

A STUDY OF EVOLUTION AND PRACTICES OF ASYLUM AND RIGHTS OF REFUGEES IN ISLAMIC TRADITIONS AND INTERNATIONAL LAW

*Nehaluddin Ahmad, MA, LL.B., LL.M. (Lucknow University,
India), LL.M. (Strathclyde University, UK), LL.D. (Meerut
University, India).*

*Professor of Law, Sultan Sharif Ali Islamic University (UNISSA),
Brunei Darussalam*

Email: ahmadnehal@yahoo.com

ABSTRACT

Asylum and “refuge-seeking” are two important themes in International Law as well as in Islamic traditions. Islamic theory and teachings relating to refugees and forced displacement are known as hijrah law. It perhaps gives more security to asylum-seekers and refugees (mustaminun). However, the rich heritage of Islam in the field of migration law and refugee protection has been abandoned throughout the Muslim world today. If they were taken into consideration, it could contribute greatly to the protection of the forcibly displaced persons and might also reduce the numerous problems of refugees that are faced by them globally. This paper focuses on the role of Islamic traditions and the International law relating to refugee protection and their rights. It concludes that there is contradiction between the Islamic tradition of hijrah and aman and the law and practice today. Given the current importance of this issue, Muslim states must urgently need to revive the Islamic concepts of asylum in order to contribute to the improvement of modern refugee law, and to make it more protective for refugees and forced migrants in general. The article further concludes that Islamic law has a broader perception than concept given by modern International Refugee Law.

1. INTRODUCTION

States have been granting protection to individuals and groups fleeing persecution for centuries; however, the modern refugee regime is largely the product of the second half of the twentieth century. Like international human rights law, modern refugee law

has its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it. 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. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the “right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.” American Convention on Human Rights, art. 22(7); African [Banjul] Charter on Human and Peoples’ Rights, art. 12(3).

The world is experiencing armed conflicts, violence and persecution of persons at an alarming rate. According to the UN High Commissioner for Refugees (UNHCR) as of the end of 2019, at least 82.4 million people around the world have been forced to flee their homes.¹ Among them nearly 26 million are refugees,² who fled their country due to war, persecution, or other devastating conditions. These numbers are records in human history. The world has never seen so many people forced to move against their will.³

In the last decade, worldwide refugees have their origin in Islamic countries, or countries with a majority Muslim population.⁴ Countries like Turkey, Jordan, Bangladesh, and Pakistan have taken in the majority of the world’s refugees.⁵ For instance, Turkey has the world’s largest refugee population⁶ where most of these people were fleeing the conflict in neighbouring Syria. Since the start of the Syrian conflict in 2011, 6.31 million people have been forced to flee the country. That is almost one-third of the world’s total refugee population.⁷ This makes Islam the most widespread religion among both refugees and host countries, and the laws, values and teaching of this religion have a direct impact on the protection of refugees that

¹ *Figures at a Glance*, UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), <https://www.unhcr.org/figures-at-a-glance.html> (last visited Jun. 18, 2021)

² *Id.*

³ Abdul Rahman Latif, ‘*Be Brothers: Case Studies of Muslim Receptions of Refugees in History*’, YAQEEEN INSTITUTE FOR ISLAMIC RESEARCH, (Sept. 13, 2018), <https://yaqeeninstitute.org/abdulrahman-latif/be-brothers-case-studies-of-muslim-receptions-of-refugees-in-history/>.

⁴ Speech of Antonio Guterres, in *The Right to Asylum between Islamic Shari’ah and International Refugee Law: A Comparative Study* 307 (2009).

⁵ 2018 Global Trends Report, UN High Commissioner for Refugees (UNHCR).

⁶ *Id.*

⁷ *Id.*

nation states and the international community are capable to provide.⁸

Asking for and granting *amān* (asylum, protection) was commonplace in pre-Islamic Arabia before the advent of Islam. In pre-Islamic Arab culture, protection of refugees entailed protection of their person, family and possessions; denying protection to refugees was seen as a dishonorable act.⁹ The advent of the Islamic faith was set against such formidable themes as persecution, asylum, and migration.¹⁰ The migration (*hijrah*) of Muslims to Abyssinia (*Habsha*) and the flight of the Prophet, to Medina in 622 AD, to avoid persecution and oppression by the people of *Quraisy*, were set an important precedent for the law of refugee.¹¹ The *hijrah* event is extraordinary for Muslims as it marks the beginning of Islamic Calendar, the onset of which was made possible only by decisive action of the *muhajirun* to mobilize and seek refuge in foreign territory.¹²

The deeply rooted Arabic traditions and customs have, for a very long time, served as a solid foundation for protecting human beings and preserving their dignity. More than any other historical source, the Qur'an along with the Sunnah and Hadith of the Prophet Mohammad are a foundation of contemporary refugee law.¹³ Hence, it can be said that Islam was a forerunner in establishing the right to refugee. Islamic theory and teachings relating to refugees and forced displacement are known as *hijrah* law.¹⁴

Whereas, the word *refugee* is linked to the Latin word *refugium*, meaning *refuge* or to flee back, from *re-* "back" and *fugere* "to

⁸ Fausto Aarya De Santis, 'Refugee Protection under Islamic Law', PEACE AND CONFLICT MONITOR, (March, 6 2015) http://www.monitor.upeace.org/printer.cfm?id_article=1081 (last updated Jun. 16 2021).

⁹ Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic Tradition*, GENEVA: OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, 15, 21 (1987).

¹⁰ Sharifah Nazneen Agha, 'The Ethics of Asylum in Early Muslim Society', 27 REFUGEE SURVEY QUARTERLY 30, 30 (2008).

¹¹ Adil Salahi. *Muhammad: Man and Prophet*. Leicestershire, The Islamic Foundation, 124 (2002).

¹² Agha, *supra* note 10, at 30.

¹³ *Ibid*, at 30.

¹⁴ UN High Commissioner for Refugees (UNHCR), *High Commissioner's Dialogue on Protection Challenges*, FAITH AND PROTECTION (2012).

flee”.¹⁵ In general, a refugee is a person who has been forced to leave their country in order to escape war, persecution, or natural disaster. In International Law, the term „refugee“ has been defined under Article 1(A)(2) of the 1951 Convention Relating to Status of Refugees as amended by the 1967 Refugee Protocol whereby, refugee is a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.¹⁶The foundation of international refugee law is rooted from the 1951 Convention whereby it was adopted to the 1967 Protocol.

This article seeks to contribute to the understanding of the protection of refugees in Islamic law and international law by examining the definition of refugee under both laws. It will also undertake a comparative analysis between the protection provided to refugees under the Islamic legal framework and the International legal framework established under the United Nations. This article will also analyse the standards of treatment meted out to refugees in Islamic history and to draw parallels between identified historical examples and the modern refugee protection regime. This article will further explore and reach to a conclusion that for refugees, Islamic law has a broader perception than concept given by modern International Law. This paper will conclude with reflections on asylum and its basis both in Islamic traditions and in modern international law and consider the relative strengths and weaknesses.

2. DEFINITION OF REFUGEE UNDER MODERN INTERNATIONAL LAW

Etymologically, the word *refugee* is linked to the Latin word *refugium*, meaning *refuge* or to flee back, from *re-* “back” and *fugere* “to flee”.¹⁷ In general, a refugee is a person who has been forced to leave their country in order to escape war, persecution, or natural disaster. In International Law, the term ‘refugee’ has been defined under Article 1(A)(2) of the 1951 Convention Relating

¹⁵ Walter W. Skeat, *The Concise Dictionary of English Etymology*, at 164 (Wordsworth Ed., 1993).

¹⁶ 1951 Convention Relating to Status of Refugees, Art. 1(A).

¹⁷ Walter W. Skeat, *The Concise Dictionary of English Etymology*, 164 (Wordsworth Ed., Ware, Hertfordshire (1993)).

to Status of Refugees as amended by the 1967 Refugee Protocol whereby, refugee is a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.¹⁸

In modern international law, the term “refugee” and “migrant” cannot be used interchangeably as not all migrants are protected in international law. Migrants are protected by international human rights law.¹⁹ This protection derives from their fundamental dignity as human beings.

Refugees are defined and protected in international law. The 1951 Refugee Convention and its 1967 Protocol as well as other legal texts, such as the 1969 OAU Refugee Convention, remain the cornerstone of modern refugee protection.²⁰ The legal principles they enshrine have permeated into countless other international, regional, and national laws and practices. The 1951 Convention defines who is a refugee and outlines the basic rights which States should afford to refugees. One of the most fundamental principles laid down in international law is that refugees should not be expelled or returned to situations where their life and freedom would be under threat.

The international legal definition of the term is contained in the 1951 UN Refugee Convention relating to the Status of Refugee which now represents the universal charter of refugee law. According to the Convention, refugee is defined as someone who has left their home:

“...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/her nationality, and is unable to, or owing to such fear, is unwilling to avail himself/herself of the protection of that country”.²¹

¹⁸ 1951 Convention Relating to Status of Refugees, Art. 1(A).

¹⁹ UN High Commissioner for Refugees (UNHCR), ‘*Refugees’ and ‘Migrants’* – (UNHCR) <https://www.unhcr.org/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html> (accessed Jun. 22, 2021).

²⁰ *Ibid.*

²¹ See Article 1A(2) of the 1951 Convention relating to the Status of Refugees.

This definition implies that several qualifying conditions apply to be considered a refugee: (1) presence outside home country; (2) well-founded fear of persecution (being at risk of harm is insufficient reason in the absence of discriminatory persecution); (3) incapacity to enjoy the protection of one's own state from the persecution feared. A person is a refugee as soon as the criteria contained in this definition are fulfilled. In other words, a person does not become a refugee because of a positive decision on an application for protection. Recognition of refugee status is declaratory: it confirms that the person is indeed a refugee.²²

The notion of a well-founded fear of persecution forms the key phrase that defines a refugee in modern refugee law, representing the main element of the refugee character found in article 1A (2) of the 1951 Convention relating to the Status of Refugees. The concept of persecution is not as such defined in the Convention but is considered to include, for example, all serious violations of human rights.²³

The definition of refugee under International law is specific and are only for limited reasons such as due to feared persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require 'international protection'.²⁴ Their situation is often so perilous and intolerable, that they cross national borders to seek safety in nearby countries, and thus become internationally recognized as 'refugees' with access to assistance from states, UN High Commissioner for Refugees (UNHCR), and relevant organizations. They are so recognized precisely because it is too dangerous for them to return home, and they therefore need sanctuary elsewhere.²⁵

Migrants choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government.²⁶

²² Frances Nicholson and Judith Kumin, *Refugee Protection: A Guide to International Refugee Law*, UNHCR at 17 (2017).

²³ Agha, *supra* note 10, at 31.

²⁴ *Id.*

²⁵ Agha, *supra* note 10, at 31.

²⁶ Patrick Brown, *What Is a Refugee? Definition and Meaning*, UNHCR (last visited June 21, 2021) <https://www.unhcr.org/asylum-and-migration.html>.

International law does not concern all forced migrants but only a few of them who are well defined in Article 1 of the 1951 Convention. Many persons are consequently excluded from its protection and therefore from asylum²⁷ For instance, modern refugee law does not protect Internally Displaced People (IDPs) as there are no binding international instruments relating to them in particular.²⁸ Also, the Refugee Convention only addresses displaced individuals who have crossed an international border. The Refugee Convention does not cover internal displacement, i.e. people who have been displaced but have not crossed an international border.²⁹

Therefore, applying this definition, internally displaced persons (IDPs) – including individuals fleeing natural disasters and generalized violence, stateless individuals not outside their country of habitual residence or not facing persecution, and individuals who have crossed an international border fleeing generalized violence are not considered refugees under either the 1951 Convention or the 1967 Optional Protocol.

2.1. Under Islamic Jurisprudence (*Shariah*)³⁰

The Islamic concept of *hijrah* complements modern refugee law to offer a broader definition of refugee than the definition of refugees given in article 1 of the 1951 Refugee Convention. This article describes refugees only as persons forced to flee persecution for specific and limited reasons and who otherwise would not have found it necessary to migrate.

The term *hijrah* comes from the Arabic word *hajara* which means to abandon, to migrate, to break ties with someone. In Islamic law, it means “migration in the path of Allah”³¹ and is very often used to designate the fact of fleeing from a state governed by the infidels in order to join the Muslim community.³²

²⁷ Muhammad Munir, *Refugee Law in Islam*, 4 JOURNAL OF SOCIAL SCIENCES 2, 10 (2011).

²⁸ *Id.*

²⁹ RAY JUREIDINI AND SAID FARES HASSAN, BRILL, MIGRATION AND ISLAMIC ETHICS: ISSUES OF RESIDENCE, NATURALIZATION AND CITIZENSHIP (vol. 2, 2020).

³⁰ Islamic jurisprudence is composed primarily by: (i) Sharia Law, which is revealed in the Quran and the Sunnah and is believed by Muslims to represent divine law; and (ii) Fiqh, which is the human understanding of the Sharia Law expanded and developed by the interpretation (ijtihad) of the Quran and Sunnah. In addition, Islamic Law is codified in various Islamic conventions on Human Rights.

³¹ ANWER MAHMOUD ZANATY, GLOSSARY OF ISLAMIC TERMS: ARABIC –ENGLISH 94 (Cairo: ‘Ain al-Shamsh University, 2006).

³² Munir, *supra* note 27, at 3.

The concept of *hijrah* is primarily discussed with reference to the Prophet's PBUH persecution in Mecca and sought refuge in Medina in 622AD.³³ Those who migrated to *Madina* were called *muhajirin* (the immigrants) and those who receive the *muhajirin* were called *ansar*.³⁴ This *hijrah*, or migration, came to symbolize the movement of Muslims from lands of oppression to those of Islam.³⁵

In Islamic law, protection for refugees is grounded in the notion of *amān*, which literally translates as 'protection' or asylum or 'safety'. As a legal term in Islamic law, *amān* refers to different concepts. The one most relevant for our purposes understands *amān* as the granting of refuge or protection or asylum seekers to people who have fled their homes because their lives and freedom are threatened.

Under this concept of *amān*, or asylum seekers, the discussions of the classical Muslim jurists address the situation of granting protection to refugees who are non-Muslim foreign nationals. Aman is a grant of security from a Muslim to a non-Muslim. This is because at the time, Muslim foreign nationals had the automatic right to enter and/or reside in the Islamic State. They did not need to seek protection, as it was automatically guaranteed to all Muslims globally as well as *dhimmi*s (i.e., permanent non-Muslim residents of the Islamic State). Since the very essence of *amān* entails the sanctity and protection of the life and property of the *musta'min* (refugee or asylum seeker), *refoulement* constitutes a violation of the protection provided under the *amān* contract.³⁶

Islam stipulates a wider definition of refugee, which encompasses under one category: refugees, internally displaced persons, stateless persons, and forced migrants; with no difference on the rights and obligation of the State or the host populations towards them.³⁷ On the other hand, under modern refugee law, a refugee is different from an internally displaced person. A refugee is a person who crosses international borders to another country in

³³ UNHCR, *supra* note 14, at 3.

³⁴ Munir, *supra* note 27, at 3.

³⁵ Astri Suhrke, *Refugees and Asylum in the Muslim World*, THE CAMBRIDGE SURVEY OF WORLD MIGRATION 457 (Robin Cohen, ed. Cambridge University Press 1995).

³⁶ AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 131 (New York: Palgrave Macmillan, 2011).

³⁷ De Santis, *supra* note 8.

search of protection, security and asylum while an internally displaced person may have the same objective as a refugee, but he differs from the latter in that he stays within the territory of his state and avails himself of its protection and is consequently subject to the laws of that state.³⁸

Moreover, International refugee law requires a motive for asylum, but in Islam, all motives for asylum are equal. This means that the granting of asylum is not only contingent upon the fact that the person had fled to Muslim land owing to fear of “persecution” they are subject to.³⁹ Additionally, asylum may be granted to any person, who in order to hear the words of Allah (religious asylum),⁴⁰ or as non-Muslims, to avail themselves of temporary protection or to reside permanently. Allah says in the Qur’an:

*“If one amongst the non-believers ask thee for asylum,
grant it to him, so that he may hear the word of Allah;
and then escort him to where he can be secure.”*⁴¹

Thus, in Islam, all refugees are treated equally under Islamic law because the land of the earth is the sovereign of God. In contrast to international refugee law, displaced persons are divided into refugees, asylum seekers, stateless persons, internally displaced, returnees and persons at risk of displacement, and appoints these groups varying rights.⁴²

Modern international refugee law is quite general and does not include special provisions relating to some categories of forced migrants that now constitute the majority of the world refugee population. Some of these refugees need special protection, namely, women and children. Women, notably Muslim women, have special needs as refugees, but these are rarely taken into account by modern refugee law or State practice.⁴³ In contrast to the international refugee regime, in Islamic law the Qur’an also puts forth certain regulations to lend additional support to women

³⁸ UNHCR, ‘*What Is a Refugee? Definition and Meaning*’, (last visited July 21, 2021) <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>.

³⁹ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari’ah and International Refugee Law: A Comparative Study*, UNHCR 45 (2009).

⁴⁰ *Id.*, at 81.

⁴¹ *Surat At-Taubah*, verse 6.

⁴² Nicolson VJ, ‘*Reconciling Notions of Asylum And Refugees In Islam And International Law: A Case Study Of Afghan Refugees In Pakistan*,’ 12 (Master Thesis, University of Western Ontario, 2007).

⁴³ Khadija Elmadmad, ‘*Asylum in Islam and in Modern Refugee Law*’ (2008) 27 REFUGEE SURVEY QUARTERLY 56.

and children, who are considered more vulnerable than the general refugee population. Under the principle of justice: those who are more at risk as a result of migration and asylum should be offered extra support.⁴⁴

Therefore, in Islamic law, all individuals, including non-Muslims, have the right to flee persecution and seek protection in an Islamic community. While international refugee regimes emphasize the involuntariness of asylum and the nature of the feared or inflicted persecution, classic Islamic notions focus on the duty of Muslims to flee religious and non-religious persecution regardless of the degree of persecution.⁴⁵

Thus, unlike the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, which exclusively define a refugee as someone who flees for fear of persecution, Islam adopts a broad definition of a refugee.

3. HISTORICAL BACKGROUND OF REFUGEE UNDER INTERNATIONAL AND ISLAMIC TRADITIONS

3.1. International law

The roots of international refugee law can be traced back to ancient times, when Greek and Roman cities offered sanctuary to anyone in need of a safe place to hide. Today, this right has become part of the fundamental rights and freedoms to which all humans are entitled to without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁶

Prior to instruments adopted in 1951, the origins of the modern concept of refugee are rooted in the reaction of Friedrich Wilhelm I. He issued his 1685 Edict of Potsdam and granted the Huguenots the right to reside in his territories.⁴⁷

The most significant developments in refugee law, however, are closely tied to the two World Wars. After the First World War the League of Nations, Fridtjof Nansen, who, in 1921, was appointed

⁴⁴ UNHCR, *supra* note 14.

⁴⁵ *Id.*

⁴⁶ Ralph Janik, 'A Very Short History of International Refugee Law' (Nov. 14, 2017) <https://ralphjanik.com/2017/11/04/a-very-short-history-of-international-refugee-law/>.

⁴⁷ K Hailbronner, J Gogolin, 'Asylum, Territorial', MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2013).

High Commissioner for Russian Refugees of the League of Nations.⁴⁸ He assist the repatriation of Russian and other prisoners of war as well as Russian refugees after the October Revolution.⁴⁹

The first international agreements on refugees only emerged after millions of Europeans were forcibly displaced by the Second World War. In order to resolve this refugee crisis, the UN General Assembly adopted the UNHCR's statute in 1950, and in 1951, adopted the Geneva Convention Relating to the Status of Refugees.⁵⁰ The Convention was limited to protecting mainly European refugees in the aftermath of World War II, but another document, the 1967 Protocol, expanded the scope of the Convention as the problem of displacement spread around the world.⁵¹

According to the 1951 Refugee Convention, refugees are those individuals fleeing across borders for the following reasons:⁵²

- persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;⁵³
- armed conflict, which may be rooted in and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides;⁵⁴

⁴⁸ Paul Weis, *The Development of Refugee Law*, 3 MICH. J. INT'L L. 27-28 (1982). Available at: <https://repository.law.umich.edu/mjil/vol3/iss1/2>.

⁴⁹ Janik, *supra* note 46.

⁵⁰ Nicolson, *supra* note 42, at 8.

⁵¹ UN High Commissioner for Refugees (UNHCR), 'What Is a Refugee? Definition and Meaning' (n 31)

⁵² United Nations High Commissioner for Refugee (UNHCR), 'The refugee concept under international law ' Global Compact for Safe, ORDERLY AND REGULAR MIGRATION, NEW YORK, 12-15 (March 2018) <http://www.unhcr.org/events/conferences/5aa290937/refugee-concept-underinternational-law.html>.

⁵³ *Id.*

⁵⁴ United Nations High Commissioner for Refugee (UNHCR), 'Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions', REFWORLD, <https://www.refworld.org/docid/583595ff4.html>.

- violence perpetrated by organized gangs,⁵⁵ traffickers, and other non-State actors, against which the State is unable or unwilling to protect;⁵⁶
- persecution on the basis of sexual orientation or gender identity;⁵⁷
- disasters (including drought or famine) where they are linked to situations of persecution or armed conflict rooted in racial, ethnic, religious, or political divides, or disproportionately affect particular groups.⁵⁸

The Convention does not however apply to all persons who might otherwise satisfy the definition of a refugee in Article 1 as above.

3.2. Islamic Traditions

“Those who believed and emigrated, and strove in the cause of GOD, as well as those who hosted them and gave them refuge, and supported them, these are the true believers. They have deserved forgiveness and a generous recompense.” (Quranic Surat al-Anfal, “The Spoils of War” [Chapter 8 verse 74])

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

(Universal Declaration of Human Rights. Article 14)

The concept of “asylum” or “ijarah” offered a basis for contemporary law and was even observed by Arabs before Islam. This principle was endorsed by Islamic Shari’ah, as it was one of the recognized good practices in their traditions and customs,

⁵⁵ United Nations High Commissioner for Refugee (UNHCR), ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’, REFWORLD (last visited July 20, 2021) <https://www.refworld.org/docid/4bb21fa02.html>.

⁵⁶ United Nations High Commissioner for Refugee (UNHCR), ‘Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked’, REFWORLD (last visited June 20, 2021) <https://www.refworld.org/docid/443679fa4.html>.

⁵⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, REFWORLD (last visited June 20, 2021) <https://www.refworld.org/docid/50348afc2.html>.

⁵⁸ UN High Commissioner for Refugees (UNHCR), *Legal considerations on refugee protection for people fleeing conflict and famine affected countries* <https://www.refworld.org/docid/5906e0824.html> accessed 25 June 2021

involving noble manners and ethical values such as rescue of people in distress and protection of the oppressed.⁵⁹

Two major events which shaped early Islam were centrally linked to asylum. The first event was the migration to Abyssinia in 615 AD, when the Prophet Muhammad advised his first followers those were facing persecution to leave for the land of the Abyssinians where they were received and found protection under Negus, the King of Abyssinia. The second event was emigration of the Prophet Mohammed to leave Mecca due to the hostility of the Quraysh and take refuge in Yathrib (Medina) where he was received by hosts (*ansar*). This event, marred by oppression and persecution, marks both the beginning of the Islamic calendar in 622AD and serves as the nucleus around which orbits the Islamic protection of refugees.⁶⁰

The Quran details numerous historic acts of seeking refuge and calls upon humanity and suggests that they could migrate from their oppressed positions to another land of God.⁶¹

The forced migration from Mecca to Medina came at great personal loss and sacrifice to the Prophet PBUH and his companions. The wealthy merchants of Mecca imposed a severe economic boycott against the Prophet and his followers for three years.⁶² When he needed to leave, he turned back to the city of Mecca and said,

*“O Mecca! I know you are the most blessed of the land of God. If your people did not force me to leave, I would never have left you.”*⁶³

After arriving at the city of Medina, which was a multicultural and multi-religious city, the first thing he did was to establish foundations for an interconnected society where people could live peacefully with one another. The population of Medina was made up of Arab idol worshippers, members of Jewish tribes, and a few

⁵⁹ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*, Produced and Printed by Printing Press of Naif Arab University, Riyadh (2009)p 21

⁶⁰ Kirsten Zaat, 'The Protection of Forced Migrants in Islamic Law' (2007) UNHCR New Issues in Refugee Research, Research Paper No. 146. 15

⁶¹ Surah an-Nisa verse 97

⁶² Zeki Saritoprak, 'The Qur'anic Perspective on Immigrants: Prophet Muhammad's Migration and Its Implications in Our Modern Society' (*The Journal of Scriptural Reasoning*) <<https://jsr.shanti.virginia.edu/back-issues/vol-10-no-1-august-2011-people-and-places/the-quranic-perspective-on-immigrants/>> accessed 28 June 2021

⁶³ Muhammad Husain Haykal. *The Life of Muhammad*. Translation by Ismail Raji al-Faruqi, Kuala Lumpur, Malaysia, Islamic Book trust, 2002, p. 102

others while Muslims were only made up of fifteen percent of its population.⁶⁴ Successfully, the Prophet PBUH brought a peaceful life to the conflicting tribes through an important document that he developed, the Medina Charter, in which equality between all members of society, regardless of religion, was established.⁶⁵

Significantly, the Medina Charter built upon the Prophet's feat of securing harmonious relations among the refugees and the host community in Medina under the broad social umbrella of the ummah, by granting civil and political rights for the Meccan refugees within a mutually agreed legal framework.⁶⁶ The subsequent governance of the first Muslim community in Medina demonstrated the emergence of a new political order known today as the first Islamic State.⁶⁷

According to the tradition, the Prophet PBUH named one *Ansar* and one *Muhajirun*, and he declared them brothers and sisters. *Ansar* shared their money and their farms with their brothers to the extent that the immigrant Muslims received legal rights from the inheritance of their Ansar brothers.⁶⁸

Considering the modern-day needs of immigrants, through this declaration of brotherhood, the Prophet successfully solved two major problems that immigrants face: housing and food. He asked Ansar to share their houses with their brothers, and they did: they would divide their houses in half and give the second part to their brothers and sisters.⁶⁹ Also, they shared their food. This helped immigrants to stand on their own feet. The most interesting part of this brotherhood is that it was not bound by force but by conviction. When the helpers shared their houses and food with the immigrants, they were doing it from their own will and from the depth of their hearts, without being forced.⁷⁰

In 615AD where the Prophet had counseled Muslims, persecuted by the Quraysh to leave and secure protection under the Christian King in Abyssinia (now Ethiopia).⁷¹ This migration was made at the request of the Prophet PBUH, although he himself did not

⁶⁴ Ibid

⁶⁵ ibid

⁶⁶ Agha (n 10) 31.

⁶⁷ Ibid 31.

⁶⁸ Saritoprak (n 62)

⁶⁹ Saritoprak (n 62)

⁷⁰ Ibid

⁷¹ Agha (n 10) 33.

participate in it. This particular event is also considered one of the early encounters between Muslims and Christians, when Muslims received support and encouragement from the Christian king. When the ruling *Quraysh* clan of Mecca learned of their departure, they made haste to seek the extradition of a group they considered as rebels, or fugitives from justice.⁷²

Upon assessing the case of the Muslim asylum-seekers, whose claim of religious persecution had theological resonance with the King, he judiciously determined their status as refugees with the words “*Go your ways, for ye are safe in my land. Not for mountains of gold would I harm a single man of you*”.⁷³ Through his actions, the King had exemplified what we would now term the role of the asylum host “state”, by acting as intercessor against harm to those seeking its protection.⁷⁴ The king’s good behavior toward immigrants became an important reference for later Muslim-Christian relations.⁷⁵ This incident also illustrates the modern principle of non-refoulement.

Thus, the migration to Abyssinia implied three rules,⁷⁶ which form part of contemporary international law on asylum, namely:

- a) The goal of asylum: to ensure safety for refugees,
- b) The cause of migration: that refugees are undergoing persecution prompting or pushing them to immigrate.
- c) Inadmissibility of extraditing a refugee, if such an act would put him at risk of being persecuted in the requesting country.

Therefore, it is obvious that the practice of the Prophet with regard to immigrants in the early history of Islam can be taken as an example for our modern-day approach to migration and immigrants. The teaching of Islam has very important foundations for providing mutual help among immigrants and citizens⁷⁷. The Qur’an and the sayings of the Prophet contain many examples of peaceful societies made of immigrants as well as regular citizens. The Prophet PBUH says, “You cannot be a real

⁷² Ibid 33

⁷³ Adil Salahi. *Muhammad: Man and Prophet*. Leicestershire, The Islamic Foundation, 2002, p.124.

⁷⁴ Agha (n 10) 33.

⁷⁵ Zeki Saritoprak, ‘The Qur’anic Perspective on Immigrants: Prophet Muhammad’s Migration and Its Implications in Our Modern Society’ (*The Journal of Scriptural Reasoning*) <<https://jsr.shanti.virginia.edu/back-issues/vol-10-no-1-august-2011-people-and-places/the-quranic-perspective-on-immigrants/>> accessed 26 June 2021

⁷⁶ Abou-El-Wafa (n 39) 106.

⁷⁷ Muhammad Husain Haykal.(n 63) p. 11

believer unless you want for your brother what you want for yourself.”⁷⁸

4. COMPARISON OF REFUGEE STATUS UNDER ISLAMIC TRADITIONS AND INTERNATIONAL LAW

In international law, UNHCR⁷⁹ defines international protection as ‘all actions aimed at ensuring equal access to and enjoyment of the rights of refugees and asylum-seekers, whether women, men, girls and boys, in accordance with the relevant bodies of law, including international refugee law, international humanitarian law, and international human rights law’.⁸⁰

International protection to people fleeing persecution begins with their admission to safety in a country of asylum, the grant of asylum and respect for their fundamental human rights, including the right not to be forcibly returned to a country where their safety or survival are threatened.⁸¹

In Islam, the question of the protection of refugees can be examined through the Quranic principles as well as Sunnah of the Prophet PBUH. For instance, the two ethical norms in the Islamic tradition; *wajib* *al-diyafa* (hospitality) and *mu’ākhā* (brotherhood), is an ethical example set when the Prophet PBUH built an effective social brotherhood between migrants of Mecca and the natives of Medina.⁸² The Prophet PBUH established a golden rule for the treatment of refugees where he decreed the principle of fraternization where each *ansar* should take care of one *muhajir*. This care included food, clothing, shelter and any other assistance needed until the *muhajir* could look after himself.⁸³

⁷⁸ Zeki Saritoprak (n 75)

⁷⁹ UNHCR pursues the durable solutions for refugees: 1) voluntary repatriation in which refugees can return in safety and dignity to their country of origin, 2) local integration, in which the country of asylum provides residency and 3) resettlement, in which refugees are transferred from the country of asylum to a third State willing to admit them on a permanent basis.

⁸⁰ Organization of the Islamic Conference (OIC) Ministerial Conference on the Problems of Refugees in the Muslim World: Working Document No. 1: Enhancing Refugee and IDP Protection in the Muslim World’ 27 – 29 November 2006 (UNHCR), 2.

⁸¹ Ibid OIC (2).

⁸² Jureidini and Hassan (n 29) 34.

⁸³ Agha (n 10) 37.

The basic rules on how refugees should be received and treated is mentioned in the Qur'an in verse 9 of Surah al-Hashr, Allah the Almighty says:

“But those who before them, had homes (in Medina) and had adopted the Faith, - Show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot) and those saved from the covetousness of their own souls, - They are the ones that achieve prosperity.”⁸⁴

The 1951 Refugee Convention also lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment. Included among the rights guaranteed the refugee within the State of asylum, to the extent such rights are assured nationals of that State, are the following: freedom to practice religion, equal educational opportunities, right to social security and public welfare assistance, right to work, right to obtain housing, and right to acquire property.⁸⁵ However, only those persons falling within the definition of the Convention or the Statute are eligible to receive the benefits provided.⁸⁶

It is established that refugees, Muslim or non-Muslim, were accorded a treatment that was no less, if not better than that accorded to nationals. Following the Prophet PBUH declaration of brotherhood among the *Muhajirin* and *Ansar* and in his hijra from Mecca to Medina that: “The rights of migrants are the same as those of their hosts.”⁸⁷ Thus, unlike international law, there is no difference in the rights and obligations of and towards the various categories of forced migrants at Islamic Law and thus refugees, internally displaced persons, stateless persons, and forced economic migrants, for example, enjoy the same legal status.⁸⁸

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol regulate the treatment of refugees.⁸⁹ When countries accede to the Convention or Protocol, they agree to

⁸⁴ Surah Al-Hashr verse 9

⁸⁵ Austin T. Fragomen Jr., *The Refugee: A Problem of Definition*, 3 Case Western Reserve Journal of International Law. 45 (1970) 50.

⁸⁶ *ibid* 51.

⁸⁷ UNHCR ‘Islam and Refugees’ (n 14)

⁸⁸ *Zaat* (n 60) 13.

⁸⁹ *OIC* (n 80)

protect refugees on their territory and under their jurisdiction, in accordance with the terms of these instruments. States have also agreed to extend relevant rights to refugees in accordance with international human rights obligations.⁹⁰ UNHCR was created as the agency responsible for supervising the 1951 Refugee Convention and for providing international protection to refugees falling within its competence.⁹¹

The Refugee Convention simply obligates Contracting Parties not to refoul, or turn back to the frontiers of territories, those individuals who are threatened on account of race, religion, nationality, social group or political opinion. For the most part, Contracting Parties to the Refugee Convention are not obligated to provide anything beyond the duty of non-refoulement. If the reason that someone is threatened falls out of the protected categories of race, religion, nationality, social group or political opinion, then states may, in fact, refoul or send back individuals to areas where their life and safety can be at risk.⁹² Under these conditions, not all forced migrants in the world are now really protected by modern refugee law.⁹³

The Convention does not apply to all persons who might otherwise satisfy the definition of a refugee in Article 1. In particular, the Convention does not apply to those for whom there are serious reasons for considering that they have committed war crimes or crimes against humanity, serious non-political crimes, or are guilty of acts contrary to the purposes and principles of the United Nations. Nor does the Convention apply to those refugees who have a status equivalent to nationals in their country of asylum.⁹⁴

The primary focus of the Convention therefore was the conditions of treatment of refugees. Hence the Convention does not address the more important issue of refugee law at the present time, namely under what circumstances should a person seeking admission to a state as a refugee be recognised as such and be granted permanent or temporary asylum by way of being accorded refugee status.⁹⁵

⁹⁰ Jureidini and Hassan (n 29) 34

⁹¹ Zeki, (n 75) 27

⁹² Jureidini and Hassan (n 29) 17.

⁹³ Khadija Elmadmad (n 43) 57.

⁹⁴ UN High Commissioner for Refugees (UNHCR), 'Convention and Protocol Relating to the Status of Refugees' (2010) 4.

⁹⁵ Abishek Puri, 'Law of Extradition and Treaties with Some Countries at International Level' <<http://www.legalserviceindia.com/legal/article-90-law-of->

Furthermore, the protection granted by present international refugee law openly excludes some categories from international protection.⁹⁶ For example, Article 1D declares that the 1951 Convention will 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.” This is the case of over 3 million Palestinian refugees who receive assistance but not protection from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).⁹⁷

Islamic law, other the other hand, honoured all refugees, even if they were non-Muslims, forbade forcing them to change their beliefs, did not compromise their rights, including the right to remain with their family or be reunited with them and guaranteed the protection of their lives and possessions as well as to be treated well at all times.⁹⁸ Therefore, the law and practice relating to forced migration and to refugees in the Muslim world are today far less protective of refugees than as conceived according to the Islamic *hijrah* and *aman* traditions⁹⁹.

4.1. Concept of Hijrah

The concept of Hijrah is primarily discussed with reference to Prophet Muhammad’s life (PBUH) and his companions. In the year of 615, approximately 100 early Muslims sought refuge with the Christian King Negus of Abyssinia (al-Najashi) to escape the brutal persecution of the ruling Quraysh tribe in Makkah. The Prophet (PBUH) did not follow them and stayed in Makkah. Then another migration happened whereby a larger migration to Madinah in 622, lead by Prophet Muhammad (PBUH) as to prevent oppression towards the Muslims and seek refuge.

Hijrah is derived from the verb ‘hajara’ which means to abandon, migrate or to break ties with someone. Hijrah has been mentioned 27 times in the Qur’an. In Surah an-Nisa verse 97, it stated that, ‘Indeed, those whom the angels (take in death) while wronging themselves - (the angels) will say, “In what (condition) were you?” They will say, “We were oppressed in the land.” The angels will say, “Was not the earth of Allah spacious [enough] for you to

[extradition-and-treaties-with-some-countries-at-international-level.html](#)>

accessed 26 June 2021

⁹⁶ Khadija Elmadmad (n 43) 56.

⁹⁷ Munir (n 27) 10.

⁹⁸ Abou-El-Wafa (n 39) 5.

⁹⁹ Ibid

emigrate therein?" For those, their refuge is Hell - and evil it is as a destination.¹⁰⁰

From this verse, seeking refuge against religious persecution is obligatory upon the Muslims as to preserve human dignity. As a principle of immigration, Hijrah entitles individuals with the rights to seek asylum and be granted asylum. It also offers a broader definition of a refugee by giving individuals the right to determine refugee status or to grant asylum to an asylum seeker. This is not the case with modern international law. Under contemporary international law, determination of refugee status or the right to grant asylum rest with the States.¹⁰¹

Moreover, the verse also implies that the persecuted have a right to find refuge on the earth, a right which has been conferred by Allah SWT, and which their fellow humans have a duty to fulfil. This verse reminds the Muslims that they are simply custodians of the earth, not the owners and thus do not have the right to deny territorial refuge to those whom Allah SWT has promised it. This right to asylum may be claimed by Muslims and non-Muslims alike from a Muslim community.¹⁰²

Nevertheless, referring to the migration of Prophet and his companions, Imam Abu Zahra inferred that refuge must be sought when Muslims who live in a country are humiliated or cannot practice his religion or where he is not treated according to Islamic laws.¹⁰³ It is obligatory for him to migrate to a land where he can strengthen the Muslims. This can be referred to a hadith, "... if any of you see an evil, then change it with your hand, and if you cannot, then change it with your tongue, and if you cannot, then hate it in your heart, and that is the least of faith"¹⁰⁴

4.1.2. Concept of Aman

Aman means protection or asylum. It is the safe conduct or assurance of protection which may be given by a Muslim citizen or by an Imam (ruler) or his deputy to a private citizen coming from a non-Muslim state or territory. If protection is granted, the protected person is called *musta'min*. The law on refugees can be found in Surah at-Taubah verse 6, 'And if any one of the polytheists seeks your protection, then grant him protection so

¹⁰⁰ Surah an Nisa 4:97.

¹⁰¹ Ghassan Maarof Arnaout. *Asylum In The Arabic-Islamic Tradition*. Geneva, International Institute of Humanitarian Law, 1987, p. 104.

¹⁰² Krafess, Jamal. *The influence of the Muslim religion in humanitarian aid*. International Review of the Red Cross, Vol. 87, No. 858 (2005) pp.327-342.

¹⁰³ Muhammad Munir, 'Refugee Law in Islam' (2011) 4:2 JSS 1, 4.

¹⁰⁴ Sunan an-Nasa'i 5008 (Sahih Darussalam).

that he may hear the words of Allah. Then deliver him to his place of safety. That is because they are a people who do not know.”¹⁰⁵ Aman can be provided to a small group of men, women and children, either Muslim or non-Muslim, and is not dependent on the political, civil, social cultural religious or economic characteristics of the person fleeing persecution.¹⁰⁶ Even enemy combatants are entitled to receive aman, provided they prove their non-combatant status first.¹⁰⁷ Aman can be given verbally or by gesture, by request or by invitation, and does not even require asylum seekers to prove their persecuted status. Whilst these practices may not always be possible to implement in the modern context, they underline the individual obligation to protect and provide refuge within Islamic teachings.

The Prophet (PBUH) is reported to have said, “Aman given by Muslims is allowed. So, if anyone violated the protection granted by a Muslim, he is cursed by Allah SWT, angels and all people.” Ibn Hajr interpreted this hadith by saying that it is prohibited for a Muslim to interfere in the aman given by his fellow Muslim. During the time of Caliph Umar ibn al-Khattab, a Persian soldier took shelter at the top of a tree. A Muslim soldier approached him and said “don’t be afraid”. In thinking that he was given a pledge and protection, the Persian soldier came down. Unfortunately, he was killed by the Muslim soldier and this matter was reported to the Caliph. Caliph Umar warned the commander and said, “As Allah SWT is my witness, if I hear anyone has done this I shall cut his neck.”¹⁰⁸ This proves that aman may be given by Muslims to non-Muslims or by non-Muslims to Muslims.

According to Imam Shaybani, if a person entered a Muslim state with aman and killed a Muslim intentionally or without intention, or committed theft, or raped a Muslim or non-Muslim woman, none of these amount to breach of his aman.¹⁰⁹ His refugee status is maintained however, he is liable to the laws of the state such as hadd punishment. No death penalty will be awarded to him but he has to pay diyah (blood money) to the victim’s relatives and will be imprisoned.

¹⁰⁵ Surah at-Taubah 9:6.

¹⁰⁶ Kirsten Zaat, ‘Protection of Forced Migrants in Islamic Law’ (2007) 146 *New Issues in Refugee Research* 1, 20.

¹⁰⁷ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari’ah and International Refugee Law: A Comparative Study* (Naif Arab University for Security Sciences 2009) 22.

¹⁰⁸ Munir (n 27) 6.

¹⁰⁹ *Ibid.*

4.1.3. The second major contrast between modern refugee law and Islamic law is the designation of asylum-granting power. In Islam, asylum is not only the right of forced migrants, but a duty of both the asylum-seeker to flee, and the host society to provide protection. Muslims must seek refuge from injustice and abuse, and in turn they are obliged to accept and protect those fleeing.¹¹⁰ The obligation of a Muslim to flee from his home as a result of persecution is found in Surah Al-Nisa verse 97, which contains a commandment to Muslims to forsake their lands and remove themselves from situations of harm:

“Indeed, those whom the angels take [in death] while wronging themselves - [the angels] will say, “In what [condition] were you?” They will say, “We were oppressed in the land.” The angels will say, “Was not the earth of Allah spacious [enough] for you to emigrate therein?” For those, their refuge is Hell - and evil it is as a destination”

On the other hand, modern international law lacks any stipulation that gives asylum seekers the full right to asylum. The 1951 Convention does not mention asylum in its provisions. Only the Universal Declaration of Human Rights deals with asylum. Article 4 of UDHR states that:

“Everyone has the right to seek and enjoy in other countries asylum from persecution.”¹¹¹

The term ‘enjoy’ does not mean in any case the automatic grant of asylum, the granting or refusing asylum is the exclusive right of the state.¹¹² In comparison, *hijrah* gives individual asylum-seekers the right both to seek and to be granted asylum by the society to which they have fled. It can be said that, in Islam, asylum is an inalienable right for individuals in terms of grant and enjoyment.¹¹³

In non-discriminating the right to seek asylum of a *muhajarin*, Islamic law recognizes also the vulnerability associated with persecution and the forced movement,¹¹⁴ and provides the *Muhajarin* with a special legal status to ensure dignified treatment¹¹⁵ and protection. In Islamic law, refugees should be

¹¹⁰ UNHCR ‘Islam and Refugees’

¹¹¹ Article 4 of UDHR

¹¹² Munir (n 27) 11.

¹¹³ Abou-El-Wafa (39) 241.

¹¹⁴ Zaat (n60) 6-7

¹¹⁵ OIC (n 74)

received, no matter whether they are well-off or poor, what matters is to give him protection, safety, security and stability in the place of asylum.¹¹⁶

The refugees should not be rejected, even if the inhabitants of the territory of asylum are in dire poverty, indigence and need and have scarce resources and money. The community or state receiving a *muhajarin* has a subsequent duty to provide safety and protection to those seeking refuge within *Dar-al-Islam* irrespective of the religion followed by the *Muhajarin*.¹¹⁷

Islam considers asylum as a right of the asylum-seekers, a duty for those who are requested for it, and a general and comprehensive form of protection.¹¹⁸ Modern refugee law, however, does not consider asylum as a right of individuals; it is the right of the State only.¹¹⁹ Nationals cannot choose their foreign hosts and expect them to grant protection, even if they are from the same origin but with different nationalities. Today, only the State has the right to decide to whom refugee status will be granted.¹²⁰

While *hijra* is a right to be enjoyed by all persons fleeing all forms of persecution, it is an obligation placed upon Muslims to seek asylum where religious persecution is so heinous as to require renouncing of their religion.¹²¹ In a sense, seeking asylum is a duty, unless it contradicts some agreements between Muslims and other nations or clashes with a general rule of Shariah.¹²²

Muslims are not obliged to live in places where there is injustice and persecution and they are urged by Islam to leave these places and seek protection elsewhere. Whether *hijra* is a right to be enjoyed or an obligation to be attended to is based upon the repeated command throughout the Quran for the early Muslim community to flee Mecca for Medina¹²³.

Asylum-seekers are not even obliged to prove that they have been persecuted before fleeing and should be granted asylum only upon

¹¹⁶Abou-El-Wafa (n 39) 47.

¹¹⁷Zaat (n 60) 20.

¹¹⁸Munir (n 27) 8.

¹¹⁹Elmadmad (n 43) 51.

¹²⁰Munir (n 27) 8.

¹²¹Zaat (n 60). 18.

¹²²Ibid 12.

¹²³Ibid Zaat 19.

their own request.¹²⁴ However, asylum-seekers should not have committed crimes before seeking asylum, as all crimes should be punished, and there is no distinction in Islam between political and non-political crimes.¹²⁵

In Islamic theory, in short, asylum is a human right both for asylum-seekers and for their hosts. By comparison, the protection guaranteed to refugees and forced migrants under modern law is more limited and restrictive.¹²⁶

The following discussion investigates the special case of Afghan refugees in Pakistan, and then goes on to explore the feasibility of incorporating Islamic notions of asylum and refugees into current policies and practices.

4.2. Rights of Refugee under International Law

Once a person is granted refugee status, he or she is entitled by law and practices some basic rights. These rights given can also be considered as part of human rights. The are numbers of rights given to the refugees and among them are as stated below:-

4.2.1. Right to Non-Refoulement

Article 33 of the 1951 Convention protects such persons refugees from being forcefully sent back to a country where there are reasonable chances of being persecuted. This principle is considered as binding on all states whether they are contracting parties or not. Right of non-refoulement can also be found under Article 3 of the UN Convention Against Torture (UNCAT), “no one including those convicted of crimes should be sent back to a country where they would be at a risk of torture.”¹²⁷ However, the right to non-refoulement is not absolute. It can be rejected on the ground that if there are reasonable grounds for regarding the refugee as a danger to the security of the host country or if the refugee has been convicted of a particularly serious crime and constitutes a danger to the host country. Non-refoulement is a fundamental principle of international law that forbids a country receiving refugees from returning them to a country in which they would be in likely danger of persecution.

¹²⁴ Munir (n 27) 8.

¹²⁵ Ibid 8.

¹²⁶ Munir (n 27) 9.

¹²⁷ UNCAT, Art. 3.

In *Sale v. Haitian Centers Council, Inc.*¹²⁸, the U.S. Supreme Court held that the U.S. was not in violation of its non-refoulement obligation when it returned Haitians interdicted on the high seas because the Haitians were not within U.S. territory and therefore the non-refoulement obligation did not apply. However the judgment was reversed in Court of Appeal whereby Article 33 is silent regarding extraterritorial application. The language of the provision suggests that individuals that already arrived on United States soil are protected and shall not be returned to their country.

4.2.2. Freedom of Movement

Article 12 of International Covenant on Civil and Political Rights (ICCPR) proclaimed that, everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.¹²⁹ Article 26 of the 1951 Convention provides that States shall afford refugees the right to choose their place of residence within the territory and to move freely within the State.¹³⁰ Meanwhile, Article 28 obliges States parties to issue refugees travel documents permitting them to travel outside the State “unless compelling reasons of national security or public order otherwise require.”¹³¹ Besides having freedom of movement within the host country, the refugee may wish to leave the country to visit family in other states, to resettle in a third state, or achieve any other purpose. Thus, Article 28 applies.

However, refugee might face restriction of movement based on Article 12 of ICCPR whereby Article 12(3) allows states to restrict internal freedom of movement and the freedom to choose residence when necessary to protect national security, public order (*ordre public*), public health or morals, or the rights or freedoms of others. This can be seen in countries such as Kenya and Ethiopia where they specified in their national laws that the movement of refugees throughout the country may be restricted and that refugees may be limited to living in designated areas, namely refugee camps.

¹²⁸ *Sale v. Haitian Centers Council, Inc.* 509 U.S. 155 (1993).

¹²⁹ International Covenant of Civil and Political Rights (ICCPR), Art. 12.

¹³⁰ 1951 Convention Relating to Status of Refugees, Art. 26.

¹³¹ 1951 Convention Relating to Status of Refugees, Art. 28.

4.2.3. Right to Family Life

Under Article 23 of ICCPR it proclaimed family as the natural and fundamental group unit of society and is entitled to protection by society and the State¹³². In respect of this right, a number of countries provide for the granting of derivative status to dependent relatives. Thus, where an individual is granted asylum, his or her dependent relatives will also receive protection through him or her.

Nevertheless, the definition of a dependent relative varies by the cultural notions of family prevalent in the State party. In the U.K., dependents are defined as the “spouse, civil partner, unmarried or same-sex partner, or minor child accompanying (the applicant)” while in Kenya, dependent relatives include the brother or sister of an applicant under the age of eighteen, “or any dependent grandparent, parent, grandchild or ward living in the same household as the refugee.”¹³³

4.2.4. Right to Employment

The right to employment is an important socio-economic right of refugees. Article 17 of the 1951 Convention grants the right of employment to refugees. Different nations based on the strengths of their economies and the status of development, have different real practices of granting such rights to refugees. The right to work and access to labour markets are prerequisites for allowing the refugees to secure sustainable livelihoods, thereby reducing vulnerability, enhancing resilience and enabling a dignified life.

4.3. Rights of Refugee in Islamic Traditions

4.3.1. Right to Protection

Granting protection to the oppressed is a duty for all Muslims as stated in Surah at-Taubah verse 9, ‘And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah. Then deliver him to his place

¹³² ICCPR, Art. 23.

¹³³ IJRC, „Asylum and the Rights of Refugee“ (International Justice Resource Center)
<[https://ijrcenter.org/refugee-law/#Exceptions Exclusion and Cessation Clauses](https://ijrcenter.org/refugee-law/#Exceptions%20Exclusion%20and%20Cessation%20Clauses) > accessed 20th June 2020.

of safety. That is because they are people who do not know.¹³⁴ This can also be seen in a hadith, “The asylum (of protection) granted by any Muslim is to be secured (respected) by all other Muslims; and whoever betrays a Muslim in this respect incurs the curse of God, the angels and the people.”¹³⁵

The protection of life is one of the key objectives of the shariah, and Islam provides firm teachings on the sanctity of life. Allah SWT calls upon Muslims to not only refrain from murder, but to also actively strive to protect the lives of others. In Surah al-Maidah verse 32, it stated that, ‘Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption (done) in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, (even) after that, throughout the land, were transgressors.’ This verse highlighted that, killing a person is considered as killing all mankind, while if a person protects a life he is considered as protecting the whole mankind.

4.3.2. Right to Non-Refoulement

This right is similar to the right in International law. When a state or individual has agreed on a protection covenant, it is forbidden for him to force a *musta'min* to return to his origin country against his will. This is rooted in the Prophetic teaching that “a Muslim is a brother of another Muslim, so he should not oppress him, nor should he hand him over to an oppressor”.¹³⁶ There is a consensus that this right extends to both Muslims and non-Muslims. Imam Shaybani stated that even if an enemy fighter came seeking aman, he should not be forced to return to his state if he fears being killed.¹³⁷ If this is done it would be considered treachery and a grave injustice.

One of the most prominent examples of principle non-refoulement can be referred to the act of al-Najashi, the Abyssinian king with whom early Makkan Muslims sought refuge. When representatives of the Quraysh arrived, beseeching al-Najashi to return the asylum seekers to Makkah where they may face justice for their treacherous behaviour, the king responded: “Nay, by God, they shall not be betrayed – a people that have sought my

¹³⁴ Surah at Taubah (9:6).

¹³⁵ Sahih al-Bukhari 1870.

¹³⁶ Sahih al-Bukhari 6940.

¹³⁷ Abou-El-Wafa (n 39) 56.

protection and made my country their abode and chosen me above all others! I will not give them up, until I have summoned them and questioned them concerning what these men say of them. If it be as they have said, then will I deliver them unto them, that they may restore them to their own people. But if not, then I will be their good protector, so long as they seek my protection.”¹³⁸

4.3.3. Right to Non-Discrimination

Musta'min would be entitled to the same rights as citizens of the host state, regardless of whether they were an internally displaced person, a refugee, or a stateless person. Islam honours humans from all backgrounds as proved in Surah ar-Rum verse 22, ‘And of His signs is the creation of the heavens and the earth and the diversity of your languages and your colors. Indeed in that are signs for those of knowledge,¹³⁹ as well as in Surah al-Hujurat verse 13, ‘O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another.’¹⁴⁰ Hence aman is granted irrespective of religions, languages, colors, genders and races.

This sentiment is reflected in Article 1 of the Cairo Declaration on Human Rights in Islam, which states that: “All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.”¹⁴¹ Therefore, Muslim ruler or individuals has a duty to rescue, protect and do justice to any *musta'min*, as long as they stay on Muslim territory.

4.3.4. Right to Non-Separation from Family

This right is also similar to the right provided in International law, unification with family. Islamic law and Prophetic traditions stress the importance of family unity, which plays a necessary role in people’s moral and psychological needs. It is the duty of the host state to keep families together, and assist *musta'min* in being reunited with their own families. The Prophet Muhammad (PBUH) taught that “whoever causes separation between a

¹³⁸ Abou-el-Wafa (n 39) 107.

¹³⁹ Surah ar-Rum 30:22

¹⁴⁰ Surah al-Hujurat 49:13.

¹⁴¹ Cairo Declaration on Human Rights in Islam, Art. 1.

mother and her child, then God will separate him from his beloved on the Day of Judgement.”¹⁴² Therefore, Prophetic tradition makes non-separation obligatory on all Muslims.

4.3.5. Right to Freedom of Religion

Islam does not force *musta'min* to embrace Islam but rather recognizes their freedom to choose their own faith. This freedom is stressed in Surah al-Baqarah 2:256, “Let there be no compulsion in religion, truth stands out clear from error.”¹⁴³ Throughout Islamic history, there are numerous examples of non-Muslims being granted aman by Muslim states. For example following the collapse of the Kingdom of Granada in 1492, and the rising persecution and anti-Semitism perpetuated within Spain by Ferdinand and Isabella,¹⁴⁴ large numbers of Iberian Jews took refuge in various parts of the Muslim world.¹⁴⁵ Russian Jewish and Christian refugees were again welcomed into the Muslim world following Ivan the Terrible’s imperial expansion in the 16th century, and again following the 1917 Bolshevik Revolution.¹⁴⁶ To coerce refugees into to follow Islam is fundamentally contrary to the commands of Allah SWT. Muslims are encouraged to grant refuge to non-Muslims as a way of introducing them to Islam, but non-Muslim refugees should feel under no obligation to accept Islam.

4.4. Cessation of Protection in Islamic Tradition

Nonetheless there are few instances when an Islamic state refuses to grant protection. Firstly, protection shall not be given to the apostates since they are regarded as rebels who defy the authority of Islamic state. Secondly, if the migrant is a non-political criminal who has committed grievances in their country of origin, and seeks refuge as a means to avoid punishment. Thirdly, if the migrant is an enemy combatant who has not revoked their combatant status. Lastly, if

¹⁴² Jami’ at-Tirmidhi 1566 (Hasan Darussalam).

¹⁴³ Surah al-Baqarah 2:256.

¹⁴⁴ Carr, Matthew, Blood and Faith: The Purging of Muslim Spain. New York: New Press. (2009).

¹⁴⁵ Sadia Najma Kidwai, ‘The Rights of Forced Migration in Islam’ (2014) Islamic Relief 1, 16.

¹⁴⁶ Martin, Janet "Ivan IV the Terrible". Medieval Russia 980–1584 (2nd ed.). New York: Cambridge University Press (2007).

hosting a migrant would contravene existing treaties with other states.¹⁴⁷

For example during the signing of Hudaibiyah Treaty between Prophet Muhammad and the Quraysh tribe of Makkah, one of the clause stated that the Muslim community in Madinah was forbade to accept any further Muslim refugees fleeing from Makkah.¹⁴⁸ When one such refugee attempted to seek asylum with Prophet Muhammad ,the Prophet responded to him “Abu Baseer, we had given those people what you know (a treaty) and in our religion treachery is not good for us”.¹⁴⁹

However, aman should not be ceased suddenly. The *musta'min* must be given prior warning, a clear explanation for why his protection has ceased, and a reasonable period of time to make arrangements to relocate. Once the time period expires, he shall be escorted to where he feels safe, and should not be assaulted or harmed in any way. It shows that principle of natural justice was already available in Islamic law.¹⁵⁰

4.5. Limitations of Modern International Refugee Law

In comparison to international law, Islam gives protection to all kinds of people. There is no difference between refugees, asylum, internally displaced persons and forced migrants. All were given protection if they sought help. International law however, only gives protection to refugees who fall under the definition of Article 1 of the 1951 Convention, thus leading to exclusion of many persons from its protection. Today only the State has the right to grant refugee status. Modern international as well as national laws do not give individuals the right to grant or be granted asylum. Nationals cannot choose their foreign hosts and expect them to grant protection, even if they are from the same origin but with different nationalities.⁶¹

In Islamic law and traditions, any person fleeing and seeking protection has the right to enter an Islamic community and ask for protection.

¹⁴⁷ Sayyid Qutb. Social Justice in Islam. Translated by John B. Hardie and Hamid Algar, Kuala Lumpur, Islamic Publications International, 2000, p. 135.

¹⁴⁸ Muhammad Husain Haykal. (n 63)p. 178

¹⁴⁹ Ghassan Maarof Arnaout. Asylum in The Arabic-Islamic Tradition. Geneva, International Institute of Humanitarian Law, 1987, p. 114.

¹⁵⁰ Sayyid Qutb. Social Justice in Islam

5. Pakistan's Response to Afghan Refugees- A classic example

Pakistan has hosted over 1.4 million registered Afghan refugees, and approximately one million more unregistered Afghan nationals for over forty two years. Initially, the government of Pakistan reacted warmly, providing them with some rights to work and live. Today, Pakistan is hosting 1,435,445 registered Afghan refugees, making it the third largest host country of refugees in the world. Practitioners estimate that there are approximately one million more unregistered Afghan nationals in the country.¹⁵¹

During the late 1970s, civil conflict produced the first refugee flows from Afghanistan to Pakistan.¹⁵² For rural Afghans, the Soviet military intervention in Afghanistan in December 1979 was an assault by a communist power on an Islamic nation. This assault imposed a religious duty on the population to migrate out of Afghanistan into countries where Islam still prevailed.¹⁵³ As a result of the ensuing war and civil conflict, thousands of Afghans left their homes and crossed the border to Pakistan.¹⁵⁴ The government of Pakistan has been tolerating refugees and asylum-seekers on its soil, though Pakistan has not ratified the Refugee Convention and does not have domestic legislation on asylum.¹⁵⁵

The government of Pakistan immediately accepted Afghanistan's refugees and saw their acceptance of these migrants, or *muhajirin*, as a religious duty.¹⁵⁶ Since Pakistan was not a signatory to the Refugee Convention, so the question of whether these people were refugees under the Convention did not apply.¹⁵⁷ The legal status of the Afghan refugees it hosts is therefore not a foregone conclusion.¹⁵⁸

Islam is crucial to understanding the acceptance of Afghan refugees by Pakistan.¹⁵⁹ After the 1970s, the Pakistani

¹⁵¹ UNHCR - Pakistan Map Registered Afghan Refugees July 30, 2021. <https://data2.unhcr.org/en/documents/details/88124> accessed 10 October 2021

¹⁵² Nicolson (n 37) 15.

¹⁵³ Peter Marseden, 'Afghanistan: A Case Study in Refugee Return' (*Humanitarian Practice Network*) <<https://odihpn.org/magazine/afghanistan-a-case-study-in-refugee-return/>> accessed 10 October 2021

¹⁵⁴ Nicolson (n 37) 15.

¹⁵⁵ Munir (n 27) 12.

¹⁵⁶ Marseden, (n 153)

¹⁵⁷ Ibid

¹⁵⁸ Zaat (n 60)

¹⁵⁹ Nicolson (n 42) 20.

government shifted from being “secular,” with Islam as a state religion, to adopting “Islamism,” an ideology that promotes Islam not only as a religious system but a political framework.¹⁶⁰ From the late 1970s to early 1990s, both the government and people of Pakistan responded to the influx of refugees from Afghanistan in the spirit of *hijrah*. In other words, the basis of refugee protection was due to an “Islamic brotherhood” shared between all Muslims.¹⁶¹

Although the Afghans were registered as foreigners by the government, they were mainly perceived as brothers and sisters of faith in Pakistan. However, during the second wave, geopolitics negatively influenced Pakistan’s relations with Afghan refugees on its territory. Lack of international concern and funding led to increased hostility from local populations toward the refugees. International food aid and UNHCR assistance also decreased dramatically.

It can be said that Pakistan’s initial reception of the refugees was due largely to shared Islamic values of asylum and refugees, and a sense of “Muslim brotherhood.” Therefore, there exists the potential for future decisions on forced migrants to be based on Islamic *hijrah* rather than purely on principles of international refugee law.

The use of Islamic concepts of asylum and refugees by Muslim states could resolve many of the issues faced by the Afghan case. Regional agreements between Muslim states could be based on laws combining both modern and Islamic laws on forced migration. These agreements and subsequent refugee protection provided by Muslim host states could provide a more effective response to Muslim refugee crises.¹⁶²

6. CONCLUSION

It is highly evident that fundamental Islamic principles of asylum, drawn from early Muslim tradition, strongly endorse the full range of rights such as religious, economic, family rights and social rights due to a refugee. The concept of refugee law in International Law as well as in Islamic traditions (*Siyar*) can be seen, by analyzing them, that there are inherent similarities but some dissimilarities too. In International law, granting refugee

¹⁶⁰ Ibid 19.

¹⁶¹ Abou-El-Wafa (n 39) 46.

¹⁶² Nicolson (n 42) 36.

status lies on the State authorities, whereby in *Siyar*, law of refugee is based on principle of *Hijrah* and *Aman*. The law of refugee in International Law is based on the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees. The rights possessed by the refugee are no different in both legal systems.

The International refugee law is quite general and does not include special provisions relating to some categories of forced migrants that now constitute the majority of the world refugee population. Some of these refugees need special protection, namely, women and children. Women, have special needs as refugees, but these are rarely taken into account by modern refugee law or State practices.¹⁶³ In contrast to the international refugee regime, in Islamic law the Qur'an also puts forth certain regulations to lend additional support to women and children, who are considered more vulnerable than the general refugee population.¹⁶⁴ However, *Hijrah* law is now rarely practiced. If they were taken into consideration, it could be a great contribution to the protection of the forcibly displaced persons. It might also reduce the numerous problems that refugees all over the globe are facing.

We can safely conclude from the above discussion, that from its very inception, Islam has provided protection to the refugees. This can be seen in the Quranic injunctions and Sunnah. It can be concluded that the right to asylum corresponds with three principles of Islam:¹⁶⁵ 1) the obligation to protect the oppressed and persecuted. The grant of asylum constitutes the least form of such protection or relief; 2) The Qur'an urges and encourages mobility should there be compelling reasons to do so;¹⁶⁶ 3) It is absolutely inadmissible in Islam to breach a covenant of asylum granted to a refugee.¹⁶⁷

It is incumbent upon Muslim governments to legitimize their stand on the issue of refugee by positioning its policy and action within Islamic parameters, established by the Quran and the Sunna. The refugee occupies a special status in Islamic history and tradition. Hence, their rights should, be carefully safeguarded.¹⁶⁸ Particularly in this age of globalization, this

¹⁶³ Khadija Elmadmad, (n 43) 56.

¹⁶⁴ UNHCR 'Islam and Refugees' (n 12)

¹⁶⁵ Abou-El-Wafa (n 39) 259.

¹⁶⁶ Ibid 260.

¹⁶⁷ ibid 261

¹⁶⁸ Agha (n 10) 40.

concept, needs to be revived in order to contribute to the improvement of modern refugee law, to contribute to its global acceptance, and to make it more protective for refugees and for forced migrants in general.¹⁶⁹

¹⁶⁹ Elmadmad (n 43).