



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بُوتِنَبْرِسِيَّتِي اِسْلَامِيَّةً اِنْبَارًا رَجِيًّا مِلْدِيَّتِيَا

THE STATUS AND RIGHTS OF REFUGEES IN
INTERNATIONAL LAW

BY

MOHAMMAD NAQIB S/O ISHAN JAN

A THESIS SUBMITTED IN FULFILMENT OF
THE REQUIREMENT FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY OF LAW

KULLIYYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

OCTOBER 2000

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

ABSTRACT

The refugee problem exists in serious proportion and will probably continue to affect large number of people in the future. Several international instruments have sought to determine the legal status of refugees and specify certain minimum rights in relation to the country where the refuge is sought and the country of origin. The object of the protective provisions of these instruments has been to ensure that the international community commits itself to be bound by certain principles of compassion and help. The objectives of this study are: (a) To examine the nature, content and ambit of the rights recognized and protected by various international instruments, especially by the provisions of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol; (b) to examine the extent to which the reservations and declarations, made by several states, as to the provisions of the Convention or the Protocol have restricted the scope of operation of the rights recognized and sought to be protected by these and other international instruments; (c) to determine the extent to which the rights that are available to refugees in relation to both the country of refuge and the country of origin have been translated, in course of time, into binding principles of international law; and (d) to examine the nature of the rights that are available to refugees under the *Shariah* or Islamic Law with an emphasis on the duty of the persecuted to seek refuge and the corresponding duty of the Muslim states to grant refuge and honour their God-given rights and to see to what extent the Muslim states have fulfilled their responsibility vis-à-vis the refugees.

This study concludes: (1) The definition of 'refugee' provided by the 1951 Convention and which determines the 'status' of a person seeking refuge has largely been followed in practice by the states party to the Convention. (2) The right to non-refoulement has been generally honoured in practice by the signatory states and even by states which are not party to the Convention. (3) In the absence of any reliable evidence it is difficult to ascertain the extent to which other rights sought to be guaranteed and protected under the Convention have been respected and protected by the states of refuge. (4) The principle on which 'refugee' status is based in terms of the Convention's definition and the principle of non-refoulement have been so widely accepted that it can be said that they have acquired the same status as other principle of customary international law. (5) The principles on which 'return to one's own country of origin' and 'compensation' for the loss and injury suffered by the refugee as the result of wrongful conduct of the authorities that displaced him are based in law and equity which have to be honoured and protected by the state of origin.

ملخص البحث

إن مشكلة اللاجئين لا زالت موجودة و بأحجام مختلفة بل أنه من المتوقع أن تظل هذه المشكلة تصيب كثيرا من الناس في المستقبل. لذا فقد اهتم بعض المؤسسات الدولية لتحديد الوضع القانوني للاجئين و تحديد بعض الحقوق الأولية أو الأساسية لهم سواء في بلد الملجئ إليه أو بلد الأصل كما ترمي هذه المؤسسات إلى ضمان أن المجتمع الدولي يتعهد بالتمسك ببعض مبادئ الرحمة و المساعدة.

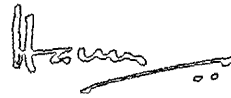
إن الهدف من هذه الدراسة هو دراسة طبيعة و مضمون و حدود الحقوق المعترف بها و الحماية من قبل عدد من المؤسسات الدولية و بخاصة الميثاق سنة 1951 حول وضع اللاجئين و مبادئ 1967 المكملة له. كما تهدف الدراسة إلى معرفة تأثير تحفظ بعض الدول عليهما و أثره في تطبيق مجاهما و تطبيق الحقوق المعترف بها. كذلك تعالج الدراسة مدى ترجمة هذه الحقوق إلى مبادئ قانونية دولية سواء من دولة الملجئ إليه أو دولة الأصل. و أخيرا تتعرض الدراسة لحقوق اللاجئين في الشريعة الإسلامية مع التركيز على حق المضطهدين في اللجوء و واجب الدول الإسلامية بمنحهم هذا الحق امتثالا لواجباتهم الشرعية نحو اللاجئين.

و قد خلصت الدراسة إلى أن مفهوم اللاجئين كما في الميثاق سنة 1951 الذي يحدد الوضع القانوني للاجئ قد طبقه على وجه العموم دول الأعضاء في الميثاق كما أن مبدأ عدم رد اللاجئين على أعقابهم قد جرى تطبيقه على العموم في دول الأعضاء و غير الأعضاء في الميثاق. و يمكن القول بأن هذه الحقوق قد اكتسبت صفة العرف القانوني الدولي و من ناحية أخرى و في ظل عدم وجود أدلة واضحة فإنه من الصعب تقويم مدى تطبيق باقي الحقوق من قبل الدول المضيفة للاجئين.

و أخيرا فإن مبادئ إرجاع اللاجئين إلى موطنهم الأصلي و ما يمكن أن يدفع إليهم كتعويضات من جراء معاناتهم أو فقد بعض أموالهم نتيجة لسوء المعاملة من الدول المضيفة فإن ذلك ينبغي أن يكون أساسه القانون و العدالة و الذي ينبغي أن يكون موضع احترام و حماية الدولة المضيفة.

APPROVAL PAGE

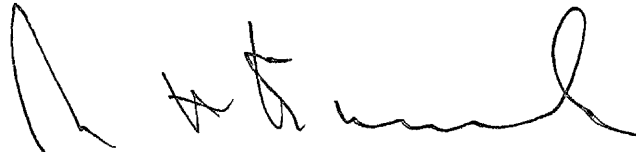
The thesis of Mohammad Naqib s/o Ishan Jan has been examined and is approved by the following:



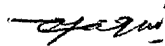
Harun Mahmud Hashim (Supervisor)



Ghulam Saqlain Masoodi



Mohammad Hashim Kamali



Anwarul Yaqin



Abdul Aziz Bari



Nik Ahmad Kamal Nik Mahmud (Chairman)

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name... *Mohammad Magib s/o Istian Jan*
Signature... *Magib* Date... *4/8/2000*

© Copyright by Mohammad Naqib s/o Ishan Jan and

International Islamic University Malaysia

To my late father and mother

ACKNOWLEDGEMENT

I am deeply grateful to my two learned supervisors Professor Tan Sri Dato' Harun Mahmud Hashim, formerly a judge in the Supreme Court of Malaysia, now occupying the post of Professor of Law at the International Islamic University Malaysia, and Professor Dr. Mohammad Ghouse, formerly a Professor of law at the same University, for their guidance and invaluable assistance. Undoubtedly they are both acknowledged experts in the field of laws. Without the inspiration given and the examples set by Professor Dr. Mohammad Ghouse during my first few years of study this work would have never been initiated. When he left the International Islamic University Malaysia for his native country, India, it became the task of Professor Tan Sri Dato' Harun Mahmud Hashim to guide me in my work. It is my heartfelt pleasure to say that he has fulfilled this task admirably. His unfailing help and advice has supported me through the years. It is quite clear that this work would never have been accomplished without the support of either.

I am also deeply indebted to Dr. Razali Nawawi, a Professor of law at the International Islamic University Malaysia, who, in the spirit of a true Malay gentleman, gave me valuable advice. I also wish to express my thanks to the entire law faculty of the International Islamic University Malaysia, and especially to the late emeritus Professor Tan Sri Datuk Ahmad Ibrahim, formerly Shaikh of the Kulliyah of Laws and Deputy Rector, who had favoured me with his kind and fatherly advice. May Allah bless his soul.

Throughout the year I have greatly benefited from the friendship of the people who have been active at the International Islamic University Malaysia. I wish to

express my gratitude to my good friends Prof. Dr. Nisar Ahmad and Bro. Salim for their academic discussions helped me to widen my intellectual horizon. I am also thankful to Dr. Rashed Moore and Madam Jounna Quinton for they help me with my English. A word of appreciation must go to Madam Nooraini Ismail and Madam Zaharah Abdul Samad, who helped me in obtaining research material from overseas.

A thesis can never successfully be completed without the access to good libraries. Therefore, I thank the entire staff of especially IIUM Library and the library of the Law Faculty of the University of Malaya for their help. I also thank the staff of the Office of the United Nations High Commissioner for Refugees in both Malaysia and Pakistan for their assistance and co-operation.

Finally, I owe deep gratitude to my parents, to my sisters and my brother, to my wife, to my two little sweet daughters and my son for the support and encouragement they have given to me. May Allah bless them all.

TABLE OF CONTENTS

Abstract.....	II
Approval.....	V
Declaration.....	VI
Acknowledgement.....	IX
Table of Treaties.....	XVI
Table of Cases.....	XVII
Abbreviations.....	XX

CHAPTER 1: INTRODUCTION

1.1 Statement of the problem.....	1
1.2 Objective of the Study.....	3
1.3 Research Methodology.....	4
1.4 Scope and Limitation.....	5
1.5 Organization of Chapters.....	7

CHAPTER 2: HISTORICAL BACKGROUND.....13

CHAPTER 3: THE 1951 CONVENTION: ITS BINDING NATURE

3.1 Effect on the Contracting States.....	28
3.2 Effect of the Reservations and Declarations.....	30
3.3 Effects on the Non-Contracting Parties.....	40

CHAPTER 4: THE STATUS OF REFUGEES

4.1 General Remarks.....	43
4.2 Criteria for Refugee Status.....	47
4.2.1 Well-Founded Fear of Being Persecuted.....	48
4.2.2 Persecution.....	54
4.2.3 Agents of Persecution.....	62
4.2.4 Grounds of Persecution.....	75
4.2.4.1 Race.....	75
4.2.4.2 Religion.....	76
4.2.4.3 Nationality.....	77
4.2.4.4 Membership of a Particular Social Group.....	77
4.2.4.5 Political Opinion.....	86
4.2.5 Outside Country of Nationality.....	91
4.2.6 Lack of Protection.....	93

CHAPTER 5: THE RIGHT OF REFUGEES TO NON-REFOULEMENT

5.1 General Remarks.....	95
5.2 Issues Related to Non-Refoulement.....	98
5.2.1 Non-Rejection at the Frontier.....	98
5.2.2 Non-Extradition.....	107
5.2.3 Non-Expulsion.....	116

CHAPTER 6: THE HUMAN RIGHTS OF REFUGEES

6.1 General Remarks.....	122
6.2 The Right Against Arbitrary Detention.....	129
6.3 The Right to be Heard by a Judicial Authority.....	139
6.4 The Right to legal Assistance.....	141
6.5 The Right to challenge the lawfulness of Detention.....	143
6.6 The Right Against Torture and Inhuman Treatment.....	148
6.7 The Right to Freedom of Movement.....	150
6.8 The Right to Travel Documents.....	154
6.9 The Right to Freedom of Association.....	158
6.10 Social and Economic Rights.....	160

CHAPTER 7: THE RIGHTS IN PRACTICE

7.1 Article 1 of the Convention.....	169
7.2 Article 33 of the Convention.....	172
7.3 Other Articles of the Convention.....	180

CHAPTER 8: THE RIGHTS TO RETURN AND TO COMPENSATION

8.1 General Remarks.....	201
8.2 The Right to Return.....	209
8.2.1 Legal Basis.....	209
8.2.2 The Character of Voluntariness.....	215
8.2.3 Facilitating the Return.....	217
8.2.4 The Protection of Returnees.....	221
8.3 The Right to Compensation.....	223
8.3.1 Meaning and Scope.....	224
8.3.1 Legal Basis.....	226

8.3.2 Implementation.....	232
---------------------------	-----

CHAPTER 9: MUSLIM STATES AND REFUGEES

9.1 General Remarks.....	237
9.2 Duty to seek Refuge.....	239
9.3 Duty to Grant Refuge.....	243
9.4 Rights of Refugees.....	248
9.5 Muslim States: Current Trend.....	255

CHAPTER 10: CONCLUSION.....267

APPENDIX 1: CONVENTION RELATING TO THE STATUS OF REFUGEES

A. Text.....	289
B. List of States Parties.....	300
C. List of States made Reservations.....	303

APPENDIX 2: PROTOCOL RELATING TO THE STATUS OF REFUGEES

A. Text.....	324
B. List of States Parties.....	327
C. List of States made Reservations.....	327

APPENDIX 3: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Text.....	334
B. List of States Parties.....	348
C. List of States made Reservations.....	352

**APPENDIX 4: INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS**

A. Text.....393
B. List of States Parties.....402
C. List of States made Reservations.....405

APPENDIX 5: UNIVERSAL DECLARATION OF HUMAN RIGHTS.....425

**APPENDIX 6: CONVENTION GOVERNING THE SPECIFIC ASPECTS OF
REFUGEES IN AFRICA**

A. Text.....430
B. List of States Parties.....434

BIBLIOGRAPHY.....436

TABLE OF TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

[The full text of instruments marked with an asterisk can be found in the Annexes]

- 1922 Arrangement with regard to the Issue of Certificate of identity to Russian Refugees.
- 1926 Arrangement relating to the Issue of Identity Certificate to Russian and Armenian Refugees.
- 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees
- 1928 Arrangement concerning the Extension to other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees
- 1928 Arrangement concerning the Functions of the Representative of the League of Nations High Commissioner for Refugees
- 1933 Convention relating to the International Status of Refugees
- 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany
- 1938 Convention concerning the Status of Refugees coming from Germany
- 1945 United Nations Charter
- 1946 Constitution of the International Refugee Organization
- 1948* Universal Declaration of Human Rights
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide
- 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War
- 1950 European Convention on Human Rights and Fundamental Freedoms
- 1950 Statute of the Office of the United Nations High Commissioner for Refugees
- 1951* Convention relating to the Status of Refugees
- 1954 Convention relating to the Status of Stateless Persons
- 1965 Convention on the Elimination of All Forms of Racial Discrimination.
- 1966 Bangkok Principles Concerning Treatment of Refugees
- 1966* Covenant on Civil and Political Rights

- 1966* Covenant on Economic, Social and Cultural Rights
- 1967* Protocol relating to the Status of Refugees
- 1967 UN Declaration on Territorial Asylum
- 1969 America Convention Human Rights
- 1969* OAU convention relating to the Specific Aspects of Refugee Problems in Africa
- 1969 Vienna Convention on the Law of Treaties
- 1973 Convention on the Prevention and Punishment of Crimes against International's Protected Persons, including Diplomatic Agents
- 1981 African Charter on Human and Peoples' Rights
- 1984 Cartagena Declaration on Refugees
- 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment
- 1990 United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment
- 1990 Cairo Declaration of Principles of International law on Compensation to Refugees
- 1994 Quadripartite Agreement (Abkhazia-Georgia Agreement) on the Voluntary Return of Refugees and Displaced Persons
- 1995 Bosnia and Herzegovina-Croatia-Yugoslavia, General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7 (Refugees and Displaced Persons)

TABLE OF CASES

Adjei v. Mei (Canadian) F.C.A.D. A-676-88, Jan. 25, 1989.....	50
Acosta, Matter of, I.D. 298 (U.S) BIA, March 1st, 1985.....	80, 81, 83
Almeida Sanchez v. United States, 413 U.S 266 (U.S.S. Ct 1973).....	178
Argueta v. INS, 759 (U.S) F. 2d 1395 (9th. Cir 1985).....	88
Arizona v. California 292 U.S. 341 (U.S. 5 Ct. 1934).....	100
Attorney General of Canada v Ward (1993) 2 SCR 689.....	56, 73, 82, 93
Asakura v. City of Seattle, 263 U.S 332 (U.S.S.Ct. 1973).....	107
Asylum Case, ICJ Reports (1950).....	198
Barcelona Traction Power and Light co. Case, ICJ Rep. 1970.....	229
Bolanos Hernandez v. INS, 767 (U.S.) F 2d. 1277 (9th. Cir. 1985).....	53, 72, 87
Bugdaycay v. Secretary of State [1976] AC 514.....	277
Canada v. Schmidt [1987] 1 S.C.A. Rep. 500.....	115
Chan Yee Kin v. Minister of Immigration and Ethnic Affairs (1989) 169 CLR.....	89
C.C.S.Uv. Minister for civil Service (U.K)[1985] 1 A.C.374.....	145
Case Abstract IJRL/0155, 5 (3) IJRL (1993).....	85, 119,115
Case Abstract IJRL/0197, IJRL 280 (1994).....	134, 135
Fernandez-Rogue v Smith, 692 (U.S) F. Supp. 887 (N.D Ga. 1985).....	134
Jean v. Nelson 472 (U.S) 846 (s.ct. 1985).....	124
Hernandez-Ortiz v INS, 777 ((U.S) F. 2d 509 (9th. cir. 1985).....	.89
Haitian Ctrs. Council, Inc. v. McNary, 969 (U.S) F. 2d. 1350 (2d Cir. 1992); rev'd, Sale v Haitian Ctrs. Council, Inc., 113 (US) s. ct 2549, (1993).....	103,104
INS v. Cardoza Fonseca, 467 (U.S) s ct, 407 (1987).....	49, 68
Lazo-Majano v. INS, 813 (U.S) F. 2d., 1432 (9 th Cir. 1987).....	89

Liversidge v. Anderson [1942] A.C. 208.....	145
McMullen v. INS, 500 (U.S) F. 2d 1312 (9 th Cir 1981).....	70, 72
Macaud v. INS, 500 (U.S) F. 2d 355 (2d Cir. 1974).....	62
North Sea Continental Shelf Cases 1 ILJ Report 1969.....	198
Plyler v. Doe 457 (U.S) 202 (s. ct. 1989).....	124, 166
Rajudeen, Zahirdeen v. Mei (Canadian) F.C.A.D 55 N.R 129 (1985).....	69
R. V. Secretary of State for the Home Department, ex parte Sirakumaran [1988] 1 ALL ER. 193 (H.L.).....	50
R. v. Secretary of State for the Home Department, ex parte Jayakumaran, 28 June, 1985, (Unreported) QBD.....	62
R. v. Chief Immigration Officer, Gatwick Airport, ex parte Harjender Singh [1987] 1 AR 346 (U.K.).....	92
Rosa v. INS 44D (U.S) F. 2d 100 (1 st Cir. 1971).....	62
Secretary of State v. Kwame Otchere et al [1988] 21 IAR (U.K.).....	83
Sumitomo Shoji America, Inc. v. Arugliano 457 (U.S) s. ct. 176 (1982).....	100
Salibrán v. Mei (1990) II Imm. LR. (2 nd) 165.....	53
Sale v. Haitian Ctrs. Council, Inc. 113 (U.S) s. ct. 2549 (1993).....	102, 104, 105, 106, 107
Soroa - Gonzales v. Civilette, 515 (U.S) F. Supp 1049 (N.D. Ga. 1981).....	133
Singh v. Mei (Canada) 58 N.R.I.....	140
Turcios v. INS 759 (U.S) F 2d. 1359 (9 th . Cir 1985).....	88
United States v. Stuard 489 (U.S) 35 (s. ct. 1989).....	100
U.S. v. Iran [1980] 1 CJ Report.....	130
Western Sahara Case, 1 CJ Report 1973.....	213

ABBREVIATION

A.J.I.L	American Journal of International Law
Aust-Y.B.I.L	Australian Year Book of International Law
Aust-L.J	Australian Law Journal
Asian Y.B.I.L	Asian Year Book of International Law
AALC	Asian-African Legal Consultative Committee
ASEAN	Association of South East Asian Nations
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human Rights and People's Rights
Art/arts	Article/articles
ANC	African National Council
BOP	Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment
B.Y.B.I.L	British Year Book of International Law
B.I.A	Board of Immigration Appeals
Colum. Hum. Rts. L. Rev.	Columbian Human Rights Law Review
C.L.Y.B	Canadian Law Year Book
D.R.	Decisions and Reports
ECHR	European Convention for the Protection of Human Rights
ECOSOC	Economic and Social Council
Ed/eds	Editor/editors
E.J.I.L	European Journal of International Law
E.T.S	European Treaty Series
ExCom	Executive Committee
Et.al	(et.alia) and others
F. 2d	Federal Report, Second Series
Fn.	footnotes
G.A	General Assembly

Geo.Imm.LJ	Georgia Immigration Law Journal
Har.ILJ	Harvard International Law Journal
IACHR	Inter-American Commission of Human Rights
Ibid	(ibidem) in the same place
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
Id	(idem) the same
I.C.L.Q	International and Comparative Law Quarterly
IGCR	Inter-Governmental Committee on Refugees
I.J.I.L	Indian Journal of International Law
I.J.R.L	International Journal of Refugee Law
I.L.M	International Legal Materials
I.L.R	International Law Report
Imm.A.R	Immigration Appeals Report
Imm.L.R	Immigration Law Report
INA	Immigration and Naturalization Act
Infra	below
INLA	Irish National Liberation Army
INS	Immigration and Naturalization Services
IRO	International Refugee Organization
I.S.Q	International Studies Quarterly
J.M.B	Journal of Malaysian Bar
J.A.A	Journal of Afghan Affairs
K.B.	King's Bench
LN	Leagues of Nation
L.N.O.J	Leagues of Nation Official Journal
N.I.L.R	Netherland International Law Review
N.E.L.Rev.	New England Law Review
OAS	Organization of American States

OAU	Organization of African Unity
Op.cit	(opere citato) in the work cited
Phil. L.J	Philadelphia Law Journal
PCIRO	Preparatory Commission of the International Refugee Organization
P.Y.B.I.L	Palestine Year Book of International Law
PCIJ	Permanent Court of International Justice
Q.B.	Queen's Bench
Res.	Resolution
T.I.C.L.J	Temple International and Comparative Law Journal
UN	United Nations
UNHCR	United Nations High Commission for Refugees
UNESCO	United Nations Education, Scientific and Cultural Organization
UDHR	Universal Declaration of Human Rights
UNKRA	United Nations Korean Reconstruction Agency
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Work Agency for Palestine Refugees in the Near East
U.N.T.S	United Nations Treaty Services
UNU	United Nations University
US	United States
US Ct. of App.	United States Court of Appeals
US S. Ct.	United States Supreme Court
U.Fla.L.Rev	University of Florida Law Review
U.Tas.L.Rev	University of Tasmania Law Review
U.N.S.W.L.Rev.	University of New South Wales Law Review
Vs	versus
Va. J.I.L	Virginia Journal of International Law
Vol	volume
Wash.L.Rev.	Washington Law Review

Ya. L.J

Yale Law Journal