non-refoulement obligation under Article 33 of the 1951 Convention is binding on all State parties as well as any other person or entity acting on its behalf and constitutes an essential and non-derogable component of international refugee protection. The fundamental importance of the obligation not to return refugees at risk of persecution reflected in Article 42 (1) of the 1951 Convention and Article VII (1) of the 1967 Protocol, listed in Article 33 of the 1951 Convention, in which none reservations have approved. In several findings since 1977, the Executive Committee

²⁰³ The term “refugee” means, any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it”.

²⁰⁴ Exclusion means denial of refugee status to persons and who are not eligible for protection under the Convention because:

- they are receiving protection or assistance from a United Nations agency other than United Nations Higher Commissioner for Refugees (first paragraph of Article 1D of the 1951 Convention); or
- they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or
- they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

²⁰⁵ Report of the United Nations High Commissioner for Refugees, paras 22–23, UN doc. E/1985/62 (1985);

²⁰⁶ Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, *available at*: <https://www.unhcr.org/4d9486929.pdf> (last visited on March 15, 2019)

of the UNHCR has also confirmed the fundamental and non-derogatory character of the doctrine of non-refoulement. Similarly, the General Assembly has also called upon states to respect the basic principle of non-refoulement.²⁰⁷

The non-refoulement obligations concerning refugees are also found in regional treaties, especially the Convention Governing Specific Aspects of Refugee Problems in Africa, 1969,²⁰⁸ and the American Convention on Human Rights, 1969.²⁰⁹

Along with this, the 1981 African Charter on Human and Peoples' Rights (ACHPR), in its Article 12(3), states; 'Every individual shall have the right, when prosecuted, to seek and obtain asylum in other countries following the law of those countries and international conventions.'²¹⁰ The Convention against Torture, 1984, delivers that where there are sufficient grounds to believe that he is at risk of being tortured, no state party shall expel, return or extradite such person to another state.²¹¹

The two countries of the Central American states, Panama and Mexico, have simultaneously declared through the Cartagena Declaration on Refugees in 1984 that the doctrine of non-return is a basis for international protection of refugees. Moreover, it has further stated that this principle is essential concerning refugees and that the current state of international law should be accepted as *jus cogens*.²¹²

Article 33 (2) of the 1951 Refugee Convention gives an exception to the right of non-return. If the refugee is a threat to the security of that country in which he is living, and the final verdict has convicted him of a particularly serious crime, or it

²⁰⁷ *Ibid.*

²⁰⁸ The Convention states that '[n]o person shall be subjected by a Member State to measures such as ... expulsion, which would compel him to return ... in a territory [where the forces that drive him away might once again threaten] his life, physical integrity or liberty.

²⁰⁹ American Convention on Human Rights, 1969, art. 22(8), It provides: 'In no case may an alien be deported or returned to a country, ... if in that country his right to life or personal freedom is in danger of being violated.

²¹⁰ African Charter on Human and Peoples' Rights, adopted 26 June 1981, OAU Doc. CAB/LEG/67/3, Rev. 5 entered into force 21 October 1986.

²¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, art. 3(1),

²¹² Cartagena Declaration on Refugees, OAS Ser. L/V/II. 66, doc. 10, rev. 1 (22 November 1984), at Section III, para 5.

represents a threat to the community of that country, then he will not get the benefit of the right of non-refoulement.²¹³

Application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention.²¹⁴ The provisions of Article 33(2) of the 1951 Convention do not affect the host State's non-refoulement obligations under international human rights law, which permit no exceptions. Thus, the host State would block from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture.²¹⁵ Similar considerations apply concerning the prohibition of refoulement to other forms of irreparable harm.²¹⁶

The right of non-refoulement under customary International law, however, extends beyond refugees recognized under the 1951 convention definition and is enforceable against all states, whether signatories to the 1951 convention or not, under its status as a peremptory norm. Practices in developing states have allowed an expanded scope of non-refoulement. Still, recently, some states have tended towards using a third tactic to prevent refugees from even reaching their borders. Policies of non-*'entrée* increasingly bypass the principle of non-refoulement.' These policies are directed not at refugees at the border. Still, they have been made to keep possible immigrants at bay using instruments such as strict visa requirements, the refusal to accept applications made from international zones, safe country of origin, and third-country rules.²¹⁷

²¹³ M. Rafiqul Islam and Jahid Hossain Bhuiyan, *An Introduction to International Refugee Law* 119(Martinus Nijhoff Publication, Leiden- Bostan. 2013)

²¹⁴ Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, *available at*: <https://www.unhcr.org/4d9486929.pdf> (last visited on March 15, 2019)

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Human Rights and Humanitarian Law: Developments in Indian and Indian Law* 178(SAHRDC, Oxford University Press, New Delhi. 1st edn., 2008)

3.4.3 OAU Convention on the Specific Aspects of Refugee Problems in Africa, 1969

According to this convention, any person is entitled to get status of refugee, if he has fled from his country based on civil disturbances, widespread violence, and war that are parties to the African Convention, even if he does not have a well-founded fear of persecution for one of the reasons of the 1951 refugee convention.

The OAU Convention inspires, “The grant of asylum to refugees is a peaceful and humanitarian act” that is not to be considered as an “unfriendly act” by any Member State of the OAU (now the African Union).²¹⁸ Besides, it requires state parties to respond appropriately to lighten the burden of a State granting asylum “in a spirit of African solidarity and international cooperation.”

Where a refugee does not get the right to live in any country of refuge, he may provide temporary residence in any country of asylum in which he has previously presented himself as a refugee where arrangements are pending for their rehabilitation under the OAU Convention.²¹⁹

The member of the state shall issue to refugees lawfully staying in their territories travel documents under the United Nations Convention relating to the status of a refugee according to Article III.²²⁰ The provisions of this Convention apply to all refugees, such as those without caste, religion, nationality, members of a particular social group, or political opinion.²²¹ The member of the state shall also use his best endeavours consistent with their respective legislations to receive refugees to secure settlement of those who for well-founded fear of persecution are unable or unwilling to return to their country.²²²

3.4.4 Cartagena Declaration on Refugees, 1984

The Cartagena Declaration on Refugee, adopted in 1984 by a colloquium of government representatives, and distinguished jurists were convened in Cartagena, Colombia, to discuss refugee protection in Latin America. The significance of the

²¹⁸ Organization of African Union Convention on the specific aspects of Refugee problems in Africa, 1969, art. II(2)

²¹⁹ *Id.*, art. II(5)

²²⁰ *Id.*, art. VI(1)

²²¹ *Id.*, art. IV

²²² *Id.*,art. II(1)

1951 Convention and its 1967 Protocol was endorsed by the Cartagena Declaration and adopted the principle of non-refoulement, as well as the importance of international cooperation to solve refugee problems in Latin America.²²³ It has taken a detailed definition of refugees along with the definition of refugees given in the 1951 Convention.

The Cartagena Declaration includes in the definition of a refugee who has fled their country, “because their lives, safety or freedom have threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”²²⁴

Although the Declaration is not a legally binding instrument, still most Central and South American countries apply their definitions, and many have incorporated it into their legislation. The Organization of American States (OAS), the UN General Assembly, and UNHCR’s Executive Committee have all endorsed the Cartagena Declaration.

Since 1984, States in Central and Latin America have adopted three Declarations on essential anniversaries of the Cartagena Declaration, including most recently, the 2014 Brazil Declaration and Plan of Action.

The definition of the Cartagena Declaration on refugees was incorporated into national legislation in the Latin American States. Although the Cartagena Declaration is non-binding, by mid-2016, the expanded refugee definition it contains was incorporated into domestic law in 14 States: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay. Courts in Costa Rica and Ecuador respectively have ruled that the local definition forms part of national ordinances and that it should have been included in the national legal framework.²²⁵

²²³Frances Nicholson and Judith Kumin., *A guide to International Refugee Protection and Building State Asylum Systems* 20 (Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, 2017)

²²⁴ Cartagena Declaration on Refugee, 1984, part iii, Para 3

²²⁵Frances Nicholson and Judith Kumin., *A guide to international refugee protection and building state asylum systems* 21 (Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, 2017)

3.4.5 New York Declaration for Refugees and Migrants, 2016

On 19 September 2016, the United Nations General Assembly hosted a high-level Summit for Refugees and Migrants that aimed at improving how the international community responds to large movements of refugees and migrants. At the Summit, all 193 Member States of the United Nations unanimously adopted the New York Declaration for Refugees and Migrants (Resolution 71/1). The New York Declaration for Refugees and Migrants addresses the situations faced by refugees and by migrants. There are strong commitments that apply equally to refugees and migrants (on topics including racism, xenophobia, and human trafficking), as well as separate commitments for refugees and migrants. The New York Declaration lays the groundwork for further action to improve the situation of refugees and migrants by laying out a process for the development of two ‘global compacts’, one on refugees and the other for safe, orderly, and regular migration, which is to be accepted in late 2018.²²⁶

In adopting the New York Declaration, Member States:²²⁷

- expressed profound solidarity with those who are mandatory to flee;
- reaffirmed their obligations to respect the human rights of refugees and migrants fully;
- agreed that protecting refugees and supporting the countries that shelter them have shared international responsibilities and must be accepted more equitably and predictably;
- pledged robust support to those countries affected by large movements of refugees and migrants;
- agreed upon the core elements of a Comprehensive Refugee Response Framework; and
- agreed to work towards the adoption of a global compact on refugees and a global compact for safe, orderly, and regular migration.

²²⁶ THE NEW YORK DECLARATION: UNHCR, the UN Refugee Agency, *available at*: <https://www.unhcr.org/584689257.pdf> (last visited on October 22, 2019)

²²⁷ New York Declaration for refugee and migrants- Comprehensive refugee response framework, *available at*: <https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html> (last visited on December 14, 2019)

3.4.6 Leaders' Summit on Refugees, 2016

Following the adoption of the New York Declaration, the UN Secretary-General, and seven Member States on 20 September 2016 co-hosted the Leaders' Summit on Refugees to increase global burden sharing for refugees. At the summit, 47 States committed to legal or policy changes to enhance refugees' access to education, lawful employment, and social services; substantially increase humanitarian aid; and expand access to third-country solutions, including through resettlement or complementary pathways.²²⁸

3.4.7 The Comprehensive Refugee Response Framework, 2018

The New York Declaration sets out the critical elements of a Comprehensive Refugee Response Framework (CRRF) to apply to large-scale movements of refugees and protracted refugee situations. The CRRF focuses on the importance of supporting those countries and communities that host a large number of refugees, promoting the inclusion of refugees in host communities, ensuring the involvement of development actors from an early stage, and developing a 'whole-of-society' approach to refugee responses. Its four key objectives are to:

1. Ease the pressures on host countries and communities;
2. Enhance refugee self-reliance;
3. Expand third-country solutions; and
4. Support conditions in countries of origin for return in safety and dignity.

Since the Declaration was adopted, UNHCR has been working with States and all other relevant stakeholders to develop and initiate the practical application of the CRRF in several countries. As of February 2018, the CRRF has formally applied in a dozen countries, including two regional contexts in Africa and Central America.²²⁹

3.4.8 The Global Compact on Refugees, 2018

In addition to setting out the Comprehensive Refugee Response Framework, the New York Declaration calls upon the United Nations High Commissioner for Refugees to propose a 'global compact on refugees' in its annual report to the United Nations General Assembly in 2018.

The global compact on refugees is the first draft of which was released at the end of January 2018 and will undergo formal consultations with the Member States

²²⁸ *Ibid.*

²²⁹ *Ibid.*

until July 2018. The Comprehensive Refugee Response Framework sets out practical measures that can be taken by a wide range of stakeholders to enhance international cooperation in response to large movements of refugees and protracted refugee situations and to ensure a more equitable and predictable sharing of the burden and responsibility for protecting refugees.²³⁰

The New York Declaration also provides for the negotiation of a global compact for safe, orderly, and regular migration, which is to adopt in 2018. Although they are to run at the same time, the General Assembly has directed that the two processes leading to the two global compacts are to be “separate, distinct and independent.”²³¹

The migration compact will enhance coordination on international migration and present a framework for comprehensive international cooperation on migrants and human mobility. UNHCR has been told, in the New York Declaration, to contribute to this process and to help in the elaboration of non-binding principles for migrants in vulnerable situations. Issues, where UNHCR is providing supports, include responses to flows of refugees and migrants, the protection of migrants in countries in crisis and other unsafe conditions, and displacement due to climate change and natural disasters.²³²

UNHCR has been working closely with various stakeholders on issues of complementarity between the two global compacts, particularly with crosscutting issues relating to both refugees and migrants such as trafficking and smuggling rescue at sea, data collection and analysis, and promoting tolerance.²³³

To support discussions taking place in the context of the migration compact on the distinction between refugees and migrants, UNHCR produced and circulated the refugee concept under international law.²³⁴

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

3.5 INTERNATIONAL INSTITUTIONS/ BODIES / ORGANISATION

So many international institutions in the world work for refugee protection and assistance. United Nations High Commissioner for Refugee is the core international institution, which works individually as well as in collaboration with other institutions.

3.5.1 The Office of the United Nations High Commissioner for Refugees (UNHCR)

The statute of the United Nations High Commissioner for Refugees was (UNHCR) adopted according to resolution 428(V) by the General Assembly. The functions of UNHCR encompass providing international protection and 'seeking permanent solutions' to the problem of refugees by way of voluntary repatriation or assimilation in new national communities. According to the statutes of the United Nations High Commissioner for the refugee, the work of the High Commissioner shall be entirely non-political, humanitarian, and social. Its task is to give primary importance to the provision of international protection related to refugees, as well as explore the possibility of finding a permanent security solution, interventions to secure entry and ensure the non-refoulement of refugees.²³⁵

Besides defining refugees, the UNHCR statute determines the high commissioner's relationship with the General Assembly and the Economic and Social Council (ECOSOC), and it makes provisions for organization and finance and identifies ways in which the High Commissioner can provide security. It develops the work done by the other organizations, which include:²³⁶

- 1) Promoting the conclusion of international conventions for the protection of refugees, supervising their application and proposing amendments to that;
- 2) Promoting through exclusive agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; and
- 3) Promote the admission of refugees.

²³⁵ Guy S. Goodwin-Gill, *The Refugee in International Law* 212(Oxford University Press, New Delhi. Reprint 1998)

²³⁶ *Ibid.*

There are three options available as permanent solutions and one temporary solution to the refugee problem. Article 1 of the UNHCR statutes above explicitly includes the permanent solutions of voluntary repatriation and local assimilation as part of the UNHCR mandate. The third permanent solution is resettlement in a third country. The temporary solution is that of settlement in so-called protective zones, which are camps of refugee holding areas, often close to international borders.²³⁷

The permanent solution, which is known as a durable solution, discussed as follows:

A. Voluntary Repatriation

Repatriation is now commonly regarded by UNHCR as the solution of choice where the return is genuinely voluntary and sustainable. In the situation where repatriation has undertaken, it is vital to ensure that return is genuinely voluntary; to repatriate otherwise would involve a breach of the principle of non-refoulement in violation of international law.²³⁸ The UNHCR is obliged to facilitate voluntary repatriation by organizing agreements between its offices and rehabilitation for returned refugees as well as covering the costs of return and assisting in it. In countries where voluntary repatriation has undertaken, the UNHCR carries out the return programme under the framework for a durable solution or 4Rs approach proposed by the high commissioner genuinely voluntary repatriation, reintegration, rehabilitation, and reconstruction.²³⁹

B. Local Assimilation

However, potentially a permanent solution to refugee status, local assimilation is a challenging and complicated process involving social, economic, and cultural adaptation on the part of both the refugee and the host community. It is also dependent on legal recognition within the country of asylum, which, as UNHCR recognizes, can only be done with the agreement of the government of the host country concerned.²⁴⁰

Where the possibility of voluntary homecoming has not been seen shortly, the best solution would be to integrate the refugee into the host country itself.

²³⁷ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 185(Oxford University Press, New Delhi, 1st edn., 2008)

²³⁸ *Id.* at 186.

²³⁹ *Id.* at 187

²⁴⁰ *Id.* at 188

C. Third Country Resettlement

If refugees do not return to their country of origin and do not have a refugee who can live safely in the country, the only solution is that they will have to be relocated to a third country. The feasibility of resettlement is dependent on the willingness and ability of third countries to accommodate refugees. In implementing resettlement as a solution, the UNHCR works in partnership with central and local authorities in the country concerned. Criteria used by the UNHCR in determining resettlement as an appropriate solution include the person under consideration being at risk in the state of refuge or having special needs warranting consideration of resettlement. Particular attention is paid to people with special needs in terms of legal, medical, or physical protection, people who have survived violence and torture. These are considered being at risk of violence and aggression, family reunification, children and adolescents, older refugees, and refugees without them have prospects for local integration.²⁴¹

Notwithstanding the statutory injunction that the work of the Office shall relate, as a rule, to groups and categories of refugees, a significant part of UNHCR's protection work has long been concerned with individual cases, as was that of its predecessor organizations. No State has objected to UNHCR taking up individual cases as such, although States may, and do; question whether an individual is indeed a refugee. Nevertheless, the individual dimension to the protection function is a natural result of the declared task of supervising the application of international conventions. Such instruments define refugees in essentially individualistic terms and provide rights on behalf of refugees, which can only be understood in the sense of the particular. The acceptance of States in the individual protection function of UNHCR, however, significantly delineates both the competence of the Office and the status of the individual refugee in international law.²⁴²

²⁴¹M'elanie Jacques, *Armed Conflict and Displacement :The Protection of Refugees and Displaced Persons under International Humanitarian Law* 186 (Cambridge University Press, New Delhi, 1st edn., 2012)

²⁴² Guy S. Goodwin-Gill, *The Refugee in International Law* 213 (Oxford University Press, New Delhi. Reprint 1998)

The refugee is the flight from persecution and the violence of a 'man-made disaster'.²⁴³ They are the same as the responsibility of the United Nations, even as the present system of duty and cooperation rails short of demanding durable solutions from sovereign States. General Assembly resolutions can extend the functional responsibilities of UNHCR, it is a subsidiary organ, but they do not thereby directly impose obligations on States.²⁴⁴

Today, most states want the United Nations to assume responsibilities for a broad category of persons obliged to flee their countries for a variety of reasons. The General Assembly has endorsed UNHCR activities for humanitarian reasons, which is also essential because the lack of protection creates a vacuum.²⁴⁵

UNHCR is one of a network of organs, funds, programs, specialized agencies, and commissions working with some UN agencies and intergovernmental organizations for the protection and respect to the refugees and returnees, which are following:²⁴⁶

- a) **International Labour Organization (ILO)** programmed to enhance self-reliance and sustainable livelihoods of refugees in the contexts of integration and return, labour mobility, and migration outcomes for refugees.
- b) **International Maritime Organization (IMO)** promotes the rescue of refugees and asylum seekers at sea, according to the international obligations of the state.
- c) **UN Children's Fund (UNICEF)** – provides health, nutrition, and education rights of children, protection of unaccompanied children, and reunification of refugee families separated in flight.
- d) **UN Counter-Terrorism Implementation Taskforce (CTITF)** collaborates in strengthening the coordination and coherence of counterterrorism efforts of the UN system.

²⁴³ Man-made disaster are now human-made disaster, according to the Guiding Principles on Internal Displacement, 1998

²⁴⁴ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 428 (Oxford University Press, New Delhi, 1st edn., 2007)

²⁴⁵ *Supra* note 242 at 212.

²⁴⁶ Frances Nicholson and Judith Kumin, *UNHCR a guide to International Refugee Protection and building State Asylum Seeker* 47 (Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, 2017)

- e) **UN Development Programme (UNDP)** – enhancing linkages between humanitarian and development programs; durable solutions including in protracted refugee situations, integration, and re-integration, Solutions Alliance.
- f) **UN Office for the Coordination of Humanitarian Affairs (OCHA)** – coordination of UN assistance in humanitarian crises that go beyond the capacity and mandate of any single humanitarian agency
- g) **UN Office on Drugs and Crime (UNODC)** – prevention of and combatting trafficking in refugees and other persons of concern to UNHCR and protection of victims
- h) **United Nations Office of the High Commissioner for Human Rights (OHCHR)** – integration of human rights into UNHCR’s work and inclusion of people of concern into OHCHR’s standard-setting, monitoring and field implementation activities, coordination of advocacy efforts for groups or persons of concern to both organizations, joint training, complementary or joint interventions in individual cases
- i) **UN Population Fund (UNPFA)** – meeting reproductive health needs; prevention of sexually transmitted diseases, including AIDS; and prevention of, and protection from sexual violence.
- j) **World Bank** – development and promotion of livelihood opportunities and self-reliance for refugees and returnees and concessional development financing for affected communities
- k) **World Food Programme (WFP)** works for the distribution of food, including in emergencies.
- l) **World Health Organization (WHO)** is doing work for improvement of the health, nutritional, sanitary, hygienic, and environmental conditions of refugees and returnees.

3.5.2 The United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA)

United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) was set up as a subsidiary organ of the General Assembly in December 1949, to assist those who had left Palestine because of the conflict; that assistance is mainly in the fields of relief, health, and education. UNRWA has

developed and modified its working definitions over the year, which have been communicated to the General Assembly and never opposed by it. As far as registration with UNRWA determined the provision of relief, funding constraints have led to limitations on eligibility and to the exclusion from UNRWA rolls of numbers of Palestinians who became refugees because of the 1948 conflict. Rules issued in 1993 defined a 'Palestine refugee' for UNRWA purposes as 'any person whose, normal place of residence was Palestine from June 1, 1946, to May 15, 1948, which lost both its home and livelihood after the conflict of 1948.'²⁴⁷

Provision is also made for registration entitlement to descend, though through the male line only, and for a Palestinian not presently receiving relief to apply for it. The definition of refugees has extended to the children. Following the 1967 war, the general assembly approved the provision of humanitarian assistance by UNRWA on the emergency basis and as a temporary measure, to other persons in the area. They are at present displaced and are in pressing need of immediate assistance because of the recent hostilities.²⁴⁸

Notwithstanding the temporary and emergency' aspects of this measure, it has been endorsed in later general Assembly resolutions and extended further to those displaced by 'subsequent hostilities. UNRWA assistance has always been limited as to locality, been restricted to Lebanon, Syria, Jordan, the Gaza Strip, and, after 1967, these placements. Egypt, and limited as to refugees registered and residing in those host countries. Registration, which initially facilitated ration distribution, which acquired more considerable significance in the countries of refuge, where it has increasingly equated with acceptance as a refugee and *prima facie* entitlement to remain.²⁴⁹

As mentioned above, Palestinian refugees have excluded from the jurisdiction of the UNHCR and then from the 1951 refugee Convention. Political reasons were partly responsible, as was the necessity to delimit the mandates of UNHCR formally. The United Nations Relief and Works Agency (UNRWA) and the United Nations Conciliation Commission for Palestine (UNCCP) are at the time, both protection and assistance for Palestinian refugees fell within institutional arrangements. Moreover, it

²⁴⁷ *Supra* note 244 at 436.

²⁴⁸ *Id.*, at 437.

²⁴⁹ *Ibid.*

has included UNCCP and UNRWA Solutions, repatriation or compensation, were also expected to eventuate; the General Assembly, for example, intended UNCCP to take on, 'in so far as it considers necessary in existing circumstances, the functions have given to the United Nations Mediator on Palestine by resolution 186(S-2). These functions include the use of the appropriate office with local and public authorities in Palestine, the Organization of the operation of common facilities necessary for protection, the well-being of the people of Palestine, and the promotion of peaceful adaptation to the future situation of Palestine.'²⁵⁰

The UN Conciliation Commission has instructed to 'facilitate the economic and social rehabilitation, and repatriation, resettlement of the refugees and the payment of compensation, by resolution 394(V) of 14 December 1950, to continue consultations with the parties concerned regarding measures for the protection of the rights, property, and interests of the refugees. The effectiveness of UNCCR contingent upon the cooperation and political will of the States concerned was in doubt; the summary of the debate in the General Assembly is brief but eloquent testimony to the fundamental differences between the parties, upon who depended on the solution to the refugee problem. To one side, the objective of a peaceful settlement required direct negotiations; to the other, direct negotiations have contingent on the full recognition of the rights of the Arabs to Palestine and their own homes. With the passing of the years, the General Assembly's repeated requests to the Conciliation Commission to continue its efforts became increasingly formal, almost ritualistic. The prospects for repatriation, resettlement, rehabilitation, and compensation waned, UNCCP became irrelevant to the protection needs of Palestinian refugees, and UN institutional mechanisms were unable to bridge the gap.'²⁵¹

UNRWA's role continued as the provider of international assistance to Palestinian refugees, save that with the beginnings of the intifada movement in 1989, it came in practice also to exercise a significant, if limited, protection role on behalf of Palestinians against the occupying forces. The perception of the Palestinian refugee problem as 'temporary,' however, accounts in the pan for the fact that the nationality status of many individual Palestinians remains unresolved.'²⁵²

²⁵⁰ *Ibid.*

²⁵¹ *Id.* at 438

²⁵² *Ibid.*

3.5.3 The United Nations Office for the Coordination of Humanitarian Affairs (OCHA)

The 1986 Report of the Group of Government Experts, some initial steps taken to improve the UN's capacity to respond to forced displacement in particular, by the establishment of the Office for Research and Collection of Information (ORCI) in an attempt to provide the UN system with some form of early warning of impending mass movements. Dissatisfaction with the effectiveness of these first measures led to the proposal for the designation by the United Nations Secretary-General of a high-level official as an emergency relief coordinator. On December 19, 1991, the General Assembly adopted Resolution 46/182 to strengthen the coordination of United Nations emergency humanitarian aid.²⁵³

This resolution was a set of guidelines, principles, and proposals, which included the standards of humanity, neutrality, and impartiality as the essential basis for the provision of humanitarian assistance. Also, respect for 'the sovereignty, territorial integrity and national unity of States', and recognition of the responsibility of each State, first and foremost, to take care of the victims of natural disasters and other emergencies occurring on its territory.²⁵⁴ States with populations in need of humanitarian assistance are called upon to facilitate the work of appropriate intergovernmental and non-governmental organizations. In contrast, neighbouring States have urged to participate jointly with affected countries. The nexus between disaster prevention and preparedness, and economic growth and sustainable development, is also acknowledged.²⁵⁵

The senior position of Emergency Relief Coordinator (ERC), created by resolution 46/182, brought together the functions previously carried out by various representatives of the Secretary-General for major and complex emergencies, and the responsibilities for natural disasters, which have entrusted to the UN Disaster Relief Coordinator (UNDRO). In 1998, the Department of Humanitarian Affairs had reorganized into the Office for the Coordination of Humanitarian Affairs (OCHA), with an expanded mandate over the coordination of the UN's humanitarian response programs. Coordination promoted through the Inter-Agency Standing Committee,

²⁵³ *Id.* at 439.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

chaired by the ERC, and the participants include UN agencies, the Red Cross Movement, and NGOs.²⁵⁶

The role of OCHA and the Emergency Relief Coordinator is, in principle, wide enough to allow the promotion of significantly higher levels of inter-state and inter-organization cooperation than have been seen so far.²⁵⁷

The Coordinator is responsible not only for processing requests from States for emergency assistance but also for overseeing all emergencies through 'the systematic pooling and analysis of early-warning information. While expected to organize needs assessment missions 'in consultation with the Government of the affected country,' the Coordinator is also authorized to facilitate the provision of emergency assistance 'by obtaining the consent of all the parties', for example, in a situation of internal conflict, or where no effective governmental authority exists. Besides, the Coordinator acts as a central focal point on UN emergency relief operations and expected to work closely not only with agencies in the UN system, but also with the ICRC, Red Crescent Societies, and the International Federation of Red Cross, IOM, and 'relevant non-governmental organizations.'²⁵⁸

3.5.4 International Organization for Migration (IOM)

International Organization for Migration founded outside the United Nations as the Intergovernmental Committee for European Migration in 1951, the International Organization Migration now brings together about one hundred and eighteen States. It premised on the idea of freedom of movement, and the preamble of the revised Constitution, adopted in 1989, recognizes that migration assistance at an international level is often required 'to ensure the orderly flow of migration movements throughout the world and to facilitate settlement and integration.'²⁵⁹ In 2016, it agreed to a closer legal and working relationship with the United Nations as a related organization. IOM works in four primary areas of migration management:

²⁵⁶ *Id.* at 440.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ Guy S. Goodwin Gill and Jane McAdam, *The Refugee in International Law*, 442(Oxford University Press, New Delhi. 1st edn., 2007)

migration and development, facilitating migration, regulating migration, and responding to forced migration.²⁶⁰

In the organization's first years of operation, it focused on displaced persons, refugees, and orderly migration from Europe. Since then, IOM's objectives and functions have become worldwide and include:

- (i) orderly and planned migration for employment purposes;
- (ii) the movement of qualified human resources, including family members; the organized transfer of refugees, displaced persons, and other persons compelled to leave their country of origin;
- (iii) technical assistance and advisory services on migration policies, legislation, administration, and programs; and
- (iv) the provision of a forum in which States and organizations concerned can exchange views and experiences, and promote cooperation and coordination on migration issues.²⁶¹

IOM is also involved in migration information, both in its own right and in cooperation with UNHCR. IOM's working concept of displaced persons includes refugees within the sense of the OAU Convention or the Cartagena Declaration, as well as those in flight from human-made disasters. It also assists asylum seekers in various countries, who have been either accepted under the immigration programs of third States or have elected to return home voluntarily. In 1972, it helped many stateless persons and former citizens of Uganda, then facing expulsion. In September 1990, in a United Nations inter-agency context, IOM assumed responsibility for the repatriation of third-country nationals displaced or expelled in the aftermath of the Iraqi invasion of Kuwait. In September 1991, working with UNHCR and within the context of the Comprehensive Plan of Action for Indo-Chinese refugees, IOM signed a memorandum of understanding with the Socialist Republic of Vietnam, concerning the return of Vietnamese citizens from countries of refuge in South East Asia. In Europe, IOM operates programs of limited assistance to asylum seekers whose claims have been definitively rejected, or who have withdrawn their applications. The focus

²⁶⁰ Frances Nicholson and Judith Kumin, *UNHCR a guide to International Refugee Protection and building State Asylum Seeker* 47(Inter-Parliamentary Union and the United Nations High Commissioner for Refugees. 2017)

²⁶¹ *Supra* note 442.

is on pre-departure assistance, re-installation, and, occasionally, also on counselling and re-insertion in the labour market.²⁶²

Lately, its range of activities has included evacuation from Lebanon, repatriation to Timor-Leste, involvement in emergency relief and rehabilitation for victims of disasters, assistance to internally displaced persons in Darfur, and, more controversially, administration of off-shore processing centres in Nauru and Papua New Guinea on behalf of Australia and as part of the latter's Pacific strategy.²⁶³

3.5.5 International Committee of the Red Cross (ICRC)

In many respects, the International Committee of the Red Cross (ICRC) has comparable protection responsibilities to UNHCR, but under the system, consolidated by the 1949 Geneva Conventions and the 1977 Additional Protocols. Article 8, common to the first three Geneva Conventions, and article 9 of the Fourth Convention, each provides that their respective provisions will be applied in cooperation and under the control of the protective powers, whose task it is to protect the interests of the parties to the conflict. Each convention has humanitarian activities, which the International Committee of the Red Cross or any other impartial humanitarian organization may undertake for the protection of persons within their scope and their relief. The Conventions provide for the appointment of substitutes for Protecting Powers, such as an organization, which offers all guarantees of impartiality and efficiency.²⁶⁴

Humanitarian objectives and the role of the ICRC has stressed throughout each of the four Geneva Conventions, in typical article 3, and their respective provisions on protected persons and the meaning of protection.²⁶⁵

3.6 PROVISIONS RELATED TO REFUGEE PROTECTION IN OTHER COUNTRIES

The world has divided into seven continents, namely Asia, Africa, Australia, North America, South America, Europe, and Antarctica. The problem of refugee

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ Guy S. Goodwin Gill and Jane McAdam, *The Refugee in International Law*, 444 (Oxford University Press, New Delhi, 1st edn., 2007)

²⁶⁵ Geneva Convention, 1949 Common Article 3

protection is not a problem of any specific continent; hence, the problem of refugee protection has existed in all the continents. So the researcher has chosen seven countries who are representative of every continent; China from the Asian continent, Germany from the European continent, Canada from North America, Brazil from South America, South Africa from the African continent, and Australia from the Australian continents. Besides, the researcher also chooses Turkey, which is situated in the middle of Asia and European continents. Turkey is the most hosting refugee country at present.

3.6.1 Turkey

Turkey is the highest refugee-hosting country in the world. According to the United Nations refugee agency of Turkey, there are almost four million refugees and asylum seekers, including over 3.6 million Syrian nationals and close to 400000 refugees and asylum seekers of other nationalities in June 2019.²⁶⁶

Turkey is the party of the 1951 Convention on the Status of Refugees²⁶⁷ and its 1967 Protocol²⁶⁸ it signed the Refugee Convention on 24 August 1951, and ratified it on 30 March 1962.²⁶⁹ The convention of accession states that the Turkish government will maintain a geographic limitation by Article 1B of the Convention, which limited the scope of the Convention in Turkey "only to people who have become refugees as a result of events in Europe."²⁷⁰

Therefore, most non-European asylum seekers still do not have the right to stay in Turkey, even after receiving UNHCR recognized refugee status. Turkish administrators have been careful to label refugees from Syria strictly as "guests," for

²⁶⁶ UNHCR: the UN Refugee Agency – Turkey, *available at*: <https://www.unhcr.org/turkey.html> (last visited on December 11, 2019)

²⁶⁷ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 150, *available at*: <https://treaties.un.org/doc/Publication/UNTS/Volume%20189/v189.pdf>, (last visited on December 28, 2019)

²⁶⁸ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 268, *available at*: <https://treaties.un.org/doc/Publication/UNTS/Volume%20606/v606.pdf>, (last visited on December 28, 2019)

²⁶⁹ Convention Relating to the Status of Refugees, UN TREATY COLLECTION (UNTC), *available at*: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V2&chapter=5&Temp=mt dsg2&lang=en, (last visited on December 28, 2019)

²⁷⁰ The Law Library of Congress, Global Legal Research Center, *available at*: <https://www.loc.gov/law/about/organization.php> (last visited on December 08, 2019)

fear of accidentally pointing out that Syrians are "refugees" who enjoy the rights of the Geneva Convention. In October 2011, however, the Turkish government announced that it would consider temporary protection, and the use of the term "guest", less used in formal and informal speeches. When Turkey began building its Syrian management structure, the Turkish authorities used the terms "refugees" and "guests" interchangeably, apparently less concerned that their use of "refugee" might be confused with Geneva Refugee Convention.²⁷¹

Turkey accepts European asylum seekers as "refugees" in the narrower sense. While "the majority of asylum seekers in Turkey come from non-European countries such as Iraq, Iran, Syria, Afghanistan, Somalia, and Sudan". In practice, geographical limits are implemented only partially because Turkey allows the UNHCR to operate and conduct refugee status determination procedures. Refugee status is granted jointly by the UNHCR and the Ministry of the Interior with the implied condition to those refugees accepted are not locally integrated, but reside in a third nation. Due to its geographical proximity to countries affected by conflict, Turkey's geographical limits disqualify a large number of asylum seekers and refugees who seek permanent protection from the Turkish state.

The term 'guest,' however, has no place in international refugee law. As a result, Turkey has prepared new administrative and legal documents, including a 'temporary protection regime'. This regime is applied to all Syrians, Palestinians, and stateless persons living in Syria. The refugees have been admitted and accommodated, and still are, through the TP(Temporary Protection), which was introduced in October 2011²⁷² and reinforced with a legal base and clarity by the Turkish Parliament, which adopted the law on foreigners and international protection (LFIP) in April 2013²⁷³.

²⁷¹ Turkey's Refugee Dilemma, *available at*:

<https://www.americanprogress.org/issues/security/reports/2019/03/13/467183/turkeys-refugee-dilemma/>(last visited on December 08, 2019)

²⁷² Federico Donelli, "Syrian Refugees in Turkey: A Security Perspective" 30 *NEJPP* 4(2018)

²⁷³ The Law on Foreigners and International Protection, Law No : 6458, *available at*:

https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf(last visited on December 08, 2019)

Under the LFIP, Turkey provides limited protection to non-European refugees under temporary circumstances. Under which conditional refugee status²⁷⁴, humanitarian residence permit²⁷⁵, or temporary protection allows them to remain in the nation until a long-term place of settlement is found outside Turkey for them.

Article 91 of the LFIP defines “temporary protection” as a protection status granted to foreigners who, having been forced to leave their country and cannot return, have arrived in Turkey seeking emergency and temporary protection. It provides the Syrians with the right to temporary asylum until they resettle in a safe, third country²⁷⁶

²⁷⁴ The Law on Foreigners and International Protection, Law No : 6458, art. 62, provide conditional refugee status to “any person who as a result of events occurring outside European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted conditional refugee status upon completion of the refugee status determination process. Conditional refugees shall be allowed to reside in Turkey temporarily until they are resettled to a third country.

²⁷⁵ LAW ON FOREIGNERS AND INTERNATIONAL PROTECTION, Law No : 6458, art. 46 – (1) Under the following cases, upon approval of the Ministry, a humanitarian residence permit with a maximum duration of one year at a time may be granted and renewed by the governorates without seeking the conditions for other types of residence permits:

- a) where the best interest of the child is of concern;
- b) where, notwithstanding a removal decision or ban on entering Turkey, foreigners cannot be removed from Turkey or their departure from Turkey is not reasonable or possible;
- c) in the absence of a removal decision in respect of the foreigner pursuant to Article 55;
- c) where there is a judicial appeal against the actions carried out pursuant to Articles 53, 72 and 77;
- d) throughout the removal actions of the applicant to the first country of asylum or a safe third country;
- e) in cases when foreigners should be allowed to enter into and stay in Turkey, due to emergency or in view of the protection of the national interests as well as reasons of public order and security, in the absence of the possibility to obtain one of the other types of residence permits due to their situation that precludes granting a residence permit;
- f) in extraordinary circumstances.

(2) Foreigners that are granted humanitarian residence permit should get registered with the address based registration system no later than twenty working days as of the issuance date.

²⁷⁶ *Id.*, art. 91

According to the law on foreigners and international protection, the protection described above is the one that falls under the refugee definition.

The term refugee is defined by the LFIP and Refugee status granted to refugees after completion of the refugee status determination process.²⁷⁷ This definition is similar to the 1951 Refugee Convention, and it is necessary to fulfil the condition or procedure of refugee status determination.

The refugee is also excluded from international protection under the following circumstances²⁷⁸ if:

- a) Refugee accepts protection or assistance from agencies other than the United Nations organs or the UNHCR;
- b) The refugee is formally recognized by the authorities of the state of residence with rights and obligations, which is associated with the citizens of that nation.
- c) There is substantial proof to trust that he is guilty of the offence specified in paragraph one of Article 1 of the Convention.

Besides, if a foreigner or stateless person does not qualify as a refugee or conditional refugee, then they receive subsidiary protection upon completion of the status determination procedures. If he returns to a previous place of residence, there will unavoidably be serious consequences, such as torture, armed conflict, or capital punishment.²⁷⁹ A person under subsidiary protection represents a shift away from prior policy; those who did not obtain refugee status were only given the designation as guests, which was received by the initial influx of Syrian refugees. Now, most of the Syrian refugees recognized by the UNHCR have been included under LFIP's subsidiary protection.²⁸⁰

²⁷⁷*Id.*, art. 61, Refugee means; A person who as a result of events occurring in European countries and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his citizenship and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

²⁷⁸*Id.*, art. 64

²⁷⁹*Id.*, art. 63

²⁸⁰ Rebecca Kilberg, Turkey's Evolving Migration Identity, MIGRATION POLICY INSTITUTE, available at: <http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity>, (last visited on December 06, 2019)

According to Article 91 of the LFIP, the Temporary protection Regulation was released in October 2014. It does not primarily refer to refugees from Syria or Iraq, but rather, it also deals with other matters. The Temporary Protection Regulation contains a right to health and education for people under protection, as well as the Geneva Convention for refugees, but there are some differences. However, under the TPR, Syrians need Turkish government-granted permits to work legally in the country. Article 24 of the 1951 Refugee Convention guarantees refugees a right to work that is equivalent to that of the host country's citizens.²⁸¹ Another potentially significant difference is that Turkey reserves the right under Article 11 of the TPR to terminate the temporary protection scheme jointly or individually under Article 12.²⁸² Termination of temporary protection includes in Article 11 of the Temporary Protection Regulation, 2013.²⁸³ The Ministry may propose the Council of Ministers to terminate the temporary protection. A Council of Minister's decision shall terminate temporary protection. Along with the termination decision, the Council of Ministers may decide:

- a) To entirely suspend the temporary protection and to return of persons benefiting from temporary protection to their countries;
- b) Collectively grant status, the conditions of which are satisfied by persons benefiting from temporary protection, or to assess the applications of those who applied for international protection on an individual basis;
- c) To allow persons benefiting from temporary protection to stay in Turkey subject to conditions to determine within the scope of the Law.

Further Article 12 stated the termination of temporary protection on an individual basis. This article provides some situations in which temporary protection has to terminate as follows:²⁸⁴

- (i) Leave Turkey on own will;
- (ii) Avail the protection of a third country;

²⁸¹ Turkey's Refugee Dilemma, *available at*:

<https://www.americanprogress.org/issues/security/reports/2019/03/13/467183/turkeys-refugee-dilemma/> (last visited on December 08, 2019)

²⁸² *Ibid.*

²⁸³ The temporary protection regulation, 2013. art. 11, Termination of temporary protection, *available at*: <https://www.refworld.org/docid/56572fd73.html> (last visited on December 04, 2019)

²⁸⁴ *Id.*, art. 12. Individual termination or cancellation of temporary protection

- (iii) They are admitted to a third country for humanitarian reasons, resettlement, or leave for a third country;
- (iv) They are deceased; temporary protection shall terminate on an individual basis.

The Directorate General shall terminate temporary protection or the Governorates. It has been understood afterward that those who fall within the scope of paragraph (1) of Article 8 should have been excluded from the scope of temporary protection.²⁸⁵

If foreigners whose temporary protection has terminated under Article 12 while the temporary protection is carried out, even if they are covered by temporary protection, arrive or cross our borders again to apply for protection. The temporary management decides individually whether temporary protective measures will implement. The Directorate General may delegate this authority partially or fully to Governorates.²⁸⁶

Thus, in general, asylum-seekers apply to the Directorate-General for Migration Management for protection, but depending on their situation and their country of origin, they may be able to apply for refugee status.²⁸⁷

For international protection, the applicant should apply to the government concerned, who performs the functions related to the application; if an application is lodged with law enforcement units at the border or within the country, it will immediately report to the Governorate.²⁸⁸ Foreign or stateless people have the right to apply on their behalf, or behalf of family members seeking protection on the same basis.²⁸⁹

In cases where unauthorized children file claims for international protection, all work related to the best interests of such children is primarily done. Moreover, as

²⁸⁵ *Supra* note 275, art. 12(2)

²⁸⁶ *Id.*, art. 13, Re-arrival of persons whose temporary protection was terminated

²⁸⁷ Refugees & Asylum in Turkey, Refugee Solidarity Network, *available at*:<http://www.refugeesolidaritynetwork.org/learnmore/>(last visited on December 08, 2019) *turkey-asylum-basics*

²⁸⁸ *Supra* note 275, art. 65(1) & 2.

²⁸⁹ *Ibid.* art. 65(3).

soon as applications are received, from that date, the provisions of Turkey's Child Protection Act become applicable to it.²⁹⁰

Besides, those individuals who are in urgent need of international protection are given priority over the rights and functions mentioned in the LFIP.²⁹¹ This Statute also states that claimants of international protection "will not be subject to administrative custody only to file a claim for international security,²⁹² that obligation of executive custody "is an exceptional act."²⁹³

The LFIP provides three types of reasons why applications for international protection can be rejected. First, when the requester repeats the same request without assigning different reasons. Second, he separately makes an application without a commendable reason. Third, he came to Turkey from a country that was the applicant's first country or the applicant's third safe country.²⁹⁴ At any stage of the evaluation of the application, the application can be terminated and the concerned party or their lawyer or legal representative will communicate the decision to reject the application.²⁹⁵

The administrative review and judicial appeals of asylum decisions have also been provided by the LFIP.²⁹⁶ Applicants of international patronage are provided with an attorney to represent them if they pay for such representation, but, if the applicant cannot pay the lawyer fees for judicial appeals, he will be provided legal assistance under Turkish law.²⁹⁷

Individuals who are granted refugee status are issued an identity card, which is valid for three years, which is their foreign identification number.²⁹⁸ In addition, the issued ID card is only valid for one year for persons who are granted conditional refugee status or subsidiary protection.²⁹⁹ Identity documents are issued to refugees,

²⁹⁰ *Id.* art. 66(1)(a).

²⁹¹ *Id.*, art. 67(1).

²⁹² *Id.*, art. 68(1)

²⁹³ *Ibid.* art. 68(2).

²⁹⁴ *Id.*, art. 72(1).

²⁹⁵ *Ibid.* arts. 72(2) & (3).

²⁹⁶ *Id.*, art. 80(1).

²⁹⁷ *Id.*, arts. 81(1) & (2).

²⁹⁸ *Id.*, art. 83(1).

²⁹⁹ *Ibid.* art. 83(2).

conditional refugees, or subsidiary protection beneficiaries at no charge. The Directorate General of Migration Management (DGMM) determines the format and content of the documents.³⁰⁰

According to the Turkish citizenship law, a foreigner can "acquire Turkish citizenship by the decision of the competent authority if it fulfils the conditions contained in this law. However, the fulfilment of the prescribed conditions does not give the person full right to obtain citizenship."³⁰¹ By the decision of the competent authority, Turkish citizenship can be acquired in many ways, including the right to exceptional status or naturalization.³⁰² The law includes the category of occupancies based on exceptional status, which are recognized as immigrants.³⁰³ All persons who are eligible to obtain citizenship can be granted citizenship naturally without meeting the five-year residency requirement; if their applications are accepted by the proposal of the Ministry of Interior and the decision of the Council of Ministers.³⁰⁴

International protection status will terminate:

- a) If he voluntarily re-avails himself of security in his country of citizenship;
- b) If he voluntarily recovers the citizenship, from which he is deprived;
- c) If he acquires the nationality of another nation and enjoys the country's protection of that new nationality;
- d) If they voluntarily return to the nation, from which they fled or were living outside for fear of persecution.³⁰⁵

International security material and financial support provided by Turkish authorities in cases of voluntary return of applicants and beneficiaries, and this repatriation are done by DGMM in collaboration with international organizations,

³⁰⁰ *Ibid.* art. 83(3).

³⁰¹ Türk Vatandaşlığı Kanunu [Turkish Citizenship Law], No. 5901, May 29, 2009, as last amended May 18, 2012, art. 10, RESMÎ GAZETE, No. 27256 (June 12, 2009), *available at*: http://www.nvi.gov.tr/Files/File/Mevzuat/Nufus_Mevzuati/Kanun/pdf/turk_vatandasligi_kanunu.pdf, (last visited on December 05, 2019)

³⁰² Turkish Citizenship Law (No. 5901) 2009, art. 12(1)(a)

³⁰³ *Ibid.* art. 12(1) (b)–(c)

³⁰⁴ Zeynep Kadirbeyoglu, Eudo Citizenship Observatory: Country Report: Turkey 13, *available at*: <http://eudo-citizenship.eu/docs/CountryReports/Turkey.pdf>, (last visited on December 08, 2019)

³⁰⁵ The Law on Foreigners and International Protection, art. 85(1).

public institutions and agencies, and civil society organizations.³⁰⁶ If the circumstances in which the subsidiary protection is approved are no longer applicable or circumstances have changed to such an extent that there is no need for protection anymore, then the status of the subsidiary protection also ceases.³⁰⁷

The state of international security can revoke, where beneficiaries present false documents or use fraud, deception, or withdrawal of facts to achieve that status, or where it has later determined that beneficiaries should have been excluded on those grounds for the exclusion mentioned above.³⁰⁸

Turkish authorities can impose administrative compulsions on applicants for their protection such as they emphasize that they "stayed in designated reception and accommodation centres," or a particular place or a region, and they will report to the authorities "as needed" upon request.³⁰⁹ Applicants registered with an address-based registration system and their domicile address is reported to the governor.³¹⁰

Turkey changed the LFIP in 2016 to facilitate the expulsion of people who enjoy temporary protection related to terrorism. This provision appears to be in line with Article 32 of the Geneva Convention, which allows refugees to be expelled on the basis of "national security or public order" following "due process." It seems that Turkey granted due process in some cases, but certainly not at all.³¹¹

In summary, under national law, Turkey is obliged to accept non-Europeans who meet the Geneva definition of a refugee. However, it grants them fewer rights than those inherent in full refugee status, as the 1951 Geneva Convention does not apply to them. In any event, an obligation based on national law, rather than an international obligation, is inherently easier to change and therefore less restrictive.³¹²

³⁰⁶ *Id.*, art. 87.

³⁰⁷ *Id.*, arts. 85(3), 85(2).

³⁰⁸ *Id.*, art. 86(1).

³⁰⁹ *Id.*, art. 71(1).

³¹⁰ *Ibid.* art. 71(2).

³¹¹ *turkeys-refugee-dilemma*, available at:

<https://www.americanprogress.org/issues/security/reports/2019/03/13/467183/turkeys-refugee-dilemma/> (last visited on December 08, 2019)

³¹² *Ibid.*

3.6.2 Germany

The right to asylum in Germany is a constitutional right given to every person who suffers from political persecution.³¹³ Asylum seekers are permitted to remain in Germany only when political asylum, refugee status, or subsidiary protection has been granted. The right to asylum is recognized by the definition of 'refugee' established in the 1951 Refugee Convention, and protects asylum seekers from deportation and provides some protection under the law. As a rule, these protective measures are part of the asylum procedure itself and are reviewed by the Federal Office for Migration and Refugees without further request.³¹⁴

Although the refugee convention has been in force in Germany since December 24, 1953, the German legislature has often not considered it necessary to grant refugee status. This procedure only changed with the Qualification Directive (2011/95 / EU) and a law that was passed in August 2007. Today, official refugee status has been conferred on refugees, in addition to the status of being entitled to political asylum when necessary (Section 3 (1) and (4) Asylum Procedure Act.³¹⁵ Now, refugee status is equal to the status of a 'person entitled to political asylum,' concerning the right of residence.

Furthermore, admitted refugees have no disadvantages compared to people entitled to political asylum concerning social benefits, participation in the employment market, and the granting of travel documents.

Germany has given asylum to more than one million people seeking protection, making it a vital host country for refugees during 2015 and 2016.³¹⁶ Most refugees come from Syria, Afghanistan, Iraq, Iran, and Eritrea.

³¹³ *Germany: Basic Law for the Federal Republic of Germany* [Germany], 23 May 1949, sec. 16a(1). available at: <https://www.refworld.org/docid/4e64d9a02.html> (last visited on December 02, 2019)

³¹⁴ An overview of the history of asylum in Germany, available at: (<http://www.asylumineurope.org/reports/country/germany>) (last visited on December 08, 2019)

³¹⁵ Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798), last amended by Article 2 of the Act of 11 March 2016 (Federal Law Gazette I, p. 394), available at: (http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0020) (last visited on December 08, 2019)

³¹⁶ Fact sheet- Germany, UN refugee Agency, available at: https://www.unhcr.org/dach/wp-content/uploads/sites/27/2019/02/2019_02_Factsheet_GermanyQ12.pdf ((last visited on December 13, 2019)

According to the Federal Statistical Office number of persons registered as seeking protection in Germany rose by 6 per cent to 1.8 million people in 2018. The Central Register for Foreigners identified 101,600 additional people seeking protection for humanitarian reasons. This increase corresponds to the five per cent increase in the previous year. In 2018, around 1.3 million people had a humanitarian residence permit, which means that they had recognized protection status. It was 129,000 more than in the previous year. Approximately 62% of them were citizens of Syria (526,000), Iraq (138,000), and Afghanistan (131,000). Most people (79%) had a temporary protection status.³¹⁷

Germany has accepted the 1951 refugee convention, which incorporated the 1951 Refugee Convention into its national law. The definition of refugee given in the Refugee Convention is organized by section 3 of the German Asylum Act.³¹⁸

Not all refugees entering Germany get asylum rights. However, the Asylum Act deals with refugee's various levels of protection based on their country of origin and risk to life upon return. The Federal Office has distinguished asylum seekers, asylum applicants, persons entitled to protection, and persons entitled to remain for Migration and Refugees.³¹⁹

The two most essential immigration laws in Germany that offer rules for refugees to enter and deal with refugee claims that are the Asylum Act and the Residence Act. The process and consequences of granting and rejecting asylum have been codified by the Asylum Act, while the rules related to entry, stay, exit, and employment of foreigners; in general, have been given in the Residence Act.³²⁰

Article 16 (a) of the Basic Law provides for political asylum to those people who are suffering from political persecution. On the basis of refugee status codified in the Refugee Convention, Section 3 (1) of the Asylum Act grants refugee status for

³¹⁷ Germany: 1.8 million people sought humanitarian protection in 2018, *available at*: <https://www.dw.com/en/germany-18-million-people-sought-humanitarian-protection-in-2018/a-49631719> (last visited on December 13, 2019)

³¹⁸ Refugee Law and Policy In Selected Countries-The Law Library of Congress, Global Legal Research Centre, *available at*: https://fas.org/irp/congress/2016_rpt/lloc-refugee.pdf (last visited on December 02, 2019)

³¹⁹ Types of protection in Germany for asylum seeker, *available at*: <https://www.dw.com/en/types-of-protection-in-germany-for-asylum-seekers/a-39085481> (last visited on December 03, 2019)

³²⁰ *Supra* note 318

humanitarian reasons. These include criteria for political asylum and a wide range of other humanitarian purposes.

A refugee is a person who receives refugee protection after the completion of the asylum process. A refugee gets a residence permit for three years, and after that, the expiry of the first term, he may be entitled to a settlement permit for three or five years; if he has acquired sufficient knowledge of the German language and he can earn enough money to support himself. He will have unlimited access to the job market and will also be entitled to a free family reunion.³²¹

If the Federal Office for Migration and Refugees has no objections after these first three years, it can issue a temporary settlement permit. According to Article 4 (1) of the Asylum Act, Subsidiary protection is provided to applicants who can prove that they are threatened with serious harm in their country of origin. The term ‘serious harm’ is defined as ‘punishment of death penalty, torture or inhuman or degrading treatment or punishment or a serious personal threat to the life or integrity of the citizen’ as a result of indiscriminate violence. Applicants who enjoy subsidiary protection are initially only allowed to stay for one year, which can be extended for a further two years. If any person does not fall in the categories of refugees, persons entitled to asylum, or persons authorized to subsidiary protection. In case, if they are suffering from a severe illness that cannot be treated in the state of origin. Then they would be allowed residence for at least one year with the possibility of renewal. If they cannot physically travel or do not have a passport, it does not protect forced returns. Rather in such cases, immigration officers only check whether they can stay temporarily in Germany.³²²

The protection of asylum, refugees, or subsidiary protection can be refused if an asylum seeker has committed a war crime or a crime outside Germany or has considered a risk to the security of the Federal Republic of Germany and poses a danger to the public.³²³

If the applicant makes an application for refugee status, the person-seeking asylum will be invited for an interview. If the applicant is under six years of age, his

³²¹*Supra* note 319

³²² Forms of asylum and refugee protection, available at: <https://help.unhcr.org/germany/asylum-in-germany/forms-of-asylum-and-refugee-protection/> (last visited on December 03, 2019)

³²³*Supra* note 319

interview will not be necessary. The applicant will inform of their rights in the language that the applicant knows. The applicant must give information and evidence of harassment or severe harm including detailed information on past residences, travel routes, time spent in other countries, and refugee status or application for asylum have already been placed or completed in another state or another location in Germany.

The caseworker decides decisions concerning the status of the refugee only based on the refugee's interview and overall evaluation of all important findings. They also take the support in the decision making of the Federal Office and Asylum Information Centre and its Migration Information Logistics; sends individual queries to the German Foreign Office; and obtains language and text analysis, checking of physical and technical documents as well as advice from medical and other experts. The decision on the asylum application is communicated to the applicant in writing and explains the reasons and legal options for the complaint.³²⁴

Where a refugee's asylum application is pending, they will be allowed to stay at the reception centre for at least six weeks, which is responsible for his/her, implementation. However, it will not be more than six months, and they will not be allowed to leave the area without permission. The geographic restriction usually ends after three months, after which the applicant no longer has to stay with the previous host institution. After six months, the refugee usually has the opportunity to live together. If the refugee does not secure his livelihood, the government authority can allow a certain German state and a certain German municipality to restrict their residence permit.³²⁵

Refugees and beneficiaries of subsidiary protection, like other foreigners, can apply for German citizenship under many conditions. Most of these conditions apply to all foreigners who want to become German citizens:³²⁶

- Applicants must have been legally resident in Germany for eight years without a break. The duration of an old asylum procedure can be included in this waiting period if the applicants have been granted refugee status or subsidiary

³²⁴ *Supra* note 318

³²⁵ *Ibid.*

³²⁶ Section 10 German Nationality Act (Staatsangehörigkeitsgesetz). An overview on the naturalisation procedure is available in English on the BAMF *available at*: <http://bit.ly/2ms1va9>. (last visited on December 03, 2019)

protection status. The length of stay can be reduced to 7 years if the candidates completed an integration course and to 6 years if the candidates particularly have well integrated into the society.

- Applicants must be able to bear the cost of living for themselves and their families.
- Applicants must have sufficient knowledge of German (level B1 of the Common European Framework of Reference for Languages).
- Applicants have to pass a "naturalization test" to prove that they have sufficient knowledge of the social and legal system in Germany and its living conditions in Germany
- Applicants must not have committed serious criminal offenses.

The recognition of asylum and the status of refugees of foreigners shall cease on the following grounds if the foreigner³²⁷

1. Keeps him or herself afresh under the protection of the state by accepting or renewing a national passport voluntarily or by any other action which he or she holds the nationality of;
1a. voluntarily returns to the country where he has either left or stays away from the fear of persecution;
2. After losing his citizenship, he has voluntarily regained that citizenship;
3. He has acquired a new nationality and enjoys the protection of the state whose nationality he has acquired; or
4. Surrender the recognition or withdraw your application before the decision of the Federal Office becomes final.

Besides, Section 73 (2) of the Asylum Act defines the reasons why refugee status can be withdrawn. As per the provisions of Article 73 (2), refugee status shall be revoked if anyone gives incorrect information or hides the essential facts and if such recognition is given on any other basis.

Similar grounds are also given for the withdrawal of subsidiary protection, as defined in Section 73b (3) of the Asylum Act. Subsidiary protection status is withdrawn if subsidiary protection has been achieved through incorrect interpretation or omission of facts or the use of incorrect documents. If the foreigner must be or will

³²⁷ Cessation (*Erlöschen*) of a protection status is defined in Section 72(1) of the Asylum Act

be "excluded" due to the exclusion clause that applies to the right for this position, the subsidiary protection status will also be withdrawn.³²⁸

3.6.3 Australia

Australia has accepted the UN Refugee Convention 1951 and its 1967 protocol, which has imposed the responsibility on the states to protect the refugees fleeing from persecution, and it is involved in the United Nations refugee resettlement program since 1977.³²⁹ Article 1A (2) of the refugee convention has been incorporated into Australia's national law by the Migration Act, 1958, and which affects Australia's liability for non-refoulement. Providing protection visas to non-citizens in Australia according to section 36 (2) of the Migration Act, 1958.³³⁰

The term 'persecuted' in article 1A (2) is qualified by section 91R (1) of the Migration Act, which provides that article 1A (2) does not apply unless persecution for one or more of the Convention reasons is:³³¹

- the 'essential and significant reasons, for the persecution'; and
- the persecution involves 'serious harm' to the person; and
- the persecution involves 'systematic and discriminatory conduct.'

A non-exhaustive list of cases of "serious harm" can be found in Article 91R paragraph 2 of the Migration Act including:³³²

- considerable physical harassment of the person;
- a threat to the person's life or freedom;

³²⁸ Withdrawal of protection status, *available at*:

<https://www.asylumineurope.org/reports/country/germany/content-international-protection/status-and-residence/withdrawal-protection> (last visited on December 03, 2019)

³²⁹ Janet Phillips, *Asylum Seekers and Refugees: What Are the Facts?*, AUSTRALIAN PARLIAMENTARY LIBRARY (updated Mar. 2, 2015), *available at*:

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AsylumFacts, (last visited on December 03, 2019)

³³⁰ Refugee law in Australia, *available at*: <https://www.alrc.gov.au/publication/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117/22-refugee-law-2/refugee-la> (last visited on December 11, 2019)

³³¹ *Ibid.*

³³² *Ibid.*

- severe physical abuse of the person; Significant economic difficulties, that threaten the survivability of the person; and denial of the ability to make a living of any kind if denial threatens the person's ability to survive.

Australia's refugee and the humanitarian program consist of two sub-programs, the first being the onshore protection program and the second offshore resettlement program. Under the onshore protection Program, protection is available to individuals who arrive in Australia on a valid visa such as a student or a tourist. People who arrive with a valid visa can apply for a permanent security visa under the onshore protection program, and they live and work as permanent residents in Australia. Whereas, from September 2013, people who visiting Australia from a boat or without a valid visa have been excluded from the onshore protection program.³³³

There are three categories under the offshore rehabilitation program, called Refugee, Special Humanitarian, and Community Assistance Program (CSP). The refugee category applies to people from other countries who are recognized as refugees by the UNHCR and who have been called to Australia to resettle. Under the particular humanitarian category are those people who suffer from substantial discrimination in their country, and for whom a person or organization has proposed a visa in Australia. It also includes family members who have been provided immediate protection in Australia. The CSP, which started in July 2017, seeks support from individuals, community groups, or businesses to help resettle refugees.³³⁴

As of August 13, 2012, anyone coming to Australia by sea without a valid visa can be returned to Manus Island (Papua New Guinea) or Nauru for treatment, even if they have applied for asylum on arrival in Australia. In July 2013, Australian governments have declared that no refugee will ever move from Nauru or PNG to Australia. Some refugees may remain in Nauru or PNG temporarily or permanently, although the prospects for integration are limited. A small number of refugees have left Nauru to Cambodia for political representation with Australia, and the states have agreed to resettle some of the Nauru and PNG refugees. United Nations experts have found that this offshore treatment regime violates international human rights

³³³ AUSTRALIA'S REFUGEE POLICY: AN OVER VIEW, *available at*:

<https://www.kaldorcentre.unsw.edu.au/publication/australias-refugee-policy-overview> (last visited on December 22, 2019)

³³⁴ *Ibid.*

standards. Under international law, Australia remains responsible for respecting the human rights of asylum seekers.³³⁵

The Migration Act of 1958 (Cth) covers general provisions for issuing visas to the foreigner in Australia. The 1994 Migration Regulation (Cth) contains additional rules for diverse "classes" and "subclasses" of visas. The four categories of visas for "Protection, Refugees and Humanitarian Aid" listed in Part 4 of Schedule 1 to the Regulations such as Protection (Class XA), Refugee and Humanitarian Aid (Class XB), Temporary Protection (Class XD), and haven enterprise (class XE), first two classes of visas involve permanent residence. At the same time, the other two are temporary visas.³³⁶

As part of the refugee and humanitarian program, there are three classes of visas, with a subclass are available to people in Australia who apply for asylum protection.³³⁷

1. Visa of Permanent Protection (class XA, subclass 866); this permanent residence visa is available to anyone in Australia who has been determined because of their refugee status or compliance with the "protection" criteria. They have "made Australia's protection obligations" in addition to the 1958 Migration Act (Cth).³³⁸
2. Visa of Temporary Protective (class XD, subclass 785): this visa allows living and working in Australia for up to three years. Individuals must be in Australia, applying for this visa and issuing visas required to fulfil Australia's protection obligations. Temporary Protection Visa holders also apply for another Temporary Visa to stay in Australia for more than three years.³³⁹
3. Visa of Haven Corporate (class XE, subclass 790): this visa allows living and working in Australia for five years. Applicants should be asked to apply for

³³⁵ *Ibid.*

³³⁶ *Supra* note 318

³³⁷ Migration Act 1958 (Cth) s 35A; available at:
http://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s35a.html (last visited December 02, 2019)

³³⁸ Migration Regulations 1994 (Cth) r 1401. available at:
<https://www.legislation.gov.au/Details/F2017C00582> (last visited on January 15, 2020)

³³⁹ *Ibid.*

and commit to Australia's protection obligations. Holders can apply for other major visas if they work or study at least a little in the Australian region.³⁴⁰

The basic criteria for a protective visa are contained in sections 36 (1B), 36 (1C), and 36 (2) of the Act. According to Section 36, Paragraph 2, the decision-maker must be convinced that the applicant is not an Australian citizen and is:

- a person for whom Australia has protection obligations as a refugee (Section 36(2) a 'refugee criterion'); or
- If a person who does not meet the criteria for refugee status, Australia (under Article 36 (2) (aa)) imposes security obligations on the person for reasons of supplementary protection or "additional protection criterion". Individuals who have security visas (section 36) (2) (B) and (C) must be protected under "additional protection criterion" as a member of the same family unit for which Australia has security obligations
- Parts 785, 790, and 866 of Schedule 2 of the Regulations set out the prescribed criteria for the Subclass 785 (Temporary Protection), Subclass 790 (Safe Haven Enterprise), and Subclass 866 (Protection) visas. These Parts also set out the circumstances applicable to the grant (including that the applicant must be in Australia at the time of visa grant) details as to when the visas will be in effect and visa conditions.³⁴¹ The category of Refugee and Humanitarian Visa (Class XB) also includes a subclass visa of four visas that form the Refugee and Refugee of Humanitarian Program:³⁴²
- Refugee visa (subclass 200): This permanent residence visa is available to people who live outside their country of origin and have been persecuted in their country of origin.³⁴³
- Special visa for a humanitarian program in the country (subclass 201): This permanent residence visa is available to people living and persecuted in their

³⁴⁰ *Ibid.*

³⁴¹ A Guide to Refugee Law in Australia, *available at*: https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter8_StateProtection.pdf (last visited on December 15, 2020)

³⁴² Migration Regulations 1994, *available at*: <https://www.legislation.gov.au/Details/F2017C00582> (last visited on January 15, 2020)

³⁴³ *Refugee Visa (Subclass 200)*, DIBP, *available at*: [https://www.border.gov.au/Trav/Visa-1/200-\(last](https://www.border.gov.au/Trav/Visa-1/200-(last) visited on December 22, 2019)

country of origin who have not been able to leave that country to seek refuge elsewhere.³⁴⁴

- Emergency Rescue Visa (Subclass 203): This permanent residence visa is available to people who were persecuted in their country of origin and who are "personally exposed to an immediate threat to their life or safety."³⁴⁵
- The Visa for Vulnerable Women (Subclass 204); This permanent residence visa for women who live outside their country of origin and are not protected by male society and are exposed to the risk of "victimization, harassment or serious abuse" due to their gender³⁴⁶
- The Refugee and Humanitarian Program Visa (Subclass 202): It is also a permanent residence visa that requires offshore applicants to be sponsored by an Australian citizen or permanent resident or an Australian-based organization. Applicants who have to live outside their country of origin do not have to meet the definition of "refugee" but must be exposed to "serious discrimination in the form of a gross violation" of their human rights in their country of origin.³⁴⁷

Applicants for the five types of Class XB visa must complete the following forms, including Form 842 related to the Community Proposal pilot program or the "shared family" provision. Form 681 related to the refugee and humanitarian program, either for a subclass 202 visa or under the "shared family" provisions. Form 1417 related to the proposing organizations approved under the Community pilot.³⁴⁸

Applicants are required to provide necessary documents, including certified copies of travel or identification documents (or an explanation of why the person does

³⁴⁴ In-country Special Humanitarian Visa (Subclass 201), DIBP, *available at*: [https://www.border.gov.au/Trav/Visa-1/201-\(last visited on December 22, 2019\)](https://www.border.gov.au/Trav/Visa-1/201-(last%20visited%20on%20December%2022%2C%202019))

³⁴⁵ Emergency Rescue Visa (Subclass 203), DIBP, *available at*: [https://www.border.gov.au/Trav/Visa-1/203-\(last visited on December 22, 2019\)](https://www.border.gov.au/Trav/Visa-1/203-(last%20visited%20on%20December%2022%2C%202019))

³⁴⁶ *Woman at Risk Visa (Subclass 204)*, DIBP, *available at*: [https://www.border.gov.au/Trav/Visa-1/204-\(last visited on December 22, 2019\)](https://www.border.gov.au/Trav/Visa-1/204-(last%20visited%20on%20December%2022%2C%202019))

³⁴⁷ Global Special Humanitarian Visa (Subclass 202), DIBP, *available at*: [https://www.border.gov.au/Trav/Visa-1/202-\(last visited on December 22, 2019\)](https://www.border.gov.au/Trav/Visa-1/202-(last%20visited%20on%20December%2022%2C%202019))

³⁴⁸ *Supra* note 318

not have them); Visa or residence permit; and marriage certificates, relationship records, and birth certificates of children included in the application.

Besides, the applicant can provide concerning proof of a person's refugee status or proof of registration with any international organization dealing with refugees. For example, copies of his UNHCR relocation registration form. For the subclass of visas in the country, applicants also provide a detailed written statement that explains why they fear they will stay in their country of origin.³⁴⁹

The application for a visa for the refugee category is free of charge. If a visa has been issued, the Australian government will pay the travel costs and the pre-travel costs, such as Medical examinations and cultural orientation.³⁵⁰

After staying in Australia for four years, XB visa holders whose age is 18 years or older can apply for Australian citizenship. While applying, the applicant must not have been abroad for more than one year and must have been in Australia at least nine months in a year before applying. Applicants must also meet the character requirements and pass the citizenship examination. The same requirements apply to other permanent residence visa holders.³⁵¹

A security visa can be issued on the basis that it meets the refugee criteria under non-national (section 36 (2) (a)) or additional security criteria subject to (36 (2) (aa)) Completes. The term "refugee" is defined by section 36 (2) (a) which depends on the date of application for the protective visa, and which applies to a particular case. Simultaneously, for applications made before 16 December 2014, the applicant is required to fulfil the criteria of Section 36 (2) (a). If they are not Australian citizens, the Minister responsible for protection under the Refugee Convention and Refugee Protocol in Australia will have to be reassured.³⁵²

However, applications filed on or after 16 December 2014 to protect a person as a refugee, Section 36 (2) the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act, 2014 have to be amended,

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² *Supra* note 341

if that minister is satisfied that the refugee is protected under the protection obligation of Australia.³⁵³

Section 5H (1) of the Migration Act 1958 as amended in 2017 has defined the term refugee as follows: (1) For this law and the provisions for a specific person in Australia, a person is a refugee:³⁵⁴

- i. if the person is outside the country of his nationality and cannot or does not want to benefit from the protection of that country for a well-founded fear of persecution; or
- ii. if the person is not a national - is outside of his previous permanent residence and cannot or does not want to return because of a reasonable fear of persecution.

This definition is based on the term refugee used in the Refugee Convention, should codify Article 1A paragraph 2 in the sense of Australian case law. The term "well-founded fear of persecution" is further defined in section 5J of that law and includes other concepts derived from the Convention, including the requirement that the persecution must be based on race, religion, nationality, or belonging to a particular social group or political opinion. Furthermore, s.5H (2), which provides s.5H(1), will not apply if the Minister has serious reasons for considering that a claimant has committed certain grave crimes.³⁵⁵

The definition of "refugee" in subsection 5H (1) is part of a legal framework for refugees based on the government's interpretation of terms and concepts derived from the Australia Refugee Convention. Further definitions relevant to 'well-founded fear of persecution' are described in ss.5K-LA.³⁵⁶

Anyone can receive financial support, health care, and visa support through the asylum seeker support system when applying for a protection visa. A person should be considered a refugee if he assures the minister that he wants protection from Australia. Australia should protect as the Minister has serious grounds for believing that a non-citizen has been sent to the host country because of the actual risk and significant harm to non-citizens. "Significant harm" is further defined by the

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

Migration Act of 1958 (Cth), which lists the various elements that result from Australia's supplementary protection obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights.³⁵⁷

3.6.4 Brazil

Refugee protection in Brazil began in 1950 when Brazil became a party to the 1951 Refugee Convention and the 1967 Refugee Protocol. The 1951 Geneva Convention on the Status of Refugees was signed by Brazil on 15 July 1952 and passed a law in 1960 to recognize it. Subsequently, in 1972, Brazil passed a law authorizing the 1967 Protocol.³⁵⁸

The refugee protection policy was introduced in Brazil in the late 1970s, a constitutional guarantee to provide asylum to foreigners supported by federal law, which normally included immigration issues and to respect for human rights, cooperation between peoples for human progress, and the permitting of political asylum.³⁵⁹

Brazil publicized Law No. 9,474, the Brazilian Refugee Act, 1997, on July 22, 1997, which defines the mechanisms for implementing refugee status through the protection mechanisms of the 1951 Convention and 1967 Protocol. This Act also incorporating the broader refugee definition contained in the 1984 Cartagena Declaration in the country and created a national commission under the supervision of the Department of Justice to deal with refugee issues.³⁶⁰

The Brazilian Refugee Act, 1997, was the first comprehensive national refugee law in South America. The Brazilian Refugee Act, 1997 guarantees some essential documentation for refugees, including work permits, identity cards, freedom of movement, and other civil rights. Government authorities, just like in any other sovereign country, are mainly responsible for the provision of documentation and

³⁵⁷ Refugee Law and Policy In Selected Countries-The Law Library of Congress, Global Legal Research Center, *available at* : https://fas.org/irp/congress/2016_rpt/lloc-refugee.pdf (last visited on December 02, 2019)

³⁵⁸ The Protocol relating to the status of refugee, 1967, *available at*: <http://www.unhcr.org/3b66c2aa10>.(last visited on December 22, 2019)

³⁵⁹ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection*, 147(Palgrave Macmillan, Singapore. 2017)

³⁶⁰ The Brazilian Refugee Act, 1997

public services for refugees both at national and local levels. Except for access to political rights, refugees benefit from similar conditions with nationals, accessing the same public policies available to Brazilians through an extensive network of governmental offices.³⁶¹

The commitments of Brazil to a resettlement policy, it views resettlement as a protection tool and durable solution, aiming at allowing refugees to integrate into Brazilian society and to achieve self-sufficiency as quickly as possible. The Brazilian Resettlement Program (BRP) relies on a tripartite structure that involves government, civil society, and UNHCR in specific roles under the macro agreement for the resettlement of refugees in Brazil, signed in 1999.³⁶²

The creation of a specific and comprehensive act on refugee status determination and protection paved the way for a network for the protection of human rights of refugees in Brazil. Further, considering its association with other South American countries, it is essential to understand the distinction made between the legal institutions of private asylum and refuge in this part of the world.³⁶³

The Brazilian Refugee Act, 1997 granting protection to persecuted people who are either outside the refugee definition according to the 1951 Refugee Convention, or to whom granting refuge was not a wise political move.³⁶⁴

This Act defines refugees, which was inspired by the UN Convention Relating to the Status of Refugees, 1951. The term "refugee" is defined by Law No. 9474 as a person who is outside of his or her country of citizenship due to a reasoned fear of persecution based on race, religion, nationality, social group, or political opinion and cannot or will not hesitate in that country land to seek refuge;

- i. are not nationals and are located outside the country in which they cannot or will not return after their permanent residence under the circumstances described in the previous point;
- ii. due to serious and general human rights violations, he was forced to leave his country of citizenship to seek refuge in another country.³⁶⁵

³⁶¹ *Supra* note 359

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ The Brazilian Refugee Act, 1997, Law N0-9474, art. 1

This Act also provides that the effects of Refugee status extend to spouses, ancestors, and descendants, as well as other family members who are economically dependent on the refugee, provided they are in the country.³⁶⁶

In defining a refugee, the Act adopts the same criteria as the 1951 UN Convention but with different wording and with the addition of the human rights perspective of the 1984 Cartagena Declaration.

About the exclusion clauses of this provision, the law adds certain categories on the basis of a person should not be granted refugee status:³⁶⁷

- a) If he or she enjoys the protection of any agency of the United Nations except UNHCR;
- b) If, as a resident of Brazil, he or she enjoys the rights and obligations of a Brazilian national;
- c) If he or she is guilty of acts against the purposes and principles of the United Nations; or
- d) If, he or she has committed a serious non-political crime or international crime such as a war crime, a crime against peace, a crime against humanity, or participated in terrorist acts or heinous crime, or drug trafficking; or are guilty of acts contrary to the purposes and principles to the United Nations.

In this law, the exclusion provision adds to the 1951 UN Convention the possibility of denying refuge to people who have committed terrorism or involved in drug trafficking.³⁶⁸

It could regard as an effort to update and refine the original text of the 1951 UN Convention insofar as both terrorisms. Drug trafficking comes under the category of serious non-political crimes or acts contrary to the purposes and principles of the UN—an effort within the realm of International Refugee Law.³⁶⁹

The Act contains a cessation clause defining reasons for losing refugee status, which is mostly dependent on the objective situation in the state of origin or residence

³⁶⁶ *Id.*, art. 2

³⁶⁷ *Id.*, art. 3

³⁶⁸ *Id.*, art. 3 (III)

³⁶⁹ *Supra* note 359

of the refugee.³⁷⁰ Such a situation is subject to changes or improvements such that the need for protection may cease to exist.

Further, any misconduct (gross violation of international law) on the part of the refugee could lead to loss of refugee status. Ordinary criminal offences are not listed in the Act's exclusion clause, as is the case in most national legislation in the South American states.³⁷¹ If refugee status ends or is lost, the individual is placed under the general system of rules for foreigners in Brazil. The Act has a provision, which is in tune with the concept of the Rule of law under which an exclusion clause can only be applied when the person asking for refugee status has committed an act, and not when there are serious reasons for considering that the person has done so.³⁷² For entry of refugees into Brazil, the Act assures the opportunity to request refuge from any immigration authority, and a person who has asked for refuge may not have to be deported until the conclusion of the refugee status determination procedure.³⁷³

³⁷⁰ According to article 38, The Brazilian Refugee Act, 1997, Law No. 9,474, refugee status ceases in cases where the alien

I - reavails himself of the protection of the country of his nationality;

II - voluntarily recovers the nationality once lost;

III - acquires a new nationality and enjoys the protection of that country;

IV - establishes himself again, voluntarily, in the country which he left, or remained outside for fear of persecution;

V - can no longer continue to refuse the protection of the country of nationality because the circumstances in which he was recognized as a refugee no longer exist;

VI - being a stateless person, is able to return to the country of his former habitual residence, as the circumstances in which he has recognized as a refugee have ceased to exist.

The Brazilian Refugee Act, 1997, Law No. 9,474, Pursuant to article 39, loss of refugee status occurs

I – with renunciation;

II – with proof of the falsity of the pleas for recognition of refugee status or the existence of facts that, had they been known at the time of recognition, would have caused a negative decision;

III – with the exercise of activities contrary to national security or public order;

IV – when the alien leaves the national territory without prior authorization from the Brazilian Government.

³⁷¹ Shuvro Prosun Sarkar, *Refugee Law in India: The Road from Ambiguity to Protection* 149 (Palgrave Macmillan, 2017)

³⁷² *Ibid.*

³⁷³ *Supra* note 365, art. 7

Illegal entry into the territory does not prevent a foreigner from applying for refugee status with the responsible authorities,³⁷⁴ and they should be to hear the applicant and make a statement detailing the circumstances of his entry into Brazil and the reasons why he left his country of origin.³⁷⁵ The Act also establishes that irregular entry does not prejudice the possibility of asking for refugee status.

Further, any criminal and administrative procedures arising from illegal or irregular entry into Brazil that could result in the expulsion or deportation of the refugee has to be adjourned until after the determination of the refugee status has been made, and has to be terminated if the request for refugee status has approved.³⁷⁶

A refugee applicant has to be present before the authority to which he/she will submit the formal application.³⁷⁷ The refugee will receive information about the commencement of proceedings and, in case of necessity, will receive assistance from an interpreter and UNHCR.³⁷⁸ After receipt of the application from the refugee applicant, the Federal Police of Brazil will issue a pass to allow the applicant and his/her family members to stay in Brazil legally.³⁷⁹ The refugee applicant will be able to apply for an employment card from the Ministry of Labour for engaging in paid employment based on the pass of the Federal Police of Brazil. The pass given by the Federal Police will be valid until a decision on refugee status has been taken.³⁸⁰

Under this law, a National Refugee Committee has been established under the control and supervision of the Department of Justice to determine refugee status.³⁸¹ The National Committee for Refugees is empowered to make decisions on any asylum application in the first instance and to take any other steps necessary under this Act to protect refugees.³⁸² The committee comprises seven representatives, including one each from the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Labour, the Ministry of Health, the Ministry of Education and Sports, the

³⁷⁴ *Id.*, art. 8

³⁷⁵ *Id.*, art. 9

³⁷⁶ *Id.*, art. 10

³⁷⁷ *Id.*, art. 17

³⁷⁸ *Id.*, art. 18

³⁷⁹ *Id.*, art. 21.

³⁸⁰ *Ibid.* arts. 21, 22

³⁸¹ *Id.*, art. 11.

³⁸² *Id.*, art. 12.

Federal Police Department, and a non-governmental organization involved in refugee protection in Brazil.³⁸³

UNHCR invites everyone to attend the meeting of the National Committee for Refugees, in which they have the right to participate only in the dialogue, but without the right to vote. As soon as the National Committee for Refugees comes to a decision on the asylum application, the decision will communicate the Federal Police Department and the applicant.³⁸⁴ If the decision is favourable to the applicant, the federal police follow the formal procedure for issuing an ID card for the refugee and conclude the process by signing documents about their obligations as a refugee.³⁸⁵ If the decision is not favourable to the applicant, the applicant has the right to appeal to the Minister of Justice within fifteen days after the decision is announced.³⁸⁶ The decision of the Minister of State of Justice is final and cannot appeal.³⁸⁷ After the rejection of the appeal, the decision will have to be communicated to the National Committee for Refugees and Federal Police for further administrative processing. However, the refugee applicant should not be sent back to any country where his/her life, physical integrity, or liberty will be at risk.

The law stipulates that the Brazilian authorities should take into account the atypical nature of the refugee situation when refugees have to produce documents from their country of origin or their diplomatic and consular representations.³⁸⁸ In these circumstances, authorities should take into account the unfavourable situation of refugees and facilitate the recognition of certificates and diplomas for refugees who wish to obtain residence status and who want to admit to university institutions at all levels.³⁸⁹

The law stipulates that the resettlement of refugees in other countries should be as voluntary as possible.³⁹⁰ The resettlement of refugees in Brazil should take place in a planned manner and, if possible, with the coordinated participation of government

³⁸³ *Id.*, art. 14.

³⁸⁴ The Brazilian Refugee Act, 1997, arts. 26, 27

³⁸⁵ *Id.*, art. 28.

³⁸⁶ *Id.*, art. 29.

³⁸⁷ *Id.*, art. 31.

³⁸⁸ *Id.*, art. 43.

³⁸⁹ *Id.*, art. 44.

³⁹⁰ *Id.*, art. 45.

agencies and non-governmental organizations in order to identify areas of cooperation and areas of responsibility.³⁹¹

According to Law No-9474, a collective decision-making body namely CONARE, created by the Ministry of Justice³⁹² declared that, under the 1951 refugee Convention with protocol 1967 and other sources of international refugee law. This decision-making body is responsible³⁹³ to examine the application, and primarily to declare the recognition of refugee status and to decide on the initial termination of refugee status ex officio or at the request of the responsible authorities.

- a) determine the loss of refugee status primarily;
- b) guiding and coordinating the actions needed for the adequate protection, assistance, and legal support to refugees; and approving normative instructions clarifying the implementation of Law No. 9473.

On April 30, 2014, CONARE published normative resolution No. 18, which lists the procedures for applying for and processing applications for refugee status.³⁹⁴ Article 1 of Normative Resolution No. 18 stipulates that a foreigner who is in the country and wants to apply for asylum from the Brazilian government must surrender personally or through his lawyer or legal representative to each federal police force and submit a completed application form for refugees. After submitting the asylum application form and collecting the applicant's biometric data (or equivalent), the federal police must immediately issue a refugee protocol, regardless of the hearing that may have been scheduled for an appointment later.³⁹⁵

The refugee protocol is sufficient evidence for the applicant's refugee status. It serves as an identity card to the foreigner. It grants him the rights guaranteed according to Law No. 9,474, and the Constitution, international conventions relating to refugees, and the same inherent rights as foreigners legally residing in the country until the final application is evaluated.³⁹⁶

³⁹¹ *Id.*, art. 46.

³⁹² *Id.*, art. 11.

³⁹³ *Id.*, art. 12.

³⁹⁴ Refugee Law and Policy In Selected Countries, The Law Library of Congress, Global Legal Research Center, available at: <https://www.loc.gov/law/help/refugee-law/refugee-law-and-policy.pdf> (last visited on December 15, 2019)

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

The refugee protocol gives the refugee the right to obtain an internal tax card and a work permit that is valid as long as the refugee protocol is valid. If the request for refuge concerns a family group, the protocol must be issued to each family member individually. The refugee protocol is valid for one year and can be extended by the same amount of time until the final decision.³⁹⁷

Normative Resolution No. 18 lists the procedures to follow upon receipt of the refugee status application by the Federal Police, the situations in which the application is likely to be cancelled, and the appeal procedures in the event of an unfavourable decision, travel authorization, and procedures for cases of loss of refugee status.³⁹⁸

3.6.5 South Africa

South Africa over the years has experienced refugee movement at a higher rate than expected by the authorities. There are two causes of refugee movements in South Africa one is micro (psychological, individual, and familial), and the second is macro (for example, social class, political, regional, and global) in nature.³⁹⁹

South Africa has witnessed how issues of political economy shape the selection of specific targets in refugee-generating conflicts—having massive impacts on individuals, families, and communities—that permits the transformation of the regional political economy. It is sociological and political economy perspectives, which are complementary and essential ingredients in understanding processes of change in the refugee-related crises in Southern Africa, reveal the dynamic interaction between macro and micro-level phenomena and their mutual transformation.⁴⁰⁰ Historically the refugee problem is to be situated in the context of class practices and the class struggle in South Africa. It means it is a multidimensional struggle, not only because of the multiplicity of social ensembles (basically classes) that take part in it

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ K. Solomon, *Refugee in the Cold War: Toward a new International Refugee Regime in the Early Post-War Era* 53 (Lund University Press, Lund 1991)

⁴⁰⁰ Tiyanjana Maluwa, 'The Refugee Problem and the Quest for Peace and Security in Southern Africa' 7 *International Journal of Refugee Law* 653, 670 (1995) .

but also because of the multitude of levels at which it waged—economic, political and ideological, as well as national, regional and global.⁴⁰¹

However, the nodal point of the class struggle takes various forms in various countries and regions at specific historical moments. Several national and global processes can capture the moment of the global class struggle.⁴⁰² Ofcechukwu writes four significant instances prevailing in South Africa; these are:⁴⁰³

- Polarization of the world (within and between nations) into a rich minority and a poor majority, a process that organically linked to the problems of exploitation, poverty, inequality, discrimination, and underdevelopment;
- political repression and the militarization of social life;
- exclusivity and factionalism, especially within ruling groups, and denial of the right of people to control their social and biophysical environments, for their benefit and as they deem fit.

It gives rise to external intervention in national and regional problems, as well as to the denial of the legitimate right of nationalities to self-determination.

South Africa has witnessed a complex conjuncture of the class struggle because of the intricate mix of class and racial factors involved. This class struggle is mirrored by several conditions that have directly generated population displacement and relocation, such as apartheid, destabilization of neighbours, and liberation struggles.⁴⁰⁴

It is in the context of these conditions and their connection to the displacement and relocation of people in the region that the South African refugee protection law will evaluate. It has generally understood that any refugee protection law aims to create decent and orderly reception, provide safety, and mitigate

⁴⁰¹ Peter Anyangnyongo & Justus Abonyo Nyangaya, “*Comprehensive Solutions to Refugee Problems in Africa: Bilateral, Regional and Multilateral Approaches*” 7 *International Journal of Refugee Law* 164,166(1995) .

⁴⁰² Obonye Jonas, 'Reflections on the Refugee Protection Regime in Africa. Challenges and Prospects' 14 *University of Botswana Law Journal* 71, 76 . (2012)

⁴⁰³ Okechu Jcwu Ibcanu, 'Apartheid, Destabilization and Displacement: The Dynamics of the Refugee Crisis in Southern Africa' 3(1) *Journal of Refugees Studies* 47, 51(1990)

⁴⁰⁴ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection*, 138 (Palgrave Macmillan, Singapore. 2017)

suffering. The Aliens Control Act, 1991 of South Africa failed on many levels to provide adequate guarantees to applicants.⁴⁰⁵

After that, the entire process of refugee reform has initiated, leading to the development of the Refugees Act, 1998,⁴⁰⁶ followed by the Immigration Act, 2002; this act has repealed the Alien Control Act, 1991.⁴⁰⁷ South Africa's national refugee legislation incorporates the basic principles of refugee protection, including freedom of movement, the right to work, and access to essential social services. The South African government has made significant strides in protecting people who have been forced to leave their nation of origin due to a well-founded fear of persecution, violence, or conflict. However, there are questions about the implementation of refugee protection legislation and rigidity in several aspects.⁴⁰⁸ South Africa is a party to the 1951 Refugee Convention and the OAU Convention. The battles that accompanied the end of the colonial era in Africa led to some large refugee movements. These displacements led to the development and adoption not only of the 1967 Refugee Protocol but also of the OAU Convention.⁴⁰⁹ The OAU Convention follows the refugee definition of the 1951 Convention with the inclusion of some objective considerations specific to Africa from the international human rights instruments.⁴¹⁰ As a result, people fleeing unrest, widespread violence, and war have the right to claim refugee status in States parties to the OAU, regardless of whether or not they have a reasonable fear of persecution.⁴¹¹

The proposal to introduce refugee legislation in South Africa came in 1996, with the preparation of an initial draft refugee bill by the Department of Home Affairs. The circulation of drafts, which received critical public comments, followed this. After that, with specific substantial changes involving public debates and

⁴⁰⁵ *Ibid.*

⁴⁰⁶ The Refugee Act, 1998 (Act. No-30 of 1998, South Africa)

⁴⁰⁷ The Immigration Act, 2002 (Act No- 13 of 2002, South Africa)

⁴⁰⁸ Audie Klitz, *Migration and National Identity in South Africa 1860-2010* 202-215(Cambridge university Press, New York 2013)

⁴⁰⁹ Heienc Lambert (ed.), *International Refugee Law* 35(Ashgate Publishing Limited 2010)

⁴¹⁰ Alice Edwards, 'Refugee Status Determination in Africa 14 African Journal of International and Comparative Law 204, 205(2006)

⁴¹¹ Oloka-Onyango, 'Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years after Geneva' 3 International Journal of Refugee Law 453,455(1991) .

meetings with civil societies, the draft received a consensus vote from the National Assembly on November 5, 1998.⁴¹²

However, the policy-making process or legislative process may sometimes be controversial. It has always recommended that the approach continue to focus on enhancing strategic partnerships and strengthening coordination in its main areas of intervention for better protection of refugees.⁴¹³

The Refugees Act, 1998, in South Africa's legislation is regarding refugee protection. The Refugees Act, 1998 establishes the institutions and procedures to offer refuge and protection to those who are facing persecution and instability in their home countries. However, the Immigration Act, 2002, deals with the regulation of entry, stay, and documentation of non-nationals in South Africa. These two pieces of legislation differ in their scope and application. Immigration law is ruled by the principle of sovereignty, where every state is free to design and implement its immigration policies, while refugee law characterized by various international obligations is based on international human rights law. As a sovereign state, South Africa has the right to detain and deport those who violate its immigration laws—a power that allows the state to govern and control its borders.

On the other hand, the Refugees Act is the primary piece of legislation that ensures the safety, well-being, and dignity of asylum seekers and refugees. It provides for the reception into the country of asylum seekers and regulates the application for and recognition of refugee status. Immigration laws do not cover matters related to asylum seekers and refugees. The integrity of the legal regime underpinning refugee protection would be at risk if asylum policies were considered a subset of migration management strategies that are governed by security concerns. Thus, the sections of this chapter will be concerned with refugees and the laws governing them, leaving aside the aspect of immigration.

⁴¹² Jeff Handmaker and Lee Anne de la Hunt (eds.) *Perspective on Refugee protection in South Africa* 17 (Pretoria: Lawyers for Human Rights, 2001)

⁴¹³ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 140 (Palgrave Macmillan, Singapore. 2017)

In order for a person in South Africa to be able to claim refugee status, they must comply with the definition of the 1998 Refugee Act. South Africa follows an individual refugee status determination procedure.⁴¹⁴

An asylum seeker is considered a refugee under the Refugee Act of 1998 if this person:

1. for the reason that of a well-founded fear of persecution because of the tribe, race, religion, nationality, political opinion or membership of a particular social group or gender, is outside the country of his nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having the nationality and being outside the country of his former habitual residence cannot or does not want to return from this fear; or
2. Owing to external aggression, foreign domination or occupation, other events seriously disturbing public order in either a part of the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence to seek refuge in another place outside his country of origin or nationality; or
3. his spouse or dependent of a person contemplated in paragraph (i) or (ii).⁴¹⁵

Asylum seekers are also protected under the umbrella concept of refugee even though they have not been expressly included in the definition. However, the law protects asylum seekers, their legal position or status is somehow unclear. This multiplicity of criteria used to determine who is a refugee leads to multiple interpretations, causing an avalanche of changes to an individual's material and social situation.⁴¹⁶ An asylum seeker will not qualify for refugee status under South African law if he/she has committed acts such as international crime, any non-political crime punishable in South Africa, acts committed against the United Nations, or OAU, or if he/she enjoys the protection of any other country.⁴¹⁷ A person no longer enjoys refugee status if they claim the protection of the country of their nationality or if the circumstances in which they have recognized refugee status no longer exist. No other

⁴¹⁴ *Supra* note 406, s. 1

⁴¹⁵ *Id.*, s. 3

⁴¹⁶ Nicholson and Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* 20 (Cambridge University Press, Cambridge 1999)

⁴¹⁷ *Supra* note 406, s. 4

circumstances have arisen to justify his/her continued recognition as a refugee.⁴¹⁸ The provision contains a clause stating that refugee status does not end for a refugee who can make use of compelling reasons that have arisen from past persecution for refusing protection related to the country of his citizenship.⁴¹⁹ It is a copy of the exception from the 1951 Convention and confirms the potential for continued refugee protection for some refugees.

An application for refugee status must be submitted to a refugee admission officer in a refugee reception office by the legal provisions.⁴²⁰ The Refugee Reception Officer is bound to accept the application, and in case of necessity, he/she will assist the applicant in complying with the requirements of application.⁴²¹ The Refugee Reception Officer will work then forward the application to the Refugee Status Determination Officer after necessary inquiry as he/she deems fit.⁴²² At the same time, the Refugee Reception Officer will issue an asylum seeker permit to the applicant that allows him/her to reside in South Africa temporarily. That permit will have regularly extended until a decision has been reached.⁴²³ After receiving the application from the Refugee Reception Officer, the Refugee Status Determination Officer may ask for further information either from the forwarding officer or from the United Nations High Commissioner for Refugees (UNHCR) representative to reach a decision.⁴²⁴ The Refugee Status Determination Officer will conduct a hearing with the applicant and may grant asylum.

In some cases, the Refugee Status Determination Officer may refer any question of law related to the application to the Standing Committee for their determination.⁴²⁵ The refugee Status Determination Officer may also reject the application if he/she finds that the application is manifestly unfounded, abusive, or fraudulent.⁴²⁶

⁴¹⁸*Id.*, s. 5

⁴¹⁹ *Id.*, s. 5(2)

⁴²⁰ *Id.*, s. 21(1)

⁴²¹ *Ibid.* ss. 21(2)(a), 21(2)(b), 21(3)

⁴²² *Ibid.* ss. 21(2)(c), 21(2)(d)

⁴²³ *Id.*, ss. 22(1), 22(3)

⁴²⁴ *Id.*, s. 24(1)

⁴²⁵ *Ibid.* s. 24(3) (d)

⁴²⁶ *Ibid.* ss. 24(3)(b), 24(3)(c)

The Refugees Act, 1998 provides for the establishment of Refugee Reception Offices throughout South Africa.⁴²⁷ In every Refugee Reception Office, there must be one Refugee Reception Officer and one Refugee Status Determination Officer functioning under this Act.⁴²⁸ Both of these officers will have experience and knowledge in dealing with refugee matters, and they will serve as the officers of the department. Above the Refugee Reception Office in the hierarchy does the Minister determine an independent Standing Committee consisting of a Chairperson and such other members as determined by the Minister.⁴²⁹

The Standing Committee is primarily responsible for formulating and implementing the procedures under this Act and other acts, such as;

- supervising the work of the Refugee Reception Offices;
- reviewing and monitoring the decisions of the Refugee Status Determination Officer;
- deciding any questions of law referred by the Refugee Status Determination Officer, and
- liaising with the Minister and the representatives of UNHCR and non-governmental organizations.⁴³⁰

The Refugees Act, 1998 also provides for the establishment of an independent Refugee Appeal Board, consisting of one Chairperson and two other members appointed by the Minister.⁴³¹ The Refugee Appeal Board is empowered under this Act to make its own rules of practice and procedure and to determine questions of law referred to the Board, determine any appeal against rejection, and advise the Minister on matters related to the implementation of the Act.⁴³²

Under the Refugees Act, 1998, the power to review the decisions of the Refugee Status Determination Officer, in the case of the rejection of an application for asylum because it is manifestly unfounded, abusive, or fraudulent, has been given to the Standing Committee.⁴³³ At the same time, the Standing Committee is empowered

⁴²⁷*Id.*, s. 8(1)

⁴²⁸*Ibid.* s. 8(2)

⁴²⁹*Id.*, s. 9, 10

⁴³⁰*Id.*, s. 11

⁴³¹*Id.*, ss. 12, 13

⁴³²*Id.*, s. 14

⁴³³*Id.*, ss. 25(1), 24(3)(b)

to decide on any question of law referred to it by the Refugee Status Determination officer, and the Standing Committee will prepare a directive on this matter, which is binding, for the officer of refugee status determination.⁴³⁴

The Standing Committee, will confirm or set aside the order made by the Refugee status determination officer after a hearing and collecting information, and communicate its decision as prescribed by the rules.⁴³⁵

The power to decide an appeal against an order of a Refugee Status Determination Officer on the grounds of rejection of an asylum application as unfounded rests with the Refugee Appeal Committee.⁴³⁶ The Appeal Board, after hearing the appeal application and upon collection of the required information as deemed necessary by it, would confirm, set aside, or substitute the order made by the Refugee Status Determination Officer.⁴³⁷

Notwithstanding any provision of this Act or any other contrary law, no person shall be barred from entering the republic, and shall not be expelled, extradited, or sent back to another country or be the subject of a similar measure which, as a result of such refusal, expulsion, extradition, return or any other measure, is required to return or remain in a country in which;

- a) He may be persecuted because of his race, religion, nationality, membership of a particular social group, or political opinion; or
- b) his life or physical security or freedom would be threatened by external aggression; the occupation of foreign rule over this event would disrupt or seriously disrupt public order in one part or the other of the country.⁴³⁸ There is a general prohibition on the refusal of entry, extradition, expulsion, or return to another country for refugees in the Refugees Act, 1998.

It is not an absolute prohibition, but from protection standards, when the national law of a state contains such provisions, it demonstrates the spirit of the legislation and its impact on the civil society.⁴³⁹ There is also a restriction on starting

⁴³⁴ *Id.*, ss. 25(3)(b), 25(5), 24(3)(d),

⁴³⁵ *Id.*, ss. 25(3), 25(4)

⁴³⁶ *Id.*, ss. 26(1), 25(3)

⁴³⁷ *Id.*, ss. 26(2), 26(3),

⁴³⁸ *Id.*, s. 2,

⁴³⁹ WiUem H. Olivier, "The New Asylum Law in South Africa" 4 *Journal of African Law* 650 & 658 (2002)

proceedings in case of unlawful entry to or presence in South Africa if the person concerned applies for refugee status.⁴⁴⁰ It is the best guarantee for a refugee who is entering countries without travel documents. Refugees have the right to a written document of their status, an identity document, and a travel document as per the law.⁴⁴¹ Like the citizens of the country, refugees have access to primary education and medical facilities guaranteed by law.⁴⁴² Refugees also have the right to seek employment and an immigration card (permanent residence) after a continuous stay of 5 years in South Africa.

Concerning the removal of refugees from South Africa, this is allowed only in cases of maintaining national security and public order, and such order of removal has to be signed by the Minister after consideration has been given to national laws and international human rights.⁴⁴³ At the same time, the refugee will give a reasonable amount of time to get approval from the country to which he or she wants to have removed.⁴⁴⁴

From this point, it can argue that the primary needs of a refugee are limited to access to documentation, a fair and functioning asylum system, essential social services, occasional emergency assistance for the most vulnerable people including shelter and food, and social integration in case of a prolonged stay. The South African refugee legislation is silent on the matter of shelter and food during the initial days following arrival; on the other hand, the possibility of obtaining an immigration permit after a stay of 5 years is the most significant achievement of this legislation. The Refugees Act, 1998 also contains provisions related to restrictions on detention for more than thirty days,⁴⁴⁵ provisions of unique assistance for unaccompanied children and mentally disabled person,⁴⁴⁶ and provisions for the dependents of a refugee to apply for and retain refugee status even after divorce or the death of the head of the refugee family.⁴⁴⁷

⁴⁴⁰ The Refugee Act, 1998 (Act 130 of 1998), s. 21,

⁴⁴¹ *Id.*, ss. 27(a), 27(d), 27(e), 30, and 31.

⁴⁴² *Id.*, s. 27(g)

⁴⁴³ *Id.*, ss. 28(1), 28(2)

⁴⁴⁴ *Ibid.* s. 28(5)

⁴⁴⁵ *Id.*, s. 29

⁴⁴⁶ *Id.*, s. 32

⁴⁴⁷ *Id.*, s. 33

An essential contribution of the South African refugee protection law is the incorporation of provisions dealing with a mass influx situation.⁴⁴⁸ The development of these provisions came with the understanding that the typical individual system of refugee status determination would be unable to cope with the workload in cases when the state concerned faced an influx of many persons likely to qualify for refugee status. The Refugee Act 1998 provides that the minister of any group or category of people who are already on the territory of South Africa can be granted refugee status without conditions or as required.⁴⁴⁹ The Minister may also seek consultation with UNHCR and the local administration to finalize the temporary reception conditions for large groups of asylum seekers.⁴⁵⁰

3.6.6 Canada

Refugees are regulated in Canada by the Immigration and Refugee Protection Act of 2001, which is part of the Refugee and Refugee Resettlement Program, and protect people outside of Canada.⁴⁵¹ Canada is a party of the 1951 Refugee Convention and its 1967 Protocol and is committed to advancing the cause of international human rights through the work of the United Nations.⁴⁵² Canada's refugee law aims to assist refugees because of their needs. The Refugee Assistance Program funded Refugee Allowances, where the Government of Canada or the Province of Quebec in Canada provides initial assistance and assistance to resettled refugees. Additionally, organizations or individuals in Canada can identify and sponsor individuals who meet legal licensing requirements. Canada is loyal to UNHCR solely with private sponsors to identify refugees for resettlement. Canada continues to be amongst the top destinations for refugees in the world, possibly

⁴⁴⁸ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 146 (Palgrave Macmillan, Singapore. 2017)

⁴⁴⁹ *Supra* note 406, s. 35(1)

⁴⁵⁰ *Ibid.* s. 35(2)

⁴⁵¹ Catherine Dauvergne, 'Evaluating Canada's New Immigration and Refugee Protection Act in its Global Context' 41(3) *Alberta Law Review* 725, and 742 (2003), *available at*: <https://www.albertalawreview.com/index.php/ALR/article/view/1321> (last visited on December 14, 2019)

⁴⁵² *Supra* note 448 at 153.

because of the reform of its law and asylum policies.⁴⁵³ Immigration has had a significant impact on Canadian society. Canada has adopted a refugee screening procedure that is thorough, rigorous, and multi-staged in response to a widespread sense that immigration is not economically beneficial for the country. The immigration flows are too high, and too concentrated in urban areas and make only a small contribution to meeting Canada's growing demand for skilled workers.⁴⁵⁴ The 1951 Refugee Convention and 1967 Protocol implemented and regulated its refugee system by The Immigration and Refugee Protection Act, 2001. The Citizenship and Immigration Canada (CIC), which manages both application processing and resettlement support, manages the refugee resettlement program. The Balanced Refugee Reform Act, 2010 that amended or replaced several provisions of the Immigration and Refugee Protection Act, 2001, altered the system of refugee status determination and other areas of the Canadian refugee protection and management system.⁴⁵⁵

Further, because of the enactment of the Protecting Canada's Immigration System Act, 2012,⁴⁵⁶ which amends or replaces several provisions of equally the Balanced Refugee Reform Act, 2010, and the Immigration and Refugee Protection Act, 2001, the government is of the view that these changes will respond to delays, backlogs, weaknesses, and inefficiencies in the process of refugee status determination.⁴⁵⁷ The Immigration and Refugee Protection Act, 2001 undeniably contains many charges, including new and expanded objectives.⁴⁵⁸ These objectives present a complicated situation for the government, serving best for the mere purpose

⁴⁵³ Peter Li, *Destination Canada: Immigration Debates and Issues* 48 (Oxford University Press, Toronto 2003)

⁴⁵⁴ Martin Collacott, *Canada's Immigration Policy: The Need for Major Reform* 6–10. (The Fraser Institute, Vancouver 2002)

⁴⁵⁵ The Balanced Refugee Reform Act (S.C. 2010, c. 8, Canada), Assented to 29-06-2010. available at: https://laws-lois.justice.gc.ca/eng/annualstatutes/2010_8/page-1.html (last visited on December 12, 2019)

⁴⁵⁶ The Protecting Canada's Immigration System Act (S.C. 2012, c. 17, Canada), Assented to 28-6-2012. available at: <https://www.canlii.org/en/ca/laws/astat/sc-2012-c-17/latest/sc-2012-c-17.html> (last visited on December 12, 2019)

⁴⁵⁷ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 154 (Palgrave Macmillan, Singapore. 2017)

⁴⁵⁸ The Immigration and Refugee Protection Act, 2001 (Act 27 of 2001), s. 3.

of the announcement alone. There appear some structural as well as procedural changes in the functioning of the Immigration and Refugee Board, as the Immigration and Refugee Protection Act, 2001 defines family in a new way, alters the points system, which provides the central logic for independent immigrant screening, and redefines skilled worker migration.⁴⁵⁹ It also provides a framework for discretionary decision-making and delegated legislative power. It expands the jurisdiction of the Refugee Board and the Refugee Protection Division of the Immigration. The Immigration and Refugee Protection Act, 2001, limits the right to appeal (mainly due to an excess of applications)⁴⁶⁰ and make provisions for more stringent enactments about smuggling,⁴⁶¹ human trafficking,⁴⁶² and criminal inadmissibility.⁴⁶³

A refugee in Canada can be divided into two different categories one is a conventional refugee or the second is a person in need of protection.⁴⁶⁴ The definition of a conventional refugee corresponds to the definition in the 1951 Refugee Convention, but is divided into two parts:

The first category is a convention refugee which means a person who has a reasoned fear of persecution based on race, religion, nationality, belonging to a particular social group, or political opinion

- a) is the outside country of his nationality and cannot or does not want to avail himself of the protection of these countries due to well-founded fear of persecution, or
- b) does not have a country of nationality, is outside the country of his former habitual residence and, because of that fear, unwilling to return to that nation.⁴⁶⁵

The second category of the refugee in Canada is defined as:

A person seeking protection is a person in Canada who has been expelled from his country or country of citizenship, or if he is not a citizen is represented by his place of residence personally:

⁴⁵⁹ *Id.*, s. 151.

⁴⁶⁰ *Id.*, s. 64

⁴⁶¹ *Id.*, s. 11.

⁴⁶² *Id.*, s. 12.

⁴⁶³ *Id.*, ss. 33–43.

⁴⁶⁴ *Id.*, ss. 95(1)(a), 95(2).

⁴⁶⁵ *Id.*, s. 96.

- a) a suspected risk of torture of severe reasons within the meaning of Article 1 of the Convention Against Torture; or
- b) at risk of life or risk of punishment or cruel and unusual treatment, if
 - i. The person is unable or unwilling to seek protection from his nation because of this risk,
 - ii. The person would bear the risk in all regions of this country and generally will not be taken by other people in or from this country,
 - iii. The risk is not associated with or associated with legal sanctions unless it is imposed against recognized international values, and
 - iv. The risk is not produced by the inability of this country to provide adequate health or medical care.⁴⁶⁶

The objectives enshrined in the Immigration and Refugee Protection Act, 2001 reflect the country's humanitarian concerns and convey its commitment to offer maximum assistance to refugees.⁴⁶⁷ A well-founded fear of persecution under the Convention definition of a refugee is taken into consideration when examining a refugee claim. After examining the reasons given by the applicant, the government official must determine whether the applicant has a reasonable fear of harassment. The applicant must also demonstrate that fear is appropriate or not, and if the applicant presents more than one reason for the harassment, then it is the responsibility of the officer, not the applicant that he will determine the reasons for the harassment.⁴⁶⁸ In addition, they must be transferred by the UNHCR or other remittance organization or sponsored by a private group.

In addition, admission and eligibility requirements must be met before an application can be accepted.⁴⁶⁹ The Immigration and Refugee Protection Act, 2001, also includes specific provisions concerning cessation. A claim for refugee protection is rejected under certain circumstances, such as voluntarily re-availing claim protection of the country's citizenship, re-acquiring nationality, acquiring a new nationality, re-establishing in the state of nationality, or habitual residence, or any

⁴⁶⁶ *Id.*, s. 97(1),

⁴⁶⁷ Elena Fiddian-Qasmiyeh, and Gil Loescher, (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* 679 (Oxford University Press, Oxford, 2014).

⁴⁶⁸ *Supra* note 458, s. 12.

⁴⁶⁹ *Id.*, ss. 101, 102.

other reason that the need for protection has ceased to exist.⁴⁷⁰ At the same time, persons from designated countries of origin, those who generally do not produce refugees and respect human rights and provide government protection, may not be eligible for refugee status in Canada.⁴⁷¹

Refugee protection may apply within or outside of Canada under the 2011 Immigration and Refugee Protection Act.⁴⁷² It is noteworthy that a person from outside Canada can make a claim by applying for a visa at a Canadian Consulate as a convention refugee or as a person in similar circumstances.⁴⁷³ South Africa and Brazil do not include such a provision in their refugee protection legislation, which substantially extends the border of Canada for entry to the country to the respective consulates.

Refugee protection applications in Canada can be provided at the time of entry to the port or after entry to specific authorities with information about the reasons for the application.⁴⁷⁴ The officer to whom an application has to be made from inside Canada must determine whether the claim is eligible to refer to the Refugee Protection Division within three days, and in case of non-referral by the officer, the application will have deemed assigned to the Refugee Protection Division within three days unless it is suspended or ineligible.⁴⁷⁵ Unless the claimant requests an initial interview, the Refugee Protection Division will fix a date for hearing after fifteen days of receiving the claim, and the burden of proof will rest on the claimant.⁴⁷⁶ After this hearing, the Refugee Protection Division will accept the application in case the applicant is considered a conventional refugee or a person to be protected, and the case of rejection, the reasons for finding no credible basis, or that

⁴⁷⁰ *Id.*, s. 108.

⁴⁷¹ *Id.*, s. 109, read with amendment made under the Balanced Refugee Reform Act, 2010. s. 12, and Protecting Canada's Immigration System Act, 2012, s. 58.

⁴⁷² *Id.*, s. 99(1)

⁴⁷³ *Ibid.* Section 99(2),

⁴⁷⁴ *Ibid.* ss. 99(3), 99(3) (1).

⁴⁷⁵ *Id.*, ss. 100(1), 100(3).

⁴⁷⁶ *Id.*, ss. 100(1) (1), 100(4), read with amendment made under Section 11, of The Balanced Refugee Reform Act, 2010.

the claim is manifestly unfounded will have to be stated.⁴⁷⁷ The Immigration and Refugee Protection Act, 2001, provides for the establishment of an Immigration and Refugee Board.⁴⁷⁸ The Board consists of a Chairperson and such other members as necessary for the proper functioning of the Board.⁴⁷⁹ There are two divisions under the Immigration and Refugee Board: the Refugee Protection Division is primarily in-charge of deciding claims in hearings,⁴⁸⁰ and the Refugee Appeal Division⁴⁸¹ is responsible for hearing appeals.⁴⁸²

The principle of non-refoulement has been recognized as protection required under the Immigration and Refugee Protection Act, 2001. However, this protection is not available to those persons who are inadmissible on the grounds of serious criminality, security, or violating human and international rights.⁴⁸³ Recognized refugees can be either permanent residents or temporary residents in Canada subject to other rules and processes relating to residency. The right of refugees as a permanent resident or temporary resident remains as much as favourable as a Canadian citizen.⁴⁸⁴ At the same time, all persons in the territory of Canada are protected by the Bill of Rights, starting from equality, due process, speech, assembly, and associations.

3.6.7 China

China accepted the 1951 Refugee Convention and the 1967 Refugee Protocol in September 1982. China is the first country in South Asia to accept the Convention

⁴⁷⁷ *Id.*, s. 107, read with amendment made under The Balanced Refugee Reform Act, 2010 Section 11, and, The Protecting Canada's Immigration System Act, 2012. Section 57

⁴⁷⁸ *Id.*, s. 151

⁴⁷⁹ *Id.*, s. 152.

⁴⁸⁰ *Id.*, s. 169.1, read with amendment made under The Balanced Refugee Reform Act, 2010 (Act 27 of 2001), s. 26.

⁴⁸¹ *Id.*, s. 171, read with amendment made under Section 28, The Balanced Refugee Reform Act, 2010 and The Protecting Canada's Immigration System Act, 2012. Section 28,

⁴⁸² *Id.*, ss. 170 and 171, read with amendment made under Balanced Refugee Reform Act, 2010, Section 28, and the Protecting Canada's Immigration System Act, 2012. Section 52, Section 28,

⁴⁸³ *Id.*, s. 115

⁴⁸⁴ *Id.*, ss. 27–32

and Protocol for Refugees. At the same time, it is one of the first communist countries to join these devices.⁴⁸⁵

Despite compliance with the treaties, national legislation on refugees and asylum is still in preparation. Currently, only relevant legal provisions such as Article 32 of the Constitution and Article 46 of the Law on Exit and Entry are, protect the refugee. The first describes the general principle of asylum and explains that the country can award asylum to aliens who appeal it for political causes.⁴⁸⁶ The latter stipulates that refugees and asylum seekers in China can obtain identity cards. Integrative refugee law is currently being examined that would cover a wide range of refugee and asylum issues. The UNHCR office in Beijing registers refugees and determines refugee status in China. The recognized refugees have been allowed to stay in China temporarily while UNHCR is looking for a permanent solution, which mainly consists of moving to a third country. Non-Indochinese refugees are generally treated as foreigners. They have no labour rights. UNHCR supports them with nutrition, housing, health care, and education for children.

China has not been a traditionally popular destination for refugees and asylum seekers,⁴⁸⁷ but it has been one of the top ten refugee host countries recognized by the United Nations High Commissioner for Refugees (UNHCR) because it still receives a large number of Indochinese refugees.⁴⁸⁸

According to the UNHCR, there were 301,057 refugees in June 2015, including 300,000 Indochinese refugees and 564 asylum seekers in China.⁴⁸⁹ The main countries of origin for non-Indochinese refugees and asylum seekers in China are Somalia, Nigeria, Iraq, and Liberia.⁴⁹⁰

⁴⁸⁵ F. Nicholson & P. Twomey (eds.), *Refugee Rights and Realities* 55(Cambridge, Cambridge University Press, 1999)

⁴⁸⁶ Official English translation *available at*:

http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm (last visited on November 11, 2019)

⁴⁸⁷ This report does not cover the laws in effect in Hong Kong, Macao, and Taiwan

⁴⁸⁸ UNHCR MID-YEAR TRENDS 2015 at 6 (2015), *available at*:

<http://www.unhcr.org/56701b969>.(last visited on November 01, 2019)

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *The People's Republic of China Fact Sheet*, UNHCR (Aug. 2015), *available at*:

<http://www.unhcr.org/5000187d9.pdf>, archived at <https://perma.cc/E366-DQPK>. (last visited on November 01, 2019)

Article 32 of the Constitution of China provides for the rights of foreigners. It provides that the People's Republic of China protects the legitimate rights and interests of foreigners in Chinese territory and that foreigners in China must respect the law of the People's Republic of China. Besides, the People's Republic of China can grant asylum to foreigners who request it on the ground of political reasons.⁴⁹¹

The PRC Law on Exit and Entry Management (Exit and Entry Law) was passed in 2012, replaced two old exit and entry laws for Chinese citizens and foreigners.⁴⁹² As of July 1, 2013, the new exit and entry law contains a provision that enables refugees and asylum seekers to obtain an identity card in China for the first time.

According to Article 46 of the Law on the Management of Entrances and Exits from the People's Republic of China, this is accepted on June 30, 2012, at the 27th meeting of the Standing Committee of the Eleventh National People's Congress.⁴⁹³ Foreigners applying for refugee status can stay in China during the verification process based on temporary identity certificates issued by public security organs. Foreign nationals recognized as refugees can also stay or live in China on the basis of refugee identity certificates issued by public security organs.⁴⁹⁴

Article 46 is seen as a positive first step towards establishing a legal basis for the life of refugees in China. In recognition of the fact that refugees and asylum seekers have the right to identity cards, the law lays the foundation for future improvements in refugee rights in China, like the right to work and the right to education⁴⁹⁵

⁴⁹¹ The Constitution law of People's Republic of China <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn147en.pdf> (last visited on November 11, 2019)

⁴⁹² Chujing Rujing Guanli Fa [Exit and Entry Administration Law] (Exit and Entry Law) (promulgated by the Standing Committee of the National People's Congress (NPC), June 30, 2012, effective July 1, 2013), 2012 FAGUI HUIBIAN 283–301, English translation *available at* <http://cs.mfa.gov.cn/wgrlh/lhqz/lhqzjjs/t1120988.shtml>, *archived at* <https://perma.cc/5XS7-BPTE> (last visited on November 02, 2019)

⁴⁹³ Exit and Entry Administration Law of the People's Republic of China, *available at*: http://subsites.chinadaily.com.cn/2018-03/29/c_208720.htm (last visited on November 01, 2019)

⁴⁹⁴ Exit and Entry Law art. 46.

⁴⁹⁵ *Ibid.*

Although there is only one section in the exit and entry law that deals specifically with asylum seekers and refugees in China are subject to other provisions of this law on refugees, foreigners, and stateless people, as well as other relevant Chinese laws. Apart from Article 46 of the Exit and Immigration Act, there is no legal provision that specifically regulates the admission of refugees and the processing of asylum applications under Chinese law. There is also no explicit authority for refugee matters. The Ministry of Public Security should be accountable for the issue related to the recognition of refugee status, and the return of refugees and the Ministry of Civil Affairs should ensure the resettlement of refugees. However, no law expressly permits them as competent authorities.⁴⁹⁶

In practice, the registration of refugees and the determination of refugee status for non-Indochinese refugees are usually carried out by the UNHCR office in Beijing.⁴⁹⁷ According to the office, it usually has access to asylum seekers in Beijing and continues to determine refugee status. Recognized refugees are allowed to stay in China temporarily, while UNHCR is looking for a permanent solution that mainly involves moving to a third country.⁴⁹⁸

China does not appear to have made any amendments or additions to its refugee law in response to the current refugee crisis. The UNHCR office in Beijing is currently responsible for determining refugee status in China. Although China and UNHCR have entered into a cooperation agreement to determine refugee status, the Chinese government has not been significantly involved in the UNHCR-managed refugee status process.⁴⁹⁹

Non-Indochinese refugees are mostly treated as foreigners in China, who have no right to work. UNHCR supports them with accommodation, nutrition, health

⁴⁹⁶ ZhaoYinan, *Legal Status for Seekers of Asylum*, CHINA DAILY (July 2, 2012), http://usa.chinadaily.com.cn/china/2012-07/02/content_15540683.htm, archived at <https://perma.cc/FH74-HUJM>. (last visited on November 11, 2019)

⁴⁹⁷ *UNHCR Regional Representation in China*, available at: <https://www.unhcr.org/hk/en/134-china-2.html> (last visited on November 01, 2019)

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Lili Song, *China and the International Refugee Protection Regime: Past, Present, and Potentials*, 37 *Refugee Survey Quarterly* 11 (2018) available at: <https://academic.oup.com/rsq/article-abstract/37/2/139/4934135> (last visited on November 01, 2019)

care,⁵⁰⁰ and education of children.⁵⁰¹ According to the UNHCR reports of 2013, refugee children in five Chinese provinces had approved to attend primary school under the same conditions as local children.⁵⁰²

3.7 ENFORCEMENT OF REFUGEE PROTECTION THROUGH INTERNATIONAL CRIMINAL LAW

The developments in international criminal law are also relevant to the protection of refugees and other persons of concern to UNHCR. The Rome Statute of the International Criminal Court established a permanent international criminal court to decide the cases of persons charged with some of the most severe crimes of global concern. The ICC Statute was adopted on 17 July 1998 by a UN Diplomatic Conference and entered into force on 1 July 2002.⁵⁰³ The jurisdiction of the ICC complements national criminal authorities. The material jurisdiction of the Court is over four categories of crimes: Genocide,⁵⁰⁴ War crimes,⁵⁰⁵ Crimes against humanity,⁵⁰⁶ and Crimes against the administration of justice of the ICC. The Rome Statute informs the interpretation of the refugee definition under the 1951 Convention. It helps to determine which acts attain the threshold of persecution and guides the delineation of excludable criminal acts under Article 1 F.

The Rome Statute defines deportation or forced transfer of the population as a crime against humanity. At the same time, it has also characterized the unlawful removal or transmission of the civilian population or the displacement of civilians considered as war crimes. It is another significant development related to both criminal law and refugees for international action to combat human trafficking and trafficking. However, due to the growing number of refugees, they have to seek the help of smugglers to reach safer places. As a result, they not only risk their lives but

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² Chinese Schools Offer Primary Education for Urban Refugees, UNHCR (Nov. 22, 2013), <http://www.unhcr.org/528f66086.html>, available at <https://perma.cc/8SSB-AS67> (last visited on October 12, 2019)

⁵⁰³ Rome Statute of the International Criminal Court, available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last visited on December 10, 2019)

⁵⁰⁴ Rome statutes of the international criminal court, art. 6

⁵⁰⁵ *Id.*, art. 8

⁵⁰⁶ *Id.*, art. 7

often also endanger the outcome of their asylum applications in the country of destination.⁵⁰⁷ In 2000, the United Nations adopted a protocol against the smuggling of migrants by Land, Sea, and Air to prevent the trafficking of refugees, which came into force from January 2003.⁵⁰⁸

In 2001, the United Nations adopted another protocol to avoid the smuggling of people, suppress it, and punish smugglers, which came into force in 2003.⁵⁰⁹ The purpose of these two protocols focuses on smuggling and trafficking so that perpetrators of trafficking and smuggling are sufficiently punished for the subject of these crimes.

The protocol provides no provision that affects the rights of individuals and obligations of states under the 1951 Convention and the 1967 Protocol or the principle of non-refoulement. These Protocols supplement the United Nations Convention against Transnational Organized Crime (2000) and provide for greater cooperation among governments in tackling cross-border criminal activity.⁵¹⁰

3.8 CONCLUSION

At an international level, there are some mechanisms for the protection of refugees, including international human rights law, international humanitarian law, and mainly international refugee law. International human rights law applies to ordinary situations due to the refugee being a human, while international humanitarian law has been used to protect refugees in war situations. Whereas, under the International Refugee Law, there is mainly the 1951 Refugee Convention and its 1967 protocol is applied to the protection of refugee. Apart from this, at the regional level,

⁵⁰⁷ Human Rights and Refugee Protection, Self-study Module 5, Vol. I. *available at:*

<https://www.refworld.org/pdfid/466942032.pdf> (last visited on November 11, 2019)

⁵⁰⁸ The United Nations Protocol against Smuggling of Migrants by Land, Sea, and Air (2000).

available at: <https://www.unodc.org/smuggling-migrants> (last visited on November 21, 2019)

⁵⁰⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *available*

at: https://www.unodc.org/documents/treaties/Special/2000_Protocol_to_Prevent_2C_Suppress_and_Punish_Trafficking_in_Persons.pdf (last visited on November 21, 2019)

⁵¹⁰ Human Rights and Refugee Protection, Self-study Module 5, Vol. I. *available at:*

<https://www.refworld.org/pdfid/466942032.pdf> (last visited on December 10, 2019)

there is the 1969 African Convention on refugees and the Cartagena Declaration, 1983.

At the national level, the laws related to refugee protection of seven countries have been mentioned here. These include Turkey, Germany, Australia, Brazil, South Africa, Canada, and China. All of these countries have accepted the 1951 Refugee Convention, and provisions have been made in national laws to protect refugees.

Despite the numerous laws protecting refugees internationally, the status of refugees remains miserable as no institution applies these laws. Due to the lack of an international enforcement agency, it is challenging to implement these methods at the international level. If a country violates or fails any provisions of the 1951 Refugee Convention or the Refugee Protection Act, there is no provision for taking any punitive action against that country. Due to which, many countries avoid completely following these methods with some excuse.

All countries should be incorporate refugee law at the national level. At the same time, states should improve their political conditions so that the situation of displacement of people does not arise.

CHAPTER - IV
NATIONAL LEGAL FRAMEWORK
FOR THE PROTECTION
OF REFUGEES

NATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF REFUGEES

CHAPTER IV

4.1 INTRODUCTION

India is a country having a long historical tradition of welcoming refugees from all over the world.¹ India has received a large number of refugees due to her unique geography, liberal democratic policy, and multi-ethnic society.² India mostly plays host to refugees from its neighbouring countries who have either been forced to leave their countries of origin due to internal or external conflict, political persecution, or human rights infringements. Tamil refugees from Sri Lanka, Chakma people from Bangladesh, Tibetan refugees from Tibet and China, and Rohingya refugees from Myanmar, Bhutanese, Afghanistan, Iran, and even Sudan today comprise the bulk of India's refugee population.³ In 2019, only India was hosting around 41,000 mandate refugees and asylum seekers registered with UNHCR.⁴ The influx of refugees in India is not only a recent spectacle. Refugees started flowing into India during the partition in 1947.⁵ The creation of India and Pakistan in 1947 caused one of the world's most massive population displacements in history. Nearly 8.5 million people migrated from India to Pakistan and 6.5 million from Pakistan to India.⁶

India is not a signatory of the UN Refugee Convention 1951 and its protocol of 1967. In India, there is no specific national legislation concerning refugees. India's refugee policy has governed by certain administrative regulations. Refugees in India have been treated on an ad-hoc basis.

Refugees in India are classified as mandate and non-mandate refugees. Those who are under the protection of UNHCR have known as mandate refugees and those

¹ National Refugee Legislation, *available at*: <http://www.lawteacher.net/immigration-law/essays/national-refugee-legislation.php> (last visited on March 22, 2019)

² Ragini Trakroo Zutshi, *Refugee and the Law* 57 (Human Rights Law Network, New Delhi 2007)

³ Arjun Nair, "National Refugee Law for India: Benefits and Road Blocks", (2007) *available at*: <http://www.ipcs.org>. (last visited on March 10, 2019)

⁴ UNHCR, The UN Refugee Agency: Global focus, UNHCR operations worldwide, *available at*: <http://reporting.unhcr.org/node/10314> (last visited on May 24, 2019)

⁵ Shuvro Prosun Sarkar, *Refugee Law in India: The Road from Ambiguity to Protection* 14 (Palgrave Macmillan, 2017)

⁶ Ragini Trakroo Zutshi, *Refugee and the Law* 60 (Human Rights Law Network, New Delhi, 2007)

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who are not under the protection of UNHCR they called non-mandate refugees.⁷ Refugees in India have been accorded protection under three main categories. The first category comprises refugees who receive full assistance from the government of India. The second category includes asylum seekers to whom UNHCR grants refugee status. The third category of refugees consists of those who have not been recognized by UNHCR or by the Indian government and has integrated into local communities.⁸

4.2 LAWS RELATED TO PROTECTION OF REFUGEES IN INDIA

India is not a party to the 1951 Convention or the 1967 Protocol. In India, there is no national legislation concerning refugees; India's refugee policy is governed by certain administrative regulations. Some laws deal with foreigners in India. They are; The Registration of Foreigners Act, 1939, which deals with all the foreigners, the foreigner's Act, 1946, and the foreigner's order 1948, which empowered the state regulates the entry, the presence, and departure of aliens in India. Under Section 2(a) of the Registration of Foreigners Act, 1939. The term foreigner is defined as "a person who is not a citizen of India," which can refer to aliens of any kind including immigrants, refugees, and tourists. The Foreigners Act, 1946, and the foreigners' order of 1948 have also used this definition of a foreigner.⁹ Although, the term 'alien' also appears in the Constitution of India (Article 22, Para 3 and Entry 17, List I, Schedule 7), in Section 83 of the Indian Civil Procedure Code, and Section 3(2)(b) of the Indian Citizenship Act, 1955, as well as some other statutes like the Passport Act, 1920 and the Passport Act, 1967.¹⁰

After the partition of India, the term refugee as defined in the East Punjab Refugees (Registration of Land Claims) Act, 1948. Refugees mean a landholder in the Province of West Punjab, or whose ancestor migrated as a colonist from Punjab since

⁷ *Id.* at 58.

⁸ Sreya Sen, Understanding The Importance of a national legislation for Refugee Protection in India, available at: <http://rightsixinexile.tumblr.com/post/162471010952/understanding-the-importance-of-a-national> (Last Modified March 10, 2019)

⁹ Tapan K. Bose, "India: Policies and Law's towards Refugees", Asian Human Rights Commission - Human Rights Solidarity, Vol-10 Oct. 2000, available at: <http://www.chro.ca/index.php/resources/refugee-issues/290-india-policies-and-laws-toward> (last visited on March 25, 2019)

¹⁰ Refugee Law: The Indian Perspective, available at: <https://www.lawteacher.net/free-law-essays/international-law/refugee-law-the-indian-perspective-law-essay.php> (last visited on December 04, 2017)

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1901 to the Provinces of North-West Frontier Province, Sind or Baluchistan, or any State adjacent to any of the Provinces mentioned above as well as acceding to the Dominion of Pakistan and who has since the 1st day of March 1947, abandoned or made to leave his land in the said territories on account of civil disturbances, or the fear of such troubles, or the partition of the country.¹¹

It is a very narrow definition of refugee, applied only to those people who came from Pakistan by the partition of India. However, this definition does not apply to India now.

The Constitution of India guarantees certain Fundamental Rights to refugees. Namely, the right to equality,¹² right to life and personal liberty,¹³ right to protection under arbitrary arrest¹⁴ right to protection in respect of conviction of offences,¹⁵ freedom of religion,¹⁶ right to approach the Supreme Court for enforcement of Fundamental Rights,¹⁷ are as much available to non-citizens, including refugees, as they are to citizens.¹⁸

In India, the judiciary has also played a major role in protecting refugees. The Supreme Court has taken recourse to Article 21 of the Constitution in the absence of legislation to regulate and justify the stay of refugees in India. In *Louis De Raedt v. Union of India*,¹⁹ the court held that even non- citizens have the Fundamental right to life with dignity and personal liberty, and the court held that foreigners are also entitled to the protection of article 21 of the Constitution of India.

4.2.1 Constitutional Protection

India has a tradition of nourishment and protection of human rights since the ancient historical period. The Constitution of India, after recognizing some inalienable

¹¹ The East Punjab Refugees (Registration of Land Claims) Act, 1948, section 2(d)

¹² The Constitution of India, art. 14

¹³ *Id.*, art. 21

¹⁴ *Id.*, art. 22

¹⁵ *Id.*, art. 20

¹⁶ *Id.*, art. 25

¹⁷ *Id.*, art. 32

¹⁸ National Refugee Legislation, *available at*: <https://www.lawteache.net/free-law-essay/international-law/refugee-law-the-indian-perspective-law-essay.php> (last visited on March 22, 2019)

¹⁹ AIR 1981 SC 1886

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natural rights as human rights, which have been enumerated in Part III and Part IV of the Indian Constitution.²⁰ Article 5, 6, and 7 of Part II of the Constitution of India specifically deal with the citizenship criteria of persons who have migrated to India from Pakistan.

Besides, the fundamental rights of the Constitution of India are available to Indian citizens and all personnel of the territory of India. The citizens of India enjoy the protection of all fundamental rights, whereas the rights available to all persons in the territory of India are comparatively restricted. The protection of Article 14 and 21 are only available to all persons. The history of the protection of refugees in India is related to the history of the liberal interpretation of two articles by the judiciary.²¹

The term refugee is not defined in the Constitution of India, but it protects refugees under the category of all persons in the territory of India. The provisions of the Constitution of India, which have to be borne on refugees are found in Articles 5 to 11, 14, 20, 21, 22, 25 to 28, 51(c) and 253 and List I, entries 14, 18, and 19 and the List II, entry 27. These provisions deal with citizenship, naturalization, aliens excluding enemy aliens, extradition, displaced persons, fundamental rights of all people within the territory of India, the rights of the person in criminal proceedings, and the power of parliament to recognize international treaties. The progressive interpretation of these articles by the judiciary integrating the human rights law and the humanitarian law makes refugee protection a part of Indian jurisprudence. The various decisions pronounced by the Supreme Courts and the High Courts have affirmed the right to protection against refoulement, the right to seek asylum, the right to life and personal liberty, the right to equality and non-discrimination, and the right to voluntary repatriation. However, the following fundamental rights are available to the refugees under the constitution of India.

²⁰ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality*, 207 (Deep and Deep Publications Pvt. Lt., New Delhi, 2007)

²¹ Probodh Saxena, "Creating Legal Space for Refugees in India: the Milestone Crossed and the Roadmap for the Future", available at: <https://www.scribd.com>. (last visited on July 12, 2019)

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(I) Equal Protection of Law

Article 14 of the Indian Constitution guarantees the right that the state shall not deny to any person equality before the law or the equal protection of the law within the territory of India.²²

We are a country governed by the Rule of Law. Our Constitution confers rights on every human being. Every person is entitled to equality before the law and equal protection of the law. So no person can be deprived of his life or personal liberty except according to the procedure established by law. The state is therefore obliged to protect the life and freedom of everyone, whether citizens or not.²³ Therefore, as per the provision of this article, the state would not discriminate against a refugee or other refugees of the same class regarding any benefits or rights, they enjoy under their refugee status.²⁴ Article 14 protects a person not only against legislation but also against executive orders or notifications.

(II) Right against Ex-Post Facto, Double Jeopardy, and Self-Incrimination

(a) Right against Ex-Post Facto

Article 20 of the Indian Constitution guarantees protection to the non-citizen as well as refugees of India in certain respects against conviction for offences by prohibiting-

- a)** Ex-post-facto legislation; Article 20(1), states: *No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*²⁵

Article 20(1) embodies the underlying objection to ex-post-facto laws and has been designed to prevent a person punished for an act or omission, which is

²² The Constitution of India, art. 14

²³ National Human Rights Commission v. State of Arunachal Pradesh (1996) 1 SCC 742.

²⁴ Manish Chaturvedi, *Human Rights of Refugees: Issues & Concerns in the Globalization Era* 173(Swastik Publication, New Delhi, 1st edn., 2011)

²⁵ The Constitution of India, art. 20(1)

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considered neutral or innocent when done or omitted.²⁶ It is a limitation upon the law-making power of the legislatures in India. According to the present clause, an authority shall not be competent to make a criminal law retrospectively.

(b) Guarantee against Double Jeopardy

The roots of the doctrine against double jeopardy are to found in the well-established maxim of English common law, '*Nemo debet bis vexari*,' which means that a man must not be put twice in peril for the same offence.²⁷ The prohibition against double jeopardy contained in clause (2) of Article 20, which runs thus— "No person shall be prosecuted and punished for the same offence more than once."

It means that if a person that is a citizen or a non-citizen has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in a subsequent procedure. However, this Article does not give protection other than proceeding before a court of law or a judicial tribunal. Article 20(2) may be invoked only when there has been prosecution and punishment in the first instance. Both prosecution and punishment should co-exist for Art. 20(2) is to be operative. Prosecution without punishment would not bring the case within Art. 20(2) if a person has been prosecuted for an offence but acquitted, then he can prosecute for the same offence again and punished.²⁸

(c) Protection from Self-Incrimination

"No person accused of any offence shall be compelled to be a witness against himself."²⁹

Self-incrimination means conveying information based upon the personal knowledge of the person giving the data³⁰, and the court held to cover not only oral or statements in writing of the accused but also the production of a thing or evidence by

²⁶ *Supra* note 20, at 246.

²⁷ M. P. Jain, *Indian Constitutional Law* 1157 (Lexis Nexis Butterworths, Wadhwa Nagpur, 6th edn., 2012)

²⁸ *Id.* at 1158.

²⁹ The Constitution of India, art. 20(3)

³⁰ *Supra* not 27 at 1165.

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other modes.³¹ The privilege against self-incrimination is a fundamental canon of common law criminal jurisprudence. The characteristic feature of this principle is-

1. That the accused is presumed to be innocent.
2. That the prosecution has to establish its crime, and
3. That the accused need not make any statement against his will.

In the case of *M. P. Sharma v. Satish Chandra*, the scope of this provision was expanded by our apex court and it said that the word 'witness' is to comprise both oral and documentary evidence so that no person can be compelled to furnish any other evidence which is reasonably likely to support a prosecution against him.³²

On the analysis of this provision, there are some components, which must necessarily co-exist before the protection of Article 20(3) can be claimed like;³³

- (a) It is a right available to a person (including refugees) accused of an offence,
- (b) It is a protection against compulsion to be a witness, and
- (c) It is a protection against such coercion resulting in his giving evidence against himself.

Self-incrimination under article 20(3) does not include the signature, thumb impression, impression of the palm or foot or finger, or specimen of the handwriting or exposing part of his body by an accused of the purpose of identification.³⁴

Moreover, the immunity does not extend to civil proceedings. Our Supreme Court further explained that he could claim the freedom from being compelled to make a self-incriminating statement. Court also said that he could not Claim immunity at some general inquiry or investigation on the ground that his account may at some later stage lead to an accusation.³⁵

³¹ AIR 1954 SC 300.

³² *Ibid.*

³³ *Supra* not 27 at 1164.

³⁴ *Id.* at 1165

³⁵ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality* 248 (Deep and Deep Publications Pvt. Ltd. New Delhi, 2007)

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(III) Right to Life and Personal Liberty

The right to life, liberty, and security of a person has acquired a significant position in the Indian Constitution. The scope of the right to life and personal freedom is extensive and protects all persons. This considerable right of the individual (citizen or non-citizen both) enshrined in Article 21 of the Indian Constitution, considers as the reflection of the provision under the international human rights instruments in this regard.³⁶ Article 21 of the Indian Constitution provides that - "No person shall deprive of his life and personal liberty except according to the procedure established by law."³⁷

The analysis of this article has been made by dividing it into three parts. That is: (i) right to life (ii) Right to personal liberty and (iii) the deprivation of these two rights are possible when the state takes action according to the procedure established by law.

(a) Right to Life

The right to life under Article 21 means something more than survival or animal existence and includes the right to live with human dignity. It would consist of all these aspects of life, which make life meaningful, complete, and worth living.³⁸ The scope of this right has been expanded by the Supreme Court and High Courts through their dynamic and liberal interpretation in all dimensions. The various jurists say it, legal luminaries and judges of the High Courts and Supreme Court that anything and everything beneath the sky may come under the purview of the Right to life-based on the various decisions of the High Courts and Supreme Court. The right to life means and includes the following Rights of an individual.³⁹

- The right to life with human dignity with minimum nutrition and shelter and all those rights and aspects of life would go to make a man's life complete and worth living.⁴⁰

³⁶ *Ibid.*

³⁷ The Constitution of India, art. 21

³⁸ Durga Das Basu, *Human Rights in Constitutional Law: Along with International Human Rights Documents* 330 (Lexis Nexis Butterworths, Wadhwa Nagpur, 3rd edn., 2008)

³⁹ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality* 248-249 (Deep and Deep Publications Pvt. Ltd. New Delhi, 2007)

⁴⁰ *Visakha v. Rajasthan*, AIR 1997 SC 3011

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- Enjoyment of life and its attainment, social, cultural, and intellectual without which life cannot be meaningful.⁴¹
- Adequate nutrition, clothing, shelter, and facilities for reading writing, and expressing on sale in diverse forms, freely moving about, mixing, and mingling with fellow human beings.⁴²
- Protection of the health and strength of the working men and women and the tender age of children against abuse, opportunities, and facilities for children to develop in a healthy manner and conditions of freedom and dignity, educational facility.⁴³
- The right to food, water, a decent environment, education, medical care, and shelter, is the fundamental human rights of the people, including refugees also.⁴⁴
- Life includes all that give meaning to a man's life, including his tradition, culture, and heritage and protection of that heritage in full measure.⁴⁵
- Right to education of children age 6-14 years⁴⁶ now, this right becomes a fundamental right.
- Right to Privacy.⁴⁷
- The right to life also extends to the non-citizen.⁴⁸
- The right to life is one of the fundamental human rights, which is guaranteed to every person by Article 21 of the Constitution.

(b) Right to Personal Liberty

When we talk about the right to personal liberty for every person, it means that no member of the Executive shall be entitled to interfere with the freedom of a citizen or a non-citizen unless he can support his action by some provision. In another way, no man can be subject to any physical coercion that does not admit of legal

⁴¹ Chandra Raja Kumari v. Commissioner of Police, Hyderabad, AIR A.P. 302

⁴² Francis Coralie v. union of India, AIR 1981 SC 746.

⁴³ Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

⁴⁴ Chameli Singh v. State of Uttar Pradesh, AIR 1996 SC 1051.

⁴⁵ Ram Saran v. Union of India, AIR, 1989 SC 549.

⁴⁶ Unnikrishnan v. State (1993) 1 SCC 644.

⁴⁷ R. Puttaswami v. Union of India AIR 2018

⁴⁸ Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988.

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justification. The state or one of its representatives deprives an individual of his freedom. This approach can be justified if there is a law that supports this work and the procedures laid down by this law.⁴⁹

However, the expression 'Personal Liberty' had been interpreted by the Supreme Court very narrowly at an earlier time.⁵⁰ Therefore, in the case of **R. C. Cooper v. Union of India**⁵¹, the court said that the expression 'Personal Liberty' in Article 21 is of the widest amplitude. Besides, it covers a variety of rights, which go to constitute the personal liberty of man, and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. In the case of **Menaka Gandhi v. The Union of India**,⁵² the Supreme Court is worth mentioning. In this case, the court held that the attempt of the court should be to expand the reach and ambit of the fundamental rights and not to restrict their meaning and content by process of judicial interpretation.

In the interpretation of the above discussion, it has been submitted that the decision of the Supreme Court in the Menaka Gandhi case has helped a lot concerning the protection of the right to personal liberty for the non-citizen because for them there is no scope of availing Article 19 of the Indian Constitution.⁵³

(IV) Right To Education

The right to education is now a fundamental right to all children, including refugee children, from the age of six to fourteen years without discrimination. Article 21-A was inserted in part III of the Indian Constitution by the Constitution (Eighty-six Amendment) Act, 2002.⁵⁴ Article 21-A stated that the state should provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may determine by law.⁵⁵ The rights should extend to have quality

⁴⁹ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality* 250 (Deep and Deep Publications Pvt. Ltd. New Delhi, 2007)

⁵⁰ A.K. Gopalan v. state of madras, AIR 1950 SC 27

⁵¹ AIR 1970 SC 564

⁵² AIR 1978 SC 597

⁵³ *Supra* not 49

⁵⁴ P M Bakshi, *The Constitution of India* 91 (Lexis Nexis Publication, India. 16th edn., 2019)

⁵⁵ The Constitution of India, art. 21A

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education without discrimination on the ground of the child's economic, social, and cultural background.⁵⁶

(V) Protection against Arbitrary Arrest and Detention

Protection against arbitrary arrest and detention means that nobody can be deprived of their freedom by a decree of the executive or the police, but only by law.⁵⁷ The Indian Constitution guaranteed protection against arrest and detention in some instances. It embodies procedural safeguards against arrest or detention.

The procedural safeguard against arbitrary arrest and detention under Article 22 claimed by any person as well as refugees under Article 22(1) and clause (2) provides some safeguard to every person as follow:⁵⁸

- A. No person arrested shall be detained in custody without being informed, as soon as of the ground for arrest.
- B. No person shall be detained the right to consult and to be defended by a legal practitioner of his choice.
- C. The arrested or detained person must be produced before the nearest magistrate within 24 hours of the most adjacent, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Nevertheless, these above safeguards do not apply to (i) any person who for the time being is an enemy alien, (ii) to any person who has been arrested or detained under any law providing for preventive detention.⁵⁹

(VI) Right against Exploitation

According to the *People's Union for Democratic Rights v. Union of India*, The Constitution of India protects against exploitation. This right is secured to every person, whether citizen, non-citizen or the alien. The protection contained therein is

⁵⁶ State of Tamil Nadu v. K. Shyam Sunder (2011) 8 SCC 737

⁵⁷ Durga Das Basu, *Human Rights in Constitutional Law: Along with International Human Rights Documents* 655 (Lexis Nexis Butterworths, Wadhwa Nagpur, 3rd edn., 2008)

⁵⁸ The Constitution of India, art. 22(1) and clause (2)

⁵⁹ *Id.*, art. 20(3)

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available not only against the state but also against private individuals.⁶⁰ Article 23 of the Constitution prohibits traffic in human beings, and the beggar, and other similar forms of forced labour, and any contravention of this provision shall be an offence punishable under law.⁶¹ The constitution of India, instead of using the word slavery, uses the more comprehensive expression traffic in human beings, which includes a prohibition not only of slavery but also of traffic in women and children or the disabled, for immoral or other purposes.⁶² The term ‘traffic in human being,’ commonly known as slavery, implies the buying and selling of human areas if they are chattels, and such a practice has constitutionally been abolished.⁶³

The Constitution of India also prohibits forced labour of any, which is similar to the beggar. The term beggar means compulsory work without any payment, and beggary is labour or service, which a person has been forced to give without receiving any remuneration for it.⁶⁴ The prohibition against forced labour has been made subject to one exception. The state can impose compulsory service for public purposes, and in imposing such service, the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.⁶⁵ The state may thus exempt women from compulsory service for that will be discrimination on the ground of sex.

(VII) Right to Freedom of Thought, Conscience, and Religion

Under the Constitution of India, Articles 25 to 28 confer some rights regarding freedom of religion to all persons, including refugees. The right to freedom of religion is one of the vital fundamental rights embodied in part III of the Indian Constitution. Freedom of religion encompasses a group of rights guaranteed to all individuals, including refugees in India. Article 25(1) guarantees to every person freedom of conscience and the right to profess, practice, and propagate religion freely, but these rights are subject to certain restrictions for the maintenance of public order, health, and morality. According to Article 25(2) (a), the State is not prevented from

⁶⁰ AIR 1982 SC 1473.

⁶¹ The Constitution of India, art. 23(1)

⁶² Vasudevan v. Mittal, AIR 1962 Bombay 53

⁶³ M. P. Jain, Indian Constitutional Law 1304 (Lexis Nexis Butterworths, Wadhwa Nagpur, 6th edn., 2012)

⁶⁴ *Ibid.*

⁶⁵ *Supra* not 60, art. 23(2)

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making any law regulating or restricting any economic, financial, political, or other secular activity, which may be associated with religious practice. Article 25(2) (b) saves the power of the State to make laws providing for social welfare and social reform.⁶⁶

The freedom of religion guaranteed by this Article is not absolute. There is no religious freedom where such freedom comes into conflict with public order, morality, and health.

Article 26 concerns the particular freedom to manage religious affairs. Unlike Article 25, which has principally directed towards individual persons, clauses (a) to (d) of Article 26 apply to religious denominations and groups. Also expressly subject to state regulation in the interest of public order, morality, and health religious denominations and sects are accorded the right to (a) establish and maintain institutions for religious or charitable reasons, (b) manage their religious affairs, (c) own and acquire real property, movable and immovable, and (d) administer the estate under other laws.⁶⁷

These activities are subject to the restriction that they must carry out under law. According to Article 27, no individual or organization should pay tax for the promotion or maintenance of any particular religion.⁶⁸ Article 28 prohibits religious instruction in state-aided educational institutions. However, an educational institution administered by the state but established under a trust or endowment that requires religious education is permitted to impart religious instruction. Clause (3) of this article states that such training must not be compulsory.⁶⁹

(VIII) Enforcement of Fundamental Rights of Refugees in India

Fundamental Rights, which are available to the non-citizen as well as refugees, are enforceable under Articles 32 and 226 of our Constitution. The constitution describes article 32 as a constitutional remedy for the enforcement of the Fundamental Rights included in Part III of the Indian Constitution. Article 32 (1), actuality itself a fundamental right, guarantees the right to move the Supreme Court

⁶⁶ *Id.*, art. 25

⁶⁷ *Id.*, art. 26

⁶⁸ *Id.*, art. 27

⁶⁹ *Id.*, art. 28

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for the enforcement of the fundamental rights, which are all persons, including refugees. In contrast, Article 32(2) empowers the Supreme Court to issue appropriate writs, orders, or directions for the enforcement of fundamental rights. According to Article 32(4), the right guaranteed by Article 32 cannot be suspended except as otherwise provided for by the Constitution of India. Article 359 provides, during an emergency, for the suspension of the right to move any court for the enforcement of the fundamental rights by presidential order.

Therefore, under Article 32 of the Indian Constitution, the Supreme Court is thus constituted as the protector and guarantor of fundamental rights. Underlining the significance of Article 32, the Supreme Court has characterized the jurisdiction conferred on it by Article 32 as "an important and integral part of the basic structure of the constitution" because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated. A right without a solution is a legal problem of a most grotesque kind. Article 32 confers one of the highly cherished rights.

However, under Article 32(2), five kinds of writs can be issued by the Supreme Court, such as the writ of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo-Warranto, for the enforcement of the fundamental rights under Part III of our Constitution. The power of the High Courts to issue these writs mentioned above is more extensive than that of the Supreme Court in as much as under Article 32 of the Indian Constitution. The Supreme Court has the power to issue these writs only for the enforcement of fundamental rights. However, under Article 226 High Court can issue these writs not only for the implementation of fundamental rights but also for the redressal of any other injury or illegal, owing to infringement of the ordinary law or the violation of any other constitutional rights.

Therefore, for the enforcement of fundamental rights, which are available to the non-citizen people under the Indian Constitution, they can seek remedy from the High Court under the writ Jurisdiction as per the provision of Article 226.

4.2.2 LEGISLATIONS RELATED TO REFUGEES

There is no specific law or legislation, which defines the term refugee or establishes provisions for dealing with refugee protection in India, India relies on laws

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dealing with foreigners to deal with refugees. Nevertheless, there several legislations which deals with entry, stay, and exit or removal of the foreigner in India.

4.2.2.1 Indian Penal Code, 1860

The Indian Penal Code, 1860, applies equally to the citizen of India, refugees, and other foreigners. Refugees can be liable under the Indian Penal code if they do wrong under some sections. Refugees are commonly detained for violating the following provisions of the IPC: cheating by impersonating under Section 416, and if a Refugee has attempted to mislead Indian authorities by using fraudulent travel documents, then he punishable under section 418⁷⁰. A refugee may travel on a false paper punishable under section 419⁷¹; he may use a genuine material where he changes the relevant information he punishable under section 420⁷², Forgery under Section 463⁷³, and making and using forged documents under Section 464⁷⁴ these acts are criminal. If a refugee commits forgery, intending that the documents shall be used for cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine under section 468⁷⁵ or refugee may obtain a genuine document by false means he punishable under section 471.⁷⁶

Unfortunately, the concerned state authorities often do not consider the compelling factors that may have brought the refugee to India. On many occasions, the importance of the circumstances compels the refugee to obtain a false passport or a forged visa for entry into India. His country might not have the infrastructure in place to issue her valid documents, may not have been willing to provide her with genuine papers, or they may not have had the time to obtain them.

A refugee may be charged with all of these offences if they have forged a passport, visa, or residence permit. Refugees detained for illegal entry into India who

⁷⁰ *Id.*, s. 418

⁷¹ *Id.*, s. 419

⁷² *Id.*, s. 420

⁷³ *Id.*, s. 463

⁷⁴ *Id.*, s. 464

⁷⁵ *Id.*, s. 468

⁷⁶ *Id.*, s. 471

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also possess travel documents that may be forged, false, or fabricated would attract the provisions of the above sections of the IPC and may be prosecuted for the same.⁷⁷

4.2.2.2 The Passport (Entry into India) Act, 1920

The Passport (Entry into India) Act, 1920, deals with the question of passports for persons entering and leaving India. Section 3 allows the Central Government to make rules requiring persons entering India to have a passport. The rules relating to prohibiting the entry of persons who do not have a passport, prescribing the authority that can issue and renew passports, and establishing the conditions that need to be complied with to obtain a passport. It allows for a police officer not below the rank of a sub-inspector and any authorized officer of the Customs Department to arrest a person who contravenes any rule or order made under Section 3.⁷⁸

The Central Government has used its power under Section 3 to enact the Passport (Entry into India) Rules, 1950. Rule 6 is most important, which states, among other things, that any person who attempts to enter India on a forged passport or visa shall be punishable with imprisonment for a term that may extend to three months or a fine or both.⁷⁹

The 1920 Act is important in the context of refugees, given that they may enter and attempt to leave the country without a passport or with a forged one. It is an accepted principle of refugee law by Article 31 of the 1951 Convention that contracting states shall not impose penalties on account of the illegal entry or presence of refugees in the country. Often, refugees do not enjoy the protection of their country and, therefore, cannot get a valid passport. Some refugees may leave their country in such turmoil that they would not have had the time to either travel with their passports or get one issued by the concerned authority. In this respect, refugees under Indian law have not exempted from entering India with travel documents as provided for under Section 3(c) of the 1920 Act. In practice, however, the administrative policy of the Indian government has operated to let certain groups

⁷⁷ Ragini Trakroo Zutshi, and Jayshree Satpute *et.al.* (eds.), *Refugees and the Law* 85(Human Rights Law Network, New Delhi, 2nd edn., 2011)

⁷⁸ *Id.* at 76-77.

⁷⁹ *Ibid.*

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of refugees enter the country without the required documentation. This is because Article 21 of the Indian Constitution encompasses the principle of non-refoulement.⁸⁰

4.2.2.3 The Registration of Foreigner Act, 1939

The Registration of foreigner Act, 1939 is enacted to provide for the registration of foreigners, to enter, staying in, and departing from India. In this Act, for the first time, a foreigner has been defined as ‘a person who is not a citizen of India.’ To operationalize the provision of the Act, the government further enacted the Registration of Foreigners Rules, 1939, and further restructured it in 1992. In general, this Act and the rule require every foreigner who enters and stays in India for more than 180 days to register as per the prescribed format and in time with the Foreigner Registration Officer FRO; of that jurisdiction, and each time they change address or leave India, they must receive authorization from the FRO. In case of contradiction or attempts to contravene, or failure to comply with the provisions and rules of this Act, there is a punishment in the form of imprisonment for a term of up to one year, and a fine of up to thousand rupees or both.⁸¹

4.2.2.4 The Foreigner Act, 1946

The Foreigners Act, 1946, is widely used in dealing with foreigners, including refugees. Under this Act, the Central Government has the power to make rules and order the prohibition, regulation, or restriction of the entry, stay, and departure of any foreigner or class of foreigners (including refugees) in India. The Central Government enacted the Foreigner Order, 1948, which the power granted under Section 3 of this Act. According to section 2 of this act, the term foreigner is defined as ‘any person who is not a citizen of India. 80 The most important provisions affecting the life and liberty of any refugee or a stateless person under this Act are those related to the determination of nationality. According to this Act, if any question arises about the nationality of a foreigner and the determination of nationality depends on the decision of the concerned authority as the foreigner is connected with to which country. That decision cannot be challenged in any court of law.⁸²

⁸⁰ *Ibid.*

⁸¹ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 17(Palgrave Macmillan, 2017)

⁸² *Ibid.*

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The penal provision of this Act is stricter than the other two acts, which are mentioned above, as any contravention of the provisions, rules, or order made under this Act is punishable by imprisonment of up to five years. Another provision that makes this Act central to the regime of entry stay and departure (or removal) of any foreigner in India is that the provisions of this Act or the rules made under this Act shall be in operation along with the provisions of the Passport (Entry into India) Act, 1920 and the Registration of Foreigners Act, 1939.⁸³

It is important to mention that the wide range of powers granted to the Central Government under the Foreigners Act, 1946, was significant in the drafting of the Foreigners Order, 1948. The Foreigners Order, 1948, is an amalgamation of many of the provisions of the Passport (Entry into India) Act, 1920, and the Registration of Foreigners Act, 1939, and the rules made thereunder. The Foreigners Order, 1948, restricts entry into India by a foreigner without a valid passport and visa and may impose restrictions on the entry in the public interest. Other important provisions include restrictions on sojourning in India, restrictions on visiting prohibited places, restrictions on visiting protected areas, restrictions on employment, restrictions on movement, and so forth.⁸⁴

Considering the inner meaning of the restrictive provisions of the laws dealing with foreigners in India mentioned above. The legal provisions that apply to entry of foreign national should not apply to a person who is entering India as refugees or asylum seekers, as these laws in the first instance treat that person as a violator of the laws and rules discussed above. Consequently, the refugee or asylum seeker is detained and prosecuted *prima facie* without the chance to put forward his or her claim to refugee status.⁸⁵

4.2.2.5 The Passport Act, 1967

The Passport Act, 1967 deals with the issuance of passports and other travel documents regulating the departure of Indians and other nationals from India. The act sets out the different types of passports that can be issued to various categories of persons, the application procedure for a passport and other travel documents, and

⁸³ *Id.* at 17-18.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

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details of the circumstances in which passports and the issuing authority may refuse other travel documents. It further defines the power of state authorities to arrest persons who, among other things, knowingly furnish any false information or suppress any material information, to obtain a passport or travel document, and the penalties, which may be imposed for such offences.⁸⁶

The Central Government may also issue passports and travel documents to persons who are not citizens of India under Section 20 of this Act. Still, for whom it is in the public interest to confer such documents. This provision has allowed many Tibetan refugees in India to travel abroad. Articles 27 and 28 of the 1951 Convention state that contracting States shall issue identity papers to refugees in their territory who do not possess valid travel documents and also issue temporary travel documents to allow them to travel outside their territory. By providing travel documents to the Tibetans, India has complied in part with these articles of the 1951 Convention.⁸⁷

4.2.2.6 The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the National Security Act, 1980

The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974,⁸⁸ has intended to provide for preventive detention in certain cases for conservation and augmentation of foreign exchange and prevention of smuggling activities. On the other hand, the National Security Act, 1980⁸⁹ has come up in our country, apparently for maintaining internal security. According to section 3(b) of the NSA, detention is possible for a foreigner by the Central Government on the conditions as if satisfied concerning any foreigner that to regulate his continued presence in India or to arrange for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.⁹⁰

⁸⁶ *Ibid.*

⁸⁷ *Id.* at 78.

⁸⁸ The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. (Act 52 of 1974), *available at*: <http://legislative.gov.in/actsofparliamentfromtheyear/conservation-foreign-exchange-and-prevention-smuggling-activities-act> (last visited on January 11, 2019)

⁸⁹ The National Security Act, 1980. (Act 65 of 1980), *available at*: https://mha.gov.in/sites/default/files/National_Security_Act1980.pdf (last visited on January 11, 2019)

⁹⁰ *Id.*, s. 3 (1)

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Moreover, such person may be a citizen or a foreigner can be detained if the Central or the State government is satisfied that such action by these persons is prejudicial to the security of the state or prejudicial to the maintenance of public order or prejudicial to the maintenance of supplies and services essential to the community.⁹¹

The power of preventive detention has given to the Central or State Government under this act for the purposes mentioned above, which can be applicable, even to a foreigner who is directly or indirectly involved in such activities.⁹²

However, under both law's provisions are there concerning the communication to the detainee, which are made for the satisfaction of clause (5) of Article 22 of our Constitution. Provisions are there in both the laws about the following principle of natural justice, including proper representation of the detainee.⁹³

Nevertheless, under both the COFEPOSSA and NSA, there is the provision for the application of the doctrine of severability in case of framing the grounds or justification for detention. So under sections 5 A of both the statutes, if any ground for detention is declared as vague, or non-existent or non-relevant or not properly connected or otherwise invalid, in that case, based on other grounds, the detention can be treated as valid.⁹⁴

For the justification of the detention, the detainee can appear before the duly constituted Advisory Board under both the laws. Nevertheless, legal representation or particularly the help of a lawyer for defending the cause of the detainee is not allowed at the so-called confidential phase of the proceeding as per section 8 (e) of the COFEPOSA and section 11(4) of the NSA. It has been submitted that this kind of provision violates the human rights provisions under international human rights instruments.⁹⁵

⁹¹ *Ibid.* s. 3(2)

⁹² *Ibid.* s. 3(1)

⁹³ *Ibid.* s. 3(3)

⁹⁴ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality* 268 (Deep and Deep Publications Pvt. Ltd. New Delhi, 2007)

⁹⁵ *Ibid.*

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Finally, according to both laws, generally, the maximum period of detention is three months. Nevertheless, in exceptional circumstances, as mentioned in these laws, the detention of a person, including a non-citizen, is possible for more than three months.

4.2.2.7 The Illegal Migrants (Determination by Tribunals) Act, 1983

In recent times, the most effective law about the rights of the non-citizen is the Illegal migrants (Determination by Tribunals) Act, 1983, which is known as IM (DT) Act, 1983⁹⁶. Section 3 (c) of this Act, defines the term ‘illegal migrant’ in the following manner- illegal migrant means a person in respect of whom each of the following condition is satisfied;

(a) He has entered into India on or after the 25th day of March 1971

(b) He is a foreigner

(c) He has entered into India without having a valid passport or other travel documents or any other lawful authority on that behalf. This law has a straightforward impact upon the sustenance of the non-citizen population in India who has been called illegal migrants according to this IM (DT) Act 1983.⁹⁷ But this act should not apply to the internally displaced person or to the foreigner who is entering or stay in India with a valid document or even after the expiry of the visa period authorized to stay in India.⁹⁸

Therefore, according to this Act, whosoever enters into the Territory of India on and after 25 March 1971 without any valid document shall be treated as an illegal migrant and the appropriate authority can deport them. Nevertheless, the tribunal set under this Act shall determine the status of such migrants. According to section-5 of the IM (DT) Act, Illegal Migrants (Determination), Tribunal has been set-up⁹⁹. That

⁹⁶ The Illegal Migrants (Determination by Tribunals) Act, 1983. *available at:*

<http://legislative.gov.in/actsofparliamentfromtheyear/illegal-migrants-determination-tribunals-act-1983>
(last visited on 15 January 2019)

⁹⁷ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality* 264-265 (Deep and Deep Publications Pvt. Ltd. New Delhi, 2007)

⁹⁸ *Supra* note 96, s. 2

⁹⁹ *Id.*, s. 5

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tribunal has the power to decide any dispute based on the application by any person against whom besides, any order has been made under the Foreigners' Act, 1946, requiring him not to remain in India or to any other effect or has arisen in any other manner whatsoever.¹⁰⁰

By the amendment of section-5 of the Act in 1988, provision of reference to the central government has been made under which any person may make the application before the government for decision by a tribunal as to whether the person whose name and other particulars have been given in the application is or is not an Illegal Migrant. After receiving such an application, the central government may inquire or cross check the contention and may further refer the matter to the tribunal. Nevertheless, such an application should not be more than ten by any one individual.¹⁰¹ According to section 12 of this Act, the above tribunal has the power to determine the question as to whether a person is an illegal migrant or not, after taking the relevant information, evidence and making an appropriate inquiry¹⁰²

Against the decision of the Illegal Migrant (Determination) Tribunal, the aggrieved person may move to the Appellate Tribunal. The Appellate Tribunal if thinks fit and proper may decide any matter, which may reverse the decision of the earlier tribunal.¹⁰³

It has been submitted that under this Act, there is no provision for the recognition of people who enter into India with fear of persecution or due to the ethnic or political conflict. So the refugee and asylum seeker's basic rights may be violated under this Act. Nevertheless, until today its application is limited to Assam. However, we cannot deny the reality that under this Act a kind of determination on the status of a person can take place, sometimes if the victim may be a permanent resident or genuine citizen of India.¹⁰⁴

¹⁰⁰ *Id.*, s. 8

¹⁰¹ *Ibid.* s. 8A

¹⁰² *Id.*, s. 12

¹⁰³ *Id.*, s. 14

¹⁰⁴ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen Law and Reality* 264-265 (Deep and Deep Publications Pvt. Ltd. New Delhi, 2007)

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4.2.2.8 Protection of Human Rights Act, 1993

The Government of India has enacted the protection of the Human Rights Act, 1993, for the better protection and promotion of human rights in India. This act is enacted in the context of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1966.¹⁰⁵ The Human Rights Bill was introduced in the Lok Sabha on 14 May 1993. It was thoroughly discussed and debated in both houses with certain modifications. The president, under Article 123 of the constitution, promulgated the Protection of Human Rights Ordinance in 1993 on 28 September 1993. The Protection of Human Rights Bill, 1993 was passed by both houses of Parliament and received permission from the President on 8 January 1994. The Act came into force with retrospective effect from 28 September 1993.¹⁰⁶

The Act provides for the constitution of a National Human Rights Commission (Herein referred to as NHRC), State Human Rights Commission in the states, and the Human Rights Courts at the district level for the better protection of human rights and the matter connected in addition to that or incidental to that.¹⁰⁷

4.2.2.9 Model National Law on Refugees (MNLR), 1997

The drafting of the Model National Law on Refugees was the first attempt at setting a consistent regime of refugee protection in India. The Eminent Persons Group drafted the MNLR in 1997.¹⁰⁸ Justice Bhagwati, who also chaired the group of experts to fine-tune the application of the Model Laws to India in 1999-2000, chaired the EPG. Although there have been technical and political misgivings about the Model Law, there is a degree of unanimity on its acceptance as a framework for future discussion on refugee protection. When the Model Law was sent to the government to take the next step, the government remained non-committed, and the law remained in

¹⁰⁵ Dr. Sunil Deshta, "Indian Judicial Initiative to Curb Custodial Violence: The Role of NHRC", 10 *JNALSA* 11 (2009).

¹⁰⁶ O.P. Chauhan, and Lalit Dadwal, *Human Rights Promotion and Protection* 56 (Anmol Publications Pvt. Limited, 2004)

¹⁰⁷ *Ibid.*

¹⁰⁸ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 161 (Palgrave Macmillan, 2017)

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limbo. Several people, including Eduardo Faleiro, in a Rajya Sabha debate, have criticized this.¹⁰⁹

The MNLR was drafted in response to the need for a consistent, non-discriminative, and equal protection regime for refugees in India.¹¹⁰ Nevertheless, it has not given yet any significant consideration by the Indian Government. The preamble of the law asserts India's tradition and experience in dealing with refugee crises, its faith in the non-refoulement principle, its commitment to uphold the principles of international human rights, and the judgments of the Supreme Court and High Courts in supporting refugee rights under the Indian Constitution.¹¹¹

The salient features of the Model Law are as follows.¹¹²

- a) The Model Law consolidates the provisions relating to refugees in India. It seeks to create a process for refugee protection,
- b) The Model Law envisages the requirements of the Act, including determining refugee status (Section 7). Section 9 elaborates on the methodology to be followed for individual refugee status determination and provides for a hearing where evidence may be presented to support a claimant's case to be treated as a refugee. It even provides for an appeal from an adverse decision of the Commissioner, who makes the initial determination to a Refugee Committee under Section 9(e) read with Section 11.
- c) It defines the term refugee and seeks to recognize a refugee as deserving of statutory recognition and protection.
- d) The Model Law provides a foundation for the non-derivability of the principle of non-refoulement, which has also been read into Article 21 as a protected fundamental right by some High Courts.
- e) The Model Law takes an essential step in actually outlining the rights and duties of refugees (Section 13(a) (3) provides for a work permit regime.

¹⁰⁹ Rajeev Dhawan, *Refugee Law and Policy in India* 77(The Public Interest and Legal Support and Research Center, New Delhi Reprint 2005)

¹¹⁰ V. Suryanarayan, 'Need for National Refugee Law' [2001] I ISIL Yearbook of International Humanitarian and Refugee Law 254, 267

¹¹¹ National Model law on Refugee, Preamble

¹¹² *Supra* note 109

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Section 13(f) (5) provides that a refugee would also be allowed to move freely within the territory of India. Section 13 provides that refugees would have access to education, health, and other related services, thereby ensuring socio-economic support and rights to which they have not presently admitted to.

- f) Section 5 (b) provides that a refugee if found guilty of a crime against humanity, a crime against peace, a war crime, or who is certified by a Minister as a threat to India may be asked to leave India. These overbroad provisions seek to address India's security concerns.
- g) Section 14 provides for situations of mass influx whereby orders can be issued permitting residence in India without individual status determination. Most importantly, the Act provides for illegal entry, provided good cause has shown, which is a considerable advancement to the present provisions like the Passport (Entry into India) Act, 1920, and the Foreigners Act, 1946.

While a case for the implementation of the Model Law has lain fallow and in a state of limbo, the NHRC has recently decided to pursue the Model Law as an instrument for refugee protection as part of the plan of human rights protection. In its Seventh, Eighth, and Ninth Reports, the NHRC has consistently reiterated the need for refugee protection. However, the government continues to be very ambivalent in its attitude, as can be seen from the extracts¹¹³

After the national Model Law on Refugee in India, some ministers have taken new initiatives by introducing the Asylum Bill, 2015 by Dr. Shashi Tharoor¹¹⁴, the National Asylum Bill, 2015 by Feroz Varun Gandhi¹¹⁵, and the Protection of Refugees and Asylum Seekers Bill, 2015 by Rabindra Kumar Jena¹¹⁶ in the Lok Sabha.

¹¹³ *Ibid.*

¹¹⁴ The Asylum Bill, No. 334 of 2015 (India), *available at*:
<http://164.100.47.4/billtexts/lbills/asintroduced/3088LS.pdf> (last visited on January 10, 2018)

¹¹⁵ The National Asylum Bill, No. 342 of 2015, *available at*:
<http://164.100.47.4/billtexts/lbills/asintroduced/3028ls.pdf> (last visited on January 10, 2018)

¹¹⁶ The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015, *available at*:
<http://164.100.47.4/billtexts/lbills/asintroduced/3024ls.pdf> (last visited on January 10, 2018)

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The texts of these proposed laws could be regarded as a guide for the grafting of a refugee law for India. There will be several differences in the resulting provisions due to the evolving nature of international refugee protection, the development of new standards, the difference of time finally differences in the mind-sets of the persons who drafted, or sprinkled them.¹¹⁷

It should also be noted that all three bills in the Lok Sabha have been introduced as private members bill, which means the Ministry that deals with foreigners and refugees in India did not draft them. Because of these factors, it is unlikely that any of these bills will become a law made by the Parliament.¹¹⁸

4.2.2.10 The Protection of Refugees and Asylum Seekers Bill, 2015

The Member of Parliament, Mr. Ravindra Kumar Jena, introduced this Bill. The Refugee Bill seeks to provide an appropriate legal framework to deal with matters relating to forced migration, determination of refugee status, protection from refoulement, and treatment during the stay in India in the interest of upholding the values of international human rights.¹¹⁹ The bill recognizes the need for an administrative procedure free from arbitrariness for refugee protection, the need for a framework in the form of a law considering the refugee crisis in Europe, and uniformity of rights of refugees during their stay in India.¹²⁰

The refugee bill 2015 states some objectives of the proposed legislation like:¹²¹

- a) to establish an appropriate legal framework through adherence to an administrative system free from arbitrariness under Article 37 and 253 of the Indian Constitution;
- b) Implementation of international human rights treaties and commitment of India to do so;

¹¹⁷ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 162(Palgrave Macmillan, 2017)

¹¹⁸ *Ibid.*

¹¹⁹ The protection of refugees and asylum bill, 2015, Preamble

¹²⁰ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 176(Palgrave Macmillan, 2017)

¹²¹ Supra note 119, objective clause

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- c) To ensure that the grant of refugee status shall be considered a peaceful and humanitarian act.

Refugee Bill provides refugee definition; the definition of refugee comes under two major criteria. Firstly, the conventional definition of refugee, extended with the inclusion of sex and ethnic identity.¹²² Secondly, the refugee bill echoes the 1969 organization of African Unity Convention Governing the specific aspect of the refugee problem in Africa by extending the definition to include external aggression occupation, foreign domination, and serious violation of human rights or other events seriously disrupting public order as the ground for leaving the country of origin.¹²³ Another important term ‘refugee children’ is defined in the refugee bill as children below the age of eighteen years who are seeking refuge or where protection is extended by the state to children under article 22 of the Convention on the rights of the child, 1989.¹²⁴

The refugee bill provides detailed provisions regarding exclusion from refugee status. The grounds included under this provision include committing international crime or suspicion thereof and committing non-political crime contrary to the South Asian Association for Regional Cooperation, Regional Convention on Suppression of Terrorism. In both of these cases, if there is reason to believe that these acts have been committed, this will be sufficient to exclude the person from refugee status.¹²⁵

The Refugee Bill deals with the formation of authorities for refugee status determination and further appeal. The authority to deal with refugee status determination is the Commissioner of the refugee. The President of India is empowered to appoint the Commissioner of Refugees, deputy Commissioner of refugees, and other members of staff in consultation with the Commissioner.¹²⁶ The qualification for the commissioner of refugee, the person must be a sitting or retired High Court Judge. For Deputy Commissioners of refugees, the person should be

¹²² *Id.*, s. 3(e) (i)

¹²³ *Ibid.* s. 3(e) (ii)

¹²⁴ *Ibid.* s. 3(g)

¹²⁵ *Id.*, s. 12

¹²⁶ *Id.*, s. 7

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qualified to be appointed as a High Court Judge.¹²⁷ The chairperson will be a retired judge of the Supreme Court of India and other three members with knowledge and experience of refugee issues and refugee law, respectively.¹²⁸

In both cases, the Commissioner of refugee and Deputy Commissioner of refugee, the appointment should be made in consultation with the Chief justice of India for three years. The appellate authority under the refugee bill is the refugee committee, consisting of one chairperson and three other members. The refugee committee is empowered to hear appeals against the orders of the commissioner of refugees and, at the same time, to hear suo moto applications for status determination.¹²⁹

The Refugee Bill proposes a system in which the refugee applicant may apply at the point of entry to India or subsequently after entering India.¹³⁰ As soon as any authority of the state receives an application for refugee status, that authority will assist and direct the refugee applicant to apply to the Commissioner of Refugees. However, it is not clear what authorities will not be responsible for assisting and directing the refugee applicant to the Commissioner for Refugees, nor how long after entering India, an application for refugee status could be made. The government may impose restrictions based on the sovereignty, integrity, and public order of India.¹³¹ Another important provision seeks to protect child refugees from vulnerable situations immediately as per the laws related to child protection prevailing in India.¹³² Apart from that, the local Legal Services Authority or any authority responsible for the protection of an unaccompanied child is permitted to apply on his or her behalf.¹³³

After making the application to the Commissioner of refugees, the refugee applicant will have the opportunity for a hearing, for determination of status as provided by the refugee Bill.¹³⁴ For the hearing before the Commissioner of refugees,

¹²⁷ *Id.*, s. 8(1), and (2)

¹²⁸ *Ibid.* s. 8(3) and (4)

¹²⁹ *Id.*, s. 8(5) and 11

¹³⁰ *Id.*, s. 6(1)

¹³¹ *Ibid.* s. 6(2)

¹³² *Ibid.* s. 6(4)

¹³³ *Ibid.* s. 6(5)

¹³⁴ *Id.*, s. 9(1)

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the refugee applicant will receive the following facilities as much as needed the services of an interpreter, a reasonable opportunity to present evidence in support of his claim, an opportunity to contact representatives of UNHCR, and a list of competent legal practitioners from that list if he wishes.¹³⁵

After the hearing, the commissioner of the refugee is required to provide reasons for the decision if the refugee applicant failed to prove his claim.¹³⁶ The commissioner of refugees will make a copy of the decision available to the applicant.¹³⁷ If the commissioner of the refugee rejects the claim, the applicant will have a reasonable amount of time to file an appeal with the refugee committee. If an applicant is been recognized as a refugee, he has to provide the necessary documentation confirming refugee status.¹³⁸

The refugee bill, in the first instance, makes it obligatory for the state to observe the principle of non-refoulement.¹³⁹ However, the state is not bound by this core principle of refugee protection if the judge convicts the refugee applicant of any court for international crime, possess a danger to the community or there are grounds to believe that they pose a threat to the sovereignty and integrity of India.¹⁴⁰

Another obligation listed in the refugee bill is non-culpability in cases of illegal and unlawful entry directly from the place of persecution in the case when the refugee applicant reports his presence to the authorities immediately.¹⁴¹ These two provisions can be said to be at the core of the protection strategy of the refugee bill. At the same time, the government is bound to provide the refugee with fair and due treatment without discrimination based on race, religion, sex, nationality, ethnic identity, membership of a particular social group, or political opinion.¹⁴²

¹³⁵ *Ibid.* s. 9(2)-(5)

¹³⁶ *Id.*, s. 6(7)

¹³⁷ *Ibid.* s. 6(6)

¹³⁸ *Ibid.* s. 6(8)

¹³⁹ *Id.*, s. 5(1)

¹⁴⁰ *Ibid.* s. 5(2)

¹⁴¹ *Id.*, s. 15

¹⁴² *Id.*, s. 13

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The Refugee Bill includes provisions related to the rights of refugees. These rights are essential for the dignified living of refugee, such as:¹⁴³

- the same treatment as per the Constitution or any other law;
- the opportunity to seek employment to maintain livelihood;
- special consideration for refugee women and children to ensure their protection and material well-being;
- choice of a place of residence and the ability to move freely within the territory of India, subject to any regulation applicable to refugees generally in the same circumstances;
- access to identity documents;
- access to travel documents; and
- access to education, health care, and other related services.

The Refugee Bill includes a provision relating to the mass influx in consideration of the experiences of India. Under this provision, the central government is empowered to allow a mass influx of refugees to stay in India for a particular time fixed by the government or as a necessity requires.¹⁴⁴ It also provides that in the case of a mass influx of refugees, the government does not need to follow the individual status determination system. There is also a provision for special assistance to refugee women and children in a mass influx situation.¹⁴⁵

4.2.2.11 The Citizenship (Amendment) Act, 2019

The Indian government has passed the Citizenship (Amendment) Act, 2019 to provide the citizenship of India to the refugees who came from other countries due to persecution on the ground of religious minorities.¹⁴⁶

The Citizenship (Amendment) Bill has introduced in the 17th Lok Sabha by the Minister of Home Affairs Amit Shah on 9 December 2019, and the bill was passed on 10 December 2019, with 311 MPs voting in favour and 80 against the

¹⁴³ *Ibid.* s. 13(2)

¹⁴⁴ *Id.*, s. 14

¹⁴⁵ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 181(Palgrave Macmillan, 2017)

¹⁴⁶ The Citizenship (Amendment) Act, 2019, *available at*:

<http://egazette.nic.in/WriteReadData/2019/214646.pdf>, (last visited on December 17, 2019)

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Bill.¹⁴⁷ The Rajya Sabha subsequently passed the bill on 11 December 2019, with 125 votes in favour and 105 elections against it.¹⁴⁸ After receiving permission from the President of India on 12 December 2019, the bill assumed the status of an act.

In India, the Citizenship Act, 1955, regulates citizenship. The Act specifies that citizenship may be acquired in India through five methods – by birth¹⁴⁹ in India, by descent,¹⁵⁰ through registration¹⁵¹, by naturalization¹⁵² (extended residence in India), and by incorporation of the territory¹⁵³ into India.

An illegal migrant is prohibited from acquiring Indian citizenship, and an illegal immigrant is a foreigner who either enters India illegally, i.e., without valid travel documents, like a visa and passport, or enters India legally, but stays beyond the time-period permitted in their travel documents. An illegal migrant can be prosecuted in India and deported or imprisoned.¹⁵⁴

According to the Citizenship (Amendment) Act, 2019 the specified class of illegal migrants who came into India from Afghanistan, Bangladesh, or Pakistan on or before December 31, 2014, and belong to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian religious communities will not be treated as illegal migrants, making them eligible for citizenship.¹⁵⁵ On acquiring citizenship, such migrants shall believe to be Indian citizens from the date of their entry into India¹⁵⁶ and all legal proceedings

¹⁴⁷ Citizenship Amendment Bill passed in Lok Sabha, the times of India, *available at*: <https://economictimes.indiatimes.com/news/politics-and-nation/lok-sabha-passes-citizenship-amendment-bill-2019/articleshow/72447352.cms> (last visited on December 18, 2019)

¹⁴⁸ The Citizenship Amendment Bill 2019: Know everything in 10 points, Jagaran Josh, *available at*: <https://www.jagranjosh.com/current-affairs/citizenship-amendment-bill-2019-passes-in-rajya-sabha-know-everything-in-10-points-1576134111-1> (last visited on December 18, 2019)

¹⁴⁹ The Citizenship Act, 1954. s. 3

¹⁵⁰ *Id.*, s. 4

¹⁵¹ *Id.*, s. 5

¹⁵² *Id.*, s. 6

¹⁵³ *Id.*, s. 7

¹⁵⁴ Explainer: The Citizenship (Amendment) Bill, 2019, *available at*: <http://prsindia.org/theprsblog/explainer-citizenship-amendment-bill-2019> (last visited on December 18, 2019)

¹⁵⁵ The Citizenship (Amendment) Act, 2019. s. 2

¹⁵⁶ *Id.*, s 3(2)

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regarding their status as illegal migrants or their citizenship will be closed.¹⁵⁷ The Act allows a person to apply for citizenship by naturalization if the person meets specific qualifications. One of the requirements is that the person must have resided in India or been in central government service for the last 12 months and at least 11 years of the preceding 14 years. For the specified class of illegal migrants, the number of years of residency has been relaxed from 11 years to five years.¹⁵⁸

The Citizenship (Amendment) Act, 2019, classifies migrants based on their country of origin to include only Afghanistan, Pakistan, and Bangladesh. While the Statement of Objects and Reasons (SoR) in the Act that millions of citizens of undivided India were living in Pakistan and Bangladesh, no reason has been provided to explain the inclusion of Afghanistan. The SoR also states that these countries have a state religion, which has resulted in religious persecution of minority groups. However, there are other countries, which may fit this qualification. For instance, two of India's neighbouring countries, Sri Lanka (Buddhist state religion) and Myanmar (primacy to Buddhism), have had a history of persecution of Tamil Eelam's (a linguistic minority in Sri Lanka), and the Rohingya Muslims, respectively.¹⁵⁹

Further, there are other religious minorities from Pakistan, Afghanistan, and Bangladesh, such as the Ahmadiyya Muslims in Pakistan (considered non-Muslims in that country), and atheists in Bangladesh who have faced religious persecution and may have illegally migrated to India.

The objective of the Act is to provide citizenship to migrants escaping from religious persecution; it is not clear why illegal migrants belonging to other neighbouring countries, or belonging to religious minorities from these three specified countries have been excluded from the Act.¹⁶⁰

The Act also creates further differentiation between the specified class of illegal migrants based on when they entered India (before or after December 31, 2014), and where they live in India (provisions not applicable to Sixth Schedule and

¹⁵⁷ *Ibid.* s. 3(3)

¹⁵⁸ *Id.*, s. 6

¹⁵⁹ Explainer: The Citizenship (Amendment) Bill, 2019, *available at*:

<http://prsindia.org/theprsblog/explainer-citizenship-amendment-bill-2019> (last visited on December 18, 2019)

¹⁶⁰ *Ibid.*

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Inner Line Permit areas). However, the reasons provided to explain the distinction is unclear. Note that certain restrictions apply to persons (both citizens and foreigners) in the Sixth Schedule areas and the states regulated by the Inner Line Permit. Once an illegal migrant residing in these areas acquires citizenship, he would be subjected to the same restrictions in these areas, as apply to other Indian citizens. Therefore, it is unclear why the Act excludes illegal migrants residing in these areas.¹⁶¹

The Act makes only certain illegal migrants eligible for citizenship. These are persons belonging to the six specified religious communities, from the three specified countries, who entered India on or before December 31, 2014, and do not reside in the Sixth Schedule areas of the states regulated by the Inner Line Permit states. It implies that no other illegal migrants will be able to claim the benefit of citizenship conferred by the Act, and may continue to be prosecuted as illegal migrants. Any provision, which distinguishes between two groups, may violate the standard of equality guaranteed under Article 14 of the Constitution unless one can show a reasonable rationale for doing so. The Act provides differential treatment to illegal migrants based on (a) their country of origin, (b) religion, (c) date of entry into India, and (d) place of residence in India. The question is whether these factors serve a reasonable purpose to justify the differential treatment.¹⁶²

4.3 INDIA'S INTERNATIONAL OBLIGATIONS TO THE PROTECTION OF REFUGEES

India is not a signatory party of the refugee convention and the protocol 1967. India believes that the 1951 Convention and Protocol are designed to meet the requirements of the post-war European Countries. The condition in the South Asian subcontinent is very different. The South Asian region is porous, and each country in the region does not have the political or administrative will to enforce strict rules on population entry. The cross border movements affect the political stability and internal security of the country. India considered that migration is a matter of bilateral and not multilateral relations. International agreements can restrict their freedom of action, security concerns, and fear of uncontrolled infiltration of terrorists and criminals. India that is still a developing country it does not have enough resources to

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

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support refugees and cannot be considered as a place of permanent safety for refugees.¹⁶³

However, India is a part of many international human rights instruments, whose provisions are directly or indirectly related to refugee protection on humanitarian grounds.¹⁶⁴ According to the international instruments, the Universal Declaration of Human Rights states that everyone has the right to seek and to enjoy in other countries asylum from persecution.¹⁶⁵ The UN Declaration on Territorial Asylum 1967, Covenant on the Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights, state-recognized refugees enjoy all of the human rights of the state in which they are granted refugee and are entitled to the same protection of their rights.¹⁶⁶ Article 22 of the Convention on the Rights of Child, 1989, requires contracting states to provide appropriate protection and humanitarian assistance to state-recognized refugee children.¹⁶⁷ Committee on the Elimination of all Forms of Racial Discrimination, 1965, stressed upon the protection of the rights of refugees concerning the right to a safe return, the importance of the principle of non-refoulement, and the right to restoration of refugee property upon their return home.¹⁶⁸ The International Convention on the Elimination of Discrimination against Women, 1979, also contains provisions relevant to the protection of refugee women.¹⁶⁹

¹⁶³ India's Refugee law and policy- An Analysis, available at: <https://blog.forumias.com/indias-refugee-law-and-policy-an-analysis/> (last visited on May 24, 2019)

¹⁶⁴ Isha Bothra, The law, policy and practice of refugee protection in India, available at: http://www.legalserviceindia.com/articles/rg_pro.htm.read (last visited on March 22, 2019)

¹⁶⁵ Universal Declaration of Human Rights, available at: <http://www.un.org/en/universal-declaration-human-rights/> (last visited on March 22, 2019)

¹⁶⁶ Human Rights Committee general comment no-15, the position of aliens under the covenant, 11/04/1986, available at: <http://www.ohchr.org/english/bodies/hrc/comments.htm>. (last visited on March 22, 2019)

¹⁶⁷ *Human Rights and Humanitarian Law: Developments in Indian and International Law*, 195(South Asia Human Rights Developments Documentation center. Oxford University Press, India. 1st edn. 2008)

¹⁶⁸ The Committee on the Elimination of Racial Discrimination, General recommendation, No-22, available at: <http://www.ohcr.org/english/bodies/cerd/comments.htm>. (Last visited on March 22, 2019)

¹⁶⁹ *Supra* note 167

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Furthermore, the Convention against torture and other Cruel, Inhuman, and Degrading Treatment or Punishment, 1984 to which India is a signatory but has yet to ratify, contains the principle of non-refoulement in article 3. The non-refoulement policy is also binding on India as a principle of customary International law under having attained the status of *jus cogens*.¹⁷⁰ *Jus cogens* is a Latin word which means a principle of international law that is based on values taken to be fundamental to the international community, and that cannot be set aside (as by treaty).¹⁷¹

India is a signatory of the Principle on the Status and Treatment of Refugee (Bangkok Principles) adopted by intergovernmental agreement in 1966 by the Asian-African Legal Consultative Committee (AALCC), which is now known as the Asian-African Legal Consultative Organization AALCO). According to this statute, the state shall not expel a refugee from the national or public interest, and they should not be deported or returned to a state or country, where his life or liberty has been threatened for the reason of race, colour, religion, political opinion, or membership of a particular social group.¹⁷²

4.4 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) AND REFUGEE PROTECTION IN INDIA

The United Nations High Commissioner for Refugees (UNHCR) plays an important role in refugee protection throughout the world. In India, UNHCR is very active to assist the refugee in getting refugee status and ensures that when they go to their home state, their repatriation is voluntary. A refugee who does not get direct assistance from the Indian government is free to apply to the UNHCR for asylum claims and other assistance. Its parent statute to conduct the test of refugee status determination and issue certificates to those who fulfil the criteria of the Refugee Convention mandates UNHCR.¹⁷³ In India, the UNHCR grant of refugee status is usually recognized, at least on a de facto basis, by the Indian government.¹⁷⁴

¹⁷⁰ S. Guy Goodwin-Gill, *The Refugee in International law* 167 (Oxford Clarendon Press, 2nd edn., 1996)

¹⁷¹ Merriam Webster: since 1828, *availavle at*: <https://www.merriam-webster.com/legal/jus%20cogens> (last visited on May 24, 2019)

¹⁷² *Supra* note 167

¹⁷³ Christina Harison, UNHCR and protection of refugee in India, *available at*: http://www.unac.org/en/get_involved/internships/protection.asp,read (last visited on March 20, 2019)

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The United Nations High Commissioner for Refugee was established in 1949 on General Assembly resolution 319(IV).¹⁷⁵ In India, UNHCR had begun to work for the first time in 1959, when China took over Tibet, and India was exposed to a massive influx of Tibetan refugees across the border. For some time, India avoided seeking international assistance for the problem due to concern over tensions in its relations with China. It refrained from voting on UN General Assembly Resolutions concerning the Chinese treatment of Tibetans. In 1962, a border war with China had prompted India, gradually to begin to seek international assistance for its Tibetan refugees. In 1963, The UNHCR began providing limited assistance, though without an institutional presence, in 1964. In 1969, the UNHCR had established a branch office in New Delhi to allow for more substantial involvement in the Tibetan refugee assistance program¹⁷⁶ and provide vocational training and was later permitted a limited role in monitoring repatriation of Tamils to Sri Lanka.¹⁷⁷

A massive influx of Pakistani refugees from East Pakistan in 1971 led India to ask for UNHCR support again, because of the scale of the problem and the desire to internationalize the problem. The UNHCR has greatly coordinated international aid, although it is under the control of the Government of India and does not have a large institutional presence in India. Relations soured, however, when the UN Secretary General's proposal for voluntary repatriation of East Pakistani refugees, a politically contentious proposal at the time, prompted India to feel that the UNHCR was in breach of its non-political role.¹⁷⁸

¹⁷⁴ *Ibid.*

¹⁷⁵ RESOLUTIONS ADOPTED ON THE REPORTS OF THE THIRD COMMITTEE 428(V). Statute of the Office of the United Nations High Commissioner for Refugees, *available at*: <https://www.unhcr.org/excom/bgaes/3ae69ee64/statute-office-united-nations-high-commissioner-refugees.html> (last visited on March 20, 2019)

¹⁷⁶ *Supra* note 167 at 198-199.

¹⁷⁷ Koichi Kozumi and G. Hoffstaedter (eds.), *Urban Refugees: Challenges in Protection, Services and Policy*, 143(Routledge Publishers, 2015)

¹⁷⁸ Ranabir Samaddar (ed.), *Refugees and the State: Practices of Asylum and care in India, 1947-2000* 400(Sage Publication, New Delhi. 1st edn., 2003). *available at* https://books.google.co.in/books/about/Refugees_and_the_State.html?id=4cuGAwAAQBAJ&printsec=frontcover&source=kp_read_button&redir_esc=y#v=onepage&q&f=false (last visited on March 20, 2019)

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A UNHCR unit was established in New Delhi in 1980 and 1981, in response to the influx of Afghan and Iranian refugees, with permission but not with formal government approval.¹⁷⁹ In 1992, the UNHCR opened in Chennai to support the voluntary repatriation of Sri Lankan refugees to their country and verify the voluntariness of return of Sri Lankan refugees.¹⁸⁰ The UNHCR Field Office in Chennai is limited to providing repatriation assistance to Tamils. It can interview outside of the camps, and it relies on other NGOs/civil society organizations to inform it about conditions in the camps themselves.¹⁸¹

The UNHCR in India does not operate on a formal legal basis and does not have a formal agreement with the Government of India but instead under the agreement of the United Nations Development Programme (UNDP). The UNHCR continues to enjoy a degree of independence in carrying out programs under the mandate contained in its statute, including the determination of refugee status through the New Delhi branch office. The New Delhi office also performs the first functions of providing refugee protection and seeking durable solutions provided in Chapter I of the UNHCR statute, as well as the provision of material assistance carried out under its general program. The UNHCR in India is been restricted by its lack of proper legal or institutional standing, the constraints of working with the government, and its policies of being over accommodating to government demands. At times, UNHCR-India falls short of its mandated role as a 'forceful advocate' for the rights of refugees in India.¹⁸²

The UNHCR in New Delhi is the only means by which asylum seekers in India can apply for asylum and are granted determinations of refugee status. These determinations have no formal legal effect under Indian law but in practice have been accorded de facto recognition by the ministry of home affairs, the Foreigners

¹⁷⁹ *Ibid*

¹⁸⁰ UNHCR: INDIA, *available at*:

https://unhcr.org.in/index.php?option=com_content&view=article&id=9&Itemid=133 (last visited on August 11, 2019)

¹⁸¹ U.N. HIGH COMM'R FOR REFUGEES, HELPING SRI LANKAN REFUGEES COME HOME (2013), *available at*: <http://unhcr.lk/wp-content/uploads/2014/03/HELPING-SRI-LANKAN-REFUGEES-Leaflet.pdf> (last visited on August 12, 2019)

¹⁸² *Supra* note 176

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Regional Registration Office, and the local police authorities, and are often the basis for the discretionary grant of a residential permit by the ministry of home affairs.

The rights available to favoured refugee groups that are officially recognized by the Government of India and those accorded refugee status by the UNHCR in New Delhi is widely different. A discussion of refugee policy in India must therefore clearly distinguish between three categories of individuals: officially recognized refugees, UNHCR-mandated refugees, and asylum seekers who have been verified by neither the government nor the UNHCR. There remains an undefined line between the respective roles of the UNHCR and that of the government. UNHCR has been granted operational autonomy but is subjected to the overall control of the government to intervene in any matter. For example, the UNHCR in India is refused access to refugees in camps, where they would generally provide or support international assistance.¹⁸³

The UNHCR in India is conducting status determination interviews, issuing certificates to UNHCR-recognized refugees, interacting with the government in protection matters, and monitoring asylum conditions, seeking durable solutions for UNHCR-recognized refugees, and negotiating clearance with the government for their departure. The fulfilment of these obligations, however, is dependent on the political will of the Indian government due to a lack of formal legal framework. Although usually recognized by the authorities, UNHCR refugee certification is not a guarantee against deportation, which remains within the unfettered discretionary power of the government. Neither are UNHCR certificates guarantees of a government-issued residence permit. There are various categories of refugees who have been refused residency despite being granted certificates by the UNHCR.¹⁸⁴

The government has at times, disagreed with the UNHCR's designation of refugees, for example, over Afghan and Iranian refugees in New Delhi. Because those refugees recognized by the UNHCR have no legal status within India, they are also prohibited from owning land or property, obtaining travel permits, entering into employment, trading, or establishing a business.

¹⁸³ *Id.* at 200

¹⁸⁴ Rajeev Dhavan, *Refugee Law and Policy in India* 82(The Public Interest and Legal Support and Research Center, New Delhi, 2005)

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The UNHCR must obtain a request from the Government of India before it can provide material assistance to a specific UNHCR-recognized refugee group. The material assistance programme is done by the UNHCR in New Delhi, often in partnership with other welfare groups, including emergency aid, housing, education, and health care assistance, needs to assessment, subsistence allowance, employment, and vocational training, support for special groups such as women and children, and legal aid.¹⁸⁵

The UNHCR Office in India works with the Government of India, non-governmental organizations, and members of civil society in ensuring that asylum seekers and refugees in India have not involuntarily returned to their countries of origin, or of the former residence and have access to international protection.

UNHCR, together with its partners and civil society, provides a range of services to support refugees and asylum-seekers in health, education, legal counselling, vocational skills, and livelihoods. UNHCR places great emphasis on every child's right to primary education and access to health care for all people of concern as a fundamental human right. Besides, UNHCR offers its support for all refugee and asylum-seeker children to attend public schools since the government allows them free access. The passing of the Right of Children to Free and Compulsory Education Act, 2009 under which every child between the ages of 6 to 14 years has the right to free and compulsory education, has recently corroborated.

In New Delhi, the Socio-Legal Information Centre provides legal assistance to protect persons under UNHCR's mandate. Bosco assists the refugees in accessing government hospitals, dispensaries, and other medical facilities, which are generously made available by the Government to refugees and asylum seekers.

Besides, it offers education services and provides language classes, counselling, and support for livelihood activities, including vocational training. Bosco works very closely with refugee youth. In India, UNHCR supports income-generating activities to help refugees lead a life with dignity. Koshish, a famous line of traditional clothing made by refugee women, is one of them.

¹⁸⁵ *Human Rights and Humanitarian Law: Developments in Indian and International Law* 201(oxford University Press, New Delhi. 1st edn., 2008)

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The Gandhi National Memorial Society in Pune assists refugees and asylum seekers in Pune, the Confederation of Voluntary Agencies is UNHCR's partner in Hyderabad, and Development and Justice Initiative (DAJI) supports refugees and asylum seekers in Jammu, Mewat, and Jaipur.

Moreover, women's protection is high on UNHCR's agenda. UNHCR, along with its partner organization and Delhi police, has been organizing self-defence training for refugee women. The training program aims at empowering women by equipping them with basic martial arts techniques.¹⁸⁶

India is a member of the Executive Committee (ExCom) of the UNHCR, which approves and supervises the material assistance programmes of the UNHCR. Considering this, it is clear that India respects international treaties on the treatment of people residing within its territory. Nevertheless, it chooses to maintain its administrative arrangements for dealing with temporarily or permanently settled refugee communities, while providing the UNHCR little room to assist except in emergencies like the displacement of Chakma tribal from Bangladesh or rehabilitation of refugees from Afghanistan or the Autonomous Region of Tibet.¹⁸⁷

Difficulties encountered with providing material assistance include the lack of resources available—meaning that the services provided are often inadequate, including for the provision of essential health and emergency assistance, and measures for the protection of women and children. These difficulties have been exacerbated by a lack of cooperation from the Government of India, particularly for specific classes of refugees. For example, in the context of Afghan refugees living in New Delhi under the protective mandate of UNHCR in India, subsistence allowances have discontinued under the pretext of encouraging self-reliance, a seemingly empty concept in the light of the refugees' inability to obtain employment or enter into business.¹⁸⁸

At the same time as providing material assistance, the UNHCR office in New Delhi explores the possibility of durable solutions. Generally, UNHCR policies view

¹⁸⁶ UNHCR: INDIA, *available at*:

https://unhcr.org.in/index.php?option=com_content&view=article&id=8&Itemid=130(last visited on August 11, 2019)

¹⁸⁷ Dr. Vivek Kumar, "A study of refugee's in India: The legal Perspective" 3 *IJL* 96 (2017).

¹⁸⁸ *Ibid.*

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India as a country where local integration is eminently achievable and prefers this to other solutions. During the durable solution stage, the role of the UNHCR includes ensuring that the chosen solution has to be carried out effectively for as long as this process may take, although often, it cannot be said that this is achieved. There have been a large number of former refugees, who either have locally integrated and therefore have no longer classified as UNHCR-mandated refugees or have abandoned claims to UNHCR assistance after finding a feasible durable solution.¹⁸⁹

The primary problem concerning local integration as a solution in India is the government's prohibition on legal employment for UNHCR-mandated refugees, making self-reliance a practical impossibility. Those who obtain work illegally live under the constant fear of deportation or imprisonment and many are frequently subject to arrest and harassment by police. Another question is how real the 'integration' can be said to be. Even long-standing government-recognized refugee groups such as the Tibetans—despite achieving a significant level of integration and protection from the government and being permitted to hold Indian travel documents and take employment—continue to experience considerable local opposition along with mixed acceptance. Similarly, despite a shared culture, Indian Tamils do not uniformly accept Sri Lankan Tamils.¹⁹⁰

In India, the refugee status determination process has been conducted by the UNHCR on an individual basis for all asylum seekers from Myanmar Afghanistan, and the government of India has conducted for Somalia (mainly urban refugees) and refugee status determination process for Tamil asylum seekers from Sri Lanka and Tibetan asylum seekers from China.¹⁹¹

If refugees wish to apply for asylum, they should contact the office of the United Nations High Commissioner for Refugees. The first step in the asylum procedure is registration. Registration is the process of registering, reviewing, and updating information about individuals of concern to UNHCR. The registration

¹⁸⁹ Rajiv Dhavan, *Refugee Law and Policy in India* 113(The Public Interest and Legal Support and Research Center, New Delhi, 2005)

¹⁹⁰ *Id.* at 113.

¹⁹¹ Summary of refugee registration and refugee status determination by Country of Asylum, *available at*: www.rstp.ca/wp-content/uploads/.../RSDs-by-country-updated-January-2017Final.pdf (last visited on January 28, 2018).

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process can take place at the UNHCR registration center in Delhi, the UNHCR office in Chennai, or through a partner organization. Registration will take place on the day you contact the UNHCR Registration Center or as soon as possible on the following days. The refugee must report to all family members who are present in India and have not yet registered with UNHCR for registration. The refugee will provide details of their full address and telephone number during the registration interview.¹⁹²

If the refugee has any of the documents listed below (original, expired, or copies), please bring them with you when contacting UNHCR for registration and present them during the registration interview:

- Case numbers of immediate family members who have been registered with UNHCR (in India or elsewhere),
- Passport/nationality document/identity document
- Birth certificates/vaccination cards for children
- Marriage/divorce/death certificates
- Any other documents you may have

If he does not have any of the above documents, he can still register with the UNHCR. The refugee must fill out a registration form with basic information about himself and his family members, including name, date of birth, education, location and country of origin, contact details, etc. He will also be asked to explain on the form why he left his country and why he cannot return. If he cannot fill out the form, he will be supported. He will be interviewed by a registration officer, through the form and may ask additional questions. His picture will be taken and his fingerprints and iris scan will be recorded. Once the registration process is complete, you will receive information on the next steps in determining refugee status. He will receive a case number and a Certificate Under Consideration Certificate” (UCC) confirming that he has applied for UNHCR asylum in India and that his application will be examined. Information will be provided about subsequent steps including his refugee status determination interview during which he will be questioned in detail about his reasons for seeking asylum. Please note that the interview to determine refugee status can last

¹⁹² UNHCR, THE UN REFUGEE AGENCY: HELP INDIA *available at*:

<https://help.unhcr.org/india/applying-for-asylum-india/> (last visited on August 10, 2019)

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up to 20 months from the date of registration. After this interview, the UNHCR will decide on his refugee status on the basis of the information contained therein and the information available on the situation in his place of origin.¹⁹³

UNHCR makes every effort to ensure that decisions are made and shared promptly. Please note that decisions can take 12 months from the date of the interview. If 12 months have passed and he has not yet received the result of his refugee status interview, he can email or call the UNHCR registration office toll-free number.¹⁹⁴

Refugees will be informed of the result of their application by post, email, or telephone. Refugees will always notify UNHCR by email or phone number if their contact details, including email address, mailing address, or phone number, change in order to keep UNHCR records up to date and UNHCR and its partners can easily contact the refugee. The refugee has the right to appeal if his application for refugee status is denied for the first time. UNHCR issues a "Notice of Denial" with a blank complaint form. The refugee has 30 days from the date of receipt of the decision to submit this complaint form to the UNHCR. An appeal may submit by the refugee at the UNHCR Registration Centre, through the blue mailbox at UNHCR's Registration Office in Vikas Puri or the offices of UNHCR's partners or send it to UNHCR through the post. Refugees under Consideration Certificate will be extended at the UNHCR Registration Office in Vikas Puri or through the UNHCR partners, once his request is received.¹⁹⁵

It is not the refugee's right to reopen a closed case related to refugee status or registration. Cases are only reopened for exceptional reasons and UNHCR may not be able to respond to all requests received. Written requests to reopen closed cases can be submitted via the Blue Box to UNHCR India, Vasant Vihar, or the UNHCR Registration Center in Vikas Puri.¹⁹⁶

India is not a signatory to the refugee convention. In addition, there is no national refugee legislation, but in India, all asylum-seekers and refugees have access to health, public education, and the national legal system. India and Australia have

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

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ties to each other for the issue of a visa by the Australian High Commissioner, which call Special Humanitarian Protection (SHP). So far, mostly Chin refugees from Myanmar received this kind of visa. The SHP program probably continued up to 2017.¹⁹⁷

In India, the government permits residence for the UNHCR-recognized refugees to live mainly in urban areas temporarily in the camps. Moreover, this type of recognized refugee can apply, for a long time visa, which allows recognized refugees to regularize their stay and join the formal labour market, in addition to giving them access to tertiary education, which was introduced in 2012. This type of visa is granted on an only individual basis. The long-term visa is issued to many refugees like Myanmar and other nationalities, but the refugee from Afghanistan face challenges to do so.¹⁹⁸

4.5 NATIONAL HUMAN RIGHTS COMMISSION AND REFUGEES

The National Human Rights Commission is established by the Protection of Human Rights Act, 1993, to protect human rights in the country of citizens as well as non-citizen, including refugees.¹⁹⁹ The NHRC, which has earned them a worldwide reputation for being an effective and independent institution in implementing human rights, has been actively considering the problems of refugees.²⁰⁰

The National Human Rights Commission (NHRC) consists of a chairperson who is a former Chief Justice of the Supreme Court, a former Justice of the Supreme Court, and a former Chief Justice of a High Court. Additional members of the Commission include the chairpersons of the National Commission for Minorities, the National Commission for Scheduled Castes and Tribes, and the National Commission for Women, as well as two other members who have knowledge and experience in matters relating to human rights.²⁰¹

There are some functions of NHRC, which has listed in chapter three; these include the power to inquire suo-moto into a petition presented to it. The right to

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ The Protection of Human Rights Act, 1993. Preamble

²⁰⁰ Sanjay Parikh, "Refugees in the International and National Framework" 1 *ISIL* 272(2001).

²⁰¹ *Supra* note 199, s. 3

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intervene with the court's approval in any judicial proceedings involving an allegation of human rights abuse, the right to study treaties and other human rights instruments and make recommendations for their effective implementation, and the power to promote research in the field of human rights.²⁰²

The NHRC has the powers of a civil court under the Code of Civil Procedure, 1908, when inquiring into a complaint.²⁰³ The NHRC has taken an interest in issues relating to refugees, and the Commission filed a petition received from Chakma refugees residing in the state of Arunachal Pradesh. They alleged that they had been threatened by the All Arunachal Pradesh Student Union to leave the country and they moved the case to the Supreme Court, indicating that there was prima facie evidence to support the claim of the refugees.²⁰⁴ After considering the evidence, the Court directed that the state government protect the Chakmas and that all those eligible and interested in applying for Indian citizenship should deal with according to the relevant laws.

The NHRC is playing a crucial role in the protection of the civil rights of the refugees, and they took the initiative in the rescue of Sri Lankan Tamils, Chakmas Afghans, and others like refugees from forced repatriation. For the protection of life, liberty, security, and property of Chakmas of Arunachal Pradesh, NHRC moved to the Supreme Court and secured favourable direction from the court to the Chakmas, which has upheld the accountability of the NHRC. However, it felt that there is a unique need for amendment in the protection of the Human Rights Act, 1993, to provide teeth in the power of the NHRC so that it can function much more vigorously. It can give more scope to the NHRC for human rights protection of the refugees.²⁰⁵ NHRC had drawn attention to the government of India for amendment in the Human Rights Protection Act, 1993.²⁰⁶

²⁰² *Id.*, s. 12

²⁰³ *Id.*, s. 13

²⁰⁴ National Human Rights Commission vs. State of Arunachal Pradesh, 1996 (SC) AIR 1234.

²⁰⁵ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen: Law and Reality* 410 (Deep & Deep Publication Pvt. Ltd. New Delhi, 2007)

²⁰⁶ Annual Report of NHRC, 2003-04

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4.6 INDIA'S PRESENT STAND TOWARDS REFUGEES

It is important to note that India is not a signatory to the 1951 refugee convention or the 1967 protocol and nor it has any domestic law which is related to refugee protection. Nevertheless, not all this means that India is inhuman towards refugees. However, it is equally important to note that India is a signatory of various other international and regional treaties and conventions relating to human rights. India has a humanistic approach towards refugees and has welcomed them with open arms when their own countries have miserably failed in giving them protection.

Nevertheless, it is also true that the lack of legal obligation make the authorities to act arbitrarily. The Government of India uses its discretion, recognizes only a few categories of refugees, and leaves the responsibility to rest on the shoulders of UNHCR. The amenities provided to Tibetans and Sri Lankan refugees are not available to other categories of refugees since the Indian Government does not recognize them. The absence of refugee law has resulted in an unstable refugee policy with extensive discrimination of rights and services.²⁰⁷

In India, for the regulation of refugees laws used for the protection of refugees are the Registration of foreigners Act, 1939; the Foreigners Act, 1946; the Passport Act, 1967 and the citizenship Act, 1954.²⁰⁸

Many refugees are waiting to get citizenship in India. To provide Indian citizenship to the refugees, the NDA Government enacted the Citizenship (Amendment) Act, 2019. This Act amends the Citizenship Act, 1955, which provides citizenship based on birth²⁰⁹ in India, by descent,²¹⁰ through registration²¹¹, by naturalization²¹² (extended residence in India), and by incorporation of the territory²¹³ into India. Furthermore, excluded from the definition of illegal immigrants, persons

²⁰⁷ V. Vijayakumar, "Developing a Regional Approach to Refugee Problems in South Asia", *4th Informal Consultation on Refugee and Migratory Movements in South Asia*, Dhaka, 57 (10-11th November, 1997).

²⁰⁸ NRC row: Where does India stand on refugees? *available at*: www.m.economictimes.com

²⁰⁹ The citizenship Act, 1954. s. 3

²¹⁰ *Id.*, s. 4

²¹¹ *Id.*, s. 5

²¹² *Id.*, s. 6

²¹³ *Id.*, s. 7

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belonging to minority communities of Hindus, Jains, Sikhs, Christians, Buddhists, and Parsis from Afghanistan, Pakistan, and Bangladesh, who have entered into India on or before 31st December 2014, given in Section 2(1)(b) of the Citizenship Act.²¹⁴

India's Citizenship Act brought new hope to the refugees living in India. The CAA 2019, grants Indian citizenship belonging to the six minority communities – Hindu, Sikh, Buddhist, Jain, Parsi, and Christian – which migrated to India (before December 2014) after facing violent religious persecution in Pakistan, Afghanistan, and Bangladesh, three Muslim-majority nations belonging to India's immediate neighbourhood.

The critical fact about the Citizenship Amendment Act is that it is about granting Indian citizenship to the refugees living in India, not revoking any community's citizenship status. There are already different provisions in the Indian law to grant citizenship to any religious community (including Muslims) on reasonable grounds, and this act does not affect that. In the last five years of the central government itself, some 600 Muslims from Pakistan, Afghanistan, and Bangladesh have been given Indian citizenship. India is home to the world's second-largest Muslim population, which is living a dignified life. However, the situation is the opposite of India's neighbourhood.²¹⁵

The reason for excluding Muslims from the purview of the act, as stated by the Home Minister is that the likelihood of Muslims facing persecution in these Muslim-majority countries is low.²¹⁶

The Citizenship Act excludes individuals who are practicing Muslims from the mentioned three neighbouring countries to enter India without being labelled as 'illegal migrants' even though they might be seeing their country due to the fear of

²¹⁴ Persecuted refugee and the Citizenship Amendment Act, 2019. *available at:* <http://www.legalserviceindia.com/legal/article-1436-persecuted-refugee-and-the-citizenship-amendment-act-2019.html> (last visited on December 22, 2019)

²¹⁵ Citizenship Amendment Act of India a hope for refugees, *available at:* <https://www.jpost.com/Opinion/Citizenship-Amendment-Act-of-India-a-hope-for-refugees-612378> (last visited on December 25, 2019)

²¹⁶ Explained: Should you read the CAA in conjunction with the proposed NRC? *available at:* <http://citizenmatters.in/faq-on-citizenship-amendment-act-and-nrc-connection-14928> (last visited on December 25, 2019)

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persecution. This exclusion is facilitated by two classifications made within the Act, the one based on religion (where six other religions have been granted protection) and another one based on country (restricted to only Afghanistan, Bangladesh, and Pakistan). Such classification not only goes against the basic tenets of the Constitution namely, the right to equality, the prohibition of discrimination, right to life, and freedom of religion incorporated under Article 14, 15, 21, and 25 but runs counter to the very idea of religion-neutral citizenship which India as an independent country adopted through its Citizenship Act, 1954.²¹⁷ The passage of the Citizenship Amendment Act also violates India's international treaty and customary law obligations as highlighted by the office of the United Nations High Commissioner for Human Rights (OHCHR) in its statement on 13 December 2019 and calls the Bill fundamentally discriminatory.²¹⁸

4.7 CONCLUSION

India is playing a significant role in dealing with the problem of the refugee because of its position as a spearhead in South Asia, India sets a model for other countries in the area, and it shelters one of the leading refugee people in the world. India does not have a national refugee law, and it is not a signatory to the UN's refugee Convention. Thus, it does not legally recognize refugees or distinguish between them and other foreign nationals entering the country's territory. In the absence of any statutes related to the refugee, the Indian judiciary has stepped in and guaranteed them protective rights, in line with the Constitution. The Supreme Court of India, in various judgments, held that the constitutional protection of life and liberty, right to leave the country for third-country resettlement, and recognized and enforced the principle of non-refoulement under article 21. These rights must extend to refugees, and who enter India, even if illegally, should be permitted to approach the UNHCR to seek refugee status. The Indian Government grants permission to

²¹⁷ Citizenship Amendment Act 2019: Modi Government Pulls A (Donald) Trump Card. *available at:* <https://www.livelaw.in/columns/citizenship-amendment-act-2019-modi-government-pulls-a-donald-trump-card-150964?infinitemscroll=1> (last visited on December 25, 2019)

²¹⁸ Press briefing on India, Spokesperson for the UN High Commissioner for Human Rights: Jeremy Laurence, *available at:* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25425&LangID=E> (last visited on December 25, 2019)

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UNHCR to conduct registration and refugee status determination as well as provided assistance to refugees who have not been extended direct assistance by the government. The Protection of Refugees and Asylum Seekers Bill, 2015 that was introduced in the Parliament by Shri Rabindra Kumar Jena, but this bill has not been passed by the Parliament until the date. The Refugee Bill specifically states the objectives of the proposed legislation, including; establishment of an appropriate legal framework through adherence to an administrative system free from arbitration under Articles 37 and 253 of the Constitution of India, implementation of international human rights treaties, and India's commitment to do so, and granting of Refugee status as a peaceful and humanitarian action. The model law defined the rights and duties of refugees and protection to give to them by the State, but this model law is not accepted by the Indian Government. In India, the refugees are treated on ad hoc policy. However, India's ad hoc policy has led to inconsistency in dealing with refugees of different nationalities. India's absence of clear standards for the treatment of refugee groups, however, is resulting in contaminations of the international standards for the treatment of refugees. For India to bring its refugee law into conformity with the international community, only improving its domestic laws is insufficient because it will continue to reject international assistance and monitoring of refugee groups. India should reform its refugee policies and accede to the Refugee Convention or its Protocol. Besides, there is a need for a proper formal structure for asylum management with the rising number of refugees in India and develop own policy on refugees that adapts to the situation in South Asia without imitating those models designed in the West. It is important to ensure legislated rights, freedoms, and basic standards of living for refugees.

Recently the Citizenship (Amendment) Act, 2019 enacted by the Indian government guarantees citizenship to religious minorities like Buddhists, Sikhs, Jains, Parsis, and Christians from three countries, Pakistan, Afghanistan, and Bangladesh respectively is welcome. Because it is the hope of giving a good life to the refugees living in crisis, but this law deprives citizenship of the Muslim community. In contrast, it has been an Indian policy to provide asylum without any discrimination, which must have been taken into consideration for maintaining our constitutional oaths in high spirits.

CHAPTER - V
JUDICIAL RESPONSE TO REFUGEE
PROTECTION

5.1 INTRODUCTION

The judiciary has played an essential role in protecting the rights of refugees both at national and international levels. The provision of the access of court is given in Article 16 of the Convention Relating to the Status of Refugees, 1951. According to this article, a refugee shall have free access to the courts of law on the territory of all contracting states, and they shall enjoy, in the contracting state in which he has his habitual residence, the same treatment as a national in matters about access to the courts, including legal assistance and exemption from *caution judicatum solvi*.¹

The international courts have protected the human rights of refugees according to human rights treaties, covenants, international conventions, declarations, international customary laws, and national legal instruments. There are some courts such as Australian Courts, American Supreme Court, Canadian Supreme Court, the European Court of Human Rights, and the European Commission of Human Rights which have made significant contributions to the protection of human rights of refugees.

At the same time, even if there is no law related to Refugee in India, the Indian courts, especially the Supreme Court of India, protected the refugees as a foreigner and protected their human rights in the light of the Indian Constitution enshrined in various fundamental rights particularly from Article 21. Several judicial decisions of the Supreme Court and various High Courts provide a series of rights to millions of refugees who had fled their country of origin, have crossed the internationally recognized border, and are staying in Indian Territories.

5.2 INTERNATIONAL JUDICIAL INTERPRETATIONS ON REFUGEES

Convention relating to the status of refugee, 1951, and its 1967 protocol are the codified instruments to refugee's protection as well as some regional instruments, and there is a significant development in judicial precedent to the protection of refugees in different countries. There are some international cases relating to refugee protection as discussed below.

¹ Convention Relating to the Status of Refugee, 1951, art. 16

5.2.1 Judicial Interpretation on Asylum

In the case of *Cruz-Varas v. Sweden and Ors*,² the European Court of Human Rights (ECtHR) examined the case of a Chilean political activist extradited from Sweden to Chile, which the applicant claimed violated the European Convention on Human Rights, article 3 which said that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Court of Human Rights had previously ruled that a contracting state had decided to remove a criminal who might be bound by that state's obligation under the convention. If there are substantial grounds for believing that if the person has disfellowshipped every time they have expelled, they are at real risk of being tortured or barbaric or corruptly treated or disciplined at the request of the nation. However, the ECtHR also stressed that ill-treatment must attain a minimum level of severity. In its application of Article 3, the ECtHR has consistently maintained a high standard of proof and conceded considerable substantive and procedural room to national authorities.

ECtHR indicated that in assessing the degree of risk, it would look at all the material placed before it, including any evidence obtained by its initiative. The court stated that in judging State actions, it would look at the facts known at the time of the alleged exposure to the risk. However, it would also take into account information subsequently available to confirm or refute the foundation of an applicant's fear.

States remain under no obligation to grant asylum, while protection within a state “implies only the normal exercise of territorial sovereignty.”³ Save in so far as it does not trespass upon the State's other obligations under international law, the sovereign act comprising the beneficial exercise of territorial jurisdiction is entitled to respect by all the other states, including the country of origin of the refugee.

Pashupanathan v. Canada (Minister of Citizenship and Immigration) and others; in this case, the court held that the exclusion clause of the 1951 Convention would not apply to any people who will act contrary to the values of the United Nations. Significant trafficking in a dangerous illicit drug constitutes an act that is contrary to the purposes and principles of the UN and they would thus form the basis

² 46/1990/237/307, Council of Europe, European Court of Human Rights, 20 March 1991, *available at*: <http://www.refworld.org/cases,ECHR,3ae6b6fe14.html>, (Last visited on August 18, 2018)

³ Asylum Case (Colombia v. Peru), 1950 (Rep) ICJ R 265. *available at*: <https://www.icj-cij.org/en/case/7>, (Last visited on August 08, 2018)

of exclusion from the refugee category under Article 1F of the Convention. Such action is recognized, equally legally and practically, not only as a domestic criminal offence but also as one that can inflict severe and significant harm on the international community.

Babar v. Secretary of State for the Home Department [2018] EWCA Civ 329⁴

In this case, on 1 March 2018, the England and Wales Court of Appeal ruled and concerned that a Pakistani national who unsuccessfully applied for asylum in the UK in 2001 and was granted exceptional leave to remain since there was a real risk that he would be detained and subjected to inhuman or degrading treatment if returned. He was excluded from the scope of the 1951 Refugee Convention because there were serious reasons to believe that he had been a party to severe criminal wrongdoings, namely crimes against humanity. In 2012, the applicant applied for indefinite leave to remain based on his continued residence in the UK, his close family ties with his wife and his children, and his work record. The Secretary of State refused the application and simultaneously decided to remove the applicant to Pakistan, taking into account that he had been able to return to Pakistan before without the authorities showing any interest in him. The Court of Appeal ruled that the Upper Tribunal had failed to give proper weight to the ‘compelling’ justification of denying settlement to those who have committed crimes against humanity. Being a haven for those who have committed such offence, the court argued, would be a breach of the UK’s international obligations and would undermine its international standing. Only very compelling circumstances could outweigh the public interest in denying settlement to persons who have committed such crimes. The Court of Appeal ruled in favour of the Secretary of State and declared that the applicant had no entitlement to an indefinite leave to remain. Since he has no leave to remain in the UK, the applicant can return if his argument that his removal would be in breach of article 8 of the European Convention on Human Rights (ECHR) fails before the courts. As agreed between the parties, the applicant’s complaint under article 8, ECHR was remitted from the First-Tier Tribunal to the Upper Tribunal.

⁴ International Journal of Refugee Law, 2018, Vol 30, No 3, 532–536, *available at*: <https://academic.oup.com/ijrl/article-abstract/30/3/532/5318627> (last visited on March 15, 2019)

*In another case of Alex Ruta v. Minister of Home Affairs*⁵

An issue was whether a prospective asylum seeker should be allowed to apply for asylum at any time they might express an intention to do so after arriving in the country, even if they have delayed. Whether an asylum seeker who was convicted of a crime committed within South Africa barred from applying for asylum. These questions raised the interface between the Immigration Act 13 of 2002 and the Refugees Act 130 of 1998. Must a person who claims to be a refugee and expresses an intention to apply for asylum be permitted to apply under the Refugees Act, or should they be dealt with as an illegal foreigner under the Immigration Act? The applicant, Mr. Alex Ruta, is a Rwandan national who entered South Africa unlawfully in December 2014. In terms of the Immigration Act, he is, therefore, an illegal foreigner.

The Court held that the Refugees Act is clear that delay in itself does not disqualify an asylum application. The only grounds on which an application may refuse are those set out in the Refugees Act itself. This approach was embedded in the Refugees Act, which was enacted by Parliament in compliance with South Africa's duties under international law.

The Refugees Act embodies a fundamental principle under international law *non-refoulement* (prohibition to expel) – in terms of which one fleeing persecution has the right to seek and to enjoy asylum. This principle is the cornerstone of refugee law and a significant doctrine of human rights law. For reasons springing from the persecution of its people during apartheid, South Africa has emphatically embraced *non-refoulement*. It has signed and ratified both the 1951 Refugees Convention and the even more generous wording of the Organisation of African Unity Refugee Convention.

The Court's judgment emphasizes that delay may still be relevant in evaluating the authenticity of a claim to be a refugee. However, it cannot bar an applicant from applying for asylum at the outset. Further, in terms of the Refugees Act, only the appropriate agency to refugee status determination may determine the

⁵ *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) (20 December 2018) *available at*:
<http://www.saflii.org/cgibin/displ.pl?file=za/cases/ZACC/2018/52.html&query=case%20laws%20related%20to%20refugee> (last visited March 22, 2019)

truth or falsity of it. The Constitutional Court also held that while the Immigration Act determines who is an “illegal foreigner” liable to deportation, the Refugees Act is the only pertinent statute in determining who may seek asylum and who is entitled to refugee status. In entrusting the processing of asylum applications to Refugee Reception Officers and the determination of refugee status to RSDOs, the Refugees Act makes precise and detailed provision for the matters, it regulates in a way that the Immigration Act does not cover or even envisage. It means that the RSDO alone is entitled to adjudge applications by asylum seekers.

The judgment recognizes that non-South African nationals do not have the right to enter, remain, or reside anywhere in the Republic and that no international conventions create such a right. By enabling Mr. Ruta and asylum seekers in his position to have their status determined under the Refugees Act, the law does not consequently give everyone or anyone the right to enter the Republic anywhere across our borders. All the Refugees Act does, in conformity with South Africa’s international and regional law obligations, is to ensure that asylum seekers have a chance to have their status determined in the process the Refugees Act itself sets out, and not to be deported summarily under the Immigration Act.

As to the exclusion in section 4(1) (b) of the Refugees Act, the Court unanimously holds that it cannot apply to the offences of which Mr. Ruta was convicted. It is because they were committed to South Africa.

5.2.2 Judicial Interpretation on Well-Founded Fear of Persecution

One of the principal elements required to claim refugee status is that the claimant must be genuinely at risk. Various legal “tests” have developed concerning the standard of proof that is required to satisfy what constitutes being genuinely at risk or having a genuine well-founded fear of persecution and discrimination may be found by increasing, certain occurrences of violence and harassment on the way to any person and his or her family members.⁶ Courts in many countries have articulated some of these tests.

⁶ *Korablina v. Immigration and Naturalization Services*, No-97-70361, United States Court of Appeals for the Ninth Circuit, 23 October 1998, *available at*: http://www.refworld.org/cases,USA_CA_9,47baf7292.html (last visited on August 14, 2018)

In the case of *INS v. Cardoza Fouseca*,⁷ the US Supreme Court held: The moderate interpretation of the ‘well-founded fear’ standard would indicate that so long as the evidence establishes an objective situation, it need not shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.

The judgment of the *House of Lords in R v. Secretary of the Home Department Ex Parte Sivakumaran*⁸ suggests that the test should consider whether there is evidence of a “real and substantial danger of persecution.” The Canadian Federal Court of Appeal considered the above and disapproved of the House of Lords formulation in *Joseph Adjei v. Ministry of Employment & Immigration*⁹

The court adopted the “reasonable chance” standard in *D v. Board of Immigration*; the Board stated that the claimant recognized a well-founded fear of persecution, after hearing evidence that she was gang-raped and beaten in her home by soldiers and targeted by her attackers because of her political opinion and religion.

These judgments demonstrate that a rather liberal approach taken when determining whether a person has a well-founded fear of persecution. If there is objective evidence indicating a reasonable possibility or chance of persecution in the claimant’s state of origin, the claim should be adjudged and well-founded.

***AS (Iran) v. Secretary of State for the Home Department* [2017] EWCA Civ 1539¹⁰**

In this case, on 12 October 2017, the England and Wales Court of Appeal delivered its judgment regarding an Iranian woman who feared persecution in Iran based on her conversion to Christianity and her illegal exit from that country. The applicant had unsuccessfully appealed against the rejection of her asylum application before the First-Tier and Upper Tribunals.

The Court of Appeal found, first, that the First-Tier Tribunal did not commit a material error by finding that the applicant was not at risk of persecution in Iran for

⁷ (1987 (46) USSC 407),

⁸ (1988) 1 AII E.R.193 (H.L.), *available at*: http://www.refworld.org/cases,GBR_HL,3ae6b67f40.html, (last visited on August 14, 2018)

⁹ R.S.C. 1976, C. 52, Canada: Federal Court, 27 January 1989, *available at*: http://www.refworld.org/cases,CAN_FC,3ae6b6d124.html (last visited on August 20, 2018)

¹⁰ International Journal of Refugee Law, 2018, Vol 30, No 1, 128–133. *available at*: <https://academic.oup.com/ijrl/article-abstract/30/1/128/5051996> (last visited on March 10, 2019)

being a member of a particular social group (namely that of Iranian women victims of domestic violence). While recalling that the Secretary of State acknowledged that women in Iran do form a particular social group, the Court of Appeal concluded that the applicant would not return to live with her husband and would be able to position herself in independent life, thus not risking persecution.

Secondly, the court reaffirmed that earlier illegal exit is insufficient in itself to give rise to a risk of persecution on return (*SB (Iran)* CG [2009] UKAIT 00053). The applicant was not identifiable or identified by the Iranian regime, and there was no evidence she would be questioned directly about her political activity.

Thirdly, the Court of Appeal did not agree with the appellant that her conversion was a permanent and fundamental part of her religious identity, which she should not be required to change or renounce in order to avoid persecution (as in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31). Instead, the court considered that the applicant had not previously and would not seek to proselytize her religion and had regarded her religion as a private matter. Thus, active evangelism could not regard as an essential element of her religious faith. The Court of Appeal concluded that the applicant would not be persecuted on the ground of her religion upon return.

5.2.3 Judicial Interpretation on Racial Persecution

The international community has expressed its abhorrence of discrimination on racial grounds, but whether such discrimination amounts to persecution by itself is less clear. In the *Patel et al. v. the United Kingdom* case, the International Court of Justice held that the discrimination likely to be faced by a Kenyan citizen of Asian origin did not amount to persecution.¹¹

5.2.4 Judicial Interpretation on Religious Persecution

In the case of *Kokkinakis v. Greece*, Article 18 of the ICCPR and the UDHR's article 18 stated that everyone should have the right to freedom of thought, religion, and conscience, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest such a religion or belief. Article 9 of ECHR also expressly recognizes the freedom to change one's religion or belief. However, a

¹¹ *Patel et al vs. United Kingdom*, Application No. 4403/700 of Oct 1970.

distinction may be drawn between the freedom to practice a religious belief and the right to proselytize.¹²

Gambia v. Myanmar¹³

In this case, the International Court of Justice ordered Myanmar to take urgent action to protect the Rohingya people from genocide. This has hailed by the refugees as their first major legal victory since leaving their homes. A lawsuit brought by the Gambia in November before the United Nations Supreme Body on Intergovernmental Disputes accuses Myanmar of the Rohingya genocide in violation of a 1948 convention.

The final decision of the tribunal could take years and that decision concerned only Gambia's request for interim measures. However, in a unanimous decision by the 17-Judges panel, the court stated that the Rohingya are facing an ongoing threat and Myanmar must act to protect them. Myanmar must "take all measures in its power to prevent all acts" prohibited by the 1948 Genocide Convention and report back within four months. Myanmar must use its influence over its military and other armed groups to prevent violence against the Rohingya "which aims to cause all or part of their physical destruction". The decision of the International Court of Justice is also a unique decision as sexual violence has been classified as genocide. However, the court did not specify who the sexual violence must be perpetrated against to constitute genocide.

5.2.5 Judicial Interpretation on Persecution Related to Nationality

Nationality in Article 1A(2) of the 1951 Convention is usually interpreted in broad terms to include the origins and membership of particular ethnic, religious, cultural, and linguistic communities. In ***Ealing London Borough Council v. Race Relations Board***¹⁴, the court excluded nationality from the generic term "national origin."

¹² Kokkinakis vs. Greece, 3/1992/348/421, European Court of Human Rights, 25 May 1993. *available at:* minorityrights.org/wp-content/uploads/.../download-383-Kokkinakis-v.-Greece.pdf, (last visited on August 20, 2018)

¹³ Ordered on 18 May 2020, No. 2020/14, 26 May 2020. *available at:* <https://www.icj-cij.org/public/files/case-related/178/178-20200526-PRE-01-00-EN.pdf> (last visited on August 12, 2020)

¹⁴ [1971] UKHL 3, [1972] AC 342, [1972] 2 WLR 71, *available at:* <https://swarb.co.uk/ealing-london-borough-council-v-race-relations-board-hl-16-dec-1971/> (last visited on August 14, 2018)

5.2.6 Judicial Interpretation on Membership of a Social Group

The persecution related to the social group has been described as the persecution according to belonging to a "certain social group", which has been directed against persons belonging to a group of people.¹⁵

The social group category has given rise to several judgments, especially in Canada. In the case of *Canada (Attorney General) v. Ward*,¹⁶ the court stated that; the head of a "particular social group," record ought to be taken of the general fundamental subjects of the safeguard of human rights and against the separation of that frame the reason for the worldwide displaced person insurance activity. A decent working guideline for the significance of "specific social gathering" gives that this premise of abuse comprises of three classes:

- (1) a group characterized by a natural, unchangeable characteristic;
- (2) a group whose members voluntarily connected for reasons so essential to their human dignity that they should not force to abandon the association; and
- (3) a group connected by a previous voluntary status, unchangeable due to its historical stability.

In the case of *Cheung v. Minister for Employment and Immigration*¹⁷, the Canadian Federal Court of Appeal held that women in China who have more than one child and faced with involuntary decontamination are a social group.

Particular weight was attached to a woman's reproductive liberty as a basic right fundamental to human dignity.

In the case of *Chen Shi Hai v. Minister of Immigration and Multi-cultural Affairs*,¹⁸ involved a Chinese national born to Chinese parents while they were held in Australian immigration detention facilities pending their return to China as illegal immigrants. The applicant was the youngest of the three children born in contravention of China's one-child policy, who wanted a protection visa under

¹⁵ UNHCR Compilation of Case Law on Refugee Protection in International Law, *available at*: www.refworld.org/docid/47dfc8e32.html(last visited on August 14, 2018)

¹⁶ [1993] 2 SCR 689, 30 June 1993, *available at*: <https://scc-csc.lexum.com/scc-csc/scccsc/en/item/1023/index.do>(last visited on August 14, 2018)

¹⁷ [1993] 2 F.C. 314, Canada: Federal Court of Appeal, 1 April 1993, *available at*: http://www.refworld.org/cases,CAN_FCA,3ae6b70b18.html (last visited on August 14, 2018)

¹⁸ [2000] HCA 19, Australia: High Court, 13 April 2000, *available at*: http://www.refworld.org/cases,AUS_HC,3ae6b6df4.html (last visited on August 19, 2018)

Section 36(2) of the Migration Act, 1958. This section provides that persons to whom Australia has an obligation under the 1951 Convention should afford protection. It argued that the appellant was a member of a social group referred to as “black children” (children born of unauthorized marriages and in contravention of the one-child policy), and therefore, he would suffer social stigma and persecution if forced to return to China. In particular, the State would deny various benefits and access to food, education, and health care.

After the initial refusal by the Minister of Immigration and Multi-cultural Affairs and the Federal Court, the appellant appealed to the Australian High Court. The findings of the latter were that children who have not violated the one-child policy themselves but are born in contravention of it do constitute a social group; they are defined other than by reference to the discriminatory treatment—i.e., of their fear of persecution. The court also held that though the alleged persecution would not result from any enmity or other adverse intention towards the appellant himself as a “black child,” that did not alter the reality of the persecution that the applicant would face, and therefore granted relief to the applicant.

In the case of *Nasser Mustapha v. Alberto Gonzales*¹⁹, the United States Court of Appeals for the Ninth Circuit held that the claimant had a well-founded fear of persecution if he were removed to Lebanon, in consideration of the fact that the applicant was gay and suffering from HIV/AIDS. Homosexuals thus held to constitute a ‘particular social group.’

5.2.7 Judicial Interpretation on Political Persecution

In the 1951 Convention, the term “political opinion” should be understood in its broad sense. It incorporates, within substantive limitations, any opinion on any matter in which the machinery of the state or government policy may be engaged. This wording was adopted and endorsed by the Supreme Court of Canada in *Attorney General V. Ward (1993(2) SCR 689)*²⁰.

¹⁹ Attorney General, No. 02-72651, United States Court of Appeals for the Ninth Circuit, 7 March 2005, available at: http://www.refworld.org/cases,USA_CA_9,4721b5c32.html (last visited on August 19, 2018)

²⁰ [1993] 2 S.C.R. 689; (1993) DLR (4th) 1, available at: <http://www.asylumlawdatabase.eu/en/content/canada-attorney-general-v-ward-1993-2-scr-689-1993-dlr-4th-1> (last visited on August 20, 2018)

5.2.8 Judicial Interpretation on Refugee Sur Place

That the 1951 Convention protects refugees '*sur place*' on an equal footing with those who cross a border after the risk of persecution is already apparent.

The case of *Chaudhri v. Canada (Minister of Employment & Immigration)*²¹ involved a Pakistani citizen who had been an activist of the ruling Pakistan Peoples' Party before the military overthrow of 1979. Mr. Chaudhri had been in Canada for three years before the coup. In 1980, he learned that the new military government had issued a politically inspired warrant for his arrest that could lead to indefinite detention. The Federal Court of Appeal of Canada held that he was considered a Convention refugee *sur place* correctly since his fear of persecution, while not extant at the time of his departure from Pakistan was nonetheless well-founded in subsequent events.

5.2.9 Judicial Interpretation on Non-Refoulement

In the case of *Kirkwood V. United Kingdom*,²² the European Commission on Human Rights held: If conditions in a country are such that the risk of severe treatment and the severity of that treatment falls within the scope of Article 3, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility of the contracting State, which so decides. According to the Commission, Article 3 guarantees "are absolute, permitting no exception." Thus, the European Convention on Human Rights provides broader guarantees than Articles 32 and 33 of the 1951 Convention.

It should however be noted that the United States Supreme Court in *Sale v. Haitian Centers Council*²³, has not upheld the principle of non-refoulement. In this case, an executive command approved by the United States Coast Guard to stop vessels transporting Haitians to the US and to repatriate them was upheld by the Supreme Court as not conflicting with Article 33 of the 1951 Convention.

While the principle of non-refoulement may be bound on states, they retain discretion regarding both the grant of durable asylum and the conditions under which

²¹ (1986 (69) N.R.114)

²² 10479/83, [1984] ECHR 19, *available at*: <https://swarb.co.uk/kirkwood-v-the-united-kingdom-echr-12-mar-1984/> (last visited on August 20, 2018)

²³ 509 U.S. 155 (1993), *available at*: <https://caselaw.findlaw.com/us-supreme-court/509/155.html> (last visited on August 20, 2018)

it may be enjoyed or terminated. However, decisions of expulsion have required being under the due process of law, except where compelling reasons of national security require otherwise. Nevertheless, the permitted power of expulsion does not include the power to return the individual to the country in which her life or freedom may threaten, unless the further exacting provisions, which regulate exceptions to the principle of non-refoulement, are also met.

The European Court of Human Rights went even further in its decision in the case of *Ahmed V. Austria*²⁴ the applicant was a Somali national who had been granted asylum by the Austrian government but subsequently had his refugee status revoked because of his conviction for robbery while he was staying in Austria. The applicant argued that if he returned to Somalia, he would be at risk of being tortured because of his association with the United Somali Congress, one of the warring factions in the civil war. Austria argued that it was under Article 33 (2) of the 1951 Convention, which allowed a state to refuse refugee status to those convicted of a severe crime in that state. The court, however, held that Article 3 of the ECHR provides for an absolute prohibition on torture and is broader than the protection afforded under Article 33 of the 1951 Convention. Thus, there was a risk of the applicant being tortured on his return to Somalia, any attempt to deport him made by the Austrian authorities would be in breach of Austria's obligation under Article 3 of the ECHR.

In the case of *Chahal v. The United Kingdom*,²⁵ the European Court of Human Rights held that Removal by a Contracting State may offer ascent to an issue under Article 3, also, subsequently draw in the obligation of that State under the Convention. Where significant grounds have appeared for trusting that the individual being referred to, whenever removed, would confront a genuine danger of being subjected to treatment despite Article 3 (art. 3) in the accepting nation.

The applicant was an Indian national who faced deportation from the UK because his activities within that country posed a threat to its national security. He opposed the deportation order on the basis that if he returned to India, he would face persecution from the national security forces because of his association with the Sikh

²⁴ 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996, available at: <http://www.refworld.org/cases,ECHR,3ae6b62f2c.html> (last visited on August 20, 2018)

²⁵ (1997) 23 EHRR 413

separatist movement. Although the English Court of Appeal found that, the Home Secretary was obliged to balance the interest of national security against the risk that the deportee would face in his home country when considering the deportation order, which court stopped short of quashing the order. The ECtHR, however, found that there was sufficient evidence to show that Mr. Chahal would face a real risk of torture on being deported to India. Accordingly, if the UK implemented the order, it would be in breach of its obligation under article 3.

***India v Basdesha* 2017 SCC 44; [2017] 2 SCR 127 (8 September 2017)²⁶**

In this case, the decision of the Supreme Court of Canada concerned Canada's implied *non-refoulement* obligations embodied in section 7 of the Canadian Charter, which provide 'at least as great a level of protection as found in Canada's international commitments regarding *non-refoulement* to torture or other gross human rights violations.' The context was the request for extradition of two Canadian citizens residing in Canada, who were suspected by the Indian government of a conspiracy to murder concerning an honour killing that occurred in India. The Canadian Minister of Justice had ordered their surrenders after receiving assurances from India regarding their treatment if incarcerated, including health, safety, and consular access. The Court of Appeal concluded that the Minister's orders were unreasonable and set them aside, but the Canadian Supreme Court allowed the appeal and restored the Minister's surrender orders.

One of the notable features of this judgment is the comprehensive analysis of the circumstances in which diplomatic assurances may be relied upon by a sending State. The court found that diplomatic assurances 'need not eliminate any possibility of torture or mistreatment; they must simply form a reasonable basis for the Minister's finding that there is no substantial risk of torture or mistreatment.' The court considered a previous authority, including from the European Court of Human Rights. It adopted an eight-point checklist of 'contextual factors to examine when assessing the reliability of diplomatic assurances' that is likely to be useful to courts in a wide range of jurisdictions.

²⁶ *International Journal of Refugee Law*, 2018, Vol 30, No 1, 128–133. available at: <https://academic.oup.com/ijrl/article-abstract/30/1/128/5051996> (last visited on March 10, 2019)

5.2.10 Judicial Interpretation on Detention

In the case of *Amuur v. France*,²⁷ the applicants (three brothers and a sister) arrived with ten other Somali nationals at a Paris airport from Syria. They claimed to have fled Somalia because their lives were at risk following the overthrow of the president. However, the airport personnel and the border police refused to admit them into French territory as their passports were not genuine. The Somalis have taken to a hotel converted for use as a waiting area in the airport. Their request to be granted refugee status turned down. They made an urgent application seeking to release from their confinement at the hotel and complained to the European Commission on Human Rights about their treatment. The Commission's President indicated that it was desirable to refrain from sending them back to Somalia. The Interior Minister, however, refused the applicants, denied leave to enter, and the Somali nationals were sent back to Syria.

The European Court of Human rights ruled that the applicants' detention was not provided for in any legislation and was unlawful. It directed that they were to be released. Because of this ruling, Syria assured their life and liberty. The other Somali nationals have been recognized as political refugees.

The European Court of Human Rights held that keeping the applicant in the international zone was equivalent in practice to a deprivation of liberty. It is an important decision. Many governments claim to hold refugees in no man's land, such as transit zones, where they claim the law does not apply, as the refugee has technically not landed in the country of refuge. The ruling also provides an expanded meaning of what is understood by deprivation of liberty and reflects a keen appreciation of the ground realities confronting many asylum-seekers, mainly when several states are anxious to stem the flow of migration.

The Human Rights Committee in the case of *A v. Australia*²⁸ (Communication No. 560 of 1993) held among other things that although the fact of illegal entry of an asylum seeker—coupled with other factors, such as the possibility that she may abscond— can justify her detention, she should not be detained for a period longer than the State can justify. Where detention was beyond a time for which the State

²⁷ 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, *available at*: <http://www.refworld.org/cases,ECHR,3ae6b76710.html> (last visited on August 14, 2018)

²⁸ CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, *available at*: <http://www.refworld.org/cases,HRC,3ae6b71a0.html> (last visited on August 14, 2018)

could provide appropriate justification, it was arbitrary and thus contrary to Article 9 of the ICCPR. In this case, the Committee found that Australia had violated Article 9 since it could not provide appropriate justification for detaining the applicant for over four years.

In the case of *Scalabrini Centre, Cape Town v Minister of Home Affairs* [2017] ZASCA 126 (29 September 2017)²⁹

The decision of the Supreme Court of Appeal of South Africa concerned the lawfulness of the decision of the South African Director-General of the Department of Home Affairs to close the Cape Town Refugee Reception Office permanently. It is a crucial decision as it is a rare example of judicial recognition of the centrality of procedural guarantees, namely access to an appropriate administrative agency, for the protection of refugees. While the court acknowledged that the Refugees Act is required to be ‘interpreted and applied concerning international instruments relating to the status and rights of refugees,’ which includes the 1951 Refugee Convention, the resolution of this case ultimately turned on the application of universal law principles of judicial review and is thus an excellent illustration of the remedy possible through the application of such principles.

The court’s decision turned on two key findings. First, the court found that in closing the reception office, the Director-General had appropriately failed to consider whether the reception office had been necessary for the Act, such purposes being to provide for the reception of asylum seekers into South Africa, and ‘to ensure the immediate protection of their rights and the determination of their status under international standards.’ Secondly, the court found that the decision was ‘tainted by an ulterior purpose,’ namely that one of the reasons for closing the reception centre was said to be that ‘refugee services were being abused by economic migrants’ since 77 per cent of applications at that office were rejected. The court found that ‘the denial of access to a refugee reception office to 23% of genuine asylum seekers (and consequently, denying them economic opportunities in Cape Town), is not only the exercise of a power for an ulterior purpose but simply arbitrary’.

²⁹ *International Journal of Refugee Law*, 2018, Vol 30, No 1, 128–133. available at: <https://academic.oup.com/ijrl/article-abstract/30/1/128/5051996> (last visited on March 10, 2019)

Accordingly, the court directed the Minister of Home Affairs to ‘reopen and maintain a fully functional refugee reception office in or around the Cape Town Municipality’ by a specified date.

5.3 NATIONAL JUDICIAL INTERPRETATIONS ON REFUGEES

The Indian judiciary plays a vital role in protecting the rights of refugees in India in absence of a direct or explicit law on Refugee. However, India is not a signatory to the 1951 Convention and not to its Protocol, 1967 but the Indian courts have issued many guidelines to bridge the legislative and executive gaps. The Supreme Court of India delivered a humanitarian solution to deal with the problems related to the refugees. The Indian courts have interpreted the existing natural laws as well as the provisions of the Indian Constitution in the absence of the municipal laws, which protect the refugees and asylum seekers.

The Supreme Court of India, in the case of *Chief Settlement Commissioner, Punjab v. Om Prakash*,³⁰ said that laws had termed a person as a displaced person³¹ or a refugee³² only if he has migrated to India because of disturbances or fear of disturbances or the partition of the country. On examining these definitions, the Court also held that if a person had died before these disturbances took place or he had never migrated to India because of such disturbances, he could not come within the definition of a displaced person or a refugee under the relevant statutes.

³⁰ AIR 1969 SC 33

³¹The East Punjab Refugees (Registration of Land Claims) Act, 1948, section 2(c) states that a ‘displaced person’ means a landholder in the territories now comprised in the province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country.

³² The East Punjab Refugees (Registration of Land Claims) Act, 1948, Section 2(d) states that ‘refugee’ means a landholder in the territories now comprised in the Province of West Punjab, or who or whose ancestor migrated as a colonist from the Punjab since 1901 to the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country.

In the case of *Ebrahim Aboobakar v. Tek Chand*³³ the Supreme Court after examining the Administration of Evacuee Property Act, 1950, stated that the object of the scheme of the Act left little doubt that it intended to provide for the administration of evacuee³⁴ property, which was ultimately too used for compensating the refugees who had lost their property in Pakistan. The Act contained elaborate provisions as to how the administration was to carry it out. After examining the facts of the present case, the Court ruled that the guardian should exercise ownership only after making a statement to that effect. If the evacuee were to die before the declaration, the custodian would not be able to take possession after the death of the alleged evacuee when the property would have passed into the hands of the heirs. In this way, the court prohibited the custodian from taking possession of the disputed property.

The position of the courts reflects the political mood of the country. Several cases pursued in West Bengal have delayed after the refugee influx from East Pakistan in 1971. The Supreme Court, in several cases, recognized the strain on the government. *Samaresh Chandra Bose v. District Magistrate Burdwan*³⁵, in this case, the petitioner was detained under Section 3 of the Maintenance of Internal Security Act, 1971. Consequently, there was a delay of 22 days before the government could consider his representation. The state government explained that the reason for the delay was that its machinery had come under strain. The officers of the Home Department were preoccupied with the influx of refugees from East Pakistan and Pakistani aggression. Accepting this explanation, the court stated:

It is a matter of the public history of which judicial notice can take that for several months preceding the Indo-Pak war, which began on 3 December 1971. There was a continuous influx of refugees from East Pakistan and is now the free Republic of Bangladesh and that on our eastern border the situation was anything but ordinary. Indeed, this unprecedented influx of refugees from the very nature of things could not

³³ AIR 1953 SC 298

³⁴The East Punjab Evacuees (Administration of Property) Act, 1947, Section 2(b) defines an evacuee as “a person ordinarily resident in or owning property or carrying on business within the territories comprised in the province of East Punjab, who on account of civil disturbances, or fear of such disturbances, or the partition of the country (I) leaves, or has since the first day of March 1947, left the said territories outside India or (II) cannot personally occupy or supervise his property or business.”

³⁵ AIR 1973 SC 2481

but give rise to huge problems affecting, among other things, the law and order situation and maintenance of security in the State of West Bengal.

5.3.1 Application of International Law for Protecting the Rights of Non-Citizens

It has been seen in various judgments that the court has respected the principle of non-refoulement though India is not a party to the 1951 Convention. Our judiciary has shown its great concern for the applicability of international norms in various cases like in the case *Kesavananda Bharati v. the State of Kerala*, the Court stated by Article 51 of the Constitution of India. It said that it is not intractable, which is after all a municipal law, in the light of the United Nations Charter, the solemn declaration subscribed to by India, and Article 17 of the ICCPR and Article 12 of the UDHR were not contradictory to municipal law, they could be used to interpret Article 21 of the Indian Constitution.

In the case of *People's Union for Civil Liberties v. Union of India*, the Supreme Court considered Articles 21, 19(1)(a) and 19(2), 14, 32, and 51 of the Constitution. It held that it is "an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall deem to be incorporated in the domestic law."

In the case of *Chairman Railway Board and others v. Chandrima Das and others* the Supreme Court, after discussing various precedents and international instruments, held that even those who are not citizens of this country and come here merely as tourists, or in any other capacity, will be entitled to the protection of their lives under the constitutional provisions. They have a right to live, so long as they are here, with human dignity, just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the lives of persons who are not citizens. The court also held that since "life" is recognized as a fundamental human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on this word by the Court in its various decisions relating to Article 21 of the Constitution. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country but also to a "person" who may not be a citizen of the country.

Another sincere effort in this regard was made by the Gujarat High Court in the case of **Ktaer Abbas Habib Al Qutaifi v. Union of India**, in this case, the high court of Gujarat laid down a specific principle for enforcement of humanitarian law. Justice N. N. Mathur stated that:

- The International Convention and Treaties are not as enforceable by the government, nor they give the cause of action to any party, but there is an obligation on the government to respect them.
- International covenants and treaties, the fundamental right guaranteed in our constitution are relied upon by the courts as those fundamental rights can be enforced as such.
- Due to the guidelines in Article 51 (c) and Article 253, international law, treaties, and obligations have complied. The court may apply those principles in domestic law, provided such principles are consistent with domestic law.
- Where no construction of the domestic law is possible, the court can give effect to international conventions and treaties by a harmonious construction.

Thus, the Court was able to recognize both the need the respecting the international obligations coming from various international standards and for refugee protection encompassing from it. The role of the judiciary for the protection of refugees can be better assessed by dividing it into the following categories:

5.3.2 Deportation and Protection of Civil Rights of Refugees

The central government has the unfettered power of deportation of the Foreigners under the Foreigners Act, 1946, and 1948 order thereunder. Under the grab of this conferred power, the central government may also deport the refugees and asylum-seekers. However, in several cases, our judiciary has reiterated toward adherence to the principle of non-refoulement. The principle of non-refoulement applies only to those persons who have been declared by the court as refugees or asylum-seekers.³⁶

Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta³⁷ in this case, the Supreme Court held that, the government has an unrestricted right to expel a foreigner and that in respect of the right to be heard, there is no hard and fast

³⁶ Rathin Bandyopadhyay, *Human Rights of Non-Citizen: Law and Reality* 391 (Deep & Deep Publications Pvt. Ltd. New Delhi. 2007)

³⁷ AIR 1955 SC 367

rule regarding how a deportee has to allow placing her case. The petitioners could have produced some relevant documents in support of their claim of acquisition of citizenship, but they failed to do so. Hans Muller's case is also read very carefully since it has been regularly used against refugees. The distinguishing feature is that an expulsion case where the issue made out to be one of extradition. The petitioner argued that extradition law should resort to in cases where the government merely expelled the petitioner. The court in the sweeping observation stated that the government has an unrestricted right to expel a foreigner which came in the context of whether a foreigner can dictate to a government the procedures to follow for her removal.

In the case of *Luis De Raedt v. Union of India*,³⁸ three foreigners, petitioned the Supreme Court under Article 32 of the Constitution challenging an order dated 8 July 1987, whereby their prayer for further extension of the period of their stay in India was rejected. Mr. De Raedt argued that since he had been living in the country since 1937, he would qualify as a citizen of India under Article 5 of the Indian Constitution. However, the Supreme Court pointed out that Article 5 mandates that the person concerned must have her domicile in the territory of India at the time of commencement of the Constitution. Domicile, according to the Court, required an intention to reside in the territory permanently, and while the petitioners may have remained in the country for an extended period, there was no indication that they intended to stay in this country permanently.

Therefore, the claim of the petitioners was rejected. This case was studied carefully because state lawyers against refugees often use this argument. The distinguishing feature is that the petitioner claimed to be a citizen, while refugees do not make this claim.

The second contention of the petitioners, in this case, was that foreigners also have a right to reside in this country—the Court, in the case of *Luis De Raedt v. Union of India* laid down the law that even foreigners enjoy the fundamental right to life and liberty, as guaranteed by Article 21 of the Constitution of India. Article 21 guarantees the protection of personal liberty for foreigners like citizens, and no person shall be deprived of his freedom or liberty without the procedure established by law.

³⁸ 1991 (3) SCC 554

However, the personal liberty and right to life have been mentioned under Article 21 applicable to the entire person, but under Article 19 (1) (e), the right to reside and settle does not apply to the alien. It applies only to the citizens of this country.

Dr. Malavika Karlekar v. Union of India³⁹, in this case, the Supreme Court stated and stayed the deportation of the Andaman Island Burmese refugees since their claim for refugee status is pending determination, and a prima facie case has made out for grant of refugee status. The court further says these individuals pose no danger or threat to the security of the country.

In the case of ***Syed Ata Mohammadi v. Union of India and Others***⁴⁰ involved a petition to the court not to deport the petitioner to his native country of Iran. During the hearing, the petitioner was granted refugee status by UNHCR. Because of the refugee certificate, the Government of India made a statement that there was no question of deportation of the petitioner to Iran and that he could travel to any country he wished under the resettlement program because of this statement, the court disposed off the petition.

In the case of ***Mohammad Sediq v. Union of India and Others***,⁴¹ The petitioner was an Afghan refugee who received a UNHCR refugee certificate in 1987 in New Delhi. This refugee certificate was renewed every year until 1999. The petitioner received an order from the Government under Section 3 (2) (c) of 1948 to leave India on or before 15 May 1998 and would not return to India. The petitioner contended that he was not given any opportunity for a hearing before the order was issued and that due to the disturbances in Afghanistan, he could not return because he feared damage if he did. The petitioner requested that decision be dismissed for violating the principles of natural justice and for permission to stay as a refugee in India. At the same time, a directive should be issued to grant an exemption to the applicant and other refugees of this type, as a class or foreigner would benefit from the application under the 1946 Foreigner Act.⁴²

³⁹ Criminal Writ Petition No. 583 of 1992

⁴⁰ High Court of Bombay, A. D. 1458 of 1994

⁴¹ High Court of Delhi, 1998 (47) DRJ 74, Decided on: August 21, 1998.

⁴² *Ibid.*

The court found that if a refugee is asked to leave the country, he must be heard. However, the scope of the opportunity depends on the facts and circumstances of the individual case. Further, the court held that the order passed by the Foreigners Registration Officer, New Delhi, is valid because of the activities of the petitioner, which is prejudicial to the security of India, and a reasonable opportunity of hearing has to give to him.⁴³

In the case of *Dongh Lian Kham and others v. Union of India and Others*,⁴⁴ both petitioners are citizens of Myanmar belonging to the ethnic Chin community. They entered India in 2009 and 2011, respectively, along with their families and were issued refugee certificates by UNHCR in New Delhi valid until 2017. The Ministry of Home Affairs (MHA) issued them with long-term visas (LTVs) based on the refugee certificate issued by UNHCR. The petitioners were convicted under the Narcotic Drugs & Psychotropic Substances Act, 1985 by a competent court and served prison terms. After their release from prison, the MHA detained them in a camp and started procedures for deportation. The petitioners contended that if they were deported to Myanmar, they would face persecution, and their lives would be threatened. MHA argued that given the petitioners' belief, they were a threat to the nation's security and that their participation in drugs threatened the social fabric, which is why the MHA decided to exclude them.⁴⁵

The petitioners asked that the MHA order be quashed because they have rights under Article 21 and Article 14 of the Constitution of India, which is based on the principle of non-refoulement of customary international law. The court observed that the government has the power to expel any foreigner from the territory of India, and there is no provision of the Constitution or laws that can affect the power of the government.

However, it is prohibited to take refugees to a country where they face persecution. They are protected as a human by non-refinement, regardless of their nationality. It is a guarantee of the right to life and liberty under Article 21 of the Constitution of India.⁴⁶

⁴³ *Ibid.*

⁴⁴ High Court of Delhi, 226 (2016) DLT 208, Decided on 21 December 2015.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

Lastly, the court, in consideration of the good conduct of the petitioners in social life and their family status, ruled that the MHA, in consultation with UNHCR, should find an opportunity to deport the petitioners to a third country other than Myanmar and that the petitioners shall not be deported from India until a decision has made on this issue.⁴⁷

The Supreme Court decided many cases in the favour of refugees on the humanitarian ground but not the Supreme Court verdict have changed. In recently the Supreme Court ordered to deport of the Rohingya refugee on the ground of law and security of the Country.

In the case of *Mohammad Salimullah & Anr. V. Union of India & Ors*⁴⁸ The Supreme Court rejected calls to stop the deportation of seven Rohingya immigrants from Assam to Myanmar. The three-judge bank, led by CJI Ranjan Gogoi, rejected the plea that the seven were previously discovered by the court as illegal immigrants and that Myanmar was ready to accept them as citizens. "We are not inclined to interfere in the decision made," said the Supreme Court.

Two Rohingya migrants, challenging the union's decision to deport 40,000 refugees who came to India due to widespread discrimination and violence from Myanmar, filed the petition. The latest petition stated that the decision to deport is a "grave violation" of India's international obligation and that the situation in Myanmar is extremely dangerous for the Rohingyas to deport and are likely to be tortured and even killed.

5.3.3 Principle of Non-Refoulement and Refugee Status

Our judiciary has tried to protect the rights of refugees in numerous cases if they believe that there is a significant ground that their life would be at risk and allowed them to be granted refugee status by the United Nations High Commissioner for Refugees, New Delhi.⁴⁹

The Guwahati High Court, in various judgments, recognized the need for refugee protection and permitted asylum-seekers to approach UNHCR for

⁴⁷ *Ibid.*

⁴⁸ Mohammad Salimullah vs Union Of India on 31 January, 2018, *available at*: <https://indiankanoon.org/doc/131083750/>(last visited on August 10, 2019)

⁴⁹ Rathin Bandyopadhyay, *Human Rights of Non-Citizen: Law and Reality* 391(Deep & Deep Publications PVT. Ltd. New Delhi, 2007)

determining their refugee status. *Zothansegpuri v. the State of Manipur*,⁵⁰ the high court of Guwahati, in the Imphal bench, stated that if the refugee's life is in danger, they have the right to not to be deported and the High Court took a very sympathetic view of the refugee's problem. It stated, "we are of the view that the petitioner deserves some sympathy, and as such, we have to give suitable directions to enable her to go to Delhi for seeking political asylum, as stated in the petition. It is, therefore, directed that after the petitioner is released, which stated to be the period of sentence, she may not be deported for one month. During that period, she may visit Delhi for making necessary arrangements (to seek political asylum in this country or a third country). She shall report to the Parliament Street Police station on the next day of her arrival and one day before she departed from Delhi."

*Bogyi v. Union of India*⁵¹, in this case, the Guwahati high court gave detention but also permitted his stay for two months and said that now the applicant could apply to UNCHR for refugee status. The court ordered in favour of the petitioner with the direction that if the petitioner were successful in obtaining refugee status, he would not serve any sentences in prison in the present case leveled against him. In this case, the Burmese asylum-seeker involved who was a prisoner undergoing trial. He claimed that if he was deported on the expiry of his detention, his life would be in danger. The court, therefore, ordered that the asylum seeker be released for two months, upon furnishing the appropriate security, so that he might apply for refugee status with UNHCR. If such status has granted, he will be released without serving the remainder of his sentence. If, however, refugee status was refused by UNHCR, he was ordered to surrender to the magistrate at Imphal.

Khy-Htoon & Others. v. The State of Manipur,⁵² the petitioners were the citizens of Myanmar who were on trial for offences under the Foreigners Act, 1945. The petitioners asked for interim bail to allow them to appear before UNHCR in New Delhi to apply for refugee status. The court granted interim bail for two months on personal bond and ordered them to seek refugee status.

⁵⁰ Civil Rule No.981 of 1989

⁵¹ Civil Rule No.1847 of 1989

⁵² High Court of Guwahati, Civil Rule No. 515 of 1990, Decided on September 11, 1990.

In the case of *U. Myat Kyaw v. the State of Manipur*,⁵³ it has stated and subsidized significantly to India's policy of refugees. In this case, the eight Burmese people were involved, and they were detained in the central jail of Manipur in Imphal for illegal entry. The petitioner entered India with travel documents to flee the political disturbance in Myanmar and approached the authorities after arriving in India. A criminal case was registered under Section 14 of the Foreigners Act, 1948, and the petitioner was placed in judicial custody. The petitioner approached the High Court to request the opportunity to seek refugee status from UNHCR in New Delhi. The court allowed the petition and ordered interim bail for two months to allow him to seek refugee status from UNHCR. The court further ordered that because the petitioner might not be able to provide local surety, he have to be released on personal bond.

Dr. Malavika Karlekar v. Union of India,⁵⁴ In this case, the Supreme Court ruled that a person who should be considered a refugee or granted refugee status should not be expelled from the country.

Further, in the case of *Khudiram Chakma v. State of Arunachal Pradesh*,⁵⁵ the Hon'ble apex court emphasized Article 14 of the UDHR, 1948. The court said that every person who is seeking asylum in a state cannot be sent back to the state from where he has come if there is the risk of persecution is embedded.

In the case of *NHRC v. State of Arunachal Pradesh*,⁵⁶ the Supreme Court directed not to refole the Chakma refugees who were the nationals of Bangladesh based on the principle of *non-refoulement*.

In the case of *Ktaer Abbas Habib Al Qutaifi and another v. Union of India*,⁵⁷ the court highlighted the principle of non-refoulement and extensively pointed out the importance of this present general principle of International law in the context of application in the municipal legal system like ours. After referring Article 33 of the 1951 refugee convention, the Gujarat High Court said that the principle of non-

⁵³ High Court of Guwahati (Imphal Bench), Civil Rule No. 516 of 1991, Decided on November 26, 1991.

⁵⁴ Criminal Writ Petition 583 of 1992

⁵⁵ 1994 Supp(I) SCC 615.

⁵⁶ 1996 SCC (1) 742.

⁵⁷ 1999 Cr. L. J. 919

refoulement prevents expulsion of a refugee where his life or freedom would be threatened on account of his religion, race, nationality, political opinion membership in a particular social group. Its application protects the life and freedom/liberty of any person irrespectively of his citizenship. It was encompassed in Article 21 of the Constitution of India, so long as the presence of refugees is not prejudicial to the law, order, and security of India.

Court further reiterated that all member nations of the United Nations, including India, are expected to respect for international treaties and conventions concerning Humanitarian law. Article 51(c) of the Indian constitution also cast a duty on the state to attempt to temporary respect for international law and treaty obligations in the dealing of systematized individuals with any other person.⁵⁸

In this context, the court laid down a certain principle for enforcement of Humanitarian laws in India, and they recognize that the petitioners are the refugees certified by the UNHCR, New Delhi. Therefore, the court ordered that the petitioners shall not be deported from India at least within a certain time and had given further assurance that even if the decision has been taken against the petitioners, they will not be deported for a further period of 15 days from the date of communication of such decision. The high court also ordered in the instant case that in the absence of relevant material and consideration by the concerned authorities, the authorities should consider the petitioner's case in the right perspective from the humanitarian point of view.⁵⁹

5.3.4 Right to Equality, Right to Life and Personal Liberty including Physical Security

*Nuang Mung mye Nyant v. Government of India*⁶⁰ and in *Shar Aung V. Government of India*,⁶¹ in these cases, the court stated and provided existing permits to enable them to leave the country for the resettlement in the third country if the case has been pending related to the illegal entry.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ CWP No. 5120 of 1994

⁶¹ G.I. WP No. 110 OF 1998

*National Human Rights Commission v. The State of Arunachal Pradesh*⁶², in this case, the Supreme Court held that no one should be deprived of her life or liberty without the procedure established by law. In this case, the NHRC filed a public interest petition under Article 32 of the Constitution, seeking enforcement of Article 21 concerning 65,000 Chakmas/Hajong tribal exist in Arunachal Pradesh. These tribes earlier existed in Bangladesh which was at that time known as East Pakistan, but in 1964 they were displaced by the Kaptai Hydel Power Project, and after that, they take the shelter was allotted in Tripura and Assam, and after some time in due course, numerous people have converted into citizens of India. Subsequently, due to the inability of the Assam government to rehabilitate them, the assistance of nearby states was sought, and 4,012 Chakmas have settled in parts of Arunachal Pradesh (then known as North-East Frontier Agency). Their population in 1996 was around 65,000. Although the Central Government sanctioned grants for their rehabilitation, its promise to grant Indian citizenship to the Chakma refugees has not been fulfilled. The District Collector of Arunachal Pradesh failed to forward the citizenship applications of the refugees to the Central Government. Moreover, the local population resented these Chakmas and wanted their removal from Arunachal Pradesh altogether. On 30 September 1995, one notice namely Quit India, was published by the All Arunachal Pradesh Students Union (AAPSU) for all alleged foreigners, including Chakmas. The Supreme Court found prima facie evidence that a threat existed to the life and liberty of the Chakmas, guaranteed by Article 21 of the Constitution. It also acknowledged that they were entitled to apply for citizenship under Section 5 of the Citizenship Act. The court said that the central government had rejected the Chakmas' citizenship applications and that the aid collector had also violated his duty under the Citizenship Act and its rules.

Then the Court stated that our country governed according to the Rule of Law, and our Indian Constitution deliberates some rights for all human beings and some rights for the Indian citizens. All human being are eligible for equality before the law and equal protection of the laws, and no one can be deprived of his/her life or personal liberty except according to the procedure established by law, and the state is obliged to protect the rights of citizens and other people, such as the right to life and liberty.

⁶² AIR 1999 SC 1234

The Supreme Court ordered the Arunachal Pradesh government to guarantee rights, such as the life and personal freedom, of Chakma refugees who live in the state and do not vacate their homes or are denied life at home and the comfort there. Furthermore, it held that any Quit India notices should deal with by the state as per the law. Finally, on the matter of citizenship, the court directed that any application for citizenship by the Chakmas under Section 5 shall be dealt with appropriately; and that while the application of an individual Chakma is pending consideration, they should not be evicted.

On the other hand, the High Court and Supreme Court have, in several cases reaffirmed the right to equality for non-nationals under Article 14 of the Indian Constitution, since the availability of guaranteed rights is limited by Articles 15, 16, and 19 for non-nationals. Our higher judiciary has said in several cases that when Article 14 has to be sought for the implementation of rights under Articles 20, 21, and 22, Article 14 may be available for the implementation of the civil rights of the non-citizens in India. However, while Article 14 is clubbed with Article 15, 16, or 19, then the application of the equality principle for them shall be restricted.⁶³

Fazal Abdali vs Government of NCT of Delhi⁶⁴

In this case, the Register because of the urgency it implied brought this petition, under Article 226 of the Constitution of India, before this House. Public interest litigation has been waged to immediately appeal against Rohingya families living in three different locations in Delhi (namely Khajuri Khas, Shram Vihar, and Madanpur Khadar) for being denied aid under the title of the several of Government in Delhi announced aid programs to fight the COVID-19 pandemic. The petitioner has made general allegations of neglect of the Rohingya refugee families, without providing specific information. For example: "Government agencies have not been given any ration or assistance to refugees, which have brought the community to the verge of starvation. Both communities do not receive enough drinking water. There are no medical services for refugees." Given the specific Provisional Policy on the

⁶³ Chairman, Railway Board and Others v. Chandrima Das and Others, AIR 2000 SC 988

⁶⁴ W.P.(C) 3063/2020, ordered on 8 May, 2020, available at: <https://indiankanoon.org/doc/187313148> (last visited on August 12, 2020)

Supreme Court's appointment of the Node Officer, that Court believes that the applicant should have made specific and precise allegations of the Node Officer.

This Court also believes that it would not be appropriate to hear a second written request as the matter is pending before the Supreme Court. Therefore, this application has been briefly addressed with instructions for the applicant to contact the Nodal Officer / Tax Magistrate with specific allegations/details detailing the name and address of the refugee who was denied medical assistance. a ration of drinking water. If such a complaint is made, the Nodal Officer will dispose of it within three working days upon written order.

5.3.5 Acquisition of Citizenship

In the case of *Smt. Shishuwala Pal and Another v. Union of India and Others*⁶⁵ mother and son were petitioners who were citizens of East Pakistan and who came to India during the 1971 war as refugees. They were rehabilitated in a refugee camp but later they moved to their relative's residence in Madhya Pradesh. The second petitioner studied up to Bachelor's level in India and was elected in the Panchayat election in 1983 from Madhya Pradesh. After the election, he said that the police for the deportation to Bangladesh arrested the petitioner. The petitioners asked for a direction to restrain the respondents from treating them as foreign nationals and from taking them into custody for deportation outside India. After considering the provisions of the Citizenship Act, 1955, the court held that the petitioners were not citizens of India but were still foreigners. It was the domain of the Government of India to decide whether they were allowed to stay in India on humanitarian grounds, and the petitioners had a statutory remedy under the Citizenship Act, 1955. With these observations, the court dismissed the petition.

Sasikumar v. State of Tamil Nadu,⁶⁶ this case was related to the petitioner who was born on March 10, 1987, in Trichy Government Hospital. The parents of the petitioner were refugees, who came to India after the outbreak of war in Sri Lanka. The petitioner challenged the validity of the order of detention in a camp for Sri Lankan refugees passed on September 4, 2008, under Section 3(2) (e) of the Foreigners Act, 1946, and according to the Citizenship Act, 1955 the petitioner was a

⁶⁵ AIR 1989 MP 254, Decided on: October 31, 1988.

⁶⁶ High Court of Madras (Madurai Bench), W.P. (MD) No. 10080 of 2008

citizen of India by birth under Section 3(1) (a). The government contended that the petitioner was a Sri Lankan citizen and can be detained under the powers conferred on the government under the Foreigners Act, 1945. However, the court, after carefully considering the provisions of the Citizenship Act, 1955, held that the petitioner was a citizen of India by birth as he was born before the cut-off date of July 1, 1987. The court quashed the order of detention by the state government.

In the case of *Namgyal Dolkar v. Govt. of India, Ministry of External Affairs*,⁶⁷ the Delhi High Court clarified the position of the law that every child born in India between January 26, 1950, and July 1, 1987, irrespective of the parents' nationality, was an Indian citizen by birth. This case has arisen when Namgyal Dolkar, the child of Tibetan parents, was denied an Indian passport by the Regional Passport Officer (RPO), Delhi. When dealing with the petition, the court noted that the petitioner was born within the cut-off dates mentioned in the Citizenship (Amendment) Act, 1986, and therefore there is no doubt that she is a citizen of India by birth. The court quashed the RPO's order dated March 24, 2009, because the petitioner was a citizen of India and directed the RPO to reconsider the petitioner's application for an Indian passport within eight weeks. Finally, the petitioner was issued an Indian passport.⁶⁸

The case of *Tenzin Choephag Ling Rinpoche v. Union of India*⁶⁹ came before the Karnataka High Court for the same reason, as was decided by the Delhi High Court in 2011 in the case of Namgyal Dolkar. The petitioner, in this case, Tenzin Rinpoche, was born November 18, 1985, in Dharamsala, Kangra District, and Himachal Pradesh. The petitioner applied for an Indian passport, and the application was denied by a letter of the RPO dated February 19, 2013, after consulting with the MHA, whereby it was stated that children born to Tibetan parents could not automatically claim citizenship in India. The court finally relied on the judgment of the Delhi High Court, which ruled that the petitioner is a citizen of India and entitled to receive an Indian passport.

⁶⁷ High Court of Delhi, W.P (C) 12179/2009, Decided on December 22, 2010.

⁶⁸ Vandana Kalra, 'Citizen Namgyal' Indian Express, 27January 2011, *available at*: <http://archive.indianexpress.com/news/citizen-namgyal/742388/> (Last visited on August 08, 2018)

⁶⁹ High Court of Karnataka at Bangalore, W.P. No. 15437 of 2013, Decided on August 7, 2013.

Sri Gopal Das v. The Union of India,⁷⁰ In this case, the petitioner identified in 2012, by the Silchar Foreigners Court as a foreigner of Bangladeshi origin. He brought this petition to quash the order of the tribunal, claiming that he was born in 1968 in India. He also argued that the petitioner, a Hindu from Bangladesh, was persecuted there and therefore was not deported or granted Indian citizenship. The court further said that this is a political issue, and so it is not a consideration in the forum of the court. The court found no merit in the contention and held that the foreigner is detained and deported to his country of origin.

In the case, ***Nityananda Malik and Others v. the State of Meghalaya***⁷¹, the court resolved an important question relating to citizenship of India for persons who came to India before March 24, 1971, from Bangladesh and their children. The forty petitioners, in this case, are children of refugees from Bangladesh. Their ancestors entered India around 1961 and rehabilitated in Meghalaya. The petitioners' citizenship certificates were seized by the Deputy Commissioner of the district because they were not citizens of India. The affidavit filed by the Union of India clarifies that the court should decide on the matter, as per the India-Bangladesh agreement, those who came to India on or before March 24, 1971, should not go back to Bangladesh. The court held that the petitioners are citizens of India by birth and that their names have to be included in the electoral roll, and dismissed the petition.

State of Arunachal Pradesh v. Khudiram Chakma,⁷² in this case, the court was required to consider the claim of citizenship under Section 6-A and Section 6-A (2) of the Citizenship Act, 1955. Moreover, the Court stated, the Chakmas were seeking citizenship under Section 5(1) (a) of the Act, which provides for citizenship by registration, and so the considerations were entirely different. In the Khudiram Chakma case, the court concentrated specifically on Section 6-A (2) of the Citizenship Act, 1955, Section 3 of the Foreigners Act, 1946; the Foreigners Order, 1948; as well as Articles 19(1) (d) and (e) of the Constitution.

The Supreme Court held that two conditions needed to be satisfied under Subsection (2) of Section 6-A. First, they should come to Assam before 1st January

⁷⁰ High Court of Gauhati, WP(C) 2134 of 2013, Decided on August 30, 2013.

⁷¹ High Court of Meghalaya, WP(C) No. 235 of 2010, Decided on May 15, 2014

⁷² 1994 Supp. (1) SCC 615

1966 from the specified territory and those claiming citizenship under the section, and second, they must have been ordinarily residing in Assam, as it existed in 1985 since their date of entry. The 'Ordinarily resident' has held to mean 'resident during the period without any serious break.' The complainants should be entitled to Section 6-A if they argued because the Arunachal Pradesh area belonged to the state of Assam.

However, the court pointed out that in the forming parts of the territory of the Meghalaya, Nagaland, and Arunachal Pradesh, the Immigrants (Expulsion from Assam) Act, 1950 has to be applied. Nevertheless, the territories of Arunachal Pradesh have been excluded from the purview of the above mentioned Immigrants Act under the North-Eastern Areas (Reorganization) Act, 1971. The court, therefore, held that the second requirement under Section 6-A (2) was not satisfied. Concerning the first condition, the court held that they have not been regarded as Indian citizens.

The appellants relied upon Section 3 of the Foreigners Act, 1946, and Clause 9 of the Foreigners Order, 1948, which restricts foreigners from acquiring land within protected areas. In 1964, some land allotted to Chakmas under the Chakma Resettlement Scheme. Instead of residing in those allotted areas, the Chakmas inhabited land donated to them by a local raja. The administration alleged that the Chakmas were indulging in the procurement of arms and other criminal activities; the state government then directed the appellants to shift to the originally allotted lands. The Supreme Court pointed out that since this was a policy matter, it would not interfere in the decision. Nevertheless, after quoting various international law authorities, the court stated that foreigners, especially refugees, could not be discriminated against in their enjoyment of the legally acquired property.

Finally, in an attempt to buttress their case, the appellants argued that they were entitled to certain fundamental rights under the Constitution, including the right to reside and settle in India. However, the Court stated that only Article 21 applied to foreigners and that they could not invoke any provision under Article 19.

P. Ulaganathan vs The Government of India⁷³

In this case, the petitioner is the descendant of the identified worker who settled on tea plantations in Sri Lanka during the colonial period but was originally owned by the Tamil Nadu state. There is no doubt that they are Tamil speaking

⁷³ Date of judgement June 17, 2019, available at: <https://indiankanoon.org/doc/16610583/> (last visited on August 15, 2019)

people. The Sri Lankan government discriminated against them from Tamils in the north and east of Sri Lanka and did not consider them to be Sri Lankan. Sri Lanka has witnessed genocide and violent ethnic conflict. In 1983, there was a vital emigration of people from Sri Lanka to India. The petitioner requested that he be treated as an Indian returnee. He filed a brief petition with Madras High Court under Section 226 of the Indian Constitution to grant him and his family member's Indian citizenship.

The state of Tamil Nadu argued that the petitioners were of Indian ancestry. There is no other place they can go so they are asking this court to apply for citizenship. In connection with this, the Tamil Nadu government has filed an affidavit stating that most of the written applicants reside as Sri Lankan refugees in the Kottapottu Transit Camp in Trichy. Others stay in various refugee camps in Madurai, Perambalur, Karur, Mandapam, etc, and they provide all the necessities, but citizenship is only granted to the Indian government. In addition, the Tamil Nadu government believes that an illegal migrant is not eligible for Indian citizenship under the provisions of the Indian Citizenship Act of 1955. It is further argued that the written applicants do not have a valid and current residence permit/visa and entered India through an illegal route. Therefore, they are considered illegal migrants. Therefore, the Tamil Nadu government is praying for the petition to be dismissed shortly.

The Government of India also confirmed the view of the Government of Tamil Nadu, stating that Tamil refugees/migrants who entered India after 1983 and who have valid travel documents can apply for Indian citizenship under Article 5 (1) (c) of the Indian Citizenship Act, 1955. Other refugees/migrants who do not have a valid passport/visa/residence permit are treated as illegal migrants and therefore cannot be registered under Section 5 or naturalized under Section 6 of Indian citizenship 1955. It is further argued that granting Indian citizenship is at the discretion of the central government.

The Madras High Court stated that after reading the provisions of the Citizenship Act, applicants believed that the applicants were illegal migrants. However, due to the applicants' intentions to make India their permanent home, the court found that this is a unique situation as they have been in camps for 35 years, where they have been monitored in severely restricted conditions and for a long time in one State of statelessness violating their rights under Article 21 of the Constitution. Therefore, the central government has been asked to use its implicit power under

Article 5 (1) of the Act, which was also used by the High Court of Delhi in *Felix Stefan Kaye v. Foreigners Regional Registration Office*, 2018 SCC Online Del 8212, taking into account the application of Article 21 of the Constitution of India to refugees and asylum seekers and certainly to petitioners who had genealogical roots on Indian soil. Given that the applicants came to India when faced with serious threats to their lives and limbs and had no choice but to seek asylum here, the court allowed applicants to reapply for citizenship in the district concerned. The collector concerned ordered him to forward this immediately to the central government, which must place the relevant orders within 16 weeks of receipt. The Court also reminded the central government of its power to positively examine petitions regardless of the technical status of the petitions as illegal migrants and to take into account the unique situation in which petitioners were placed. The court refrained from issuing a positive mandamus instructing the central government to grant citizenship to the applicants and ruled shortly.

5.3.6 Judicial Interpretation on Repatriation and Resettlement of Refugees

It may recall that international human rights and refugee instruments recognize only voluntary repatriation. In other words, if the refugees and the asylum seekers think that their country of origin can secure their life, liberty, and property to a great extent and there is no such possibility of a well-founded fear of persecution, then they should leave the host country and return to their country of origin. The principle of non-refoulement and non-forceful repatriation are two fundamental human rights for the refugees and asylum seeker which are available under the above-mentioned international instruments. These basic tenants of the international instruments are well recognized by our judiciary⁷⁴.

Guru Nathan v. The Government of India,⁷⁵ in this case, Madras high court stayed that repatriation process of the Sri Lankan Tamil refugees as the court found that the process of repatriation was not voluntary. The high court has held that when there is an international organization to ascertain the voluntariness of consent, it is not for the court to decide whether the consent was voluntary or not. At the same time, the court ordered the Tamil Nadu government to issue orders in Tamil in the

⁷⁴ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen: Law and Reality* 390 (Deep & Deep Publications PVT. LTD, New Delhi, 2007).

⁷⁵ W. P. No. 6707 of 1992, High Court of Madras

camps scattered across various parts of Tamil Nadu and ordered not to return the refugees against their will.

In the same manner, the Madras high court came to the rescue of a group of Sri Lankan Tamil refugees from forced repatriation by the Government. We found the decision of the case, *P. Nedumaran, and Dr. Ramadoss v. Union of India*⁷⁶, where again the court had ordered that the Tamil refugees shall not be repatriated against their will because the court found that there was sufficient reason for possible ethnic and political persecution in Sri Lanka.

In the case of *Aung Thant Min v. Union of India*,⁷⁷ the petitioner had previously been granted interim bail by order of the High Court of Guwahati to seek refugee status from UNHCR. The petitioner duly received the status and the refugee certificate. The present petition came before the court to direct the government to issue him an exit visa to travel to Canada under the UNHCR resettlement program. The Government of India had no objection to this petition, and the Government of Manipur is in the process of withdrawing the case against the petitioner under the Foreigners Act, 1945. Based on the above, the court ordered the government to issue an exit visa to the petitioner.

The case of *Saifullah Bajwa v. Union of India*⁷⁸ came to the court with a request to withdraw a writ petition against the Government of India as UNHCR had granted the petitioners resettlement. The case was first presented before another bench of the High Court in 2008, ordering the government to give asylum to persecuted petitioners in Pakistan and to hold at the UNHCR in New Delhi. In that case, it has revealed that the Government of India was not inclined to grant asylum and put the petitioners in Tihar Jail. The court ordered that UNHCR be allowed to intervene and directed the government not to deport the petitioners to their country of origin. Finally, the petition was withdrawn and petitioners were allowed resettling in another country by UNHCR.

⁷⁶ W. P. No. 12298 and 12343 of 1992

⁷⁷ High Court of Delhi, W.P. (CRL) 110 of 1998, Decided on March 4, 1998

⁷⁸ High Court of Delhi, W.P. (CRL) 465/2011, Decided on December 9, 2011.

5.3.7 Judicial Interpretation on Humanitarian Assistance (Right to Basic Amenities)

The right to basic amenities to the non-citizen was reaffirmed by the several decision of the judiciary; it is particularly evident from the decision of the following cases.

Digvijay Mote v. Government of India⁷⁹ in this case the high court of Karnataka after considering the right of 150 Sri Lankan Tamil refugee children ordered the State to make the necessary arrangement to provide basic amenities to the refugee children in the camp on humanitarian grounds.

In the same manner, our supreme court has held in ***The Collector of 24 Paraganas v. Lalit Mohan Mullick***⁸⁰, in this case, basic amenities like medical care are very much part and parcel of the process of rehabilitation for the immigrants. The Supreme Court emphatically said the real purpose of rehabilitation can be achieved if those who are seeking to be rehabilitated are provided with shelter, food, and other necessary amenities of life. It is not correct to say that providing medical facilities would not come within the concept of the word rehabilitation. It is putting up a hospital and a particular one for disabled children is one of the essential facts of the concept of the rehabilitation of the displaced persons. Displaced persons are an unenviable section of society, and they bring with them not only misery and poverty but also ailments. Children will be afflicted by various ailments to provide a hospital for the displaced, and the disabled children of such displaced persons squarely come within the concept of the idea of rehabilitation and, consequently, of the settlement of the refugees.

Majid Ahmed Abdul Majid Mohammad Jal Al-Hak v. Union of India⁸¹, Court held that necessities, like food and medical care, must be provided while in detention.

Satish Kumar Singh and v. Union of India,⁸² the petitioners requested a ruling that Tibetan nationals employed with the Central Tibetan Schools Administration (CTSA) ought not to be regularized or given permanent employment

⁷⁹ Writ Appeal No.354 of 1994

⁸⁰ AIR 1996 SC 622

⁸¹ Criminal W. P. No. 60 of 1997

⁸² High Court of Delhi, W.P. (C) Nos. 1006/2003 and 6161-63/06, Decided on April 20, 2005.

because CTSA is an organization governed by the Central Civil Services Rules. The Central Administration of Tibetan Schools was founded in 1961 to educate the children of Tibetan refugees, and 236 Tibetan refugees have found employment with CTSA. During the proceedings, the Government of India issued a notification that a one-time exemption has to be made to regularize the 236 Tibetan refugee working with CTSA and that no more Tibetan refugees to be appointed to regular posts under CTSA in the future. After this notification, the court found that the issue had been resolved and dismissed the petition.

The decision of the Apex court, in this case, may establish the notion that the court is very much concerned about the humanitarian assistance to the noncitizen population in India.

5.3.8 Judicial interpretation on Detention

The case of *Ramsingh v. State of Rajasthan*⁸³ is a revision petition before the Court, and the petitioner was a Pakistani citizen who came to India during the 1971 war and stayed at a refugee camp. It was alleged by the state that the petitioner crossed the border back into Pakistan in 1972 and then re-entered Indian Territory in 1973, and thus he was charged under Section 14 of the Foreigners Act, 1946 and Rule 3 of the Passports (Entry into India) Rules, 1950. The petitioner was convicted and sentenced to rigorous imprisonment by the Chief Judicial Magistrate, whose decision was further affirmed by the Sessions Judge in 1977. In this case, the court, after careful examination of the records of the lower court, found no evidence to prove the petitioner had left India in 1972. Finally, the court held that the petitioner was entitled to the benefit of the doubt and acquitted him from charges.

In the case of *Kalavathy v. State of Tamil Nadu*,⁸⁴ the division bench of Madras High Court dealt with the contention of the petitioners that the detention order under Section 3(2) (e) of the Foreigners Act, 1946 violates Articles 14, 21, and 22 of the Constitution of India. The state of Tamil Nadu was accused of ordering refugees of Sri Lankan origin to reside in special camps. The state contended that only a small proportion of the Sri Lankan refugees who might have an association with militant organizations in Sri Lanka were ordered to stay in special camps. The court, considering the rival contentions, held that classifying refugees and ordering them to

⁸³ High Court of Rajasthan, 1978 WLN (UC) 90, Decided on March 15, 1978.

⁸⁴ High Court of Madras, 1995-2-LW (Cr. L. J) 690, Decided on April 28, 1992.

stay in special camps does not violate the provisions of the Constitution, and thus the state has the power under the Foreigners Act, 1948 to do so and further that it is not a total restriction of the movement of the foreigner.

In the case of *Yogeswari v. The State of Tamil Nadu*⁸⁵, the son of the petitioner was detained under Section 3(2) (e) of the Foreigners Act, 1945. The detainee is a Sri Lankan refugee who was granted bail by the court of competent jurisdiction for charges against him under various Sections of the Indian Penal Code. However, before his release from prison, the detainee received a detention order under the Foreigners Act. The court, in this case, held that detention under the Foreigners Act has to comply with Article 21 and Article 22(4) of the Constitution of India and that as a pre-constitutional Act it does not contain safeguards, and thus the division bench of the court quashed the detention order under the Foreigners Act.

In *Premavathy v. State of Tamil Nadu*,⁸⁶ it was decided by the division bench of Madras High Court, where the petitioners raised similar contentions, that the state was detaining them under Section 3(2)(e) of the Foreigners Act, 1948 in violation of their rights contained under Articles 14, 21 and 22 of the Constitution of India. The two previous contradicting judgments of the division bench of Madras High Court, one in Kalavathy and another in Yogeswari, set the stage for this case. However, in this case, the division bench sided with the Kalavathy case and held that restricting the movement of the foreigners by order of the state under Section 3(2) (e) of the Foreigners Act that cannot be termed preventive detention and violate the provisions of the Constitution of India. However, the court finally directed the state to review those detention decisions every two years and to provide more facilities to the special camps.

In the case of *Selvakulendran v. State of Tamil Nadu*,⁸⁷ the petitioner is a Sri Lankan refugee who entered India in 1989 and stayed in India with his family in Tiruchirappalli, Tamil Nadu. It is essential to note that the petitioner and his family members were given ration cards by the Civil Supplies Department, and their names included in the voter list. The petitioner was arrested by the police under various Sections of the Indian Penal Code, and after spending some time in prison, the

⁸⁵ High Court of Madras, Habeas Corpus Petition No. 971 of 2001, Decided on April 10, 2003

⁸⁶ High Court of Madras, 2004 Cri. L. J 1475, Decided on November 14, 2003.

⁸⁷ High Court of Madras, Habeas Corpus Petition No. 1249 of 2005, Decided on March 15, 2005.

petitioner was granted bail. However, he was not released from the prison, and an order was passed by the government under Section 3(2) (e) of the Foreigners Act, 1948 requiring the petitioner to reside in the special camp for Sri Lankan immigrants and prohibiting him from leaving the boundaries of the special camp without permission from the District Collector. The court held that the right to move throughout the territory of India is not available to a foreigner and that particularly, in this case, it was reasonable to impose this restriction on the petitioner because of his criminal conduct.

In the case of *Maheswaran v. State of Tamil Nadu*,⁸⁸ a Sri Lankan refugee was arrested as a suspect in the bomb blast at Madras Airport in 1984 by the police. He tried and was finally acquitted of the charges by the trial court in 2004. In the meantime, while he was awaiting trial, the state government issued an order under Section 3(2) (e) of the Foreigners Act, 1948, to confine the petitioner to a special camp for Sri Lankan refugees. The petitioner challenged this order through this writ petition. The court found that under the Foreigners Act, the government has the power to restrict the movement of foreigners for reasons of state security. The court also observed that there was no absolute restriction of the petitioner's movement by this order of the government, and dismissed the petition.

In the case of *Premanand v. the State of Kerala*,⁸⁹ the petitioner was charged under Section 13 and 14 of the Foreigners Act, 1948, and Section 3 of the Passports (Entry into India) Act, 1920. The petitioner, in this case, was a Sri Lankan refugee who was residing in a refugee camp in Chennai. He, along with some other Sri Lankan refugees, came to Alwaye, Kerala, at the instruction of Mr. Ramesh, who would arrange to send them to Australia for a better life. The Kerala police apprehended the refugees and brought a case under the Sections mentioned above. The present petition was for bail, which the High Court of Kerala granted on condition of a bail bond of 10,000 rupees and the refugee-petitioner returning to the refugee camp in Chennai. The Refugee Rehabilitation Commissioner was ordered to keep watch over the petitioner and make him available before the trial court as and when required

⁸⁸ High Court of Madras, Habeas Corpus Petition No. 1208 of 2005, Decided on March 21, 2005.

⁸⁹ High Court of Kerala, 2013 (3) KLJ 543, Decided on July 12, 2013.

In the case of *B. Sivashankar v. State of Tamil Nadu*,⁹⁰ the petitioner was another Sri Lankan refugee. He was in judicial custody in a case under various Sections of the Indian Penal Code and the Foreigners Act, 1945. The petitioner received the impugned detention order under the National Security Act, 1980 from the state, and filed this petition challenging that order. However, no bail application was pending before any court regarding the original criminal case of the petitioner, the state, anticipating his release on bail, made this impugned detention order. The court found the reason for the detention to be vicious as cogent materials were absent for arriving at this subjective satisfaction. The court also found a violation of Article 22(5) of the Constitution of India in this case, and finally quashed the detention order. *T. Sathishkumar v. State of Tamil Nadu* was a similar case on the same issues and was decided by the court similarly.⁹¹

5.3.9 Refugees of other Nationalities

In *The Mailwand's Trust of Afghan Human Freedom v. State of Punjab & Others*⁹² and *N. D. Pancholi v. State of Punjab and Others*⁹³, the Supreme Court ordered that the refugees should not be deported from India without the notice of the court. The Supreme Court of India has sometimes acted on the principle of non-refoulement and suspended deportation orders from India while the refugee application is pending. These decisions can be seen as evidence that the laws applicable to other foreigners do not apply to refugees. In the case of *Dr. Malavika Karlekar v. Union of India*,⁹⁴ the Supreme Court stated that twenty-one residents of Myanmar who have applied for the status of refugee could not be deported to Myanmar if the decision is pending against the UNHCR.

In *Swajan and Another v. Union of India and Another*⁹⁵ before the Supreme Court of India in deciding the question of granting refugee status to the minorities of Bangladesh who entered India after March 25, 1971, to escape persecution. The matter is still pending before the Supreme Court for final orders.

⁹⁰ High Court of Madras, Habeas Corpus Petition No. 2718 of 2013, Decided on June 25, 2014.

⁹¹ High Court of Madras, Habeas Corpus Petition No. 2721 of 2013, Decided on June 25, 2014.

⁹² Supreme Court of India, WP (CRL) No 125 and 126 of 1986

⁹³ Supreme Court of India, WP (CRL) No 243 of 1988, Decided on 9 June 1988.

⁹⁴ Supreme Court of India, WP (CRL) No 583 of 1992, Decided on September 25, 1992.

⁹⁵ Supreme Court of India, WP Civil No. 243 of 2012

5.4 NON-REPORTED CASES RELATED TO REFUGEES

In the case of *State v. Mohd Ehsan*,⁹⁶ the petitioner was a refugee against whom an order of deportation was passed by the trial court. However, after submission of the refugee certificate issued by UNHCR before the court, the order of deportation was cancelled. However, he was sentenced to a fine and, in case of default, sentenced to 6 months of simple imprisonment.

In the case of *State v. Mohd Riza Ali*,⁹⁷ the accused was charged under various sections of the Indian Penal Code for holding forged travel documents, as well as under the Foreigners Act. The accused submitted a refugee certificate granted by UNHCR before the court, and thus the court released him from the charges under the Foreigners Act, but the trial continues for the offenses under the Penal Code.

In the case of *State v. Farid Ali Khan*,⁹⁸ the accused was arrested under the Foreigners Act, 1946, for not being able to show a valid refugee certificate issued by the United Nations High Commissioner for Refugees (UNHCR) and residence certificate issued by the government. However, the accused had all the valid documents, but he was unable to show them at the time of arrest, and the law allows the accused up to 24 hours to produce the documents. No time was given to the accused of this purpose, and on this finding, the trial court discharged the accused.

The case of *State v. Evan Massar Musa Ahmed* was registered under Section 14 of the Foreigners Act, 1945.⁹⁹ The accused is a Sudanese citizen who entered India with an expired Sudanese passport and no travel authorization from the Indian Government. The accused was held in custody for ten days. She submitted before the court that she was gang-raped in Sudan for converting from Islam to Christianity and

⁹⁶ FIR No. 435/1993, Court of Metropolitan Magistrate, New Delhi, Decided on March 17, 1994, available at: http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8fa74,0.html(Last visited on December 15, 2017).

⁹⁷ FIR No. 414/93, Court of the Assistant Chief Metropolitan Magistrate, New Delhi, Decided July 7, 1995, available at: http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8fc24,0.html (Last visited on December 25, 2017).

⁹⁸ Court of Metropolitan Magistrate, New Delhi, Decided on November 1, 1995, available at: <http://www.refworld.org/docid/3f4b8f2e4.html> (Last visited on December 25, 2017).

⁹⁹ FIR No. 278/95, Court of Metropolitan Magistrate, New Delhi, Decided on October 26, 1995, available at: http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8c084,0.html(Last visited on December 25, 2017).

subsequently granted refugee status by UNHCR. The trial court, considering the situation of the accused, sentenced her to imprisonment for the days already spent in custody and a small fine.

In the case of *State v. Benjamin Zang Nang*,¹⁰⁰ the accused served his sentence of imprisonment under the Foreigners Act. He was ordered to be deported from India after the completion of his sentence in prison.

However, the accused pleaded to the court to send him under the custody of UNHCR to apply for refugee status. This plea was rejected by the court, as the court had no jurisdiction to hand him over to UNHCR.

In the case of *State v. Kishan Chand and Habib Iranpur*,¹⁰¹ the second accused pleaded guilty under the Foreigners Act, 1945. The second accused submitted that he was a refugee mandated by UNHCR in New Delhi and that he left Iran because he had suffered persecution. The court sentenced the second accused to one month of rigorous imprisonment and a fine.

However, in *State v. Montasir M. Gubara*,¹⁰² the accused was a refugee who was staying in India with refugee status. At the time of his arrest, he was not able to produce his refugee certificate granted by UNHCR, which had to be placed before the court when the trial started. Nevertheless, the court sentenced him to rigorous imprisonment for six weeks, along with a fine.

State v. Mohd. Yashin,¹⁰³ according to this case, the accused was charged under the Indian Penal Code for procuring a false passport and travel document to enter India, and was charged under the Foreigners Act. Because of the refugee certificate granted by UNHCR, he was released from the charges under the Foreigners

¹⁰⁰GR Case No. 1235/1994, Court of Assistant Chief Judicial Magistrate, Sealdah, 1996, *available at*: http://www.refworld.org/type,CASELAW,IND_MMM,,3f3223584,0.html (Last visited on December 23, 2017).

¹⁰¹ Criminal Case No. 66/96, Court of Metropolitan Magistrate, New Delhi, Decided on May 31, 1996, *available at*: http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8f8b4,0.html (Last visited on December 25, 2017).

¹⁰² Criminal Case No. 427/P/1994, Court of Additional Chief Metropolitan Magistrate, Mumbai, Decided on September 3, 1996, *available at*: http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8fe14,0.html (Last visited on December 25, 2017).

¹⁰³ Case No. 528/2, Court of Metropolitan Magistrate, New Delhi, Decided on June 4, 1997.

Act. However, the court fined him, and in case of default, he was sentenced to 30 days.

The case of *State v. Huson Vilvaraj* was registered under Section 14 of the Foreigners Act, 1946, against the accused, a Sri Lankan refugee.¹⁰⁴ The Delhi police arrested the accused as he was living in Delhi without travel documents.

The court convicted the accused and sentenced him to simple imprisonment for six months and a fine. The trial court also observed that refugee status does not entitle a person to move about freely in another country and that the person is always subjected to the laws of the country, which has accorded him the refugee status.

State v. Thang Cin,¹⁰⁵ in this case, the accused is a citizen of Myanmar who entered India and applied for refugee status from UNHCR in New Delhi. He was arrested before receiving refugee status and held in judicial custody for about nine months. Afterward, the accused received refugee status from UNHCR in New Delhi, and the court took a lenient view on convicting him under the Foreigners Act, 1945. The court sentenced him to the term already spent in prison and set him free.

The case of *State v. Chandra Kumar & Others* has received extensive media coverage,¹⁰⁶ as the trial court in this case not only quashed the order of deportation but also ordered the Government of India to table the Refugee and Asylum Seekers (Protection) Bill, 2006 before the Parliament which is still not passed after many attempts. The accused was arrested for procuring false documents to leave India and travel to Italy. The prosecution wanted to deport him after he had served his sentence. However, the court decided to send the refugee-accused back to the refugee camp in Tamil Nadu.

Thus, broadly, the trial courts have been unable to develop any standard practice in cases against refugees. There are many variations, which are primarily a

¹⁰⁴ Case No. 443/3 of 1997, Court Metropolitan Magistrate, New Delhi, Decided on May 6, 1998, available at: http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8f702,0.html (Last visited on December 25, 2017).

¹⁰⁵ FIR No. 330/01, Court of Metropolitan Magistrate, New Delhi, Decided on June 3, 2002, available at: http://www.refworld.org/type,CASELAW,IND_MMM,,3f4b90bd4,0.html (Last visited on December 15, 2017).

¹⁰⁶ FIR No. 78/10, Court of Metropolitan Magistrate (Dwarka), New Delhi, Decided on September 20, 2011.

result of reliance on colonial laws, which do not deal with the situation of refugees. In some cases, the court took a lenient approach to a sentence when UNHCR issued a refugee certificate but finally convicted the refugee. The High Court, however, made the decisions withdrawing the 1946 Foreigners Act when the accused was granted refugee status. Our courts are playing a vital role in implementing and protecting the human rights of the refugees and non-citizens. The judiciary is gradually and day by day inclining towards the recognition of international human rights and refugee law in the Indian legal system for the protection of human rights for refugees and non-citizens through their pragmatic and insightful analysis of the human rights provisions enshrined in the Indian Constitution and other laws and by this way they try to fill up the gap between the national and international laws in this regard.¹⁰⁷

However, considering the decision of cases in various courts, it can be pointed out that there is a compassionate regime of protection available to refugees in India in general, but only when the refugees reach the higher courts to appeal the decisions of the trial courts.¹⁰⁸

5.5 CONCLUSION

In this chapter, the researcher discussed the role of the judiciary in protecting refugees from a national and international perspective. In India, the Indian government has not signed the 1951 UN Refugee Convention or the 1967 protocol. Nevertheless, the Indian judiciary recognizes refugee and refugee laws to a certain extent, and it has been playing an active and creative role in recent years. The judiciary of India has introduced refugee law into our legal system through the back door. Indian judiciary adopted a method by creative interpretation of Article 21 of the Constitution of India, which guarantees the right to life, and liberty to all persons and not merely to citizens, and refugees may not be citizens. However, they are specific persons, and hence they too are entitled to the protection of Article 21.

The Supreme Court of India has interpreted the word life in Article 21 to mean not merely an animal life but a dignified life, and hence refugee being persons are also entitled to the same. There are many decisions of the Supreme Court and high

¹⁰⁷ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen: Law and Reality* 405-406 (Deep & Deep Publications PVT. LTD New Delhi, 2007)

¹⁰⁸ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 45 (Palgrave Macmillan, Singapore, 2017).

courts where refugees have been given protection by evoking Article 21 of the constitution. In the case of Chakma refugees and National Human Rights Commission v. State of Arunachal Pradesh, the Supreme Court held that Chakma refugees who had come from Bangladesh due to persecution could not be forcibly pushed back to Bangladesh as they may be killed there and thus they would be deprived of their rights under Article 21 of the Constitution. There are various other decisions also of our courts in his connection. But now a day a change can also be seen in the attitude of the Supreme Court in recent deportation cases of certain refugees to Myanmar by giving references to national security and maintaining peace and order.

As well as in the international perspective, there are so many decisions on the protection of refugees like the European Court on Human rights, the Australian Supreme Court, the Canada Supreme Court, the American Supreme Court, and others. Many courts are playing an essential role in refugee protection because many countries ratified the 1951 UN Refugee convention and its 1967 Protocol.

CHAPTER - VI
STATUS, ISSUES AND CHALLENGES
OF REFUGEES

6.1 INTRODUCTION

In the contemporary era of proxy war and persistent armed conflict, millions of people are compelled by the threat of persecution and fear of their life and property to abandon their respective homeland in search of safe refuge. Over the period, this problem of displacement is growing as a predicament involving all international, domestic, and local legal systems simultaneously within its sweep. It can say that the refugee problem under international law is the interplay of a complex network of national, regional, and international law. It is one of the most debatable human rights issues in the contemporary world both at the international as well as national level.¹

The global community is witnessing an unprecedented level of human mobility, more than ever before. In 2018, the population of forcibly displaced people in the world had increased from 43.3 million in 2009 to 70.8 million in 2018, among them are nearly 25.9 million refugees, including 5.5 million Palestinian refugees under the mandate of UNRWA.

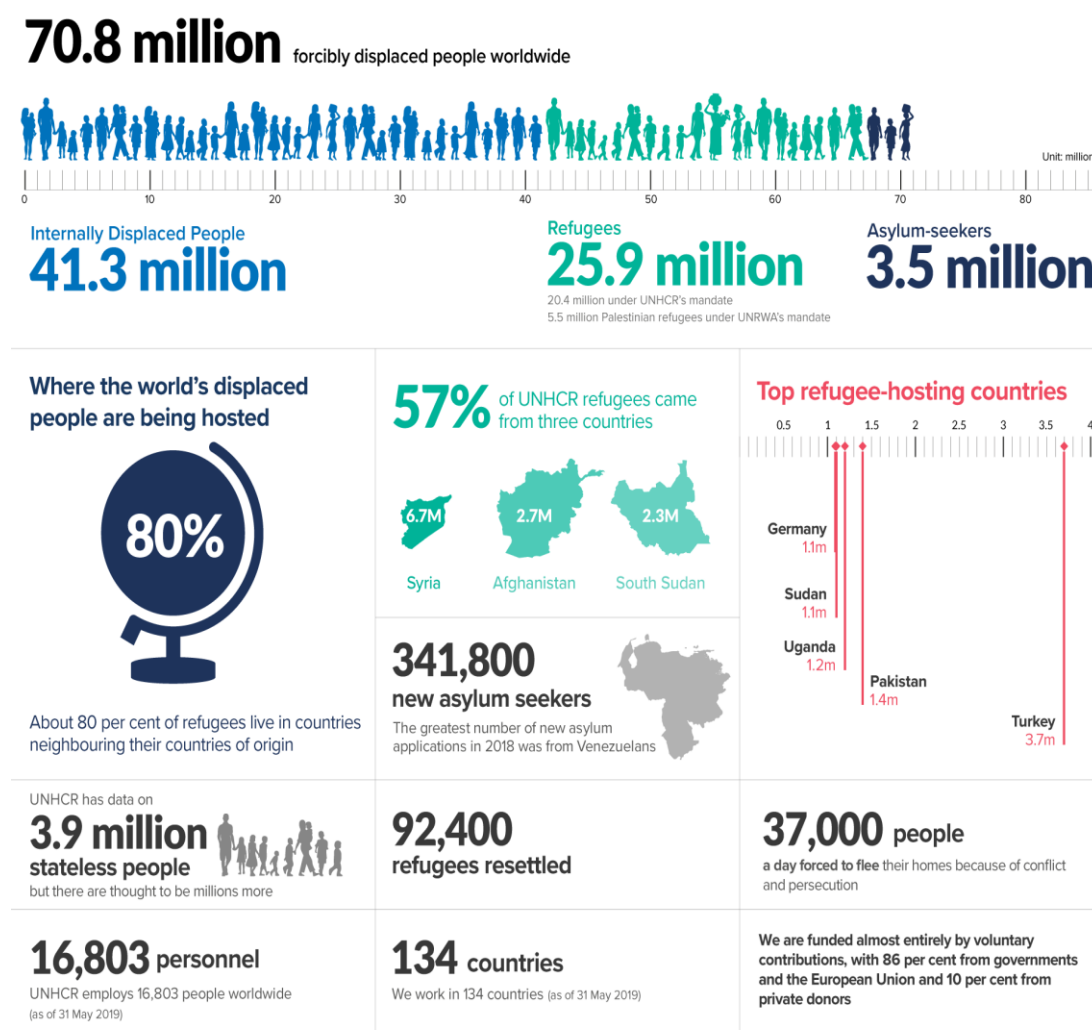
The main reason for this has been the Syrian conflict, which led to most of the increase between 2012 and 2015. However, conflicts in other regions also contributed to this increase, including Yemen, Iraq, South Sudan, and the Democratic Republic of Congo (DRC) as well as the widespread flow of Rohingya refugees from Myanmar in late 2017.²

¹ B S. Chimni, *International refugee law: A reader* XII(sage Publication New Delhi, 8th edn., 2012)

² Global trends, forced Displacement in 2018: UNHCR, the UN Refugee agency, *available at*: <https://www.unhcr.org/globaltrends2018/#sect-intro> (last visited on January 15, 2020)

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Figure 6.1: Forcibly Displaced People Worldwide



Source: UNHCR / 19 June 2019



Source: Figures at a Glance, <https://www.unhcr.org/figures-at-a-glance.html>

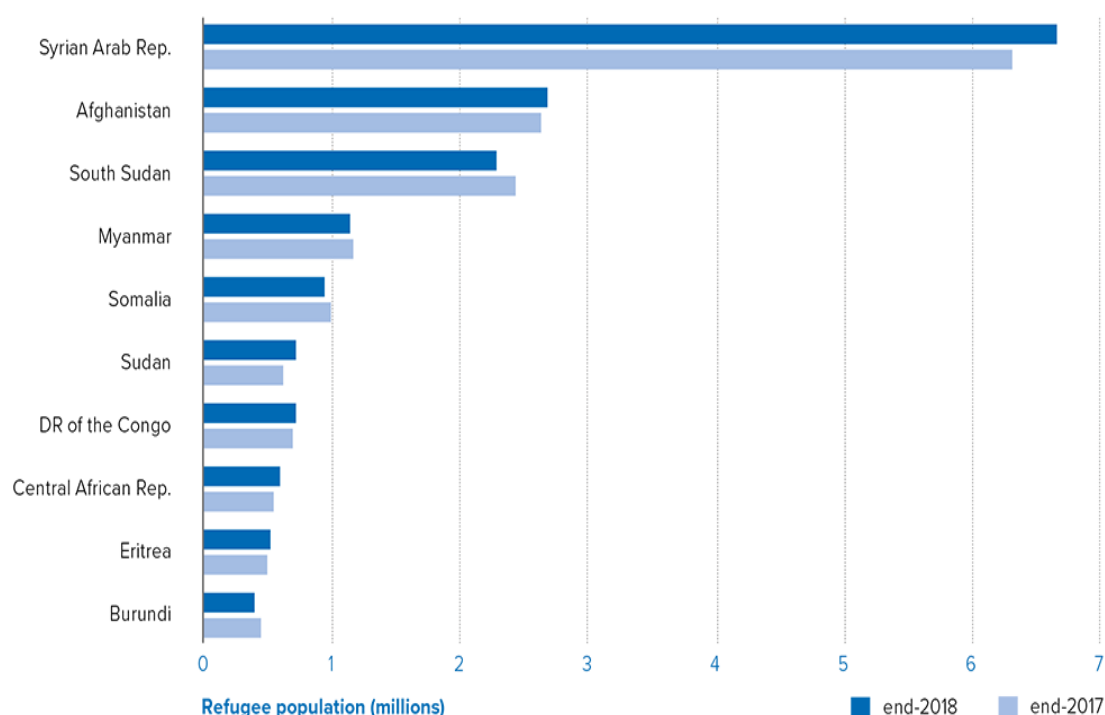
By the end of the year 2018, as per the picture above, there are approximately 70.8 million forcibly displaced people in the world. Out of these 70.8 million, 41.3 million are the internally displaced person, 3.5 million asylum seeker and 25.9 million are refugees, of these 25.9 million refugees 20.4 million refugees are under the mandate of the UNHCR, while 5.5 million are Palestinian refugees.

According to this figure, every day about 37000 people are forced to flee due to conflict and persecution in the world. The main reason for the increasing number of refugees in the world is three countries like Syria, Afghanistan, and South Sudan from which about 57 per cent of refugees come, while the five most hosting countries are Turkey, Pakistan, Uganda, Sudan, and Germany.

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Figure 6.2: Major Source Countries of Refugees

Major source countries of refugees | end-2017 to end-2018



Source: Global trends Forced Displacement in 2018

<https://www.unhcr.org/5d08d7ee7.pdf>

This figure (2) presents the comparative chart of the top ten refugee's origin countries in the period of 2017 to 2018.

More than two-thirds of the world's refugees come from countries like Afghanistan, Syria, Somalia, South Sudan, and Myanmar. Syria was the most important country of origin for refugees in 2018, with 6.7 million, an increase of more than 6.3 million compared to the previous year. One hundred twenty-seven countries from six continents have given refuge to these refugees. In which about 75 percent of the refugees live. By the end of 2018, Turkey has hosted the most significant number of Syrian refugees (3.6 million). Syrian refugees are also hosted by countries in the Middle East and North Africa, Iraq (252,500), Lebanon (944,200), and Jordan (676,300).

Additionally, large Syrian refugee populations are hosted by Sweden (109,300), Germany (532,100), and Sudan (93,500). Afghanistan was the second country to generate the most refugees in 2018. In which mainly Pakistan and the Islamic Republic of Iran and India have given 2.7 million Afghan refugees shelter.

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South Sudan was the third most refugee-producing country in the world in 2016 with 2.3 million. It has hosted by neighbouring countries Uganda (788,800), Sudan (852,100), Ethiopia (422,100), Kenya (115,200), and DRC (95,700).

The Rohingya refugee is the fourth refugee group in the world with 1.1 million abortions, with most members hosted by Bangladesh (906,600), Malaysia (114,200), Thailand (97,600), and India (18,800).

The fifth number of Somali refugees with 949700 refugees in the world at the end of 2018. The Somalian refugees hosted by Ethiopia with 257200 refugees, Yemen with 249000 refugees, and Kenya with 252500 refugees at the end of 2018.

While Sudan ranked sixth with 724800 refugees at the end of 2018, the refugees hosted by Yemen chad are 336400 and South Sudan are 269900. Moreover, the democratic republic of Congo was at the seventh position with 720300 refugees, the Central African Republic at the eighth positions, at the end of 2018.

While Eritrea (504300) and Burundi (439300) respectively at the ninth and tenth positions at the end of 2018.³

6.2 THE STATUS OF REFUGEES IN THE TOP FIVE COUNTRIES PRODUCING MAXIMUM REFUGEES OF THE WORLD

There are top five countries producing maximum refugees of the world Like Syria, Afghanistan, South Sudan Myanmar, and Somalia are discussed as follows:

6.2.1 Syrian Refugees

The intense fighting in Syria for eight consecutive years has forcibly displaced more people than any other country. Half of Syria's population has been displaced by about 13 million in total. Those missing out of the country or need help, more than half of whom are children. About 5.8 million Syrian refugees are living in their neighbouring developing countries as registered refugees. Most Syrian refugees live in poor settlements located between cities, rather than regular camps, for which they could pay rent. Due to this, the already scattered infrastructure gets further disintegrated, which puts more pressure on their essential resources like education, health. They have to struggle to meet basic requirements. The recent ban imposed by

³ Global trends, forced Displacement in 2018: UNHCR, the UN Refugee agency, *available at*: <https://www.unhcr.org/globaltrends2018/#sect-intro> (last visited on January 15, 2020)

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the US government on Syrian refugees entering the US has led to persecution and immediate danger to life during their travels.⁴

Since the civil war broke out in Syria, more than 5.4 million refugees have taken refuge in Turkey, Lebanon, Europe, and Jordan, of which Turkey has given refuge to about 3.3 million refugees.⁵ Hundreds of thousands of people have died due to civil war and have faced struggles. Almost all the things of basic needs like education, health, water, sanitation systems have been destroyed or damaged, and the war severed the social and occupational ties that bound neighbours to their community. While around 12 million people in the country require humanitarian aid. Thus, due to the scattering of millions, we see the biggest refugee and displacement crisis of our time.⁶

The exponential influx of refugees in the Middle East in the past three years has led to one of the worst humanitarian crises the international community has faced in the past few decades. Some of the critical challenges and areas of intervention engaging the international community include:

Over all Protection of refugees: Ensuring legal, physical, and psychological protection to the refugee population is a sine qua non in meeting the on-going crisis. Indeed, the lack of basic security takes a direct toll and exerts a negative impact on virtually all assistance programs. As such, providing security for the vulnerable refugee population is a challenge both within and outside refugee camps. Refugee camps can present significant security challenges by providing the breeding ground for organized criminal groups as well as for the recruitment of fighters. At the same time, securing a widely dispersed refugee population – often living in informal settlements – represents a different but just as daunting task. Vulnerable groups are especially affected, with women and girls, particularly women who fled Syria alone or

⁴ Syrian Refugee Crisis, *available at*: <https://www.care.org/emergencies/syria-crisis> (last visited on January 15, 2020)

⁵ Refugee crises around the world, *available at*: <https://www.infomigrants.net/en/post/19033/refugee-crises-around-the-world> (last visited on January 12, 2020)

⁶ Syrian refugee crisis: Facts, FAQs, and how to help, *available at*: <https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts> (last visited on January 15, 2020)

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with their children, vulnerable to sexual and verbal harassment outside the home, as well as to a heightened risk of domestic violence or abuse.⁷

Protection of Children as refugee: Children are particularly unaccompanied minors are a vulnerable group with insecure and impoverished living conditions. children exposed to various forms of exploitation, from child labour to sexual violence, to recruitment and employment by armed and criminal groups.⁸

In addition to securing refugee camps, communities, individuals, and especially vulnerable populations, protection also concerns the refugees' legal status, beginning with ensuring that each refugee can register and obtain a recognized legal status in the host country and preventing forced repatriation as well as statelessness. Jordan and Lebanon have not having ratified the 1951 Refugee Convention.⁹

Shelter: According to UN estimates, up to 85 per cent of Syrian refugees live outside of refugee camps, scattered in both urban and rural settings. In Jordan, 18 per cent of Syrian refugees live in camps, chiefly Zaatari and Azraq. Turkey has accommodated roughly 20 per cent of the refugee population in 22 camps that have initially been described as “the best refugee camps ever seen,” but which are under increasing strain by the prolonged crisis. In Lebanon, all Syrians are accommodated outside camps, as domestic political realities have led the country to oppose their construction.¹⁰

Health and Education: Along with the housing shortage, the refugee influx also had direct repercussions on the states' capacity to deliver social services, with the host countries' health and educational systems, especially in the cases of Lebanon and Jordan, stretched beyond their limits. In the health sector, there is pressure from a significant increase in need, demand, and costs, and a lack of staff and structures, leading to a general deterioration in the system for refugees and the host community. Poor and unsanitary living conditions and limited access to basic health services also pose an added risk in terms of both preventing and treating epidemics and outbreaks

⁷ Shifting Sands: Changing Gender Roles among Refugees in Lebanon,” Oxfam, September 3, 2013, available at: <http://www.oxfam.org/en/research/shifting-sands> (last visited on January 15, 2020)

⁸ Benedetta Berti, The Syrian Refugee Crisis: Regional and Human Security Implications, available at: https://www.inss.org.il/he/wpcontent/uploads/sites/2/systemfiles/SystemFiles/adkan17_4ENG_7_Berti.pdf(last visited on January 15, 2020)

⁹ *Ibid.*

¹⁰ *Ibid.*

of infections while contributing to a worsening of the target population's health. Lack of heating or damp housing conditions, for example, can lead to respiratory diseases such as asthma, allergies, and acute bronchitis.¹¹

Lack of adequate access to the medical system takes an especially high toll on the elderly refugee population, as well as on Syrians with disabilities, chronic conditions, or in need of psychological assistance. It is especially relevant given the high percentage of Syrian refugees with impairments: for example, a Help Age International and Handicap International survey in 2014 found that "30 per cent of refugees have specific needs."¹²

Providing access to education has been similarly complex, with the international community and the host governments struggling to accommodate Syrian children and with the local educational system increasingly overcrowded, under a financial strain, and with overworked personnel. For example, in Lebanon, the number of Syrian school-aged children surpasses the number of Lebanese children in the public school system. Additional factors, including lack of proper documentation, costs of education, distance from school, safety issues, cultural or language barriers, great differences in the curriculum, or the need to work to support the household have kept Syrian children out of schools, a trend with extremely negative long-term consequences.¹³

Employment: The massive refugee flows, in some cases, have resulted in the saturation of the job market, with a widespread perception in host communities that refugees have contributed a general rise in unemployment rates along with a decrease in wages. It is especially the case as the refugee population, often driven by the desperation of their circumstances and unable to obtain the proper work permits, agree to work for lower wages, harsher conditions, and fewer rights than their counterparts in the host communities do.¹⁴

6.2.2 Afghan Refugees

Afghan refugees are the second largest number of refugees in the world, numbering around 2.7 million. Of which, 1.4 million refugees live in Pakistan, and the

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

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rest in other countries, including India. Moreover, within the country, about 2.6 million people have been displaced due to conflicts, droughts, and other natural disasters.¹⁵

When the Marxist People's Democratic Party of Afghanistan (PDPA) overthrew the government of Muhammad Daud, then migration of refugees from Afghanistan began in 1978. When the Soviet Union invaded in December 1979, the number of refugees increased rapidly. By early 1981, approximately 3.7 million refugees had fled to Iran and Pakistan.¹⁶

Refugees from Afghanistan face many problems in Pakistan and Iran. They are also scared and harassed. Afghan refugees who stay in Iran have complicated conditions. There is no religious freedom in Iran because Islam has a separate cult. In Iran, Shia communities dominate while Afghan refugees are Sunni communities. The religion that Afghan refugees follow is not valid in Iran. Because of which they have to endure persecution. Human rights organizations have extensively documented and repeatedly called for an end to the systematic discrimination that Afghan refugees face in Iran and Pakistan. Afghan refugees in Pakistan face police harassment, extortion, physical abuse in custody, forced expulsion, and other repressive tactics. Significant incidents related to terrorist attacks like the 2014 bombings at the Peshawar school resulted in reduced educational and social opportunities for Afghan refugees in Pakistan. Similarly, further, the Lahore suicide attacks engrained anti-Afghan opinions in Pakistan. Afghan refugees parallel face difficulties in Iran, including enforced exclusions, rejection of admittance to schooling, and severe limitations on occupation and residency. Practical suitability, such as ownership of motor vehicles is also prohibited.

Afghan refugees face many problems and challenges in Iran and Pakistan, similar to those living in Afghanistan. Still, they are isolated in a place where foreigners are considered enemies, whose position has deteriorated in recent years.

¹⁵ Forced to flee: Top countries refugees are coming from, *available at*:

<https://www.worldvision.org/refugees-news-stories/forced-to-flee-top-countries-refugees-coming-from> (last visited on January 15, 2020)

¹⁶ Afghan Refugees: Current Status and Future Prospects, *crc reports for congress*, by Rhoda Margesson

Specialist in Foreign Affairs Foreign Affairs, Defence, and Trade Division, *available at*:

<https://fas.org/sgp/crs/row/RL33851.pdf> (last visited on January 13, 2020)

This push factor forces Afghans to seek a life outside their neighbouring countries, to preserve life in Europe and beyond. Obtaining citizenship should be the ultimate ideal goal among Afghan refugees already existing in neighbouring countries and among future Afghan refugees.

Despite the disregard of other negative factors, there is no way for Afghan refugees to have citizenship in Pakistan and Iran. Afghans are practically aware of this obstacle. Similarly, regional countries - such as India, Turkey, and Central Asia - do not present a causal pull factor because there are almost no routes of legal migration or access to job markets for Afghans. It is also difficult for highly educated Afghan refugees, who prefer a legal stay in a regional country for the goal of an uncertain future and a dangerous journey towards Europe.¹⁷

Now the Indian government has passed a citizenship amendment act, 2019, which provides citizenship of India to religious minorities of Afghanistan.

6.2.3 Refugees from South Sudan

Nearly 2.3 million South Sudanese have fled to neighbouring countries, and 1.87 million remain internally displaced in South Sudan due to violent conflict throughout the country. It is the most massive refugee crisis in Africa and the third-largest refugee crisis in the world. In 2011, South Sudan was established as a new nation at the end of a deadly war. However, a few years later, after the beginning of a new-armed struggle in the country, complicated and dangerous crisis, disease, starvation has arisen. This conflict has forced millions to flee their country. More than 63 per cent of those fleeing South Sudan are women and children. They have to face violent attacks, sexual violence. Besides, many times, the children have to travel alone due to separation from their family, which is very painful for them. Most of the refugees from South Sudan are living in neighbouring countries such as Sudan, Uganda, Ethiopia, Kenya, and the Democratic Republic of Congo. Kenya's Kakuma refugee camp and its expansion site, Kalobeyei, host the most extensive South Sudanese refugee population in the world, more than 106,000 South Sudanese refugees. The UNHCR accepts some resolution to bring success to refugees living in

¹⁷ Hameed Hakimi and Barin S. Haymon, The Voices behind the Refugee Outflow from Afghanistan. CIDOB Policy Research Project- BARCELONA CENTRE FOR INTERNATIONAL AFFAIRS, available at: E:/JUNE_2016_HAKIMI_HAYMON.pdf (last visited on January 15, 2020)

Kakuma. For example, Kakuma hosted the world's first TED Talk in a refugee camp and a refugee-led hackathon.¹⁸

The world's largest refugee camp Bidi Bidi is situated north-western Uganda, in which more than 270,000 refugees live where South Sudan refugees have also taken refuge. Life in Bidi Bidi is complicated, yet Bidi Bidi Camp has helped South Sudanese refugees escape violence from their country. Food deliveries are inadequate and sometimes delayed, causing some refugees to sell non-food items for food. Water supply is neither sufficient nor sustainable. Lack of water has reduced latrine coverage, resulting in poor sanitation and increased infection.¹⁹

With the current situation in South Sudan not yet robust, secure, and honourable, the UNHCR is neither facilitating nor promoting the return of refugees to South Sudan. Nevertheless, it has recognized the right of refugees to return. It is protecting the refugees. About 800 South Sudanese refugees have returned to their country from Ethiopia, Uganda, and the Democratic Republic of Congo in 2019.²⁰

6.2.4 Myanmar Refugee

Over 70000 people have fled to Bangladesh since 25 August 2017 due to extreme violence in the northern part of the Rakhine state of Myanmar. Most of the refugees belong to a Rohingya Muslim minority ethnic group. The Rohingya refugee crisis has been declared "the world's most urgent refugee emergency" by the U. N. High Commissioner.²¹

Most Rohingya refugees have taken refuge in areas around Bangladesh, which have limited land and resources to host refugees. According to the United Nations Refugee Agency, more than nine lakh Rohingya refugees are in the country. These refugees live in the most crowded refugee camp in Cox's Bazar

¹⁸ South Sudan Refugee Crisis Explained, *available at*: <https://www.unrefugees.org/news/south-sudan-refugee-crisis-explained/> (last visited on January 15, 2020)

¹⁹ Franck Azobou Tonleu, South Sudan Refugee Crisis, *available at*: https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2018/12/Azobou_South-Sudan-Refugee-Crisis-112018.pdf (last visited on January 15, 2020)

²⁰ South Sudan Refugee Crisis Explained, *available at*: <https://www.unrefugees.org/news/south-sudan-refugee-crisis-explained/> (last visited on January 15, 2020)

²¹ Rohingya refugees in Bangladesh: Facts, FAQs, and how to help, *available at*: <https://www.worldvision.org/refugees-news-stories/rohingya-refugees-bangladesh-facts> (last visited on January 15, 2020)

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district of Bangladesh, which is now the world's largest refugee camp. About four hundred thousand children are living in the camps that do not get an education because Bangladeshi and Myanmar courses have been banned in the refugee camps, and there is a restriction on Rohingya children getting admission to schools outside the camps. Due to a lack of cleanliness in the camps, there is a high risk of spreading the disease, with possible outbreaks of measles, tetanus, diphtheria, and acute jaundice syndrome. The risk of infectious and water-borne diseases in the refugee camp has also increased, as more than 60 per cent of the available water supply is contaminated. Some refugees became involved in smuggling to pay for transportation outside Bangladesh and Myanmar, causing them to risk sexual exploitation as well. According to the United Nations, as of October 2019, around one lakh Rohingya were in Malaysia. Rohingya refugees do not have any legal status in Malaysia; neither do they have employment, due to which their families are not able to get health and education benefits.

The United Nations Refugee Agency has registered about eighteen thousand Rohingya refugees in India. In contrast, according to Indian authorities, around forty thousand Rohingya refugees are living in the whole of India. The Government of India considers Rohingya refugees illegal migrants and attempts to repatriate them. India sent dozens of Rohingya refugees to Myanmar in 2018, which was criticized by the United Nations and human rights groups.

Rohingya refugees have also taken refuge in Indonesia, although the number of refugees from Myanmar is comparatively small because they are considered illegal immigrants in Indonesia.²²

The biggest challenge for Rohingya refugees after fleeing violence in Myanmar is to avoid the threat of seasonal monsoon, rain, and cyclone. They also face challenges such as landslides, floods, contaminated water toilets, shelters, or damaged shelters and disease. Refugees are more likely to suffer from physical and mental illnesses due to living in crowded and dirty camps, and more people are expected to die due to the rapid spread. Most Rohingya refugees suffer from acute jaundice syndrome and diarrhea, while respiratory infections are common in adults and children. American agencies and humanitarian organizations provide essential

²² The Rohingya Crisis- council on foreign relation, *available at*:

<https://www.cfr.org/backgrounder/rohingya-crisis> (last visited on January 10, 2020)

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food supplies to families, whereas refugee families in Bangladesh require about 12,200 metric tons of food every month.

One reality of Myanmar refugees is that they are victims of sexual violence. Almost every woman and girl, who makes up about 65% of the refugee population, is a witness or survivor of sexual abuse in Balukhali settlements. Cases related to sexual offenses are registered every week. Due to which women and girls are in great need of support for mental health as well as physical health and safety.²³

Refugee children are also at high risk of disease and malnutrition, physical harm, and violence. Here are some of the adverse conditions they face:²⁴

- ♦ **Lack of protection:** Thousands of children have separated from their parents or primary caregivers. Both girls and boys face unsafe conditions as child labourers, most often gathering firewood or in domestic service. Extreme poverty makes them more vulnerable.
- ♦ **Disease outbreaks:** The World Health Organization has reported outbreaks of measles, diphtheria, diarrhea, and respiratory infections among children younger than five years.
- ♦ **Malnutrition:** Malnutrition among refugee children is at dangerous levels with fewer than 10% of children between 6 and 23 months old eating four of the seven food groups and three or more meals per day. A Bangladesh government and U.N. study reported that 37% of children ages 6 to 59 months suffer from chronic malnutrition or stunting. “Stunting means that children are under height for the age and may never catch up,” says Colleen Emary, a World Vision health, and nutrition advisor. “Those who are acutely severely malnourished are also nearly 12% more likely to die than a healthy child if they catch an infection or disease.”
- ♦ **Gender-based violence:** Girls are vulnerable to violence, especially as refugees from Myanmar have no legal status in Bangladesh. Many suffer from neglect, abuse, exploitation, or sexual violence, and resort to harmful methods of coping, including child labour and child marriage.

²³ Rohingya refugees in Bangladesh: Facts, FAQs, and how to help, *available at:*

<https://www.worldvision.org/refugees-news-stories/rohingya-refugees-bangladesh-facts> (last visited on January 15, 2020)

²⁴ *Ibid.*

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- ♦ **Lack of schooling:** Refugees are not allowed to enroll in local education facilities. Child labourers, children with disabilities, girls, and children in women-headed households also face barriers to attend educational programs for refugees. About 98% of refugee children and adolescents, aged 15 to 24 years are not accessing education.

6.2.5 Somali Refugees

The displacement of thousands from Somalia for the last three years has resulted in political instability and the dreaded civil war that broke out in the 1990s. About 7500,000 Somali refugees have taken refuge in their neighbouring countries. These include Kenya (256,186), Yemen (250,500), and Ethiopia (192,082).

Somali refugees have lived in refugee camps for 30 years, while many have spent their entire lives in camps. It is called a situation of refugee protection. According to the UNHCR, where 25,000 or more refugees from the same country live in exile for five consecutive years or more in the same region, it is called a protected refugee situation. Approximately 78 per cent of all Somali refugees have lived in a refugee-protected position.²⁵

Women, children, and members of minority groups are often vulnerable in the event of displacement, and women and children, in particular, are at risk of sexual violence, living in informal urban centres. Due to lack of adequate infrastructure and resources, women and girls have been forced to walk in hazardous areas in search of water or firewood, which causes them to face additional difficulties. Female-headed and child-headed households and members of minority groups become vulnerable due to the absence of their social and community networks. Displaced people that belong to different clans than that of their host community face an increased risk of violence and abuse. One-third of those who need assistance are children. Most of them are out of school. It makes them more vulnerable to exploitation through child labour, including possible use in hostilities.²⁶

²⁵ Somalia Refugee Crisis Explained, *available at:* <https://www.unrefugees.org/news/somalia-refugee-crisis-explained/> (last visited on January 15, 2020)

²⁶ **7 things you should know about the crisis in Somalia**, *available at:* <https://www.nrc.no/news/2019/november/seven-things-you-should-know-about-the-crisis-in-somalia/> (last visited on January 15, 2020)

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The current rhetoric of a "refugee crisis" has underlined, while the lack of political will actually to protect the refugees is causing the refugee crisis. The lack of a political will has reflected in the closure of international borders, the securitization of migration, the criminalization of migrants, and the logic of "national security," preventing refugees from entering and sending out. "States have not dismissed human rights outright, in favour of national security." Instead, they "adopt an argument of human rights. They accept human rights but claim that other concerns such as national security and financial security are justified and more relevant and should be prioritized."

It makes a difference in what is necessary for the refugee's safety and what the state wants to provide. This type of consideration of states is helpful in the violation of the human rights of refugees.

This type of ideology also promotes the logic of "us versus others," in which refugees are addressed as others and strangers. It creates a crisis for refugees, in which they are always trapped in a cycle of human rights violations - sometimes even through state policy. Such policy includes:

1. push-backs (not allowing refugees to cross borders or also returning them after they have reached the border),
2. Transfer agreements,
3. Violations of the principle of non-refoulement (the cornerstone of International Refugee Law),
4. Severe violation of human rights like; (a) Detention of migrants (including refugee children, and for long periods), (b) Selling of refugees as slaves, (c) Trafficking of refugees, (d) Organ trafficking (e) Violations of the right to life.
5. lack of respect for specific vulnerabilities (such as those of children, women, the elderly, persons with disabilities, and LGBT refugees).

They have to face this type of human rights violation during travel, when they reach a safe zone, and even when they have been sheltered. For example, consider refugee camps in which access to economic and social rights and sustainable solutions are rare. Besides, due to a lack of funds, with the number of resettlement places, refugees are unable to meet the requirements.

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Refugees are persons fleeing from a well-founded fear of persecution due to religion, nationality, race, political opinion, or belonging to a social group. In some parts of the world, an individual remains a refugee for an average of 20 years. Like Latin America, they are running away from gross and generalized violations of human rights.

Refugees who already suffer from human rights violations need protection while the international scenario is trying to victimize them again. However, such ongoing violations are unsuccessful in stopping migration. They only make it harder and more dangerous, and they endanger the lives of refugees and the right to stay.²⁷

Currently, 148 countries of the world have adopted the Refugee Convention, but the reality is different. However, most states do not allow refugees to live an independent life. Instead, an international organization holds most of the refugees. Besides, most refugees are not empowered to help their own needs.

To be able to contribute to meeting their needs, the greatest need for refugees is to enjoy the freedom of movement. However, one in four refugees in the world is incarcerated, and their freedom of movement has often been banned.

In a cruel irony, the United Nations High Commissioner for Refugees (UNHCR) runs more refugee camps than anyone else. Not only is this reaction illegal, but it is also absurdly contradictory. Refugees have become a burden on their host countries and international communities. Due to which they make those methods weak, which makes their homecoming, local integration, and resettlement difficult.²⁸

6.3 SITUATION OF REFUGEES IN VARIOUS REGIONS

Refugees from European, African, and Asian regions are specially discussed here under the following heading.

6.3.1 Refugees in Europe

One of the most significant challenges faced by twenty-first century Europe is the mass migration and integration of refugees who cross borders in search of safer lives.²⁹ In 2018, some 141,6000 refugees and migrants undertook treacherous journeys

²⁷ Refugees are victims of the crisis, not the creators- World Economic Forum, *available at*: <https://www.weforum.org/agenda/2017/11/the-refugee-crisis-or-a-crisis-for-refugees/> (last visited on January 10, 2020)

²⁸ James C. Hathaway, A Global Solution to a Global Refugee Crisis 1 *European Papers* 94 (2016)

²⁹ Refugees in Europe-REVIEW OF INTEGRATION PRACTICES & POLICIES(2018)

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from the Middle East, East, and West Africa, as well as South Asia and some Western Balkan countries to seek safety, protection, and better opportunities in Europe. The war in Syria has caused millions of refugees who have taken refuge in their neighbouring countries, while others have migrated to Europe.³⁰ During the first half of 2019, some 35,400 refugees and migrants arrived through the Mediterranean migration, arriving in Greece, Italy, Spain, and Bulgaria.³¹

In Europe, about 54,000 refugees have been given refuge by Spain and 24000 Greece by the end of 2018. About 57 per cent of the refugees live in urban areas in Europe.³²

Refugees use many routes to reach Europe, which later becomes useful and accessible. As seen in Figure 1, these include several ways to the western, central, and eastern Mediterranean Sea. Greece and Italy are important points of arrival and transit to Europe over the years, while visitors in Spain have increased since 2017. There are land routes through Turkey and the Balkans and the eastern borders with Belarus, Moldova, Ukraine, and Russia.

Estimated Refugee/Migrant Flows to Europe.³³

Table 6.1: Estimated Refugee/Migrant Flows to Europe

Year	Arrivals from Sea	Arrivals from Land	Dead or Missing
2014	216,054	Not available	3,538
2015	1,015,078	34,887	3,771
2016	362,753	24,388	5,096
2017	161,338	10,550	3,049
2018	116,711	24,800	2,277

Source: Europe's Refugee and Migration Flows, www.crs.gov

According to the International Organization for Migration, Most of the refugees in Greece come from Syria, Iraq, and Afghanistan. In contrast, most of those

³⁰ REFUGEE AND MIGRANT CRISIS IN EUROPE CONSOLIDATED EMERGENCY REPORT 2018, United Nations Children's Fund (UNICEF) Europe and Central Asia Regional Office March 2019

³¹ Refugee and Migrant response in Europe- humanitarian situation reports 32 by UNICEF

³² Refugee Crisis in Europe, *available at:* <https://www.unrefugees.org/emergencies/refugee-crisis-in-europe/> (last visited on January 20, 2020)

³³ Europe's Refugee and Migration Flows, *available at:* www.crs.gov (last visited on January 20, 2020)

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who reach Italy and Spain are from African countries. Although there was a significant jump in arrivals in 2015, the estimated number of dead or missing was the highest in 2016. The International Organization for Migration (IOM) estimates that many of those who died in the Mediterranean were from Africa.³⁴

In 2018, the refugees and migrants came into different countries. In 2018, more than 50,000 refugees and migrants in Greece, some 23400 newly refugees and migrants in Italy, 3,000 refugees and Migrants in Bulgaria, 12,000 refugees and migrants in Serbia, and border authorities registered over 24,000 refugees and migrants in Bosnia and Herzegovina.³⁵

In 2019, only 9.6 per cent of the world's refugees lived in Europe and almost half of those living in Germany.³⁶

Little attention has been paid to how the new refugees exposed to the trauma of the dramatic events that led to their flight and the traumatic journey on which thousands lost their lives. Moreover, after a painful journey, most refugees and migrants find themselves in legal custody, after being subject to inhuman conditions in the Mediterranean Sea during the voyage, they are kept in detention camps where there is insufficient medical care, and their travel is restricted. The anti-migration rhetoric is becoming a permanent fixture of European politics, and the concept of the refugee as a threat to security and the economy has raised concerns about globalization and multiculturalism.³⁷

When we started to help refugees, we have often asked why so many refugees come to Europe – but the reality is that the overwhelming majority of refugees live in the nations neighbouring their home country. Turkey, which shares a border with Syria – is home to over 3.4 million refugees. Likewise, Jordan hosts 2.9 million – in a

³⁴ *Ibid.*

³⁵ REFUGEE AND MIGRANT CRISIS IN EUROPE CONSOLIDATED EMERGENCY REPORT 2018, United Nations Children's Fund (UNICEF) Europe and Central Asia Regional Office March 2019

³⁶ European Refugee Crisis: The truth - Help Refugees, *available at*: <https://helprefugees.org/news/european-refugee-crisisthetruth/?gclid=Cj0KCQiApaXxBRDNARIsAGFdaB8zvIhEeYdnBnxSLaOlq2JpHwMV1sr6TxTE...> (last visited on January 15, 2020)

³⁷ A Crisis of Humanitarianism: Refugees at the Gates of Europe, *available at*: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6600017/> (last visited on January 15, 2020)

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state of only 9 million people. That is almost a third of the population. The UK, on the other hand, is currently home to just 126,720 refugees. That is only 0.48% of the world's total – and only 1.8% of the population. Compare that to Jordan's 32%, and suddenly the phrase "European refugee crisis" seems a bit silly.

Meanwhile, the European Union pays off Turkey and Libya to get them to stop the flow of refugees – leaving millions of people in extremely insecure environments, even putting people at risk of detention and human trafficking. The EU-Turkey Deal³⁸ has left millions of Syrians in limbo in Turkey, where it is nearly impossible to find work as a refugee – but where they conveniently cause no headaches for Europe's leaders. Likewise, in funding the coastguard and preventing people from leaving Libya, the EU is indirectly putting people at risk of modern slavery and trafficking.³⁹

In Greece, there are almost 80,000 refugees and asylum seekers, many of whom live in the worst camps on the continent. The asylum system is overloaded, and hundreds of unaccompanied minors have to sleep on the streets. In Northern France, hundreds of people have been forced to live on the streets and in the forests, blocked by hostile bureaucracies and anti-immigrant sentiment across the country, desperately trying to find safety in the UK.⁴⁰

The Council of Europe's Committee for the Prevention of Torture (CPT) raised concerns over the "inhuman and degrading" conditions in Greece's refugee camps. The committee's report said the situation was particularly alarming at the Fylakio camp near the Turkish border, one of the "hot spots" set up with backing from the EU to speed up refugee processing. There was a lack of doctors, medicines, food,

³⁸ Agreed in March 2016, the EU-Turkey deal is a statement of cooperation between European states and the Turkish government. It seeks to control the crossing of refugees and migrants from Turkey to the Greek islands, and was initially intended to curb the large numbers of refugees arriving in Europe – or losing their lives on the way – in 2015. The crux of the deal was that every person arriving irregularly (i.e. by boat, without official permission or passage) to the Greek islands – including asylum-seekers – would be returned to Turkey. In exchange, EU Member States would take one Syrian refugee from Turkey for every Syrian returned from the islands.

³⁹ European refugees crisis: the truth, *available at*: <https://helprefugees.org/news/european-refugee-crisis-the-truth/?gclid=Cj0KCQiApaXxBRDNARIsAGFdaB8zvIhEeYdnBnxSLaOlq2JpHwMV1sr6TxTE%E2%80%A6> (last visited on January 15, 2020)

⁴⁰ *Ibid.*

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and drinking water in several camps along Turkey's land border, in Athens, and on the Aegean. People had been detained for extended periods in inadequate and dirty conditions by border patrol stations such as Isaacio and Tychero. Many migrants were suffering from scabies because of the poor state of washing facilities, clogged toilets and dirty mattresses, and blankets. Refugees at several camps, including Moria on the island of Lesbos, reported suffering abuse and beatings at the hands of police. Hundreds of unaccompanied minors have been housed with single men and at risk of sexual violence.⁴¹

Overall, such measures fail to address the problems of refugees and fail to ensure what will happen to their lives and future. For example, even though international human rights law includes the right to family life and family protection and is shared across the country, the Displacement policy forces families to continue also after separation during displacement, exposing them to related risks. The European Union and its member states are failing to protect this right of refugees, as their policies and practices have separated families. The agreement between the European Union and Turkey shows the development of guidelines and possible implications that run counter to the interests of the refugee. This agreement may be in breach of the Geneva Convention's non-refoulement rule (the forcible return of refugees or asylum seekers to countries where they are liable to be subjected to persecution), as Turkey falls short of the criteria for a safe first country in which asylum concepts can apply.⁴²

⁴¹ Council of Europe slams Greece over refugee camp conditions, *available at*: <https://www.dw.com/en/council-of-europe-slams-greece-over-refugee-camp-conditions/a-47576477>(last visited on January 15, 2020)

⁴² A Crisis of Humanitarianism: Refugees at the Gates of Europe, *available at*: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6600017/> (last visited on January 15, 2020)

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6.3.2 Refugees in Africa

Table 6.2: The Population of Refugees by the United Nations High Commissioner for Refugees Regions 2018

UNHCR regions	Start-2018	End-2018	Absolute	%	% of the total end of 2018
Central Africa and Great Lakes	1,475,700	1,449,400	-26,300	-1.8	7
East and North of Africa	4,307,800	4,348,800	41,000	1.0	21
Southern Africa	197,700	211,000	13,300	6.7	1
West Africa	286,900	326,300	39,400	13.7	2
Total Africa	6,268,200	6,335,400	67,200	1.1	32

Source: UNHCR: A UN Refugee Agency, <https://www.unhcr.org/globaltrends2018/>

Africa is the second highest hosting refugees region in the world with 6,335,400 displaced populations, because of the on-going crisis in central Africa, South Sudan Somalia, the Democratic Republic of Congo, and Burundi. According to the UNHCR, there is 32 per cent of the world's refugees, including Central Africa with (6335400) refugees and Great Lakes with 1,449,400 refugees, East and Horn of Africa with 4,348,800 refugees, Southern Africa with 211,000 refugees, and West Africa with 326,300 refugees. (Table 2)

In the African region, most of the refugees come from the following countries, including 2.4 million refugees in South Sudan, 986400 refugees from Somalia, 694506 refugees from Sudan, 620775 refugees from the Democratic Republic, and 5454498 refugees from the Central African Republic. These refugees have lived in

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their neighbouring countries like Uganda with 1.4 million refugees, Sudan (906600), Ethiopia (694506), Democratic Republic of Congo (536000), and Kenya (471300).⁴³

South Sudan is the third most refugees' origin country in the world, with the decline of the refugee population from 2.4 million to 2.3 million displaced persons in 2018. Sudan became the most significant population hosting country of south Sudanese refugees with 852100 people. Ethiopia followed this with 42210 refugees, Kenya, with 115200 refugees, and the Democratic Republic of Congo with 95700 refugees.⁴⁴

The maximum number of refugees crossing these borders is women and children, who sometimes have to cross the border alone, who often arrive weak, undernourished. When the rainy season comes, floods, food shortages, and disease increase their needs.⁴⁵

The Democratic Republic of Congo is the seventh-largest country in the world at the end of 2018, with 72030 refugees. The 85 per cent of DRC refugees hosted by Uganda with a population of 303100, Rwanda with 77000 population Burundi with 70900 population, Tanzania with 56600 persons, Zambia with 41500 people, Angola with 3700 persons, south Sudan with 15600 and the republic of Congo with 11300 people. The substantial refugee population was also hosted by South Africa (26300), Kenya (24600, but 94 per cent of DRC refugees remained in Sub-Saharan countries).⁴⁶

When a long and costly civil war ended in 2003, some expectations were raised, but even after that, the eastern parts of the country witnessed war events. Since 2016, the emergence of a new wave of violence has affected the DRC's peaceful Kasai area, as well as the country's south and central region. Because of which now, thousands of citizens are struggling for survival.

⁴³ What you need to know about Africa's refugees, *available at*:

<https://www.aljazeera.com/indepth/interactive/2019/02/africa-refugees-190209130248319.html> (last visited on January 15, 2020)

⁴⁴ Global trends forced displacement in 2018, UNHCR- A UN Refugee Agency, *available at*:

<https://www.unhcr.org/5d08d7ee7.pdf> (last visited on January 15, 2020)

⁴⁵ South Sudan emergency, *available at*: <https://www.unhcr.org/en-in/south-sudan-emergency.html> (last visited on January 15, 2020)

⁴⁶ *Ibid.*

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Although many refugees have returned to the Kasai region and elsewhere, they found their property, businesses, and schools vandalized and family members dead. However, human rights violations are still widely seen, including physical harassment, murder, sexual violence, arbitrary arrest, and detention in inhumane conditions. This type of human rights violation has forced many Congolese to flee their homes, as well as hosts over half a million refugees from neighbouring countries such as Burundi, the Central African Republic, and South Sudan.

Due to political and ethnic conflicts, many areas have been affected, which further increases the risk of displacement. The needs of conservation are particularly high for the most vulnerable, and the challenges of getting help to the needy are increasing. Furthermore, to prevent diseases, it is essential to strengthening sanitation and water supply as well as public health.⁴⁷

The Central African Republic is the eight most significant countries of refugee origin in the world in the year 2018. In this year, the number of refugee population has increased from 545500 to 590900. The refugee from CAR has hosted in Cameroon with 274700 refugees, DRC with 172000 refugees, Chad with 102100 refugees, Congo with 24700 refugees, and Sudan with 7000 refugees.⁴⁸

In 2018, an African country, Eritrea, remained in the ninth position with 507300 refugees. Most of the refugees from Eritrea were hosted in Ethiopia with 174000 refugees, Sudan, with 114500 refugees. The refugees from Eritrea were also found in Germany with 55300 refugees, Switzerland with 34100, Sweden with 27700 refugees, Norway with 15200, the Netherlands with 14900 refugees Israel with 14500 refugees, and the United Kingdom with 1300 refugees.⁴⁹

Further, Burundi is in the tenth position with the largest refugee-producing country, with 387900 refugees at the end of 2018. All refugees from Burundi are located in Zambia with 221400, Rwanda with 68300, DRC with 43000, Uganda with 32500, Kenya with 4900, and Zambia with 4500 refugees.⁵⁰

The people of Burundi are facing extreme humanitarian crises such as economic crises, disease, and food insecurity. There has been a decrease in severe

⁴⁷ Democratic republic Congo emergency, *available at*: <https://www.unhcr.org/en-in/dr-congo-emergency.html> (last visited on January 15, 2020)

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

violence. Full and only temporary shelters are available to find Burundian refugee camps in Tanzania, Rwanda, and DRC. Health centres are struggling to deal with large numbers of patients. There is only one system of primary education, and it lacks adequate teaching materials and classrooms so that in Tanzania, hundreds of children attend classes under trees.

Refugees feeling fear for their lives are struggling to provide necessary facilities to their children in crowded, undernourished camps. Even some refugees are choosing to return home, but the majority will still need international protection for some time to come. For hundreds of thousands of Burundian refugees who still need international protection, support that is more global and further funding is required to provide immediate life-saving assistance for a long-term solution for the future.⁵¹

6.3.3 Refugees in Asia

After large flows in 2017, the situation in Asia and the Pacific remained relatively stable in 2018. According to UNHCR's concern, the Asia and Pacific region is home to 7.7 million displaced people, including 4.2 million refugees,⁵² 1.9 million IDPs, and 1.4 million stateless people. Most of the refugees originate from Afghanistan and Myanmar.⁵³

Afghani refugees are the second-largest refugee group in the world, with 2.7 million refugees worldwide in 2018. Most refugees are hosted by Pakistan from Afghanistan with 1403500 refugees. Neighbouring Pakistan hosted over 88 per cent of Afghan refugees and the Islamic Republic of Iran, The refugees from Afghanistan were hosted by Germany with 126,000, refugees, Austria with (33,100), refugees, Sweden with (28,200), refugees, France with (18,500), refugees, Italy with (16,900), refugees, Switzerland with (12,300) refugees and Australia with (11,900) refugees at the end of 2018.⁵⁴

Myanmar is the fourth largest country in the world for refugee production, with 1.1 million refugees in 2018. The Myanmar refugees have been hosted by

⁵¹ Burundi Situations, *available at:* <https://www.unhcr.org/en-in/burundi-situation.html> (last visited on January 11, 2020)

⁵² Global trends forced displacement in 2018, UNHCR- A UN Refugee Agency, *available at:* <https://www.unhcr.org/5d08d7ee7.pdf> (last visited on January 27, 2020)

⁵³ Asia and the pacific, *available at:* <https://www.unhcr.org/asia-and-the-pacific.html>

⁵⁴ Global trends forced displacement in 2018, UNHCR- A UN Refugee Agency, *available at:* <https://www.unhcr.org/5d08d7ee7.pdf> (last visited on January 27, 2020)

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Bangladesh with 906600 refugees, Malaysia with 114200 refugees, Thailand with 97600 refugees, and India with 18800 refugees at the end of the year 2018.⁵⁵

In the Asia Pacific, refugees are in higher numbers than in any other region and need help now, whether there is the law for it or not. The countries of origin of around half of the world's refugees are in Asia, and Asia hosts around half of the world's refugees. It is, of course, essential to remind ourselves that the actual number of refugees is unknown, as many remain unregistered or misclassified as “illegal” or “economic” migrants.⁵⁶ Despite the problems that have resulted in forced migration in the region, and the magnitude of the population seeking protection, only 15 of 47 countries in the Asia region have signed the Refugee Convention.⁵⁷

In this context, asylum-seekers and refugees have frequently been subjected to human rights violations such as forcible return back to persecution (refoulement), arbitrary and prolonged detention, lack of access to healthcare, education, and livelihood; sex and gender-based violence; trafficking; and torture.⁵⁸

There is a lack of compliance with legal standards in the Asia Pacific. It is apparent in the adoption of restrictive laws aimed at reducing the number of asylum-seekers reaching the border, and increasing the use of harsh detention practices. There is a tendency to interpret the Refugee Convention definition narrowly, and recognition rates throughout Asia are meagre.

Moreover, many legal and practical limitations on local integration make resettlement the only possible durable solution for many, and in some cases, leave the person in perpetual limbo with no available durable solution. Public perception of refugees also creates a significant barrier to refugee protection in Asia. Among the

⁵⁵ *Ibid.*

⁵⁶ Jeff Crisp, “Who has Counted the Refugees?”: UNHCR and the Politics of Numbers 6-7 (United Nations High Commissioner for Refugees, Working Paper No. 12, 1999), *available at*: <http://reliefweb.int/sites/reliefweb.int/files/resources/ED9302CE174AB751C1256DAD0037FB44-hcr-count-jun99.pdf> (last visited on January 20, 2020)

⁵⁷ UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, *available at*: <http://www.unhcr.org/3b73b0d63.html>. (last visited on January 27, 2020)

⁵⁸ Alex Pagliaro, Refoulement in the Asia Pacific, Amnesty International, *available at*: <http://www.amnesty.org.au/refugees/comments/22395/> (last visited on January 27, 2020)

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public, there is little understanding of what a refugee is, and generally, no distinction is made between the words: refugee, asylum-seeker, economic migrant, or illegal.⁵⁹

6.4 REFUGEES IN INDIA

In India, the status of the refugee has been established on an ad hoc basis because India is not ratifying the 1951 refugee convention and the 1967 refugee protocol. India has been coming up with a massive influx of refugees into India since its independence from the British. It has played host to some of the massive refugee movements in the 20th century. The partition of India in 1947 resulted in the movements of approximately 7.2 million people from Pakistan into India, and the early seventies have been characterized by an influx of a few million refugees from former East Pakistan, now Bangladesh into the Indian Territory.

There are many types of refugees presently living in India like refugees from Tibetan, Sri Lankan, Afghanistan, Iranian, Somalia, Sudan, and Myanmar. According to the UNHCR report, approximately two Lakh⁶⁰ refugees have been living in India.

FACTSHEET OF INDIA, FEBRUARY 2020⁶¹

Table: 6.3

People of Concern by Country of Origin, Cumulative figures until 31/1/2020

Country	Total Refugees
Tibetans	108005
Sri Lankans	95230
Afghanistan	16333
Others	3477

⁵⁹ Protection in Practice: The Situation of Refugees in East Asia, *available at*: <https://www.refugeestudies.jp/journal/Protection%20in%20Practice%20%20The%20Situation%20of%20Refugees%20in%20East%20Asia.pdf> (last visited on January 27, 2020)

⁶⁰ UNHCR, the UN Refugee Agency: India. *available at*: <https://www.unhcr.org/protection/operations/50001ec69/india-fact-sheet.html> (last visited on March 11, 2019)

⁶¹ UNHCR, The UN Refugee Agency: Fact Sheet of India(31 January 2020), *available at*: <http://reporting.unhcr.org/sites/default/files/UNHCR%20India%20factsheet%20-%20January%202020.pdf> (last visited on August 10, 2020)

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Assisted by Govt. of India

Tibetans	108005
Sri Lankans(as of 31 January 2020)	95230

Registered under UNHCR's Mandate

Refugees and Asylum seeker	40859
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Total 2, 10,201 Refugees in India

Source: UNHCR, The UN Refugee Agency: Fact Sheet of India (31 January 2020), <http://reporting.unhcr.org/sites/default/files/UNHCR%20India%20factsheet%20-%20January%202020.pdf>

In addition, by the end of January, approximately 12,524 asylum seekers had been registered with the UNHCR; 16 refugees were presented for resettlement; 11 refugees left for resettlement; While 59 Sri Lankan refugees were assisted to return to Sri Lanka voluntarily.

It is notable that although India has long been home to refugees from different countries, the term refugee has not been defined in any Indian law or administrative text. Despite the lack of an official definition, however, in practice, the meaning of the term could be said to be synonymous with the definition given in the 1951 Convention relating to the Status of Refugees concerning the Indian Practice of providing asylum.⁶²

Refugees in India are classified as a mandate and non-mandate refugees. Those who are under the protection of UNHCR have known as mandate refugees and those who are not under the protection of UNHCR they called non-mandate refugees. They are under the direct protection of the Indian government, which prefers to discuss refugee issues at a bilateral level with the countries concerned.⁶³ Refugees in India have re-settled on an ad-hoc basis. The status of the vast majority of refugees living in India is broad, massive, significant, and most ambiguous; with only certain groups of asylum seekers have been granted uniform privileges and rights, namely the Tamil refugees from Sri Lanka and refugees from Tibet. Refugees in India have been

⁶² Shuvro Prosun Sarkar, *Refugee Law in India: The Road from Ambiguity to Protection* 109 (Palgrave Macmillan, 2017)

⁶³ *Id.* at 58

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accorded protection under three main categories. The first category comprises refugees who receive full assistance from the government of India. The Sri Lankan Tamil refugees in India may fall under this category. They are broadly classified as refugees who receive full assistance from the government and do not have the right to vote or own land. They are issued individual and family identity cards and refugee certificates by the revenue inspector of their camp, which is required for their return to Sri Lanka. The second category includes asylum seekers to whom UNHCR grants refugee status. Examples include the Burmese and Afghan refugees. The third category of refugees consists of those who have not been recognized by UNHCR or by the Indian government, and they have integrated into local communities. An excellent example in this regard would be that of the Burmese Chins currently residing in the Indian state of Mizoram.⁶⁴ In India, there are primarily three categories of refugees:⁶⁵

1. Refugees under the control and mandate of the government of India, who came from Tibet or Sri Lanka. Both of these refugee communities hold refugee identity document issued by the government.
2. Refugees under the control of the Government of India and belong to the minority community in Pakistan or Bangladesh. These refugees hold long-term visas on the ground of being a minority in their country of origin and or based on extreme compassion. However, they do not keep documents identifying them as a refugee provided by the government.
3. Refugees under the control and mandate of the United Nations High Commissioner for refugees in New Delhi, who come mostly from Afghanistan, Myanmar, Somalia, Sudan, Iran, Iraq, or another country. In other words, refugees from all countries except Tibet, Sri Lanka, Pakistan, and Bangladesh are under the mandate of UNHCR in New Delhi.

It is important to note that the refugees in all three categories faced persecution in their country of origin due to various factors, and they have faced different procedures to obtain refugee status or regularized to stay in India.

⁶⁴ Sreya Sen, Understanding The Importance of a national legislation for Refugee Protection in India, available at: <http://rightsixinexile.tumblr.com/post/162471010952/understanding-the-importance-of-a-national>(last visited on March 10, 2019)

⁶⁵ *Ibid*

6.4.1 Types of Refugees in India

India deals with refugees in three different ways:

- (i) Those refugees are living in camps and accorded protection and assistance by the government, such as Sri Lankans and Tibetans.
- (ii) Those refugees are not recognized by the government of India, and they have been granted refugee status by UNHCR and protected under the principle of non-refoulement such as the Burmese, Somalis, Afghans, and others.
- (iii) Those entered India and integrated into the local community, such as tribal refugees, live in Mizoram but not recognized by the government of India or by the UNHCR.

6.4.1.1 Mandate Refugees

Those refugees who get refugee status by the UNHCR called mandate refugees.

a) Afghan Refugee

The inflow of Afghan refugees started in 1979-80 that is just after the Soviet intervention in Afghanistan. Although approximately 4 million civilians fled to Iran and Pakistan during this period, a few thousand people, most elite and upper-middle-class people, came to India. Most of them had valid travel documents to stay in India temporarily on their way to the countries of asylum in the western world, and those who could not go to any other country stayed back in India and sought protection from the UNHCR, New Delhi.⁶⁶

The Afghan refugee has not officially considered a refugee by the Indian government. Instead, they have recognized and protected under the UNHCR mandate. The Government of India has issued most Afghan refugees residence permits, and besides, gives a small subsistence allowance for the first six months. While most Afghan refugees live in Delhi, and there is a large number living in Faridabad, Haryana. Refugees from Afghan Hindu and Sikh communities share religious beliefs and often speak Hindi, which has made them mingle well in Indian society. Since most Afghan communities have been granted residence permits, many Afghans still work in the informal sector. There are some affluent Afghan refugees but still, most live in large numbers in poverty. The UNHCR is running several assistance programs

⁶⁶ Rathin Bandyopadhyay, *Human Rights of the non-citizen: Law and Reality* 197 (Deep & Deep Publication Pvt. Ltd. New Delhi 2007)

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for the benefit of Afghan refugees through other partners. It includes providing education under an education assistance program with the Young Men's Christian Association, Delhi. Under this educational assistance program, primary and secondary education is provided to all Afghan refugee children.

Afghan refugees who do not receive residence permits have to struggle to support themselves and their families. A large part of the Afghan community consists of widows and single mothers. Afghan refugees often work in the informal sector, in which they have to work for long hours. Muslim Afghan women, in particular, face discrimination, harassment, and exploitation at the workplace. Afghan refugees who do not have valid residence permits are considered illegal and are at risk of harassment and extortion by the police. Education is open to all Afghan refugee children, and most Afghan boys only study up to the primary level. At the ground level, many Afghan girls are left school because of many reasons. Moreover, most of the Afghan boys work to support their families.⁶⁷

Most Afghan refugees are Hindus and Sikhs, and a large number of them have shown interest in becoming Indian citizens. Recently, the Government of India has passed the Citizenship (Amendment) Act, 2019, under which a provision has been made to give citizenship to Afghan Hindu and Sikh refugees.

b) Iranian Refugees

Iranian refugees fled their country following the Islamic revolution in 1979, which led to the downfall of the Shah of Iran and the emergence of the Islamic fundamentalist government under the leadership of Ayatollah Khomeini. Before these developments, many Iranian students were studying in India in various educational institutions. Following the political upheaval, they could not return to their country of origin and claimed refugee status. They had remained in India on valid travel documents and subsequently became mandate refugees surplus.⁶⁸

c) Sudanese, Refugee

Small numbers of Sudanese visitors have been arriving in India since the 1960s for education, travel, minor business dealings. The conflicts in the country led to persecution, some of those who were already in India remained and sought

⁶⁷ *Ibid.*

⁶⁸ Ragini Trakroo Zutshi (ed.) *Refugees and the Law* 58-59 (Human Rights Law Network New Delhi 2007)

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protection from the government, fearing that they would be persecuted when they returned. Refugees are still trickling in from these countries, and they have been considered to mandate refugees in India by UNHCR.⁶⁹

d) Somalia Refugees

The number of Somalia refugees in India is around 400, of which the number of officially registered refugees is less than 200. Somali refugees do not get residence permits from the Government of India due to which there is difficulty in getting their employment. Refugees who are recognized by the UNHCR are given a subsistence allowance. The amount of subsistence allowance is meagre, which is not sufficient to meet the basic needs of the refugees. Somalis refugees face more struggles than other refugee groups, such as finding housing, obtaining education and medical treatment, and seeking employment because of two reasons for this. First, the Somali refugees cannot speak English or Hindi. Secondly, they have to face discrimination due to their colour. They stand out from the local population.⁷⁰

Somali women refugees face particular problems in access to healthcare, education, and transportation. They are inferior to their male counterparts to learn English or Hindi and are isolated from the local community. The majority of Somalian refugees are minors and young adults who are forced to live in cramped residences and have no way of living. In Delhi, the implementation partner of UNHCR, YMCA, and Don Bosco help refugees to access housing and education, there is no equal opportunity or assistance in these matters in Hyderabad. As a result, refugees in Hyderabad often feel depressed, lonely, and without any support.⁷¹

e) Palestinian Refugees

Palestinian refugees are the most recent refugee group to come to India. The United Nations High Commission Refugee has granted them refugee status, while others have applications under consideration. Palestinian refugees are refugees who fled Iraq under threat of persecution. The majority of the Palestinian refugees stay in New Delhi. Palestinian refugees in India experience great difficulty in everyday life. They face language difficulties, making it very difficult to obtain employment; they have not even been allowed residence. In terms of the housing and home of the

⁶⁹ *Ibid*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

refugees, their living conditions are deplorable, and they are forced to live in very tight conditions. Another concern of refugee children is their education. Because most of the schools study in Hindi, while English medium schools (private schools) are costly. Because of which they do not go to school or leave. The United Nations High Commissioner has given a subsistence allowance for refugees, but only for new refugees. This amount is given for six months, and for the next six months, it is reduced by fifty per cent. Furthermore, after one year, it is provided only to refugees from weaker sections and stays for others.⁷²

f) Refugees from Myanmar(Burma)

Since 1988, Burmese refugees have entered the Indian state of Mizoram. These Burmese immigrants are mainly comprised of pro-democratic activists of Burma and Chin refugees, a tribal chunk of Burma who is opposing military dictatorship and pressing for autonomy in their Chin district of Burma.⁷³ Due to these repressive measures, brutal torture, persecution, and political turmoil, a few thousand pro-democratic activists took shelter and asked for political asylum in India. The Government of India accepted all the people who left Burma in fear of persecution, as refugees.⁷⁴ However, their living conditions are deplorable. They often face exploitation by their private employers, including sexual abuse and extortion by the police, their arrest, and detention by the state authorities take place at regular intervals. They do not receive state assistance or international assistance because of their ambiguous status.⁷⁵

While the conditions at the camps later improved, and the refugees started applying for official UNHCR refugee status and financial aid, and some assistance was also provided to pro-democracy students and activists by UNHCR.

The UNHCR was in a dilemma as to the status of China, the majority of Burmese in India, and who were often considered purely economic migrants. According to the UNHCR, there are most Chin asylum applicants unable to present plausible, coherent, and credible claims for refugee status. Some organizations have accused the UNHCR of not fulfilling its mandate concerning the Burmese refugees.

⁷² *Ibid.*

⁷³ Rathin Bandyopadhyay, *Human Rights of the non-citizen: Law and Reality* 184(Deep & Deep Publication Pvt. Ltd. New Delhi 2007)

⁷⁴ *Id.* at 196

⁷⁵ *Id.* at 308

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The UNHCR has been instrumental in ensuring that residence permits are issued to the Burmese, while there is a problem due to the UNHCR recognizing a less percentage of the migrants as a refugee.⁷⁶

It has been alleged by some NGOs and academic experts that Chin asylum seekers have not been brought before any court of law. They have often been pushed back without determination of status as illegal immigrants by any court of law. All these irregularities particularly violate the provision of the Foreigners Act, 1946, and the Fundamental rights available to the non-citizen under the Constitution of India.⁷⁷ The Burmese refugees have also protested that the denial of full support from the UNHCR and denial of resettlement have left these refugees bereft and deprived. The case of Burmese refugees requires care, sensitivity, and responsibility, which is not forthcoming from either the Government of India or others dealing with the problem.⁷⁸

Recently, approximately 600,000 Rohingya refugees have taken refuge in India due to torture by religious violence in Myanmar (Burma). Identity cards have been issued to approximately 16,500 Rohingyas by the UNHCR's office to help prevent "persecution, arbitrary arrest, detention and deportation" of refugees.

Although the Indian government has classified Rohingya refugees as illegal migrants and a security threat, according to the Government of India, the principle of non-refoulement, or not forcing refugees to return to their country of origin, does not apply in India because it is not a party to the 1951 Refugee Convention. The Indian government has appealed to Myanmar to withdraw Rohingya refugees.

However, according to a report by The Indian Express, India's claim of sending the Rohingyas back to Myanmar rests on the belief that the refugees are Burmese citizens. However, Burmese do not consider Rohingyas as their citizens and consider them immigrants who came from Bangladesh during British colonial rule.

⁷⁶ Rajiv Dhavan, *Refugee Law and Policy in India* 133-134 (The Public Interest and Legal Support and Research Center, New Delhi Reprint 2005)

⁷⁷ Rathin Bandyopadhyay, *Human Rights of the non-citizen: Law and Reality* 309 (Deep & Deep Publication Pvt. Ltd. New Delhi 2007)

⁷⁸ *Supra* note 76 at 134.

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Besides, Bangladesh also believes that they are native to the Burmese state and should be protected there."⁷⁹

6.4.1.2 Non-Mandate Refugees

Those refugees who are not under the protection of UNHRC they are called non-mandate refugees.

a) Tamil Refugees

Sri Lanka gained its independence on 4 February 1948. Ethnic conflict between the Tamil minority and the Sinhalese majority started soon after the independence order was promulgated and took a violent turn in July 1973. Tamil homes and business establishments in Colombo have systematically been destroyed, after which the violence gradually spread to other towns in Sri Lanka. The Tamils sought refuge in camps or fled to Jaffna-a Tamil stronghold in the north. Since the government was unable to guarantee the safety of their lives and property, many of them decided to seek refuge in India. More than 125000 people have crossed over to India since July 1983 and have been granted refugee status in Tamil Nadu. According to the UNHCR, approximately 68000 refugees from Sri Lankan live in Tamil Nadu in 138 camps.⁸⁰ The Sri Lankan Refugees living in the government camps have been housed in warehouses or temporary shelters.

The Sri Lankan refugees worked as unskilled labour in the informal sector, and those refugees who did not get an official permit to do work they receive some monthly stipend. The Government of India provides first aid care and education for Sri Lankan children as well as subsidized food grains for the residents of the camps. Despite these provisions and the assistance provided to refugees, they are inadequate as the condition of the camp is very poor, lack of sanitation and lack of health facilities. The Foreigner Act 1946 and Citizenship Act 1955 are governs the Sri

⁷⁹ Martand Jha, India's refugee saga, from 1947 to 2017, *available at*:

<https://www.livemint.com/Sundayapp/clQnXG60MIR2LhCitpMmMWO/Indias-refugee-saga-from-1947-to-2017.html> (last visited on January 2, 2020)

⁸⁰ Sujata V. Manohar, "An Indian Perseption of International Humanitarian Law and Refugee Law", 2 *ISIL Year Book of IHRL* 1 (2002)

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Lankan refugees in India, which defines all non-citizens as illegal migrants who enter without visas, will be applied for refugees or asylum seekers.⁸¹

In cases where the refugee considered being a threat to national security, the refugee is detained under the Foreigners Act, 1946, for illegal entry and stay in India. The Sri Lankan militants, considered a threat to national security, have been detained in 'special camps' in Chenglepet and Vellore and.⁸²

Around 54,000 Tamil refugees have repatriated to Sri Lanka following an agreement between the Sri Lankan and Indian governments. Others have been repatriated with the assistance of UNHCR. However, due to the unstable political conditions in Sri Lanka, there has been a further influx of refugees into India. While many returnees moved into camps for internally displaced persons, several others have returned to India. UNHCR interviews those who wish to return and verify the voluntary nature of their repatriation from India.

The Sri Lankan government and UNHCR signed a Memorandum of Understanding on 31 August 1987 under which UNHCR agreed to provide rehabilitation assistance to refugees and the displaced in Sri Lanka. According to this agreement, there has been some return to Sri Lanka. Due to the fluid situation in the country, the repatriation has not been sustainable. There were also phases of repatriation, in which, in 2005, an armistice was announced, which was soon interrupted by violence. Since 2006, with the changing situation and deteriorating security situation, there has been a steady flow of refugees into India.

However, the reasons for their flight have elements of both persecution and human rights violations, Sri Lankan Tamils are humanitarian refugees since their trip was motivated by the unstable situation in their country. They have been recognized as refugees by the Government of India and have been taken care of accordingly. As of 31 August 2010, there are an estimated 72,000 Sri Lankan refugees in India.⁸³

⁸¹ Report of Refugee Populations in India- Human Right Law Network, *available at:* https://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf (last visited on January 7, 2020)

⁸² *Ibid.*

⁸³ Ragini Trakroo Zutshi (ed.) *Refugees and the Law* 60 (Human Rights Law Network New Delhi 2007)

b) Refugees from Tibet

India faced another refugee influx in 1959 following the political unrest in Tibet. The Government of India granted political asylum to the Dalai Lama, the political and spiritual head of the Tibetan people. After a preliminary screening procedure, Tibetans have registered as a refugee and given registration certificates.⁸⁴ Registration certificates have been issued to these Tibetans, who have to renew once or twice a year, and those Tibetans born in India are also eligible to obtain a registration certificate after they turn 18 years. Although the Indian government continues to allow Tibetans to enter the country, they are not given the same legal status as Tibetans who came before. However, some Tibetans able to obtain their registration certificates by claiming that they were born in India. Tibetan refugees are more empowered than other refugee groups. They have residence permits, which enables them to look for employment. Tibetan refugees are the only refugee group to receive a travel permit from the Government of India.⁸⁵ However, since they are not Indian citizens, most employment opportunities have been closed to them.⁸⁶

Many refugees have settled near the hill stations of northern India since the mountainous landscape was similar to their original environment in Tibet. Tibetans in India live in 37 different settlements and have 70 scattered communities in Laddakh, Himachal Pradesh, South Sikkim, Arunachal Pradesh, Uttar Pradesh, Karnataka, Orissa, West Bengal, Maharashtra, and Madhya Pradesh. Usually, Indians and Tibetans live together peacefully. Still, sometimes-separate cases of Tibetan violence continue to come up, but there are no cases where a specific group targeted within the Tibetan community.⁸⁷

The Indian government implemented schemes for the rehabilitation of Tibetan refugees in agricultural settlements and through self-employment. They enjoy basic amenities, like education and health care.⁸⁸

The Ministry of Education has created the Tibetan Schools Society, which is funded by the Indian Government. The society developed and administered an outstanding programme for Tibetan refugee education. Tibetan refugees also have

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ B. S. Chimni (ed.) *International Refugee Law* 496 (Sage Publication New Delhi, 8th edn., 2012)

⁸⁷ *Ibid.*

⁸⁸ *Supra* note 83.

access to institutions of higher education in India. However, they have faced specific problems in this regard. Education being a state as opposed to federal responsibility in India, one of the requirements of admission into any of the state colleges is a domicile certificate, which confirms that his or her parents are the legal resident of that state. If they are not a legal resident of the country, they are not eligible to apply for admission. Furthermore, it is pointed out, to be able to get a domicile certificate, a Tibetan student must first take Indian citizenship, a highly sensitive and emotional issue with Tibetan refugees, for it felt that taking Indian citizenship and forsaking refugee status negates the very purpose of fleeing one's own country.⁸⁹

Tibetan refugees fled their country of origin to save their lives, religion, and culture, thereby amounting to flight due to fear of persecution. Thus, they are refugees in the political sense, and most of the benefits derived from the refugee status have been made available to them.⁹⁰ Tibetan refugee inflows have not ceased, and there are approximately 85,000, Tibetan refugees in India.⁹¹

In exercise of the powers conferred by section 3 of the registration of Foreigners Act, 1939, and section 3 of the Foreigners Act 1946, the central government issued S.R.O. 1108, dated 26 December 1950, regulating the entry of Tibetan nationals into India. The order states: any foreigner of Tibetan Nationality, who enters into India hereafter shall:⁹²

1. At the time of entering India will receive a permit from the police officer at the Indian-Tibetan border in the form shown in the attached appendix.
2. Comply with such instructions as may be prescribed in the said permit;
3. Get him registered as a foreigner and obtain a certificate of registration.

c) Bangladeshi Refugees

In 1971 East Pakistan, now Bangladesh seceded from Pakistan in what has been described as a classic case of national liberation from a colonial political economy that sustained in the post-colonial period, with relations of dominance and

⁸⁹ B. S. Chimni (ed.) *International Refugee Law* 495(Sage Publication New Delhi, 8th edn., 2012)

⁹⁰ *Supra* note 83 at 61.

⁹¹ Indian Express, NEW DELHI, India, 11 September 2018, *available at*:

<https://www.tibetsun.com/news/2018/09/11/number-of-tibetans-in-india-decrease-from-1-5-lakh-to-85000> (last visited on May, 14,2020)

⁹² *Supra* note 90.

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dependence further reinforced by ethnic divisions. Brutal repression was unleashed by Pakistan in present-day Bangladesh in March 1971. With the result that nearly 10 million refugees entered India between March and December 1971. Most of the refugees were Bengali Hindus, who were especially open to attack by the armed force. The refugees returned home quickly after the liberation of Bangladesh. However, thousands of refugees remained in neighbouring Indian states where migration and refugee trails already had created sizable Bengali communities.⁹³

The issue of economic migrants from Bangladesh finds relevance because of the lack of a status determination regime as well as the increasing politicization of this issue, making it relevant to the issue of refugee protection in India. In the absence of any legal regime-governing refugees, there is legal ambiguity concerning the distinction between refugees and migrants. Further, it is not always possible to make such a distinction, especially in the case of a country such as Bangladesh, from which the migration problem arises due to a combination of social, economic, political, and environmental reasons. There has been a continuous influx of people from Bangladesh even after the war in 1971. In the absence of any protection regime, this largely Muslim economic migrant not only become targets of communal rhetoric but victims of prejudice as some groups in India seek to give vent to their politics to excite a paranoid communal nationalism. The existence of these Bangladeshi migrants was used to justify the strict legal and administrative measures, which affect all classes of refugees and migrants.⁹⁴

Some of the measures taken against these migrants include higher penalties, increased vigilance on the border, and regular deportation of such migrants, and the fencing of the borders, thus suggesting that the migrants certainly face a well-founded fear of persecution in India. It remains an important unresolved problem, which influences as a reason for not adopting the refugee law.⁹⁵

d) Chakma Refugees

Chakma people belong to the Tibet-Burmese language family. Most of them migrated from Myanmar to the Chittagong Hill Tract region, now in Bangladesh.

⁹³ *Supra* note 89 at 496-497.

⁹⁴ Rajiv Dhavan, *Refugee Law and Policy in India* 134-135 (The Public Interest and Legal Support and Research Center, New Delhi Reprint 2005)

⁹⁵ *Ibid.*

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They have been fighting for developmental autonomy since the British period.⁹⁶ The Chakma refugees, the tribal groups, consisting of Chakmas, Murangs, and Tripuras, migrated to the territories of Assam, Tripura, Arunachal Pradesh, Mizoram, and Meghalaya after the partition of India in the year 1947.⁹⁷ The Kaptai Hydro Electric Project that inundated over 5,400 acres of agricultural land, depriving 100,000 tribal of their home heightened this discontent during the year 1963. As a result, about 45,000 Chakmas left for India and settled in the northeastern region. Islamisation of newly established Bangladesh and because of a scheme for settlement of Bengali Muslims in the Chittagong Hill Tract region, a conflict arose between the Chakmas and these settlers. The incident again forced 18,000 Chakmas to flee to the Indian border and entered the state of Mizoram in the year 1979.⁹⁸

The refugees were initially sheltered in the government camps in Assam. They have later shifted to a camp within the State of Arunachal Pradesh, which has then known as North-East Frontier Agency (NEFA). The refugees numbered 81,000 by the year 1981. After the liberation of Bangladesh, about 50,000 refugees have been repatriated back to Chittagong Hill Tract by the year 1998.⁹⁹

e) Sindhi (Hindu) Refugees from Pakistan

In the wake of the 1971 conflict with Pakistan, Sindhi refugees came over to India, entering mainly through Rajasthan and Gujarat. It was in addition to those who crossed over from East Pakistan, who is present-day Bangladesh. These refugees have integrated very well into the local Sindhi community in India.¹⁰⁰

The Government of India does not grant refugee status to Pakistani Hindu refugees. Due to which residence permits and employment are very difficult to obtain. However, special provisions have been made in the Indian Constitution and the Indian Citizenship Act 1955 for those refugees who were born or whose parents were born in undivided India, under which they can apply for citizenship. The Citizenship Amendment Rules 2004 specifically empowers Pakistani refugees residing in Gujarat

⁹⁶ Ragini Trakroo Zutshi (ed.) *Refugees and the Law* 61-62(Human Rights Law Network New Delhi 2007)

⁹⁷ Vijayakumar, Veerabhadran., "A Critical Analysis of Refugee Protection in South Asia", *Refugee*, Vol.19, No.2, (January 2001), p.8.

⁹⁸ Ragini Trakroo Zutshi (ed.) *Refugees and the Law* 62(Human Rights Law Network New Delhi 2007)

⁹⁹ B. S. Chimni (ed.) *International Refugee Law* 497(Sage Publication New Delhi, 8th edn., 2012)

¹⁰⁰ *Supra* note 98.

and Rajasthan to apply for citizenship. Due to this law, the Government of India granted Indian citizenship to approximately 13,000 Pakistani Hindu refugees between 2005 and 2006. When Pakistani refugees get citizenship, they get the same rights as Indian citizens.

Now in 2019, the Indian government passed the citizenship (amendment) act, 2019, that provides citizenship to the Pakistani Hindu.¹⁰¹ Pakistani refugees typically work in the informal sector and often work in mines or other work, like the daily wage labourer. They often face exploitation at workplaces, due to which they are unable to earn much and nurture their family.

f) Bhutanese Refugees

Since March 1991, ethnic Nepali Bhutanese Nationals have entered the district of Jalpaiguri in West Bengal due to persecution faced by them in Bhutan. They enjoyed free movement between Nepal and Bhutan and have thus been influenced by the ethnic and cultural lifestyle of Nepal. In 1989, the Bhutanese government introduced the policy of *driglam Nam Zha* (revival of traditional Bhutanese culture), which was viewed by Nepali Bhutanese as an attempt to suppress their culture. They launched civil strife, which was resisted by the government. Fearing arrest, unlawful detention, and torture, the Nepali Bhutanese escaped to India.¹⁰²

Bhutan refugees are entitled to residency, study, and work without the need for an identity card. Bhutanese refugees have not been recognized as refugees and they not eligible to receive the facilities and assistance offered to refugees. Despite being officially considered equal to Indian citizens, Bhutanese refugees still find it difficult to obtain travel documents, driving and business licenses, cooking gas, and school and university admissions.¹⁰³ The Indian governments have neither acknowledged their presence and nor extended any relief or assistance to them. These refugees are mostly staying in the northeastern states and West Bengal. They earn a living through self-employment in animal husbandry and by finding work in agriculture and the informal sector. The Indian government has not yet formulated and policy statement regarding these refugees.¹⁰⁴

¹⁰¹ The citizenship (amendment) Act, 2019

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

g) Ugandan Refugees

Some Ugandan citizens of Indian origin came to India as refugees following the repressive and racial policies pursued by Idi Amin in 1972. While some of them settled in India, others left for England. In this case, the Government of India passed the Foreigners from Uganda order, 1972, and assisted in their rehabilitation.¹⁰⁵

6.4.2 Status of Refugees in India

There were two categories of status as determined by authorities in India. Refugees from Tibet and Sri Lanka have been given refugee status by the government. They have issued documents by the foreigner's registration office—registration certificates for Tibetan refugees and refugee identity cards for Sri Lankan refugees. The Foreigners Registration Office in the place of residence of the refugee also extends the validity of these documents.¹⁰⁶

The other refugee groups have been given refugee status by UNHCR in New Delhi as per the mandate of the 1951 refugee convention. These refugees are required to apply for registration with the Foreigners Registration Office after receiving a refugee certificate from UNHCR. The document provided by the Foreigners Registration Office has called the Residential Permit and Residential Certificate (RP&RC).¹⁰⁷

When obtaining the RP&RC, the visa for legal stay in India is also endorsed by the Foreigners Registration Office. The types of visas given to these refugees are staying visas and long-term visas. The stay visa is valid for one year, whereas the long-term visa is valid for between one and five years, depending on various factors such as country of origin, religion. While most refugees have the UNHCR refugee certificate, RP&RC, and visa, a very few refugees from Somalia and Afghanistan reported having no such documentation from the government, which means their stay in India is illegal per the existing laws.¹⁰⁸

Refugees who have been granted refugee status regularly live in rental housing. Besides, many refugees from Tibet, Sri Lanka, and Afghanistan live in refugee camps. A distinct category emerged in the case of Tibetans, some of whom

¹⁰⁵ *Ibid.*

¹⁰⁶ Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 90 (Palgrave Macmillan, 2017)

¹⁰⁷ *Ibid.*

¹⁰⁸ *Id.* at 91

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reported living in property leased by the government. A refugee from Sri Lanka lives primarily in camps set up by the government. Apart from that, it is reported that several non-government organizations have assisted refugees from Tibet and Myanmar in building refugee camps in various places in Delhi. Refugees from Afghanistan, Sudan, Somalia, Iraq, and Iran have not received any assistance for accommodation or any rehabilitation package, either from the government, UNHCR, or any NGO's. An important factor associated with place of residence, from which refugees in India have reported suffering, is the restriction of movement.¹⁰⁹

The conditions and status of refugees in India can be examined on the following parameter.

a) Livelihood

In general, as per prevailing international standards, refugees must have the opportunity to work and earn their livelihood. The Indian policy seems very strange in this regard. While certain groups are required to have work permits, other does not need any work permit to continue their profession or occupation. However, in a vast country like India, it is not always possible to enforce the rules regarding work permits. A work permit is not a requirement for Tibetan to employ nor do business in India. The Tibetan resettlement policy, 2014 of the Ministry of Home Affairs, established specific provisions for Tibetan refugees to take private-sector employment and facilities of doing business. On the other hand, most of the refugees from other countries reported are having no work permit. At the same time, assistance in finding a job or for self-employment activities for earning a livelihood is minimal. Assistance from the government in the form of creating a self-help group or leasing land for agriculture purposes is available to the Sri Lankan and Tibetan refugees, respectively. Assistance from UNHCR, as reported by refugees, is available only to refugees from Myanmar and Afghanistan in the form of a grant for starting a small business. An important concern has risen by refugee groups about the availability of a subsistence allowance for day-to-day living. Still, only refugees from Sri Lanka, Sudan, and Somalia received a subsistence allowance, though their number is deficient.¹¹⁰

¹⁰⁹ *Id.* at 92-94.

¹¹⁰ *Id.* at 96-98.

b) Health and Education

Most of the refugees having the opportunity to obtain an education for themselves or their children, a considerable number had not been able to access education mainly due to the absence of formal education in their country of origin. The refugee children from Tibet and Sri Lanka are receiving education in the government school. It is significant that to provide educational opportunities to Tibetan refugees' children, the government established central Tibetan schools in various places in India. In contrast, no such facility is available for the Sri Lankan or other refugees. The other groups of refugees have sent their children to private schools primarily due to denial of admission to government schools. Children of Sri Lankan refugees have received similar treatment to Indian citizens in the government schools in Tamil Nadu due to the generosity of the state government. They are entitled to free education up to the higher secondary level, free uniforms, books.¹¹¹

In accessing health care facilities, most of the refugees are dependent on government hospitals. The reason for this heavy dependence on government hospitals is the lack of financial resources. It has also found that government hospitals did not make any distinction between refugees and Indian nationals. Those refugees are holding UNHCR refugee certificates and receiving free medicine from UNHCR. At the same time, some refugees in a better financial position visited private doctors or hospitals for treatment. However, none of the refugees held any medical or health insurance.¹¹²

c) Exploitation and Security

Security is one of the most important issues relating to the refugee, especially if she is a woman and girl. During refugee movements, women and girls risk further violations of human rights and have been repeatedly targeted as victims of rape and abduction. Their passage to safety may have to be bought at the price of sexual favour, and even within the relative security of a refugee camp or settlement and bearing additional responsibilities as heads of households. They face discrimination in

¹¹¹ *Id.* at 99-100.

¹¹² *Id.* at 100-101.

food distribution, access to health, welfare, and education services; they are double disadvantaged - as a refugee and as women.¹¹³

d) Deportation, Detention, Repatriation, and Resettlement of Refugees

Entry into the Indian Territory without valid travel documents is an offense under the Foreigner Act, 1948, and unauthorized stay after the expiry of such documents can result in detention or deportation. As most of the refugees in India entered Indian Territory without the required travel documents that expired after their entry, many refugees reported have been detained by the authorities. At the same time, the trend of detention of refugees under the Foreigner Act, 1948, has decreased, which may be due to the rulings of various high courts to enable refugees to appeal to UNHCR for refugee status succeeding in getting the charges dropped. Only a few refugees from Sri Lanka, Myanmar, and Iran are detained under the Foreigner Act, 1948. However, some refugees from Myanmar are detained under the Information Technology laws for campaigning online in the favour of the Rohingya community. It is important to note that religious faith cannot be regarded as a factor in detention. In contrast, only male refugees have been subjected to detention or threat of deportation or repatriation.¹¹⁴

In the case of an application for third-country resettlement from India, refugees from Tibet, Sri Lanka, and Afghanistan did not apply for third-country resettlement; most of such applications have been made by refugees from Myanmar, irrespective of religious faith. A major issue raised by almost all refugees who had applied for third-country resettlement was that UNHCR was not cooperative in this regard. The refugees need comprehensive information and assistance from UNHCR regarding application for third-country resettlement.¹¹⁵

e) Permanent Stay

Several refugee groups from Tibet, Sri Lanka, Afghanistan, and Myanmar have residence in India for a long time. Refugees from these groups expressed an interest in staying in India permanently and expected no discrimination by either the government or the citizen of India. It was mainly refugees from Sudan, Somalia, Iraq,

¹¹³ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 473(Oxford University Press, New Delhi. 3rd edn., 2007)

¹¹⁴ *Id.* at 101-103.

¹¹⁵ *Ibid.*

and Myanmar who experienced discrimination and who did not want to stay in India permanently. There is a clear scenario of the religion-based question that only refugees who follow Christianity and Islam are experiencing discrimination and do not want to live permanently in India. They highlighted the difference in culture, language, and physical orientation as reasons that discrimination. These refugees have applied for third-country resettlement.¹¹⁶

Another important matter that becomes a matter of concern is the possession of the ration card, allowing refugees to obtain essential items from the ration shop at a lower rate. It has been found that ration cards are only available to refugees from Tibet and Sri Lanka. The government of Tamil Nadu has provided ration cards for Sri Lankan refugees, while the Tibetan resettlement policy, 2014, recommended the same for Tibetan refugees. However, it has also been found that several refugees from Tibet have possession of Indian voter cards while also holding registration certificates as refugees from the Foreigner Registration office. Thus, several Tibetans have lived in India as both Indian citizens and Tibetan refugees. This matter is alarming, as only citizens of India are entitled to voting cards.¹¹⁷

f) Treatment and Management of Refugees

India's refugee policy is governed by certain administrative regulations. The standard of compassion set by these administrative regulations flowed from the ethos that persons displaced from their homes need both protection and economic sustain. The administrative experience of the department of rehabilitation and the laws adjudicated at the time of partition contributed towards refugees' policy for India.¹¹⁸

In India, refugees are registered under the 1939 registration Act, which applies to all foreigners entering India. Under the 1946 Foreigner Acts, the government empowered to regulate the entry, presence, and departure of aliens in India, though the word 'alien' itself has nowhere been defined. The passport Act, 1967, also governs entry. Entry can be restricted if a person does not have a valid passport or visa, though the government can exempt a person when so desires. These procedures are linked at this stage to individuals who enter India without a valid visa or any other documents. Though it is related to illegal migrants, the exemption provision applies to

¹¹⁶ *Ibid.*

¹¹⁷ *Id.* at 105

¹¹⁸ Sumita Das Majumdar, "refugee Management in India: Policy Introspection" 5YBHR145(2005)

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refugees. Besides, refugees in developing countries usually descend in large numbers. Under this circumstance, refugees become an administrative problem to oversee the relief and rehabilitation process rather than to supervise who stays or does not stay.¹¹⁹

The government of India alone determines refugees' status and has no specific legislation to deal with refugees. Owing to several reasons, persons from different countries have been arriving in India with or without proper travel documents. They are expected to get registration with FFRO/State police authorities, which regulate their entry, stay, and existence in the country, under the instructions issued by the Foreigners' division, ministry of home affairs from time to time. However, there is no separate legal status for these refugees, and they continue to deal with under the laws and rules about foreigners in India. The government does not provide relief to all kinds of refugees in India.¹²⁰

The management of refugees lies entirely with the people of the state and their respective governments, where the refugees seek their shelter and protection. Generally, the refugee influx in India is mostly from its neighbouring countries. Thus, the relations between these countries with India play a vital role in the treatment of the refugees. The Centre and the respective state government policies towards these refugees are visualized by visiting any refugee camp whose management depends on the officers in charge of the respective state government. When the intention of service is based on the humanitarian ground, the country's foreign policy, the temperament of the ruling government both in the Centre and in the state has a major role to play in policy decisions.¹²¹

6.5 PROBLEMS FACED BY REFUGEES

States are responsible for protecting the rights of their citizens. When governments are unable or unwilling to do this, people may face such serious threats that they are forced to leave their country and seek safety elsewhere. If this happens, another country has to step in to ensure that the refugees' fundamental rights are respected, which is known as refugee protection.

The need for protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable

¹¹⁹ *Ibid.*

¹²⁰ *Id.* at 145-146.

¹²¹ Sumita Das Majumdar, "Refugee Management in India: Policy Introspection" 5YBHL143(2005)

or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom, or physical integrity arising from armed conflict, severe public disorder, or different situations of violence. Other risks may stem from famine linked to cases of armed conflict, natural or human-made disasters, as well as being stateless.¹²²

States should protect refugees. States built the legal framework that supports the refugee protection regime. Through the years, States have affirmed their commitment to protecting refugees by acceding to the 1951 Convention relating to the Status of Refugees and the 1967 protocol relating to the status of refugee the cornerstone document of refugee protection. In addition, refugees are also protected at the regional level. The Convention, which was developed and drafted by States, enumerates the rights and responsibilities of refugees and the obligations of States that are parties to it.¹²³ When it comes to protecting refugees, refugees and states face many problems and challenges.

6.5.1 Life and Personal Security

Refugees as a group are the most endangered people in the world. Most of their fundamental rights are threatened if they flee and are relocated to camps in the protected states and eventually return to their country of origin or citizenship. In the initial and most desperate phase, they often lose all their belongings, their primary security, family, and often their own lives. For the majority of refugees, life in exile is as bad or as worse than the condition in their own country, which compelled them to flee.

Refugees frequently are at risk of various acts of violence, which may include killing, torture, rape, genocide, extra-judicial execution, forcible disappearance, they are also vulnerable to direct and indiscriminate attacks during hostilities acts of terrorism and the use of dangerous weapons and land crime.¹²⁴

¹²² Persons in need of international protection, United nations high Commissioner for Refugees

¹²³ Ms. Kate Jastram and Ms. Marilyn Achiron, Refugee Protection: A Guide To International Refugee Law

¹²⁴ B. C. Nirmal, "Refugee and human rights", 1 *ISIL YEAR BOOK OF IHRL* 104 (2001)

Women have always been vulnerable and easy victims in the co-called refugee cycle. Still, over the year, violence against them has manifested in the ugliest form creating a blot on the human conscience.¹²⁵

6.5.2 Right to Return

Refugees need to guarantee the right to return voluntarily and in safety to their countries of origin or nationality. They also need protection against forced return to territories in which their lives, safety, and dignity would endanger. Human rights law recognizes the right of an individual outside of national territory to return to his or her country. The U.N. Security Council has also affirmed to right of refugees to return to their homes. The right to return to his country arises from rules of traditional international law, which stresses the duty of the states of origin to receive back its citizens when the latter is expelled by the admitting state and to extend its diplomatic protection to him. However, the actual return of refugees may be barred by the complex of duties and obligation, which derives from the principle of non-refoulement.¹²⁶

6.5.3 Xenophobia

Xenophobia is found in every corner of the world and it can be defined as "attitudes, prejudices, and behaviours that reject, or exclude, individuals based on the assumption that they are external or foreign to the community, society, or national identity." The term xenophobia has historically been used to refer to the fear of outsiders but has recently been associated with "ethnocentrism," which characterizes the view that one group or culture is superior to others. Xenophobia also contrasts racism, which is associated with "biases against individuals commonly found on the socially constructed perception of groups, such as the separation of phenotypical markers that appear as skin colour."

Further, "Xenophobia specifically targets individuals who are foreign as a particular community."¹²⁷

¹²⁵ *Ibid.*

¹²⁶ *Id.* at 107-108

¹²⁷ Sarah Deardorff Miller, *Xenophobia toward Refugees and Other Forced Migrants- World Refugee Council Research Paper No. 5* — September 2018, *available at*:

<https://reliefweb.int/sites/reliefweb.int/files/resources/WRC%20Research%20Paper%20no.5.pdf> (last visited on January 2, 2020)

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It is no wonder that most of the refugees live in poverty, due to which they face many difficulties as well as xenophobic attitudes and behaviour in violent urban areas. The increasing population and urbanization of the refugee's population have opened up new places for a confrontation between refugees and citizens. Refugees continue to receive protection in poor and marginal urban areas, where racism and intolerant attitudes and practices have been seen against them, which not only endanger their lives but prevent them from receiving livelihoods, public services, such as their children's education, health care, social welfare systems, and free movements. The United Nations High Commissioner for Refugees (UNHCR) recognizes that various manifestations of xenophobia represent security threats to refugees. Expressions of xenophobia range from discriminatory attitudes and commentary to institutional or social exclusion, oppression, and interpersonal and collective violence. Xenophobic attacks targeting Persons of concern, including refugees to UNHCR, have recently occurred in all five geographic regions within its operational field. These include, among other things, Colombians in Ecuador and Costa Rica; Zimbabweans, Somalis, Pakistanis, and other refugees and asylum seekers in South Africa; Somalis and people from the Democratic Republic of Congo (DRC) in Kenya; the Rohingya in Myanmar; and asylum seekers in Greece. This situation gravely concerns UNHCR and its partners.¹²⁸

6.5.4 Racial Discrimination

One of the major causes of forced displacement in the world is racial discrimination. Throughout the world, refugees, asylum seekers, and migrants are the sufferers of racial discrimination and racist attacks. Racism is equally a reason and a product of forced displacement and a hurdle to its solution. Even traditionally generous host countries in the developing world, often over-burdened with their own social and economic problems, have become increasingly reluctant to host large refugee populations. Faced with mass influxes of refugees from neighbouring countries, many fleeing racist face violence in their own countries, governments have closed their borders or attempted to push refugees back over the border. In countries such as Burundi, Burma, Bhutan, Indonesia, Sri Lanka, Turkey, and the former

¹²⁸Jean Pierre Misago, Iriann Freemantle & Loren B. Landau, PROTECTION FROM XENOPHOBIA- An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes, available at: <https://www.unhcr.org/55cb153f9.pdf> (last visited on January 2, 2020)

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Yugoslavia, millions of people have been forced to flee their homes because of ethnic violence, racism, racial discrimination, and intolerance. In these cases, people flee across borders as refugees.¹²⁹

While the international community has condemned discrimination on racial grounds on numerous occasions, whether such practices constitute persecution is a more contentious issue. In *Ali v. Secretary of state*, the racial discrimination likely to be faced by Kenyan citizens of Asian origin is not considered amounting to persecution within the meaning of the 1951 convention. The applicant did not wish to return to their country of origin because they feared racial discrimination persecution.¹³⁰

In recent times, there has been an increase in racially motivated attacks and violence against refugees and asylum seekers in European countries. Because of this, in the U.K., the prevalence of asylum seekers in remote or deprived areas increased. In August, First Dag, a Kurdish asylum seeker was stabbed to death in an unprovoked racial attack in Glasgow. Days later, an Iranian asylum seeker was also stabbed, and a Kurdish asylum seeker in Hull had his throat slashed. In Russia, there were attacks on African students in Moscow, including many refugees, by mobs of youth, often wielding weapons or bottles. Most victims feared to report such assaults to the police; those that did generally found the police unwilling to investigate.¹³¹

6.5.5 Problems Faced by Refugee Women

Women have always been vulnerable and easy victims in the so-called refugee cycle. Still, over the year, violence against them has manifested in the ugliest forms creating a blot on the human conscience.¹³²

¹²⁹ Refugees, Asylum Seekers, Migrants, and Internally Displaced Persons, *available at*: C:\Users\Dell Exclusive\Desktop\issues and challenges befor refugee protection\racial discrimination\HRW_ Refugees, Asylum seekers, Migrants and Internally Displaced Persons.mhtml (last visited on January 7, 2020)

¹³⁰ Sylvie Da Lomba, *The right to seek refugee status in the European Union* 53 (Intersentia Publication, New York. 2004)

¹³¹ Refugees, Asylum Seekers, Migrants, and Internally Displaced Persons, *available at*: <https://www.hrw.org/legacy/wr2k2/refugees.html#Combating%20Racism%20and%20Xenophobia> (last visited on January 7, 2020)

¹³² B. C. Nirmal, "Refugee and human rights", 1 *ISIL YEAR BOOK OF IHRL* 104 (2001)

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During refugee movements, women and girls risk further violations of their human rights and have been repeatedly targeted as victims of rape, abduction, trafficking, and have forced prostitution. Their passage to safety may have to be bought at the price of sexual favours, and even within the relative security of a refugee, camp, or settlement and bearing additional responsibilities as head of households. They face discrimination in food distribution, access to health, welfare, and education services doubly disadvantaged as a refugee and as women. Women also face problems in making their voices heard on important decisions such as voluntary repatriation.¹³³

Women trafficking for prostitution are a burning problem since time immemorial. It is a present problem for the women who are trafficked to another country from the country of origin for the flesh trade.

Rohingya refugee women are mass trafficked in an organized manner to Pakistan, through Bangladesh, Kolkata, New Delhi, and Ajmer in Rajasthan to Karachi in Pakistan. The concentration of Rohingya refugee women in Karachi is the biggest in number where they are sold into the village-based rich people.¹³⁴

According to Amnesty International, women and girl refugees in almost every part of the world face violence, assault, exploitation, and sexual harassment at every stage of their journey.¹³⁵

The organization last month interviewed more than 40 refugee women and girls in Northern Europe who were traveling from Turkey to Greece and then to the Balkans. All the women felt threatened and insecure during the journey. Many reported that in almost all countries, they experienced physical abuse and financial exploitation, pressured by smugglers, security staff, or other refugees to have sex.¹³⁶ The women also stated that they had to use the men's bathroom and shower. A woman

¹³³ Guy S. Goodwin Gill and Jane Mc Adam, *The Refugee in International Law* 473 (Oxford University Press, New York, 3rd edn., 2007)

¹³⁴ Rathin Bandyopadhyay, *Human Rights of the Non-Citizen: Law and Reality* 436 (Deep & Deep Publication, New Delhi, 2007)

¹³⁵ Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe, *available at*: <https://www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe/> (last visited on January 7, 2020)

¹³⁶ *Ibid.*

said to Amnesty International that at a reception center in Germany, some refugee men would see women going to the bathroom. Some women avoided eating or drinking so that they would not have to go to the toilet where they felt insecure.¹³⁷

A Syrian woman who accompanied her husband said that she was afraid of sleeping in Greece's refugee camps because she had a large number of men around her. She also explained how she continued to eat without food for several days.¹³⁸

Interviews of a dozen women said they were touched, stroked in European transit camps. A 22-year-old Iraqi woman told Amnesty International that while she was in Germany, uniformed security personnel offered to give her some clothes in exchange for "spending time alone" with her.¹³⁹

6.5.6 Problems faced by Refugee Children

Approximately half of the global refugee population in 2018 is of refugee children, some of whom are single or isolated from their parents, who are always at risk of abuse and exploitation. At the end of 2018, approximately 111,000 children are registered refugees under the refugee population.¹⁴⁰

However, many countries underestimate the actual figures or give incorrect data for this most vulnerable refugee group. Child refugees are undoubtedly vulnerable, as they often find themselves family-less and destitute. Thousands of child refugees go missing during the journey or become victims of trafficking and sexual exploitation.¹⁴¹

Refugee children are sometimes victims of military and armed assaults, recruited into the armed forces or groups, undergo forced labor, kidnapping, irregular adoption, and inhumane detention. The consequences of a refugee disruption for refugee children can be grave. When a society is guiding, and regulation mechanisms are lost, the individual finds himself deprived of their healthy social, economic, and

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ 5 facts you should know about the world's refugees, *available at:*

<https://www.weforum.org/agenda/2019/06/5-facts-you-should-know-about-the-world-s-refugees/> (last visited on January 27, 2020)

¹⁴¹ Sex Trafficking and the Refugee Crisis: Exploiting the Vulnerable, *available at:*

<https://www.cfr.org/blog/sex-trafficking-and-refugee-crisis-exploiting-vulnerable> (last visited on January 27, 2020)

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cultural environment. As consequences, the human relationship often suffers. Parental distress and anxiety can severely disrupt the healthy emotional development of their children, and children often lose their role models in a refugee situation whom they imitate or keep building upon their personality.

The uprooting disruption and insecurity inherent in a refugee situation can harm children's physical, intellectual, psychological, cultural, and social development. Refugee children's health and nutrition are most important, but these things do not correctly in displacement situations. Then they suffer extremely high rates of morbidity and mortality.

Education is most important for any person to build their life. Education exists as human rights to the children, including refugee children.

Education should be one of the top priorities of refugee communities, especially for child refugees. Refugee children have provided the right to education, but there is insufficient support for the UNHCR to provide it. Lack of high quality and protective education for the refugees is an obstacle in the way of meeting all the goals of education, like achieving durable solutions, and of sustainable development and reconstruction of home and host countries. Access to education for refugees in areas of displacement is limited. The enrollment of refugees in primary school globally is only 76% and drops dramatically to 36% at the secondary level. The situation of girls is particularly pathetic compared to boys. In East Africa, only five girls enroll in a ratio of ten boys, most of whom drop out of school. Teacher-pupil ratios average is as high as 1:70, and, in many situations, teachers do not have even the ten days of training viewed as a minimum. Available data indicate that many refugee children are learning very little in schools; among Eritrean refugees in Ethiopia, less than 6% of refugee children reached benchmark reading fluency by grade 4.¹⁴²

¹⁴² Refugees, *available at*: <https://educateachild.org/explore/barriers-to-education/refugees>(last visited at December 22, 2019)

6.5.7 Condition of Camps

Figure 6.3: Burundian refugees at their makeshift camp on the shores of Lake Tanganyika in the Kigoma Region in western Tanzania.



Source: The living conditions of Burundi refugees in Rwanda and Tanzania

<https://www.theeastafrican.co.ke/news/Living-conditions-of-Burundi-refugees-in-Rwanda-and-Tanzania-/2558-2726996-yprk3g/index.html>

Figure 6.4: Bangladesh camps for Rohingya refugees



Source: Rohingya refugees: 'No words' to describe Bangladesh camps, Red

Cross says <https://www.abc.net.au/news/2017-09-16/rohingya-no-words-to-described-bangladesh-camps-red-cross/8951962>

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According to the UNHCR- the UN refugee agency, there 2.6 million refugees living in camps around the world. A refugee camp is intended as temporary accommodation for people who have been forced to flee their homes because of violence and persecution. They are constructed while crises unfold for people fleeing for their lives. These hastily built shelters provide immediate protection and safety for the world's most vulnerable people. Camps allow UNHCR to deliver lifesaving aid like food, water, and medical attention during an emergency.¹⁴³

While refugee camps are less dangerous than refugees' native homes, they often provide horrible living conditions. In one journalist's account of her volunteer experience at Ritsona, a Greek refugee camp, she recalls the absence of running water and electricity. Food was given to families based on their size, and extra water and food were very rarely handed out. When she traveled to the camp Calais in France, she found that the camp infested with rats, the water contaminated with feces, and tuberculosis was rampant. Most recently, the UNHCR, the United Nations Refugee Agency, has reported that sexual assault is "rampant" in Moria, another refugee camp in Greece. Moria, along with other refugee camps, are overpopulated as it hosts 5,000 refugees, exceeding the capacity of 2,000 people, these conditions are inhumane.

The lifestyle has grave effects on the refugees' mental health. Reuters reported that in March of 2018, a Syrian refugee staying at Moria attempted to commit suicide by setting himself on fire. He has survived and has been treated for his burns. Last year in the Mae La camp in Thailand that serves refugees from Myanmar, 66 refugees attempted suicide, and 28 refugees killed themselves over two years. According to the International Organization for Migration, this is three times the global average. In addition to suicide, high levels of anxiety, depression, and PTSD have been reported in refugee camps. The causes of these mental illnesses can be due to trauma, but more and more studies are showing that these poor living conditions do harm refugees' mental health.

While political violence may not be an issue for these refugees anymore, their well-being has still threatened. As human beings, these refugees deserve a livable place to stay. It means they should have running, clean water, a source of electricity, enough food, and an environment free of sexual assault and disease. UNHCR aims to

¹⁴³ Shelter is vital in emergencies, *available at: <https://www.unrefugees.org/refugee-facts/camps/>* (last visited on January 27, 2020)

protect the human rights of refugees, but they are not fully succeeding if they are not providing refugees with a right home.¹⁴⁴

6.5.8 Language

It is no great surprise that language tops the list of issues faced by immigrants to any country. Being able to communicate (or not) affects every area of life in which we have to interact with others. From jobs to schooling, to merely finding their way around or buying food, learning a native language is essential.¹⁴⁵

6.5.9 Crisis of Identity

One of the fundamental problems facing refugees and the displaced person is their lack of internationally recognized identity documents.

Due to the extreme circumstances under which they are forced to flee their homes, refugees and asylum seekers are less likely than other migrants and foreign nationals to possess a proof of identity from their country of origin. Identity documents can be forgotten, lost, destroyed, or stolen during a refugee's journey, and those who are fleeing persecution based on some aspect of their identity (e.g., nationality, religion, ethnic group, or political affiliation) might make a decision not to travel with documentation.¹⁴⁶

The hardships faced by refugees and asylum seekers compounded in the absence of identity documents. Those traveling without an ID are likely to face barriers or delays when attempting to cross international borders and when registering with authorities or humanitarian organizations. Once in their host country, those without recognized identity documents or proofs of residency will have limited freedom of movement and will be at a much higher risk of detained or, in some cases, expelled back to the country from which they fled. Undocumented refugees are less likely to report when they are abused or exploited due to fear of arrested or deported. Over time, a lack of identity documents will make it difficult or impossible for a

¹⁴⁴ Refugee Camps: Poor Living Conditions and their Effects on Mental Health, *available at*: <https://sites.duke.edu/refugeementalhealth/2018/03/27/refugee-camps-poor-living-conditions-and-their-effects-on-mental-health/> (last visited on January 27, 2020)

¹⁴⁵ The Top 10 Problems Faced by Immigrants, *available at*: <https://www.immigroup.com/news/top-10-problems-immigrants> (last visited on December 14, 2019)

¹⁴⁶ Refugees and Identity: Considerations for mobile-enabled registration and aid delivery, *available at*: <https://www.gsmaintelligence.com/research/?file=1cb984aae8f279c617fb30b151bad5a8&download> (last visited on December 12, 2019)

refugee to access a wide range of services such as mobile connectivity, financial services, education, health care, or employment; only the most basic functions are likely to be provided in the absence of identification.¹⁴⁷

6.5.10 Burden Sharing

The concept of burden sharing arises from paragraph four of the 1951 Refugee Convention. Accordingly, the international communities through advice are trying to solve the refugee problem with mutual support so that no one nation should be subjected to the excessive burden. The concept of burden sharing is advisory in nature. It does not impose any form of legal obligation on nations, nor is there any binding provision related to it, which obliges the nation to obey it. Due to no compulsion, the developed nations stop the refugees from coming there, due to which the developing country has to bear the burden of an excessive number of refugees.

Recently several developed nations, including the United States, Australia, and some European countries, have toughened their entry policies and employed a non-entry approach preventing asylum seeker, including those with a legitimate, well-founded fear of persecution on a specified ground, from entering state territory and applying for asylum there.¹⁴⁸

At present, many developing countries have given refuge to refugees in large quantities, which is further weakening their weak infrastructure and economic status. Due to the weak infrastructure and economic status of developing countries, they are unable to provide basic amenities to the refugees. Due to which the issue of violation of the human rights of refugees continues.

6.5.11 Issues Related to Durable Solutions

I. Voluntary Repatriation

Voluntary repatriation is a permanent solution to the refugee problem. However, this is not easy; voluntary repatriation of a refugee depends on the nation from which the refugee has arrived. Furthermore, it is necessary to see if those circumstances have ended, which caused the refugee to leave his country. Voluntariness is an essential part of the voluntary repatriation of refugees.

¹⁴⁷ *Ibid.*

¹⁴⁸ Human rights and humanitarian law: Development in Indian and international law, 190(oxford university Press, New Delhi. 1st edn., 2008)

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However, under the guise of voluntary homecoming, refugees are forcefully sent back to their own country, and the principle of non-refoulement has been disregarded. Due to which the refugees have to face many troubles.

II. Local integration

Integration is a type of permanent solution. In which it is used when there is no possibility of a voluntary homecoming. Under this, the refugee is integrated into the host country itself. However, this can only be possible by agreement with the nation giving shelter.

Local integration is also not without any restriction or difficulty. Many nations are not parties to international or regional documents related to refugees. Sometimes permanent integration of refugees is not in the political, economic, and social interests of the hospitality of the nation. If the permanent settlement of refugees takes place in a nation that is contrary to the refugee's culture, caste, or religion of the refugee, then there is a possibility of discrimination against the refugees, which makes the refugees face many difficulties.

III. Resettlement in the third country

Table 6.4: Global Resettlement needs by Region of Asylum

UNHCR region	Estimated in 2019	Estimated in 2020
Africa	629,744	667,432
Americas	4,074	4,990
Asia/Pacific	102,146	98,281
Europe	420,750	420,000
The Middle East/North Africa	271,297	249,705
Total	1,428,011	1,440,408

Source: Resettlement at a glance (January-December 2019), <https://www.unhcr.org/en-in/protection/resettlement/5e31448a4/resettlement-fact-sheet-2019.html>

When the refugees are neither able to return to their country of origin nor do the refugees stay safely in the country, then the only solution that remains is to be resettled in a third country. Resettlement in the third country is an essential tool for

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the protection of refugees when their particular needs in the hospitality country have not been adequately met.

In practical terms, resettlement as an instrument of protection and a durable solution has declined in recent years, and some would argue, has fallen out of favour within the international community. Today, only one per cent of the world's refugees have resettled to a third country. Resettlement is the best and only option for hundreds of thousands of refugees. However, very few refugees have even been considered for resettlement and much less referred to resettlement countries by the UNHCR.¹⁴⁹

One of the other problems facing resettlement in third countries is that only countries like Australia, Canada, and the United States have been able to make a sizeable contribution towards making such resettlements. Other countries, due to lack of resources and various other reasons, are not able to resettle such refugees.¹⁵⁰

If the hospitality country is unable to protect the refugee and there is no possibility of voluntary return of the refugees and resettlement in the third country, then in this situation, the refugees are forced to live a very miserable life.

6.6 CONCLUSION

Despite the achievements of resolving displacement over the years, the numbers of refugees continue to increase day by day. Due to which the refugee situation of the world is still incurable. Today's refugee problem is fundamentally different from before. Besides the traditional reasons for the refugee problem, many new causes have increased in forced displacement, such as wars between nations, internal wars of armies, environmental change, poverty, geographic degradation, and governments emphasizing their sovereignty lead to creating the refugee problem.

Since the consequences of the causes related to the contemporary refugee crisis, it has been strongly felt that the diagnosis of refugee issues and other problems has to be explored in an integrated manner. There should be a detailed action plan that includes the country of origin of the refugee and the host country of the refugee, and prevention, protection, and solution should be included in their periphery and supplemented by regional efforts. In other words, something can be done to solve the contrasted refugee problem only when there is a full international contribution.

¹⁴⁹ V. Seshaiiah Shasthri and A. S. Dalal "Emerging Trends in the Refugee Protection- A Critique" 11 *MDULJ* 108 (2006)

¹⁵⁰ *Ibid.*

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Along with international participation, the following tasks are also mandatory.

- Do Agreement on the obligations to the first refugee country whose ultimate goal is to establish common areas for asylum for humanitarian reasons.
- Initiative to initiate mediation and reconciliation in case of conservative conflict, thereby preventing it.
- The principle of burden sharing should be followed by all developed and developing nations.
- Encourage all nations to use the durable solutions by UNHCR.



CHAPTER - VII

CONCLUSION AND SUGGESTIONS



CHAPTER- VII

In the modern world, fierce competition for survival, terrorism, racial-religious conflicts, inter-state warfare, natural calamities, and forced occupation of religions by the powerful has led to the mass exodus of population from their roots to strange adjacent or far-off places the social, economic, or political causes which emerged the problem of refugees.

The refugee problem is a global phenomenon infesting all nations developed or developing. Refugees are unprotected persons not just in the sense that their fundamental liberties or entitlements are in jeopardy, but more essential because they cannot work within or even to restructure the national community, of which they are nominally a part to exercise those human rights. The refugee problem is not new, but it has existed ever since human civilization. Currently, it caused the displacement of millions of people due to social and political changes in Europe from World War I, most of who were Russian and Armenian. Subsequently, due to World War II, millions of refugees took refuge in Western countries and African countries of Eastern Europe.

In the present time, many countries of the world are facing the problem of refugee's influx. Syrian refugees have taken refuge in 126 countries of six continents due to the civil war in Syria, most of the Syrian refugees have hosted in Turkey. China's occupation of Tibet forced Tibetans to take asylum in India. Soviet and later US attacks on Afghanistan resulted in an influx of Afghans to neighbouring countries. Internal conflict in Sri Lanka caused the Tamil mass exodus in India.

According to the annual reports of the UNHCR, global report on forced displacement, there are 25.9 million refugees in the year of 2018, including 20.4 million refugees who unite the country's high commissioner for the refugee mandate, while 5.5 million refugees as Palestinian refugees by the United Nations Relief and Construction Agency have been registered.¹ Refugees from the top 10 countries of origin² accounted for 82 per cent of refugees (16.6 million) in 2018; over two-thirds

¹UNHCR: The UN Refugee Agency, Global Trends Forced Displacement in 2018, *available at*:<https://www.unhcr.org/globaltrends2018/> (last visited on January 22, 2020)

² Syrian Arab Rep., Afghanistan, South Sudan, Myanmar, Somalia, Sudan, DR of the Congo, Central African Rep., Eritrea, and Burundi

of the world's refugees come from just five countries: Syria, Afghanistan, South Sudan, Myanmar, and Somalia.³ Altogether, according to the United Nations Statistics Division classification, nine of the top ten refugee-hosting countries⁴ were in developing regions, and 84 per cent of refugees lived in these countries.⁵ Developing countries already face severe structural barriers to sustainable development. Usually, they have the least resources to respond to the needs of people seeking refugees such as Bangladesh, Chad, DRC, Ethiopia, Rwanda, South Sudan, Sudan, Tanzania, Uganda, and Yemen, hosted 6.7 million refugees, 33 per cent of the global total.⁶ One of the main reasons for the refugee problem is the violation of their human rights, which begin when they travel from their own country and stay in a refugee camp.

Human rights are those rights, which an individual has a right to enjoy because he is a human being. It is one of the primary obligations of the state and the international community to protect and make possible due enjoyment of such rights. The issue gains much importance when the human rights of refugees are in focus. They are most vulnerable to deprivation and persecution, more so, because of a lack of state protection. The cognizance of refugee status must have been taken under the refugee law and the human rights law, two inseparable composite lenses for that purpose. In reality, the aim is not only a mere institutionalization of the exile but also respect for the rights of the individuals. It is the responsibility of the international community to join hands with the countries giving protection and the country of refugees and work to eliminate the causes of migration. The individual well-being and fairness of the general masses must have looked into in an integrated manner. Thus, the refugee crises could not address without direct consideration of human rights.⁷

The global community has shown due concern for the refugee's rights, which is evident from the establishment of the United Nations High Commissioner for Refugees (UNHCR) and adoption of the United Nations Declaration on Territorial

³Ibid. UNHCR: The UN Refugee Agency, Global Trends Forced Displacement in 2018

⁴ Turkey, Pakistan, Uganda, Sudan, Germany, Islamic Rep. of Iran, Lebanon, Bangladesh, Ethiopia, and Jordan

⁵ List of developed countries, *available at*: www.unstats.un.org/unsd/methodology/m49/ for a list of Least Developed Countries. (last visited on January 22, 2020)

⁶*Ibid.*

⁷ M. AfzalWani, "Refugee crises and the universal human rights instruments: an overview of fifty years developments" 41 *JILI* 203-204 (1999)

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Asylum, the UN Convention Relating to the Status of Refugees, 1951, and Protocol of 1967 Relating to the Refugees. And many other instruments like Article 14 of the Universal Declaration of Human Rights, the European Agreement on the Abolition of Visas for Refugees 1969, Convention of the Organization of African Unity 1969 and American Convention on Human Rights, and the Cartagena Declaration of 1984.⁸

The 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees has been the chief legal instrument for the protection of refugees. However, it is no longer as resilient as it used to be, mostly because of the reluctance of its members to deliver their assumed commitments under the Convention. The current level of protection is not only grossly inadequate for traditional refugees, but also new groups of refugees resulted from a myriad of new causes, and sources of persecution are filling between the cracks of the system.⁹

While talking about the refugee problem in India, firstly one has to look into the history of the arrival of refugees in India when India got independence and the independence of Bangladesh. At the time of independence, millions of refugees arrived in India, which is currently continuing. There are now 209,234 refugees and an asylum seeker from different countries as China, Sri Lanka, Iran, Iraq, Nepal, Bangladesh, Somali, Sudan, Bhutan, and Afghanistan in India.¹⁰ The latest example of which is 18,914, Rohingya refugees have come to India.¹¹ These include more or less open-border policies with countries where harsh regimes and ethnic tensions have forced many to flee. Another factor is the multicultural and secular nature of the Indian government and society. Besides, during certain situations in the past, India has exercised a tolerant and liberal attitude towards hosting specific groups of refugees. However, this attitude has not been consistently applied to the person of all nationals equally. Nearly 4,000 people from Pakistan, Afghanistan, and Bangladesh, hundreds of them Muslims, have been given Indian citizenship in the past six

⁸*Supra* note, 200

⁹Rafiqul Islam and Jahid Hossain Bhuiyan, (ed.) *An Introduction to International Refugee Law* 3 (Martinus Nijhoph Publisher, Bostan. 1st edn., 2013)

¹⁰ FACTSHEET INDIA FEBRUARY 2016, *available at*: United Nations High Commissioner for Refugees (UNHCR) – www.unhcr.org (last visited on January 25, 2020)

¹¹*Ibid.*

years.¹² Despite this India is not a party of the 1951 convention or to the 1967 protocol. Nor is there any national laws relating to the recognition and treatment of refugees in India. Further, there are no binding regional agreements relating to refugees in South Asia as exist in Africa, nor is there an accepted declaration as in the Americas. In the context of this legal vacuum, refugees have often been dealt with on an ad hoc basis. They are vulnerable to the shifting objectives of the Indian government's foreign policy and political expediency.

Chapter I deal with the Introduction. This Chapter is introductory in nature and endeavours to summarize the entirety of the thesis. This chapter also discussed the literature review, statement of the problem, the objective of the study, hypothesis, research methodology, and lastly scheme of chapters.

Refugee protection means the legal protection of refugees. For legal protection, refugees have been provided protection based on International Human Rights Law, International Humanitarian Law, and International Refugee Law available at the national and international levels. Based on these available mechanisms, the legal protection that has been given to a refugee means the protection of the human rights of refugees. Because the refugee is also a human, and as a human being, he has the entire human rights available to him to live a dignified life. At the same time, upon attaining the status of a refugee, they also have rights that they have under the 1951 Refugee Convention and 1967 Protocol. Human rights are those rights that a person enjoys as a human being and without which it is impossible to live as a human being and dignified life. The human rights of refugees, which are mainly protected at the international level, are as follows. Right to non-refoulement, Right to seek asylum, Right to equality and non-discrimination, Right to peaceful assembly, Right to religion, Right to education, Right to life and personal security, freedom of movements, and Right to work. There have many refugee-related terms used concurrently with refugees, but there is a significant difference between these words and the refugee. The terms that have been explained are as follows; asylum, internally displaced person (IDPs), statelessness, immigrant, and economic migrant.

¹² Muslims among 4,000 granted citizenship in last 6 years: Home Ministry- business Standard, available at: https://www.business-standard.com/article/pti-stories/2-830-people-from-pak-912-from-afghanistan-given-citizenship-in-last-6-yrs-many-muslims-officials-119121801397_1.html (last visited on January 12, 2020)

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Chapter II looks into the Evolution of Definition and Determination of Refugee Status. In this chapter meaning and definition of refugees given by various researchers and provides a historical overview of the evolution of the definition of refugees in international refugee law before and after 1950, as well as discussed the definition of refugees given in regional instruments along with the definition of refugee in Asian perspective. For the legal protection of a refugee, it is essential to have a proper and appropriate definition of the word refugee. An attempt has been made to understand its development sequence. The word refugee has been thought to come from the French word *refuge*, which means hiding place or shelter, and this word is also used for protection from danger and crisis. The word refugee also has the origin from the Latin word *refugee* and '*refugium*', which means to flee and take shelter. Besides, many scholars as Guy S. Goodwin-Gill, Prof. Goodhart, and Sir John Hope Simpson have given the definition of the term refugee have been mentioned.

In contemporary international law, the first effort for the protection and definition of refugees has reflected in many international agreements made by the League of Nations to protect people displaced by the First World War. The League of Nations was established in 1919. The League of Nations faced a problem created by the millions of refugees who left Russia because of the Bolshevik Revolution. In February 1921, the International Red Cross Committee appealed to the Council of the United Nations to act on behalf of Russian refugees scattered throughout Europe without legal protection. On 27 June 1921, Dr. Friedtjof Nansen was appointed the High Commissioner for Russian Refugees by the Council of the League of Nations, assisting refugees from various countries. The League of Nations provides a responsibility to UNHCR for Russian refugees; to define the legal status of refugees, to organize their repatriation on their allocation to various countries, and to undertake the relief works amongst them with the aid of philanthropic societies.

In 1926, the Russian and Armenian refugees were defined by the arrangement relating to the issue of identity certificate to Russian and Armenian refugees. According to this arrangement, Russian refugee means any person of Russian origin who does not enjoy or who no longer enjoys the support of the USSR government and who has not acquired a second nationality. Furthermore, Armenian refugees mean anyone of Armenian origin was formerly the subject of the Ottoman Empire, who does not enjoy the patronage of the government of the Republic of Turkey, or who no

longer acquires any other nationality. After that, the Assyrian and Turkish refugees were defined by the arrangement of 30 June 1928. Spanish refugees were defined by the Convention relating to the International Status of Refugees, 1933. In 1938, the Convention concerning the Status of Refugees coming from Germany established the German refugees, and the protocol of 14 September 1939 defined the Australian refugees.

In 1944, the UN Relief and Rehabilitation Administration had established and administered refugee camps and catered for the need of refugees. It served the interest of the international community of state more than a refugee in alleviating the prevailing refugee crisis without committing to a universal and long-term structure of refugee protection. In 1946, the international refugee organization was established. Moreover, its mandate was to protect those refugee groups that have been recognized by the League of Nations. Further, the refugee was defined by the Constitution of the International Refugee Organization. According to the IRO Constitution, refugee means any person who has left his country or permanent place of residence and who has not retained his nationality. The constitution of IRO also includes the refugee definition like; victims of the Nazi, the victims of the Falangist regime in Spain whether enjoying international status as are refugees or not. Persons who were considered as a refugee before the outbreak of the Second World War, because they were persecuted on the ground on race, religion, nationality, or political opinion. Unaccompanied children were also included in the refugee definition by the constitution of IRO. The constitution of IRO was the first document, which used the word persecution in the definition of the refugee. The international refugee organization was replaced by the Statutes of the Office of the United Nations High Commissioner for Refugees in 1950, which was adopted by the general assembly resolution 428(V). The objectives of the statute of the UNHCR are to provide international protection to the refugees and to seek permanent solutions for the problem of refugees. This statute first covers refugees with the capacity of UNHCR through various prior treaties and arrangements and includes refugees resulting from the event before 1 January 1951. The statute of UNHCR provides refugee definition in extended form with the well-founded fear of persecution on the ground of race, religion, nationality, or political opinion to a person who has been outside the country of his nationality or habitual residence or if he has no citizenship and who was unable

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to return his country. The definition of UNHCR differs from previous statements and sets the standard for the question of who will be entitled to UN security and includes two essential features. First, a refugee is one who lacks the welfare of his native state or nationality. Second, the categories of causes of persecution, derived from the IRO definition, place significant restrictions on who can be considered refugees for UNHCR purposes.

The UN Convention Relating to the Status of Refugees, 1951, is the first binding international instrument adopted by the General Assembly of the United Nations resolution 429(V) in Geneva on 28 July 1951 and comes into force on 22 April 1954. The vital purpose of the Convention is to provide for legal protection to a group of persons who are in particular in vulnerable situations and set minimum standards for the treatment of refugees. This Convention provides the human rights of refugees as follows; right to employment, right to education, right to residence, freedom of movement, access to court, naturalization, and right against non-refoulement. According to Article 1 of the United Nations Convention Relating to the Status of Refugees, 1951, the term refugee shall apply to any person who is already recognized as a refugee under previous international agreements and documents or the constitution of IRO. A refugee is a person who has gone out of his country due to the well-founded fear of persecution due to events before 1951 because of his caste, religion, citizenship, membership of a particular social group or political opinion, who is unable to return or do not wish to return to his own country. The UN Convention Relating to the Status of Refugees, 1951, covers two kinds of refugees one is who has already been considered refugees according to the previous international agreements and the constitution of the international refugee organization. Second is who is accorded the status of refugees for the first time.

It is necessary to fulfil these five requirements for the Protection of Refugee Convention 1951. (1) He is outside the country of his nationality. (2) A well-founded fear of persecution (3) Genuinely risk of persecution in his country of origin (4)The persecution is based on that person's race, religion, nationality, membership of a particular social group, or political opinion (5)A legitimate claim and need for protection. The definition of refugee given under the 1951 Refugee Convention 1951 is being criticized on the following grounds.

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- There is no specific definition of persecution.
- It is a European centric definition.
- Given preference to the event occurring before 1951
- There are only five limited grounds of persecution.
- Natural disasters, geographical degradation, and civil war are not included in the cause of persecution.

The Protocol Relating to the Status of Refugees was adopted in 1967 and come into force on 4 October 1967. The most important aspect of this protocol is that it removes the temporal and geographical limitation of the term refugee under the 1951 Refugee Convention. Refugee status determination is a process by which a person receives a refugee status if he fulfils the conditions given in the refugee convention 1951. However, the procedure related to the refugee status determination is not provided in the refugee convention. The procedure of Refugee Status Determination is conducted by the United Nations High Commissioner for Refugees or by the state. The process of determining refugee status requires the fulfilment of certain conditions even when no procedure has been mentioned.

- Procedure for the examination of refugee claims
- Specialized asylum authority
- Access to the determination of refugee status
- The use of translators and interpreters
- Fair hearings
- Access to legal services provided by an independent legal profession
- Allowing the presence of legal or other counsel
- Assessment of each application on the individual basis and personal interview
- Confidentiality
- Giving written reasons if the application has been rejected
- Appeal or review
- Manifestly unfounded applications

The status of refugees is not permanent, and there are some circumstances where any people will lose refugee status. Article 1 (C) of the 1951 Refugee Convention provides some conditions in which any refugee loses their status if he has voluntarily re-availed national protection if he has lost his nationality, he voluntarily reacquired it, if he has acquired new citizenship in another country, if he has re-

established himself in the country which he has left, and because the conditions have changed in which he is recognized as a refugee. Article 1 (F) of this Convention does not apply any person if he has committed a crime against peace, a war crime, or a crime against humanity, he has committed a serious non-political crime, and he has been guilty of acts contrary to the purposes and principle of the United Nations.

At the regional level, various regional instruments have developed and broadened the scope of the definition of a refugee. The African Union Administers the Convention governing the specific aspect of the refugee problem in Africa, 1969 was the first regional instrument to the protection of refugees in Africa, known as the OAU convention adopted on 10 September 1969 and came into force on 20 June 1974. The OAU convention provides refugee definition in two paragraphs, paragraph one is the duplicate of the 1951 refugee convention, but the second paragraph of article 1 apply to every person who left their country of origin owing to external aggression, occupation, foreign domination, or event seriously disturbing the public order.

The Cartagena Declaration on refugee, 1984, was adopted in Latin America. It has been recommended for the use of the definition of refugee, which is given in the 1951 refugee convention and the 1967 protocol. It is also included that, who have fled their country because of their lives, safety, or freedom and threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights, or other circumstances, which have seriously disturbed public order.

In the Asian region, there are not available any different refugee definitions compared to the 1951 refugee convention. Moreover, in the south Asian region, most countries have not ratified the 1951 refugee convention. India has also not ratified the refugee convention. There is also not a proper definition of a refugee. The refugee is treated as a foreigner in India, and they regulate according to the law relating to the foreigner.

Chapter III discussed the International Legal Framework for the Protection of Refugees. The refugee problem is a global problem. There are many conventions, agreements, covenants, and proclamations at the international level to protect the rights of refugees. The mechanisms available to protect refugee human rights have been interpreted at three levels, which are International Human Rights Law,

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International Humanitarian Law, and International Refugee Law. The Universal Declaration of Human Rights 1948 proclaims the rights that everyone has for being human beings. It is not binding, but this sets a common standard for the nation and the people. By this, human rights and fundamental freedoms have been recognized at the international level. This declaration explains all types of human rights that apply to all persons without discrimination, including refugees. In particular, Articles 13, 14, and 15 of this declaration are used to protect refugees. Article 13, provides the right to freedom, article 14, provide the right to seek asylum, and article 15, provide the right to a nationality. Apart from this, the right to employment, right against torture, right against slavery, and arbitrary arrest and detention are also available.

International Covenant on Civil and Political Rights 1966 speaks of civil and political rights. It imposes duties on states to ensure the civil and political rights of citizens and non-citizens residing in the country. Mainly Article 12 (2), 12 (4), and 13 of this instrument explain the human rights of refugees. According to this covenant, people have the right to live in and from any country; they can only be removed from the country consistent with the law. It also establishes the principle of non-refoulement. The rights conferred under this are not absolute, but limits can be imposed on them.

International Covenant on Economic, Social, and Cultural Rights, 1966 provides economic, social, and cultural rights to all individuals, including refugees. It empowers all people, whether citizens or non-citizens, to respect and promote their social beliefs and culture.

The Convention on the Rights of the Child, 1989 is the world's first binding Convention that protects the human rights of children, including refugee children. This Convention imposes duties on the states that each state will make appropriate arrangements for the protection of the human rights of children, including refugee children. Besides, the Convention also establishes various rights, including the child's right to express themselves, religion, association, privacy, rights against sexual exploitation, medical care, education, and the right to legal access to the courts.

The Convention on the Elimination of all Forms of Discrimination against Women, 1979 is directed that all people and states to stop discrimination against women, and they will try to defeat atrocities against women such as sexual

harassment, discrimination at workplaces, and discrimination in health. This Convention also gives women the right to change their nationality, and marry any person. The Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 prevents any person and state from using any inhuman, cruel, or degrading act or sentence on a human being. Article 2 and 3 of this Convention are used to protect the human rights of refugees. According to which states have imposed a duty to take legal, administrative, and judicial measures at the national level to prevent inhuman treatment and torture against refugees. Along with this, it prohibits the use of force by states to send refugees back to their country. International Convention on the Elimination of all Forms of Racial Discrimination, 1965 prohibits any discrimination based on race, colour, descent, or national or ethnic origin. This Convention also applies to refugees as refugees face racial discrimination. The Convention related to the genocide makes Genocide a crime, which provisions are also applicable to the protection of refugees.

The Human Rights of Individuals Who are not Nationals of the Country in which they live, 1985 it is not binding, but it imposed rights and obligations on the states and on the foreigner to respect the law of nations. The regional human rights instruments, such as the American Declaration on the Rights and Duties of Man, 1948, and the African Charter on Human and People's Rights, 1981 have been explained. The American Declaration on the Rights and Duties of Man has mentioned the duties and the rights of individuals. The rights enumerated in the declaration are closely related to the UDHR. The African Charter on Human and People's Rights, 1981 provides non- exhaustive rights like; equality before the law; equal protection of the law; right to life; freedom from exploitation and degradation; right to liberty and security; freedom of conscience, the profession, and free practice of religion; and freedom of movement. International criminal law is also applicable to refugee protection. The Rome Statute informs the interpretation of the refugee definition under the 1951 Convention. It helps to determine which acts attain the threshold of persecution and guides the delineation of excludable criminal acts under Article 1 F. The Rome Statute defines the deportation or forcible transfer of a population as a crime against humanity. The provisions of international humanitarian law are also important to protect refugees. Under this, the Fourth Geneva Conventions provision is described, which is used for the protection of civilians. The Fourth Geneva Convention prohibits the forced transfer of an individual or a collective. Protocol I of

the Fourth Geneva Convention is also explained, according to the protocol refugee has been included in the category of protected persons.

Under The international refugee law, the Statute of the Office of the United Nations High Commissioner for Refugees, 1950; Convention Relating to the Status of Refugee, 1951; and Protocol about the Status of Refugees, 1967; are discussed. These instruments are the fundamental instruments at the international level for the protection of refugees. And in the regional refugee laws to the protection of refugee, such instruments are important like OAU Convention on the Specific Aspects of Refugee Problems in Africa, 1969; the Cartagena Declaration on Refugees, 1984; New York Declaration for Refugees and Migrants, 2016 the Comprehensive Refugee Response Framework, 2018 the Global Compact on Refugees, 2018.

Article 1 of the Statute of the office of the United Nations High Commissioner for Refugees, 1950, provides a durable solution for the refugee problem. There have been explained all three types of a durable solution, and these are voluntary Repatriation, local assimilation, and third-country resettlement. If the durable solution is followed by all the states, then the refugee problem can be stopped.

The Refugee Convention of 1951 is the most important instrument at the international level. This Convention sets the standard for dealing with refugees. The principle of Burden-Sharing is described which is given in the Preamble of the 1951 refugee Convention. This principle is not binding, yet all countries should follow it to protect the human rights of refugees. Besides, this the rights of refugees also discussed in detail, which is given in the 1951 refugee convention. Apart from this, the principle of non-refoulement under this Convention is the base of refugee protection, which is the part of the international customary law. Further, the protocol relating to the status of refugees, 1967 is discussed. This protocol applies to all refugees without any discrimination.

The OAU Convention on the Specific Aspects of Refugee Problems in Africa, 1969, is adopted to curb the refugee problem in the Africa region. The Convention includes the definition of a refugee in a broad manner. The Cartagena Declaration on refugee, 1984, is discussed this declaration has also provided a broad definition of a refugee. It is nonbinding in nature but sets a minimum standard for the Latin American countries that they will include it in their national law. New York

Declaration for refugees and migrants, 2016 is also discussed. Through this, it is seen how measures to prevent the displacement of refugees and migrants at large and in response to international communities could be improved. After that, the comprehensive refugee response framework, 2018, is discussed, under it has talked about giving support to those countries, which have given refuge to refugees on a large scale. Along with this, it is also to include inclusion and encourage the developed countries to do it.

The international institution is playing an important role in the protection of refugees the first is described as the Office of the United Nations Higher Commissioner for Refugees. It is a non-political and essential institution working for the protection and assistance of refugees. It seeks to improve the situation of refugees by entering into agreements with governments. The United Nations Relief and Works Agency for Palestinian Refugees in the Near East has worked mainly for the protection and assistance of the Palestinian refugees. Later the United Nations Office for the Coordination of Humanitarian Affairs, the International Organization for Migration, and the International Committee of the Red Cross are discussed. After that, discussed some national laws and policies relating to the refugees. There have been chosen seven countries that have a representation of every continent like; China from the Asian continent, Germany from the European continent, Canada from North America, Brazil from South America, South Africa from the African continent, and Australia from the Australian continents and Turkey is also chosen which is situated in the middle of Asia and the European continent.

Chapter IV discusses the National Legal Framework for the Protection of Refugees. In the absence of direct and special refugee legislation in India, the Constitution of India provides the rights of refugees such as equal protection of the right against ex-post-facto, double jeopardy and self-incrimination, right to life and personal liberty, right to education, protection against arbitrary arrest and detention, right against exploitation, right to freedom of thought, conscience and religion, and enforcement of fundamental rights as well as human rights. Moreover, other legislation like the Indian Penal Code, 1860; the Passport (Entry into India) Act, 1920; the Registration of Foreigner Act, 1939; the Foreigner Act, 1946; the Passport Act, 1967; the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1947; and the National Security Act, 1980; the Illegal Migrants

(Determination by Tribunals) Act, 1983; Protection of Human Rights Act, 1993 also served as the basis for the protection of refugees. Besides India is also having an international obligation for the protection of refugees as being the signatory and ratifying country to many human rights standards. But there is a need for national law on refugees (NLR) as the protection of refugees and asylum seekers bill is pending in parliament. This is high time to be the party of the Refugee Convention, 1951 particularly after the enactment of the Citizenship (Amendment) Act, 2019. Furthermore, the United Nations High Commissioner for Refugees in India and the National Human Rights Commission is also working well for the protection of refugees.

Chapter V point out that the Judicial Response to Refugee Protection. In this chapter, the researcher deals with the various judicial decisions given by both the international and national judiciary for the protection of refugees. At the international level it discusses the various international cases related to the refugee such as *Cruz-Varas v. Sweden and others*, *Pashupanathan v. Canada (Minister of Citizenship and Immigration)* and another, *Babar v. Secretary of State for the Home Department*, *Alex Ruta v. Minister of Home Affairs*. The international court's decisions have been discussed in some headings like the right to seek asylum, well-founded fear of persecution, racial persecution, religious persecution, persecution related to nationality, membership of a social group, political persecution, 'sur place' refugee, non-refoulement, and detention.

The chapter further discussed the various decisions of the Indian Supreme Court, High Court, and some non-registered cases of refugees like *Luis De Raedt v. Union of India*, *Dr. Malavika Karlekar v. Union of India*, *Dongh Lian Kham, and others v. Union of India and Others*, *Zothansegpuri v. the State of Manipur*, *National Human Rights Commission v. The State of Arunachal Pradesh*, *State of Arunachal Pradesh v. Khudiram Chakma*, *Chairman Railway Board and others v. Chandrima Das and others*. These decisions of the national courts are explained under the some headings such as Deportation and protection of civil rights for the refugees; the principle of non-refoulement and refugee status, right to equality, right to life and personal liberty including personal security, acquisition of citizenship, deemed citizenship of refugees, application of international law, and judicial interpretation for protection of non-citizen's rights, repatriation or resettlement of refugees,

humanitarian assistance, detention, Chakma refugees, other nationalities, and unreported cases.

In chapter VI, discussed the Status, Issues and Challenges of Refugees. Today almost all the countries of the world are suffering from the problem of refugees. The number of forcefully displaced people is increasing day by day in the world. In 2009, where the number of forcibly displaced people was 43.3 million, by the end of 2018, its number increased to 70.6 million. Among these displaced people, there were about 25.4 million refugees. The maximum contribution of these increased refugees was from five countries, Including Syrian, Afghan, South Sudan, Myanmar, and Somalia. It represented about 80 percent of the world's refugees. Syria is the top country, which generates approximately 6.7 million refugees. These refugees have taken refuge in 128 countries of the world. Turkey provides asylum to most Syrian refugees. Apart from this, countries like Lebanon, Jordan, Iraq, Germany, Sweden, and Sudan have given refuge to Syrian refugees. The main reason for the displacement of the Syrian refugee is the civil war going on in Syria. Civil war has made it impossible for people to live there. The refugee goes out of his country in search of a good life, but he has to face human rights violations while traveling and in the camp. The biggest challenges for refugees are their safety, health, education, employment, and food. Especially women and children have to face more difficulties. Afghanistan is the second most refugee-producing country in the world. It has generated about 2.7 lakh refugees in the world. Pakistan, Iran, and India have given refuge to Afghan refugees. The situation of Afghan refugees is not good in Pakistan and Iran. They do not have religious freedom in Pakistan and Iran. Afghan refugees face discrimination, police harassment, extortion, physical exploitation, forced expulsion, and other repressive tactics. South Sudan produces the third-highest number of refugees in the world, with 2.3 million refugees. Due to the continuous armed fighting in South Sudan, people suffering from the economic recession, disease, and starvation had to leave the country. South Sudan refugees have been given shelter by their neighbouring countries Sudan, Uganda, Ethiopia, and Congo. The countries where refugees from South Sudan have taken refuge in their economic situation is not healthy. Due to which they are unable to protect the refugees. The situation of camps in these countries is also very pathetic. There is much lack of necessary resources here, and refugees are not able to get enough food and water. There is a lack of health facilities

and security, due to which they are sick with illness and have to face many types of violence. The number of Rohingya refugees is the fourth largest in the world. Their number is about 1.1 million. The Rohingya refugee has been given shelter by Bangladesh, Thailand, Malaysia, and India. Rohingya refugees are minority Muslims from Myanmar's Rakhine province who have been displaced due to persecution and violent attacks by Buddhist majorities. Most Rohingya refugees live in Cox's Bazar district of Bangladesh. The situation in the camps is very pathetic, and there is a lack of necessary facilities. There is no system of education for children. Children do not have the right to be registered in schools outside the camps. Due to the mess in the camps and the lack of health facilities, the children suffer from malnutrition, tetanus, diphtheria, and acute jaundice. There is also no employment system for Rohingya refugees due to which they have to get involved in criminal activity. They have to be victims of physical violence. Especially women and girls have to suffer sexual harassment. They also fall victim to human trafficking. Therefore, women and girls are in great need of support for mental health and physical health as well as protection. Rohingya refugees in India are considered illegal migrants. Approximately 949,600 Syrian refugees have taken refuge in their neighbouring countries, Kenya, Yemen, and Ethiopia. Somalia refugees have been living in camps for almost 30 years. Those camps are mostly in rural areas. There is a shortage of many things in these camps. Due to a lack of adequate infrastructure, they have to go to dangerous places for water and burning wood. The minority refugee community has to suffer the violence and abuse committed by the majority. Families that do not have male heads face extreme social and economic difficulties. Moreover, women and girls also face more sexual harassment. Most children do not get the facility of education, which makes them victims of child labour.

Refugees all over the world go to European countries in search of a good life. However, they have to go through extreme difficulties in search of a good life. To avoid being caught and to enter the country, refugees resort to illegal and dangerous routes. Due to which many refugees have to die, and many refugees go missing. When the refugees somehow end their journey, they find themselves in the grip of the law. Where they are kept in detention centres, these detention centres lack health facilities and ban activities. European countries have adopted the push back policy. This anti-migrant or anti-refugee policy is now becoming an essential part of

European politics. Because they consider the refugees as a threat to the country's economy and security, it is a concern for the globalization of the world and the tradition of multiculturalism. The European Union pays Turkey and Lebanon to stop the flow of refugees here. As a result of the EU-Turkey agreement, many refugees were stopped at the border because of the risk of slavery, which forced them to stay in dangerous places or detention centres. The Fylakio camp has situated near of turkey border. Refugees are kept in this camp to prevent them from entering Europe. The condition of this camp is very pathetic, and there is much lack of doctors, health facilities, food, water, and security. The European Union has failed to protect the human rights of refugees because the agreement between the European Union and Turkey violates the principle of non-refinement.

The main reasons for the increasing refugee problem in the African region are poverty, continuous armed conflicts, and geographical degradation in the countries. Most refugees in the African region come from South Sudan, Somalia, Sudan, the democratic republic of Congo, the Central African Republic, and Burundi. These refugees have been given shelter by neighbouring countries Sudan, Ethiopia, the democratic republic of Congo, and Kenya. These countries are developing countries whose economic condition is not healthy, and there is a shortage of resources. Hence, due to which they are unable to protect refugees coming from other countries, and have to face economic, social, and sexual harassment. Refugees live in permanent and temporary camps, in which most camps lack the necessary facilities. Somewhere there is a shortage of schools, and sometimes schools are run under trees. Due to the lack of adequate schools, most children are unable to obtain elementary education. There is a great need for international help and funds for the proper protection of these refugees.

In the Asia region, particularly, South Asia is affected by the refugee problem. The major refugee-producing countries in South Asia are Afghanistan, Myanmar, Pakistan, and Sri Lanka. India has given asylum to refugees from Bangladesh, Pakistan, Malaysia, and Thailand. Most countries in South Asia have not adopted the 1951 Refugee Convention. Due to which the refugees are treated as illegal migrants. In this context, refugees are often forced into human rights violations such as forcible withdrawal (refoulement), arbitrary and prolonged detention, and loss of access to healthcare, education, livelihoods, gender-based violence, smuggling, and torture.

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As far as the status of refugees in India is concerned, India has also not accepted the 1951 Convention. The status of the refugee has been established on an ad hoc basis in India. India has given shelter to two types of refugees one is Mandate Refugee, and the second is Non-Mandate Refugee. In India, about 8000 Sri Lankan refugees live in 132 government camps in Kerala. They treated as a foreigner in India. The government has not given permits to refugees to work. The government pays them monthly expenses. The government has provided primary health facilities and education to Sri Lankan refugees. They are provided food grains at subsidy. Despite all this, the condition of the camps remains terrible. There is a lack of cleanliness in the camps, due to which they become victims of many diseases. Tibetan refugees have more facilities than other refugees in India. They have a residential permit to live in India, based on which they can get employment. The Tibetan refugee also receives a travel permit, based on which he can travel in or outside India. They work in agriculture, agricultural industries, and handicrafts. Tibetan refugees live peacefully in India, although cases of Tibetan violence occasionally occur. Bhutanese refugees also receive travel permits. Due to an agreement between India and Bhutan, there are no restrictions on Bhutanese refugees the movement from the borders of India and Bhutan. They are guaranteed residence, education, and employment without any documents. The Bhutanese refugee does not have the status of a refugee but is treated as an Indian citizen. Pakistani Hindu refugees also do not have refugee status. They live in the Gujarat state of India. Pakistani Hindu refugees work in the informal sector, where they have to face persecution. Recently, the Government of India has passed the Citizenship Amendment Act 2019, under which a provision has been made to give citizenship to Pakistani Hindus.

The United Nations High Commissioner for Refugees has granted the Burmese refugee's refugee status. They live in Mizoram and Delhi. He has a residential permit to live in India. The Burmese refugees mostly come from rural areas, due to which they are unable to write and speak English and Hindi. Due to which one has to face extreme difficulties in getting an education and employment. Burmese women face harassment at worksites and elsewhere.

The Somalia refugee is a refugee of African descent. The United Nations High Commissioner for Refugees has granted the Somalia refugee status. The Government of India has not given them residential permits, but the United Nations High

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Commissioner gives them subsistence allowance for Refugees. These subsistence allowances are not sufficient to fulfil their basic needs. They face more difficulties than other refugees. They are unable to speak English or Hindi, due to which they have to suffer in everyday life. They are discriminated against based on colour.

The United Nations High Commissioner for Refugees has granted the Palestinians a refugee status. While some are still waiting, they have taken refuge in New Delhi. Due to the difficulty of the language, there are many problems faced by people in getting employment and education. They do not get residential permits, due to which they have been forced to live in terrible conditions. The United Nations High Commissioner for Refugees only provides subsistence allowance to new refugees.

The Indian government has not officially recognized Afghan refugees. However, the United Nations High Commissioner for Refugees grants them refugee status. Afghan refugees receive a residence permit as well as a subsistence allowance. Many Hindu and Sikh refugees have socialized in Indian society. Many Afghan refugees work in the informal sector, yet they are spending their lives in poverty. Muslim Afghan refugees suffer more persecution than Hindu and Sikh Afghan refugees. Although the system of education is for all Afghan refugees, very few children have access to primary education. While the Afghan refugee girl leaves school due to many other reasons.

About 4000 Rohingya refugees are living in India. The High Commissioner of the United Nations to prevent violence, persecution, arbitrary arrest, detention and deportation against them has provided with an identity card for the refugees. The Indian government has given them the status of illegal migrants because the government considers them a threat to the security of India. Recently, Indian authorities have stopped issuing refugee cards to Rohingya by UNHCR, effectively giving small amounts of legal protection to some 18,000 registered Rohingya refugees in the country. The present government has played in many ways an important role in destroying the human rights of Rohingya refugees, including work, education, shelter, sanitation, health care, and basic social respect.

The situation of refugees in India has been discussed in such headings livelihood, health and education, exploitation and security, deportation, detention, repatriation and resettlement, permanent stay, treatment, and management of refugees.

It is the responsibility of the state to protect the refugees. When the state fails to provide security, the problems of refugees have increased. Many reasons or issues obstruct the safety of the refugees or the challenges that the refugees have to bear. The biggest issue or problem-related to the protection of the refugee across the world is related to the life and personal safety of the refugee. Refugees face maximum violations of this human right. Protection of other rights is a challenging task if there is no guarantee of life and personal safety. Many refugees lose their lives during the journey when there is no security by the state. The right to return is the human right of all refugees. However, this right has most commonly been misused by the states. The right to return should be voluntary, but many countries send refugees back to their countries by force. The crisis of life of a refugee arises due to being sent by force. It impedes the human rights protection of the refugee.

Xenophobia is also an essential issue of refugee protection. The refugees have to face the troubles related to Xenophobia in the new country where they take refuge. Xenophobia specifically targets individuals who are foreigners in a particular community. Practices related to Xenophobia sometimes take violent forms. Due to which the life of the refugees is threatened. Due to Xenophobia, refugees have to face difficulties in other facilities like school, health, and freedom to travel.

Racial discrimination is a significant cause of the refugee problem. Refugees face a wide range of issues due to racial discrimination. When racial discrimination is rampant, it takes the form of violence, causing a life and property crisis. Protecting the human rights of refugees is a big challenge due to racial discrimination.

The security of women refugees is a huge issue at the international level. Women refugees face the most human rights violations. They have to suffer the most mental and physical harassment, especially rape, human trafficking, prostitution, sexual violence. Therefore, it is impossible to protect the human rights of refugees without guaranteeing the safety of women refugees.

The protection of child refugees is also an important issue. Because they are the easiest targets for harassment, they can be used efficiently for bad things. They quickly fall prey to child crime, human trafficking, child prostitution, and sexual harassment.

Camps play an essential role in the protection of the human rights of refugees. However, the condition of most camps is exceptionally pathetic. Camps lack health facilities, schools, water, sanitation, electricity. Lack of security also leads to violence in camps and criminal incidents. Due to this, there is a crisis in the lives of refugees. Language is also a crucial issue for the protection of the human rights of refugees. Without knowing the language of the country in which the refugee has taken refuge, it becomes impossible to accept the facilities given there.

The identification of refugees is also necessary for the protection of refugees. Without an identity card, they are deprived of basic amenities. They are treated as illegal migrants without an identity card. Limited facilities are available without an identity card. They are kept in detention centres and after sent back to their country.

The biggest obstacle to the protection of refugees is not to follow the principles of burden sharing. Most refugees take refuge in developing countries, which lack resources. Due to which they are unable to protect the refugees. Therefore, refugees have to face a violation of human rights. The most accurate way to solve the refugee problem is a durable solution. In which three types of measures are used such as Voluntary Repatriation, Local integration, and Resettlement in the third country. In involuntary repatriation, the refugee is deported to his country, but voluntariness is very important for voluntary return. However, its violation is seen when the refugees are forced to go back to their country. The biggest challenge of local integration is to integrate the refugee into the people and culture of that country. There remains an intense fear of discrimination against refugees in local integration. Due to which the refugees have to face difficulties. For the resettlement in third countries, it is necessary to have an agreement with a third country, as well as that country should also be a party to the 1951 Refugee Convention. If a refugee is sent to a country where there is a shortage of resources, then the country will be unable to protect the refugee.

Findings

On the basis of the conclusion of all chapters, certain findings can be noted as follows.

1. The reason for the forced displacement in the world is no longer traditional. There are many reasons in the modern era that are forcefully promoting displacement. Due to which the problem of refugees in the world is increasing

day by day. One reason for this is the increase in human rights violations because the nation has failed to protect the human rights of its citizens for many reasons. In countries where there are minorities, the government does not pay much attention to the protection of human rights, due to which atrocities are more on them. These atrocities can be of any kind social, economic, cultural, sexual, or religious due to which they are forced to leave the country. Due to civil war, a country suffers from war for years. When people are affected by war, their lives become miserable. Due to which people are forced to seek refuge in another country in search of a good life. Poverty is also the main reason for the refugee problem. There are many countries whose economic condition is not good. Because of which citizens have to face many problems. Due to which they are forced to leave the country. Geographical degradation and climate change are also a reason why people have forced to leave their country because they are always at risk of life and property.

2. The 1951 Refugee Convention is an essential instrument for refugee protection. It has been almost 70 years since its adoption. However, the 1951 refugee definition is still used to determine refugees. This definition only covers persecution on five grounds, while at present; there are many reasons why people have been persecuted. Apart from this, persecution has also not been defined in this definition. The determination of persecution is complicated because there is no measurement to determine persecution.
3. The process of determining refugee status is essential, through which a person receives refugee status. Only after achieving refugee status can that person take advantage of the rights of the refugee. International refugee instruments do not specifically regulate procedures related to refugee status determination and the requirement to be followed for this. Its responsibility has been given to the United Nations High Commissioner for refugees and the States. The adjudicator makes a final decision based on an assessment of the claim submitted by the applicant, whether the person has established a well-founded fear of persecution. The burden of proof of persecution is on the applicant. It is used arbitrarily by states because the state has the authority to set procedures for determining refugee status. Therefore, the state avoids granting refugee status to any person due to which their chances of human rights violation increases.

4. The definition of refugees given in the Regional Conventions, such as the African Convention and the Cartagena Declaration, only applies at the regional level. While the definition of refugee provided by these instruments is more detailed than the definition of the 1951 refugee convention, this type of refugee definition is not widely applicable, making it challenging to provide refugee protection.
5. The doctrine of Burden Sharing talks about the coordination of the international community to work to solve the refugee problem and protect the human rights of refugees. However, this is not a binding principle, and it depends on the will of states. Due to a lack of coordination in international communities, this principle is not appropriately followed. Currently, the number of refugees in developing countries is high, while developed countries avoid giving refuge to refugees. An example of this is the United States, which has recently limited the number of refugees to enter America. Further, The European Union has agreed with Turkey to prevent the entry of refugees into European countries. The burden on developing countries increases as developed countries have prevented from giving asylum to refugees. Whereas the developing country lacks resources, due to which these countries are unable to protect the refugees and have to face extreme human rights violations.
6. A durable solution is an excellent solution to the refugee problem. However, to implement this, we have to face many functional problems. For example, the completion of the four conditions is essential for voluntary repatriation. They are ensuring that the situation has changed due to the displacement of refugees. Return is voluntary. There is an agreement between the parent state, the refugee state, and the United Nations High Commissioner for Refugees. Return with safety and dignity. They are ensuring that the circumstance of a country has changed or not is a complicated task because some situations are indirect, such as religious persecution, sexual harassment, environmental change. Voluntariness is mandatory for voluntary repatriation, but under the guise of this, many countries forcefully send refugees to the country of origin. As far as the agreement is concerned, the country that persecutes a community

is not ready to accept them, so there is much difficulty in the agreement with the country of origin. With this, ensuring that there will not be atrocities in the state of origin is a difficult task. In local integration, refugee countries refuse to sign agreements for local integration, seeing the increasing number of refugees because this will increase the number of people in their country and will increase the economic burden. Third countries also make agreements only for temporary shelter for resettlement in the third country. Still, sometimes these countries avoid joining the agreement because they too are afraid of increasing numbers and economic and political burdens.

7. The UN High Commissioner for Refugees works for the protection and assistance of refugees in the world, which is a non-profit and non-political organization. It organizes several programs and agreements for the protection and assistance of refugees. The protection and support of refugees required a substantial amount, which is provided by the financial support of the different countries. However, extensive protection and support of the refugee require more money. Therefore, due to lack of funds, there is a shortage in the protection and assistance of the refugee, who should get protection and support.
8. India has not adopted any refugee law at the national or international levels. Refugees are treated as a foreigner in India. The provisions of the Foreigners Act apply to the refugees. In the absence of domestic law, the authorities have a free hand on how to handle refugees. Due to which there is a possibility of atrocities against the refugees. Even though there is no refugee law in India, his or her rights are protected under the Indian Constitution. At the same time, Indian courts have played an essential role in protecting human rights for refugees. Indian courts have rendered judgments, from time to time, to protect the human rights of refugees. But now a day a change can also be seen in the attitude of the Supreme Court in recent deportation cases of certain refugees to Myanmar by giving references to national security and maintaining peace and order. Along with this, the Human Rights Commission has also played an essential role in protecting the human rights of refugees. In India, the United Nations High Commissioner for refugees provides refugee status to some persons and gives all kinds of facilities to refugees. However, these facilities are not enough. Hitherto, due to the unbridled treatment of refugees by the

government, they are forced to endure other sufferings. Those who do not have refugee status are treated as illegal migrants, and they do not get any government help because of which their life has remained complicated. Because of the non-acceptance of refugee law by India, the condition of the refugees is pathetic, especially those refugees who belong to the minority class. However, the Human Rights Commission had also directed the Government of India to adopt refugee law. If the Indian government takes the refugee law then issues related to India's security can also be resolved.

9. Many countries in the world do not have a political desire for refugee protection because of which they do not accept any refugee law. If they receive any refugee law, then they will be bound to give refuge to the refugee an example of which we can be seen in the South Asian countries, where many countries have accepted neither the refugee convention nor any laws at the national level. It is due to political reluctance that many European countries have accepted the Refugee Convention, yet they refrain from giving protection to refugees in their country. Therefore, due to political reluctance, refugees do not get proper protection and assistance.
10. An essential issue in refugee protection is to prevent gender-based violence. Currently, the number of female and LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, asexual) refugees is increasing in the number of refugees. They have to suffer gender-based violence in their country, during travel, and in the state of refugees. They have to face discrimination in everyday life like education, health, employment, and travel based only on gender. Women and LGBTQIA have to endure atrocities like rape, sexual harassment, human trafficking, which adversely affects their mental, physical, and social health. Gender-based harassment is not considered a cause of persecution in the Refugee Convention, while harassment based on gender is the leading cause of forced displacement. In the process of determining refugee status, they also face discrimination based on gender, and while giving them protection, they should be given priority in this process.
11. Refugee camps play an important role in refugee protection. It is temporary resettlement designed to accommodate refugees. Refugees are kept in camps to protect them from persecution and to provide them rehabilitation. The situation in those refugee camps is proper where the numbers of refugees are

small, but on average, the condition of almost all the refugee camps is not satisfactory. About 64 per cent of the refugee camps are built-in rural places. Only 60 to 65 per cent of the numbers of refugees in the world are living in refugee camps. Due to the number of camps being smaller than the number of refugees, refugees are placed in camps with higher capacity. Because of the refugee camps located in rural areas, there is a lack of cleanliness, which poses the risk of infection with many diseases. Refugees also have to struggle in the camps in everyday life, a person gets 20 liters of water, and if they do not get water, then they have to go to dangerous places, and 20 people have to share one toilet. The condition of health centers and schools is also pathetic. The number of health centres and schools is much less than the number of refugees, due to which the refugees are not able to get health care and education properly. The most critical issue in refugee camps is safety, there is no security system in the camps, due to which crimes against women and children are high. The incidences of sexual offenses with women are particularly noted. Police stations are located far from the camps. Since refugee camps take place in rural areas, refugees have to face employment problems. Due to a lack of employment in the camp, they leave the camp in search of employment, due to which they face difficulty. The refugee camps are constructed and arranged in collaboration with the governments and United Nations High Commissioner for Refugees. There is a shortage of resources in camps due to lack of funds and the increasing number of refugees. Therefore, there is a greater need for the co-operation of governments, NGOs, and funds to protect the human rights of the refugee.

TESTING OF HYPOTHESIS

The researcher has tested the following hypothesis based on the research work.

- 1. The increasing refugee crisis is the result of a very narrow and confined definition of the United Nations Convention Relating to the Status of Refugees, 1951.**

On the basis of the research work, it is found that the definition of refugee given under the 1951 Refugee Convention was adopted about 70 years ago. However, still, the status of the refugee is determined only based on persecution caused on five grounds like race, religion, nationality, membership of a particular social group, and

political opinion, whereas since 1951, the present-day national and international situation has changed.

According to these changes, many grounds have arisen, which have led to an increase in the number of refugees such as, gender-based persecution, sexual violence, geographical degradation, climate changes, internal and external aggressions, poverty, disturbances of public order, civil war, occupation, foreign domination, massive human rights violation, famine or flood, and international conflicts.

Besides, harassment has not been defined due to which harassment is difficult to ensure. Due to which the scope of the definition of a refugee has reduced. As a result, many people leave their country for fear of persecution and do not receive the benefits of refugee protection due to the limited definition of refugees. Therefore, due to which the refugee problem has increased. Hence, it can be said that the hypothesis has been proved.

2. Law relating to the protection of refugees in India is not capable enough to stop the violation of the human rights of refugees.

On the basis of research work, it is found that India has not adopted any specific law relating to the refugee. Moreover, it is also not the party of the 1951 refugee convention. This means that refugees in India are not receiving any legal status. Refugees in India are considered as other nationals or foreigners, and they have protection on an ad-hoc basis. Refugees in India have the same rights as a foreigner. India protects the refugee on humanitarian grounds, even when there is no refugee law. They are protected in India according to the Indian Constitution, the law relating to foreigners, and the human rights laws accepted by India. Some communities in India enjoy refugee status by the United Nations High Commissioner for Refugees. Protection of refugee rights, despite being a refugee certificate, depends on the will of the government in the absence of any refugee law due to which government officials get a free hand to commit atrocities against refugees. Apart from that, the fundamental human rights of refugees are not protected as these laws do not oblige the government to protect the human rights of refugees if there is no refugee law. In the absence of the refugee law, it is challenging to determine the actual status of the refugees and the rights they receive, by the present law. Apart from this, it is difficult to identify a refugee from the displaced people.

Therefore, despite the laws that exist in India, there is no hesitation in saying that whatever measures are in place to deal with the refugee problem are not sufficient. Hence, it can be said that the hypothesis has been proved.

3. NHRC and the Indian judiciary are playing a vital role in the protection of the rights of refugees.

On the basis of research work, it is found that Indian courts and the National Human Rights Commission have played an essential role in protecting the human rights of refugees, even in the absence of any specific law relating to refugees in India. The Indian Court has given several decisions to protect the refugees in the light of the Indian Constitution, the international human rights instruments accepted by India, and law related to foreigners. The courts have also declared rights of refugees recognized in the Indian Constitution, such as the right to equality, the right to life and personal freedom, the right to religion, the right not to be persecuted, a stranger has enjoyed. Courts have taken the following decisions through their proceeding.

In the case of *Luis De Raedt v. Union of India*, Article 21 guarantees the protection of life and personal liberty to foreigners and refugees, and they can be deprived of life and person liberty by the only procedure established by law.

The high court of Gujarat held in the case *Ktaer Abbas Habib Al Qutaifi v. Union of India* that Article 21 of the Constitution included the principle of non-refoulement, so long as the presence of the refugee is not exempted from prejudice to the law & order and security of India. The court further stated, the right of non-refoulement also available related to the person awaiting determination of status by the UNHCR.

In the case of *NHRC v. state of Arunachal Pradesh*, the Supreme Court held that where the refugees had been in India for a long time, they were entitled to protection and appropriate treatment until the matter was determined.

In the case of *MalavikaKarlekar v. Union of India*, the Supreme Court directed a stay of deportation of Burmese refugees because their claim for refugee status was the pending determination by UNHCR. Moreover, in another case, *P. Nedumaran v. Union of India*, the court held that concerning the Sri Lankan refugees in Tamil Nadu, there existed a right not to forcibly repatriated, and repatriation was not to be undertaken in these cases unless the return was found to be voluntary.

These decisions are based on two aspects of the refugee problem—first, the expulsion of the refugees by the government and the refugee's demand for refugee status. Second, the safeguarded return to the refugee's home should be voluntary, and they should not force to return to their country of origin. Apart from these, there are many other decisions in which the court protects the human rights of refugees. The National Human Rights Commission established by the Protection of Human Rights Act, 1993, has also played an active role in the protection of the human rights of refugees. The Commission investigates the violation of the human rights of a person by suo-moto or by petition. The Commission has taken specific steps concerning the protection of Chakma refugees and has effectively intervened in the illegal detention of Sri Lankan refugees in the state of Tamil Nadu. The National Human Rights Commission in the year 2000-01 report directed the Government of India that there should be a comprehensive national refugee law to deal with the problem of refugees.

Therefore, it can be said that the Courts and Human Rights Commission has played an essential role in preserving the right of the refugee. But now a day a change can also be seen in the attitude of the Supreme Court in recent deportation cases of certain refugees to Myanmar by giving references to national security and maintaining peace and order.

4. Lack of national and international political will to improve the socio-economic and legal status of refugees creates a hindrance to improve their situation.

On the basis of research work it is found that, currently, one reason for the increasing number of refugees and their pathetic status is the lack of political will at the national and international levels for the exhortation of refugee's condition. The status of a refugee living in any country depends on the political will of that country. Many countries have neither adopted the international refugee law nor created any specific refugee law at the national level, because of which they have to bear many socially, economically, and legal problems in that country.

An example of this is observed in India, where no refugee law has been accepted due to the government's lack of political will. As a result, the social, economic, and legal status of its refugees is exceptionally pathetic, Especially Rohingya refugees whose social, economic, and legal status is incredibly pathetic due to lack of any facility from the government. Due to the unwillingness of political will, many

countries prevent refugees from entering the country and try to force the evacuated refugees out, which does not improve their social, economic, and legal status.

The United Nations High Commissioner for Refugees works for the protection and assistance of refugees all over the world, for which cooperation of the countries is also necessary. However, some countries, due to political reluctance, do not cooperate in the work done by the United Nations High Commissioner for Refugees, which makes it extremely difficult to provide refugee protection and assistance to refugees. Because of which their condition remains pathetic.

Therefore, it can be said that the social, economic, and legal status of the refugees depends entirely on the political will of the countries, because where the political will is right, the condition of the refugees is respectable, such as in Turkey. Moreover, in some countries because of the lack of political will the refugee situation is pathetic, e.g., India, Bangladesh, Kenya, Pakistan, and America.

Suggestions

On the basis of the above findings the researcher has offered some suggestions to be incorporated at the international level in general and at the national level in particular which are mentioned as follows:

- The Indian government must take the initiative to enact a unique and exclusive law related to the refugees.
- Mutual cooperation between destination and transit countries should be promoted in order to increase the protection of refugees.
- A legal cell should be established for taking care of the issues relating to refugees like sexual exploitation, trafficking, atrocities, and other issues relating to the violation of human rights.
- An individual department at both central and state levels should be established to look after the protection of refugees.
- A special unit should also be established to provide a border security force for the humane treatment of refugees both at the national and international levels.
- The provisions related to asylum and protection for refugees should be followed as per the due process at borders.
- The United Nations Convention relating to the status of refugees, 1951, should include some more grounds of persecution in the present time like; human rights violation, internal and external conflict, climate change, natural disaster, external

CONCLUSION AND SUGGESTIONS

aggression. Moreover, gender-based persecution should also be included, like the female, third gender, and LGBTs.

- The principle of non-refoulement should be made the necessary part of the constitution of every country by adopting any convention or resolution.
- An early warning system should be developed to identify the threatened nations and react to them.
- The awareness relating to the protection of refugees should be spread through the seminar, symposium, and debate at the national and international levels.
- The durable solution should be adopted and followed by all nations to protect and support refugees and asylum seekers.
- A responsibility-sharing formula should be developed to prevent the mass migration of refugees.
- The temporary protection should be used on a large-scale to protect people who are displaced due to natural disasters.



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APPENDICES



Appendix- 1

Convention relating to the Status of Refugees

**Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries
on the Status of Refugees and Stateless Persons convened under General
Assembly resolution 429
(V) of 14 December 1950**

Entry into force: 22 April 1954, in accordance with article 43

Preamble

The High Contracting Parties ,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees,

and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows :

Chapter I GENERAL PROVISIONS

Article 1. - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration

at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2. - General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3. - Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4. - Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5. - Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6. - The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7. - Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8. - Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of

such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9. - Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10. - Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11. - Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II JURIDICAL STATUS

Article 12. - Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13. - Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14. - Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15. - Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III GAINFUL EMPLOYMENT

Article 17. - Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18. - Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19. - Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

3. Chapter IV WELFARE

Article 20. - Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21. - Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22. - Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23. - Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24. - Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

ChapterV ADMINISTRATIVE MEASURES

Article 25. - Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26. - Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27. - Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28. - Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29. - Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30. - Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the

country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34. - Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI EXECUTORY AND TRANSITORY PROVISIONS

Article 35. - Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) The condition of refugees,
- (b) The implementation of this Convention, and
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36. - Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37. - Relation to previous conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10

February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII FINAL CLAUSES

Article 38. - Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39. - Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40. - Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41. - Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42. - Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43. - Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44. - Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45. - Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46. - Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1; (b) Of signatures, ratifications and accessions in accordance with article 39; (c) Of declarations and notifications in accordance with article 40; (d) Of reservations and withdrawals in accordance with article 42;
(e) Of the date on which this Convention will come into force in accordance with article 43; (f) Of denunciations and notifications in accordance with article 44; (g) Of requests for revision in accordance with article 45.

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

Appendix- 2

Protocol relating to the Status of Refugees

The Protocol was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966. In the same resolution the General Assembly requested the Secretary-General to transmit the text of the Protocol to the States mentioned in article V thereof, with a view to enabling them to accede to the Protocol entry into force 4 October 1967, in accordance with article VIII.

The States Parties to the present Protocol, Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article 1. General Provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to

the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

Article 2. Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 3. Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article 4. Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 5. Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed

by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 6. Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article 7. Reservations and declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph I of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs I and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article 8. Entry into Protocol

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article 9. Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article 10. Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto .

Article 11. Deposit in the archives of the Secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article 5 above.