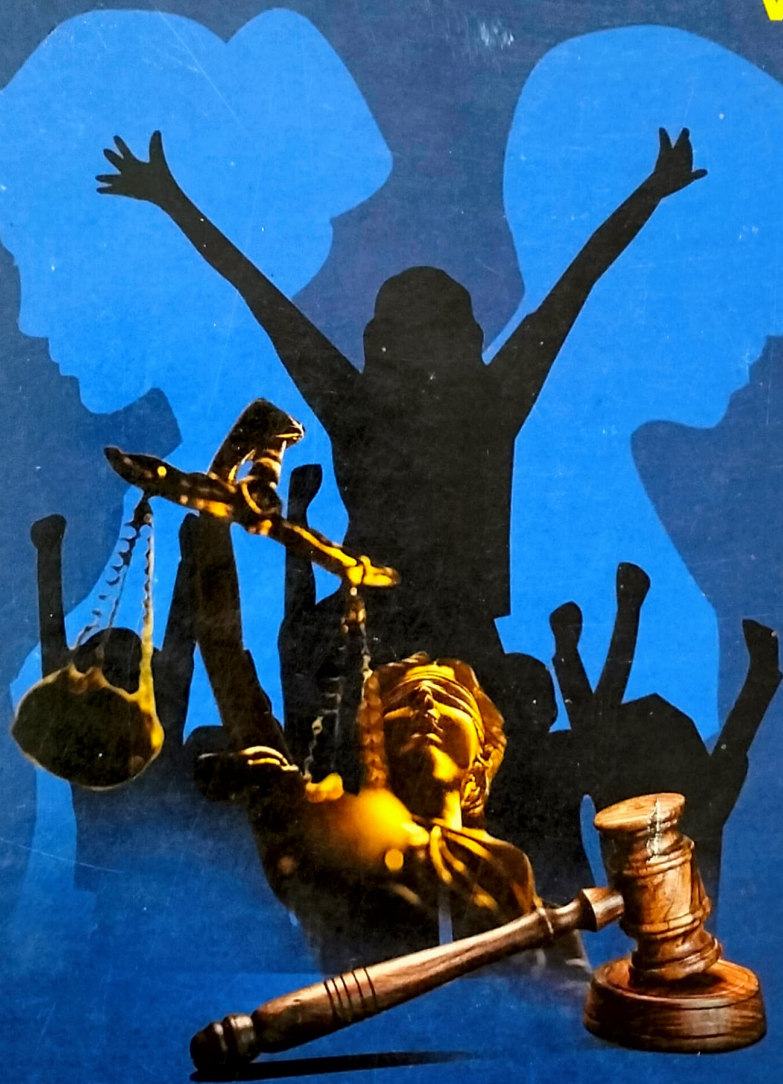


# HUMAN RIGHTS & GENDER JUSTICE

**Vol-2**



Editor  
Dr. Abul Foyes Md Malik



# **HUMAN RIGHTS AND GENDER JUSTICE**

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# An analysis of the Principle of *Non-refoulement* and Refugee Rights under In- ternational Law

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## 1. Abstract

This article first describes the background of refugee law and its evolution in course of time. It focuses on the definition of refugee and throws light on various attempts to define actually who the refugees are. The two world wars resulted in large number of stateless person which actually geared up the discussion on the problem of refugees. In course of time refugee rights became a serious issue due to exploitation, discrimination and ever-increasing number of refugees in the world. Institutions like IRO, UNHCR along with different conventions formulated various refugee rights under international law. The principle of *non-refoulement* is considered one of the major principles related to refugee protection under international law. The exercise of principle of *non-refoulement* by the states while dealing with the refugees or stateless person has become very much controversial now a day. The article attempts to highlight major refugee rights under international law with special focus on the principle of non-refoulement.

*Key-words: refugee, refugee rights, UNHCR, international law, non-refoulement*

## 2. Statement of the Problem

The problem of Refugee as well as stateless person is a major one now a day. Entire world is now facing it either direct or in an indirect way. The two world wars resulted in a sizeable number of stateless people. It depends upon the states where the stateless person is seeking shelter that whom will be given the status of refugee. Hence all the stateless people are not considered as refugees. The human rights and security of the stateless people gradually became a matter of concern as they were often became the subject of exploitation and inhuman treatment. At the initial stage UDHR mentioned about the human rights to everyone and then International Refugee Organization (IRO) was established in 1946 which was a historic step for the cause of refugees. After that United Nations High Commissioner for



Refugee (UNHCR) replaced IRO as the responsible agency for the protection of the refugees in the world. After that 1951 Convention and 1967 Protocol is considered as the instruments which extended enormous rights and protection to the refugees.

The 1951 Convention and 1967 Protocol offers the definition of a refugee as 'any person who owing to well-founded fear of being persecute 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 wing 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, is unable or, owing to such fear, is unwilling to return to it'. The 1951 Convention considers a person refugee who satisfies the criteria laid down in Article 1, but does not mention any measures to as to how eligibility is to be determined in any contracting state (states party to the Convention) but leaves the matter with the asylum state. In order to determine who is a refugee, the criteria is based on the establishment of well founded fear of persecution. The important criterion in the definition is that a person claiming refugee status should be outside the country of his origin owing to well founded fear of persecution. The fear of persecution and lack of protection remain the two main factors for determining the criteria for refugee status.

Article 33 of the 1951 Convention for the first time expressed the principle of *non-refoulement*, a measure for the protection of the refugees. *Non-refoulement* is a concept which prohibits states from forcefully returning a refugee or asylum seeker to territories, whether their own nation or a different one, where there is a risk that his or her life or freedom. In the era of global terrorism and ongoing crisis in the third world countries, the number of stateless people is increasing day by day. Hence the rights and security of the refugee must be ensured by the world community.

### 3. Significance of the Study

The number of stateless person is rapidly growing in present times. Either state sponsored violence or non-state actors are responsible in so many ways for the shifting status of citizens to stateless person. The refugees are part of the concept of stateless person and it depends upon the sheltering nation whether they confer them the status of refugee or not. Then it comes about their rights and basic necessities which are primarily expected from the sheltering nation. Here comes the controversy as their rights and facilities may differ from nation to nation. The miserable condition and the substandard life style of the refugees is a common phenomena in the world. Since the establishment of International Refugee Organization (IRO), there were concerns about their human rights. Later on, the formation of United Nations High Commissioner for Refugees (UNHCR) and subsequent conventions and protocols laid down various human rights for the refugees under International law. The human



rights of the refugees have been subject to violation by both state and non-state elements in course of time.

The proposed study focuses upon the rights of the refugees under International law as it has been proven very much crucial for their protection. The principle of *non-refoulement*, since its inception, is working as a safeguard for the refugees. Many a times the deportation or expulsion of refugees/stateless persons is wrongfully handled by the nations for their benefit and principle of *non-refoulement* acts as a protecting measure in such occasions.

#### 4. Limitation of the Study

The proposed study emphasizes on the rights of the refugees. It attempts to examine the human rights of the refugees under International law. Regional frameworks are not discussed in this study. The principle of *non-refoulement* is discussed in this study and examined its role as a protecting measure to the refugees.

#### 5. Methodology

In preparation of this research paper, descriptive cum analytical was considered as fit for the study. Hence the same method is followed in this study. Required data collection is purely based on secondary sources like journal, magazine, books, articles, reports etc.

#### 6. Objectives

- i. To find out the refugee rights under International law.
- ii. To examine the principle of *non-refoulement* and its role in refugee protection.

#### 7. Rights of the Refugees under International Law

The rights and security of the refugees are ensured under the aegis of United Nations. Through various conventions, protocol, covenant and other measures, refugees are offered various rights under International law. A few of them are discussed below-

##### A. Universal Declaration of Human Rights (UDHR)

UN General Assembly adopted the UDHR on 10 Jan 1948 as a bulwark against oppression and discrimination. This represented the first international recognition, that human rights and fundamental freedoms are applicable to every person everywhere. Some of the rights under UDHR are as follows-

- i. Everyone has the right to freedom of movement and residence within the borders of each state;
- ii. Everyone has the right to leave any country including his own and return to his country;
- iii. Everyone has the right to a nationality;
- iv. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.



Reducing a person to refugee would seriously affect his birth rights like right to life, liberty and security, right to express, right to education,, freedom of religion, right to equality etc. Although UDHR is not a treaty, a few of the rights mentioned here was later further recognized in 1951 Convention and 1967 Protocol and in many regional arrangements.

### **B. 1951 Convention relating to the Status of Refugees and its 1967 Protocol**

The 1951 Convention and the 1967 Protocol constitute the most important codification efforts of the rights of refugees. These ensure the refugees certain fundamental rights laid down in UDHR, 1948.

Some of the rights under 1951 Convention as follows-

- i. It refers to the UN Charter and UDHR as having affirmed the principles that human beings shall enjoy fundamental rights and freedom without discrimination.
- ii. Application of the provisions of Convention to refugees without discrimination on the basis of race, religion or country of origin.
- iii. The convention provides for the protection of refugees right not only under its own provisions but also those available under any other law or policy.
- iv. The Convention recognizes the rights of acquisition of moveable and immoveable property through different modes.
- v. A refugee shall have right to free access to courts and to legal assistance.
- vi. Rational required facilities.
- vii. A refugee shall have regarding association with non-political and non-profit making associations and trade unions.
- viii. Education, recognition of degree and qualifications.
- ix. The conformity with laws and regulations, a contracting state shall permit refugees to transfer of assets to their places of settlements.

Moreover, Article 35 (1) of the 1951 Convention provides that the contracting states undertake to cooperate with UNHCR in the exercise of its functions particularly its supervisory responsibilities.

The 1967 Protocol expanded the protection under the Convention to such person irrespective of nationality or geographic location, providing a International Bill of Rights, containing details provisions on the minimum standards of treatment of refugees.

### **C. International Covenant on Civil and Political Rights (ICCPR), 1966**

The ICCPR deals with various human rights and fundamental freedoms. The basic human rights provided by the Covenant are-

- i. The prohibition of discrimination which ensures that rights under the Covenant must be granted without discrimination between citizens and aliens. Therefore it has crucial importance to refugees.



- ii. Rights to liberty and security of person and freedom from arbitrary arrest and detention.
- iii. Rights to freedom from slavery, and slave trade, servitude and compulsory labour.
- iv. Rights to freedom of expression and to hold opinion.
- v. Right to freedom of thought, conscience and religion.
- vi. Right to peaceful assembly and association.
- vii. Right to equality before law and equal protection of the law
- viii. Right to unity of the family is another essential right of refugees.

In comparison to UDHR, ICCPR incorporates a wide range of certain rights which do not found mention in the provisions of the former.

#### **D. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966**

The implementation of Civil and Political rights requires the realization of economic, social and cultural rights. The state parties to ICESCR guarantees that the rights recognized in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, property, birth or other status.

The Covenant includes following rights-

- i. Right to work of the refugees.
- ii. Recognizes the right of everyone to the enjoyment of just and favourable condition of work.
- iii. Recognizes the right of protection and assistance to the family.
- iv. Right of everyone to enjoy the highest attainable standard of physical and mental health.
- v. Recognizes the right of everyone to take part in cultural life.
- vi. Recognizes the right of everyone to social security, including social insurance.

It is noticeable that both ICCPR and ICESCR complement each other. Both the instruments recognize basic human rights of refugees.

#### **8. Principle of non-refoulement**

The principle of *non-refoulement* was expressed for the first time in Article 33 of the 1951 Convention. *Non-refoulement* is a concept which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, and membership of a particular social group or political opinion. The relevance of the concept of *non-refoulement* is very much crucial for refugee protection.

Article 33 of the 1951 Convention Relating to the Status of Refugees expresses its scope- no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers or 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. However this provision cannot be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country or convicted for serious crimes where he is taking shelter. The 1967 Declaration of Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), on 14 December 1967 also expresses its concern about the principle of non-refoulement. Article 3 of the declaration dictates that no person seeking asylum from persecution shall be rejected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution. The declaration also reiterates that in case of mass influx or for reasons of national security, countries may override these provisions related to non-refoulement.

It is mentionable that the 1951 Convention binds only those states that are a party to it but pursuant to Article I(2) of the 1967 protocol, a state that is a party to the Protocol though not to the 1951 Convention will also be bound to apply Articles 2 to 34 inclusive of the Convention. However, the *non-refoulement* obligation in Article 33 of the 1951 Convention will only be opposable to states that are a party to one or both of these instruments. It embodies the humanitarian essence of the Convention. It holds a special place in the Convention and prohibition of *refoulement* in Article 33 is therefore a non-derogable obligation. The non-derogable character of the prohibition of *refoulement* is affirmed in Article VII (1) of the 1967 Protocol. The fundamental humanitarian character and primary importance of *non-refoulement* as a cardinal principle of refugee protection is thereby frequently affirmed. The paragraph 5 of Section III of 1984 Cartagena Declaration also mentions the importance and meaning of the principle as a corner-stone of the international protection of the refugees.

The principle of *non-refoulement* is also applied as a competent part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment. Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that no state party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger or being subjected to torture. For determination of such grounds competent authorities shall take into account all relevant considerations including the existence in the state concerned of gross, flagrant or mass violation of human rights. Likewise Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. By reference to the 1951 Convention, the Torture Convention and the ICCPR, 169 states representing the overwhelming majority of the international community are bound by some or other treaty commitment



prohibiting *refoulement*. This number increases when account is taken of other international instruments including instruments applicable at a regional level.

When we look at the UNHCR, it also emphasizes in the application of *non-refoulement* due to its responsibility to provide the international protection of refugees. In 1946, the United Nations General Assembly (UNGA) established the International Refugee Organization (IRO) as a Specialized Agency of the United Nations of limited duration. After the termination of IRO and regard to continuing concern over refugees, the UNGA decided to establish a High Commissioner's Office for Refugees. By Resolution 428 (V) of 14 December 1950, the UNGA adopted the Statute of the Office of the United Nations High Commissioner for Refugees. The Paragraph 1 of the UNHCR Statute describes that acting under authority of the General Assembly it will assume the function of providing international protection under auspices of United Nations, to refugees who fall within the scope of the Statute and of seeking permanent solutions for the problem of refugees. UNHCR is accorded a special status as the guardian of the 1951 Convention and the 1967 Protocol relating to the Status of refugees. However it is not limited in the exercise of its protective functions to the application of the substantive provisions of these two treaties and hence it can rely on whatever instruments and principles of international law may be pertinent and applicable to the situation in which it is called upon to address.

It is often argued that *non-refoulement* only avails those who have been formally recognized as refugees. The basis for this contention is that refugee status is conferred formally as a matter of municipal law once it has been established that an asylum seeker comes within the definition of refugee under Article 1A(2) of the 1951 Convention. But there are many reasons why this argument is devoid of merit. The protective regime of the 1951 Convention extends to person who has not yet been formally recognized as refugee which is apparent from the terms of Article 31 of the Convention.

## 9. Conclusion

Although there are various rights of the refugees under International law, there status of refugee may be revoked by the states where they are taking shelter. Article 32 explains about the expulsion of refugees. The expulsion shall be only in pursuance of a decision reached in accordance with due process of law. Except in serious conviction or cases of national security, the refugee shall be allowed to submit evidence to clear himself and to appeal and be represented before competent authority.

The status of refugee ceases to exist under certain conditions provided under the 1951 Convention. A few of these conditions are-

- i. He has voluntarily re-availed himself of the protection of country of his nationality;



- ii. Ha has voluntarily re-acquired the nationality which was previously lost by him;
- iii. He has acquired a new nationality, and enjoy the protection of the country of his new nationality;
- iv. Ha has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;
- v. He is able to return to the country of his former habitual residence after the circumstances in connection with which he has been recognized as a refugee have ceases to exist.

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