



PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW: AN ANALYSIS

Mohd Owais Farooqui

NALSAR University of Law, Hyderabad, India,

ABSTRACT

Persecution of individuals and groups based on difference in race, ethnicity, color, culture, religion, political ideology and region etc. is a very old phenomenon which repeats itself in the annals of human history. People have been struggling in different ways to escape such prosecutions. However, many are not able to cope up with the stressful situation and would prefer migration to peaceful areas. Many countries in the world have faced the internal civil war between different politico-social groups. This also creates dire situation for general populace which tries to flee from war ravaged nations. The origin of international human law, modern refugee law can be traced back to the world war crisis in which huge number of people lost their lives. World wars also saw violation of



basic human rights. Article 14(1) of the Universal Declaration of Human Rights (UDHR), which was adopted in 1948, guarantees the right to seek and enjoy asylum in other countries.³

The author attempts to analyze the current legal regime of refuge protection and tries to suggest the plausible for the betterment of the refuge rights & protection.

KEYWORDS:

Protection of Refugees , international Law , political ideology.

The set of rules and procedures laid down by the International refugee law is to protect, first a person seeking refuge from persecution or political unrest or armed conflict and second those who have been recognized as refugees under the relevant instruments. The set of guarantees are provided by the legal framework for this group of people. Protection provided the legal framework overlaps with international human rights law to a certain extent. The main sources of refugee law are treaty law, notably the 1951 Convention relating to the status of refugees

(1951 Refugee Convention)¹ and its 1967 Protocol (Relating to the Status the Refugees)² , and customary international law. However Customary international law applies to all states irrespective of whether they are a party to relevant treaties or not.

The 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol are the only international instruments directly applied to refugees. Both the Convention and the Protocol are open to states, but each may be signed separately. 145 states have ratified the Convention, and 146 have ratified the Protocol. Hence, these instruments only apply in the countries that have ratified them. Although, some countries have ratified these instruments subject to various reservations.

Article 1(A)(2) of the refugee Convention 1951, read with the 1967

¹ United Nations General Assembly resolution 429(V) of 14 December 1950

² Resolution 2198 (XXI) adopted by the United Nations General Assembly

³ Ullah, Akm Ahsan(2011) 'Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization', Journal of Immigrant & Refugee Studies, p-3

Protocol, defines a refugee as:

"A 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 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"

Certain key terms which have been defined in the 1951 convention are of importance in order to understand the way these procedures operate. These are:

PERSECUTION:

The convention proposes, as a minimum level of relief that refugees should receive. Despite the fact that the risk of persecution is fundamental to the refugee definition. The word "persecution" itself is not defined in the Convention. Articles 31 and 33 allude to those whose life or liberty "was" or "would be" endangered, so obviously it includes the risk of death, or the risk of torture, or cruel, brutal or inhuman treatment or punishment. A few commentators argue that no definition was felt required as its meaning was well clear from past instruments and experience, others propose it was purposely left unclear all together in order that newly emerging forms of persecution would be covered.⁴ Whatever the reasons, the reality is that the Convention does not legally characterize persecution is a strong sign that, on the ground of the experience of the past, the drafters planned that every single future type of persecution should be covered by the term. However the Council of Europe which attempted to provide direction on what constituted persecution included a non-exhaustive list in the Qualification Directive of acts that could be considered persecution such as:

Acts of physical or mental violence, including acts of sexual violence; legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment, which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2). The persecution at issue also does not need to have been committed by a State actor, persecutory acts committed by non-state actors may qualify under the 1951 Convention where the State is unwilling or unable to protect the individual claiming refugee status.⁵

Asylum Seeker

A Person within a State Party or in a state where UNHCR is allowed to operate, and who has applied for recognition as a refugee.

Well-founded fear:

Individual States have interpreted the 1951 Convention's requirement of a well-founded fear of persecution to require asylum seekers to show that there is a reasonable possibility that they will suffer persecution if returned to their country of nationality or habitual residence.⁶ This is considered to be both an objective and subjective standard. Although well-founded fear refers to a future threat of persecution, individuals who have faced persecution in the past are presumed to have a well-founded fear.⁷

RELATION OF PERSECUTION AND THE GROUNDS MENTIONED IN ARTICLE 1 OF CONVENTION ON REFUGEES 1951:

There must be a causal nexus between one of the five grounds and the persecutory act. In practice, this means that applicants must show that one of the protected grounds was or will be at least one central reason for the persecution.

⁴ The concept of the refugee in international law (1960), 87 JDI 928 at 970

⁵ Council of Europe; *The Qualification Directive of Acts*; Art 6

⁶ Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

⁷ Immigration Rules, 2012, S.I. 2012/11, Art. 339 K (U.K.).

RACE, RELIGION, NATIONALITY

The asylum applicant need not actually possess the racial, religious, or national characteristic in question provided that characteristic was attributed to the asylum seeker by the persecutor and is the reason for the persecution.⁸

POLITICAL OPINION

Like the above three grounds, political opinion may be imputed to the asylum-seeker. There is some debate as to whether neutrality may qualify as a political opinion for the purposes of obtaining asylum.⁹

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

There is still a lack of consensus as to what constitutes a particular social group and whether classes of persons not included in the 1951 Convention who nonetheless face persecution, such as women and homosexuals, fall within this category. The Council of Europe has stated that persons may be considered to constitute a particular social group when they share a common immutable characteristic, that is, something innate to their being or so fundamental to their being that they cannot be expected to change it, and have a distinct identity within their country of nationality or habitual residence because they are perceived as being different by that society.¹⁰

The convention on Refugees has its roots in Article 14 of UDHR 1948, which established the right to seek asylum in other country in the event of persecution. The convention is centerpiece of refugee protection regime in the world. Originally this convention was made for the refugee of Europe due to Second World War. However soon after it cold war and other newly independent state tensions created huge influx of refugee which was now global in nature therefore to overcome this scale and extent of refugee crises. The time and geographical limitation was removed by the protocol¹¹ of 1967, now the convention¹² will have universal coverage, this convention also get strengthen by regional treaties on refugee like

- a) The 1966 Bangkok Principles on Status and Treatment of Refugees¹³
- b) The 1969 Organization of African Union Convention¹⁴
- c) The 1976 Council of Europe's Recommendation¹⁵
- d) The 1984 Cartagena Declaration¹⁶
- e) The 2004 European Union's Council Directive on minimum standards for the qualification and status of third country nationals and stateless Persons as refugees or as persons who otherwise need international protection and content of the protection granted¹⁷
- f) The American Declaration on the Rights and Duties of Man¹⁸ (art. 27)
- g) The American Convention on Human Rights¹⁹ (art. 22)

⁸Council of Europe; *The Qualification Directive of Acts*; Art 10(2)

⁹Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)

¹⁰Council of Europe; *The Qualification Directive of Acts*; Art 10(1)(d)

¹¹Protocol Relating to the Status of Refugees; 4 October 1967

¹² 1951 convention relating to the status of refugees

¹³ Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles")*, 31 December 1966

¹⁴Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969,

¹⁵ Council of Europe, *Recommendation 787 (1976) on Harmonisation of Eligibility Practice under the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol*, 16 September 1976

¹⁶*Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984

¹⁷European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004

¹⁸American declaration of the rights and duties of man; The Ninth International Conference of American States, Bogotá, Colombia, 1948)

- h) The African [Banjul] Charter on Human and Peoples' Rights²⁰ (art. 12)
- i) The Arab Charter on Human Rights²¹ (art. 28)
- j) The Cairo Declaration on Human Rights in Islam²² (art. 12)
- k) The European Convention on Human Rights²³ (arts. 2, 3, and 5)
- l) The ASEAN Charter²⁴ [Article 1(7)]

EXCEPTION OF 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

This convention has some exception which may be summarized as follow:-

- a) Any person who has committed war crime against humanity.
- b) Any person who has committed serious non-political crime.
- c) Any person guilty of action contrary to the principles and purpose of united nation.
- d) Any person who is the beneficiary of the protection or assistance of any UN agency except UNHCR for example UNRWA²⁵ for Palestine refugees
- e) Any person who have a status similar to the nationals of the country where he/she have taken asylum.

In 2001, States parties issued a Declaration reaffirming their commitment to the 1951 Convention and the 1967 Protocol, and they recognized in particular that the core principle of non-refoulement (Non-refoulement is a rule of international law which forbids the returning of a victim of persecution to his/her persecutor. Generally, the state actor is a persecutor) is embedded in customary international law²⁶. Under Article 2 of convention, the refugees are duty bound to follow rules and regulation of hosting country and to do all needful thing to maintain public order on their part. Article 3 says about the duty of contracting states to be none discriminating as to religion, race and country of origin of refugee. However breach of Article 3 is observed some time by authorizes of the hosting country. Article 4 gives freedom as much as to the national of hosting country with regard to the religion and its education to their children. Article 5 declare that the right given to refugee under this convention is minimum standard which every contracting state have to fulfill and if they want to give some additional benefit than they are free to do so

Chapter II of the convention deals with the juridical status of refugee and declare that the personal status of refugees will be governed by laws of the country of his/her domicile and if he/she has no domicile than in that case by the law of country of his residence. Rights which are by the virtue of personal status for example right attached to marriage must be respected by hosting state. However refugee has to follow the formalities of compliance of hosting state. Rights to property moveable or immoveable shall meets at least to the level of a foreigner in the hosting country. Artistic and intellectual property right of refugee shall not be less than that of nationals of hosting country. Refugees has the right to association (non political) and Access to the court not less than that of foreigner in the hosting country.

Chapter III of convention deals with the wages and employment and says that refugee will be given the maximum freedom for employment and wages which are given to the national of a foreign country and no restrictive measures will be applied on refugee which is imposed on the employment of foreigners for the protection of domestic labour market. However if a refugee has stayed for 3 years in the hosting country or he/she has a spouse who possess nationality of hosting country or he/she has children having nationality of the country of residence than in these cases the restrictive policy of contracting state can be applied to them The

¹⁹ Organization of American States (OAS), *American Convention on Human Rights "Pact of San Jose, Costa Rica"* (B-32), 22 January 1969

²⁰ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981.

²¹ League of Arab States, *Arab Charter on Human Rights*, 15 September 1994

²² Organization of the Islamic Conference (OIC), *Cairo Declaration on Human Rights in Islam*, 5 August 2015.

²³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950

²⁴ Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012

²⁵ United Nations Relief and Works Agency for Palestine Refugees in the Near East

²⁶ Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16 January 2002.

hosting state will also accord sympathetic consideration to make refugee at par with their own national in respect of wages and employment but not less than to the foreign nationals in the contracting state of residence

Chapter IV deals with welfare regime which include rationing, housing, public education, public relief and social security all such support and facilities shall be given to the nationals of the contracting state. However in case of housing and higher education contracting state can differentiate refugee to that of their own nationals but not below to the maximum level given to the foreign nationals in the contracting state. Article 32 prohibits the expulsion of refugee save on the ground of public order and national security. Article 34 says about naturalization of refugees as a process of assimilation and this should be done as soon as possible and contracting state will try to reduce the cost and charges of such proceedings. Article 38 deals with case of dispute between the parties and for the settlement of any such case must be referred to international court of justice by any party to the dispute.

UNIVERSAL DECLARATION OF HUMAN RIGHTS²⁷

The opening lines of preamble of UDHR make it abundantly clear that the rights given it will be applicable to all of humankind including refugees these golden words are:-

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”²⁸

Article 2 of it further make this point clear that the right under it will be applicable to all irrespective of any kind of status and classification of person. This declaration is not a treaty, so it cannot be legally binding, but some political thinkers are of the opinion that this declaration's acceptance by majority of nation over a period of 60 years make it a customary international law which are legally binding in nature. However this declaration is an expression of all member states at the same time it is a minimum fundamental values of modern era mankind. Nevertheless this declaration is guiding light for many legally binding agreements and in event of absence of any settle principle of law or treaty UDHR became the scale for judging and taking appropriate action. Article 3 says about the right of life, security and liberty of every person. Actually an asylum seeker core objective of moving out of his/her country of residence is same as mention in Article 3 of UDHR

Article 14 is the root of refugee laws in general this article says about the right to seek asylum but with exception imposed by sub clause 2 of the same Article which declare that in case of genuine prosecution due to non political offence or by acts against the principles and the purposes of the United Nation for example crime against humanity, war crime and crime against peace.

Article 5 of UDHR says about torture, cruel, inhuman and degrading treatment or punishment shall not be given to anyone. However by not allowing refugee to escape from the territory where they are subjected to torture and killing is indirectly contrary to Article 5 of UDHR by omission of protection to the refugee. Article 9 also became operational in case of refugees which gives right and protection against arbitrary arrest, detention and exile. Article 13(2) gives right to everyone to leave his own country or to any country and to go back to his own country. this can be similar to non refoulement and repatriation right of refugee.

Article 16(3) declares family to be basic and natural unit of society therefore family is entitled to be protected by state and society, but contrary to it sometime one or two member of the family are given asylum and other are denied or family member are put into different camp on the basis of unreasonable doubt against individuals refugee like in case of Tamil refugee in India, where hundreds of male member of families were put into observation camp on the doubt of well wisher of L.T.T.E²⁹. Similarly in case of Rohingya refugees it is very common trend now that families are break up during transit journey and sometime by arrest and human trafficking

²⁷General Assembly resolution 217 A on 10 December 1948 at the [Palais de Chaillot](#), Paris

²⁸Preamble of UDHR

²⁹Liberation Tigers of Tamil Eelam is a separatist group which began its armed campaign in support of minority's rights in Sri Lanka in 1983.

Article 22 and 25 of UDHR gives right related to social security, economic, cultural and social right to everyone expressly in addition to the right to a standard of living which is conducive for health including food, housing, clothing, and medical care. Right to security in case of sickness, disability, unemployment, widowhood, old age, lost or lack of livelihood under circumstances beyond his/her control. Special attention, care and assistance should be given to motherhood and children. Article 23 gives right of work and employment, without any discrimination with regard to Wages and work.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS³⁰

India is a state party to this covenant and hence as a contracting party all provision of it are to enforced by government and state machinery ICCPR is a step toward protecting the civil and political right of all humankind and recognized the instructive dignity attached to every individual, at the same time endeavour to promote condition within states for the full enjoyment of such rights as mentioned in the covenant. The contracting states parties are obligated to uphold at least basic human rights and are bound to take legislative, administrative and judicial measures with an objective to protect the rights mentioned in this covenant and to provide an effective mechanism for speedy redressal of such right in the event of violation. This covenant along with its two protocols (first optional protocol³¹ and second optional protocol for abolition of death penalty³²) are essential part of international bill of human rights³³

ICCPR had a preamble with 53 articles, broadly divided into six parts. Part 3 deals with the rights themselves (Articles 6 – 27). Some of them are also applicable to refugees which are as follow:

Article 6 of the covenant declare that everyone have right to life irrespective of nationality so it will also applicable to refugees and asylum seeker right to life does not mean only surviving but dignified life and other inherent thing attached to it for its proper enjoyment and development. Article 7 says about prohibition of torture, inhumane, cruel and degrading treatment as it is common phenomena whenever refugees try to pass international border they are treated in contravention of the rights provided by this article specially by police, border forces and other law enforcement agencies Article 9 talk about right to liberty and security of every person within the boundaries of contracting states. Provision of this article gives rights against arbitrary arrest and detention and also direct the authorities in case of arrest and detention, the detainee must be produced before competent authority promptly and the matter should be disposed of as soon as possible or at least the detainee must be released on bail so that his right of liberty does not violates. Article 12(1) gives right to movement and freedom to choose his/her residence, sub clause 4 of the article provide right to enter his own country (repatriation). Whereas sub clause 2 provide right to leave his/her own country

Article 13 gives right against expulsion of alien which include refugees also, except in case where there is compelling ground of national security. However even under such security threat reason must be recorded and same will be submitted before competent authority for its review. Article 16 provide right to recognition as a person before law many time refugees and asylum seeker are not given this right by law enforcement agencies. Article 17 gives right against interference of any person privacy, family, and home. However in name of security reviews and checking this right of refugees are violated sometime by state machinery. Article 23 declare family and marriage are fundamental element of society and ever one has right to marry and have family. Article 24 says that every child have right to registered his/her name immediately after his/her birth and also have right to acquire a nationality. Article 26 declare that there should be no discrimination as regard to equal protection of the law so there must be parity of relief and other benefits provided to the refugees of different origin and nationality but in India we notice that some class of refugees are taken care of more than the other without having any rational ground for this differential approach.

³⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966

³¹ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966,

³² UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989

³³ UN General Assembly, *International Bill of Human Rights*, 10 December 1948

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS³⁴

This covenant's preamble recognizes all rights enumerated in it by the virtue of humanity and inherent dignity of every person. India ratified and acceded to the ICSCR³⁵ on 10 April 1979. It contain right related to reasonable standard of living, including food, clothing, health and housing(article 12) and the right to education (Article 13).³⁶ Article 6 and 7 says about right to work and equal wages for equal work and to achieve this contracting state shall used vocational and technical guidance and training programs, and try to provide full and productive employment. Article 9 gives right to social security to all living under the contracting state. Article 10 provide the protection to family and recognizing it as a basic unity of society, mothers should be given special care and protection before and after the birth for a reasonable time period and young person and children should be protected and supported by state to avoid exploitation

CONCLUSION:

There are three traditional durable solutions to the refugee problem:

- a) Resettlement in third countries
- b) Local integration
- c) Voluntary repatriation(organized repatriation and spontaneous repatriation)

Presently, great stress is laid on the solution of voluntary repatriation which is described as the ideal and the most desirable solution³⁷. According to the opinion of UNHCR, for India local integration is the best solution and also easily achievable as Indian society is culturally, socially, religiously multi dimensional therefore refugees from different part of the world can be assimilated with best suited community available to them

³⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966

³⁵ International covenant on economic, social and cultural rights 1966

³⁶ Rajeev Dhavan, *Refugee Law and Policy in India*(PILSARC, New Delhi,2004); pg-65

³⁷ B.S. Chimni (ed.), *International Refugee Law* 381(Sage Publications, New Delhi, 2000), p-331