

**The Refugee in Islamic and
International Law: A Comparative and
Practical Study on Refugees in Saudi Arabia
and Australia**

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Abstract:

This paper employs comparative law to explore similarities and differences in Saudi and Australian Refugee Laws, particularly their compliance with Sharia and Public International Law. The technique of comparative legal research is used to compare various legal norms to analyze refugee laws of both the countries leading to suggestions for changes to strengthen the existing legal jurisprudence and legislation. Comparative study of law from Saudi Arabia and Australia be helpful in providing recommendations for each country to learn from the experience of the other and integrate useful developments in refugee law. The study helps synthesize a comprehensive law to protect the rights of refugees and asylum seekers.

The researcher has identified and analyzed refugee law from Common law in Australia and examined their application in different court decisions. Additionally, sources of Sharia including Quran, Sunnah, conventions, statutes, has been evaluated in the context of refugee problems. Peter D Cruz's framework of comparative legal study has been used as a guide for the study to conduct the analysis of legal documents in accordance with doctrinal legal research.

Qualitative research methodology is used to determine relevant sections of laws, court decisions, and courts' interpretation of refugee laws in different cases involving asylum seekers. The qualitative approach of reviewing legal documents and literature from Australia and Saudi Arabia through comparative analysis has helped researcher to ascertain the status of refugees and asylum seekers in both the countries. The royal decrees issued by Saudi Arabia are also analyzed for their relevance with Sharia principles protecting the refugee rights. The analysis has been helpful in exploring a common premise from the refugee laws of both Saudi Arabia and Australia and its relevance with Sharia principles and Public International Law.

Finally, has offer concluding remarks and offer recommendations based on the study findings. Also, it has included a concise summary of the main findings of the paper. In particular, the thesis restates the main features identified by the researcher in regard to the Saudi Arabian refugee law and those that characterise the Australian refugee law. The main provisions of refugee protection in both the Sharia law and the international law captured briefly, including the key similarities and differences between the two laws in regard to safeguarding refugees. Based on this comparison, the areas for improvement are highlighted in both the Islamic refugee law and international refugee law.

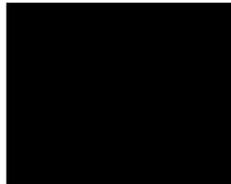
Declaration

“I, Mohammed Alsubaih, declare that the PhD thesis entitled: 'The Refugee in Islamic and International Law: A Comparative Study and Practical Study on Refugees in Saudi Arabia and Australia', is no more than 80,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work”.

“I have conducted my research in alignment with the Australian Code for the Responsible Conduct of Research and Victoria University’s Higher Degree by Research Policy and Procedures.

“All research procedures reported in the thesis were approved by the Ethics and Research Integrity Office and Approval Number: HRE19-178.”

Signature:



Date: 13/12/2021

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Abbreviations**Glossary**

ICR - Intergovernmental Committee for Refugees

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

UNNRRRA – United Nations Relief and Rehabilitation Administration

WWI – First World War

WWII – Second World War

IRO - International Refugee Organization

OIC - Organisation of Islamic Cooperation

INTV – Interview

CERD - Convention on the Elimination of All Forms of Racial Discrimination

UMA – United Muslim of Australia

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Chapter One: Introduction

1.1 Overview

Chapter one and two of this paper addresses the introductory phase of this paper. The paper briefly provides a comprehensive but concise history of the refugee status in Saudi Arabia and Australia that allows the researcher to create a foundation to build the readers' interest. Going on to discuss the duty of the states hosting the refugees will allow the researcher to elaborate on the responsibilities taken on by Saudi Arabia and Australia upon taking charge of caring for these refugees. Discussing the aims of the research which are: to assess the interactions of Islamic and International Law with refugees and provide a comparative evaluation of the situation of Arab refugees in both Saudi Arabia and Australia. Also introduced, are the research questions, which query the similarities of both situations, and the law and practices of both Saudi Arabian Law and Australian Law on claims of asylum. Thereafter, this introductory chapter will ensure that definitions and terms are examined and defined in order to ensure that the reader is able to understand the paper in its entirety without confusing terminology. Terms that are defined include the meaning of this asylum in International Law as well as the relevant terms, Differences between labels such as Immigrant, Permanent Resident, Expat, Citizen, Statelessness and Refugee are examined and the comparison between Islamic and International Law is discussed. Further, there is an introduction provided to the Islamic and International Law and the Non-Refoulement Principle. Australia is also introduced as an emerging country of refuge, discussing the potential responsibilities of Australia as they facilitate this goal. The methodology and framework of the paper incorporates qualitative research approach, investigating legal documents to analyse the situation in a quantifiable manner, while the qualitative aspect entails comparative analyses being conducted to critically evaluate the literature. Lastly, Chapter two examines the existing literature that compares Islamic Law and International Law regarding refugees, as well as determining if international asylum procedures as being compatible with Islamic Law. The purpose of providing such an in-depth introduction within Chapter one, is to ensure that the reader of this chapter has a broad understanding of the topic and issues addressed within this paper. By creating clarity of all terms, analysed and discussed throughout this paper, the researcher intends to avoid potential misunderstanding and confusion as the reader progresses through the paper.

1.2 Introduction

The protection of refugees and their human rights is a guarantee under international law and is based on the broader framework of international human rights law, especially through the conventions and covenants that form the regional and topical instruments for protection and assistance of refugees.¹ First, it is important to contextualize the concept of Islamic law for this research. The research setting is Saudi Arabia, which embraces the larger branch of Islam, Sunni. The Sunni branch of Islam has four schools of thought that guide the jurisprudence of Islamic law. The schools of thought are *Hanbali*, *Maliki*, *Hanafi*, and *Shafi'i*. Saudi Arabia embraces the Hanbali School of jurisprudence, which bases all its Islamic laws on the Quran. However, concerning asylum seekers, the Hanbali concurs with other Islamic jurisprudence as stipulated by the Quran regarding hospitality and charity. Islam requires all Muslims to assist and protect vulnerable people such as refugees; it also presents mechanisms for their care and support. According to Abou-El-Wafa, the concept of asylum is ingrained in the Shari'a Law, which stipulates that every human being is entitled to protection, especially in the face of persecution.² Specifically, Shari'a Law emphasises the concept of *Aman*, which implies safety for all human beings irrespective of whether they are Muslims or non-Muslims. In this regard, Islamic Law is a rich custodian of the principles of refugee protection as highlighted by its focus on charity and kindness. In this regard, there are no significant differences in the application of Islamic law and international law for the status and protection of refugees.

The provisions of Islamic law are based on Qur'an and Hadith. All the doctrines are due to these two sources. Islamic jurisprudence in Saudi Arabia is the Hanbali jurisprudence, so the paper will rely on the Hanbali doctrine in the differences between laws, if any.

1.3 Aims of the Research

The purpose of this research project is to make a comparative analysis of the status of refugees under Islamic law and international law. While Islamic laws require the government to accept refugees for asylum in any condition, international law impose certain

¹ Musab, Hayatli., "Islam, International Law and the Protection of Refugees and IDPs." *Forced Immigration Review*, 1 June 2012, 2

² Ahmed, Abou-El-Wafa., *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 43.

restrictions on the refugees to qualify for asylum. That entry of non-citizens in Saudi Arabia and Australia is not possible without valid travel documents. Two representative countries, Saudi Arabia and Australia, have been selected for the analysis because Saudi Arabia employs Islamic laws whereas Australia implements international laws to address the refugee problem. The main difference between the two countries is the offshore requirement of the applicants. Under Islamic laws, a refugee should be present in an Islamic country to seek asylum, but Australia require that the applicant of asylum should be offshore until they are granted asylum. The strict Australian immigration laws regarding boat people are clearly in contrast with Islamic refugee laws. The researcher will assess the influence of these laws over refugees as per the legal instruments concerned in the specific conventions that apply to refugees. Additionally, the paper will evaluate and contrast the situation of Arab refugees in Saudi Arabia (practices Islamic law) and Australia which has domestic legislation on refugees as well as International law. Moreover, the research also aims at identifying the differences in the status of refugees under Islamic law and international law by analysing the pertinent covenants and conventions following the methodology advocate by Cruz. Also, find out what is actually happening to refugees and asylum seekers in Australia and KSA to establish how the related conventions and covenants are experienced by refugees and asylum seeker, interview is conducted with lawyers. Finally, the researcher will evaluate the problems that arise from the research and present apposite recommendations for improving the treatment of refugees, as well as establishing the refugees' rights in Saudi Arabia and Australia.

1.4 Research Questions

The main question of the research is whether the Islamic law on refugees only protects the interests of Muslims and obscures the basic human rights of non-Muslim refugees. Other specific questions include:

1. What are the similarities and differences in international and Islamic law on refugees?
 - (a) What is the status of refugees in international law?
 - (b) What is the status of refugees in Islamic law?
2. What is the Saudi Arabian law and practice on asylum claims?
 - (a) Is Saudi Arabian law and practice consistent with Islamic law?

- (b) Is Saudi Arabian law and practice consistent with international law?
 - (c) Are applicants for asylum aware of their substantive and procedural rights?
 - (d) Are successful applicants aware of their rights and responsibilities?
3. What is the Australian law and practice on asylum claims?
 - (a) Is Australian law and practice consistent with international law?
 - (b) Is Australian law and practice consistent with Islamic law?
 - (c) Are applicants for asylum aware of their substantive and procedural rights?
 - (d) Are successful applicants aware of their rights and responsibilities?
 4. Are there changes required to improve the substantive and procedural rights of refugees in Saudi Arabia and Australia?
 5. What is actually happening to refugees and asylum seekers in Australia and KSA?
 6. Is the Refugee Law in Saudi Arabia compatible with Islamic Refugee Law? Is it enough to protect refugees or not? Compare asylum applications procedure in Saudi Arabia with the asylum application procedure in Australia.

These questions derive a conclusive approach towards the analysis of refugee law in the interest of human rights.

1.5 Contribution of the Research to Knowledge on Refugees

Compatibility of Islamic Law on Refugees with International Law

The literature on Islamic law on refugee protection has focused on whether the principles of international law apply to or are compatible with sharia.³ Scholars have considered whether principles such as those outlined in the UDHR such as the universality of human rights are suited in the Islamic world, where religious scriptures espouse the concept of rights. The duties of Muslims to protect refugees are borne out of obedience to God and the teachings of *shari'a* or *Hijrah*, which are broader and differently defined than in international law.⁴ Accordingly, Islamic law views the right to asylum as only possible through the belief system of Islam.

³ Musab, Hayati., "Islam, International Law and the Protection of Refugees and IDPs." *Forced Immigration Review*, 1 June 2012, 2

⁴ Islamic Relief Worldwide. "Islam and Refugees." *UNHCR*, 20 Nov. 2012

Another challenge to the compatibility of these two laws is the difficulty in reconciling the principle of equality of gender in Islamic law. Human rights under international law are consistent in promoting the equality between sexes; accordingly, international laws on refugees affirm equality even in the treatment of asylum seekers and refugees. However, sharia treats men and women as unequal; consequently, there are difficulties on how to treat or protect female refugees concerning issues such as the rights of restitution of property to refugees.⁵

At its most fundamental level, Islamic law subscribes to the protection of similar rights to International law such as the rights to justice, equality, human dignity, security and safety.⁶ The laws of Hijrah and aman extend these same rights to asylum seekers. In this regard, irrespective of some differences, Islamic law agrees with most aspects of the protection of refugees under international law. Accordingly, Munir argued for the need to improve the understanding of refugee laws to foster the integration of Islamic law and international law on refugees for the protection of asylum seekers in Muslim states.⁷ However, the study by Nicolson is the only research that examined the possible approaches to integrating Islamic law with international law on the protection and status of refugees.⁸ The present research will thus consider the policy options that are available to Muslim states such as Saudi Arabia and non-Muslim states such as Australia in integrating *shari'a* in international law.

Challenges in the modern international law of refugees and asylum

Literature suggests that there are challenges in international law on refugees, which have created gaps in the legal framework for the protection of refugees. According to Engedahl one of the challenges of international law is the flexible but volatile conceptualisation of international protection of refugees.⁹ In the initial conceptualisation of international protection under the Refugee Convention 1951 Convention Relating to the Status of Refugees and the subsequent 1967 Protocol, the UN described international protection within the context of the recognition of refugee status and safety from persecution.

⁵ Musab, Hayatli., "Islam, International Law and the Protection of Refugees and IDPs." *Forced Immigration Review*, 1 June 2012, 2

⁶ Vanessa Johan, Nicolson. *Reconciling Notions of Asylum and Refugees in Islam and International Law A Case Study of Afghan Refugees in Pakistan*. 2009. University of British Columbia, Master's Thesis.

⁷ Munir, Muhammad. "Refugee Law in Islam." *Journal of Social Sciences*, vol. 4, no. 2, 2011, pp. 12..

⁸ Ibid.

⁹ Terje Einarsen and Marthe Engedahl " The universal asylum system and the 2016 New York Declaration: towards an improved 'global compact' on refugees?" *Refugees Law Initiative* vol.1, no 17, 2016, pp. 17

However, although the legal documents of the UNHCR seemingly seek to promote protection of refugees, the meaning of the concept still raises challenges concerning the responsibility of states to protect refugees. In this regard, Munir indicates that states can decline to take responsibility for refugees because the UN fails at enforcing compliance with international law¹⁰ That decline is against the principle of non-refoulement, which demands that states cannot return refugees to the country of origin if they fear persecution and inhumane treatment. It can be noted that scope of non-refoulement principle is much broader than its application in international refugee law. Thus, clauses of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), especially the first paragraph of Article Three: “No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”., and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) should be included in international as well as regional treaties to make them consistent with Islamic laws. These challenges are evident in most Gulf States; for instance, the response to asylum seekers in the Syrian refugee crisis was discouraging to the international community.¹¹ Accordingly, Einarsen and Engedahl argue that incorporating certain non-refoulement clauses of international human rights laws can improve modern international refugee law.¹²

Nicolson suggests the adoption of the Islamic meaning of protection and asylum, which is clearer and more comprehensive than that in international law.¹³ It is evident that Islam’s traditions play a crucial role in helping nations manage refugee crises in ways that are compliant with Islamic tradition. For this reason, the basis of this research is that the classical teachings of Islam on refugees can be applied to modern refugee law to improve the handling of refugees even in non-Muslim states such as Australia. The research will assert that integrating the principle of non-refoulement into the international refugee laws will make them consistent with Islamic laws, which are based on empathy. The classical teachings-based solution requires further research on the differences in meaning, goal, and purpose in Islam Shari'a compared to International law. This research will thus consider the differences in conceptualising

¹⁰ Munir, Muhammad. “Refugee Law in Islam.” *Journal of Social Sciences*, vol. 4, no. 2, 2011, pp. 10

¹¹ Sari, Hanafi. “Gulf Response to the Syrian Refugee Crisis.” *Sociology of Islam*, vol. 5, no. 2/3, 2017, pp.112

¹² Terje Einarsen and Marthe Engedahl " The universal asylum system and the 2016 New York Declaration: towards an improved ‘global compact’ on refugees?" *Refugees Law Initiative* vol.1, no 17, 2016, pp. 17

¹³ Vanessa Johan, Nicolson. *Reconciling Notions of Asylum and Refugees in Islam and International Law A Case Study of Afghan Refugees in Pakistan*. 2009. University of British Columbia, Master’s Thesis.

refugee protection and status in Australia and Saudi Arabia and how nations can utilise these concepts in the improvement of modern international refugee law. This research will also recommend possible solutions to address these challenges by considering improvements to the legal framework for refugees in Saudi Arabia and Australia. The recommendation will follow Nicolson's approach of seeking stronger multilateral cooperation between Muslim states in support of refugees.¹⁴

1.6 Significance of the research project

This research is important to scholars because it will improve the body of literature on refugees in Islamic law and international law because the current evidence is limited in its use of Islamic principles on refugees and asylum. According to Munir, scholars on refugee protection and status continue to ignore Islamic law even though it provides more protection to asylum seekers and refugees than international law.¹⁵ In this regard, this research will invoke dialogue and research on how to enhance the understanding of the role of Islam in the protection of refugees. This research will also add to the theory of refugee protection concerning the significance of the different definitions and understandings of refugees in Islam and international law.

It can also be asserted that countries like Australia rely more on local laws than international refugee laws to deprive refugees of their basic human rights. The Australian government's handling of refugees arriving by boat is clearly in contrast with Islamic principles. Deporting a refugee to another country goes against the clause 14 of human rights which states that everyone has the right to seek and to enjoy in other countries asylum from persecution. Thus, the research will try to establish that the Australian government should revise its policy to make it consistent with international laws by extending the principle of non-refoulement to the people arriving through boat (See further Ch4).

Importantly, for individuals and states, this research will inform refugees and asylum-seekers on their rights and also advocate increased awareness of their rights in countries of asylum. Additionally, the research findings will provide recommendations on how non-Muslim states such as Australia can improve their current understanding and utilisation of international law to improve the treatment of refugees. This study also ascertains the importance of presenting recommendations to Muslim states such as

¹⁴ Vanessa Johan, Nicolson. *Reconciling Notions of Asylum and Refugees in Islam and International Law A Case Study of Afghan Refugees in Pakistan*. 2009. University of British Columbia, Master's Thesis

¹⁵ Munir, Muhammad. "Refugee Law in Islam." *Journal of Social Sciences*, vol. 4, no. 2, 2011, pp.2

Saudi Arabia on how to improve their current regulations and laws on refugees, especially regarding the application of Islamic law in dealing with refugees. As Nicolson highlighted, the behaviour and needs of Muslim refugees are unique; accordingly, further understanding of Islamic aspects can improve both Islamic and international laws on refugees.¹⁶ It is evident that the successful resolution of refugee crises involving Muslims requires the incorporation of Islamic principles of asylum and refugees into policies and practices in both Muslim and non-Muslim states. For this reason, this research has significant implication to policy formulation on refugee protection.

1.7 Methodology and Framework

According to Vernon Palmer comparative law is used as a means of effecting sameness and suppressing differences in the law.¹⁷ Comparative legal research is the practice of comparing legal norms, case law, legal jurisprudence and legislation from different states and legal families. A comparative study of law from two different countries can be used to effect change and strengthen the law. The comparative study, undertaken in this thesis enables it to provide recommendations, for Saudi Arabia and Australia to consider, and to learn from each other. This can be achieved by borrowing, transplanting and transposing law and legal principles from each other.

This research utilises a methodology research design that uses qualitative approaches. Specifically, the methodology is the basis of the doctrinal legal research. Doctrinal legal research entails research into legal documents and concepts. The documents include case law from Common law in Australia and court decisions from appellate courts and statutory law. In this regard, the researcher identifies, studies, analyses, and interprets primary and secondary legal materials such as the Quran, Sunnah, conventions, statutes and legal history. The scholar, in the case of Australia, uses the issue of the status of refugees to search for relevant legal history and document. The researcher, then sorts all the identified legal documents and materials, and analyses the text using legal expertise to understand the legal interpretations and meanings of the text. In this case, the scholar adopts an evaluative form of inquiry, which aims at demystifying the reason that influenced the legislations, court decisions, statutory materials, or committee reports. Importantly, when using case law, the

¹⁶ Ibid.

¹⁷ Vernon, Palmer. "From Leretholi to Lando: Some Examples of Comparative Law Methodology." *Global Jurist Frontiers*, vol. 4, no. 2, 2004.

researcher locates cases and court decisions within the premise of the research problem and evaluates the cases to identify common ground, which facilitates interpretations for objective conclusions. Similarly, the researcher locates international conventions, royal decrees and legislations (in Saudi Arabia) relating to refugees and asylum seekers. The researcher examines and analyses the conventions and declarations of both Saudi Arabia and Australia to identify a common premise that guides the discussion of the status of refugees.

The qualitative approach entails the use of a comparative analysis to review and evaluate critically legal documents and literature regarding the status of refugees. The researcher uses the qualitative framework to develop a critical review of the relevant literature regarding laws and refugee statuses. The comparative analysis enables the researcher to understand each country's refugee legal framework and determine the differences and similarities in both Islamic and international laws. Concerning the legal documents, the scholar conducts a comparative, legal analysis of the legal documents to discern the differences in the legal doctrines employed by the Islamic and International laws regarding the status of refugees. Peter de Cruz, in his book *Comparative Law in a Changing World*, provides a comprehensive methodology for comparative legal study. His methodology is effective in analysing legal documents because it is in line with the tenets of doctrinal legal research.¹⁸ According to Cruz, the framework for comparative law study is as follows:

- i. The scholar should identify and state the problem precisely in the research questions. Chapter 1
- ii. The researcher should also indicate the foreign jurisdictions and parent legal family to which the issues belong. Chapter 1.
- iii. The primary sources of law required for the national legal systems are the nation's legislation and case law in accordance with the jurisdiction referred to in the second point above. The researcher also collects, for analysis, committee reports and publications by national government agencies, law reform commissions, and commissions of inquiry into key issues. The scholar reviews professional practice commentaries on the pertinent laws and literature in scholarly monographs.

¹⁸ Peter, De Cruz. *Comparative Law in a Changing World*. London, Routledge, 2007 pp75

- iv. The researcher also collects materials concerning relevant jurisdictions for analysis.
- v. The researcher organises the data and materials in relation to the research questions; the scholar arranges the materials using headings that reflect legal philosophy and ideologies of the concerned legal systems- in this case Saudi Arabia, Australia, Islamic law and international law.
- vi. The researcher also critically analyses the legal principles in terms of their intrinsic meanings in each legal system. Chapters 3 and 4
- vii. . The scholar maps out the possible answers using a meticulous comparison. Chapter 5
- viii. Finally, the researcher provides the conclusions within a comparative framework with caveats, where relevant. The scholar also uses critical commentaries under the framework of the original objectives of the study. The commentaries reference doctrinal legal research and policy.¹⁹ Chapter 6.

The issue of context is pertinent to research because different countries apply international laws differently. For these reasons, a legal and literature analysis facilitates the comparison of real-life aspects of refugee protection and status in both Islamic and international laws. Accordingly, a literature review and legal analysis provides the researcher with enhanced mechanisms for interpreting laws and previous research to enhance the applicability of the knowledge from the literature to present research. In this case, the application helps the researcher understand the differences in both Islamic laws on refugees and also international refugee laws. Importantly, the comparison of the legal documents and literature fosters an understanding of how Islamic Law has contributed to the development and improvement of international laws on refugees. Notably, the survey of literature helps the researcher to avoid duplication of the research by identifying prior researches, which facilitates the creation of unique research questions and objectives that facilitates the formulation of new facts and knowledge regarding the topic.²⁰ Accordingly, literature reviews and legal analysis are instrumental tools for this research.

¹⁹ Peter, De Cruz. *Comparative Law in a Changing World*. London, Routledge, 2007. pp 88

²⁰ Ibid.

However, Yin contends that it is crucial to consider not just the strengths but also limitations of a research design when conducting research.²¹ One of the main limitations of literature review is they it does not create room for the identification of new problems. As noted above, literature reviews focus on existing scholarly content, which has its basis on the topics or problems that other scholars have explored. Accordingly, it is sometimes difficult to identify gaps in research, especially when studying new phenomenon. However, the adoption of a comparative literature and legal analysis constitutes new research and new perspectives on existing knowledge.

The researcher has selected legal documents, case law, statutes, and specific laws in the international legal framework and Islamic law together with books, journals, and articles from international organisations such as the UN. The researcher has sorted the literature and legal documents on the basic of their relevance and contribution to the research topic.²² The researcher analysed the literature.

In addition to the data collected from the legal documents, the researcher conducts interviews with legal experts from Saudi to determine their viewpoint on refugee laws to gain further knowledge about the interpretations of Saudi and Islamic refugee laws. The researcher interviews lawyers, mufti (experts on Islamic law), law professors, and other legal experts proficient in Saudi and Islamic refugee laws to explore similarities and differences in Islamic and international refugee laws. The interviews focus getting further insight about interpreting the existing laws and legal practices prevailing in Saudi regarding refugees. The treatment of Muslim and non-Muslim refugees under international and Islamic refugee law will also be explored. The legal experts are asked about their interpretation of the refugee laws under the Islamic legal paradigm. They are also asked to interpret the existing statutes. The interviewing process determines how the provisions in refugee law apply to different groups of people in practice. It supports the data collected from the primary legal documents. It has not been considered necessary to conduct such interviews in Australia as the literature and materials sufficiently reveal the operation of the law in practice.

²¹ Robert, Yin. *Case Study Research and Applications Design and Methods*. Thousand Oaks, Sage Publications, 2009. pp. 2.

²² Ibid.

1.8 Definitions and Terms

Throughout this study, there are various key concepts and constructs. While they are discussed and contextualised throughout the paper, this section makes a brief introduction to allow the reader have some level of understanding of what subsequent chapters present.

Refugee

A refugee is a person who leaves or is unable to return their country of their nationality as a result of well-founded fear from persecution by their state of origin. Such a person fears persecution for reasons of race, religion, political opinion, and nationality. Membership to certain social group may also generate the fear of being persecuted. A person is also considered a refugee if they are forced to leave their country of nationality or origin as a result of events that threaten public order. In such instances, a person need not fear being persecuted.²³

Immigrant

An immigrant is a person who makes a conscious decision to leave their country of origin for another state. Immigrants often have the chance to review their destination country before moving. Consequently, they prepare for the journey and familiarise themselves on what is to be expected. Immigrants differ from refugees in that their decision to move to another country is not motivated by fear of their lives or freedom as a result of actions by their state of origin.²⁴

Permanent Resident

A permanent resident is a person who has been allowed to live and work in a foreign country permanently. Such a person is allowed to enjoy their stay in the foreign country without any requirement to obtain citizenship. Consequently, they can travel abroad while using the passport issued by their country of origin and will not face any restrictions when returning to the country in which they have obtained permanent residence.²⁵

Expatriate

²³Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 36

²⁴Caysi, Simpson. "What's the Difference between an Immigrant and a Refugee?" *The Borgen Project* 4 January 2018

²⁵Ivan, Vasic. *The Immigration Handbook A Practical Guide to United States Visas, Permanent Residency and Citizenship*. Jefferson, McFarland & Company, Inc., Publishers, 2008. Pp. 7.

An expat is a person that leaves their country of origin and moves to a foreign country for purposes of work. Expats retain the citizenship of their country of origin and only live in the foreign country for the duration of their employment.²⁶

Citizen

A citizen is a person who has legal recognition and protection by a state to enjoy all rights and privileges provided by that state. One can become a citizen of a country through birth (being born in the country or being born to citizen parents) or naturalisation (where a permanent resident obtains citizenship).²⁷

Asylum

Asylum refers to the protection of a person by a state from harm by their state. The three main types of asylums are religious, territorial, and diplomatic asylum.²⁸ In Islam, religious asylum can be granted when a non-Muslim seeks to hear the word of Allah or in the holy sanctuary of Makkah (al-Haram). In both cases, those seeking refuge are granted protection. In international relations, religious asylum applies where persons who enter sacred or religious places are granted protection.²⁹ Territorial asylum is where a person is granted refuge in a foreign territory. In Islam, territorial asylum can be granted by state authorities and individual citizens. This type of asylum can be granted to migrants, people who convert to Islam, or through humanitarian reasons when the life or freedom of a person is threatened. In international law, territorial asylum is provided to persons that seek safe refuge in a sovereign state. Granting asylum by a state is a sign of its sovereignty over a territory.³⁰ Diplomatic asylum is granted to diplomats. In Islam, it applies to members of a diplomatic mission and persons for whom an accredited ambassador has intervened. In international law, diplomatic asylum is granted in places where a state has authority but which are outside its territory such as consulates, embassies, and military vessels.³¹

Statelessness

²⁶ Sally, Christie. *Vault Guide to International Careers*. New York, Vault Inc., 2004

²⁷ Ivan, Vasic. *The Immigration Handbook – A Practical Guide to United States Visas, Permanent Residency and Citizenship*. Jefferson, McFarland & Company, Inc., Publishers, 2008. Pp. 61.

²⁸ Ahmed, Abou-El-Wafa,. *The Right to Asylum between Islamic Shari'ah and International Refugee Law – A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 81.

²⁹ Ibid.

³⁰ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law – A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 91.

³¹ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law – A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. pp. 140

Statelessness is a condition in which a person is not recognised as a citizen by any state under the operation of its law.³² Such people lack a legal bond with any state. As only state can have citizens. In other cases, persons may become stateless if they lose or denounce their existing citizenship and are yet to obtain new citizenship in another country.³³ The UN International organisation for migration defines statelessness as a condition where an individual does not get considered as a national of any state under the operations of state laws. It may result from several factors, which may include several causes including conflicts of law, administrative practices, discrimination, failure to conduct birth registration, denationalisation, and renunciation.³⁴

Aman

Aman refers to the assurance of protection. It is given to Muslims and non-Muslims moving to an Islamic state or territory. Consequently, aman refers to refuge. Aman can be given to all people through a peace treaty or to a few individuals. All people are entitled to aman, except apostate since they are viewed as rebels to Islamic states.³⁵

Hijrah

The term hijrah refers to immigration. In Islam, the term is used to refer to the migration of a person in the path of Allah. It is used to refer to the movement of people from a non-religious state to an Islamic state.

Istijara

The term is often used in line with the concept of asylum seeking, and it refers to the asylum seeker's plea for protection.³⁶

Dhimmi

The term dhimmi is used in a context referring to a non-Muslim who has been protected, or one whose responsibility has been taken.³⁷

³² Perruchod, Richard and Redpath-Cross, Jillyanne. *Glossary on Migration* 2nd edition. International Migration Law no. 25. International Organisation for Migration, 2011, pp. 95.

³³ Tendayi, Bloom. et al. *Understanding Statelessness*. Oxon, Routledge, 2017. Pp33

³⁴ Perruchod, Richard and Redpath-Cross, Jillyanne. *Glossary on Migration* 2nd edition. International Migration Law no. 25. International Organisation for Migration, 2011, pp. 95.

³⁵ Munir, Muhammad. "Refugee Law in Islam." *Journal of Social Sciences*, vol. 4, no. 2, 2011, pp.4-7

³⁶ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 3.

³⁷ Kadiruzzaman, Sabila. slam Without Borders: Transnationalism, Social Justice, and Refugee Assistance. Student Research Papers #2012-5. Pp. 3. (Web page, 11 Nov 2021) <<https://klau.nd.edu/assets/331817/islamwithoutborders.pdf>>

1.9 Ethics Approval

The thesis is guided by the ethics approval under the number (HRE19-178). In this study, the researcher depends on human subjects to carry out the investigative activities. The recruitment of the participants included a thorough approach to ensure the inclusion of the most applicable respondents. To be included in the study, the person must be a legal expert in the field of Islamic and International refugee laws. not.

The researcher provided details of the aims and related investigative conditions to offer the participants a good understanding of the study (see Appendix). As a result, the participants made informed decisions regarding their participation in the research or otherwise.

Moreover, the researcher upheld research integrity and ethical requirements during the data collection stage, interpretation, analysis, use, reporting and storage of the study outcomes. This critical requirement in research will commence with the researcher's description of the ultimate use of the collected data. The procedure is important due to the use of human participants in the research. The data is "anonymized" to remove any direct links to particular respondents. INTV is the symbol of the interviews.

1.10 Occupational Health & Safety Risks

The researcher seeks to incorporate informed consent as a critical element of the research activity to guarantee high levels of confidentiality when dealing with respondents' data. This study raises very low hazards in conducting the research and while collecting the data. Research and case studies are through libraries and networks of social communication where they will certainly be low risk. Occupational health concerns may relate to safety during collection of the data or in travelling to other cities in order to conduct the interviews and the researcher's work on a laptop computer. The last two years of the project have been conducted during the COVID-19 pandemic.

1.11 Conclusion

The study of the status of refugees under Islamic and International laws, as applied in KSA and Australia, provides notable highlights of the challenges to the compatibility of both laws, especially concerning Arab refugees. The use of a comparative approach to study refugee law in Islamic and International laws shows that Islamic laws have their basis in religion. However, the research also contributes to

knowledge regarding the integration of Islamic and International laws to address the gaps in both legal frameworks and capitalize on the strengths of the laws, especially regarding the principle of non-refoulement. Importantly, the study will inform the development of theories that are the basis for developing policies or laws that enhance the effectiveness of Islamic and International refugee laws as applied in KSA and Australia.

The comparison between the Islamic and international refugee laws adopts a literature analysis perspective. The researcher focuses on relevant documents informing about the two sets of laws, and a few examples on applicability in both Australia and KSA. Therefore, it is a comparative legal analysis as highlighted and discussed by Cruz as he shares an 8-point framework. It means that the researcher identifies the problem, indicates all the relevant international jurisdictions and national legal systems relevant to the cases under review. All necessary and relevant materials on the case are collected and organised to respond to the research questions. All possible answers involve the meticulous comparisons of diverse approaches available. The researcher critically analyses the legal principles and their meanings in line with the current research. Finally, the researcher provides commentary on the achievement of the original objectives of the study.

Chapter Two: Islamic and International Refugee Law

2.1 Introduction

2.2 Refugee Convention and Protocols

2.2.1 The Status of Refugees

2.2.2 The Final Act the UN Envoys for Refugees and Stateless Persons

2.2.3 History and Theory of International Refugee Law

2.2.4 Convention and Protocol

2.3 History and Theory of Islamic Refugee Law

2.4 Summary

2.1 Introduction

Throughout this chapter, the researcher focuses on the theories of Islamic law on refugees, and theories of international law of refugees. Chapter 3 will examine refugee law in Saudi Arabia in terms of its application of Sharia. Chapter 4 will examine refugee law in Australia in terms of its application of international law. Chapter 5 will then evaluate and compare the two systems. Chapter 6 will draw conclusions. The researcher adopts a literature review approach throughout this chapter and focuses on how each of the two systems of law have developed over time to the current laws.

This section will mainly focus on the history and theory of Islamic refugee law; history and theory of international refugee law; and international humanitarian law as it relates to refugees. Human beings have experienced forced migration throughout history. Throughout history, states have offered asylum to individuals who face the risk of persecution and potential death in their home countries. It has resulted in the development of theories and laws governing the welfare of the refugees. Such laws do not only exist in the contemporary setting, but also in Islamic teachings. Understanding these perspectives will allow the researcher to shed light on the existing similarities and differences between the two theoretical backgrounds. While people have sought refuge from other places for millennia, the developments of the modern international refugee law developed after World War II. Since Islamic law is based on the Quran, it takes a more traditional approach than the modern refugee law. The existence of the Universal Declaration of Human Rights (UDHR) introduces issues of contention and debate, especially in the Islamic world.³⁸ A significant number of refugees in the world today are either in Muslim countries or have a Muslim background. Since the Arab Spring, displacements have continued to rise amid other tensions, war and terror in the Arab world.³⁹ Some rights are shared between the Islamic law and international law on human rights, but there are differences that this chapter identifies.

Understanding the international refugee law and its relevance to the Islamic law requires understanding of various undernotes. There are concepts of international refugee law that have been in Islamic law practices for centuries. Nonetheless, understanding these factors requires looking at four main areas. First, the beneficiary of

³⁸ Hayatli, Musab. "Islam, International Law and The Protection of Refugees and IDPs." *Forced Migration Review*, 2012, pp.2.

³⁹ Ibid.

the law or rules made is an important factor. Under the Islamic law, all Muslims have the right to reside or get accepted and protected within the Islamic State or territory. The same law also allows granting of aman to all non-Muslims. It is a clear expression of the high level of acceptance and some form of protection that all human beings get under the Islamic law. Looking at the international refugee law, the protection of refugees considers that they could be non-nationals. It means that an individual deserves the assistance and protection as an asylum seeker regardless of their nationality, ethnicity or religion, both under customary international law and Islamic law. The second factor to consider is the grounds of non-refoulement, and this considers all the reasons that may result in an individual seeking protection or refuge from another state. Under the Islamic law, the main objective when according aman is to prevent bloodshed and protect the life of an asylum seeker. It also allows offering protection to any person who feels that their life, that of their family could be at risk of persecution, or their property could be destroyed. In addition, such people cannot get repatriated without their will, and if they feel that their lives could still be at risk. The international law on protects all people against refoulement to a place where an individual feels that their property or life could be threatened based on a wide range of factors. While the Islamic law looks at an individual as either being Muslim or non-Muslim, international law has a wide classification based on all factors of diversity, including race, nationality, ethnicity, or even membership in a social group or political affiliation.

Third, it is also important to understand the authorities in both Islamic and international law that are held responsible for granting asylum and protection to the refugees. Under the Islamic law, the Islamic State and all Muslim individuals have the responsibility of granting aman to a person or group of people.⁴⁰ On the other hand, under the international law, the territorial authority governing the area where a person is seeking asylum is responsible for granting asylum status. In this case, it is usually the country where an individual seeks protection. Finally, one must also consider the exceptions that these laws give when it comes to granting asylum and protection to refugees. Under the Islamic law, when a person or group requests for asylum, such a requested must be accepted, and it should be withdrawn unless one of the following two elements arise. First, a person's protection may be withdrawn if they become hostile to

⁴⁰ Ahmed, Abou-El-Wafa., *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009, pp. 43.

their host. It means that harbouring the individual creates a threat to the welfare of the other people. Second, the protection may be withdrawn if an individual is known to be engaging in espionage. Under the Islamic law and Quranic teaching, spying is discouraged, and if a refugee is a spy, they are a threat to the state. Under the international law, refugee status may be withdrawn if an individual becomes a security threat to the host country. It may also be withdrawn if the individual gets convicted of a major crime that poses them as a danger to the community within the host country. Evidently, there are multiple similarities on the four main areas assessed, but as the following discussions highlight, these similarities emanate from different foundations.

2.2 Refugee Convention and Protocols

2.2.1 The Status of Refugees

Since there are refugees in almost all parts of the world, there is a need to ensure and guarantee their protection. Understanding the status of refugees in line with the international law is critical for their overall wellbeing. Article 14 of the Universal Declaration of Human Rights 1948 emphasises the rights that a person can look for asylum whenever they are persecuted in another country, which is the central source of the refugee protection principle today. The Refugee Convention came into force in 1954 and was subject to amendment. However, the convention has received progressive development of the international human rights laws, and in turn, overcoming the limitations to its universal coverage. The Convention, as both a status and a rights-based tool, is subject to various central principles—the most outstanding of them being non-discrimination and non-penalisation. The convention has provision for all, regardless of their gender, race, religion, sexual orientation, or any other basis of discrimination.⁴¹

Furthermore, the convention provides that refugees should not be penalised on the grounds of illegal entry or stay.⁴² Lastly, the convention provides basic standards for treating refugees, where they are entitled to primary education, work, access to courts, and travel documentation and rights.⁴³ Conclusively, the significance of the convention and its principle for refugee protection continue to gain fundamental

Hayatli, Musab. "Islam, International Law and The Protection of Refugees and IDPs." *Forced Migration Review*, 2012, pp.2.

⁴² Ibid, pp. 2

⁴³ Ibid, pp. 2

recognition. For this reason, it is crucial to spread awareness of these provisions to both the refugees and those involved with refugee issues.

2.2.2 The Final Act the UN Envoys for Refugees and Stateless Persons

The official conference that led to the Final Act of the Convention was held in the European Office of the United Nations in Geneva from 2nd to 25th July, 1951.⁴⁴ Twenty-six countries were present, whose governments provided representative delegates with satisfactory credentials to approving their participation. The conference essentially provided the grounds for a discussion to draft a convention relating to provisions and protocols relating to refugees and stateless persons. The conference majority decided that all headings to the chapters and articles of the convention are put in place for practicality.⁴⁵ That is, any constituent of interpretation would not accompany the titles. Regarding the status of stateless persons, the draft protocol did not make any permanent decisions because the issue required further study by the appropriate body in the UN.⁴⁶

The third recommendation is the welfare services that refugees require help from the appropriate organisation to facilitate, encourage, and sustain the efforts already put in place in the moral, legal and material issues.⁴⁷ The fourth recommendation is international cooperation in the field of refuge and resettlement.⁴⁸ Putting into consideration that refugees flee their original states due to persecution, they are entitled to protection. Therefore, this recommendation requires that governments keep welcoming refugees in their terrains to provide the refugees with a haven or even resettlement in the spirit of international unity. Lastly, the conferences recommend the extension of treatment by convention.⁴⁹ The conference articulates the anticipation that the convention terms are treated as a binding contract to guide all states while dealing with refugees. The president, vice-president, and the conference's executive secretary witnessed the recommendations and signed the Final Act. Both KSA and Australia have adopted elements of the Convention in their local laws. However, in both countries, the local laws supersede any international laws.

⁴⁴ General Assembly. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. *UNHCR*. 1951.

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

2.2.3 History and Theory of International Refugee Law

The western development of the refugee law appears in the form of international refugee law. Throughout history, one of the most ancient human freedoms entailed people moving across borders between countries. However, these freedoms were delimited by other actors as opposed to the person enjoying the freedom. While countries have always had some rules or practices regarding their dealings with asylum seekers, there are no records of a global or regional legal mandate for states to provide protection to a refugee. The actions of any state where a person sought refuge were based on its practices, and how it felt like treating any asylum seeker. It meant that other than the host country, such an individual could not have recourse or seek assistance through any other means. If their host decided to expel them, they could not get protection from an international source.⁵⁰ While the period after WWII is said to be the main source of international refugee law, there are other events and factors that contributed to its formation, and they can be traced as back as the period before WWII and after WWI⁵¹⁵² Other researchers trace elements of actions far back into the 19th century as indicators of a need to develop and international governance mechanism for the plight of asylum seekers. While not covering the entire world, some nations adopted treaties that they used to ensure that political asylum seekers did not get extradited since their lives were at risk.⁵³ After WWII, the world, especially the Western countries had to deal with a massive influx of refugees. They had to develop laws on an international level, which would govern the imminent problem.⁵⁴ The initial approach entailed the application of international refugee laws based on an individual's ethnic background, and their nationality. There were acceptance of refugees moving from European countries, and this was mainly due to the large numbers that the host countries were receiving.⁵⁵ Evidently, the international refugee law is not more than a century old, and its formation and continued development expresses a reactive approach and not proactiveness.

⁵⁰ Rafiqul Islam. "The Origin and Evolution of International Refugee Law." *An Introduction to International Refugee Law*, edited by Rafiqul Islam and Jahid H. Bhuiyan, Martinus Nijhoff Publishers, 2013, pp.13

⁵¹ Vanessa Johan, Nicolson. *Reconciling Notions of Asylum and Refugees in Islam and International Law A Case Study of Afghan Refugees in Pakistan*. 2009. University of British Columbia, Master's Thesis

⁵² Guy, Goodwin-Gill. "The International Protection of Refugees: What Future?" *International Journal of Refugee Law*, vol. 12, no. 1, 2000, pp.6

⁵³ Agnès, Hurwitz. *The Collective Responsibility of States to Protect Refugees*. Oxford, Oxford University Press, 2009. Pp. 9

⁵⁴ Rafiq, Islam. "The Origin and Evolution of International Refugee Law." *An Introduction to International Refugee Law*, edited by Rafiqul Islam and Jahid H. Bhuiyan, Martinus Nijhoff Publishers, 2013, pp.13

⁵⁵ Agnès, Hurwitz. *The Collective Responsibility of States to Protect Refugees*. Oxford, Oxford University Press, 2009. Pp. 11

While there have always been reasons for people to seek asylum or protection from foreign nations, it was not a widely discussed issue on an international level until after World War I. The receipt of protection by refugees through international law happened when millions of individuals became stateless as a result of war, and multi-ethnic empires disintegrated. This happened after the First World War 1914-1918 when the Ottoman, German and Austro-Hungarian Empires were broken up and the Russian Empire became the USSR after the Russian Revolution of 1917. It happened again after the Second World War 1939-1945, with the division of Europe into Eastern and Western parts. Large refugee populations were also seen as threats to security, and already scarce resources were stretched to the limit.⁵⁶ Since then, there was need to work on the problem before it got out of control. Essentially, the idea of international law for the protection of refugees started in Europe before its global adoption.⁵⁷ The main reason for the development of the new laws was to safeguard the interests and safety of these vulnerable people. They were entitled to adequate protection despite their status as refugees. Nonetheless, there is a historical rift between theoretical approaches of refugee protection and the practical aspect. Essentially, states have failed to keep their agreement to look after the interests of the refugees.

There was a time when states prioritised the mutual respect for one another more than they did for the individual citizens. Major refugee crisis promoted a change in the way that nations acted, and some of the refugees were rendered stateless, which meant no sovereignty was at stake. It led to states concluding various multilateral treaties meant for the protection of specific refugee groups as they emerged.⁵⁸ After the 1917 Russian revolution, a significant number of Kulaks escaped in search of asylum. Most of them lacked proper documentations about their nation of origin. It made it difficult for them to move beyond the first country where they were received. It led to the issuance of identity certificates to Russian Refugees during a Geneva Conference in 1922.⁵⁹ One of the requirements for an individual to claim refugee status, they needed to be outside their home country, which should also not be giving them any protection.⁶⁰ In 1938, the international community developed a convention in regard to the welfare

⁵⁶ Gill Loescher, "The International Refugee Regime: Stretched to the Limit?" *Journal of International Affairs*, vol. 47, 1994, pp. 353.

⁵⁷ Rafiqul Islam. "The Origin and Evolution of International Refugee Law." *An Introduction to International Refugee Law*, edited by Rafiqul Islam and Jahid H. Bhuiyan, Martinus Nijhoff Publishers, 2013, pp.13

⁵⁸ Franz, Koeck Heribert. "The Core Problem of Europe's Migration Policy." *Istorie, Cultura, Cetatenie in Uniunea Europeana*, vol. 12, no. 1, 2019, pp.74.

⁵⁹ Rafiqul Islam. "The Origin and Evolution of International Refugee Law." *An Introduction to International Refugee Law*, edited by Rafiqul Islam and Jahid H. Bhuiyan, Martinus Nijhoff Publishers, 2013, pp.16

⁶⁰ Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law*. Oxford University Press, 2007. Pp 245

and status of refugees that were fleeing the Nazi rule in Germany. At the time, the Nazis had refused to recognise Jews as German citizens. As new issues relating to the refugees emerged, they were given further attention, and new protection approaches were developed. Therefore, institutionalising the international protection of refugees from a legal perspective resulted from numerous multilateral treaties. While concerns arose during both WWI and WWII due to the number of refugees that resulted, a coherent body offering their protection or a normative standard did not emerge.

It was not until WWII that further developments in this area emerged. World War II (WWII) was a pivotal event in the development of the international refugee law since it resulted in a large number of refugees that sought asylum from their war-torn countries. It resulted to a large number of international organisations that developed with the sole purpose of offering assistance and protection to the refugees. Some of the organisations that formed for this purpose existed for a period before being disbanded or absorbed into other organisations. The United Nations was instrumental in the development and formation of these organisations, and it orchestrated the overall establishment of the United Nations High Commission for Refugees (UNHCR) which is still the main international organisations that offers assistance to countries receiving refugees throughout the world.⁶¹ However, that was not always the case even though the organisation was formed in 1950. It was meant as a temporary solution to the rising refugee problem, and its initial mandate was to assist them for three years. After the expiry of the period, and additional five years were added to its term, and this trend continued for decades until the limit of operations was removed in 2004. Through the UNHCR, the 1951 Convention on Refugees was formed, and it formed the basis and guidance of how refugees would operate over the years.⁶² The Convention defined a refugee, and also stated their rights, and what nations were expected to do when an individual or a group sought asylum in their state as illustrated as the beginning of the chapter.⁶³ While the formation originally looked to resolve the plight of European refugees, it soon became clear that the refugee problem was a global issue, and needed to incorporate other parts of the world. Protocols and regional conventions formed soon

⁶¹ Alexander, Betts., *Protection by Persuasion International Cooperation in the Refugee Regime*. London, Cornell University Press, 2009. Pp 8.

⁶² Nahla, Valji. "1951 Refugee Convention: Fifty Years of Seeking Visibility." *Refuge*, vol. 19, no. 5, 2001, pp. 26-27.

⁶³ *Ibid*, p. 26

after to incorporate different regions that have over the years adopted the provisions of the international law on refugees.⁶⁴⁶⁵⁶⁶

Even with these developments, the post-international refugee convention period continued to have various challenges on the conceptualisation of refugee status. Various nations led by the United States pushed for the agenda that sought to identify the specific refugees that needed international protection. They did not find it necessary to have a blanket protection approach for all refugees. These states sought to determine the refugee status, and through the process, they would only assume restricted and precise protection duties. Further development led to the growth in the comprehension and understanding of refugee-hood that would be conceived as relating to a specific individual. Consequently, determination of the refugee status of a person would cease being a group issue, and focus on the individual. It was a grossly unrealistic approach considering the modern era cases where people seek safety and asylum en masse.⁶⁷ A major concern arising from the need to determine the status of an individual to grant them refugee status entailed both objective and subjective factors. They needed to show that they had a well-founded fear of persecution.⁶⁸ The Refugee Convention articulation of processes and procedures seemed to cater for the geopolitical interests of western countries that interpreted refugee status with the intention of excluding certain problems and types of displaced individuals. The result was a Eurocentric approach that resulted in a two-tier approach in refugee protection that led to the acceptance and protection of European claimants while those from third-world nations got denied asylum.

Over the years, Signatory countries to the agreement have formed some form of discretionary refugee protection. It means that while an individual has a right of seeking and receiving refugee status and protection, it cannot be taken as a matter of right. Various other factors have come into play over the years, and shaped the refugee laws and standards. During the cold war, which took place between 1947 and 1991, there were blockades that meant some immigrants could not get into certain countries as a

⁶⁴ Alexander, Betts., *Protection by Persuasion International Cooperation in the Refugee Regime*. London, Cornell University Press, 2009. Pp 177.

⁶⁵ UNHCR. "Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees." *UNHCR*, 6 April 1992

⁶⁶ Musab, Hayatli., "Islam, International Law and the Protection of Refugees and IDPs." *Forced Immigration Review*, 1 June 2012, pp 2

⁶⁷ Rafiqul Islam. "The Origin and Evolution of International Refugee Law." *An Introduction to International Refugee Law*, edited by Rafiqul Islam and Jahid H. Bhuiyan, Martinus Nijhoff Publishers, 2013, pp.20.

⁶⁸ *Ibid*, 21

matter of their citizenship.⁶⁹ Nonetheless, the western nations were also in high demand for skilled and unskilled labour, which meant that some immigrants seeking economic benefits could get into their countries seamless. It was a process that would not last over time since the steadily growing pressure led to the international community developing several conventions and humanitarian refugee agencies.⁷⁰

Judiciary would also engage and play a regulatory role in discretionary determination. Nonetheless, the role was minimalistic in such a way that they did not arrest the highly politicised interpretation of the provisions of the Refugee Convention. These courts are open and free to access by any refugee who is in state that is party to the convention. Some of the issues that courts have tackled include the US Supreme Court determining that an individual may have well-founded fear of persecution or threat on their lives even if the chance of such an event occurring was less than 50%.⁷¹⁷²

All these factors and elements play a vital role in the development experienced in modern laws safeguarding the welfare of refugees. Nonetheless, the Refugee Convention is still the main source of protective principles for refugees. Overall, the IRL defines a refugee, and protects their right to request for asylum in any country, and also safeguards them from forceful repatriation where an individual faces the risk of persecution. The UN, through the UNHCR is the international body that protects the refugees and helps them receive permanent solutions. Australia is a signatory to the Convention

2.2.4 Convention and Protocol

The first chapter is the general provisions where Article 1 of the convention defines a refugee and their eligibility. It does not apply to any person that falls out of the full definition. Article 2 states the general obligation of every refugee is that they have a duty to whichever country they find themselves in.⁷³ The duty is to adhere to the laws and regulations of the particular country while taking measures to maintain order in public. Article 3 states that the convention is non-discriminatory.⁷⁴ Thus, all the

⁶⁹ Ibid, 25

⁷⁰ Ibid, 25

⁷¹ Ibid, 26, 27

⁷² The *Cardoza-Fonseca* case (1987) 467 US 407.

⁷³ UNHCR. *Convention and Protocol Relating to the Status of Refugees*. 2011, pp. 16

⁷⁴ Ibid, pp. 17

contracting countries shall satisfy the accord's provisions with no regard to gender, race, or country of origin. Article 4 states that The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children. Article 5 states that all elements of the Convention must not be deemed to impair the rights and benefits that a contracting state accords to the refugees in line with the Convention provisions.⁷⁵ Article 6 interprets the term 'same circumstances'.⁷⁶ Article 7 states that, apart from the favourable treatment required by the convention, contracting states shall grant refugees the same treatment as other aliens in the State, exempting refugees from reciprocity.⁷⁷ Article 8 states that refugees should be exempted from exceptional measures taken against the person or property of non-refugees of the same nationality. Articles 9 and 10 cover the continuance of measures and residence, respectively.⁷⁸ In exceptional circumstances, such as war, measures which it considers to be essential to the national security in the case of a particular person can be taken. Article 11 requires contracting countries to exercise sympathy to refugee seafarers, particularly assistance with documentation.⁷⁹

The second chapter is titled 'The Judicial Status', of the convention, and it begins with Article 12 that entails the personal status of the refugee, which is governed by the law of his home country, and if he lacks one, by the law of the residence country. Rights that the refugee acquired and reliant on their status, say marriage, will comply with the rights and laws of the residential State. Article 13 regards movable and immovable property, and the residential State will provide refugee treatment as advantageous as it can. On few good occasions, the State will accord the treatment granted to other aliens.⁸⁰ Article 14 protects the refugees' artistic rights and protects similar property treatment as other aliens in the State.⁸¹ In the same circumstance, Articles 15 and 16 provide for association rights, say participation in politics and access to courts refugees are accorded the most favourable treatment as foreigners.⁸² In the third chapter, the case of gainful employment, all refugees have the right to wage-earning employment, self-employment, and liberal professions as stated

⁷⁵ Ibid, 17

⁷⁶ Ibid, 17

⁷⁷ Ibid, 17, 18

⁷⁸ Ibid, 18, 19

⁷⁹ Ibid, 19

⁸⁰ Ibid, 20

⁸¹ Ibid, 20

⁸² Ibid, 21

by Articles 17, 18, and 19. In all the above, contracting states are to give the refugees sympathetic considerations while integrating the rights of all refugees.⁸³

The next chapter of the convention is the welfare of the refugees. Article 20 states that, in rationing, the refugees should receive similar treatment to nationals whenever a rationing system is present. In housing, Article 21 states that the contracting States will follow their public authority regulations.⁸⁴ However, favourable treatment can be accorded at any event, and less favourable treatment if also accorded to aliens in a similar situation. Concerning public education, Article 22 states that the contracting country should offer refugees similar standards of primary education offered to the nationals. However, favourable treatment can be accorded at any event, and a less favourable one accorded to aliens in a similar situation. Article 23 states that contracting countries should provide refugees with similar assistance to nationals in public relief.⁸⁵ Lastly, Article 24 of the Convention protects that in labour legislation and social security, contracting States are expected to treat refugees similar to nationals.⁸⁶ However, favourable treatment can be accorded at any event, and a less favourable one accorded to aliens in a similar situation. Additionally, contracting states are to give the refugees sympathetic consideration while integrating the rights of all refugees.

Chapter five of the convention covers the administrative measures, starting with Article 25: administrative assistance. Usually, a refugee will need the help of authorities in the haven country.⁸⁷ Thus, in Articles 26, 27, and 28, the contracting State will be required to afford all refugees this help without prejudice to freedom of movement or provision of identification papers.⁸⁸ On fiscal charges, Article 29 states that contracting countries should not impose such duties as taxes, or any other duty whatsoever, higher than those imposed on its nationals.⁸⁹ In the case of property transfer, Article 30 states that a contracting State must conform to its law and regulations about the same.⁹⁰ Refugees are to be allowed to transfer the assets they have brought in for resettlement reasons. However, contracting states are to give the refugees sympathetic considerations while integrating the rights of all refugees. For those

⁸³ Ibid, pp. 22

⁸⁴ Ibid, pp. 24

⁸⁵ Ibid, pp. 24, 25

⁸⁶ Ibid, 25

⁸⁷ Ibid, 27

⁸⁸ Ibid, pp. 28

⁸⁹ Ibid, pp. 28

⁹⁰ Ibid, pp. 28-29

refugees who are unlawfully staying in the country, Article 31 states that contracting countries should not impose any penalties. Instead, according to Articles 32 and 33, they give them reasonable time to acquire the necessary authorisation for their admission in the country.⁹¹ Article 34 states that a contracting country will strive as much as possible to facilitate the integration and naturalisation of refugees.⁹² Through these efforts, naturalisation proceedings are advanced, which reduces the expense of these proceedings.

Chapter 6 consists of the executory and transitory provisions. To commence with Article 35, which indicates that the international and national authorities with the UN under which the contracting countries are obligated to co-operate with the UN commissioner for refugees.⁹³ According to Article 36, the contracting countries should communicate with the Secretary-General of the UN to uphold information on national legislation. Article 37 refers to previous conventions without prejudice.⁹⁴

Lastly, Chapter 7 consists of the Final clauses. Article 38 indicates that all disputes regarding the Convention's application or regulation will be taken to the International Court of Justice: Article 39 regards signing, ratification, and accession. When signature was opened in 1951, all states' representatives did the signing and accession during the same time. Article 40 indicates the territorial application clause that provides for any state to acknowledge the convention.⁹⁵ In case a state extends its territorial borders after it ascends the convention, the state has the responsibility of notifying the Secretary General of the United Nations, and the Convention gets into force in the new territory of the state. Article 41 (a) states that the convention is within the legislative jurisdiction of a state. (b) Requires the federal government to consider favourable recommendations for the appropriate authorities promptly. Article 42 provides for reservations by any state, and these reservations must not be in respect to Articles 1, 3, 4, 16, 33, 36-46. Article 43 of the convention states that the convention is enforced on the ninetieth day after ratification or accession.⁹⁶ Article 44 is the denunciation clause that requires any contracting state to notify the Secretary-General of the United Nations of its decision to denounce the Convention. The denunciation takes effect for the Contracting State one year from the date upon which the notification

⁹¹ Ibid, pp. 29-30

⁹² Ibid, pp. 30

⁹³ Ibid, pp. 31

⁹⁴ Ibid, pp. 31

⁹⁵ Ibid, pp. 34

⁹⁶ Ibid, pp. 35

is received by the Secretary General of the United Nations. Article 45 provides any contracting state with the chance to request a revision at any time through the secretary of the UN. The revision can include the recommendations of the said request.⁹⁷ Finally, Article 46 involves the Secretary-General informing the members of the declarations and notifications, signatures, reservations and withdrawals, the date on which the Convention will come into force, denunciations and notifications, and requests for revisions in accordance to Articles 1, 39, 40, 42, 43, 44, and 45, as applicable.

The Protocol Relating to the Status of Refugees follows a similar structure and it consists of 11 articles. Article I sets out the general provisions and defines the term “refugees” as it relates to the Protocol. Article II refers to the cooperation of the national authorities with the United Nations, and it indicates that the state parties undertake to cooperate with the UN to facilitate and provide any information and statistical data that may be requested, in an appropriate form. Such data may include the condition of refugees, the Protocol’s implementation, and the laws, regulations and decrees that may be in force in relation to refugees. Article III entails information on national legislation and it requires the state parties to the Protocol to communicate any laws and regulations that they may adopt to ensure they apply the Protocol appropriately, to the UN secretary general. Article IV illustrates how disputes between state parties should be resolved when they relate to the interpretation or interpretation of the Protocol. Such disputes, if not solved through other means, shall be referred to the International Court of Justice. Article V discusses accession and states that the Protocol is open for accession for all States that are parties to the Convention and any members of the UN, or that are invited to accede. Accession shall be in effect once a deposit of the accession instrument is made to the UN Secretary-General. Article VI is the federal clause and it provides the provisions that need following in the case of a federal or non-unitary state. Article VII articulates the reservations and declarations that a state may have in relation to both the Protocol and the Convention. It states that such reservations should be communicated to the Secretary-General of the UN. Article IX refers to denunciation and expresses that any State party to the Protocol can denounce it at any time through a notification to the Secretary General of the UN, and the denunciation shall come into effect one year from the date that the notification is received by the Secretary-General of the UN. Article X refers to the notifications made

⁹⁷ Ibid, pp. 36

by the UN Secretary-General, and they shall inform of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the Protocol, and any declarations and notifications. Finally, Article XI refers to the requirement for a copy of the Protocol to be deposited in the archives of the Secretariat of the UN. Authentic copies signed by the Secretary-General and President of the General Assembly shall be deposited. These copies shall be made in Chinese, English, French, Russian, and Spanish.

The Convention and Protocol indicate all the important aspects and related legal issues that support the wellbeing of refugees. There is adequate information to cover all possible issues related to refugee welfare that all countries can borrow and adopt into their local laws. Australia acceded to the 1951 Convention on 22 January 1954 and to the 1967 Protocol on 13 December 1973.⁹⁸⁹⁹ The Kingdom of Saudi Arabia (KSA) is a party to neither the Convention nor the Protocol.¹⁰⁰

2.3 History and Theory of Islamic Refugee Law

For Muslims, the concept of asylum captures emotions and elucidates history. In the Arabian Peninsula, even before the onset of the Islamic religion, people granted protection and asylum to others who were not from their area.¹⁰¹ People belonged to small units or tribes, and these were important elements that meant individuals gained protection and a sense of belonging. It was not uncommon for individuals to get expelled from their tribe, which left them without protection. Such individuals had to seek refuge or protection and acceptance from another tribe. Therefore, this practice was already a tradition in Arabia even before Islam started, and later incorporated these practices as doctrines into the Sharia law and Quranic teachings. Refugee protection was critical, and it meant not only giving these individuals the help and protection they needed, but it also meant that their families and dependents could enjoy it. People saw

⁹⁸UNTC. "CHAPTER V REFUGEES AND STATELESS PERSONS. Convention relating to the Status of Refugees Geneva, 28 July 1951." (Web Page, 11 Nov 2021) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en>

⁹⁹ UNTC. "CHAPTER V REFUGEES AND STATELESS PERSONS. Protocol relating to the Status of Refugees New York, 31 January 1967" Web Page, 11 Nov 2021) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5>

¹⁰⁰UNHCR. "Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: THE KINGDOM OF SAUDI ARABIA." 2013. Pp. 1.

¹⁰¹Aldawoody, Ahmed and Tilman Rodenhauer, "The Principle of Non-Refoulement Under Islamic Law and International Law: Complementing International Legal Protection in Muslim Contexts" *Humanitarian Law & Policy* (Web Page, 20 June 2021) <<https://blogs.icrc.org/law-and-policy/2021/06/20/non-refoulement-islamic-law/>>

failure to protect refugees and their people as a dishonourable action.¹⁰² There was a common religious practice in the pre-Islamic Arab world that entailed having enclaves scattered throughout the desert. These enclaves were sacred and were marked by *Tawaf*¹⁰³ around sacred stones and the *maqam Ibrahim*.¹⁰⁴ These stations were demarcations meant for asylum seekers.¹⁰⁵ The culture of hospitality was essential, especially for the desert tribes. They were expected to be hospitable and protect any strangers who entered their tents seeking *jiwar*.¹⁰⁶

Upon the advent of Islam, the existing traditions became stronger and were codified from the simple humanitarian principles of the people to legal requirements outlined in the Quran. Looking at the foundation of early Islam, there is linkage to asylum seeking. There are two major events that took place during these early years that Muslims associate with, and they influenced current practice. First, there is the event where Prophet Mohammed (SAW) advised the first converts who faced persecution to leave for Abyssinia, modern day Ethiopia, in 615.¹⁰⁷ When they reached there, they were welcomed and protected by King Negus who ruled over that land. Second, Prophet Mohammed (SAW) faced hostility in Makkah and had to move and take refuge in Yathrib that was later renamed to Medina.¹⁰⁸ As a result, the word *hijra* has been used to refer to the movement of people from a place where they are being oppressed to the land of Islam. It is a move from infidelity to Islam. It is an important period since the date when the movement from Makkah to Medina happened marks the start of the Islamic calendar. These two foundational experiences form the model or theory of asylum seeking and giving in Islam.

In Islamic law, there is the notion of *aman*, and it is the main source of refugee protection. Its literal translation is safety or protection. It has diverse meanings and applications in Islamic law, but the researcher applies it in this analysis to refer to the act of offering asylum and protection to persons who flee their homes due to the risk of persecution or having their freedom under threat. Assessing the development and use of

¹⁰² Ibid

¹⁰³ Tawaf is the Muslims' walk around the 'Kaaba' in Makka during Hajj or Umrah and when they visit the mosque. This in Arabic is called 'Tawaf' or circumambulation. They move together in one direction in a circular fashion to symbolize their belief in and worship of the one true God, Allah.

¹⁰⁴ Maqam is Arabic word which means, a place or point where the two feet of an individual is situated while standing. Maqam Ibrahim is the venturing stone used by the Prophet Ibrahim throughout the development of the Ka'bah.

¹⁰⁵ Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic Tradition* (Office of the United Nations High Commissioner for Refugees: Geneva, 1987), pp. 11-12

¹⁰⁶ *Jiwar* is the act of seeking protection by an asylum seeker.

¹⁰⁷ Ahmed Aldawoody and Tilman Rodenhauer, "The Principle of Non-Refoulement Under Islamic Law and International Law: Complementing International Legal Protection in Muslim Contexts" *Humanitarian Law & Policy* (Web Page, 20 June 2021) <<https://blogs.icrc.org/law-and-policy/2021/06/20/non-refoulement-islamic-law/>>

¹⁰⁸ Ibid.

this term from an Islamic perspective, it would mostly be used when a non-Muslim foreigner sought refuge in an Islamic state. Ideally, during the early days and as the religion developed, any foreign Muslim enjoyed the automatic right to enter and reside in any Islamic State, which means that they would not be required to seek protection. Islamic teachings accord these experiences further exemplification and the enjoyment of asylum is built upon them. The Quran adopts the traditional practice of *istijara* and fortifies it using *aman* and *dhimmi*. These are the initial instances where modern concepts of temporary protection and non-refoulement start to develop. The hosts are expected to offer temporary asylum and protection to any stranger who seeks it from the Islamic land. Such asylum must be granted regardless of the person's origin or their religion.¹⁰⁹ It is an obligation given to all Muslims in the fourth *surah* of the Quran and it is further polished through the *Sunnah*, which makes it a significant part of the Islamic society.¹¹⁰ History evidences this as these Islamic States welcomed Christians and Jews who fled persecution.¹¹¹

While there is insistence or focus on temporary asylum in the initial instance, it may also become permanent when the refugee through the *dhimmi* status. Once the refugee enjoys the temporal refuge for a year, they can agree to get into the *dhimmi* category and enjoy perpetual protection. It adds to them additional benefits. They earn a right to marry, work, practise their faith, freedom of movement, and they can still repatriate at will. While this is the case, it is still vital to note that even in *aman*, an individual is protected from repatriation, unless they wish to proceed with it voluntarily. These traditional practices have developed over the years and retain a significant impact in modern practices in Islam. While this section has described what the holy texts of Islam require, the researcher will now survey scholarly literature on how Islamic law has been applied in modern contexts. It is vital to also note that the holy texts suggest a single Muslim state but that this state does not currently exist as there are many states in the modern world that are either officially Muslim or a majority of their people are Muslim.

Muhammad Munir conducts an in-depth analysis of the refugee law and its application in Islam.¹¹² The analysis includes some influential traditions of *aman* and

¹⁰⁹ Astri Suhrke. "Refugees and Asylum in the Muslim World." *The Cambridge Survey of World Migration*, 1995, pp. 457-59.

¹¹⁰ *Sunnah* refers to the traditions and practices of prophet Mohamed (SAW) that Muslims are expected to follow.

¹¹¹ Munir, Muhammad. "Refugee Law in Islam." *Journal of Social Sciences*, vol. 4, no. 2, 2011, p. 12

¹¹² *Ibid*

hijrah, as well as rules that govern migration and asylum seeking within the Islamic world.¹¹³ The analysis stipulates the traditions relating to asylum seeking or refugee status, and their applications in the society. The two central concepts of *aman* and *hijrah* are relevant throughout the analysis since they depict significance, limitations and comparability to the international law on refugees. Munir focuses on the case of Afghan refugees who sought asylum in Pakistan, a highly Islamic state which, in modern days, also applies or depends on aspects of international law.¹¹⁴ It offers an ideal example since the two nations under consideration have deep-set Islamic foundations, and considering the inherent situation of a high number of refugees from Afghanistan, it is interesting to see how they get treated in another Islamic nation. While Munir does not include a defined theoretical framework for the study, he finds that these refugees receive dismal assistance and protection in Pakistan, and from a global perspective too. The provisions of *aman* and *hijrah* are specific on how an Islamic state and Muslims should treat an individual seeking refuge in their state. It is especially clear that all Muslims from any part of the world have a right to access asylum and protection in any Islamic state in the world. The same applies to their families and property. However, the analysis done by Munir indicates significantly less application of the Islamic rules in relation to refugees even in an Islamic nation. The reduction in the protection of refugees can only be attributed to the selective application of Islamic laws in most modern nations. Many nations have lost significant parts of their traditions and heritage especially those dealing with the protection of refugees.¹¹⁵

One could also argue that it would be expected that the Islamic state would be a single unified nation that all Muslims lived in, but modernity has changed this given the modern demarcations of nations. Despite this, it remains important that these Islamic states adopt an approach that incorporates the traditional Islamic rules that ought to improve how refugees are protected and assisted. The selective adoption of Islamic laws is not the most ideal approach for an Islamic state. While this recommendation is applicable in an ideal world, it is practically not possible in the modern Islamic states that are largely governed through secular laws, and only apply Islamic laws that they feel favour their operations. The local culture borrows from diverse influences, and when the culture is highly Islamic, the local legal operations are influenced by the

¹¹³ Ibid p. 12

¹¹⁴ Ibid, p. 12

¹¹⁵ Elmadmad, Khadija. "Asylum in Islam and in modern refugee law." *Refugee Survey Quarterly*, vol. 27, no. 2, 2008, pp.60.

religion. It is especially the case with KSA and this thesis uses this approach to look into how Islam has impacted the legal framework and conduct in relation to how the country deals with refugees.

Syahrin Alvi focuses on the Rohingya refugee crisis, and how Islamic and international laws applied.¹¹⁶ The author reviews the main principles presented by each of the laws and their applications in the case of these refugees. There is argument that the countries that hosted Rohingya refugees followed the principles of Islamic and International refugee laws. For instance, they received these refugees, and they did not send them back to their country in line with the non-refoulement principle, which is present in both international and Islamic refugee laws.¹¹⁷ The same actions may be interpreted as having been done in line with the Quranic and Sharia law provisions that require Muslims and Islamic states to accord refuge and protection to asylum seekers. The human rights of the refugees were protected and they were not forced to return to their country where they would face hostility, persecution and potential death. While Alvi gives a clear depiction of the activities done from Islamic and International law perspectives, he fails to offer a distinction between the theoretical principles of the actual regimes that rule in Thailand and Indonesia. While the two nations acted in line with international refugee law, they are not, technically, bound by it, considering that they were not parties to the Convention at the time. In addition, it is crucial to identify that neither of the two countries is an officially Islamic state, but they both have significant Muslim populations, with Indonesia having the world's largest Muslim population in a single country.¹¹⁸

Evaluating practice in modern days by Islamic states requires looking at the notable case of Afghan refugees in Iran and Pakistan, which started as early as 1979.¹¹⁹ The initial conflict resulted from the Saur Revolution, which resulted in the internal displacement and international migration of the Afghans. The USSR then invaded Afghanistan. There have been diverse issues in the country that have led to the people seeking asylum in neighbouring countries. In both countries where most of the Afghans sought refuge, liberal practices of temporary protection were adopted with voluntary

¹¹⁶Alvi, Syahrin. "The Rohingya Refugee Crisis: Legal Protection on International Law and Islamic Law." *Advances in Social Science, Education and Humanities Research*, vol. 94, 2018, pp. 94-99.

¹¹⁷ *Ibid*, pp. 94

¹¹⁸Diamand, Jeff. "The countries with the 10 largest Christian populations and the 10 largest Muslim populations" *Pew Research Center*, 2019 (Web page, 15 Nov 2021). <<https://www.pewresearch.org/fact-tank/2019/04/01/the-countries-with-the-10-largest-christian-populations-and-the-10-largest-muslim-populations/>>

¹¹⁹ Colville, Robert, "Refugees Magazine Issue 108 (Afghanistan : the unending crisis) - The biggest caseload in the world" *UNHCR*. 1997 (Web page, 15 Nov 2021). <<https://www.unhcr.org/publications/refugeemag/3b680fbfc/refugees-magazine-issue-108-afghanistan-unending-crisis-biggest-caseload.html>>

repatriation pending. It was not until the fall of the Taliban in 2002 that one of the largest repatriation exercises in modern history occurred.¹²⁰ However, as the situation in the country changed due to instability, voluntary repatriation also reduced. As highlighted, repatriation only took place on voluntary basis, which is aligned to Islamic law. While Iran and Pakistan repatriated the Afghans, it was not done forcefully, and when the situation in Afghanistan started deteriorating, the two countries stopped repatriations.¹²¹

2.3.1 Islamic Scholarship on Refugees and Asylum

Islam has received significantly lesser attention and appreciation from non-Muslim entities when it comes to the recognition of human rights and their protection. However, Islamic scholars contend that Islam has pioneered protection of fundamental rights and has especially focused on the protection of the basic rights of refugees both in time of war and peace.¹²² Since early Islamic era was punctuated with periodic migrations and wars in which many of the Muslims have to migrate to distant places, inclusive of other Islamic as well as non-Muslim localities. Furthermore, non-Muslims who faced excessive persecution or oppression in their local territories also valued the peace and calm, which Muslim rulers have established in their regions and, thus, preferred to relocate in those areas. Muslim rulers and residents have been ever-welcoming to such migrants, regardless of their religious belief, cultural background, or ethnicity, as the former have been enjoined by religious injunctions to warrant safety and security of the desolate and needy.

Muslim jurists draw the concept of refuge from overarching term *aman* (protection, refuge, safety) used in the verse 9:6 of the Holy Quran.¹²³ Kamal ibn al-Human regards *aman* as a kind of *Muwada'a* (peace pact) as such an action is tantamount to the suspension of hostilities. Regarding it as a safe passage, assurance of protection, and safe conduct, the author of *Enayat 'ala al-Hidaya* explicates the term as a comprehensive framework by which an ordinary Muslim citizen, Leader (*Imam*), or his deputy may extend *aman* to any private individual hailing from Muslim or Non-Muslim territory.¹²⁴ Islamic jurists opine that *aman*, regardless of the fact that it has

¹²⁰ Naseh, Mitra, Miriam Potocky, Paul H. Stuart, and Sara Pezeshk. "Repatriation of Afghan refugees from Iran: a shelter profile study." *Journal of International Humanitarian Action*, vol. 3, no. 1 2018, pp. 2.

¹²¹ Ibid

¹²². Ahmad Zaki Yamani, 'Humanitarian International Law in Islam: A General Outlook,' *Michigan Yearbook of International Legal Studies*, 7, 204. 1985.

¹²³. *The Qur'an*, Sahih International tr (<https://quran.com/>), 9:6.

¹²⁴. Akmal ud Din & Mahmood al-Babarti, *Al-Enaya ala al-Hidaya with Fath al-Qadeer*, Beirut: Bolaq, 1316.

been granted by a free man or by the one who is deputy to another capable Muslim, usually covers a small group of people – up to 10 individuals, or a caravan, or a fort as the case maybe.¹²⁵ In such circumstances, if a Muslim proclaims addressing an adversary that “Lay down weapons and fear not”, the adversary has the leverage to interpret this proclamation as an assurance of protection. Such a protection obliges the proclaimer not to kill or harm the adversary and the latter should be allowed to return to his place of safety.

Aman has been interpreted as of two major typologies in Islamic tradition and theology; namely general that is applicable to all the people, and the specific which is meant for a specific individual or group of individuals. The Majority of the scholars agree on the point that only *Imam* or his deputy can grant general *aman*, whereas specific *aman* can be granted by any Muslim adult. Notably, Islamic traditions and opinions of the Muslim scholars vary considerably regarding specific *aman*. For instance, Ibn Habib as well as Ibn Majishun, both belonging to the Maliki school of Islamic Thought, contend specific *aman* has to be duly ratified by an *Imam* in order to be regarded as valid. Other jurists from the Maliki School, however, have propounded different opinions on this aspect. For instance, Ibn Juzi asserts that if any Muslim has granted *aman* to someone and there is no explicit or implicit harm in granting such a protection, the *Imam* and the other Muslims must respect such a grant and abide by the protection¹²⁶.

In another explanatory Islamic Tradition (*Hadith*), the Holy Prophet (SAW) has been reported as saying that *Aman* extended by any Muslim is allowed and if someone does not respect this protection, he will face curse of the God, angels, and all the people.¹²⁷ Commenting on this Hadith, Ibn Hajr vehemently asserts that interfering with the *Aman* given by any Muslim to someone is strictly prohibited and falls under the category of *Haram*. At the occasion of siege Makkah, The Holy Prophet himself approved the *Aman* given by Umm Hanni to two adversary men who were relatives of her husband and had clearly transgressed the terms of the general amnesty granted to all the residents of Makkah.¹²⁸ Likewise, during the reign of , Umar, the second Caliph of

¹²⁵. Ibid.

¹²⁶ Akmal ud Din & Mahmood al-Babarti, *Al- Enaya ala al-Hidaya with Fath al-Qadeer*, Beirut: Bolaq, 1316 Pp29

¹²⁷. Muhammd Ibn Isma'el Al-Bukhari, *Sahih Bukhari*, (3rd. ed.), Edited by Muhammad Daib, Beirut: Dar ibn Kathir, 1987. 3:1160, hadith no. 3008.

¹²⁸. Ibn Hajr, *Fath*, 4:86.

Islam, a Persian soldier ran and found shelter at the top of a tree during the war. A Muslim soldier who was conversant in the Persian and Arabic languages proclaimed “*matrasi*” which meant ‘don’t be afraid’. Upon listening this pledge and regarding it as a token of protection, he came down; however, the proclaimer Muslim soldier drew his sword and killed him. When the matter came to the knowledge of the Caliph, he remonstrated with the Muslim commander in strong words and said “God is my witness, if I come to know that someone of us has done this, I shall cut his throat.”¹²⁹ After the incident, Umar wrote to his commander in Iraq that if someone of Muslim ranks gave pledge by using Persian term *matrasi* before any enemy soldier, such words then binding and the *Aman* must be respected.¹³⁰

Regarding the rights and circumstances surrounding *Aman*, Shaybani has devoted twenty-five expansive chapters of his treatise, *Kitab al-Siyar al Kabir*, i.e. chapters 42 to 50 of Volume I and chapter 51 to 67 in Volume II. Shaybani has further explicated that if a Muslim commander forbids a besieged enemy from accepting *Aman* on account of it being invalid, and despite this the enemy accepts such an *Aman*, the enemy has to be regarded and treated as prisoners of war; rather than regarded as protected subjects.¹³¹ Such a variation stems from the point that the enemy has not abided by the forewarning of the Muslim commander. The expanse and impact of a valid *Aman* is far reaching and even criminal transgression does not waive it. Shaybani argues that if an individual has availed themselves of *Aman* and, afterwards commits some crime, such as killing a Muslim intentionally or unintentionally, committing robbery, engaging in espionage activities in Muslim territories, committing theft, or raping a Muslim or non-Muslim female, none of his such acts amounts to a breach of the *Aman*; rather he will be prosecuted under Islamic laws pertaining to the criminal action.¹³² Furthermore, if a Muslim or non-Muslim citizen of an Islamic state kills someone who is under *Aman*, the citizen will not be awarded the death penalty; rather he has to pay blood money as a compensation to heirs of the deceased and will also face imprisonment.¹³³ Shaybani’s expositions are regarded as an elaborate commentary on

¹²⁹. Badrudin Ayni, (n.d.). *Umdah Al Qari Sharh Saheeh al-Bukharii*. Cairo: Idarat Al-Taba at Al-Muneeeriya. XV: 94.

¹³⁰. Shaybani, *Siyar al-Kabir*, 1:199.

¹³¹. Shaybani, *Siyar al-Kabir*, 201.

¹³². *Ibid.*, 215.

¹³³. *Ibid.*, 216.

the circumstances and Islamic teachings concerning the grant, validation, and annulment of *Aman*.

Apart from this moral and religious obligation, individuals who received *Aman* in Muslim territories were able to harness victory for the Muslims on many occasions. For instance, Ibn Nuhas¹³⁴ narrates that in the battle of Tastur, Abu Musa was commanding Islamic forces against the Persian general al-Hurmuzan when a Persian man came to the Muslim commander and demanded protection of his life and family against disseminating information regarding a secret entry pathway right into the heavily fortified Persian stronghold. Upon the grant of *Aman*, the Persian man accompanied Majza'ah bin Thawr – a Muslim soldier – to the sieged city through a secret pathway that ran through underground fountain waters. Upon reaching the city, the Persian man also identified the Persian general. Majza'ah travelled through the path until he learned the map and came back to Abu Musa, who sent Majzah and 35 other Muslim soldiers to capture the city. These men swam through the waters, entered the city during the night, fought bravely, and forced the Persian General to surrender and accept Islam. Islamic scholars regard it as the revered duty of any person residing in *dar al-Islam* (Islamic terrains) to grant protection, *Aman*, or asylum to refugees, rather than closing their borders or doors.

By regarding the protection of needy refugees and granting of *Aman* as obligatory for Muslim individuals and states, Muslim scholars have paved the way for the Muslim states to align their local laws according to the Islamic injunctions and traditions. Protection of refugees not only warrants fundamental rights to the persecuted and oppressed non-Muslims but it is also Islam's key tenet of warranting welfare of the whole universe. Scholars such as Shayabani, Al Juzi, and Ibn Hajr have devoted enormous amount of scholarship on explicating Islamic traditions regarding refugees and grant of asylum and, thereby, have paved the way for Muslim states to enact relevant laws under the purview of Islamic traditions.

2.3.2 Types of asylum

2.3.2.1 Religious Asylum

KSA is governed under Islamic law and observes Islam as the national religion. Provisions in the Sharia law and international conventions to which the nation is a

¹³⁴. Abi Zakriya al Dimishqi ibn Nuhas, *Mashari al-Ahswaq ila-Masar I al-Ushaaq*, (Edited by Idrees M. Ali & M. Khalid Istanbuli), Beeirut: Darr al Bash'ir, 1983.

signatory provide for asylum for Muslims and non-Muslims. Religious asylum to non-Muslims can be granted in two major forms: asylum to those seeking to hear the word of Allah and asylum to non-Muslims in the country¹³⁵. For Muslims, Islamic Sharia provides the grounds upon which asylum can be granted on religious grounds. The recognition and emphasis on religious asylum in Sharia stem from the history of religious conflicts in Islamic countries. While it is inaccurate to argue that Islam was spread through violence, its spread accompanied numerous violent conquests. The conquests of Muslim Arabs in the modern-day Middle East were motivated largely by the need to gain control over large land masses, as opposed to spreading of the religion. These conquests led to the spread of Islam as a consequence and not as a motivation.¹³⁶ Protracted wars between Muslims and non-Muslims might have led to a rising number of people seeking religious asylum, a phenomenon that explains the emphasis laid by Sharia law on the subject.

Sharia law allows Muslims to extend asylum to non-Muslims who seek to hear the word of Allah. Muslims are obliged to provide them with the surety of protection as is the case of persons who, during a war, request for a chance to learn Islam. Muslims should then facilitate their visit and make the visitors understand the will of Allah. In the case that the non-Muslim does not embrace Islam even after understanding it, they should be facilitated back to their place, for their decision is based on the lack of knowledge. In the Holy Quran, Allah says:

And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah. Then ensure his safe arrival at his place of safety. That is because they are a people who do not know.¹³⁷

Adhering to this *Ayah*, Muslims are required to grant asylum to anyone requesting it as long as the purpose of the request is to listen to and learn the word of Allah. During a fight, non-believers can be granted asylum in Islamic territories and assured of their protection during the period they may require to understand Islam. If such a person does not embrace Islam even after being given the opportunity to understand it, they should be assisted back to their place. Their place in this context

¹³⁵ Basic Law of Governance, Royal Order No. (A/91), 1992.

¹³⁶ Colin Chapman, 'Christians in the Middle East – Past, Present and Future' (2012) 29(2) Transformation: An International Journal of Holistic Mission Studies 91.

¹³⁷ *The Qur'an*, Sahih International tr (<https://quran.com/>), 9:6.

refers to their point of origin or their country. The nonbeliever should not be harmed even after they have failed to convert to Islam.

Granting asylum to people who seek to hear the word of Allah dates back to the Makkahn period and its religious associations. The protection of the Prophet Mohammad (SAW) from polytheists in Makkah after his forced migration forms the basis upon which the concept originates. The advent of Islam led to an evolution of the concept of granting *jiwar* (protection). While this concept only represented an exchange of bounty between the *mujir* (protector) and the *mustajir* (protected) through institutionalized moral codes among Arabs during the pre-Islamic period, it gained pragmatic significance and acted as a divine path to recruiting non-Muslims to Islam. Granting asylum became more than just an honour of institutionalized codes and transformed to a heavenly obligation of Muslims.¹³⁸ Evidently, the protection of asylum-seekers from different faiths dates back to the pre-Islamic years. The advent of Islam only changed it from a moral practice guided by codes adopted in Arab communities to a heavenly duty that sought to convert more non-Muslim to Islam.

Under the concept of *Aman*, refugees were offered different types of protection depending on their origin and religious inclination. Contrary to the historic period when the term *mustajir* referred to all those protected regardless of origin and religious identity, the change in the conceptualization of *jiwar* led to further categorization of emigrants in Islamic countries. Emigrants were now categorized as either *muhajirun* --- Muslims from Islamic states in need of asylum; or *musta'minum* --- Muslims and non-Muslims from states outside the Islamic countries. Non-Muslims belonging to the covenant faiths (Christianity and Judaism) could enter into an agreement with the Islamic state to pay a tax (*jizya* tax) and abide by general Islamic rulings, thus granting them the right to continue practising their religions. Such non-Muslims were referred to as *ahl al-dhimmah*. *Muhajirun* and *ahl al-dhimmah* enjoyed permanent protection by Islamic states. On the contrary, non-Muslim *mustajirun* and *musta'minum* were only eligible for temporary protection by Islamic states.¹³⁹ To avoid paying taxes, some non-Muslims converted to Islam. Converting also improved one's social standing because

¹³⁸ Yousif M. Qasmiyeh, 'Refugee Status in Islam: Concepts of Protection in Islamic Tradition and International Law. By Arafat Madi Shoukri' (2011) 24(3) *Journal of Refugee Studies* 629.

¹³⁹ Ibid.

they were not practising the religion of their rulers.¹⁴⁰ Religious justifications for granting asylum date back to the early years of Islam. While both Muslim and non-Muslim emigrants were entitled to protection, the latter were only offered protection temporarily unless they agreed to pay a tax to Islamic states. Some of the non-Muslims would opt to convert to Islam to avoid paying taxes. Consequently, offering asylum to non-Muslim *mustajirun* and *musta'minum* can be viewed as a form of religious asylum to those seeking to listen to the word of Allah. As directed by the Qur'an, it was not mandatory for these non-Muslims to convert to Islam. However, when they did not, they only enjoyed protection on a temporary basis as long as they continued paying tax, or in certain exceptional cases, they stayed in Muslim terrains.

Sharia law also requires Muslims to accommodate those that emigrate to Muslim lands and commit their resources in the cause of Allah. Non-Muslims who believe in the word of Allah, accompany or serve fighters for Allah's sake, or migrate to Islamic lands are to be provided help if they ask for it. The Quran has several *surahs* referring to Makkah as a safe sanctuary for all who come into it,¹⁴¹ as a holy resort and peace to all humankind while providing them with protection. At all times, Muslims are asked to keep it pure and clean in the name of Allah. Those who reside in it should abide in devotion and no harm should come to them. The Quran further states:

Indeed, those who have believed and emigrated and fought with their wealth and lives in the cause of Allah and those who gave shelter and aided - they are allies of one another [...] And if they seek help of you for the religion, then you must help.¹⁴²

Apart from the accommodation of non-Muslim refugees seeking to listen to the word of Allah, the Quran also provides for those that only seek protection. Such protection is provided in the Great Mosque of Makkah (al-Masjid al-Ḥarām) as a way of glorifying Allah. Muslims are required to protect all those that seek protection there. The Holy Quran states:

¹⁴⁰ Colin Chapman, 'Christians in the Middle East – Past, Present and Future' (2012) 29(2) Transformation: An International Journal of Holistic Mission Studies 91. (n 1).

¹⁴¹ Ibid 29:67.

¹⁴² Ibid 3:72.

In it [al-Masjid al-Ḥarām] are clear signs [such as] the standing place of Abraham. And whoever enters it shall be safe. And [due] to Allah from the people is a pilgrimage to the House - for whoever is able to find thereto a way. But whoever disbelieves - then indeed, Allah is free from need of the worlds.¹⁴³

Besides providing for asylum for non-Muslims emigrating into Islamic lands, the Quran also requires for believers living among nonbelievers to emigrate. The provision of Asylum to Muslims can be traced back to the early Islamic years when the early believers faced the persecution from established religions. Although the Prophet Mohammed (SAW) had a very good relationship with the Christians and Jews, including marrying Khadija, a Christian, as his first wife, they did not accept him. On the contrary, the early Muslims were fiercely persecuted in Makkah on religious grounds. The oppression faced by the early Muslims at the hands of local enemies forced Mohammad (SAW) to send a group of them to the Kingdom of Abyssinia to seek asylum there.¹⁴⁴ The Prophet Mohammed (SAW) set the precedent of believers seeking asylum if they were facing religious persecution.

There are advantages to seeking asylum in Saudi Arabia as outlined by several key scholars. See further Chapter 3.

All Muslims, except those with disability or too feeble to escape or with nowhere to go, should move away from lands living under un-Islamic order. The continued stay in such land for the love of ease and comfort associated with the order and attachment to wealth or family are deemed as having gone against the will of Allah. People living in areas with a hegemony of non-Islamic beliefs are required to move to Islamic states where they would find sanctuary. The Quran states, “And whoever emigrates for the cause of Allah will find on the earth many [alternative] locations and abundance...”.¹⁴⁵ The practice of this concept is noted in the granting of *jiwar* to Muslim *musta'minum* in Islamic countries. For these Muslims from non-Muslim lands,

¹⁴³ Ibid 3:97.

¹⁴⁴ Colin Chapman, 'Christians in the Middle East – Past, Present and Future' (2012) 29(2) Transformation: An International Journal of Holistic Mission Studies 91. (n 1).

¹⁴⁵ Ibid 4:100.

permanent protection was offered.¹⁴⁶ This is an illustration of the need for Muslims living among non-believers to migrate. In both Sharia law and in practice, the migration of Muslims from non-Islamic states is permitted. Those migrating on these religious bases are guaranteed permanent protection.

The emigration of believers on religious grounds is also supported in the book of Merits of the Helpers of Medinah (Ansaar). Abu Bakr Abdullah ibn Uthman migrated from Makkah to the land of Ethiopia after witnessing the continued troubling of the Muslims by pagans in Makkah. On reaching there, he was received by Ibn-al-Ghimad. After Abu Bakr explained to Ibn-al-Ghimad his reason for emigrating, the latter convinced him to get back to his town and worship the Lord while helping the people. He also offered him protection against the pagans in the land. It is stated:

When the Muslims were put to the test (i.e. troubled by the pagans), Abu Bakr set out migrating to the land of Ethiopia, and when he reached Bark-al-Ghimad, Ibn Ad-Daghina, the chief of the tribe of Qara, met him and said, "O Abu Bakr! Where are you going?" Abu Bakr replied, "My people have turned me out (of my country), so I want to wander on the earth and worship my Lord." Ibn Ad-Daghina said, "O Abu Bakr! A man like you should not leave his home-land [...]. Therefore I am your protector. Go back and worship your Lord in your town. So Abu Bakr returned and Ibn Ad-Daghina accompanied him. In the evening Ibn Ad-Daghina visited the nobles of Quraish and said to them. "A man like Abu Bakr should not leave his homeland, nor should he be driven out..."¹⁴⁷

2.3.2.2 Territorial Asylum

Although Islamic Sharia is largely based on religious principles it does not overlook territorial asylum. Territorial asylum in Arab nations predates Islam. Arabs have over the years practised protection of refugees, a custom that continued during the Islamic era also. Muslims and non-Muslims alike are granted asylum in the Arab

¹⁴⁶ Yousif M. Qasmiyeh, 'Refugee Status in Islam: Concepts of Protection in Islamic Tradition and International Law. By Arafat Madi Shoukri' (2011) 24(3) *Journal of Refugee Studies* 629 pp3

¹⁴⁷ *Merits of the Helpers in Madinah (Ansaar)* (Volume 5, Book 58, Number 245).

countries under the guidance of the general principle that all persons are equal. The Quran and Sunnah discuss the concept of emigration (*hijra*) in detail. Its origin in Sharia can be traced back to the time when Prophet Mohammad (SAW) moved to Medina with his followers. The Prophet was first offered asylum by Tufail, son of Amr Al-Dausi, of the tribe of Daus. However, he declined because the privilege of offering him protection belonged to residents of Madinah --- termed in Islamic history as *Ans'ar*. It is then that Tufail offered to accompany him to Medina. Allah's Apostle stayed in Medina as an immigrant for 13 years from the age of 50 until his death at the age of 63.¹⁴⁸ The migration of people who fear incurring harm in the places they currently live in is also supported in the Quran. People who are weak and ill-treated can even ask for help to be rescued from their towns as illustrated in this *Ayah*. In Surah an-Nisa (75), it is stated, "And what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, 'Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper?'"¹⁴⁹

The concept of migration of the oppressed is also mentioned in other *Ayahs* in the Quran. For instance, Allah extended His favour on Muslims when they were few and weak in Makkah and provided them with a safe place in Medina. The new land had enough resources to support their livelihoods. It states, "And remember when you were few and oppressed in the land, fearing that people might abduct you, but He sheltered you, supported you with His victory, and provided you with good things - that you might be grateful".¹⁵⁰ Allah even promises property and inheritance to both those who emigrated to Medina and those who stayed. The Quran states:

For the poor emigrants who were expelled from their homes and their properties, seeking bounty from Allah and [His] approval and supporting Allah and His Messenger, [there is also a share]. Those are the truthful. And [also for] those who were settled in al-Madinah and [adopted] the faith before them. They love those who emigrated to them and

¹⁴⁸ Ibn Taymiyyah, *Kitab Al-Iman (The Book of Faith)*, 211.

¹⁴⁹ *The Qur'an* (n 1) 4:75.

¹⁵⁰ *Ibid* 8:26.

find not any want in their breasts of what the emigrants were given but give [them] preference over themselves, even though they are in privation. And whoever is protected from the stinginess of his soul - it is those who will be the successful.¹⁵¹

On multiple occasions, the Quran reports on Allah's support and acknowledgment of migration as a form of asylum. Allah is pleased by all those that migrate in the name of faith and those who help them. The refugee problem is recognised as a major issue as illustrated in the following *Ayahs*:

And the first forerunners [in the faith] among the Muhajireen and the Ansar and those who followed them with good conduct - Allah is pleased with them and they are pleased with Him, and He has prepared for them gardens beneath which rivers flow, wherein they will abide forever. That is the great attainment.¹⁵²

Have you not considered the assembly of the Children of Israel after [the time of] Moses when they said to a prophet of theirs, "Send to us a king, and we will fight in the way of Allah"? He said, "Would you perhaps refrain from fighting if fighting was prescribed for you?" They said, "And why should we not fight in the cause of Allah when we have been driven out from our homes and from our children?" But when fighting was prescribed for them, they turned away, except for a few of them. And Allah is Knowing of the wrongdoers.¹⁵³

Allah only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion - [forbids] that you make allies of them. And

¹⁵¹ Ibid 59:8-9.

¹⁵² *The Qur'an* (n 1) 9:100.

¹⁵³ Ibid 2:125.

whoever makes allies of them, then it is those who are the wrongdoers.¹⁵⁴

2.3.2.3 Diplomatic Asylum

Diplomatic asylum has little application in Sharia law. This type of asylum is closely associated with the establishment of embassies, which provide a residence for members of a diplomatic mission. However, this does not mean that diplomatic asylum contravenes Islamic law. On the contrary, Muslims are required to honour any treaties that they make with others for as long as they are not against the rule of Islam. The Quran states, “O you who have believed, fulfil [all] contracts.”¹⁵⁵ and “[...] fulfil [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned.”¹⁵⁶ Diplomatic relations between nations that require granting residence to those on diplomatic missions constitute contracts. The Quran requires Muslims to fulfil all contracts, which implies the support of diplomatic asylum.

2.3.3 Reasons for asylum

Under Islamic law, the reasons for asylum can be found in the wordings of the different religious texts and treaties providing for the granting of asylum in Islamic countries. The different types of asylum are also determined partly by the reasons for asylum. The first major reason that is identified in Sharia for asylum is persecution which entitles persecuted individuals to right to seek asylum.¹⁵⁷ Islamic countries recognise the systematic mistreatment of an individual or a group of people as a basis upon which asylum can be sought and refuge granted. The Cairo Declaration on Human Rights in Islam provides for this protection. In Article 12, the Declaration requires that “Every man [...] if persecuted, is entitled to seek asylum in another country.”¹⁵⁸ The Article further obliges nations to offer protection to the asylum seeker. It states, “the

¹⁵⁴ Ibid 60:9.

¹⁵⁵ *The Qur'an* (n 1) 5:1.

¹⁵⁶ Ibid 17:34.

¹⁵⁷ Abdullal Ibn Hamid al-Hayyeed, *Safarat al-imam al-motawakil aliullah ismail ibn al-qassim ila al-balat al-malaki fi asimat al-habasha Jondar, 1057 AH- 1647 AD*, Faculty of Shari'ah and Islamic Studies Journal, Ummul-Qura University Makkah al-Mukarramah, 3, 1397 – 1398 AH, pp. 34 – 35.

¹⁵⁸ Organisation of Islamic Cooperation (n 26).

county of refuge shall be obliged to protect the asylum seeker...”.¹⁵⁹ Similarly, Article 28 of the Arab Charter on Human Rights provides for the right of citizens escaping persecution to seek political asylum in other countries. People granted political asylum cannot be extradited. It states, “Everyone shall have the right to seek political asylum in other countries to escape persecution [...] Political refugees shall not be extraditable.”¹⁶⁰ Persecution is one of the primary reasons for granting asylum. Islamic countries are under the obligation to grant refuge and protection to all those people facing systemic mistreatment.

For a person to qualify for asylum in Islamic countries based on asylum, actual persecution does not need to have occurred. On the contrary, a well-grounded fear of persecution is reason enough for a person to seek asylum. One of the definitions of a refugee, as provided for in Article 1 of Arab Convention on Regulating Status of Refugees in the Arab Countries, outlines the fear of being persecuted as one of the reasons for seeking asylum. It uses the term refugee to refer to:

Any person who is outside the country of his nationality or outside his habitual place of residence in case of not having a nationality and owing to well-grounded fear of being persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion, unable or unwilling to avail himself of the protection of or return to such country.¹⁶¹

Apart from perceived and actual persecution, Islamic countries also recognize asylum seeking on the basis of fear from other dangers other than from systemic mistreatment. Although Makkah is primarily identified as a place of worship in the Qur’an, it also serves as an important sanctuary to those who may be facing dangers. Regardless of the dangers facing a person, entering Makkah guarantees them of their safety, hence serving as a refuge for them. The following *Ayahs* provide for the provision of sanctuary against dangers other than persecution:

¹⁵⁹ Ibid.

¹⁶⁰ League of Arab States (n 15). Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008. <http://hrlibrary.umn.edu/instreet/loas2005.html>.

¹⁶¹ League of Arab States (n 14).

In it are clear signs [such as] the standing place of Abraham. And whoever enters it [Makkah] shall be safe...¹⁶²

Let them worship the Lord of this House, who has fed them, [saving them] from hunger and made them safe, [saving them] from fear [of danger].¹⁶³

And [mention] when We made the House [Makkah] a place of return for the people and [a place of] security...¹⁶⁴

The justification of persecution and fear as primary reasons for asylum can be justified by the principle of humanitarian character of the right to asylum as established in Islamic law. The right to asylum is founded on the need to rescue people in need or distress. It is a way of showing mercy to people whose basic rights and freedoms are being violated. The establishment of asylum is focused on wading off the causes of harm.¹⁶⁵ Granting asylum to persons fearing for their lives or safety is considered a humanitarian act in Islam.

Another reason for asylum is listening to the Quran. Asylum should be granted if the one requesting is a non-Muslim and comes to hear the Words of Allah.¹⁶⁶ There are three conditions that apply when one uses this reason as a justification for seeking asylum in Islamic countries. First, the asylum-seeker must be a non-Muslim. Second, he should be motivated to listen to the Words of Allah. Lastly, he should be in need of protection. If these conditions are satisfied, such an asylum-seeker is entitled to protection from the receiving state. They should be taken to a place where they feel safe.¹⁶⁷ Offering asylum to non-Muslims seeking to listen to the Words of Allah is motivated by the need to recruit more non-believers into Islam. It is the heavenly duty

¹⁶² Ibid 3: 97.

¹⁶³ Ibid 106: 3-4.

¹⁶⁴ Ibid 2: 125.

¹⁶⁵ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study* (UN High Commissioner for Refugees 2009).

¹⁶⁶ Ibid 9:6.

¹⁶⁷ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study* (UN High Commissioner for Refugees 2009 pp.40)

of Muslims to bring more people to Islam.¹⁶⁸ Muslims believe that Islam is the only true faith. While Muslims are forbidden from forcing any refugee to convert to Islam after they have listened to the Qur'an, it is the duty of Muslims to convert non-believers and those from other religions to Islam.¹⁶⁹ In Islam, listening to the Words of Allah is one basis upon which asylum can be granted. This concept has its foundation on the obligation of Muslims to convert nonbelievers to Islam without coercing those who listen to the Qur'an and still choose not to believe.

2.3.4 Conditions for granting asylum

The conditions for providing asylum as provided for in the Sharia are dependent on the type of asylum but some apply to all types of asylum. The first condition for granting asylum is that the asylum-seeker must solicit it. In Islamic countries, refuge is granted to all persons who ask for protection regardless of their race, religion, colour, nationality, gender or social standing. The non-discriminatory nature of the right to asylum is founded on the understanding that all persons are equal. Islam is founded on the right to equality for all people. It does not distinguish people on the basis of might, fortune or demographic characteristics but piety.¹⁷⁰ The first condition for granting asylum for a person to solicit asylum from the Islamic state they seek to make their refuge. Upon presenting their reasons for seeking asylum, any person can be granted refuge.

Another condition for granting asylum that is closely related to soliciting asylum is obtaining permission from state authorities. To date, it is universally acknowledged that persons entering Islamic territories from other states require prior permission or a document confirming that they have a right to enter or reside in the state of refuge.¹⁷¹ Similarly, Muslim jurists required that non-Muslims must obtain permission before they enter into an Islamic state even if they were messengers or merchants. However, this condition can be waived in a number of scenarios. Ambassadors, messengers or traders with evidence proving their capacity to operate as such do not require to obtain permission or an entry visa. Ibn Muflih Al-Hanbali

¹⁶⁸ Yousif M. Qasmiyeh, 'Refugee Status in Islam: Concepts of Protection in Islamic Tradition and International Law. By Arafat Madi Shoukri' (2011) 24(3) *Journal of Refugee Studies* pp 629

¹⁶⁹ Matt Buttsworth, *Utøya Island - Anders Breivik and The Dangers of Theocratic Absolutism* (Buttsworth Books, 2011).

¹⁷⁰ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study* (UN High Commissioner for Refugees 2009 pp 40.

¹⁷¹ *Ibid.*, 65.

explains that a messenger or a trader can be allowed into an Islamic territory without any prior permission. Similarly, Imam Al-Baidhawi argues that an ambassador coming to listen to the word of Allah can come without prior obtaining permission. Although he also exempts traders, he states that they must first become believers before they can be allowed to get into an Islamic territory without permission.¹⁷² Although obtaining permission is a condition for granting asylum, ambassadors, messengers and traders are not subjected to this condition. Allowing these people to enter into a Muslim territory with no prior permission may have arisen from pre-Islamic practices when these groups of people were allowed free access to different territories in the Arab world.¹⁷³

The condition of seeking permission is also exempted for persons who are deemed habitually safe. These include all people who have been established to be safe over time. For instance, people who enter into an Islamic territory when they are vulnerable and seeking protection are deemed safe upon arrival. Habit is also used as condition for establishing the precedent for habitual safety. For instance, messengers and traders are deemed to be habitually safe because they have been so since the pre-Islamic times. If there lacks any custom to justify why a person should be considered habitually safe, Muslims are under no obligation to grant them asylum. In certain cases, circumstantial evidence is also used to exempt people from the requirement of seeking permission before entering into Islamic countries. For instance, in the case that a person's claim to be a messenger is doubtful, they can be sworn and thereafter admitted. Whenever the claim of the asylum-seeker corresponds with their real status, their statements are to be believed and them admitted even though they may not have any permission to enter into a territory. The last scenario under which the condition of prior permission is not required is when one enters a Muslim territory seeking refuge (*aman*).¹⁷⁴ The condition of seeking permission when soliciting asylum is also exempted for people considered habitually safe, those seeking *aman* (shelter and peace), and when there is circumstantial evidence supporting a person's entry into a territory without permission.

¹⁷². Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study* (UN High Commissioner for Refugees 2009).

¹⁷³. Ibid.

¹⁷⁴ Ibid.

Consistent with the conditions that the asylum-seeker solicit asylum and acquire permission, they must also be present in an Islamic state or a territory controlled by an Islamic state. In the application of this condition, Islamic territory is defined as land that applies Islamic Shari'ah and where the residents enjoy the aman of Islam. In all cases, Muslims must prevail over non-believers for a territory to qualify as Muslim land. In such territories, provisions of Islam prevail.¹⁷⁵ This condition implies that asylum-seekers cannot be granted refuge in Islamic territories if they are still living in the land of nonbelievers. It supports the *ayahs* in the Qur'an that admonish those who refuse to migrate from the lands of nonbelievers to Muslim territories. For the believers that will die without migrating to Muslim lands, the angels will ask, "... "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."¹⁷⁶ On the other hand, "...whoever emigrates for the cause of Allah will find on the earth many [alternative] locations and abundance."¹⁷⁷ As a condition, those that seek asylum in Muslim countries to move away from persecution in the land of nonbelievers are required to take the bold step of leaving first because Allah has promised to provide them with alternative residences in the form of asylum.

This condition is further reinforced by the condition that asylum is only granted to persons who are unwilling or unable to avail themselves of the protection of their country of their nationality. It is understood that person that avail themselves to Islamic territories seeking protection only do so when getting similar protection from the state of their nationality is impossible. Asylum-seekers should also have motive for wanting protection in Islamic states. Asylum under Islamic law is not only granted to those facing persecution in their countries of origin. Asylum can still be given to those that wish to reside in Muslim nations even when their lives are not at risk in their country of origin. The wish to live in a Muslim land may be motivated by a person having converted to Islam or if they wish to live as a non-Muslim under protection in a Muslim land. All motives of seeking asylum in Muslim land are treated equally.¹⁷⁸ The

¹⁷⁵ Ibid.

¹⁷⁶ *The Qur'an* (n 1) 4:97.

¹⁷⁷ Ibid 4:100

¹⁷⁸ Abou-El-Wafa (n 40).

recognition of more than one motive for granting asylum is a reflection of the expansive definition of the concept of asylum in Islam. Beyond offering protection from persecution, asylum in Muslim land can be a form of religious journey or preferential migration to a different land.

Although the different motives of seeking asylum in Islamic countries are treated equally, only legal reasons qualify. Islamic countries impose a condition that the right to asylum should not conflict with Sharia rules. The essence, outcomes, and effects of asylum should be consistent with the provisions of Sharia.¹⁷⁹ Article 12 of the Cairo Declaration of Human Rights in Islam prohibits the granting of asylum to any person whose reason for seeking asylum arose from their criminal activities. It mandates all Islamic nations to grant asylum to persons facing persecution, “unless the asylum is motivated by committing an act regarded by the Shari’ah as a crime.”¹⁸⁰ Article 28 of the *Arab Charter on Human Rights* also prohibits persons from being granted political asylum if they are facing persecution for crimes they have committed. It states that “this right [to seek political asylum] shall not be enjoyed by persons facing prosecution for an offense under ordinary criminal law.”¹⁸¹ Although persecution is one of the main reasons for seeking asylum as recognised by Islamic countries, it only applies to those who are not engaged in criminal activities. Those facing persecution for offences committed in their countries of origin do not enjoy refuge in Islamic countries.

In addition to the condition of not admitting asylum seekers whose motivation for seeking refuge is their engagement in crime, Islamic countries are also not obliged to provide asylum to persons convicted of other crimes before seeking asylum. Article 2 of the *Arab Convention on Regulating Status of Refugees in the Arab Countries* outlines that the provision for providing asylum to refugees does not apply to persons convicted of crimes before their admission. It states that the provisions for asylum-seekers in Islamic countries do not apply to any person who:

Has been convicted of having committed a war crime, a crime against humanity or a terrorist crime as defined in the international conventions and covenants [or one who] Has been

¹⁷⁹ Ibid.

¹⁸⁰ Organisation of Islamic Cooperation (n 26).

¹⁸¹ League of Arab States (n 15)

convicted of a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee and has not been acquitted under a final peremptory verdict.¹⁸²

Based on these provisions, the application of refugee laws in Islamic countries such as KSA is dependent on the criminal history of the asylum seeker regardless of their motivation for seeking asylum.¹⁸³ On the one hand, people who seek asylum because they have committed a crime in the country of origin are not entitled to protection as refugees. Similarly, those who have previously committed serious political and non-political crimes in another country before their admission as refugees and have not been acquitted do not enjoy protection as refugees even if their motivation for seeking asylum is not to run from persecution for the crime committed. These provisions are a clear illustration of the condition that asylum in Islamic countries should not be abused as an avenue to escape from prosecution for crimes committed outside the country of refuge.

The last condition for granting asylum is adherence to the rules enshrined in the Quran that provide for the right to asylum. There are five guiding rules that guide how Muslims should receive and treat refugees. These rules are found in the following *Ayah*:

And [also for] those who were settled in al-Madinah and [adopted] the faith before them. They love those who emigrated to them and find not any want in their breasts of what the emigrants were given but give [them] preference over themselves, even though they are in privation. And whoever is protected from the stinginess of his soul - it is those who will be the successful.¹⁸⁴

The first rule from this *Ayah* is that refugees or migrants coming to Muslim land should be welcomed and treated well. The rule aims to further prohibit *refouling* of migrants at the borders if they meet all other conditions. In the second rule, it is required that Muslims prioritize the needs of refugees over their own regardless of the

¹⁸² League of Arab States (n 14)

¹⁸³ Basic Law of Governance, Royal Order No. (A/91), 1992.

¹⁸⁴ *The Qur'an* (n 1) 59:9.

conditions in which the latter came. In Islam, the giving of preference to others over oneself is hailed as a true sign of true love and endurance of hardship.¹⁸⁵ The third rule provides for the principle of non-discrimination. Muslims should not base their decision to accept refugees on the level of wealth of the latter. Protection, security, and stability in asylum should be provided to all those that seek it. The fourth rule states that refugees should be accepted even when the Muslim inhabitants receiving them are poor. Lastly, the *Ayah* provides for territorial asylum. By referring to believers from Medinah, it outlines that all immigrants, including those that left their homes are to be welcomed to a Muslim land.

2.3.5 Expiring of asylum

The expiration of asylum in Islam is dependent on the conditions motivating it. When asylum is motivated by persecution, asylum lasts until the asylum-seeker's safety is guaranteed. Article 12 of the *Cairo Declaration of Human Rights in Islam* states that countries providing refuge to an asylum-seeker should do so “until his safety has been attained...”.¹⁸⁶

At times, the expiration of asylum in Islamic countries is occasioned when the protection of the refugee is transferred to another country, either by their own actions or by changes in their circumstances. With regards to the actions of the refugee, asylum can expire if the refugee voluntarily presents themselves back to their country of origin or nationality or acquires new citizenship, which renders their status as a refugee null. Alternatively, the circumstances that led to the asylum-seeker obtaining refuge may change and render the need for the continued stay in the country of refuge unnecessary. In such cases, the asylum seeker has no choice but to present themselves in the country of nationality/origin. Article 4 of the *Arab Convention on Regulating Status of Refugees in the Arab Countries* states:

The provisions hereof shall cease to apply to any refugee if:

1. He voluntarily re-avails himself to the protection of the country of his nationality; or
2. He has acquired a new nationality and enjoys the protection of the country of such new nationality; or

¹⁸⁵ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 36

¹⁸⁶ Organisation of Islamic Cooperation (n 26).

3. He has voluntarily re-established himself in the country, which he had earlier left owing to fear of persecution; or
4. Having lost his nationality, he has voluntarily re-acquired it; or
5. Because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, he can no longer continue to refuse to avail himself of the protection of the country of his nationality; or
6. Being a person of no nationality (stateless), and because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, he is able to return to his former habitual place of residence.¹⁸⁷

The country of refuge cannot refuse the refugee his right to return to their country of origin if they so wish. Article 9 of the Arab Convention on Regulating Status of Refugees in the Arab Countries enforces the provisions of Article 4 by arguing against any state disrespecting the will of a refugee to voluntary return to their country of origin. It further provides for how the country of refuge and country of origin should cooperate to facilitate this return. It states:

Subject to the provisions of Article 4 hereof, the will for return to country of origin in all cases shall be respected and the refugee shall not be involuntarily repatriated to his country of origin. The country of asylum, in cooperation with the country of origin, shall make appropriate arrangements for the safe return of refugees willing to return home.¹⁸⁸

The expiration of asylum can also be occasioned if the nation of refuge feels that expelling the refugee is in the best interests of national security or public order. Although asylum-seekers should not be repatriated to their country of origin involuntarily, this rule has exceptions if the continued hosting of a refugee compromises the national interests of the host country. Even then, there are provisions to ensure that the security of the refugee is not compromised despite their expulsion.

¹⁸⁷ League of Arab States (n 14).

¹⁸⁸ *Ibid.*

Article 8 of the *Arab Convention on Regulating the Status of Refugees in the Arab Countries* states:

A refugee lawfully residing on the territory of a Contracting State shall not be expelled save on grounds of national security or public order. A refugee may, however, appeal before the competent judicial authority against the expulsion decision. In such case, the Contracting State shall allow such refugee a reasonable period within which to seek legal admission into another country. The Contracting State reserves the right to apply during that period such internal measures as it may deem necessary. A Contracting State shall temporarily accept a refugee should his expulsion or return (refoulement) threaten his life or freedom.¹⁸⁹

2.3.6 The rights of refugees

Sharia law provides guidelines to be followed when dealing with refugees. The Quran has set forth the instructions to be used when providing asylum, including how different types of refugees should be protected by Muslims. The Quran requires all faithful to assist refugees and praises those who engage in their protection.¹⁹⁰ It also provides for the rights that should be enjoyed by refugees. In particular, it entitles them to humane treatment as outlined in the following *Ayahs*:

Indeed, those who have believed and emigrated and fought with their wealth and lives in the cause of Allah and those who gave shelter and aided - they are allies of one another. But those who believed and did not emigrate - for you there is no guardianship of them until they emigrate. And if they seek help of you for the religion, then you must help, except against a people between yourselves and whom is a treaty. And Allah is Seeing of what you do. And those who disbelieved are allies of one another. If you do not do so,

¹⁸⁹ Ibid.

¹⁹⁰ Ibid 9:100,117.

there will be *fitnah*¹⁹¹ on earth and great corruption. But those who have believed and emigrated and fought in the cause of Allah and those who gave shelter and aided - it is they who are the believers, truly. For them is forgiveness and noble provision. And those who believed after [the initial emigration] and emigrated and fought with you - they are of you. But those of [blood] relationship are more entitled [to inheritance] in the decree of Allah. Indeed, Allah is Knowing of all things.¹⁹²

And those who emigrated for [the cause of] Allah after they had been wronged - We will surely settle them in this world in a good place; but the reward of the Hereafter is greater, if only they could know.¹⁹³

The rights of refugees in Sharia law are grounded on the principles of justice and equity. All faithful are required to protect refugees based on their vulnerability. Those considered most vulnerable and at the highest risk following migration are lent additional support. Specifically, women and children should be provided the highest level of protection. Vulnerable men who are refugees are also recognised as being more at risk and should be provided extra protection. The following *Ayahs* guide the protection of vulnerable and at-risk refugees:

And what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, "Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper?"¹⁹⁴

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

¹⁹¹ *Fitnah* in this context refers to oppression.

¹⁹² Ibid 8:72-75.

¹⁹³ Ibid 16:41.

¹⁹⁴ Ibid 4:75.

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. Except for the oppressed among men, women and children who cannot devise a plan nor are they directed to a way - For those it is expected that Allah will pardon them, and Allah is ever Pardoning and Forgiving.¹⁹⁵

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 of safety. That is because they are a people who do not know.¹⁹⁶

O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do.¹⁹⁷

Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded.¹⁹⁸

The Quran and other holy books also provide provisions for how to ensure that other basic rights of refugees are met. One of these rights is the provision of basic physical requirements such as food, drinkables, and clothing as provided for in these *Ayahs*:

And they [servants of Allah] give food in spite of love for it to the needy, the orphan, and the captive, [Saying], "We feed you

¹⁹⁵ Ibid 4: 97-99.

¹⁹⁶ Ibid 9:6.

¹⁹⁷ Ibid 5:8

¹⁹⁸ Ibid 16:90.

only for the countenance of Allah. We wish not from you reward or gratitude.¹⁹⁹

And what can make you know what is [breaking through] the difficult pass? It is the freeing of a slave [O]r feeding on a day of severe hunger, [A]n orphan of near relationship [O]r a needy person in misery.²⁰⁰

In Kitab al-Iman, the Prophet Mohammed (SAW) reiterates the need to offer food to all people regardless of the existing relations. It is stated:

It is narrated on the authority of 'Abdullah b. 'Amr that a man asked the Messenger of Allah (may peace and blessings be upon him) which of the merits (is superior) in Islam. He (the Holy Prophet) remarked: That you provide food and extend greetings to one whom you know or do not know.²⁰¹

Apart from the right to have food and other basic needs, refugees are entitled to care and assistance. The following *Ayahs* provides for the provision of care and assistance to refugees:

Righteousness is not that you turn your faces toward the east or the west, but [true] righteousness is [in] one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveler, those who ask [for help], and for freeing slaves; [and who] establishes prayer and gives zakah²⁰²; [those who] fulfill their promise when they promise; and [those who] are patient in poverty and hardship and during battle. Those are the ones who have been true, and it is those who are the righteous.²⁰³

¹⁹⁹ Ibid 76: 8-9.

²⁰⁰ Ibid 90: 12-16.

²⁰¹ Ibn Taymiyyah 63.

²⁰² Zakah is a religious tax in Islam. It is contributed by the wealthy every year to fund charitable courses. This alms-giving obligation is only ranked second to prayer in importance as explained by Hallaq (2013, p. 123).

²⁰³ *The Qur'an* (n 1) 2: 177

They ask you, [Mohammed], what they should spend. Say, "Whatever you spend of good is [to be] for parents and relatives and orphans and the needy and the traveler. And whatever you do of good - indeed, Allah is Knowing of it."²⁰⁴

Refugees are even entitled to property in certain circumstances. In cases of war spoils, booty, and alms (*Sadaqa*), the Qur'an provides for a portion of Muslim property to be given to wayfarers. The following *Ayahs* outline this right:

And know that anything you obtain of war booty - then indeed, for Allah is one fifth of it and for the Messenger and for [his] near relatives and the orphans, the needy, and the [stranded] traveler, if you have believed in Allah and in that which We sent down to Our Servant on the day of criterion - the day when the two armies met. And Allah, over all things, is competent.²⁰⁵

Zakah expenditures are only for the poor and for the needy and for those employed to collect [*zakah*] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveler - an obligation [imposed] by Allah . And Allah is Knowing and Wise.²⁰⁶

And what Allah restored to His Messenger from the people of the towns - it is for Allah and for the Messenger and for [his] near relatives and orphans and the [stranded] traveler - so that it will not be a perpetual distribution among the rich from among you. And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty.²⁰⁷

²⁰⁴ Ibid 2: 215.

²⁰⁵ Ibid 8: 41.

²⁰⁶ Ibid 9: 60.

²⁰⁷ Ibid 59: 7.

2.3.7 Right to Asylum for non-Muslim Refugees

In Islam, refugees are honoured in the Sharia regardless of whether they practice Islam or not. The Qur'an recognises certain rights that apply to non-Muslims such as the right to practise their religion without being forced to convert to Islam. Although the Holy Qur'an recognises only Allah as the true God and argues that disbelievers have no reason to continue disbelieving, it is against anyone being forced to practise the Islamic faith. Disbelief is recognised as a heinous crime but Muslims are not to coerce nonbelievers into converting. On the contrary, only Allah can punish them during the Day of Judgment. The following *Ayah* give an outline of the implied right to worship any deity:

There shall be no compulsion in [acceptance of] the religion.

The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.²⁰⁸

The rights of refugees are also outlined in the conventions governing Arab states, in which KSA is a signatory. *The Arab Charter of Human Rights* outlines the rights of a person living within a territory. Human rights apply to all those residing in the territory governed by the state regardless of their nationality. Article 3 of the *Charter* provides that each state undertakes in ensuring that all persons living within its territory enjoy all human rights without distinction based on grounds such as national origin. Article 4 also outlines the articles that contain rights not subject to derogation such as Article 5 (right to life), Article 8 (right against torture), and Article 10 (right against slavery, forced labour and human trafficking) among many others.²⁰⁹ Since the Charter provides that these rights cannot be suspended and apply to all those living in a territory, they automatically apply to all refugees in a state. Each member state of the League of Arab Nations should protect the fundamental rights of all refugees living within its territory.

The *Arab Convention on Regulating Status of Refugees in the Arab Countries* requires contracting states to accord equal rights to refugees as they would citizens. It

²⁰⁸ Ibid 2: 256

²⁰⁹ League of Arab Nations (n 15)

requires all Islamic states that accept refugees in their territory to make all efforts necessary to ensure that refugees enjoy equal rights as their citizens. Article 5 of the Convention states:

The Contracting States to this Convention shall undertake to exert every possible effort, to ensure that refugees are accorded a level of treatment no less than that accorded to foreign residents on their territories.²¹⁰

Article 7 further requires the state of refuge to treat the refugees without discrimination regardless of their distinguishing characteristics, such as race, gender, and religion. It states:

The Contracting States of this Convention shall undertake to refrain from discriminating against refugees as to race, religion, gender and country of origin, political or social affiliation.²¹¹

While Sharia law grants a right to basic provisions, care and assistance, and protection for all asylum-seekers, this right is not enjoyed by offenders. Military enemies do not enjoy the same rights as other asylum-seekers. Although there is no consensus on whether they should be ousted of *al-Haram*, there is agreement that they should not enjoy the rights to basic provisions, care and assistance. According to Imam al-Kasani, military enemies taking refuge in *al-Haram* should be denied food, water and shelter.²¹² In addition to being denied these basic provisions, Judge Abu Bakr ibn al-Arabi holds that such enemies should not be spoken or dealt with in any way until they leave *al-Haram*. The purpose of denying basic provisions to military enemies while taking refuge in *al-Haram* is to force them to leave this refuge.²¹³ Some scholars even hold that such enemies should not be protected even when in *al-Haram*. According to Abū ‘ Abdillāh Muhammad ibn Idrīs al-Shāfi‘ī, military enemies should be killed in al-Haram.²¹⁴ However, the Qur’an only requires that such enemies be killed

²¹⁰ League of Arab States (n 15). Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008. <http://hrlibrary.umn.edu/instree/loas2005.html>.

²¹¹ *Ibid.*

²¹² Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 91

²¹³ Mahmoud M. Ayoub, *The Qur'an and its interpreters* (Kuala Lumpur: Islamic Book Trust, 2012).

²¹⁴ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 91

if they continue fighting while in *al-Haram*.²¹⁵ Military enemies are only entitled to protection when they seek refuge in *al-Haram*. Considering that they are not entitled to any provisions, including food and water, this form of asylum is temporary and can only apply for a limited amount of time.

The right to protection from harm is also not enjoyed by persons that have committed capital offences (*hudud*). *Hudud* are considered crimes against Allah and are punishable even when one is taking refuge in *al-Haram*. A large majority of Muslim scholars agree that when a person commits a crime against life that exacts a *hud*, punishment is inflicted even when they are taking refuge in *al-Haram*. For instance, when a person kills another within al-Haram, punishment is inflicted with no regard for their refugee status.²¹⁶ The ordering of the execution of Abdullah ibn Khatal after he killed his Muslim servant and later apostatized, even though he was seeking refuge in the *Kaaba*, is one of the clearest illustration that legal punishments can still be inflicted even when one is seeking refuge.²¹⁷ The *hudud* crimes identified in Islamic law include: theft, fornication, adultery, false accusation about illicit sex, taking intoxicants, highway robbery, and apostasy.²¹⁸ From this list, Ibn Khatal committed apostasy. The rights enjoyed by asylum-seekers in Islamic countries do not apply to those found guilty of *hudud*.

Similarly, committing offences that invoke due retaliation (*qasas*) under Islamic law also leads to one forfeiting some of the rights provided to asylum-seekers in Islam. When a person commits a crime that demands an 'eye for an eye' kind of punishment, such as assault and/or murder, and then seeks refuge in al-Haram, punishments can still be inflicted while in asylum.²¹⁹ Those found guilty of such offenses are punished by being harmed in a similar way that they harmed their victim. For instance, those found guilty of murder are executed.²²⁰ Ibn Khatal killed his servant in a fit of anger. This crime violated the sanctity of life that the holy Quran safeguards. Consequently, when

²¹⁵ *The Qur'an* (n 1) 2:191.

²¹⁶ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 98

²¹⁷ Mahmoud M. Ayoub, *The Qur'an and its interpreters* (Kuala Lumpur: Islamic Book Trust, 2012).

²¹⁸ Etim E.Okon, 'Hudud punishments in Islamic criminal law' (2014) 10(4) *European Scientific Journal* 227.

²¹⁹ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 109

²²⁰ Etim E.Okon, 'Hudud punishments in Islamic criminal law' (2014) 10(4) *European Scientific Journal* 227 pp96

he sought asylum in *al-Haram*, he did not have the right to protection. Instead, Prophet Mohammed (SAW) ordered his execution.²²¹ Although asylum-seekers are entitled to protection when they seek refuge at *al-Haram* in Islamic countries, those who have committed *hudud* do not enjoy these rights. Consequently, the *al-Haram* cannot be abused by offenders as a sanctuary for avoiding the consequences of their actions.

2.3.8 The duties of refugees

The duties of refugees residing in Islamic states are dependent on the type of asylum among other factors. While certain duties only apply to certain categories of refugees, some apply for all. One of the duties of refugees that apply to all types of asylum relates to how they should relate to other nations. Although the *Arab Convention on Regulating Status of Refugees in the Arab Countries* requires (ACRSRAC) nations to make the best effort to ensure that refugees enjoy equal rights as the citizens, they have more limitations on their rights. In particular, they are to avoid expressing opinions against other countries or acting in a way that may jeopardise the relationship between the host country and other countries. Article 13 of the *Convention* states:

In practising his freedom of opinion and expression, a refugee shall refrain from attacking any country including his country of origin, nor shall he/she convey, by any means whatsoever, any such opinions or news that may create tension between the host country and other countries.²²²

The duty of refugees to avoid any communications that may compromise the relationship between the country of refuge and other countries has a slight impact on the political rights of the refugees and their freedom of expression. However, it is understandable to limit them considering the unique position that refugees occupy and the understanding of the act of offering refuge to asylum seekers. Article 6 of the *Arab Convention on Regulating Status of Refugees in the Arab Countries* indicates that “Granting asylum is a peaceful and humanitarian act and shall not be deemed by any state as a hostile act against it.”²²³ Given the recognition of the offering of refuge as a

²²¹ Mahmoud M. Ayoub, *The Qur'an and its interpreters* (Kuala Lumpur: Islamic Book Trust, 2012).

²²² Ibid.

²²³ League of Arab States (n 14).

peaceful and humanitarian act, action by the refugees that may cause a confrontation between the host nation and other countries violates this understanding, hence their limitation.

2.4 Summary

In conclusion, this chapter has highlighted vital factors on the history of both the Islamic Law on refugees and the International Refugee Law. Evidently, both sets of law have a significant history over which they have developed into the modern concepts being applied across the world. As illustrated, Islamic Law takes assumes a single Islamic state, which is non-existent in the modern world. Nonetheless, elements of its provisions are visible in the practices of the Islamic states, or Muslim-majority countries throughout the world. While that remains the case, there are still many Muslim countries that are party to the Convention including Afghanistan, Algeria, Egypt, Iran, Kyrgyzstan, Mauritania, Morocco, Somalia, Tunisia, and Turkmenistan, among others. Therefore, while not all Islamic nations are party to the Convention and its Protocol, a significant number of them have acceded or ratified it.

Chapter Three: Refugee Law in the Kingdom of Saudi Arabia with Special Reference to Shariah

- 3.1 Overview
- 3.2 The legal status of refugees
- 3.3 Obstacles to the right of asylum
- 3.4 Compatibility of Asylum Procedures in Saudi with Islamic Law
- 3.5 Islamic Teachings, Asylum, and Saudi Arabia
- 3.6 Concluding Remarks

3.1 Overview

This chapter provides in-depth coverage of the refugee law in the Kingdom of Saudi Arabia (KSA). As an Islamic state, KSA capitalises on Sharia law in order to determine the asylum procedures to be followed when dealing with refugees, including the rights and responsibilities of those seeking asylum in the country. Therefore, the connection between the refugee law in the KSA and Sharia law is examined in detail. To understand how the refugee law in KSA protects these asylum seekers, legal materials concerning refugees including the Sunnah, the Quran, statutes, conventions, and court decisions employed in the country is evaluated. The legal history of Saudi Arabia will be examined to show how refugees are treated in the country.

While Saudi Arabia is not party to the 1951 Refugee Convention or the 1967 Protocol, it follows some elements of the basic law to meet the needs of refugees who seek asylum in the country. Furthermore, the country is largely guided by the Islamic Law, albeit, not in the strictness of the law, but in the elements adapted by the nation into its national laws and regulations. Therefore, provision of asylum on the basis on political protection as stipulated in Article 42 of the Basic Law are adapted even without the outright acceding to the Convention or Protocol. The Article states, “The State shall grant political asylum if public interest so dictates. Laws and international agreements shall specify the rules and procedure for the extradition of ordinary criminals.

This chapter will address the refugees’ enjoyment of civil, social and economic rights when in Saudi Arabia. The provisions of Islamic law concerning the same is highlighted. First, the legal status of the refugees in Saudi Arabia is established as provided for in Sharia law and any other supporting statutes. The chapter provides a comprehensive understanding of how different provisions ensure the protection of rights bestowed upon refugees. The findings from Sharia Law are supplemented by interviews from renowned scholars and immigration lawyers who will provide more insights into the issue. The various obstacles encountered in accessing the right of asylum in Saudi Arabia are also reviewed.

3.2 The legal status of refugees

The legal status of refugees in Islamic countries is governed by the existing treaties governing Islamic states and the provisions of the holy books, especially the Quran. Islamic countries also borrow partly from international refugee law. Refugees in Islamic states are provided with identification cards and travel documents to affirm the legality of their occupation

of a territory and enable their travel. Article 10 of the Arab Convention on Regulating Status of Refugees in the Arab Countries states:

Contracting States shall issue to refugees lawfully residing in their territories identification cards and travel documents in conformity with the United Nations Convention relating to the Status of Refugees and its supplements, in order to enable them to travel from and return to such territories, except in cases where this is barred for reasons related to national security or public order.²²⁴

The provisions of the *United Nations Convention* and referred to in this Article can be found in Articles 27 and 28 of the *Convention and Protocol Relating to the Status of Refugees*. These Articles require the country of refuge to issue identity papers and travel documents to all refugees without them. They state:

[Article 27] The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

[Article 28] The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence [...] Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.²²⁵

²²⁴ Ibid.

²²⁵ The United Nations Refugee Agency, *Convention and Protocol Relating to the Status of Refugees* (2010).

Saudi Visa Framework

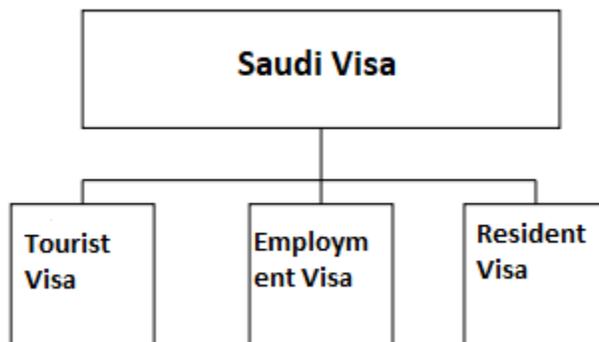


Figure 3.1

The above-mentioned sponsor requirements. Also reflected in the Saudi *Kafala* and *Iqama* system where an individual or an organization is required to sponsor a person immigrating to Saudi Arabia. A non-citizen cannot establish any kind of business in the country without the participation of a *Kafeel* (Sponsor). Such requirements discourage the immigrants from investing in the country as the requirement does not permit them to work independently. Therefore, it can be argued that the arrangements of *Kafala* should only be applied in the employment visa, while individuals seeking economic immigration should be exempted from this documentation.

KSA and Refugee Conventions

KSA is also a signatory of several conventions on the treatment of refugees that outline conditions for territorial asylum. By being a signatory of these conventions, the rules related to the recognition and treatment of refugees apply to the country. One of the conventions that guide KSA's treatment of refugees is the *Arab Convention on Regulating Status of Refugees in the Arab Countries* (1994). The Convention outlines the guidelines for dealing with refugees in the Arab states. It includes the definition of a refugee, conditions for granting asylum, rights of refugees, obligations of nation states, and limitations to the right to asylum.²²⁶ Although this convention is yet to be ratified by the League of Arab Nations, it reflects the commitment of the 22 members states to address multidimensional issues related to refugees. The Convention adopts a broad definition of refugees, which includes all those that have left their countries unwillingly for multiple reasons, including natural disasters. In the convention, the Member

²²⁶ League of Arab States, *Arab Convention on Regulating Status of Refugees in the Arab Countries* (1994).

States of the League of Arab States agreed on the definition of a refugee, which takes cognisance of territorial asylum. The convention defines a refugee as a

Any person who is outside the country of his nationality or outside his habitual place of residence in case of not having a nationality and owing to well-grounded fear of being persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion, unable or unwilling to avail himself of the protection of or return to such country.

Any person who unwillingly takes refuge in a country other than his country of origin or his habitual place of residence because of sustained aggression against, occupation and foreign domination of such country or because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.²²⁷

From this definition, governments of the Member States of the League of Arab States, including KSA, recognise all those who seek asylum after moving away from their country of origin. Once it is ratified, any person who has reason to fear for their safety will be eligible for asylum in in any of these countries. All nations recognise that granting asylum is a peaceful and humanitarian act that should not be deemed as exerting hostility on any other nation. However, this Convention is yet to be ratified by the member countries despite adopting it over 25 years ago. Having not been ratified, this Convention is not enforceable and is yet to be recognised as law in Saudi Arabia. Despite its status, this treaty is recognised as one of the main instruments used in the protection of refugees in the international community. For instance, the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol* operate in combination with this treaty in the implementation of rights relating to refugees.²²⁸

The League of Arab States also adopted the *Arab Charter of Human Rights* in 2004. The Charter is an affirmation of the UDHR that focuses on the enjoyment of human rights of persons residing in nations governed under Sharia law. The Charter was adopted in May 2004 by as the

²²⁷ Ibid.

²²⁸ National Immigration Forum, 'Fact Sheet: International Refugee Protection System', *refworld* (Web Page, 1 April 2009) <<https://immigrationforum.org/article/fact-sheet-international-refugee-protection-system/>>

guiding document in the protection of rights and freedoms of persons residing in Islamic territories. It primarily focuses on the traditional human rights such as the right to life, protection from torture, and right to security²²⁹. Although it was adopted in 2004, it only came into force in 2008 after getting ratified by the minimum required seven member states. Today, 13 of the 22 member states of the League of Arab States have ratified the *Charter*. These states include KSA, Jordan, Algeria, Bahrain, the UAE, Palestine, Qatar, Lebanon, Kuwait, Syria, Sudan, Libya, and Yemen.²³⁰ Having ratified the Charter, KSA is bound by the provisions outlined therein.

Concerning asylum, Article 28 of the Charter states:

Everyone shall have the right to seek political asylum in other countries to escape persecution. This right shall not be enjoyed by persons facing prosecution for an offense under ordinary criminal law. Political refugees shall not be extraditable.²³¹

KSA is also a member state of the Organisation of Islamic Cooperation (OIC), which adopted the Cairo Declaration on Human Rights in Islam. The OIC adopted it in 1990. The organisation is consisted of 57 member states, with Islamic countries forming the largest percentage of these countries. Saudi Arabia is one of the member countries of OIC. The Declaration is closely linked to the UDHR and seeks to provide a version of the same rights while being grounded on Sharia law. The Declaration is considered as an Islamic response the UDHR. It outlines a perspective of human rights to be adopted by member states of the OIC. Although it guarantees nearly all the human rights provided for in the UDHR, it is largely grounded on the Islamic Sharia as the source of these rights. In fact, member states of the OIC are restricted to the limits set by the Sharia in the implementation of this human rights framework. Article 12 of the Declaration acknowledges the right to migrate and live in different countries and the right of asylum to those persecuted. It states:

Every man shall have the right, within the framework of the Shari'ah, to free movement and to select his place of residence whether within or outside his country and if persecuted, is entitled to seek asylum in

²²⁹ League of Arab States, *Arab Charter of Human Rights* (2004).

²³⁰ Cesare P R Romano, 'Mirage in the Desert: Regional Judicialization in the Arab World' in Ignacio de la Rasilla and Jorge E. Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press, 2019) 169.

²³¹ *Ibid.*

another country. The country of refuge shall be obliged to provide protection to the asylum-seeker until his safety has been attained, unless asylum is motivated by committing an act regarded by the Shari'ah as a crime.²³²

The treaties adopted by Saudi Arabia in dealing relating to asylum and the treatment of refugees share multiple similarities with the 1951 *Convention* and 1967 *Protocol*. These treaties are adopted by over three-quarters (76%) of all nations in the world. As of 2021, at least 146 countries had adopted both treaties or the 1967 Protocol only. The two treaties are required to establish and maintain a national asylum system. The basic requirement of these laws is that countries implement national strategies to guarantee the protection of refugees. They should create refugee protection frameworks and task it to national authorities for implementation. It is upon the national authorities to make decisions about the legal principles to be applied and monitor the processing and protection of refugees. Although countries have the right to decide on the legal concepts, they are obliged to adopt the definition of a refugee as stipulated in the two treaties. A refugee in these treaties is any person who has a well-founded fear of persecution based on their race, religion, political, or membership to a group. Individual countries can, however, clarify this definition further if they so wish.²³³ Considering the large number of countries that have adopted the UN treaties regarding the treatment of refugee, they have acted as a universal guide in the treatment of refugees for most countries and in the formulation of other treaties related to refugees.

Although the 1951 Convention is a treaty by the United Nations, not all member states have adopted it. One of the UN member states that is yet to adopt these treaties is Saudi Arabia. The failure of Saudi Arabia to adopt this treaty is highly notable considering it is one of the countries hosting the largest number of refugees. Other UN member countries that are yet to adopt the treaty and host large refugee populations are India and Libya.²³⁴ Although Saudi Arabia has not adopted these treaties, it still cooperates with the UNHCR in processing refugees

²³² Organisation of Islamic Cooperation, *Cairo Declaration on Human Rights in Islam* (1990)

²³³ National Immigration Forum (n 22)

²³⁴ Ibid.

within its borders. For instance, it allows the UNHCR to carry out refugee state determination for asylum-seekers within its borders.²³⁵ Despite Saudi Arabia not being a signatory to the 1951 Convention and the 1967 Protocol, it is still a member state of the United Nations and collaborates with the UNHCR in the processing of asylum-seekers within its borders. Consequently, the provisions of the UNHCR relating to the definition and treatment of refugees may be evident in the conduct of Saudi Arabia.

Although most Arab/Islamic countries are signatories to Islamic-based treaties related to human rights or the protection of refugees, some have acceded to the 1951 Convention and 1967 Protocol. The majority of these countries are in Africa. On the contrary, Yemen is the only country in the Middle East that has acceded to these international treaties. The other Islamic countries that are party to these treaties are Algeria, Djibouti, Egypt, Mauritania, Morocco, Somalia, Sudan, and Tunisia.²³⁶ Although Islamic countries have agreed on various treaties that are primarily based on the Sharia law, the UNHCR treaties on human rights and protection of refugees have a major influence on most of them. Some of these countries have acceded the treaties while others work alongside the UNHCR when implementing refugee protection measures.

3.3 Obstacles to the right of asylum

Often, the provision of asylum is made difficult by certain prevailing circumstances. One of the major obstacles to the right of asylum is the lack of capacity to accommodate many refugees. In the provision of territorial asylum, it is recognised that Islamic countries may lack the ability to host a large number of refugees. ACRSRAC recognises situations in which Islamic states may be overwhelmed by the influx of refugees. Such a situation may lead to them failing to provide refuge to asylum-seekers despite them qualifying as refugees. When this happens, the *Convention* places a collective responsibility on all its signatories to provide refuge to asylum seekers. Article 13 of the Convention states:

Should a Contracting State face difficulty in granting or continuing to grant right of asylum under this Convention because of sudden or mass

²³⁵ Immigration and Refugee Board of Canada, 'Saudi Arabia: Refugee determination system', *refworld* (Web Page, 31 May 2002) <<https://www.refworld.org/docid/3df4bea524.html>>

²³⁶ Nassar, Joanna, Dawn Chatty, and Ibrahim Awad, 'Refugee Crisis in the Arab World', *Carnegie Endowment for International Peace* (Web Page, 18 October 2018) <<https://carnegieendowment.org/2018/10/18/refugee-crises-in-arab-world-pub-77522>>

influx or for any other compelling reasons, the rest of the Contracting States shall, at the request of such State, take such appropriate measures, severally or jointly as to alleviate the burden to the asylum-providing State.²³⁷

The right to asylum can also be limited by the actions of the asylum seeker. The Qur'an recognizes Makkah as a sacred place for worship where all who enter should feel safe. To that extent, it acts as a territorial refuge where all refugees enjoy protection. However, this right to asylum can only be enjoyed if those enjoying it do not fight while in the Mosque. The Qur'an states:

And kill them wherever you overtake them and expel them from wherever they have expelled you, and fitnah²³⁸ is worse than killing. And do not fight them at al-Masjid al- Haram until they fight you there. But if they fight you, then kill them. Such is the recompense of the disbelievers.²³⁹

The lack of consensus on the interpretation of the Quran and other provisions of the Sharia can also act as an obstacle to the right to asylum. In particular, there are differing views on how people seeking asylum in al-Haram should be treated if they commit crimes. Although there is consensus that those who enter al-Haram should be safe even if they are military enemies (after laying down their arms), there are different versions on the treatment that such refugees should be given while there. Imams and jurists have different interpretations the treatment of such refugees given different conditions. One faction holds that punishment in al-Haram is prohibited under all circumstances. For instance, Imam Abū Ḥanīfa held that punishment cannot be executed in the haram regardless of the crime that one commits.²⁴⁰ Hanifa and Hanafites hold this view based on the generality of the *Ayah*, "...And whoever enters it [al-Masjid al-Ḥarām] shall be safe..."²⁴¹ Although they believe that a person who commits a crime and takes refuge in

²³⁷ League of Arab Nations.

²³⁸ In this context, fitnah refers to wrongful persecution. It is used to indicate the harassment of a person or a group for accepting ideas that are contrary to those held in the existing social order. Fitnah occurs when the person or group condemns what is wrong with the existing ideas in society.

²³⁹ *The Qur'an* 2:191.

²⁴⁰ Ayoub,

²⁴¹ *The Qur'an* (n 1) 3:97.

al-Haram should not be inflicted with punishment, they are of the view that such offenders should be forced out by denying them food, water, and association with others. They hold that only after leaving al-Haram should the offender be punished.²⁴² In their interpretation of the Qur'an, Hanafites hold that no punishment should be executed on offenders for as long as they remain in al-Haram. On the contrary, measures should be put in place to force them out and then punished once out. However, this interpretation is not held by all, which creates an obstacle regarding how the right to religious asylum should be applied.

The view that punishment cannot be exerted in al-Haram is opposed by a majority of Islamic scholars, imams, and jurists. On the one hand, there are those that oppose on the account that it contradicts Allah's account. Judge Abu Bakr ibn al-Arabi, the word of Allah cannot be contradicted, which implies that punishment can be executed in the al-Haram.²⁴³ The jurist appears to make reference to the Qur'an, where Allah grants believers the permission to kill an enemy taking refuge in the al-Masjid al-Haram if he fights them.²⁴⁴ Those holding this view argue that the safety guaranteed in al-Haram should not be loosely translated to security from the Fire. Legal punishment can still be administered in al-Haram. Imam Abu 'Abdullah Al-Qurtubi held that the assurance of safety in al-Haram should not be taken to mean that offenders cannot be punished when residing there. He cited Prophet Muhammad's (SAW) command to have Abdullah ibn Khatal executed despite his effort to hang on the curtains of Kaaba in Makkah in an effort to take refuge there. Abdullah ibn Khatal had committed the crime of killing a Muslim and apostatizing before his execution.²⁴⁵ In fact, majority of Muslim scholars agree that offenders who commit an offence that demands a hadd or retaliation (qasas) before taking refuge in al-Haram, they should be inflicted with punishment.²⁴⁶ The majority of Muslim scholars, imams, and jurists hold that an offender seeking refuge in al-Haram after committing an offense is not a guarantee that punishment will not be inflicted. This position conflicts with the one held by Hanafites. The conflict in the interpretation of Shari'ah law implies that its application may vary

²⁴² Abou-El-Wafa (n 40).

²⁴³ Ayoub full ref

²⁴⁴ *The Qur'an* (n 1) 2:191

²⁴⁵ Ayoub (n 91).

²⁴⁶ Abou-El-Wafa (n 40).

when applied in dealing with asylum-seekers. The lack of consensus among interpreters on the implementation of the right to asylum in acts as an obstacle to the enjoyment of this right in Islamic countries.

3.4 Compatibility of Asylum Procedures in Saudi Arabia with Islamic Law

The Asylum procedures in KSA are consistent with the Sharia law to a certain extent. The first area that the country abides by the Sharia law regards the recognition of refugees based on asylum-seekers' safety concerns. While there is no consensus regarding the number of refugees hosted by Saudi Arabia, the country is a major host of refugees displaced by conflicts in the region.²⁴⁷ In an interview conducted by the researcher with (INTV 1), he makes it clear that the KSA receives refugees from countries facing wars.²⁴⁸ The three major sources of refugees are Syria, Yemen and Myanmar. Currently, these countries have a total number of 1.07 million refugees living in KSA. Of this number, Yemenis make up over half of the refugees (561,911) while Syrians (262,573) and Burmese (249,669) are about quarter of the refugees each. Other sources cite an even larger number of refugees from the region. For instance, the KSA government had indicated that around 2.5 million entry permits have been authorized for Syrian refugees fleeing their country since 2011. This number is often disputed by scholars who cite about 420,000 entry permits based on official data.²⁴⁹ Regardless of the inconsistencies in the actual number of Syrian refugees, Saudi Arabia is recognized as the major player among the Arab Gulf states in responding to the Syrian crisis. The country's high capabilities in terms of area and capabilities enables it to respond more effectively to this crisis.²⁵⁰

The granting of asylum in Saudi Arabia is consistent with Islamic law in that it is done on humanitarian grounds. In Islamic law, granting of asylum aimed at alleviating suffering of people and warding off the sources of harm.²⁵¹ Similarly, the granting of asylum by Saudi Arabia is done on religious and humanitarian grounds. The refugee situation in Saudi Arabia has been occasioned by conflict in the region, which forces citizens to flee. Saudi Arabia offers asylum to

²⁴⁷ Yahya, Maha & Muasher, Marwan, 'Refugee Crises in Arab World', *UNHCR*, (Web Page, n.d.). <
<https://carnegieendowment.org/2018/10/18/refugee-crises-in-arab-world-pub-77522>>

²⁴⁸ Interview with Researcher, Refugee Law in Kingdom of Saudi Arabia including connection to Sharia. (2020).

²⁴⁹ Nassar (n 30).

²⁵⁰ Arafat Madi Shukri, *Asylum in Islamic Heritage and the International and Arab Law System* (Al Jazeera Centre for Studies, 2018).

²⁵¹ Abou-El-Wafa (n 40).

these refugees to ease their suffering and offer them protection from harm in their countries. According to communication from the Saudi Ministry of Foreign Affairs, little is discussed about the support provided by the government to Syrian refugees because it is done purely on humanitarian grounds and not for show off. To further demonstrate the humanitarian character of the aid given to Syrian refugees by the Saudi government, it did not treat them like refugees but like brothers. This approach to granting asylum is aimed at preserving the dignity and safety of the asylum-seekers.²⁵²

The humanitarian nature of KSA's approach to refugees is best explained in an interview conducted by the researcher with (INTV 3), a lawyer and expert in Islamic refugee laws. In the interview, the lawyer explains that Saudi Arabia is a major host of refugees in the Arab Gulf despite not being tied by the 1951 Convention.²⁵³ This means that the nation is not required by international law and covenant to take in refugees and offer them protections. The lawyer explains that despite this, the nation has pledged to help thousands of Syrian refugees who are fleeing the horrific conditions in their homelands. He further adds that the country further pledges to issue 100,000 residency permits to Syrian refugees having already accepted over 500,000 on a temporary basis.²⁵⁴

The Saudi government is often criticized for treating immigrants in an inhumane manner, including those that would qualify for refugee status under international refugee law. For instance, in 2013, the government was accused of detaining and mistreating illegal migrant workers before deporting them to their country of origin.²⁵⁵ Some of the deported immigrants were met with violence upon arrival in their countries. For instance, those deported to Somalia faced persecution or feared for their safety after returning to their country.²⁵⁶ However, not all agree with this assessment. In the interview conducted with (INTV 3) by the researcher, he explains that the question of morality in the treatment of refugees in Saudi Arabia is likely to

²⁵² Arafat Madi Shukri, *Asylum in Islamic Heritage and the International and Arab Law System* (Al Jazeera Centre for Studies, 2018).

²⁵³ Interview with Researcher, *Refugee Law in Kingdom of Saudi Arabia including connection to Sharia*. (2020).

²⁵⁴ Yahya, Maha & Muasher, Marwan, 'Refugee Crises in Arab World', *UNHCR*, (Web Page, n.d.). <

<https://carnegieendowment.org/2018/10/18/refugee-crises-in-arab-world-pub-77522>>

²⁵⁵. Ibid.

²⁵⁶ 'Detained, Beaten, Deported: Saudi Abuses against Migrants during Mass Expulsions', *Human Rights Watch* (Web Page, 10 May 2015) <<https://www.hrw.org/report/2015/05/10/detained-beaten-deported/saudi-abuses-against-migrants-during-mass-expulsions>>

differ from person to person. However, he feels that the Saudi government acts very humanely towards refugees and asylum seekers. The government appreciates the plight of many people, to include Muslim brothers and sisters, throughout the world, and feels that it is the obligation of stable nations to care for and help those in need. Importantly, the Saudi government is grounded in strict Sharia law that aims to follow the Quran and uphold basic moral principles of Islam. He adds that in Islam, there is a strong focus on charity and taking care of foreigners by showing hospitality. These values and ethics are reflected in Saudi asylum and refugee policies and protocols. The policies aim to provide for those without resources and ensure that the government is acting in an ethical manner towards all people, whether they are Muslim, Christian, or any other religion.

(INTV 3) further adds that the Saudi government has invested millions of dollars into providing refugees with the resources they need to start a new life. The government provides facilities to all refugees that serve as shelter and places to procure food, healthcare, and other essentials for life. These are costly, but the Saudi people feel that it is their ethical and moral duty to provide for those in distress and need. The moral compass of the nation requires the government to extend services to refugees and to allow each person the opportunity to live a life of value and dignity. The Saudi government tries to approach each asylum case fairly and with respect for human life and the suffering of others. Each case is evaluated individually to determine if the asylum seekers is entitled to resources and support. Most of the time, the person seeking asylum receives some help and oftentimes the aid is comprehensive. In general, the government acts very morally uprightly.

In addition to the financial cost incurred by the Saudi government in helping refugees, the country has invested heavily in humanitarian operations in affected countries. In 2015, for instance, KSA contributed \$88.8 million towards humanitarian operations related to the Syrian crisis. Care for refugees was one of the functions for which this money was directed.²⁵⁷ The approach is consistent with Sharia laws. Apart from affirming the humanitarian aspect of KSA's decision to help refugees, it is consistent with the role of asylum in Islam. One of the primary objectives of asylum in Islam is to wade off the causes of harm. In fact, eliminating the cause of

²⁵⁷ Nassar, Joanna, Dawn Chatty, and Ibrahim Awad, 'Refugee Crisis in the Arab World', *Carnegie Endowment for International Peace* (Web Page, 18 October 2018) <<https://carnegieendowment.org/2018/10/18/refugee-crises-in-arab-world-pub-77522>>

fear or harm to asylum-seekers is equally as important as protecting them from further harm.²⁵⁸ The financial contribution of the Saudi government to humanitarian efforts in countries like Syria can be viewed as an effort to prevent the suffering at source. For instance, the financial help can help Syria to address the political issues leading to instability, thus wading the cause of harm to citizens.

The financial contribution of the Saudi government to humanitarian efforts in countries facing conflict can also be viewed in terms of *zakah*. Paying *zakah* is one of the noble acts recognized in Islamic law. This humanitarian tax is contributed to help the poor and the needy. The uses of this contribution as recognised in the Quran include freeing captives and helping stranded travellers.²⁵⁹ Similarly, the financial contributions made by the KSA government are aimed at helping those facing persecution in their home countries and settling asylum-seekers arriving in Saudi Arabia. This contribution qualifies as a humanitarian tax, although it is contributed by the government.

The asylum provided to refugees in Saudi Arabia can be categorized as either territorial or religious. Both types of asylum are recognized in Sharia law. Currently, all the refugees in Saudi Arabia have originated from Islamic states, making all the refugees in the Kingdom Muslims. The type of asylum granted to these refugees can be considered territorial based on the reasons for asylum. The refugees in Saudi Arabia have been motivated primarily by security reasons. Over the years, KSA has been accepting refugees from the region owing to instability in different countries. For instance, the Saudi government hosted about 35,000 Iraqi refugees in Rafha camp. These refugees were fleeing from Iraq due to the crisis at the time.²⁶⁰ In the recent past, the number of refugees in KSA has been on the increase owing to the increased instability in the Gulf region. In particular, the Syrian crisis has contributed to a rising number of asylum seekers in the neighbouring countries.²⁶¹ The accommodation of refugees whose motivation for seeking asylum is political persecution qualifies as territorial asylum.

²⁵⁸ Abou-El-Wafa, Ahmed. *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*. Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. Pp. 36

²⁵⁹ The Qur'an (n 2) 9:60

²⁶⁰ UNHCR, 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: The Kingdom of Saudi Arabia', *refworld* (Web Page, 2013) <<https://www.refworld.org/docid/5135c0902.html>>

²⁶¹ Arafat Madi Shukri, *Asylum in Islamic Heritage and the International and Arab Law System* (Al Jazeera Centre for Studies, 2018).

The recognition of territorial asylum in Islamic countries can be as a result of obligation from international refugee law or Sharia law. However, Saudi Arabia has not ratified or acceded to any international treaty relating to the treatment of refugees. Notably, the country is not party to the 1951 Convention, the 1967 Protocol, the 1954 Convention relating to the Status of Stateless persons, or the 1961 Convention on the Reduction of Statelessness.²⁶² The provision of asylum on the basis on political protection is only stipulated in Article 42 of the Basic Law. The Article states, “The State shall grant political asylum if public interest so dictates. Laws and international agreements shall specify the rules and procedure for the extradition of ordinary criminals.”²⁶³ Despite the existence of this provision, KSA lacks legislation implementing it.²⁶⁴ Consequently, international law does not bind the country to grant political asylum while the national provision guaranteeing the same is weak. Contrary to basing its recognition of political asylum on international law, Saudi Arabia has made policies that stem from religious tenets.²⁶⁵ Granting of territorial/political asylum in Saudi Arabia is primarily grounded on the provisions of the Quran. These provisions are the basis for the Sharia law. Therefore, territorial asylum in the country is compatible with the Sharia law.

The provision of asylum in Saudi Arabia can also be approached as a form of religious asylum. As discussed earlier, refugees in Saudi Arabia are Muslims. Under concept of Aman in Sharia, Muslim refugees are categorised as either *mahujirun* or *musta'minum* depending on their place of origin. The former refers to Muslims from Islamic states while the latter are Muslims from states outside the Islamic countries.²⁶⁶ The current refugees in Saudi Arabia have originated from Gulf countries in the region, all of which are Islamic countries. Consequently, these refugees should enjoy the treatment of *mahujirun*. Specifically, these refugees should enjoy for permanent protection since they originate from Islamic territories.²⁶⁷ In practice, however, this

²⁶² UNHCR (n 122)

²⁶³ Basic Law of Governance, Royal Order No. (A/91), 1992.

²⁶⁴ United States Committee for Refugees and Immigrants, 'World Refugee Survey 2009 - Saudi Arabia', *refworld* (Web Page, 2009) <<https://www.refworld.org/docid/4a40d2b071.html>>

²⁶⁵ UNHCR (n 122)

²⁶⁶ Yousif M. Qasmiyeh, 'Refugee Status in Islam: Concepts of Protection in Islamic Tradition and International Law. By Arafat Madi Shoukri' (2011) 24(3) *Journal of Refugee Studies* 629. pp3

²⁶⁷ *Ibid.*

rule does not always apply. While certain refugees enjoy permanent protection in the country, some only enjoy temporary protection.

From the interview conducted by the interviewer with (INTV 1), refugees from Islamic states are not guaranteed of permanent protection. On the contrary, they can either enjoy either permanent or temporary protection, a decision that made by the state. He explains that people like the Burmese communities were granted permanent protection during their stay as refugees in KSA.²⁶⁸ Linked to the end of the conflict in the country when the Burmese entered the Saudi territory since 1970, most of them obtained permanent residence and some of them obtained Saudi citizenship. Similarly, he explains, Syrians and Yemenis with relatives in Saudi Arabia have permanent residence without obtaining Saudi nationality. On the contrary, Syrians and Yemenis with no relatives in KSA obtained temporary residence cards for five years from the beginning of the conflict with a possibility to renew them until the end of the conflict in their countries. The failure to grant equal entitlements to Muslims from Islamic territories goes contrary to the provisions of Sharia law.

Some of the conditions for granting asylum as applied in Saudi Arabia are consistent with Sharia law. (INTV 1), explains these conditions in his interview with the researcher. According to him, the first condition for processing both temporary and permanent refugee applications is that the asylum-seeker must present themselves to a police station if they are applying for political asylum.²⁶⁹ The condition for processing asylum applications for other refugees, explains (INTV 1), is that they should present themselves to government representatives in their country of origin before travelling to Saudi Arabia.²⁷⁰ The requirement to obtain permission the before entering into an Islamic territory is well acknowledged as a universal requirement, as well as a tradition in the Arab world.²⁷¹ The requirement that asylum-seekers and refugees obtain prior permission or present themselves to the relevant authorities is well founded in Sharia law. The practice of processing asylum applications in KSA based on these conditions is consistent with Sharia law.

²⁶⁸ Interview, (n 132)

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Abou-El-Wafa (n 40).

Another condition for asylum in Saudi Arabia that is consistent with Sharia law relates to the criminal conduct of asylum seekers. In the interview conducted by the researchers with (INTV 1), he explained that the criminal record of asylum seekers is a major hindrance to them being granted entry into Saudi Arabia.²⁷² He noted that the past histories and criminal background of asylum seekers are a major obstacle to them accessing asylum in Saudi Arabia. Saudi Arabia is a nation that takes crimes seriously and strives to maintain a safe, secure society. Saudi Arabia is harsher than most nations on addressing crime and keeping it at bay. If a refugee has a criminal background or even any nefarious incidents in their past, they might be denied entrance into the nation. The practice of denying criminals entry into Saudi Arabia is consistent with Sharia law, which prohibits granting asylum in a way that violates Sharia. Refuge should not be abused as an avenue for criminals to run away from the law.²⁷³

Although the Sharia law does not support granting asylum to criminals, the strategy used by Saudi Arabia to bar those with criminal records from accessing the country is not supported directly in Sharia. On the contrary, it only prohibits granting refuge to persons whose motivation for seeking refuge is their involvement in crime. However, this provision is understandable considering that Sharia law prohibits granting asylum to person who threaten the security in Islamic territories or those with an intention to commit crime.²⁷⁴ Consequently, KSA is justified under Sharia law to deny asylum to persons who have committed an acted considered a crime under Sharia in their place of origin and those that threaten to commit a crime once admitted. The act of denying asylum to persons with a criminal recorded can be regarded in the latter category. Those with a criminal record can be considered as highly likely to commit crimes once admitted into the country, which forces the government to deny them asylum.

The right to asylum in Saudi Arabia is also limited by the lack of proper identification documents among asylum seekers. (INTV 1) explains that refugees who are applying for asylum are required by law to have documentation to identify them. Many do not have this documentation, or their documentation is insufficient, outdated, or not approved by the state.²⁷⁵ This can hold up their asylum case for weeks or even months. At times, the lack of proper

²⁷² Interview, (n 132).

²⁷³ Ibid.

²⁷⁴ Organisation of Islamic Cooperation (n 26).

²⁷⁵ Interview, (n 132).

documentation can result in them never gaining asylum seeker status. For obvious reasons, it is imperative that Saudi Arabia be able to identify who is coming into the nation, but refugees often fail to produce adequate, acceptable documentation for logical reasons. When you are fleeing your homeland for your life, you often do not think to pick up your documentation. Others simply never had formal documentation due to systemic issues in their home nation such as corruption or poverty. The requirement to have people identify themselves before obtaining permission is consistent with the Sharia.

However, Saudi Arabia fails to abide by Sharia law given its failure to exempt certain types of refugees from identifying themselves. Ambassadors, messengers and traders with evidence proving their capacity to operate as such do not require to obtain permission or an entry visa according to Sharia law. Similarly, people who are deemed to be habitually safe do not require prior permission before seeking refuge in Islamic countries according to the Sharia law. For a person to be declared habitually safe, circumstantial evidence should prove them as such.²⁷⁶ Refugees fleeing from unsafe places can be considered habitually safe. Through custom, such persons have been proven to only be seeking asylum to avoid persecution and do not pose danger. With the current flow of information, countries learn of looming or existing refugee crises long before they start receiving refugees. For instance, Saudi Arabia is aware of the ongoing Syrian crisis. Refugees fleeing from such regions can be considered habitually safe. For instance, women with small children can be considered safe even if they lack the necessary documentation to proof their identity. Denying such refugees asylum on account that they lack identifying documents is not compatible with Sharia law. While this practice is not consistent with the provisions of Sharia law, it is understandable. Without the requirement of identifying documents, people from areas other than those with ongoing conflicts can take advantage to acquire asylum and residency. Such persons may enter Saudi Arabia with the intention of committing crimes.

In an interview with this researcher, The Mufti: (INTV 5) observes that failure to receive and support refugees is a sin as it violates the Sharia order. It is against the instructions from the Prophet Muhammad who said that one should help their brothers who are oppressed. There are no conditions from the Sharia for one to help refugees, with the only mandate being for those

²⁷⁶ Abou-El-Wafa (n 40).

with the ability to help them. Supporting refugees is doing God's work as they have rights to moral and financial support. Muslims should show benevolence and altruism to refugees who seek help from their countries.

However, there are instances when the asylum may be terminated for refugees. (INTV 5) explains that if the refugee commits dangerous acts that harm him or the security of the state, the asylum may be terminated, and the refugee forcibly returned to his country. Besides, if the reason for which the refugee came to the country ceases to exist, then the refugees may be forcibly returned to their country.

Nonetheless, it is not permissible to abruptly terminate asylum without excuses, as this becomes a kind of treachery. It is not permissible in Islamic law to return a refugee to his country in a situation where the refugee is in danger of being persecuted. Nor is it permissible in Islamic law to impose a penalty on refugees fleeing the conflict zone who enter or are in the country in an irregular manner. Muslims must contain and honor them. For (INTV 5), this is a very important principle, which is that penalties may not be imposed on a refugee who enters or is present illegally in the territory of the Islamic State if it is proven that he intends to seek refuge and safety.

Financial capability conditions to asylum are also contrary to the provisions of Sharia law. (INTV 1) further explains that the declaration of wealth or the source of livelihood while at Saudi Arabia is also a condition before asylum can be granted. When visiting the seeking permission from government representatives, refugees should have a reason for entering Saudi Arabia, details about the money that they intend to bring in the country, and details of a sponsor in the case that the person lacks means to support themselves.²⁷⁷ Overall, the person seeking to enter Saudi Arabia must prove to the authorities their ability to fend for themselves. Should the authorities declare the asylum-seeker incapable of meeting their expenditures, they are cannot be admitted into the country. The condition to only accept refugees who can proof financial adequacy is contrary to the stipulations of Sharia law. Sharia law prohibits denying refugees asylum on the basis of their social standing.²⁷⁸ The Quran specifically prohibits the use of financial reason as a justification to deny asylum. Muslims are urged to prioritize poor asylum seekers who may have lost their property when fleeing.²⁷⁹ Even when the receiving people are

²⁷⁷ Interview, (n 132).

²⁷⁸ Abou-El-Wafa (n 40).

²⁷⁹ The Qur'an (n 2) 59:8-9.

poor, they should not use it as a reason to deny asylum.²⁸⁰ The condition that refugees must have the financial means to meet their expenditures implies that asylum seekers of low social standing are discriminated.

It is not surprising that financial constraints are among the leading obstacles of asylum in Saudi Arabia. According to (INTV 1), lack of resources and a guarantor is a major factor impeding the acquisition of asylum in Saudi Arabia.²⁸¹ Refugees have to possess some means of money and resources. The nation does not want to support new people who have no financial backing. Many asylum seekers lack resources and a guarantor who will vouch for their behaviour and needs while in the nation. Considering that most refugees run away from countries where they face multiple challenges, including financial challenges, the requirement to have enough resources or a guarantor to fund your stay as a refugee is discriminatory. It contradicts the stipulations of Sharia law.

Although the process of acquiring, those who qualify enjoy certain economic and social rights during their stay. Notably, refugees in Islamic countries are considered visitors. In an interview conducted by the researcher with (INTV 2), refugees (called ‘visitors’) do not live in camps in Saudi Arabia as is the case in many countries.²⁸² They have the right to reside and move around and enjoy education, health, and work in the same way the Saudi citizens do. Granting these rights to refugees is consistent with Sharia. Granting asylum is based on the principle of justice in Shariah. As discussed earlier, the Quran has multiple *Ayahs* that urge Muslims to treat refugees with fairness and to provide to them based on their vulnerabilities. Granting refugees these rights reflect justice.

Refugees in Saudi Arabia also enjoy the right to protection and security. Although Saudi Arabia is not party to the 1951 Convention and 1967 Protocol, it provides protection to its refugees and does not return them to the country if they acquired asylum through the legal means. The Saudi government entered into a Memorandum of Understanding with the Office of the UNHCR in 1993 to guide how it would approach the protection of refugees. In the memorandum the government pledged to protect the refugees that were at the time living in the Kingdom and to grant other refugees' temporary stay. In 2004, the Saudi government amended

²⁸⁰ Ibid 59:9.

²⁸¹ Interview, (n 132).

²⁸² Interview with Researcher, Refugee Law in Kingdom of Saudi Arabia including connection to Sharia. (2020).

the naturalization laws to allow foreigners that had been living as refugees a chance to apply for citizenship. To qualify, persons had to have lived in the country for at least 10 years, have a clean criminal record, and be financially able. Only Muslim refugees were qualified to apply for citizenship. This approach to the right to protection is consistent with Sharia law. Saudi Arabia guaranteed security for every refugee but only granted permanent protection to Muslims, consistent with Sharia.

Similarly, immigration lawyer (**INTV 4**) outlines several advantages to seeking asylum in Saudi Arabia for Muslims. The Saudi people are characterized as being socially cohesive, adhering to the principles of freedom, and opposing all forms of racial discrimination. Therefore, forming friendships and neighborly relations with Saudi citizens is easy. The refugee can benefit from the high-quality Saudi health insurance, which covers everything related to the refugee's medical and health issues free of charge. Children of refugees can benefit from Saudi education for free. Even those who excel academically can continue their university education by obtaining scholarships from Saudi universities. The Saudi citizen who is financially able to host the refugee with his family takes full responsibility for the refugee. This is an advantage not found in other countries.

Although refugees in Saudi Arabia enjoy these rights, the Saudi refugee protection regime is lacking in multiple areas. Notably, the rights enjoyed by refugees in terms of basic supplies are below the ones required in the Quran. Saudi Arabia does not provide social security to refugees. The provision of humanitarian aid such as food is not provided by the government. On the contrary, the government expects refugees to earn a living for them to continue staying within its territory. UNHCR and humanitarian organisations are allowed to aid refugees while cooperating with Saudi authorities.²⁸³ Although the refugees can access health services, the government does not guarantee these rights. In fact, only citizens have the guarantee of health services and social security.²⁸⁴ These practices are contrary to Sharia law. The Quran requires Muslims to provide food and basic supplies all those seeking asylum. The failure by the Saudi government to guarantee this right is contrary to this requirement.

²⁸³ United States Committee for Refugees and Immigrants (n 126).

²⁸⁴ Ibid.

Moreover, (INTV 4) points out that one of the main disadvantages of asylum in the Kingdom is the high living expense in it. This is because of the increase in the rate of added tax on goods in Saudi Arabia, due to the Corona pandemic. This has negative and exhausting repercussions for the refugee on all areas of life, especially the economy. The situation is exacerbated by the lack of direct financial support with a monthly salary for refugees. The refugee receives support through social solidarity and *zakat* funds, which are a legally obligatory right from the wealth of the rich Muslim to the poor at an annual rate of 2.5%. He may receive in-kind subsidies such as food and clothing, which are charity from the rich for the weak. So, they must begin to integrate into society, because he will not depend on *zakat* money for his whole life. Continuing to receive aid from individuals also means the difficulty of integrating into Saudi society. And yet, there are no job opportunities for refugees in Saudi Arabia. The eligibility to work first is for Saudi citizens because of Vision 2030, which supports Saudization and supports companies by employing Saudi citizens, who have the right to choose suitable jobs for them. Refugees only get the lowest paying jobs that Saudis have rejected.

The refugees endure discrimination if they are not fluent in Arabic as Saudi Arabians are considerably intolerant of other cultures, making it hard for them to access jobs and other opportunities. The majority of official transactions, economic, social, and commercial activities and workplaces in Saudi Arabia are conducted in Arabic, while the rest of the languages are used on a very small scale. It is imperative for refugees in Saudi Arabia to learn the Arabic language before anything else. This is so that they can adapt and integrate into Saudi society.

3.5 Islamic Teachings, Asylum, and Saudi Arabia

Like all other laws of the state, Saudi policy relating to the grant of asylum has its roots in religious teachings; however, there are visible discrepancies that make the country's asylum policy as one of the most derailed one from core Islamic teachings and their intent. During times of Rafha Camp, the country had an inclusive Memorandum of Understanding (MoU) with UNHCR that enabled a large number of Iraqi refugees to find refuge in KSA. However, with the passage of time, government and its institutions became awry of the heavy financial and social costs that they have to bear in lieu of supporting refugees. This wariness led the country to request UNHCR to revise the MoU, whereby a number of its articles were removed in their entirety, while some of the others were modified to fit in the newly emerging socio-political and economic concerns of the country as well as the emerging global refugee situation. Despite that

the procedural formalities force that refugee seeking refuge in KSA to fulfil many conditions, a fact that runs contrary to the true spirit of Islamic teachings, the Kingdom has been extending enormous amount of resources to make the life of refugees easier across the world.

Islam enjoins its followers to extend extraordinary, unconditional support to refugees. Holy Quran, Sunnah, and Islamic traditions provide for the expansive and holistic framework and instruct Muslims as well as Islamic state to take extraordinary measures. Apart from the clear injunctions contained in above-referred Verse 9:6 that warrants right of protection to all the refugees, Holy Quran reverses those who provide assistance to the people who are dislocated from their place of residence, migrate by their choice, or are expelled by tyrannical rulers. Hence, instituting legislative hurdles emanating from regional, political, or even religious interests runs against the spirit of Quranic teachings as such measures are likely to exclude a large number of asylum seekers from availing protection and care under Islamic states. KSA's refugee policy is checkered with such interest-oriented obstacles.

3.5.1 Work Permits, Not Asylum

Keeping in line with other Gulf countries, KSA prefers to allocate work permits rather than granting permanent asylum to the in-coming refugees and has instituted numerous procedural requirements before granting a permit. Each work permit empowers a Saudi national to act as a *Wali* (guardian) or *Kafeel* (care-taker) over the refugee or worker to whom it is entitled. Furthermore, each such permit has a predefined expiry date, on which the worker or the refugee residing in the country on its basis has to leave the Kingdom. Governmental authorities and police keep a close watch on all work permit holders and any transgression of the terms of permit may result in expulsion of the permit holder. These regulations run contrary to the spirit of Islamic injunctions that allow all Muslims to choose their place of residence freely and if they are subjected to persecution, they are entitled to seek asylum. It is responsibility of the country of refuge to ensure protection, safety, and sustenance of such individuals.

The Kingdom's reluctance to accommodate refugees fleeing the Syrian crisis is rooted mainly in regional geo-political concerns. Spearheading the anti-Iran block of Islamic countries, KSA pays enormous attention to its security concerns. While denying refuge to criminals has not been barred explicitly in Shariah, the spirit of the Islamic teaching regarding helping the needy and the high place that Islam accords to *Hijrah* (migration) suggests that the Islamic state must accommodate needy refugees and help them through all possible means. As an oil rich

economy, KSA has long been in a strong position to devote a part of its resources to playing a constructive role in alleviating global refugee crises.

However, consequent to the Syrian war, KSA authorities were caught in the dilemma of supporting refugees on one hand and preserving their regional and state security interests on the other. An initial response to the question of why there are no official Syrian refugees in KSA is that the latter has no refugee policy. Going deeper, KSA authorities became excessively apprehensive on the possibility of pro-Assad and pro-Iran factions seeking infiltration into the country.²⁸⁵ In response to these perceived regional security threats, KSA and other Gulf states made it highly difficult for displaced and desolate Syrian refugees to obtain fresh or, otherwise, renew their work permits. Notably, hindrances instituted to obstruct Syrians persist even today. This situation clearly contravenes Islamic teachings of extending open support to all, whether Muslims or non-Muslims, in times of need.

In addition to the set of instructions and guidelines relating to the treatment of refugees, Quran praises those who are kind toward refugees and extend open help to them and promises great reward.²⁸⁶ Furthermore, those who take care of the refugees have been termed as the “real guardian” of each other in this world.²⁸⁷ Thus, in order for an Islamic state to assume the role of a guardian, it must welcome refugees in general and to those who look toward support and protection from the Islamic state after embracing Islam particularly. Notably, Islam deals the appalling issue of migration, plight of refugees, and the right of asylum for political and religious asylum from a humanistic perspective and, therefore, enjoins Muslim state and its institutions to deal with each of such case accordingly. Acting as the real guardian of humanity, Muslim state has to shoulder the core responsibility of eliminating sufferings of the migrants and provide them a conducive environment. KSA authorities can focus on robustly following Islamic tradition of protecting, upbringing, and educating refugees and their families and. Align its local laws and practice accordingly.

Islam extends extraordinary care to the children and women who have to flee their native lands on account of war, persecution, or embracing Islam. Under its overarching principle of justice, as contained in Quranic Verse 42: 15 and Verse 16: 90, those who are more vulnerable

²⁸⁵. Michael Stephen, ‘Migrant crisis: Why Gulf states are not letting Syrians in,’ *BBC*, 2015, Sep. 7., (<https://www.bbc.com/news/world-middle-east-34173139>).

²⁸⁶. Holy Quran (9:100)

²⁸⁷. *Ibid* (8:72).

to the hardships of life, such as migrants, are entitled to extra support. These tenets guide the Muslims as well as Islamic State authorities to ensure that their local laws are structured in such a way that these vulnerable populations receive extraordinary support without any hassle.

Refugees and migrants usually lack protection from their state of origin and, therefore, they are in dire need of protection and accommodation from other states or international actors. Most of them do not have identifying documentation, are financially hapless, and have no means of subsistence. All of these circumstances necessitate that international actors act proactively and extend comprehensive support and accommodation in the form of asylum to the refugees without any bar relating to the production of identification documentation, financial constraints, or other legal or procedural formalities. However, ground reality does rarely live up the intent of these purely humanitarian considerations as almost every state has enacted special legal frameworks that guide the state institutions to allow or refuse asylum to the refugees. Notably, freedom of the states regarding devising and implementing asylum laws stems from International Humanitarian Law and regional and international treaties that respect the right of states in relation to the grant of citizenship and protection of their citizens.

3.6 Concluding Remarks

Islam underscores both the importance and the exigency of immigration as way to safeguard individual protection against odds, and enjoins Muslims and Islamic states to provide protection and support to all the needy. Islamic jurists and scholars have cited numerous Quranic verses, *Hadiths*, and events from the Islamic history that explicate the concepts of *Aman* – interpreted as the right of asylum. The kingdom of Saudi Arabia has its laws rooted in Islamic theology and tradition and categorically deals the issue of granting asylum from religious perspective. KSA can also follow such a calibrated course and play its supportive role in addressing global refugee crises more effectively.

Chapter Four: Refugee Law in Australia

4.1 Overview

4.2 Australian Refugee Law

4.3 Australia's Refugee System as a Reflection of Religious Values

4.4 Is Australia's Refugee System Punitive?

4.5 Analysis of Refugee Applications and Outcomes for Muslim Refugees

4.6 Analysis of Refugee Applications and Outcomes for Other Religions

4.7 Conclusion

4.1 Overview

International treaties and conventions must be ratified to take effect in a nation. Australia is dualist and therefore treaties must be transposed into domestic law to have domestic effect. Australia acceded to the Refugee Convention on 22 January 1954. Parts of it were inserted in the *Migration Act 1958*²⁸⁸. However, Australia did not adopt the 1951 Refugee Convention and 1967 Protocol provisions automatically into its domestic law²⁸⁹. There are specific provisions of the 1951 Convention reflected in Australian domestic legislation. Chapter 4 explores the case of Australian refugee law and its compliance with international refugee laws as a relevant example of increasing individualization of nations. A pertinent question guides the chapter- "Does Australia comply with international refugee laws, and if not, why?". Also, this chapter will answer the third question: What is the Australian law and practice on asylum claims?

The chapter begins with an overview of the matter under investigation. The section defines how Australia accepted the 1951 Convention and implemented it in domestic legislation, and the constitutional link that makes it possible for the Commonwealth nation to legislate on immigration matters.²⁹⁰ It also examines the means through which Australia accepts refugees before highlighting the main aspects of refugee law in the nation in comparison to International Refugee Law. The next section dissects Australia's Refugee Law, identifying how the nation defines refugees and the procedure for one to become a refugee in the nation. The section also identifies where refugee cases can be heard to determine an individual's refugee status. The third section explores Australia's refugee system as a reflection of religious values. Specifically, it explores the treatment of Muslim and non-Muslim refugees entering the country. The section that follows analyses refugee applications and outcomes for Muslims, coming just before the section analysing refugee applications and outcomes for other religions. A summary section concludes the chapter with an exploration of its main points.

²⁸⁸ Khalid Koser, "Australia and the 1951 Refugee Convention" (, 2015), https://www.lowyinstitute.org/sites/default/files/koser_australia_and_the_1951_refugee_convention_0_0.pdf.

²⁸⁹ Ibid.

²⁹⁰ Thom, Graham. "Australia's obligations under Article 31 (1) of the Refugees Convention: what are penalties?." *Alternative Law Journal*, vol. 31, no. 3, 2006, pp. 142.

4.2 Australian Refugee Law

4.2.1 Historical Analysis

Refugees or asylum seekers have been in existence for as long as humanity has been around. People sought refuge from other communities when their lives or that of their properties was threatened. Nations have started to adopt policies that display an ambiguous relationship with the obligations set out in the 1951 Refugee Convention.²⁹¹ Today, more borders are getting closed as governments try out individual rather than collective solutions to the global refugee crisis. The outcomes of individualized solutions and their ramifications on how global states perceive international cooperation on refugee protection are yet to be identified. For instance, in Australia, questions about whether the nation abides by the requirements of the 1951 Convention. As a party to the 1951 Convention and 1967 Protocol, Australia is voluntarily obliged to observe their provisions.²⁹² In reality, however, the nation does not fully abide by the United Nations' guidelines and declarations.²⁹³

Given that Australia is a party to both the 1951 Refugee Convention and the 1967 Protocol²⁹⁴, it may come as a surprise to many that the nation did not have a standard refugee policy separate from its immigration legislation until the late 1970s. While it is wrong to assume that Australia did not accept refugees before adopting a comprehensive policy to facilitate an ongoing approach, the Indo-Chinese crisis in the 1970s and 80s exacerbated the need for such a policy.²⁹⁵

From the establishment of the Commonwealth of Australia at the onset of the 20th century, framers of the nation's immigration policy were keen to prevent Chinese and other non-white people from settling in the country permanently using the Immigration (Restriction) Act of 1901.²⁹⁶ They achieved this through dictation tests at immigrants' disembarkation points, where they would be tested in European languages. Failure to pass the tests saw a "prohibited

²⁹¹ Dr Weis, "THE REFUGEE CONVENTION, 1951 the TRAVAUX PREPARATOIRES ANALYSED with a COMMENTARY" (, 1951), <https://www.unhcr.org/4ca34be29.pdf>.

²⁹² William, Maley. "Australia's refugee policy: domestic politics and diplomatic consequences." *Australian journal of international affairs* 70, no. 6 (2016): 673

²⁹³ Ibid.

²⁹⁴ Khalid Koser, "Australia and the 1951 Refugee Convention" (2015), https://www.lowyinstitute.org/sites/default/files/koser_australia_and_the_1951_refugee_convention_0_0.pdf.

²⁹⁵ Ibid.

²⁹⁶ Klaus Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

immigrant" status imposed on individuals in a highly effective deterrence and exclusion approach.

Before the establishment of the League of Nations in 1919, following the First World War, there was no global interest in formulating policies that seek to address the plight of refugees.²⁹⁷ However, the League- and later the United Nations- provided guidelines to have nations around the world consider the victims of war and persecution. However, Australia did not have any international obligation to accept or protect refugees until it became a party to the 1951 Refugee Convention.²⁹⁸ Even then, it discriminated on racial grounds despite an obligation not to do so when assessing and accepting refugees. The *Immigration Restriction Act 1901*, which enabled the "White Australia Policy," remained a critical guiding principle of the nation's immigration even after ratifying the 1951 Refugee Convention.²⁹⁹ The realities of racial exclusion meant that Australia could not be as hospitable to refugees as other nations. For instance, the nation granted over 6,000 Asian evacuees' refuge at the Pacific War's height between 1941 and 1945.³⁰⁰ However, they were expatriated as soon as the war was over. Those who fought expatriation were forced out when the *War-Time Refugees Removal Act 1949* was passed, despite having married Australians.³⁰¹

Some other factors besides racism influenced Australia's refugee policy before the White Australian Policy was abolished gradually between 1966 and 1973.³⁰² For instance, the nation needed more labourers after World War II, which provided an opportunity for the connection of the refugee policy and immigration policy. Moreover, there was a bipartisan political desire to stand against the USSR in the Cold War. Australia took a large number of refugees from communist countries between 1947 and 1968.³⁰³ They included people displaced from European camps (1947-54), Hungarian escapees (1956-58), and Czech and Slovak refugees (1968).³⁰⁴ The refugees were accepted because they were white and they were a convenient source of

²⁹⁷ Sallinen, Harri. "Intergovernmental Advocates of Refugees: The Refugee Policy of the League of Nations and the International Labour Organization in the 1920s and 1930s." (2013).

²⁹⁸ William, Maley. "Australia's refugee policy: domestic politics and diplomatic consequences." *Australian journal of international affairs* 70, no. 6 (2016): 671

²⁹⁹ Klaus, Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² National Museum of Australia "End of the White Australia Policy," www.nma.gov.au, 2021, <https://www.nma.gov.au/defining-moments/resources/end-of-white-australia-policy>.

³⁰³ Klaus, Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

³⁰⁴ Ibid.

inexpensive labour.³⁰⁵ The country needed additional labour to cater for its growing development.

However, the abolition of the *Immigration (Restriction) Act* in 1973 saw the nation accept the first batch of refugees from Chile, where a pro-Western regime had overthrown a democratic socialist one.³⁰⁶ It was a watershed moment in the nation's refugee policy development as a racial background was no longer a criterion in refugee evaluation and acceptance procedures.³⁰⁷ It was made easier that almost all the Chilean refugees were white. It was more significant that they were refugees from a pro-Western regime. In 1976, Australia received the first boat of East Timorese refugees who were fleeing their country after the 1975 invasion by Indonesia.³⁰⁸ Since East Timor was a Portuguese colony for more than 400 years, the refugees included both white individuals of Portuguese ancestry and native East Timorese people.³⁰⁹ Additionally, the nation was no longer focused on refugees who offered cheap labour. Instead, it focused more on people with specific skills. While the refugee policy was now more pragmatic, it required a sharper definition delivered through a statement made in 1977 by the Minister for Immigration, Michael Mackellar.³¹⁰

Mackellar's statement provided the basic principles and practical initiatives for comprehensive Australian refugee policy. It provided four fundamental principles that remain the basis of the policy to date.³¹¹ The first principle articulated Australia's recognition of its humanitarian commitment and responsibility to resettle refugees. Secondly, the Australian government must always give the final decision regarding the acceptance or rejection of refugees.³¹² It was meant to allow a country control entry into its borders, which would give it ample capacity to screen asylum seekers and ensure that they were legitimate and needed the said help. Thirdly, the statement required the nation to cater to the movement and resettlement needs of refugees in designated situations. Finally, it acknowledged that for reasons beyond the

³⁰⁵ Ibid.

³⁰⁶ "Abolition of the 'White Australia' Policy" (, n.d.), https://www.europarl.europa.eu/meetdocs/2009_2014/documents/danz/dv/0220_13_1/0220_13_1en.pdf.

³⁰⁷ Klaus, Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

³⁰⁸ Ibid.

³⁰⁹ Southgate, Laura. *ASEAN Resistance to Sovereignty Violation Interests, Balancing and the Role of the Vanguard State*. Bristol University Press, 2019.

³¹⁰ Higgins, Claire. "Australian Refugee Policy: Twists in the Tale." *The Interpreter*. 2017. <<https://www.lowyinstitute.org/the-interpreter/australian-refugee-policy-twists-in-tale>>

³¹¹ Parliament of Australia (b). "Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources. *Www.aph.gov.au*. N.d.

³¹² Ibid.

nation's control, some refugees may be better off when resettled in another country.³¹³ There is a historical significance to the Mackellar statement as it marked when Australia established an ongoing refugee commitment. Ostensibly, refugees were no longer treated like other migrant groups.³¹⁴ Instead, Australia had now recognized refugees as a separate component of the nation's immigration program.

Today, Australia's domestic legislation on refugees is contained in the *Migration Act 1958*. The Act provides all the immigration and visas provisions for all incoming persons, including refugees and people seeking humanitarian assistance. However, not all provisions of International Refugee Law are reflected in Australia's laws on refugees.³¹⁵ The Commonwealth Constitution allows the Commonwealth to legislate for "immigration and emigration", "aliens" and "external affairs". As such, Australia has the leeway to legislate refugee matters without necessarily making them consistent with international conventions, treaties, protocols, and declarations. It is with this understanding that Australia accepts refugees through either offshore resettlement applications or onshore applications for protection. Onshore protection is primarily designed for detain people arriving unlawfully by sea or air, people who have overstayed their visas or had their visas cancelled. Off-shore detention centres have been located on Christmas Island and Nauru and Manus Island, Papua New Guinea.³¹⁶ The section below dissects Australia's Refugee Law to identify how the nation defines refugees and the requisite procedures a refugee in the nation.

4.2.2 Australia's Refugee Law Today

Australia's program for taking in refugees comprises two sub-programs- the offshore resettlement program and the onshore protection program. The offshore protection program consists of three categories- a community support program (CSP), a special humanitarian program, and a refugee program.³¹⁷ The community support program facilitates refugee resettlement through support from community groups, individuals, or businesses. There is an

³¹³ Parliament of Australia (b). "Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources. www.aph.gov.au. N.d.

³¹⁴ Ibid.

³¹⁵ Minns, John, Kieran Bradley, and Fabricio Chagas-Bastos. "Australia's refugee policy: not a model for the world." *International Studies* 55, no. 1 (2018): 3

³¹⁶ Gold, Caitlin. "Closed Borders: A Comparative Analysis Between the Immigration Detention Policies of the United States and Australia." *Texas State University Honors Thesis*. (2019).

³¹⁷ Phillips, Janet. Australia's Humanitarian Program: A Quick Guide to the Statistics Since 1947. 2017, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/HumanitarianProg>

annual limit of 1000 annual community support program intakes. The offshore program's special humanitarian category resettles people who are subjected to persecution or discrimination in their domicile countries. For one to be resettled through the special humanitarian program, they must be proposed for the visa by an Australian citizen or organization. The refugee resettlement program applies to people living as refugees in other countries under UNHCR, which refers them to Australia for resettlement.³¹⁸ The onshore refugee resettlement program applies to people who seek asylum after already arriving in the country under a different visa, for instance, a tourist or student visa. Such people can apply for a permanent protection visa, which would allow them to live permanently and work in Australia. However, people who arrive without a valid visa are able to apply for a temporary protection visa (TPV) or safe haven enterprise visas (SHEV).³¹⁹

The Australian Constitution enumerates Federal matters, including migration. It makes Australia's statutory law dealing with refugees a federal matter. Section 51(xix) of the Constitution deals with "aliens and naturalization", while Section 51(xxvii) deals with emigration and immigration. The principal Federal Statute concerning refugees in Australia is the *Migration Act 1958* (Cth), hereafter referred to as "The Act." It is the legislative basis for all types of migration and citizenship applications, including for those requiring humanitarian assistance. The Department of Home Affairs enforces The Act and all other aspects of Australia's immigration program.³²⁰ Part 1—Preliminary (Section 5) of The Act defines refugees in the same way they are defined in Article 1 of the 1951 Refugees Convention, which was later modified by the 1967 Protocol.³²¹ The immigration program has two primary components—migration for skilled and family immigrants and a humanitarian program. The latter is most pertinent to this chapter, and it has two components: offshore resettlement that covers individuals outside Australia, and onshore protection for people within Australia.³²² The COVID-19 epidemic continues to have a significant effect on Australia's immigration policy, with limitations on entry and exit and extended processing delays across a wide variety of visa categories.

³¹⁸ Ibid.

³¹⁹ ASRC. Permanent Protection: Policy Statement, n.d. <<https://asrc.org.au/policies/permanent-protection/>>

³²⁰ Phillips, Janet and Simon-Davies, "Migration to Australia: A Quick Guide to the Statistics – Parliament of Australia."

³²¹ Neumann, Klaus. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

³²² Australian Government Department of Home Affairs. "Discussion Paper: Australia's Humanitarian Program 2021-22. 2021, <<https://www.homeaffairs.gov.au/reports-and-pubs/files/2021-22-discussion-paper.pdf> >

Australian Visa Framework for refugees

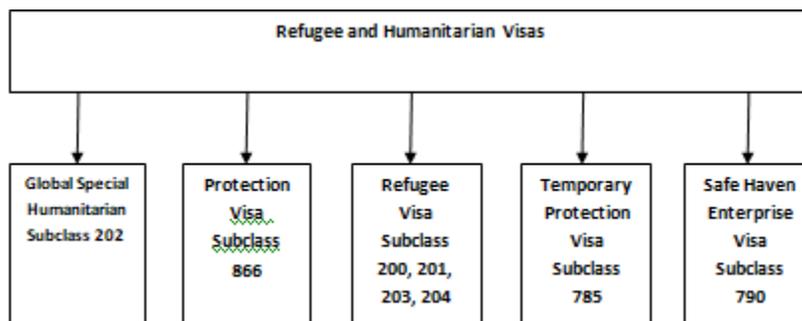


Figure 4.1

Applications for refugee and humanitarian visas (i.e., subclass 200, 201, 202, 203 and 204) are made offshore so there is no need for a bridging visa while awaiting decision on the substantive visa application. With this visa, they can stay in Australia permanently, work and study in Australia and propose certain family members for permanent residence.

A bridging visa is only necessary when applying onshore for a protection visa subclass 866, subclass 785 or subclass 790. With this visa, they can live, work and study in Australia permanently. They can also sponsor eligible family members for permanent residence through the offshore Humanitarian Program.

The only way someone onshore could receive a subclass 200-204 visa is through exercise of the Minister's *Migration Act* s195A power. For example, grant visa who is in detention under section 189, or Minister may grant visa if the Minister thinks that it is in the public interest to do so.

Humanitarian Program

The first component of the humanitarian program under the Australian immigration program deals with offshore resettlement applications. People apply for resettlement visas while overseas before arriving in the nation. Resettling refugees from around the world involves consulting with the UNHCR and the Refugee Council of Australia provides submissions to the responsible department with advice.³²³ The second component deals with onshore protection applications. People who flee their domicile countries and escape to Australia are required to seek asylum directly from the government. As per the Act, those who arrive without valid visas are detained in designated facilities before being resettled.³²⁴ It shows that people do not have to

³²³ Neumann, Klaus. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

³²⁴ Ibid.

enter Australia legally to be identified as refugees. However, they must apply to be identified as refugees as soon as they are to avoid deportation. All foreigners in Australia must have valid visas.³²⁵ Some enter on tourist or other types of visas and seek asylum later. Those who try to access Australia illegally by boat are conveyed to offshore facilities in Nauru or Papua New Guinea or are being turned back to the transit country or handed back to the country of origin from which they departed.

Australia is harsher to arrivals under the onshore program compared to those entering the country through the offshore program. For instance, most of those who arrive through the offshore program are often granted permanent settlement status.³²⁶ In contrast, arrivals under the onshore program face lengthy determination procedures, and when they succeed, they are often only offered temporary visas. The visa is granted either temporary or permanent depends on whether or not the person has obtained an immigration permit or not. Ostensibly, those accepted under the offshore program are deemed more deserving of resettlement because they follow the appropriate entry procedure. In contrast, arrivals through the onshore program- who mostly access the nation by boats- are serenaded with negative media coverage and hostile public rhetoric and political discourse.³²⁷ As such, most of their claims are considered to be illegitimate because they engage in illegal behaviour by not following formal refugee entry procedures. Indeed, many citizens deem them threats to Australian security and identity³²⁸. The notion is associated with how the allocation of resettlement spots works in the humanitarian immigration program.

Onshore refugee arrivals who come by boat or plane mean fewer spots to be allocated to offshore applicants. It breeds the perception that they "jump the queue." However, the allocation of resettlement spots is specific to Australia and does not align with international refugee laws. In international refugee laws, people either have valid reasons to seek asylum or not, their manner of arrival notwithstanding.³²⁹ However, the thin line between "genuine" (offshore) and "illegal" (onshore) refugees has seen Australia establish elaborate offshore visa processing

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Lisa Hartley, and Pedersen, Anne. "Asylum seekers and resettled refugees in Australia: Predicting social policy attitude from prejudice versus emotion." *Journal of Social and Political Psychology* 3, no. 1 (2015): 148.

³²⁸ (id) Lisa Hartley, and Pedersen, Anne. "Asylum seekers and resettled refugees in Australia: Predicting social policy attitude from prejudice versus emotion." *Journal of Social and Political Psychology* 3, no. 1 (2015): 148.

³²⁹ Phillips, Janet. *Asylum Seekers and Refugees: What are the Facts?* Parliamentary of Australia. 2011.
<<https://www.aph.gov.au/binaries/library/pubs/bn/sp/asylumfacts.pdf>>

arrangements, migration excision zones, and issuance of temporary protection visas.³³⁰ For those who apply for refugee status in Australia, their fears of persecution in their domicile countries must be well-founded. Their cases are heard in the Refugee and Migration Division of the Administrative Appeals Tribunal, from which appeal is possible to the Federal Circuit Court and from there to the Federal Court, Full Federal Court, and ultimately the High Court. It is worth noting that while the Refugee Review Tribunal's decisions are final and their merits cannot be challenged in any court, they are subject to judicial review by courts to test a legality of a decision.

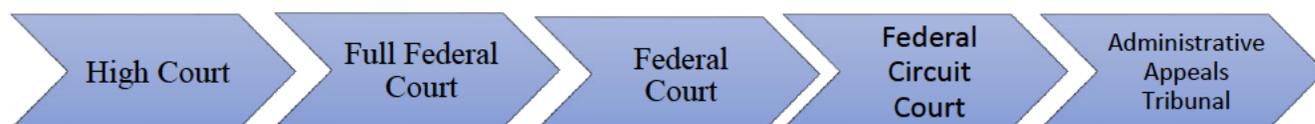


Figure 4.2. Case hearing process

Boat Arrivals

Asylum seekers who access Australia by boat do not act illegally under Public International Law. The 1951 UNHCR Refugee Convention, to which the nation is a signatory, recognizes refugees lawful rights to enter any country for the purposes of seeking asylum regardless of their mode of arrival or whether they have valid travel and identification documents. The Convention stipulates that entering a signatory country without a visa should not be treated as illegal if done for the purposes of seeking asylum. Furthermore, Australian law does not criminalize unauthorized arrivals by asylum seekers. It shows that asylum seekers do not break any Australian or international laws simply by arriving via the sea or without proper authorization. It means that it is incorrect to term asylum seekers who arrive via boats and without authorization as illegal entrants because they have a legal right to access the nation to seek asylum.

4.2.3. The Constitutional Context of Australian Refugee Law

The 1951 Refugee Convention is a binding international instrument. Its purpose entails the regulating the obligations of global nations to protect those who flee their home countries on the basis of persecution. It defines refugees as those with well-founded fears of religious, racial, nationality, membership of a particular social group or political persecution in their domicile

³³⁰ Klaus Neumann. *Across the seas: Australia's response to refugees: A history*. Black Inc., 2015

countries. Their fears prevent them from seeking protection or other relevant assistance from their home countries.³³¹ In Australia, The Migration Act incorporates the Articles, such as art 1a (2) of the Convention into domestic law. The Act effectively activates the nation's non-refoulement obligations- the obligation not to return asylum seekers to the territories where their lives and liberties are threatened for the reasons stated above. Section 35A-91V of the Act provides a non-citizen must satisfy all the requirements of relevant Australian law before they are provided with protection visas.³³² The requirements are needed to prove that the country has protection obligations under the Refugee Convention and the Refugee Protocol.

Section 5J (1) of the Migration Act qualifies the term “persecuted” as defined in Article 1A (2) of the Refugees Convention. The section provides that the Convention's article does not apply in Australia unless their persecution involves serious harm to them, involves systemic and discriminatory conduct, and fundamental and significant reasons for their persecution. Section 91R (2) of the Migration Act defines “serious harm” to a person. Harm includes threats to one’s life and liberties, physical or bodily harm, and subjection to economic hardships that makes it hard for them to subsist.³³³ Moreover, any denial of a person’s capacity to earn a livelihood, thereby making it hard for them to subsist, is also considered to be a form of harm.

Therefore, the Section 35A and 36 of the Migration Act 1958 requires asylum seekers to apply for protection visas before traveling to Australia.³³⁴ The Office of the Minister for Home Affairs tasks the Department of Home Affairs with making refugee assessments. Successful applicants are then granted protection visas, while those who fail at this juncture can file merits reviews with the Refugee and Migration Division of the Administrative Appeals Tribunal.³³⁵ The RRT's decisions are subject to judicial review. After an applicant exhausts all avenues of review, only the Minister for Immigration and Citizenship can resettle them in Australia on humanitarian grounds or if the Minister considers resettling an individual to be in the public interest.³³⁶

The Australian refugee policy is best analogized with Janus, an ancient Roman god who presided over doors, gates, and passageways. Janus is depicted in mythological literature as having two faces that look at opposite directions- one at the front of his head and one at the

³³¹ Australian Law Reform Commission. “Refugee Law in Australia.” *Www.alrc.gov.au*. 2011.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ Karlsen, “Refugee Resettlement to Australia: What Are the Facts? Parliament of Australia.”

³³⁵ Australian Law Reform Commission. “Refugee Law in Australia.” *Www.alrc.gov.au*. 2011.

³³⁶ *Ibid.*

back.³³⁷ Australia shows the smiling, forward-looking face to the international community by being a signatory to the Refugee Convention and Refugees Protocol. However, the frowning face at the back of the head presents asylum seekers with a series of formidable legal and legislative obstacles enshrined in the *Migration Act* before they can be granted sanctuary in the form of a protection visa.³³⁸ For instance, for over 30 years, Australia has implemented a policy of mandatory detention for asylum seekers who arrive by sea.³³⁹ Such a policy skews public opinion to believe that asylum seekers are smugglers and dangerous criminals who must be locked away before their refugee claims are assessed. It has also led to a divide in public sentiment between the rights of onshore and offshore refugees.

The policy deliberately reinforces the divide between the two types of refugees by moving onshore refugees into immigration detention centres in remote areas such as Nauru and Papua New Guinea. It is a tyranny of distance that prevents Australians from understanding the plight of onshore asylum seekers and see how they are treated. Staff at the detention centres must sign non-disclosure agreements upon their employment, meaning that they cannot speak about what goes on in the centres.³⁴⁰ Figures from the DIAC show that most asylum seekers who attempt to reach Australia by sea qualify as refugees under the Refugee Convention and Refugees Protocol.³⁴¹ However, since they do not arrive with visas like offshore refugees, the Migration Act subjects them to restrictive policies such as mandatory detention and offshore processing. In contrast, offshore refugees who arrive by air are not subjected to such restrictive policies because they arrive with a visa, such as a student or a tourist visa. In reality, those attempting to arrive by sea are more likely to qualify as refugees under Public International Law than offshore refugees, yet the former are conferred fewer rights than the latter.³⁴² Such policies violate Australia's obligations under public international law.

Australian refugee policy also caps the number of refugees that the nation can accept per year. It means that if the nation accepts more onshore refugees, it will accept fewer offshore refugees.³⁴³ It is a zero-sum game between offshore and onshore refugee applicants that remains

³³⁷ Robert, Lindsay. "The Australian Janus: the face of the Refugee Convention or the unacceptable face of the Migration Act?" In *AIAL Forum*, no. 13, p. 33.

³³⁸ *Ibid.*

³³⁹ Jane, McAdam. *Refugees Why seeking asylum is legal and Australia's policies are not*. UNSW Press, 2014.

³⁴⁰ McAdam, Jane *Refugees Why seeking asylum is legal and Australia's policies are not*. UNSW Press, 2014.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ Pickering, Sharon and Caroline Lambert "Deterrence: Australia's refugee policy." *Current issues in criminal justice* 14, no. 1 (2002): 66.

unseen in any other country. It results in the rhetoric of "jumping the queue" being invoked against onshore asylum seekers, thereby obscuring their plight and the reasons they would try to make the hazardous voyage.³⁴⁴ They are deemed to be less deserving of protection visas in Australia because they pay people to smuggle them. According to the policy's supposition, people who wait in camps in other countries and wait to be processed by the UNHCR so that they may come to Australia with valid visas are the genuine and deserving refugees.³⁴⁵ Thus, it explains why the country's refugee policy is positioned by its laws to aim for deterrence of those who arrive by sea. They are prevented from embarking on arduous and dangerous voyages to Australia. In a nutshell, deterrence is the policy's *raison d'etre*.³⁴⁶

The refugee policy and laws regarding refugees in Australia have not always sought to deter onshore refugees. Australia had concerns about a threat to the living standards that was thought to result from a potential influx of cheap and efficient workers from Asia, which led to the enactment of the repugnant "White Australia Policy," which was dismantled 1973.³⁴⁷

The terror attacks on 11th September 2001 in the United States enabled the Australian government to exploit public anxiety and create a rhetorical- and later legislative- divide between onshore asylum seekers and offshore refugees.³⁴⁸ It sent a clear message that migrating to Australia must be achieved through legal means, not by merely arriving and expecting to be allowed into society.

Public International Law does make such distinctions between asylum seekers and refugees. There is no middle ground - one either has a well-founded fear of persecution in their country of residence or does not. There are no refugee camps in Australia for people to reach safely and await assessment and processing.³⁴⁹ While the country remains a high recipient of refugees per capita, its low intake and mistreatment of asylum seekers who attempt to arrive by boat is concerning. One's chance of being resettled as a refugee in Australia depends on factors such as their vulnerability, suitability for resettlement as per the assessments, and countries considered priorities for resettlement, instead of factors like the length of time one has been awaiting processing. To refugees, protection transcends finding safety from the fears that led

³⁴⁴ Sharon, Pickering, and Lambert Caroline. "Deterrence: Australia's refugee policy." *Current issues in criminal justice* 14, no. 1 (2002): 66.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Pickering, Sharon and Caroline Lambert. "Deterrence: Australia's refugee policy." *Current issues in criminal justice* 14, no. 1 (2002): 66.

³⁴⁸ Ibid.

³⁴⁹ Jane, McAdam. "Australia and asylum seekers." *International Journal of Refugee Law* Vol. 25 No. 3. (2013): 436

them to flee their homes. They are also concerned by the large number of countries that have not signed the Refugee Convention of 1958.³⁵⁰ Instead, they seek nations where they can start their lives anew, satisfy their broader needs, and work towards returning to normality.³⁵¹ It is not a crime for people to seek protection from human rights abuses.

Public International Law recognizes every global citizen person's right to seek protection from persecution and human rights abuses. For instance, the Refugee Convention prohibits nations from requiring asylum seekers to present visas.³⁵² The logic behind the prohibition is that the very nature of being an asylum seeker may make it impossible for an individual to obtain such documents. Moreover, they cannot apply for protection visas in their domicile countries because refugees' very definition implies that they are already outside their home countries.³⁵³ It is also highly unlikely that asylum seekers can enter Australia using student or tourist visas. A person who applies for a student or tourist visa from a war-torn country like the Democratic Republic of Congo will most likely be screened out based on the assumption that they might claim refugee status upon their arrival.³⁵⁴ While Australian refugee laws and policies favour offshore refugees, Public International Law privileges onshore asylum seekers through the non-refoulement obligation.³⁵⁵ In essence, the Australian system pits onshore and offshore refugees against each other by ensuring that those attempting to arrive by boat do not get to settle in Australia.

4.2.4. Landmark Refugee Law Events in Australia

In the post-war period, the nation accepted hordes of displaced people from Europe. Australia understood the need to increase its population, which led to the development of the slogan, "populate or perish" and it promoted the intake of large numbers of migrants, albeit most of them were white.³⁵⁶ It was a mutually beneficial arrangement that helped the refugees start afresh away from the horrors of war and economic depression. Their labour played a significant part in making Australia a wealthy, developed, and multicultural country. The White Australia Policy was renounced in 1973 and a multiculturalism policy was initiated in its place.³⁵⁷ The aim

³⁵⁰ Weis, "THE REFUGEE CONVENTION, 1951 the TRAVAUX PREPARATOIRES ANALYSED with a COMMENTARY."

³⁵¹ Jane, McAdam. "Australia and asylum seekers." *International Journal of Refugee Law* Vol. 25 No. 3. (2013): 438

³⁵² IJRC. Asylum & the Rights of Refugees. n.d. <<https://ijrcenter.org/refugee-law/>>

³⁵³ Ibid.

³⁵⁴ IJRC. Asylum & the Rights of Refugees. n.d. <<https://ijrcenter.org/refugee-law/>>

³⁵⁵ Jane McAdam. "Australia and asylum seekers." *International Journal of Refugee Law* Vol. 25 No. 3. (2013): 439.

³⁵⁶ Phillips, Janet. "Asylum Seekers and Refugees: What Are the Facts? – Parliament of Australia." *Aph.gov.au*, 2014. Parliament of Australia."

³⁵⁷ Ibid.

was to welcome all ethnicities and diverse people into Australia.³⁵⁸ Between 1975 and 1980, the Vietnamese boat people arrived in Australia seeking refuge due to oppression at home. More than 200,000 people arrived and were given asylum.³⁵⁹ The country also gave asylum to Chinese students after the tenement square massacre. They could reside in Australia without worrying about repatriation due to the internal threats back in their country. Australia had transformed into a welcoming state.

Two key events have shaped the refugee policy in Australia. The first case resulted from the Tampa Crisis that occurred in August 2001.³⁶⁰ It was in the middle of national election campaigns when authorities identified a fishing boat in distress near Christmas Island in the Indian Ocean. The Indonesian boat was ferrying over 400 asylum seekers to Australia.³⁶¹ While it was not in Australia's territorial waters, the Australian authorities issued a rescue signal. The people on the boat were rescued by *MV Tampa*, a Norwegian container ship, whose captain initially sought to return those aboard to an Indonesian port.³⁶² However, some of the rescuees insisted on being taken to Christmas Island, an Australian territory. Australia denied *MV Tampa* access to its territorial waters as part of a governmental crackdown on irregular onshore refugee arrivals by sea, which had increased substantially at the time.³⁶³ The government also cited a crackdown on human trafficking and smuggling operations that had been encouraged by the abuse of the nation's onshore asylum program as a reason for its decision alongside the dangers involved in asylum-seeking voyages executed by human smugglers.³⁶⁴

The Australian government was keen to assert its authority in determining who comes to the country and the circumstances in which they come. The victims aboard the distressed boat were immediately dismissed and labelled illegal immigrants and unauthorized arrivals rather than asylum seekers or refugees.³⁶⁵ The government's decision led to a stand-off that took several days to resolve, leading to increasingly grave conditions for those on-board *MV-Tampa*. After five days of the stand-off, the container ship's captain tried to enter Australian waters without permission, but Australian troops repulsed it. The Tampa approached Christmas Island

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Phillips, "Asylum Seekers and Refugees: What Are the Facts? – Parliament of Australia."

³⁶¹ Inder, Claire. "International Refugee Law, 'Hyper-Legalism' and Migration Management: The Pacific Solution." In Martin Geiger and Antoine Pécoud *The politics of international migration management*, Palgrave Macmillan, London, 2010: 225.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ "Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base."

³⁶⁵ Ibid.

but Australia sent a Navy ship to take the rescues to Nauru HMAS Kanimbla.³⁶⁶ The Tampa crisis triggered a series of legislations that created the “Pacific Solution.” The Pacific Solution was designed to ensure that people without appropriate travel documents do not land on Australian territory to claim asylum.³⁶⁷

The second event was a high court case challenging the legality of Australia’s policy regarding the offshore detention of asylum seekers in Nauru. The case- Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1- was filed by a Bangladesh woman aboard a boat intercepted by Australian troops in October 2013.³⁶⁸ She was first taken to Christmas Island and then Nauru, where she was detained. In August 2014, she was taken to Australia for maternity medical attention, where she gave birth to a baby girl. When she no longer needed medical attention, she was due to be taken back to the Nauru detention center.³⁶⁹ She challenged her detention in court, claiming that it was unlawful as a no valid law authorized it. The court ruled that the Commonwealth government has the legal power to participate in the detention of asylum seekers in Nauru.³⁷⁰ It means that anyone brought to Australia for medical attention from a mandatory detention centre can be sent back after they are well.

4.2.5 Developments in the World and in Australia's Policies that Affected Migration

The development in Australia's policies with regard to migration is best described using four sequences. The first sequence details migration experiences post-war to the 1970s while the second focuses on dismantling the White Australia policy in the 1970s. The third sequence examines multiculturalism and migration in the 1980s and 1990s, while the fourth looks into the shaping of multicultural Australia in the 21st century.

4.2.5.1 Sequence 1- Post-War to the 1970s

From the onset of the 20th century- when the Commonwealth of Australia was established- up until the early 1970s, the discriminatory White Australia policy dominated Australia's migration policy.³⁷¹ The policy reflected racist attitudes and beliefs of the time

³⁶⁶ Claire, Inder. "International Refugee Law, 'Hyper-Legalism' and Migration Management: The Pacific Solution." In Martin Geiger and Antoine Pécoud, *The politics of international migration management*, Palgrave Macmillan, London, 2010: 225.

³⁶⁷ Claire, Inder. "International Refugee Law, 'Hyper-Legalism' and Migration Management: The Pacific Solution." In Martin Geiger and Antoine Pécoud, *The politics of international migration management*, Palgrave Macmillan, London, 2010: 226.

³⁶⁸ Library of Congress. "Australia/Nauru: High Court Rules Offshore Detention of Asylum Seekers Is Lawful." *www.loc.gov*. (2016).

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ "A Guide to International Refugee Protection and Building State Asylum Systems Handbook for Parliamentarians N 27, 2017 Acknowledgements."

designed to prevent non-European immigrants from making Australia their home. It persisted even after the country had become a signatory of the 1951 Refugee Convention and 1967 Protocol on the Status of Refugees.³⁷² The policy's hallmark was a dictation test that every immigrant was required to pass before being granted entry into Australia.³⁷³ However, global and political events combined with economic and social forces within the nation led to significant changes to its immigration policies and national identity. For instance, the post-World War II period was characterized by pressures to populate or perish, which prompted significant shifts in Australia's immigration policy. The war had created concerns about the need to enhance the nation's industrial and military capabilities in readiness for another war if it came. To achieve this, a massive population boost was necessary. This shift allowed new diverse ethnic and cultural groups to settle in Australia for the first time.³⁷⁴ It resulted in changing communal attitudes, implying that Australian's were more open to diversity than before. The result was a more inclusive approach to Australia's immigration policy, which ended the Immigration Restriction Act of 1901, otherwise referred to as the White Australia policy.³⁷⁵

The Immigration Restriction Act of 1901 was designed to supplement Australia's natural population increase at a steady, albeit restricted rate.³⁷⁶ Significant global social, economic, and political events would create ripples of migration that resulted in upward surges in the number of immigrants arriving in Australia. For instance, in the aftermath of World War II, the first significant wave of migration reached Australia.³⁷⁷ It consisted of European refugees and migrants who had been left homeless by the war. Other migrants were fleeing the social and economic devastation wrought by the war to seek refuge in more prosperous and peaceful nations like Australia. Many were fleeing communist takeover of their homelands after WWII. By opening its borders to European migrants, Australia was exposed to a myriad of cultures and ethnicities for the first time. However, locals were concerned that the new arrivals would threaten the country's culture and identity.³⁷⁸ It exposed the refugees and migrants to considerable pressures to assimilate into Australian society. They were expected to absorb Australian culture to such an extent that they lost aspects of their initial cultural identities.

³⁷² Ibid.

³⁷³ Australian Human Rights Commission. "The Globalising World: Changing policies and Australian identity." *Humanrights.gov.au*.

³⁷⁴ Ibid.

³⁷⁵ Australian Human Rights Commission. "The Globalising World: Changing policies and Australian identity." *Humanrights.gov.au*

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

4.2.5.2 Sequence 2- Dismantling the Immigration Restriction Act

The influx of new cultures into Australia changed local attitudes towards migrants, leading to the Immigration Restriction Act's demise. Attitudes changed from racially discriminatory perspectives towards a general acceptance of multiculturalism that bred social, legal, and political changes.³⁷⁹ While the process of dismantling the racial policy formally began in 1972, the change had been preceded by the government's revision of the Act in 1958 to abolish dictation tests.³⁸⁰ In 1966, the then secretary of the department of immigration, Peter Heydon, and the Immigration Minister, Sir Hubert Opperman, persuaded the government to liberalize the restrictive immigration policy by basing the assessment of accepted refugees on their qualifications that were useful to the nation and their ability to integrate readily into Australian society.³⁸¹

However, the most significant milestone in Australia's migration policy was realized in 1975, when the Racial Discrimination Act was enacted.³⁸² The Act was inspired by the Civil Rights Movement in the United States that culminated in the creation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).³⁸³ Australia Signed to CERD in 1966 but only ratified in 1975 and enacted its commitment in the form of the Racial Discrimination Act.³⁸⁴ The Act made it against the law to discriminate against anyone based on their race, ethnicity, colour, nationality, and immigration status.

The end of the Vietnam War in 1975 prompted the arrival of a new wave of immigrants and refugees, specifically from Cambodia and Vietnam.³⁸⁵ South Vietnamese people fled their homes in 1975 after the end of the Vietnamese war to escape persecution by the newly installed Communist government. Cambodians also fled the persecution perpetrated against non-communists by the Khmer Rouge regime, and led by Pol Pot.³⁸⁶ These refugees sought asylum in Australia, which impacted significantly on the country's policy.

³⁷⁹ Tavan, Gwenda. "The dismantling of the White Australia policy: Elite conspiracy or will of the Australian people?" *Australian Journal of Political Science*, vol. 39, no. 1, (2004), pp. 109-125.

³⁸⁰ *Ibid.*

³⁸¹ Tavan, Gwenda. "The dismantling of the White Australia policy: Elite conspiracy or will of the Australian people?" *Australian Journal of Political Science*, vol. 39, no. 1, (2004), pp. 118.

³⁸² Australian Human Rights Commission. "The Globalising World: Changing policies and Australian identity." 2014, p.42 <https://humanrights.gov.au/sites/default/files/AHRC_RightsEd_Race_History_Yr10.pdf>

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ Phillips, Janet, and Harriet Spinks. *Boat arrivals in Australia since 1976*. Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, 2013.

³⁸⁶ Australian Human Rights Commission. "The Globalising World: Changing policies and Australian identity." 2014, p.40 <https://humanrights.gov.au/sites/default/files/AHRC_RightsEd_Race_History_Yr10.pdf>

The arrival of the migrants and refugees from Cambodian and Vietnam had a significant impact on Australia's immigration and refugee policy, marking a radical departure from the predominant acceptance of European refugees. However, many Australians treated the new arrivals with suspicion. New refugees had to deal with prejudice and discrimination in their new country after fleeing persecution from their domicile countries.³⁸⁷ They faced challenges in that their native countries had real risks of persecution or death while their countries of refuge involved dealing with discrimination from the natives. However, Australia had begun to transform into a multicultural society as more nationalities and religions came into the country through migration. Features of British heritage started to fade gradually as a government policy of multiculturalism rose to prominence in acknowledging the new cultural diversity evident in the nation.³⁸⁸ There was an increase in other races and not just the white, although they were still the majority.

4.2.5.3 Sequence 3 - Migration and Multiculturalism in the 1980s and 90s

Political controversies and economic pressures challenged the new trend of multiculturalism in Australia. The Indo-Chinese migration experiences continued into the 1980s.³⁸⁹ However, there was an economic recession that plagued Australia in the early 1980s.³⁹⁰ A Labour government with Bob Hawke as Prime Minister was elected in 1983. The recession put pressure on the government to reduce the number of immigrants accepted into the nation. It was fuelled by the 1984 Blainey debate, one of Australia's best-known historians, suggested that the rate of "Asian" migration would need to be slowed, and the launch of the "One Australia Policy" designed to slow down the rate of Asian migration into the country.³⁹¹ In 1989, the government formulated the "National Agenda for a Multicultural Australia" that delineated cultural identity, social justice, and economic efficiency.³⁹² The agenda was intended to reduce the discrimination and disadvantages experienced by migrants. It also addressed concerns about national values, identity, and unity while also seeking to protect migrants' rights to hold on to their diverse cultural heritages. Also 1989 the offer of asylum to all Chinese students in Australia after

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Phillips, Janet, Michael Klapdor, and Joanne Simon-Davies. "Migration to Australia since federation: a guide to the statistics." *Migration* 27 (2010): 11.

³⁹⁰ Australian Human Rights Commission. "The Globalising World: Changing policies and Australian identity." *Humanrights.gov.au*

³⁹¹ Dellios, Alexandra. "Personal, Public Pasts: Negotiating Migrant Heritage—Heritage Practice and Migration History in Australia." *Remembering Migration*. Palgrave Macmillan, Cham, 2019. 219-236.

³⁹² Dellios, Alexandra. "Personal, Public Pasts: Negotiating Migrant Heritage—Heritage Practice and Migration History in Australia." *Remembering Migration*. Palgrave Macmillan, Cham, 2019. 219-236.

Tiananmen Square massacre. In 1991, the "National Inquiry into Racial Violence" explored the issue of violence suffered by people from linguistically and culturally diverse backgrounds.³⁹³³⁹⁴ It was a major milestone in ensuring that migrants and refugees settled comfortably and led their new lives without fear of discrimination or persecution.

4.2.5.4 Sequence 4- Shaping a Multicultural Australia in the 21st Century

A more culturally diverse Australian society met the new millennium. However, the nation still faced numerous immigration-related challenges. For instance, the country faced the need to balance the use of immigration to spur economic development while maintaining cohesion and harmony within its social fabric. It also faced the need to balance its international obligations with regard to refugees while addressing public concerns about citizens' economic security and the nation's cultural identity. The Howard Coalition government, elected in 1996, was anti-multicultural and tried to equate Christian values with "Australian values".³⁹⁵ This was already under way when the *Tampa* incident and World Trade Centre attacks took place in 2001 which led to an attempt to associate Muslim asylum seekers in boats with terrorism.³⁹⁶ The challenges persist to date. The nation's humanitarian program deals specifically with refugees and asylum seekers. It is divided into offshore and onshore protection programs. The offshore protection program has under consistent criticism due to its associated detention policy.³⁹⁷ International standards on refugees allow immigration detention to allow host nations to conduct identity, security, and health checks on asylum seekers to ensure the safety of communities. However, in Australia, mandatory immigration detention for offshore asylum seekers requires people to stay in detention for periods beyond the time it should take to gather health, security, and identity information. Essentially, asylum seekers are expected to remain in mandatory detention until their asylum claims have been finalized. The mandatory detention policy is deemed to breach a wide array of human rights, especially when children are detained for months.³⁹⁸ It also raises issues about Australia's treatment of refugees and asylum seekers and how it aligns or fails to align with its international refugee and human rights obligations.

³⁹³ Ibid.

³⁹⁴ Dagleish, Paul. *Bob Hawke Guide to Archives of Australia's Prime Ministers*. National Archives of Australia.

³⁹⁵

³⁹⁶ Stratton, Jon. *Multiculturalism, Whiteness and Otherness in Australia*. Springer International Publishing, 2020.

³⁹⁷ Australian Human Rights Commission. "The Globalising World: Changing policies and Australian identity." *Humanrights.gov.au*

³⁹⁸ Ibid.

4.2.6 The Shifting Nature of Australia's Government Policies

Australia has had a long, albeit mixed experience with refugees. In a sense, it is a nation that has been largely built by migrants - with the exception of Aboriginal and Torres Strait Islander people. It also has a storied history of offering protection to asylum seekers who flee from hostile countries or come searching for a better future. The history shows that Australia is generous to refugees who arrive through managed programs (offshore refugees), often resettling them and providing them with temporary and permanent havens.³⁹⁹ Since 2013 a policy was passed that no one who attempts to get to Australia by boat would get resettled in the country. However, Australia rarely receives refugees in the real sense of the word- people in immediate need for protection on one of the five grounds enshrined in the 1951 UNHCR Refugee Convention.⁴⁰⁰ Given that Australia is a signatory to the 1951 *Convention relating to the Status of Refugees* and the 1967 Protocol, it is obliged not to return refugees to countries where they would face persecution under the Convention's non-refoulement provision.⁴⁰¹ The nation is also required by the Convention not to punish asylum seekers who attempt to access Australia illegally⁴⁰². The dilemma lies in reconciling refugees' rights under the Convention with Australia's sovereign power to control immigration into the country.

Australia has established stringent mechanisms for determining an asylum seeker's qualification for refugee protection as a means of complying with its international legal obligations with regard to refugees. However, its policy is skewed towards preventing "boat people" from entering Australia and encouraging asylum seekers to use the offshore humanitarian program rather than trying to enter the country illegally.⁴⁰³ Details of the laws that implemented this policy. Australia's policy leans towards deterring unauthorized arrivals by deeming them unworthy of fair treatment while branding offshore arrivals as "good refugees". It makes the nation's laws and policies concerning UMA refugees dissonant with its international refugee protection obligations. While Australia's humanitarian refugee program is generous and accommodating to offshore asylum seekers, its treatment of illegal immigrants and onshore asylum seekers (otherwise christened "boat people" or "Unauthorised Maritime Arrivals") is

³⁹⁹ Mary, Crock. "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 254

⁴⁰⁰ Koser, "Australia and the 1951 Refugee Convention."

⁴⁰¹ Mary, Crock. "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 258

⁴⁰² UNHCR Refugee Convention 1958.

⁴⁰³ Ibid.

dissonant with its commitments under public international law.⁴⁰⁴ The policy of mandatory detention of onshore asylum seekers has drawn criticisms from across the world.⁴⁰⁵ Australia's measures to deter boat people are directly at odds with the central standards of international and human rights laws. One such policy enacted in 2013 denies unauthorized arrivals by the sea the right to seek asylum in Australia or apply for an Australian visa.⁴⁰⁶ It complemented the already-existing policy of removing unauthorized onshore refugee arrivals from Australian territory to third-party states of Nauru and Papua New Guinea.

Australia has grown increasingly resistant to the idea that irregular and unauthorized asylum seekers who come by boat should be regarded as genuine refugees. The nation's policy is especially harsh to secondary movers who exercise their choice and select the nation where they would want to seek refuge. The assertion is that the "true" asylum seekers who deserve protection are those who arrive from the immediate country where they fear harm or persecution. As soon as refugees travel beyond the first place they land after fleeing, they automatically become refugees with a secondary goal of achieving an immigration outcome.⁴⁰⁷ Australia's current policy responds to offshore arrivals has shifted at least three times. It started with the mandatory detention of boat people who arrive without valid visas in Nauru and Papua New Guinea. Once asylum seekers were determined to be genuine, they would be resettled in the island nations instead of mainland Australia. The second shift saw Australia only grant unauthorized refugees temporary protection when they were recognized as genuine refugees instead of permanent resettlement like offshore arrivals.⁴⁰⁸ The third shift was in the form of the Pacific Solution, which saw Australia explicitly refuse to accept more unauthorized onshore asylum seekers.⁴⁰⁹

There is great irony in Australia's policy response to unauthorized onshore refugee arrivals. When one of the most endowed nations on earth is presented with people in obvious danger and overwhelmed by their experiences in their countries of origin, it responds with greater ostracization of the individuals instead of sympathy. Mary Crock argues that most

⁴⁰⁴ Mary, Crock. "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 260

⁴⁰⁵ Edwards, Alice. "'Less Coercive Means': The Legal Case for Alternatives to Detention for Refugees, Asylum Seekers and Other Migrants." *The Ashgate Research Companion to Migration Law, Theory and Policy* (2016): 443.

⁴⁰⁶ Mary, Crock. "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 264

⁴⁰⁷ Ibid.

⁴⁰⁸ Mary, Crock. "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 267

⁴⁰⁹ Cook, Peter. Chapter 11 - Pacific Solution: Outcomes and Cost. Parliament of Australia.

offshore detention facilities in the remote island nations are run like prisoner concentration camps in many respects.⁴¹⁰ The facilities are fenced into compounds that can be locked down at short notice. Those detained are referred by assigned numbers rather than by their names, which is as dehumanizing as it is humiliating.⁴¹¹ The facilities' guards also show little sensitivity to the plight of the detained asylum seekers. The detention policy is especially at odds with Australia's international refugee obligations and international human rights laws. There have been some developments with these since 2014 including PNG finding detention unconstitutional.⁴¹²

4.3 Australia's Refugee System as a Reflection of Religious Values

4.3.1 The Role of Religion in Refugee Protection

The major religions in Australia- Christianity, Islam, Hinduism, and Buddhism- all have profound histories of providing sanctuary, asylum, and protection to vulnerable strangers. Whereas Australia cannot establish a religion (CCs116) and promotes freedom of religion, Christianity is its dominant religion.⁴¹³ Additionally, Christian perspectives appear to be prominent in the law, as indicated by readings from the Bible. The call to care for and stand with marginalized, persecuted, and oppressed people is elucidated clearly in Christian scriptures. Isaiah 1: 17 reminds Christians to "learn to do good, seek justice, rescue the oppressed, defend the orphan, and plead for the widow". In the New Testament, Jesus says that He came so that humans may have life and have it in abundance (John 10:10).⁴¹⁴

However, that is not the kind of life offered to refugees by the Australian approach to asylum seekers. Jesus also teaches in Matthew 25:40 that "Truly I say to you, just as you did it to one of the least of these who are members of my family, you did it to me."⁴¹⁵ It is clear that Christianity requires the expression of God's love to those in need through care and service.

Jesus challenged societal structures and systems that forced people to the margins of their communities. He did this by speaking to, and eating with, those who had been rejected by the high and mighty in society. Inspired by His works and the prophets' teachings, Christianity

⁴¹⁰ Crock, Mary "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 269

⁴¹¹ Ibid.

⁴¹² Fraenkel, Jon. "Australia's detention centres on Manus Island and Nauru: An end of constructive pacific engagement?" *The Journal of Pacific History* 51.3 (2016): 278-285.

⁴¹³ Australian Bureau of Statistics. "2016 Census: Religion." (2017).

<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>>

⁴¹⁴ Wilson, Erin., "What it means to value life: The role of religions in global asylum and protection. *ABC Religion and Ethics*. (2013).

⁴¹⁵ New International Version (Holy Bible).

should seek to fulfil its calling to challenge society's injustices. Christianity calls for loving one's neighbour, welcoming strangers, challenging unjust systems, and providing refuge and care to the marginalized and exiled.⁴¹⁶

However, the church's dependence on and partnership with the state has pressed the Christian mission increasingly away from its mandate enshrined in the Bible towards service provision. Involvement with the state has forced the church to mimic the state's forms and practices.⁴¹⁷

It is foolhardy to ignore religious teachings and practices when trying to protect refugees' rights and well-being effectively. Becoming a refugee is one of the most testing times of an individual's faith and patience. The hospitable treatment of Prophet Mohammed (SAW) by the people of Medina when he fled persecution in Makkah embodies the Islamic refugee protection model. Therefore, in Islam, people not only have a right to seek and be granted asylum, but it is the duty of any adherent to accept and protect refugees for as long they seek protection. Islamic law and history also affirm the concept of sanctuary that is popular within Christianity. When Prophet Mohammed (SAW) conquered Makkah, anyone seeking refuge in sacred spots within the city or at the homes of their companions were safe and secure. It shows that granting asylum should not just be confined to holy places, but also granted in communal places. Islamic responsibility towards refugees is referred to as *Aman*, which means safety or trust. The concept can also refer to the refuge and safeguard that Muslims offer to non-Muslims as expressed in chapters 2 and 3.

4.3.2 Biblical Perspective on Refugees

A close examination of the lives of some key characters of the Old Testament reveals that they were displaced, in the sense that they did not live where they were born. Some of them, like Daniel, Moses, Ruth, Joseph, and Noah, are forced to leave their homes either by disasters or the search for exile.⁴¹⁸ Ostensibly, the Old Testament was written by people who know the feeling of living like outsiders.⁴¹⁹ Adam and Eve start the story of displacement in the Bible when they are chased away from the Garden of Eden. The great flood forces Noah to abandon his home

⁴¹⁶ Ibid.

⁴¹⁷ Erin, Wilson. "What it means to value life: The role of religions in global asylum and protection. ABC Religion and Ethics. (2013).

⁴¹⁸ David, Stemmett. A Biblical Theology of Ministry to Refugees for Baptist Churches in South Africa. *Master of Theology Thesis*, University of Port Hare.

⁴¹⁹ Ibid.

(Genesis 6:9-9:17). It is in the light of Noah's Ark that all people today can be deemed to be descendants of boat people. When Abraham leaves his home in Ur after a calling from God, he becomes a homeless wanderer.⁴²⁰ When he seeks to buy a burial site for his wife from the Hittites, he calls himself "an alien and a stranger" (Genesis 23:4). Another notable Old Testament figure who lives like a refugee is Joseph.⁴²¹ His brothers displace him from his home and sell him to Egypt as a slave (Genesis 37:28).⁴²² While working as a slave, he was imprisoned and faced the sort of sexual exploitation that many refugees today are exposed to, before he rose to a position of prominence.⁴²³

The nation of Israel in the Old Testament claims its heritage from the Patriarchs. The Patriarchs are defined as strangers living in the Promised Land.⁴²⁴⁴²⁵ They were strangers with no land, who trusted God's provision, making them the perfect embodiment of the parable of living by faith. Joseph's family- Jacob's descendants- fled their home in Canaan and lived as refugees in Egypt for many years before being forced into slavery (Exodus 1:11). When God rescued His people from slavery, they were joined by many others who were not God's covenant people. It shows that other oppressed people in Egypt joined the Israelites as they were rescued.⁴²⁶ When the Israelites returned to their domicile land in Canaan, they displaced another tribe that had inhabited the land. The fall of the Hittite and Mycenaean Empires also led to the displacement of many people who lived around the Aegean Sea.⁴²⁷ Some of the displaced people were the Philistines, who attempted to settle in Egypt before being chased away to settle into Canaan. As the Israelite and Philistine populations in Canaan grew, they would come into conflict with one another.⁴²⁸ It made the Israelites perpetual immigrants.

A large part of the Bible's Old Testament is narrated from the perspective of refugees living in captivity in foreign lands. One notable figure, Ezekiel, not only exiles himself, but also uses his writing to address his fellow countrymen who were in exile or thinking of going into

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ Waters, Julie. "The intersection of law, theology, and human trafficking in the narrative of Joseph: Linking the past to the present." (2010).

⁴²⁴ Ibid.

⁴²⁵ Genesis 12-50

⁴²⁶ Ibid.

⁴²⁷ Norrie, Philip. "How Disease Affected the End of the Bronze Age." *A History of Disease in Ancient Times: More Lethal than War* 61–101. 26 Jun. 2016, pp. 62.

⁴²⁸ Stemmett, David. A Biblical Theology of Ministry to Refugees for Baptist Churches in South Africa. *Master of Theology Thesis, University of Port Hare.*

exile.⁴²⁹ When the Assyrians defeated Samaria and the Northern Kingdom of Israel, thousands of people were displaced from their homelands and forced into exile.⁴³⁰ The citizens of Judah and Jerusalem were also exiled from their domicile lands by the powers of Babylon. While the citizens of Judah were neither prisoners nor slaves in Babylon, they were displaced people who longed to return to their land as evidenced in Psalm. The Psalm encapsulates many questions for all refugees who are displaced today, how can they sing in foreign nations that treat them as second-class citizens? How can they forget their homes, where peace, comfort, and harmony reigned before they were uprooted?⁴³¹

The Book of Lamentations in the Old Testament is Prophet Jeremiah's eyewitness account of the destruction of Jerusalem and the Temple by the Babylonians. It provides valuable insights into the feelings of ancient people who had to flee their homelands due to war and violence.⁴³²

The Bible- specifically the Old Testament - is remarkably supportive of offering protection to vulnerable foreigners who have been displaced from their lands for various reasons. For instance, such people were meek in Israel as they did not have any influence, which often made them deprived, needy, and open to abuse. The Bible instructs God's covenant people- the Israelites- to treat vulnerable strangers fairly and hospitably.⁴³³ It also instructs them to protect vulnerable foreigners from exploitation and unjust dealings when they work for them. The Bible also advocates for the assimilation of refugees and their inclusion in societal matters.

4.3.3 Australia's Religious Context

Australia is an advanced, multicultural, multi-faith, post-modern, and secular country. The nation is predominantly Christian.⁴³⁴ It has been suggested that Australians hold their spirituality close to their hearts and only speak about it tentatively.⁴³⁵ There is a deep-seated fear in the nation that religious talk may be divisive. Before its colonization, Australia had indigenous spiritualities, but these were later suppressed, seen as inferior, or ignored altogether as the

⁴²⁹ Stökl, Jonathan, and Caroline Waerzeggers. *Exile and Return, The Babylonian Context*. de Gruyter, 2015, pp. 241.

⁴³⁰ David, Stemmett. A Biblical Theology of Ministry to Refugees for Baptist Churches in South Africa. *Master of Theology Thesis, University of Port Hare*.

⁴³¹ Ibid.

⁴³² Ibid

⁴³³ Ibid.

⁴³⁴ Australian Bureau of Statistics. "2016 Census: Religion." (2017).

<<https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>>

⁴³⁵ Susan, Ennis. "Religion, spirituality and the refugee experience." *RMIT University, Australia PhD Thesis*. (2011), pp. 30

colonists settled in the country.⁴³⁶ Interfaith contact was also documented in Australia years before white settlement, with some indigenous coastal groups in the north having contact with Muslim coastal traders in the 18th century.⁴³⁷ Christianity and other faiths arrived in Australia with the arrival of the first British fleet in 1788. Anglican Christians were the dominant faith originally as they were affiliated with the colonial power.⁴³⁸ But from the earliest days, many of the convicts were Irish Catholics. Other religious groups, such as Orthodox Christians, started arriving later in the 19th century. A group of German religious refugees were significant early settlers of the colony of South Australia.

The impact of migration and conversion and refugeeism- mainly after the Second World War has meant that the nation has increased its diversity of spiritualities and religious groups. For instance, there was an influx of Jews from Eastern Europe, Orthodox Greeks, and Italian Catholics post-World War II. In the 1970s, there was an influx of Muslims from Turkey settling in Australia.⁴³⁹ They were followed by people of Hindu, Christian, Buddhist and Confucian backgrounds. Starting in the 1980s, Australia has received wave after wave of refugees and immigrants from African countries. It shows that each different wave of migrants and refugees has brought their religion with them. It also suggests that Australia does not discriminate against refugees on religious grounds. But a substantial number of UMAs are Muslim and they have been very badly treated.

4.3.4 Religion and Legal Rights in Australia

With regard to the intersection between religion and legal rights, the Australian Constitution Section 116 advocates for religious freedom without establishing, fostering, or supporting any one religion.⁴⁴⁰ It also advocated for the right of citizens not to adhere to any religion. However, the Australian Constitution fails to offer a guarantee of freedom of religion.⁴⁴¹

The *Racial Discrimination Act 1975 (CT)*, the *Australian Human Rights Commission Act 1986*, and several Acts by State governments prohibit discrimination based on religion in Australia.⁴⁴² Some other relevant laws and policies help with religious freedom in the country,

⁴³⁶ Ibid.

⁴³⁷ Jennings, Katherine Laura. "At Port and at Sea: Early Muslim Presence along the Australian Coastline, 1880–1939." *Islam and Christian–Muslim Relations* 29 1 (2018): 89-104.

⁴³⁸ Jennings, Katherine Laura. "At Port and at Sea: Early Muslim Presence along the Australian Coastline, 1880–1939." *Islam and Christian–Muslim Relations* 29 1 (2018): 89-104.

⁴³⁹ Susan Ennis. "Religion, spirituality and the refugee experience." *RMIT University, Australia PhD Thesis*. (2011).

⁴⁴⁰ s116 of the Commonwealth Constitution

⁴⁴¹ Susan Ennis. "Religion, spirituality and the refugee experience." *RMIT University, Australia PhD Thesis*. (2011).

⁴⁴² Ibid.

including the Federal Government's obligation to fund religious schools made possible by multiculturalism policies and a long struggle by the Australian Catholic Church.⁴⁴³ This has resulted in significant shifts in the nation's religiosity, with Islam and Hinduism rising alongside the number of people who do not identify with any religion (secularism).⁴⁴⁴ Such shifts in Islam and Hinduism are also attributable to immigration and the arrival of refugees. While the rise in secularism does not indicate a drop in spirituality, it means that more Australians do not believe in organized religions.⁴⁴⁵ It is not unique as such a shift to secularism is increasingly occurring in other developed countries.

4.3.5 Typologies of Australian Christians, Muslims, and Buddhists

Intra and inter-faith relations are not uncommon among refugees. Regarding Buddhists, there are Vajrayana, Mahayana, and Theravada. While most Anglo-Australian Buddhists subscribe to Vajrayana Buddhism, most Vietnamese refugees are Mahayana, while those from Cambodia and Laos subscribe to the Theravada school of Buddhism.⁴⁴⁶ In Australia, Buddhist ecumenical bodies mix the three schools, even though Buddhist ecumenicalism in the country is not as well-developed as overseas. However, there is a history of opposition between groups such as the Mahayana versus Theravada, and Anglo-Australians against immigrants. For Muslim refugees, they are divided into religious, non-religious, and those in-between. Religious Muslims are those who, upon entering Australia, seek contact with fellow religious people rather than fellow nationals. Non-religious refugees are those deemed to have strayed by the religious, while those in-between maintain contact with both the religious and non-religious.⁴⁴⁷ Concerning Australia, there four distinctive variations in trends among Muslims in the country, namely neo-revivalists, traditionalists, neo-modernists, and liberals.

Neo-revivalist Australian Muslims are divided into two groups. The first group perceives Western institutions and values as anti-Islamic. At the same time, the second group is critical of western values and institutions, but it is not as hostile as the first group. Traditionalists remain committed to pre-modern Islam with an emphasis on Sharia law.⁴⁴⁸ They believe that since Australia is neither legally nor politically Islamic, they cannot function fully as Muslims in the

⁴⁴³ Ibid.

⁴⁴⁴ Barker, Renae. "Is Australia a secular country? It depends what you mean." *Australian Humanist*, The 127 (2017): 15-16.

⁴⁴⁵ Ibid.

⁴⁴⁶ Susan, Ennis. "Religion, spirituality and the refugee experience." *RMIT University, Australia PhD Thesis*. (2011).

⁴⁴⁷ Ibid. Susan, Ennis. "Religion, spirituality and the refugee experience." *RMIT University, Australia PhD Thesis*. (2011).

⁴⁴⁸ Ibid.

country. Traditionalist Australian Muslims subscribe to traditional rituals and practices with little regard for the nation's legal and political frameworks. Neo-modernist Australian Muslims are best described by their relatively relaxed attitudes to Australian institutions, values, and ideas. Ostensibly, they do not believe that there is an intrinsic conflict between Islam and modernity. Liberals are Muslims with a secular outlook, both practising and non-practising. Only a small portion of Australian Muslims are opposed to Western values, institutions, and ideologies, with the rest being either liberal or neo-modernist.⁴⁴⁹ Even though there are ideological, historical, and theological differences between the different strains of Islam in Australia, no literature explains which Islamic approach, Sunni or Shia, dominates the Australian Muslim community.

There are different typologies of Christianity in Australia that Christian refugees can encounter. Conversionists are saved Christians who consider the world and earthly treasures evil as they have been redeemed by God and the blood of His son, Jesus.⁴⁵⁰ According to them, the primary role of the Christian church is to convert. Next, there are devotionalists. They are Christians who believe that they have personal access to a loving and caring God. Conventionalists are the striking opposite of devotionalists. They believe in religious values to live by rather than personal access to God. They principally derive the values they live by from their faith. They believe that the world is not evil and that the church is mandated with educating people with fundamental life principles.⁴⁵¹ Bearing in mind that Australia is predominantly Christian, Christian refugees have an easier path than Muslim and Buddhist refugees. There are complexities with regard to work, unemployment, discrimination, and protection visa issuances between Christian and Islamic refugees in Australia.

4.3.6 The History of other Religions in Australia

4.3.6.1 Jews

After the American Colonies' revolt in 1776, the British needed a new colony to hold their prisoners. Britain annexed Australia in 1788 as a prison colony and transported around 1500 prisoners there. Among the prisoners were 16 Jews, who became the first Jews in Australia.⁴⁵² By 1817, more Jews had arrived, making them enough to form organized

⁴⁴⁹ Susan, Ennis. "Religion, spirituality and the refugee experience." *RMIT University, Australia PhD Thesis*. (2011).

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Jewish Virtual Library. "Australia Virtual Jewish History Tour." <<https://www.jewishvirtuallibrary.org/australia-virtual-jewish-history-tour>>

communities known as *kehillahs*. More *kehillahs* emerged in Sydney and Melbourne. However, the Jews worshipped in shops and at home before the first synagogue in Australia was built in 1844.⁴⁵³ By 1850, there were four synagogues in Australia. The 1850s were characterized by the gold rush, which attracted even more Jewish immigrants, most of whom settled in the rural areas.⁴⁵⁴ However, fear of assimilating into Australian society forced them to relocate to the cities by the onset of the 19th century.⁴⁵⁵

Jews have been recognized as Australian citizens since the nation's founding. As a consequence, anti-Semitism has never taken root in Australia like in Europe. Jews have always been free to participate in economic and cultural Australian life. One of the most famous Australian musical figures, Isaac Nathan, was a Jew regarded by many to be the "father of Australian music." A Jew also built the first theatre in the country.⁴⁵⁶ Jews also served in elected capacities as members of governments from the outset. Prominent Australian Jews in the 19th century include the Speaker of Parliament, Mayor of Melbourne, Speaker of the House of Representatives, and the Premier of South Australia State.⁴⁵⁷ Political leadership was regarded highly in Australia's Jewish communities, as shown by the fact that most political leaders, such as those mentioned above, were leaders of their respective *kehillahs*. Ostensibly, Jews have integrated seamlessly into Australia, which allowed them to flourish in all spheres.

Australia has accepted thousands of Jewish refugees since the onset of the 20th century. The first stream of Jews in the 20th century arrived in Australia after the First World War. A significantly larger stream arrived after Adolf Hitler became the leader of Germany in 1933. The refugees from Germany were so many that the government started hesitating to open its borders to them. In 1938, before the onset of the Second World War, the Australian government allocated 15,000 blanket visas for victims of persecution and oppression. More than 7000 Jews took advantage of them and relocated to Australia. More than 2000 Jews arrived two years later, in 1940, aboard the HMT *Dunera* after being deported from the United Kingdom. Over 17,000 more arrived after the Second World War's culmination, most of them Holocaust survivors from Europe. After that, there have also been several waves of Jewish refugee arrivals, notably

⁴⁵³ Ibid.

⁴⁵⁴ Ibid

⁴⁵⁵ Ibid.

⁴⁵⁶ Breaking Matzo. "History of Jews in Australia." 2020. <<https://breakingmatzo.com/history-of-jews/the-history-of-jews-in-australia/>>

⁴⁵⁷ Jewish Virtual Library. "Australia Virtual Jewish History Tour." <<https://www.jewishvirtuallibrary.org/australia-virtual-jewish-history-tour>>

arrivals from the Union of Soviet Socialist Republics (USSR) and South Africa in the 1970s and 80s.

4.3.6.2 Hindus

The first Hindus in Australia arrived in the 19th century to work as laborers on sugar and cotton plantations.⁴⁵⁸ Most of the first arrivals settled and grew into merchants and small business proprietors. However, most of the Hindus in Australia today arrived after the *Immigration Restriction Act/ White Australia Policy* was repealed in the 1970s.⁴⁵⁹ Today, there are more than half a million Hindus in Australia. Most of them come from India and Sri Lanka, while others migrated from Fiji, Singapore, Malaysia, New Zealand, and the United Kingdom.⁴⁶⁰ Fijian Hindus arrived as asylum seekers in the 1980s following military coups in their domicile country, while most Hindus from Sri Lanka fled to Australia in response to constant political upheavals.⁴⁶¹ They have contributed considerably towards forging a distinctive religious identity in Australia. While Hindus were restricted from resettling in Australia as refugees or asylum seekers by the *Immigration Restriction Act*, its disestablishment saw the Australian government adopt a passive attitude towards Hindu refugees.⁴⁶²

4.3.7 The Intersection between Australian Refugee Law and Religion

The “Pacific Solution” devised in 2001 after the previously discussed “Tampa incident” meant that onshore asylum seekers would be sent to the Pacific islands of Papua New Guinea and Nauru. While the arrangement was suspended in 2008, offshore processing of asylum seekers seeking to access Australia by boat was re-introduced in 2012.⁴⁶³ It was considerably expanded at the time of its re-introduction to ensure that these boat arrivals would not just be detained and processed but also resettled outside Australia. It implied that those who were processed and found to be actual refugees would still not be resettled in Australia but remain in Nauru and Papua New Guinea or be resettled to third countries.⁴⁶⁴ Those who do not qualify as refugees would remain detained on the islands if they could not be returned to their domicile

⁴⁵⁸ The University of Western Australia. *Hindu Identities*. <https://www.hr.uwa.edu.au/_data/assets/pdf_file/0004/697828/105936-June-2013-GIFs-online-Hindu.pdf>

⁴⁵⁹ Purushottama, Bilimoria. "Speaking of the Hindu Diaspora in Australia." *Journal of Hindu-Christian Studies* 11, no. 1 (1998): 6.

⁴⁶⁰ Ibid.

⁴⁶¹ Purushottama, Bilimoria. "Speaking of the Hindu Diaspora in Australia." *Journal of Hindu-Christian Studies* 11, no. 1 (1998): 6.

⁴⁶² Ibid.

⁴⁶³ Christine Goodall. "Shouting towards the Sky: the role of religious individuals, communities, organizations and institutions in support for refugees and asylum seekers." *United Nations High Commissioner for Refugees*. (2015).

⁴⁶⁴ Ibid.

countries or resettled in a third country. In a nutshell, no onshore asylum seeker who had attempted to arrive by boat would end up in Australia, whether or not they qualified as refugees.

It is not clear that the Australian government is in compliance with the nation's international legal obligations by having asylum seekers processed in third countries. Moreover, it may also be imposing obligations on Nauru and Papua New Guinea that the two states did not wish to take on.⁴⁶⁵ There was no genuine consultation with the Pacific Islands prior to the Pacific Solution being ratified.⁴⁶⁶ Australia's normalization of the detention of asylum seekers and the externalization of their processing raises questions about the nation avoiding responsibility and failing to adhere to international standards. Moreover, it enables the refugee situation to become depersonalized so that the Australian public and religious groups feel more removed from asylum seekers' plight. Therefore, they are less likely to care about what happens to asylum seekers and refugees as they lay in detention, waiting to be processed.⁴⁶⁷ Ostensibly, such individuals may die while in the detention camps, and away from the eyes of the Australians.

Australian refugee law enables the plight of asylum seekers to be hidden from the public, which the law has misled to believe that onshore asylum seekers are not genuine refugees. The law has many Australians believing that the act of seeking asylum is illegal in itself, which is why they pay little attention to the reasons why the asylum seekers escape their home countries or the trauma that they experience *en route*.⁴⁶⁸ From a The Baptist Church standpoint, the Australian government and population evade their responsibilities when it comes to the protection of refugees as enshrined in Public International Law. The nation's hard-line immigration and refugee laws have contributed to a harsh, exclusionary, and securitizing rhetoric in both public and political discourses. It has turned the refugee crisis into a solidarity crisis.⁴⁶⁹ The question of religion, with a specific emphasis on Islam, is a critical catalyst to the draconian and stringently applied refugee law in Australia. The question of religion, particularly Islam, has catalysed the harshness of Australia's refugee law. The leeway that the country has in choosing who can get asylum means that they can control or discriminate against some people based on their religion.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Christine Goodall. "Shouting towards the Sky: the role of religious individuals, communities, organizations and institutions in support for refugees and asylum seekers." *United Nations High Commissioner for Refugees*. (2015).

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

Three false assumptions emerge to use religion as a primary criterion for the assessment, understanding the nature, reasons behind, and the plight associated with refugeeism.

1. Most refugees today come from countries that are riddled with war. Most such countries are predominantly Muslim, including South Sudan, Iraq, Somalia, and Syria. Therefore, the assumption is that all refugees from these nations are Muslims. The reality could not be more different. While some of the refugees are indeed Muslim, most are from other religions.⁴⁷⁰
2. The second assumption is that all Muslims are similar, regardless of their nationality. The assumption dangerously ignores the multiplicity of Islamic variations with regard to religious beliefs, culture, rituals, and practices. There are many variations of Islam, and regarding all Muslims as similar is not fair.⁴⁷¹
3. The surge of mass displacements of people alongside the increase in terrorist activities borne of radical and violent extremism has resulted in the creation of an intricate link between Muslim refugees and stereotypes about them, and terrorism. Most refugees are perceived as Muslim, while most Muslims are presumed to be terrorists in much public consciousness and discourse.⁴⁷² It leads to the false belief that all refugees from Islamic backgrounds seeking resettlement in Australia may be potential terrorists.

The three false assumptions are critical in contextualizing policy responses towards refugees in Australia. They have resulted in a refugee law that is more concerned with national security than the plight of asylum seekers.

Another aspect that has made the Australian refugee situation substantially worse is the overlap between “good” and “bad” refugees and Muslims. In the aftermath of the devastating September 2001 attacks in the United States, tropes about Islam dominated global discourse.⁴⁷³ The global discourse not only focused on connecting Muslims to terrorism. Rather, it highlighted the need to differentiate between “good” and “bad” Muslims.⁴⁷⁴ Law-abiding Muslims who are peaceful and do not associate with radical and violent extremists personify the definition of

⁴⁷⁰ Ibid

⁴⁷¹ Ibid.

⁴⁷² Christine Goodall. “Shouting towards the Sky: the role of religious individuals, communities, organizations and institutions in support for refugees and asylum seekers.” *United Nations High Commissioner for Refugees*. (2015).

⁴⁷³ Jamil, Uzma. “How Muslims became corn.” *ReOrient 2.2* (2017): 175-189.

⁴⁷⁴ Wilson, Erin and Luca Mavelli. “The refugee crisis and religion: Beyond physical and conceptual boundaries” *Social Science Research Council*. (2016)

“good” Muslims. On the other hand, “bad” Muslims are those who engage in radicalization, commit extremist acts of violence, deviate from the teachings of the Quran.⁴⁷⁵ In the context of this chapter, good Muslims and refugees are those devoid of agency, who wait patiently in refugee camps to be rescued through humanitarian visas that allow them to be resettled in Australia. Conversely, bad Muslims and refugees are those who engage in survival strategies such as trying to access the nation by sea, which goes against the narrative that refugees are victims.⁴⁷⁶ They are christened "bogus asylum seekers" and “queue jumpers" and ostracized because they jeopardize “good” refugees' protection claims.

The dominant discourse about good and bad Muslims and refugees explains the increasingly important politics of religious identity in Australia’s refugee and humanitarian programs. Refugees are often characterized and prioritized according to their racial and religious attributes. Christian refugees- who are often presumed to be victims of Muslim persecution, sit atop the hierarchy.⁴⁷⁷ Below them are asylum seekers who symbolize the very meaning of vulnerability and wait for processing so that they can enter Australia legally with a valid visa. However, refugees who take matters into their own hands and attempt to access Australia by boat with the intention of seeking asylum are characterized as bad refugees and occupy the bottom-most rank in the hierarchy. What seems to have been forgotten in the dominant discourse is that all refugees are people, be it economic immigrants or "genuine refugees." The discourse unwittingly neglects the complexities that turn people into refugees, which means that they have complex identities that cannot be reduced to racial or religious identities.⁴⁷⁸ It calls for efforts to stress the diverse nature of Islam and de-link Islam, refugeeism, and terrorism in public discourse while emphasizing asylum seekers' plight.

4.3.8 Religious Favouritism in Australia’s Migration Program

One critical example of the success of Australia’s humanitarian efforts is the intake of more than 12,000 refugees from the long-standing Iraqi-Syria conflict. However, a vast majority of the resettled refugees were Christians, which is an indication of favouritism considering that

⁴⁷⁵ Ibid.

⁴⁷⁶ Wilson, Erin and Luca Mavelli. “The refugee crisis and religion: Beyond physical and conceptual boundaries” *Social Science Research Council*. (2016)

⁴⁷⁷ Ibid.

⁴⁷⁸ Daphna Canetti, Snider, Keren, Pedersen, Ann and Hall, Brian. "Threatened or threatening? How ideology shapes asylum seekers' immigration policy attitudes in Israel and Australia." *Journal of Refugee Studies* 29, no. 4 (2016): 589.

they came from an overwhelmingly Muslim part of the world.⁴⁷⁹ It is undoubted that Christians in Syria and Iraq have suffered persecution at the hands of Muslims, specifically the Islamic State of Iraq and Syria (ISIS). However, Muslims in the region have similarly been persecuted under the hands of ISIS. Furthermore, Christians make up less than 10 per cent of the Syrian population and 1 per cent of Iraqis.⁴⁸⁰ It shows that Australia's intake of refugees from the Syria-Iraq region is disproportionate to the proportion of Christians who have been displaced from the war-torn region. The UNHCR estimates that among the displaced from Iraq, only 15 per cent are Christians while only 1 per cent of those displaced from Syria are Christians. However, 80 per cent of those resettled in Australia from the region are Christians.⁴⁸¹ The high rates of resettled Christians in the cohort of people resettled in Australia from the predominantly Islamic Syria and Iraq region points to a refugee law that is skewed against Muslims.

Australia underwent substantial law reforms with regard to accessing citizenship in the country through the *Australian Citizenship Act 2007*. Key amendments in the reforms included the introduction of citizenship tests and the requirement for migrants to have resided in the country for more extended periods.⁴⁸² The justification behind the reforms was that they were designed to help migrants and refugees understand Australian values better, thereby giving them a better and more informed chance to commit to Australian citizenship. Minister's 2nd reading speech.⁴⁸³ It is an approach that sought to eradicate allegations of racial, nationality, and religious discrimination as the new criteria would be applied indiscriminately to all applicants.⁴⁸⁴ However, the concept of "Australian values" describes citizenship status in racially and religiously exclusionary ways. Australian values are imagined in opposition to migrant otherness, specifically Muslim otherness. The discourse embedded in Australia's migration law legitimizes the exclusion of asylum seekers. For instance, the reforms aimed at ensuring that migrants do more to demonstrate that they understand and would commit to the country's values.

The extended residency period before one can apply for Australian citizenship was ostensibly designed to give migrants more time to become familiar with the values which they

⁴⁷⁹ Patrick, A. Odysseus. "Australia's Immoral Preference for Christian Refugees." *The New York Times*. 2017
<<https://www.nytimes.com/2017/05/03/opinion/australias-immoral-preference-for-christian-refugees.html>>

⁴⁸⁰ Tony Caravella. "Fortress Australia – barriers facing intending migrants." 2nd *Global Conference- Migration and Diasporas*. (2018).

⁴⁸¹ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations 15* (2012).

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations 15* (2012).

need to commit to when they become citizens. It was also meant to provide them with more time to acclimatize to the values considered essential in the country. Citizenship tests in the 2007 reforms were meant to ensure that all Australians show a level of commitment to the nation's values and way of life.⁴⁸⁵ Essentially, the reforms emphasized that migrants and refugees should not seek to change Australian society and way of life. The reform bill called for the transformation of migrants rather than the nation, through integration and assimilation. Considering that Australia is a Judeo-Christian nation, Muslims- mostly migrants- are perceived as cultural and religious "others".⁴⁸⁶ They are perceived to hold values that are incompatible with the nation's values, such as wearing head coverings (Muslim women) and following Sharia law. As such, they are deemed unable to understand the privileges, responsibilities, and commitment demanded of them as Australian citizens. Other Islamic values that are considered to be incompatible with Australian values include gender inequality and religious fundamentalism.⁴⁸⁷

There are several interconnecting assumptions about Muslims that result in them being deemed unsuitable for resettlement in Australia or achieving citizenship status. The first assumption is that Muslims form a distinct cultural group that is far-removed from Australian values. Secondly, due to their cultural identification, Muslims cannot be integrated and assimilated enough to commit to Australian values.⁴⁸⁸ As such, Muslim migrants are thought not suitable to be granted citizenship. While the reforms do not explicitly exclude Muslim migrants from accessing citizenship, the description of Australian values in their establishment implies that it is harder for Muslims to access Australian citizenship than Christians and people from other religions. Islam's supposed incompatibility with Australian values poses a cultural threat to the nation. It is a way of identifying what Australian identity is by delineating what is not. Moreover, it raises fear and suspicion against Muslims who are already citizens as they are seen to be parroting exclusionary discourse that questions their commitment to Australian values, and by extension, citizenship.⁴⁸⁹ Ostensibly, the reforms place the actions and practices of Muslims who are Australian citizens under intense public scrutiny, thereby acting as a catalyst for religious and racial discrimination.

⁴⁸⁵ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations* 15 (2012).

⁴⁸⁶ Ibid.

⁴⁸⁷ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations* 15 (2012).

⁴⁸⁸ Ibid.

⁴⁸⁹ Refugee Council of Australia. "Submission on The Status of The Human Right to Freedom of Religion or Belief" *Www.refugeecouncil.org.au*. (2018).

Another piece of evidence to prove that Australia prioritizes Christian refugees ahead of Muslim asylum seekers is the nation's handling of Rohingya Muslims from Burma. The percentage of accepted Muslim asylum seekers in Australia continues to drop against the number of accepted Christian refugees. Notably, the nation's humanitarian program has taken more Christians from predominantly Islamic regions than Muslims in recent years.⁴⁹⁰ Countries that have benefited from the program include Iraq, Syria, and Afghanistan. It begs the question of why Australia would accept Christian refugees from Far-off regions while Muslims closer to home continue to suffer. The Rohingya are some of the most severely persecuted religious minorities in Asia. Muslims constitute less than five per cent of the Burmese population. The Rohingya make up most of the Muslim population in the small country. They live in one of its poorest states- Rohingya-Rakhine which has limited access to basic and essential services. Successive Burmese regimes have subjected Rohingya Muslims to brutal oppression while officially discriminating against them.⁴⁹¹ For instance, they were excluded from Burmese citizenship by a 1982 Citizenship law which rendered Rohingya Muslims stateless.

The Burmese government fosters the notion that the Rohingya have no right to be in the nation, even officially forbidding the use of their name. While there are millions of Rohingya Muslims in Burma, only a few thousand of them have acquired Burmese citizenship.⁴⁹² There have been longstanding conflicts between the Buddhist majority in the nation and the Rohingya Muslims, often resulting in community violence. Three such episodes of community violence in June and October 2012 and March 2014 resulted in hundreds of casualties, thousands of people rendered homeless, and thousands of businesses destroyed.⁴⁹³ The systemic discrimination and multiple human rights violations against the Rohingya Muslims of Burma have forced most of them to flee and seek refuge elsewhere. However, Australia has only accepted to resettle less than 100 Rohingya Muslims since 2013.⁴⁹⁴ The persecution of Rohingya Muslims in Burma is a flagrant example of religious persecution near Australia's region. However, instead of protecting them and granting them asylum, the nation has mostly ignored them. Instead, the Australian

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Refugee Council of Australia. "Submission on The Status of The Human Right to Freedom of Religion or Belief" www.refugeecouncil.org.au. (2018).

⁴⁹⁴ Refugee Council of Australia. "Submission on The Status of The Human Right to Freedom of Religion or Belief" www.refugeecouncil.org.au. (2018).

humanitarian program has focused more on protecting refugees from far-off regions so long as they are Christians.

4.4 Is Australia's Refugee System Punitive?

4.4.1 Australia Treats Refugees Depending on the Way They Come

Australia has been a leader in bringing vulnerable refugees from all over the world for many years and helping them settle in the island nation. The nation has continued to show a commitment at a time when it is harder for refugees to find protection in safe countries. However, Australia's humanitarian program treats refugees in two markedly distinct ways. The refugees it deems to be unwanted are subjected to punitive policies to deter them from seeking safety.⁴⁹⁵ Specifically, Australia is keen to deter the people seeking asylum from getting into the nation without permission. Asylum seekers who arrive by boat are sent to Papua New Guinea or Nauru for processing. They often stay there for years with little prospect of living safely, supporting themselves, or resettling in Australia. The law requires people who enter Australia without permission (a visa) to be detained without reviewing their circumstances to determine whether or not they are genuine refugees.⁴⁹⁶ There is no time limit to the legally-required detention. It is punitive to place people who have committed no crime in detention for years.

Recent years have seen some of the people seeking asylum in Australia released into the community. While it is certainly a welcome development, the refugees' troubles do not stop there because they are forced into destitution in a foreign land since they have nothing to live on. Since it takes years to process their claims, they are forced to live in desperate circumstances for a long time. Even when their claims are processed, and they are verified to be genuine refugees, the punitive measures continue. If a refugee arrived by boat, they never qualify for a permanent visa. They are forced to live on temporary visas, which they have to renew every few years to continue their stay in Australia.⁴⁹⁷ It means that their chances of reuniting with family members remain slim, as they cannot be visited without the government's permission. In contrast, those who arrive in Australia with valid visas and then seek protection have to contend with fewer restrictions.

⁴⁹⁵ Australian Refugee Council (b). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

Life in Australia is increasingly temporary for refugees. It takes longer for the claims of people seeking asylum to be determined, even those who come with valid visas- such as student and tourist visas- and then seek protection and resettlement.⁴⁹⁸ Their visa conditions are often contingent on the conditions of their tourist or student visas. It implies that they are often not entitled to medical insurance and may be barred from working, and hence cannot receive any form of income support. Their residency's impermanence means that they cannot access most of the nation's social security programs and other important supports- such as refuge for women who are victims of domestic violence.⁴⁹⁹ The government has also started cancelling some refugees' permanent visas besides making it harder for refugees to get new permanent visas or achieve citizenship. Indeed, Australia's refugee policies' punitive nature denies asylum seekers what they need most - to feel safe.

4.4.2 The Legality of Seeking Asylum

Australia's refugee policies have many Australians thinking that refugees' legal way to access the country is through a resettlement program. They feel that refugees should wait in UNHCR refugee camps in other countries until they are granted permission to come to Australia as asylum seekers.⁵⁰⁰ However, the reality is that refugees' resettlement is not as common as many Australians think, and the need for resettlement exceeds the nation's ability to meet it. The most "normal" way for asylum seekers to seek protection across the world entails crossing a border and claiming protection as a refugee. The 1951 Refugee Convention and 1967 Protocol protect this normal way of seeking asylum. While governments can choose to accept or refuse to resettle refugees, being a signatory to the 1951 Convention obliges them to consider the claims of asylum seekers who arrive in their territories. The very nature of a refugee requires them to cross borders without permission or the necessary travel documents, namely visas. As such, crossing borders to seek protection from persecution or any of the five protections recognized by the Refugee Convention is not a criminal act. Indeed, the non-refoulement clause of the Convention bans nations from penalizing asylum seekers who cross their borders without permission.

⁴⁹⁸ Ibid.

⁴⁹⁹ Australian Refugee Council (b). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵⁰⁰ Ibid.

The Universal Declaration of Human Rights also recognizes and upholds the right to seek asylum globally. The reason why crossing borders without permission is allowed for refugees is that their situations are often messy. It is hard and sometimes even risky for people facing persecution to try and get travel documents to let them flee their countries. Not many embassies allow people to apply for visas simply because they fear persecution and need protection. Similarly, people fleeing from wars and conflict rarely have the time to apply for visas. Some countries also require people to have permission before leaving, meaning asylum seekers may need exit visas.⁵⁰¹ Governments worldwide are increasingly adopting more stringent border protection policies that make it harder for people to get in if it is suspected that they may end up seeking asylum. As it gets harder for asylum seekers to get to safety, they are often forced to pay other people, christened often described as “people smugglers” to get them to safety.⁵⁰² It is not uncommon for people to resort to extreme measures to save their lives, especially their children's lives.

Seeking asylum in Australia or any other country is not illegal. It is a basic human right. Every global citizen is entitled to the protection of their human rights regardless of how they arrive in the country. Refugees' right to enter Australia without prior authorization is protected under Article 31 of the 1951 Refugee Convention, which gives them a good cause for entering the country without a valid visa. Furthermore, there is no Australian law that criminalizes coming to the nation without a valid visa to seek asylum. However, asylum seekers who enter the country without valid visas are often detained for verification of their identities, health status, and security status while preventing them from absconding before the resolution of their legal status. While in detention, the conditions that they are subjected to are tantamount to punishment, and they result in a great deal of mental and physical anguish. Australia's allegation that boat arrivals are illegal is, therefore, not true. Most of the asylum seekers who arrive via boat are ultimately proven to be genuine refugees after years of detention but are not granted entry to Australia. Indeed, seeking asylum is not illegal. However, the long-standing Australian government policy of preventing any person from traveling to Australia to seek asylum is unlawful in the eyes of Public International Law.

⁵⁰¹ Australian Refugee Council (b). “Australia’s Detention Policies.” *Www.refugeecouncil.org.au*. 2020.

⁵⁰² *Ibid.*

4.4.3 Current Asylum Policies and Concerns about them

When people seek to flee their country, they often seek refuge in a neighbouring country. It means that countries closer to home, such as countries in Africa and Turkey (for those fleeing the Middle East), are the largest host of refugees as opposed to developed countries.⁵⁰³ The easiest way to flee persecution or conflict in one's home country is over a land border. However, Australia is an island nation that does not border any country, making its case unusual with regard to refugees. The nation's isolation makes it easy to control who enters its borders, thereby making it harder for asylum seekers to seek refuge in Australia. It also means that ordinary Australians perceive refugees who arrive by boat as threats. The fear of refugees and the threats they pose among ordinary Australians have been stoked by politicians for a long time.⁵⁰⁴ Australia was more welcoming to refugees then than it is today.

When Cambodian refugees fled by boat and headed to Australia in the early 1990s, they met a markedly different reaction. The government of the day designed punitive laws to have the Cambodian refugees detained. The laws laid the foundation for the detention policies that reign to date. While the punitive detention laws were disputed in court, the High Court found them to be constitutional. As the number of asylum seekers arriving in Australia increased in the 90s, different governments introduced more policies, including restricting refugees' rights before courts and tribunals in Australia.⁵⁰⁵ A major turning point was the aftermath of the Tampa crisis explored in Section 4.2.4. The government's decision to turn away asylum seekers aboard the Norwegian vessel, MV Tampa, is credited with John Howard's election victory in 2001. The popularity of the government's actions to refuse asylum seekers aboard a boat entry into the country allowed the government a series of more punitive refugee policies that formed the basis for today's policies.

4.4.3.1 The Pacific Solution

The Pacific Solution was the government's brainchild after the Tampa Crisis. The asylum seekers stranded on MV Tampa were sent for processing in Nauru. Nauru is a small island in the Pacific Ocean that was formerly an Australian territory. Its economy had collapsed at the time, meaning that Nauru was heavily reliant on Australian aid and trade.⁵⁰⁶ The circumstances made

⁵⁰³ Australian Refugee Council (b). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

it easy for the government to draw up a hasty agreement with the small island to host the Tampa occupants as their asylum claims were determined.⁵⁰⁷ If the claims revealed that they were genuine refugees, they would be resettled in Australia or one of its territories. The Australian government also negotiated a similar agreement with Papua New Guinea to host asylum seekers on Manus Island as they awaited their asylum claims' processing and determination. The Pacific Solution marked the beginning of Australia's offshore processing policy that dominates its refugee system.

The punitive Pacific Solution paved the way for the Australian Parliament to enact laws to excise some islands from the nation's migration zone, including Christmas Island. It means that anyone who landed on an excised island had no right to apply for protection as a refugee under Australia's law. The laws also meant that the laws applying to refugees and asylum seekers in Australia would not apply to people who landed in excised islands. The Pacific Solution and its affiliated laws were enforced through "Operation Relex". The naval operation was designed to turn away any boats that approached Australian territory carrying asylum seekers.⁵⁰⁸ The operation blatantly undermined Australia's obligations not to return people who face a real risk of violation of certain human rights under the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and the Convention on the Rights of the Child (CRC), and not to send people to third countries where they would face a real risk of violation of their human rights under these instruments. Essentially, the Pacific Solution, the laws, and the operation did nothing to ensure refugees' rights, safety, and dignity were protected.

Besides the punitive policy, laws, and operation, John Howard's administration also introduced the aspect of temporary refugee protection. It meant that refugees would only be provided with temporary visas that allowed them to stay in Australia for three years.⁵⁰⁹ Upon the expiry of their temporary visas, the refugees would be required to re-apply and prove that they still needed protection. Notably, only those asylum seekers who arrived by boat were affected by the temporary visa rule. It meant that they could not feel safe even after being resettled, always plagued by worries of being returned to their home countries alongside the stress brought by the prospect of never seeing their families again.⁵¹⁰ However, those who got a visa upon re-applying-

⁵⁰⁷ Australian Refugee Council (b). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

meaning they proved that they still needed protection - received permanent visas. The policies and laws enacted under John Howard's administration were as punitive as they were controversial. The conditions where refugees were hosted in Papua New Guinea and Nauru were extremely harsh.⁵¹¹

The Pacific Solution enables Australia to outsource its responsibilities towards refugees under Public International Law and renege on international obligations that require the country to respect asylum seekers' human rights. The Pacific Solution also discriminates against asylum seekers who access Australia by boat as it refuses them entry and ships them off to detention centres. The detention facilities in Nauru and Papua New Guinea are designed to be punitive, and the Australian government promotes them as deterrents to discourage people from coming by boat to seek asylum. A 2017 report by Francois Crepeau, the United Nations Special Rapporteur on the Human Rights of Migrants, focused on the Nauru processing and detention centres, and its findings were bleak. The regimes in the detention facilities were unnecessarily punitive and embodied cruel, inhuman, and degrading treatment. The report also noted that most of the detainees were confronting a wide range of mental health issues, notably depression, anxiety, and post-traumatic stress disorder. The centres lack health care systems, meaning that most detainees rely on sleeping pills and anti-depressants, which is unhealthy.⁵¹² Verbal and physical abuse is also common in the Nauru processing and detention centres. The report deems the detention facilities illegal under international law. Ostensibly, the criminalization of asylum seeking by the Australian government is simply a political ploy to justify the indefinite, and sometimes fatal, detention of asylum seekers who arrive by boat or without valid Australian visas.

4.4.3.2 Brief Hiatus of Punitive Policies Post-John Howard's Tenure

While most of the refugees hosted offshore were ultimately resettled after years of waiting, some were still in the offshore detention centres by 2007 when the Labour Party regained power. The Labor government formally abolished the offshore processing of asylum seekers in 2008. It also ended the issuance of temporary visas to refugees, and those with temporary visas were offered permanent protection. The Labor government also made numerous more efforts at reforming Australia's refugee policies. However, the efforts coincided with wars across the globe- such as in Iraq and Afghanistan and the persecution of Tamils in Sri Lanka-

⁵¹¹Ibid

⁵¹²Ibid

which dramatically increased the number of people seeking protection.⁵¹³ It resulted in an increase of boats bringing asylum seekers to Australia, particularly from nearby Indonesia. The Liberal opposition used the circumstances to argue for reviving the abolished punitive refugee policies to solve the emerging, albeit complex problem. However, the Labor government focused on alternative ways of dealing with the problem without politicizing it.

One way through which the Labour government attempted to approach the problem entailed establishing a new refugee claims processing system on the previously-excised Christmas Island.⁵¹⁴ The system processed claims differently from the system in Mainland Australia. However, the High Court undermined the new system, leading to its collapse.⁵¹⁵⁵¹⁶ The processing of refugees' claims was halted after the system's collapse. A dramatic boat wreck on Christmas Island in 2010 - which left tens of people dead - marked a major turning point. The scenes of desperate people drowning with no one rushing to help them created a sense of urgency in resolving the refugee crisis. It bred a compromise, albeit short-lived policy referred to as the “Malaysian Solution”.⁵¹⁷ Under the “Solution”, asylum seekers would be hosted in Malaysia awaiting processing. However, refugees in Malaysia are denied many basic rights, meaning that asylum seekers were subjected to dire asylum conditions. It made the policy look morally dubious and desperate.⁵¹⁸ It collapsed due to a High Court decision that deemed that Malaysia did not satisfy the conditions of an offshore processing country under the Migration Act.

4.4.4 The Punitive Nature of Australia's Refugee System

4.4.4.1 Offshore Processing

Australia's refugee system is among the most punitive systems globally. It is designed with deterrence as the main objective and relies on interception measures to stopping asylum seekers who do not use the accepted channels of seeking protection from getting to Australia.⁵¹⁹ Essentially, asylum seekers are forced back by the Australian Navy when they enter into the nation's territorial waters as part of “Operation Sovereign Borders”. Those who make it into the

⁵¹³ Ibid.

⁵¹⁴ Ibid.

⁵¹⁵ Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41 (11 November 2010).

⁵¹⁶ Australian Refugee Council (b). “Australia’s Detention Policies.” *Www.refugeecouncil.org.au*. 2020.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

country are sent to detention centres in Papua New Guinea and Nauru.⁵²⁰ As per the Refugee Convention and Public International Law, the asylum seekers intercepted by the Navy should have the opportunity to present their claims for protection before being turned away. However, it is unclear how the Navy conducts refugee assessments, and there are many indications that the process is not fair to asylum seekers. For instance, a UNHCR report about 41 asylum seekers returned to Sri Lanka by Australia in 2014 indicates that Australia used enhanced screening procedures to determine whether the asylum seekers' claims for protection required further consideration.⁵²¹ The report points out that the enhanced screening procedures used were non-compliant with international law.⁵²² The Navy's actions of turning asylum seekers back contravene the Refugee Convention's Non-Refoulement Clause.⁵²³

The Australian government has conducted operations in foreign nations - especially in the Asia-Pacific region - to prevent people from entering the country. For instance, the Australian Refugee Council indicates that the government has run a series of information campaigns aimed at discouraging people from going to Australia.⁵²⁴ The government also liaises with officials from other nations in a bid to detect and prevent the onward movement of asylum seekers. There are numerous airline liaison officers employed by the Australian government to spot any passengers who may claim asylum upon getting to Australia and restrict them from traveling.⁵²⁵ Airlines are also forced to act as gatekeepers to avoid sanctions for aiding individuals' travel without visas. The government's actions aim to ensure that all asylum seekers who are resettled in Australia are processed offshore and arrive with valid visas. Those who arrive without visas, otherwise deemed to be illegal asylum seekers, are taken to offshore detention centres to await the determination of their protection claims and subsequent processing.

4.4.4.2 Offshore Processing

The most high-profile policy in Australia's refugee system requires asylum seekers to be detained in Papua New Guinea and Nauru before the determination of their protection claims. The policy was introduced in 2001 under Prime Minister John Howard and is as damaging as it

⁵²⁰ Ibid.

⁵²¹ United Nations High Commissioner on Refugees. "Returns to Sri Lanka of Individuals Intercepted at Sea." *www.unhcr.org*. 2014.

⁵²² Ibid.

⁵²³ Jufri, Modhy Mahardika. "Violations of International Law by the Government of Australian in Practice of Turn Back the Boat Management Policy for Asylum Seekers." *Indonesian J. Int'l L.* 14 (2016): 205-236.

⁵²⁴ Ibid.

⁵²⁵ Ibid.

is heart breaking.⁵²⁶ However, there was mandatory onshore detention from 1992 before this offshore detention started. Indeed, today's policy is more draconian than its original version. When people were determined to be genuine refugees in the original version, they were resettled to Australia and sometimes to other countries. However, today's policy does not allow those taken to Nauru and Papua New Guinea ever to be resettled in Australia.⁵²⁷ It implies that asylum seekers can remain in detention even years after they are recognized as genuine refugees in need of protection. The law's default position requires asylum seekers who arrive without a visa to be detained, meaning that the only thing a court can review about them is if they have a valid visa.⁵²⁸ It effectively removes any opportunities for an independent review of whether they should be in detention. There is also no maximum time limit on detention. It is a punitive policy that breaches Australia's international legal and humanitarian obligations.⁵²⁹

While immigration detention is recognized under international law, its purpose should not be to punish people. Rather, it is intended to allow governments to carry out health, security, and identity checks and verifications.⁵³⁰ No one should be detained simply to await the determination of their protection claims.⁵³¹ However, the Australian refugee system requires asylum seekers to be detained until they are provided with a visa or choose to leave the country. Unlike most nations globally, the detention of refugees in Australia is not contingent on individual circumstances. It shows that the system is in breach of Australia's obligations under the Refugee Convention and International law. The lack of a maximum time limit on detention means that one could be detained for life unless they get a visa or agree to leave Australia. The lack of a time limit increases uncertainty about detainees' futures, thereby causing them a lot of stress and anxiety.

4.4.4.3 Inhumane Detention Conditions and Mental Health Risks

Out of more than three thousand people who come looking for protection in Australia around a half end up in offshore detention facilities in Nauru and Papua New Guinea.⁵³² They live as if they are in jail, with these detention centres' conditions often described as inhumane.⁵³³

⁵²⁶ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵²⁷ Australia Refugee Council (c). "Australia's offshore processing regime: The facts." 2020.

<<https://www.refugeecouncil.org.au/offshore-processing-facts/>>

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵³¹ Ben, Doherty. "UN official says Australia responsible for inhuman treatment of asylum seekers." *Www.theguardian.com*. 2017

⁵³² Ibid.

⁵³³ Ibid.

There are numerous concerns about detainees' living conditions, access to healthcare, risk of physical, mental, and sexual abuse, and the criminalization of homosexuality and abortion in the two island nations - Papua New Guinea and Nauru.⁵³⁴ More pertinent concerns pertain to the pain, anguish, stress, and anxiety caused by prolonged and indefinite detention compounded by fear of not seeing their families again. The detainees also have limited access to interpreters, lawyers, and support networks. They are also restricted from contacting people outside the remote detention centres or even having visitors. When detainees are allowed to seek health care or counselling services, they are often physically restrained.⁵³⁵ The government has recently made it impossible for detainees to communicate with the outside world by restricting their mobile phones' access.⁵³⁶

The prolonged and indefinite detention of asylum seekers impacts their mental health negatively. It causes serious mental health issues stemming from their uncertainty about the future, the monotony of life, loss of control and independence, constant worry about family members still in danger in their home countries, impacts of past trauma, and witnessing the negative effects of detention on fellow detainees.⁵³⁷ It can lead to the development of issues such as stress, anxiety, depression, reduced cognitive functioning, and difficulties in emotional regulation. It may also leave detainees behaving in uncharacteristic or abnormal ways, which often leads them to engage in negative coping strategies such as self-harm. Detention may also cause asylum seekers sleeping problems and, in worst-case scenarios, lead to suicide. The use of force by detention guard and jail-like conditions also has adverse effects on mental health. The sad thing about the detention centres is that detainees' mental health is rarely an issue of consideration.⁵³⁸ Detainees are only allowed to seek medical attention in extreme cases, which may be too late in the case of mental health problems.

Asylum seekers who are detained in offshore detention and processing centres experience a vast range of mental health issues. When detainees are placed in prolonged or indefinite detention, it increases their risks of experiencing chronic depression and suicidal ideation.⁵³⁹ While detention directly impacts detainees' mental health, it also obstructs their access to legal

⁵³⁴ Ben, Doherty. "UN official says Australia responsible for inhuman treatment of asylum seekers." *Www.theguardian.com*. 2017.

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

⁵³⁷ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

advice and information that is essential for them to pursue their asylum claims. Asylum seekers find it difficult to prove their cases due to the very limitations imposed by mandatory detention. It is virtually impossible for them to access the services they need to prepare their defence to the highest standards. It also proves difficult for service providers like legal experts, doctors, interpreters, and educators to access detainees in the detention and processing facilities. The denial of tools that can help to adequately present asylum seekers' cases or appeal decisions can result in situations where genuine asylum seekers are returned to the life-threatening conditions that made them escape and seek asylum in the first place. It leads to a situation where Australia contravenes the internationally accepted principle of non-refoulement as discussed in Chapter 2. Before leaving their home countries, most asylum seekers have often been subjected to persecution, torture, and assault. Upon seeking help in Australia, they should be provided with every means available to recover. However, instead of humane and compassionate treatment, they are met with detention in prison-like environments with staff who are not adequately trained to help victims deal with the effects of war and stress. It is quite telling that the detention facilities in Nauru and Papua New Guinea are managed by a private security company that also provides security services to army bases, nuclear facilities, and prisons.

4.4.4.4 “Fast-Tracking”

The Labor government's efforts to come up with non-punitive policies to process refugees' claims left around thirty thousand people with “frozen” claims (processing had not started) by the time the Liberal Party returned to power in 2013. The thirty thousand people were loosely referred to as the “legacy caseload”.⁵⁴⁰ Since the government had only promised that they would be given primary protection, it stalled processing their claims for more than one year because it could not fulfil its promise without changing the law.⁵⁴¹ Changing the law took over one year, after which the fast-tracking process was established. It aimed to process their claims in less time while reducing the level of independent oversight in the process.⁵⁴² However, the new law also denied them government-funded legal help to make their claims. It was very hard for them to prove their need for protection. The so-called “Fast-Tracking” policy was a paradox.

⁵⁴⁰ Pearson, Elaine, Human Rights Watch “Seven years of suffering for Australia's asylum seekers, refugees.” *Www.hrw.org*. 2020

⁵⁴¹ Ibid.

⁵⁴² Ibid.

The process took longer than initially anticipated, as it only began four years after the Liberal government came to power-in 2017.⁵⁴³

Initially, applicants would only be invited by the minister, and the law had a different definition of refugees to the one contained in the Refugee Convention as explained in chapter 2. The government then required everyone to apply in 2017, threatening to cut them off from the little income support they received and bar them from applying for any Australian Visa.⁵⁴⁴ Some made the application with no help, making it hard for the government to make fair, timely, and accurate decisions and punishing the asylum seekers further.⁵⁴⁵ The fast-tracking law also allowed Australia to send an asylum seeker back to their domicile country even in the presence of a real risk that it would endanger their lives, thereby breaching the non-refoulment clause. The inconsistent definition of refugees, threats forcing asylum seekers to make hurried protection claim applications, and breach of the non-refoulment clause means that Australia's refugee system is inconsistent with international law.⁵⁴⁶ However, this was further mitigated by the passage of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*. The purpose of the amendment was to clarify that the *Migration Act 1958* does not authorise the removal of individuals found to attract the protection obligation under the international law. Nonetheless, while the new Act has provided a remedy, the lack of clarity prior to its passage resulted in concerns and endangerment of life in prior years.

4.4.4.5 Living on the Margins

One way through which people can leave detention facilities is by being granted bridging visas (BVE). The visa allows a person to live in Australia as they await their protection claim to be processed. The Minister of Immigration provides asylum seekers with bridging visas at their office's discretion. Holders are required to renew them regularly. They are also required to accede to a code of behaviour, and breaching it is grounds for returning them to a detention centre.⁵⁴⁷ The code of behaviour that they sign is broad-ranging, even encompassing online activity. The determination of whether one has breached the code is not subjected to any formal review. It creates a climate of fear among holders of bridging visas as they could be accused

⁵⁴³ Ibid.

⁵⁴⁴ Australian Refugee Council (b). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁵⁴⁵ Elaine, Pearson. "Seven years of suffering for Australia's asylum seekers, refugees." *Www.hrw.org*. 2020

⁵⁴⁶ Ibid.

⁵⁴⁷ Australian Refugee Council (b). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

falsely at any time and have no means to prove their innocence. Administrative issues sometimes mean that some bridging visas are often not renewed in time, thereby leaving holders in Australia without legal status.⁵⁴⁸ It means that they cannot study, work, or access essential services.

Bridging visas are also confusing to employers, and since they are often short-term, it forces most holders into low-wage employment under exploitative conditions. Most holders of bridging visas in Australia live in destitution.⁵⁴⁹

4.4.4.6 Detention in a Global Pandemic

Public health practitioners quickly identified mandatory detention centres as extremely high-risk places for the infection and transmission of the novel COVID-19 when the pandemic started spreading globally. It led to calls for the government to release people from the mandatory immigration detention centres as they were at great risk of infection and possible death.⁵⁵⁰ The Australian government was also warned that failure to release detainees would also place the broader community at risk as detention centres are porous facilities with staff and other persons moving in and out of them and re-entering the community. However, the government failed to heed the warnings and recommendations. It also failed to consider the impossibility of social distancing in immigration detention and the dire hygiene standards in the facilities both onshore and offshore.⁵⁵¹ The law is part of a punitive system that has failed to protect refugees' health and safety in the face of a global pandemic.

4.5 Analysis of Refugee Applications and Outcomes for Muslim Refugees

4.5.1 Public Attitudes to Islam and Muslim Identity in Australia

In most Western nations, including Australia, Muslim identity acquired new meaning after September 11, 2001. Today, many Westerners perceive Islam and Muslim identity as problematic and potentially dangerous. As a consequence, Muslim identity has been pushed further into the realm of “otherness” and has become socially disadvantageous.⁵⁵² Today, religious prejudice is the most important driver of negative attitudes towards asylum seekers in Australia.⁵⁵³ The main reason why this prejudice is directed at Muslim refugees is the belief that

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

⁵⁵⁰ Anthea Vogl, Caroline Fleay, Claire Loughnan, Philomena Murray, and Sara Dehm, "COVID-19 and the relentless harms of Australia's punitive immigration detention regime." *Crime, Media, Culture*, vol. 17, no. 1, 2021, pp. 43–51

⁵⁵¹ Ibid.

⁵⁵² Colic-Peisker, Val. *Bosnian refugees in Australia: identity, community and labour market integration*. UNHCR, 2003.

⁵⁵³ University of Melbourne. "Religious prejudice, not racism, main driver of intolerance towards asylum seekers." 2016, <<https://about.unimelb.edu.au/newsroom/news/2016/march/religious-prejudice-not-racism-main-driver-of-intolerance-towards-asylum-seekers>>

Islam is an intolerant religion. Apparently, Muslims expect the rest of society to tolerate Islam but are unwilling to show equal tolerance to non-Muslims in return.⁵⁵⁴ Another reason is that many Westerners, including Australians, perceive Islam as inseparable from the threat of terrorism.⁵⁵⁵

The combination of the reasons above results in a potent risk about what the nation might be opening itself to if it did not apply more stringent measures to screen Muslim asylum seekers. For instance, a leaked sensitive document from the Australian Cabinet recommended that the government applies additional screening criteria to thousands of asylum seekers from Syria and Iraq.⁵⁵⁶ They were being resettled in the nation as part of its efforts to help address the Middle East refugee crisis in 2016. The statement from an arm of the Australian government epitomizes perceptions of Muslim refugees in the nation.

4.5.2 Islamization of Australia

The main fear that Australians have concerning Muslim refugees connects with the perception of Islam as an intolerant religion and results in concerns about the “Islamization” of Australia. Many people believe that if Muslim asylum seekers are resettled in Australia without stringent restrictions, they will not wish to assimilate into Australian culture and way of life.⁵⁵⁷ Instead, it is believed that they would seek to impose their religious preferences on the rest of society, a phenomenon widely referred to as “Islamization”. While such suspicion is not expressed directly, it comes out in repeated anecdotes. There are concerns among Australians that the inclusion of Islamic doctrines or allowing Muslim immigration would result in the Australians living under the Sharia law. In 2016, Pauline Hanson, the One Nation Senator, made her maiden speech in the Senate to reiterate the fears that multiculturalism would lead Australia into living under the Islamic law.⁵⁵⁸ Such fears and suspicions mean that in the eyes of many Australians, Muslim asylum seekers are perceived to be likely to breach the cardinal rule that the

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid.

⁵⁵⁶ Gordon, Michael. “Leaked cabinet document reveals radical citizenship revamp, links migrant program to terrorist attacks.” *The Sydney Morning Herald*. (2016). < <https://www.smh.com.au/politics/federal/leaked-cabinet-document-reveals-radical-citizenship-revamp-links-migrant-program-to-terrorist-attacks-20160204-gmm5v4.html>>

⁵⁵⁷ Muller, Denis. ‘Islamization’ and other anxieties: voter attitudes to asylum seekers. University of Melbourne. 2016. <https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0007/2598460/Islamisation-and-Other-Anxieties.pdf>

⁵⁵⁸ Murphy, Katharine. ‘Pauline Hanson calls for immigration ban: ‘Go back to where you came from.’’ *The Guardian*. 2016. < <https://www.theguardian.com/australia-news/2016/sep/14/pauline-hanson-first-speech-senate-calls-for-immigration-ban>>.

nation has applied to immigrants for decades- the need to assimilate.⁵⁵⁹ Perceived unwillingness to assimilate by Muslim asylum seekers poses a real risk to Australian's way of life.

4.5.3 Islamophobia in Australia

There is an increasing prevalence of personal and institutional Islamophobia in Australia, which affects Muslim asylum seekers' outcomes. While Australian society identifies as pluralist and its culture is largely inclusive, there are exclusivist individuals and agencies that view the nation as predominantly Christian, thereby perceiving that Islam has no place in society.⁵⁶⁰ Ostensibly, it is why Islamophobia is increasingly being turned into normalized political rhetoric. Islamophobia is also rampant in media and social media across Australia. While the media in Australia has been quick to criminalize Islam and Muslim identity for a vast range of alleged deviance forms, it has been slow to notice, pinpoint, and present evidence for anti-Muslim acts in the country.⁵⁶¹ Moreover, the potential danger of anti-Muslim attacks and the spread of anti-Muslim hate and sentiment through social media are minimized by the government, community, media, and police because they focus on preventing violent extremist threats from the Muslim camp.

The media, especially, plays a huge role in facilitating the spread of Islamophobia. Iner analysed how selected events were reported in the Australian mainstream media between 2014 and 2015. The events include the September 2014 Brisbane police raids, the 2014 Sydney siege, the January 2015 *Charlie Hebdo* attacks in Paris, and the October 2015 Parramatta shooting.⁵⁶² Her analysis concludes that media reports about Islam and Muslim identity increased considerably in response to terror and violence-related incidents both in Australia and abroad. Iner also finds that a significant section of the reports was disparaging and pejorative of Islam and Muslim identity, thereby imposing the image of a menacing and unlikable "other" on Australian society.⁵⁶³ This leads to increased vilification of Muslims and connections to the terror attacks, showing the lack of a clear distinction between ordinary Muslims and terrorists in public discourse.

⁵⁵⁹ Muller, Denis. 'Islamization' and other anxieties: voter attitudes to asylum seekers. University of Melbourne. 2016. <https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0007/2598460/Islamisation-and-Other-Anxieties.pdf>.

⁵⁶⁰ Iner, Deria. Islamophobia in Australia- 2014-2016. *Charles Sturt University*. 2017. P.14

⁵⁶¹ Ibid.

⁵⁶² Ibid.

⁵⁶³ Ibid.

Political Islamophobia is also rampant in Australia, especially with right-wing groups forming political parties with the anti-Islamic sentiment, forming a crucial part of their platforms. In the 2016 Federal election, there were at least six anti-Muslim political parties fielding candidates for various seats.⁵⁶⁴ For instance, the Australian Liberty Alliance (ALA) contested 21 seats but did not win any.⁵⁶⁵ The One Nation Party's founder, Pauline Hanson, was first elected to parliament on an anti-Asian platform in 1996. In the 2016 Federal election, the party asserted its anti-Islamic sentiment by claiming that Islam was more of a political ideology than a religion.⁵⁶⁶ Pauline Hanson's party also advocates a ban on Muslim immigration, the wearing of face veils by Muslim women, halal certification, and the building of new mosques.⁵⁶⁷ In another example of extreme Islamophobia, the One Nation Party demands that all mosques and Islamic schools be fitted with government-controlled surveillance cameras.⁵⁶⁸ The party epitomizes political Islamophobia in Australia.

4.5.4 Muslim Refugee Applications and Outcomes in Australia

Australians' perceptions of Muslims, the fear of Australia's Islamization, and the spread of Islamophobia explain why Australia's response towards Muslim asylum seekers exhibits Islamophobic tendencies. Australian media's unwillingness to challenge government policy that discriminates against Muslim asylum seekers and tendency to adopt and spread anti-asylum seeker political discourse encourage the development and implementation of increasingly hostile policies towards Muslim asylum seekers, which reinforces similar attitudes among Australians. Besides applying stringent measures for those who apply for asylum through legal means, the government also treats Muslim asylum seekers who arrive by boats and are taken to detention centres without regard for their religion. Detained Muslim asylum seekers do not get Halal food, nor do they get time to pray as their religion requires.⁵⁶⁹ It results in mental torture, which is exacerbated by the knowledge of the fact that they may never leave the detention centres even if they are found to be genuine asylum seekers.

The negative sentiment against Muslim asylum seekers in Australia stems from a combination of fear, contempt, and resentment. Fears abound that Islam is a breeding ground for

⁵⁶⁴ Iner, Deria. Islamophobia in Australia- 2014-2016. *Charles Sturt University*. 2017. Pp. 1-87.

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid.

⁵⁶⁹ Armbruster, Stefan. 'Mental torture': Muslim immigration detainees say they haven't been given halal food for more than a year. *www.sbs.com.au*. 2020

terrorism, and the more Muslim asylum seekers the government accepts, the higher the risk it poses for Australians' security.⁵⁷⁰ There are also fears that Muslims have ambitions to grow into Australian society's dominant religious and cultural force. Australians fear that accepting more Muslim immigrants will expedite the pursuit of such ambitions. The resentment that Australians have towards Muslim refugees - and it shows in the nation's immigration policy - stems from the perception that in order to accommodate Muslims' religious sensibilities, Christian-oriented traditions must be watered down.⁵⁷¹ The contempt is reinforced by a perception that Muslims could take advantage of the nation's tolerance to assert their religious freedoms while their religion does not provide similar freedoms to non-Muslims. For instance, it is perceived unfair that an Australian citizen who is a motorcyclist must remove their helmet when entering a bank or shopping mall.⁵⁷²

The fears, contempt, and resentment impact the Australian immigration system's treatment of Muslim refugees to the extent that the nation is perceived to have an immoral preference for Christian refugees over Muslim refugees. For instance, even though Christians formed the minority of those seeking refuge from the wars in Syria and Iraq, Australia explicitly favoured them, even though more Muslim refugees needed help than Christian refugees.⁵⁷³ The state-directed prejudice against Muslim refugees stems from the demonization of Islam and Muslim identity within Australian culture. Between 2015 and 2017, 78 percent of the over 18,000 refugees from Syria and Iraq who were granted entry in Australia were Christians. However, Syria and Iraq are predominantly Muslim nations, showing how out of proportion the above figure is, especially considering that the UNHCR reports that Christian refugees from Iraq only account for 15 percent of all refugees.

The public discourse and national policy in Australia emphasize on using religion as a consideration factor in choosing who to resettle in the country. The approach is motivated in part by the belief that Muslim refugees are less likely to assimilate and integrate into the nation's Anglo-Christian dominated culture than Christian refugees.⁵⁷⁴ Refugee Muslim women, especially, face great obstacles in the resettlement process, including language barriers.⁵⁷⁵ As

⁵⁷⁰ University of Melbourne. 'Islamization' and other anxieties: voter attitudes to asylum seekers. *Arts.unimelb.edu.au*. 2016.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ Odysseus Patrick, "Australia's Immoral Preference for Christian Refugees". *Www.nytimes.com*. May 5, 2017.

⁵⁷⁴ Ibid.

⁵⁷⁵ Casimiro, Suzy, Peter Hancock, and Jeremy Northcote. "Isolation and insecurity: Resettlement issues among Muslim refugee women in Perth, Western Australia." *Australian journal of social issues* 42, no. 1 (2007)

Muslims, such women are part of a religious minority that continues to face racial attacks, exacerbated by international terrorism. As refugees and asylum seekers, they face the challenge of moving on past trauma and finding security in a new country with markedly different customs and social mores. As women, they struggle to find a voice for themselves coming from a background that limits their expression and thrown into a society that aspires for gender equality.⁵⁷⁶ Their struggles represent an unfavourable outcome for Muslim refugees in Australia.

4.6 Analysis of Refugee Applications and Outcomes for Other Religions

4.6.1 Christian Refugee Applications and Outcomes

While Australia boasts of running a non-discriminatory immigration program, Christians have started to dominate humanitarian visas in the country in recent years.⁵⁷⁷ Statements from politicians and government agents allude to a preference for Christian refugees in Australia over other religions. The approach has been likened to asking a drowning man what their religion is before saving him.⁵⁷⁸ The preference for Christian refugees in Australia stems from their perceived ease of assimilating into Australian culture and society combined with the worry of people being radicalized into Islam. Christian refugees face less stringent restrictions compared to refugees who ascribe to the Muslim region when being granted entry into Australia.⁵⁷⁹ The media also fuels the tilting of immigration policy to favour Christian refugees, claiming that accepting more Christian immigrants, especially from the war-hit nations of Iraq and Syria, will protect Australians “against creeping Islamism because they have suffered its effects and know its warning signs.”⁵⁸⁰ It makes Australians believe that accepting more Christian refugees can inoculate the nation against the ideological violence that displaced them in the first place.

The preference for Christian refugees in the public discourse and immigration policy in Australia stems from the nation’s strong Anglo-Celtic background. It is a way of protecting Australian nationalism.⁵⁸¹ Media reports of asylum seekers in Australia converting to Christianity indicate how many people conflate Christianity and Australianness.⁵⁸² Government

⁵⁷⁶ Ibid.

⁵⁷⁷ Phillips, Janet. *Australia’s Humanitarian Program: A Quick Guide to the Statistics Since 1947*. 2017, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/HumanitarianProgram>

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Devine, Miranda. ‘We can’t go home’: Australia must help Christian refugees persecuted by ISIS. *www.dailytelegraph.com.au*. 2017.

⁵⁸¹ Randell-Moon, Holly. "Common values': whiteness, Christianity, asylum seekers and the Howard Government." (2006). pp. 1-14.

⁵⁸² Ibid ,

policy preferring Christian refugees over refugees from other religions reflects a religiously inflected cultural agenda that presents the nation as one with broad and inclusive values but underpinned by the aim to protect Australian nationalism that has an Anglocentric outlook. It presents non-Christian values as secondary to national interests and emphasizes the moral compatibility of Christianity and Australianness.⁵⁸³ It is why some refugees who face mandatory detention in the Nauru and Papua New Guinea centres may opt to convert to Christianity to increase their chances of being granted entry into Australia. For instance, in 2005, it was reported that the Australian immigration department was reviewing refugee claims for at least thirty long-term detainees from Islamic countries because they had converted to Christianity.⁵⁸⁴ The department justified the reviews by arguing that deporting such detainees back to their countries would likely expose them to persecution under strict Islamic laws that punish conversion from Islam. However, it pointed to a possible Christian bias by the government, with fears that it may encourage asylum seekers to convert to Christianity to gain resident status.

Non-white immigrants are perceived to lack English language skills and are deemed more likely to refuse to adapt to the Australian way of life. On the other hand, Christian refugees are perceived to be likely to respect Australian culture and traditions, assimilate into Australian society, and leave their own lives behind to embrace a new life in Australia.⁵⁸⁵ It is why Australians believe that non-Christian refugees would overpopulate their country and bring with them their bigotry, intolerance, and violence, thereby preferring Christian refugees over other religions. It shows the importance of Christianity as a dimension of Australian identity. Ostensibly, exclusively granting Christian refugees entry into Australia keeps Australia safe and reduces the threat of social disruption.⁵⁸⁶ However, it does not imply that Christian refugees who are resettled in Australia do not face acculturative issues. Some face literacy and language issues and experience problems within the Australian educational and vocational centres.⁵⁸⁷ Acculturation requires refugees to re-examine their original values and cultural beliefs and realign them to integrate better with the Australian culture. Failure to acculturate successfully can result in stress that emerges in various forms. However, Christian refugees acculturate and

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Randell-Moon, Holly. "Common values': whiteness, Christianity, asylum seekers and the Howard Government." (2006).(Ibid.)

⁵⁸⁶ Ibid.

⁵⁸⁷ Milner, Karla, and Nigar G. Khawaja. "Sudanese refugees in Australia: The impact of acculturation stress." *Journal of Pacific Rim Psychology* 4, no. 1 (2010)

assimilate better in Australia, implying that they experience better outcomes than Muslim refugees and other non-Christian and non-Muslim refugees.

4.6.2 Why Christian Refugees Experience Better Outcomes than Refugees from other Religions in Australia

Christian refugees experience better outcomes after resettling in Australia because they assimilate and acculturate better than refugees who ascribe to other religions. It means that they experience more social connectedness in their host country, which provides them with opportunities to be involved in the wider Australian community.⁵⁸⁸ When non-Christian refugees fail to assimilate and acculturate, they often feel excluded from the wider community and fall into the social isolation trap. Since Christian refugees come to a country where their religious values are already practised, they are more comfortable adapting and participating in social activities. The church serves as a focal point of the relationships between Christian refugees and Australian nationals.⁵⁸⁹ Such relationships enable Christian refugees to combine the successful elements from their culture with the appealing elements of Australian culture. In so doing, it means that Christian refugees are better placed to contribute positively to Australian culture's vibrant multicultural fabric.⁵⁹⁰ When refugees from other religions fail to engage in genuine encounters with Australian culture and society, they cannot learn and contribute positively to their host society. Ostensibly, Christian refugees encourage deeper unity among Australian refugees and general Australian community, while refugees from other religions are often deemed to be catalysts of social disruption within Australian communities.

4.7 Conclusion

Australia does not comply with international refugee laws such as the 1951 Convention and the 1967 Protocol. As a signatory to both conventions, Australia is obliged to observe their provisions. In reality, as demonstrated above, the nation does not fully abide by the United Nations' guidelines and declarations.⁵⁹¹ The nation's racist and selective approach against immigrants dates back to the *Immigration (Restriction) Act 1901*, which in turn enabled

⁵⁸⁸ Bambrick, Tom. "The Emotional Politics of Syrian Refugees Evoked by Australian Media Reporting Shame, Compassion, Fear." (2016).

⁵⁸⁹ Ibid.

⁵⁹⁰ Ibid.

⁵⁹¹ William, Maley. "Australia's refugee policy: domestic politics and diplomatic consequences." *Australian journal of international affairs* 70, no. 6 (2016): 673

otherwise christened "The White Australia Policy," a critical guiding principle of the nation's immigration for much of the 20th century.

Its abolition in 1973 was a watershed moment in the nation's refugee policy development as a racial background was no longer a criterion in migrant or refugee evaluation and acceptance procedures. Additionally, the nation was no longer focused on refugees who offered cheap labour. Instead, it focused more on people with specific and specialized skills. Today, Australia's domestic legislation on refugees is contained in the *Migration Act 1958*, which provides all the immigration and visas provisions for all incoming persons, including refugees and people seeking humanitarian assistance. However, the fact that the Commonwealth Constitution allows nations to legislate for immigration and external affairs enabled Australia to legislate refugee matters without necessarily making them consistent with international conventions, treaties, protocols, and declarations.

The *Migration Act 1958* (Cth) is the legislative basis for all types of migration and citizenship applications, including for those requiring humanitarian assistance. Section 5H(1) of The Act defines refugees in the same way they are defined in Article 1 of the 1951 UNHCR Convention, which was later modified by the 1967 Protocol. The Act also activates the nation's non-refoulement obligations - the obligation not to return asylum seekers to the territories where their lives and liberties are threatened for the reasons stated above. The country's immigration program has two primary components: migration for skilled and family immigrants and a humanitarian program. The humanitarian program is made up of two components: offshore resettlement applications (where people apply for resettlement visas while overseas before arriving in the nation) and onshore asylum applications, where asylum seekers who arrive without visas are detained in designated facilities before the processing of their asylum claims. Australia is harsher to arrivals under the onshore program compared to those entering the country through the offshore program. Most of those who arrive through the offshore program are often granted permanent settlement status. In contrast, arrivals under the onshore program face lengthy determination procedures, and when they succeed, they are often only offered temporary visas.

For over 30 years, Australia has implemented a policy of mandatory detention for asylum seekers who arrive by sea, leading to divisions in legal procedures and public sentiment between the rights of onshore and offshore refugees. Such a policy skews public opinion to believe that asylum seekers are smugglers and dangerous criminals who must be locked away before their

refugee claims are assessed. However, offshore refugees who arrive by air are not subjected to such restrictive policies because they have arrived with a visa, such as a student or a tourist visa. In reality, those arriving by sea are more likely to qualify as refugees under Public International Law than offshore refugees, yet the former are conferred fewer rights than the latter. It violates Australia's obligations under public international law.⁵⁹²

To refugees, protection transcends beyond finding safety from the fears that led them to flee their homes. Instead, they seek nations where they can start their lives anew, satisfy their broader needs, and work towards returning to normalcy. Instead, they are met with mandatory detention in offshore facilities in Macau Nauru and Papua New Guinea. The facilities are fenced into compounds that can be locked down at short notice. Those detained are referred by assigned numbers rather than by their names, which is as dehumanizing as it is humiliating. The facilities' guards also show little sensitivity to the plight of the detained asylum seekers. When one of the most endowed nations on earth is presented with people in obvious risk and overwhelmed by their experiences in their countries of origin, it responds with greater ostracization of the individuals instead of sympathy.

Australia rarely receives refugees in the real sense of the word- people in immediate need for protection on one of the five grounds enshrined in the 1951 UNHCR Refugee Convention. Most asylum seekers attempt to access Australia by boat, often arriving uninvited and without visas. The Convention requires the nation not to punish asylum seekers who attempt to access Australia illegally. However, Australia's policy is skewed towards preventing "boat people" from entering Australia and encouraging asylum seekers to use the offshore humanitarian program rather than trying to enter the country illegally.⁵⁹³ It makes the nation's laws and policies concerning refugees dissonant with its international refugee protection obligations. While Australia's humanitarian refugee program is generous and accommodating to offshore asylum seekers, its treatment of illegal immigrants and onshore asylum seekers is dissonant with its commitments under public international law.⁵⁹⁴ The law's default position requires asylum seekers who arrive without a visa to be detained, meaning that the only thing a court can review about them is if they have a valid visa. The law requires asylum seekers to be detained until they

⁵⁹² Jane, McAdam. *Refugees Why seeking asylum is legal and Australia's policies are not*. UNSW Press, 2014.

⁵⁹³ Mary, Crock. "Shadow plays, shifting sands and international refugee law: Convergences in the Asia-Pacific." *International and Comparative Law Quarterly* (2014): 258

⁵⁹⁴ *Ibid.*

are provided with a visa or choose to leave the country. Unlike most nations globally, the detention of refugees in Australia is not contingent on individual circumstances. It shows that the system is in breach of Australia's obligations under the Refugee Convention and International law.

Whereas Australia cannot establish a religion and promotes freedom of religion, Christianity is its dominant religion. The major religions in the nation- Christianity, Islam, Judaism, Hinduism, and Buddhism- all have profound histories of providing sanctuary, asylum, and protection to vulnerable strangers. Christianity calls for loving one's neighbour, welcoming strangers, challenging unjust systems, and providing refuge and care to the marginalized and exiled. The Bible- specifically the Old Testament- is remarkably supportive of offering protection to vulnerable foreigners who have been displaced from their lands for various reasons.

However, Australia's normalization of the detention of asylum seekers and externalization of their processing does not ascribe to these values. It enables the refugee situation to become depersonalized so that the Australian public and religious groups feel more removed from asylum seekers' plight. The law has many Australians believing that the act of seeking asylum is illegal in itself, which is why they pay little attention to the reasons why they escape their home countries or the trauma that they experience en-route. The question of religion, particularly Islam, has catalysed the harshness of Australia's refugee law. The dominant discourse about "good" and "bad" Muslims and refugees explains the increasingly important politics of religious identity in Australia's refugee program.

Australia's intake of refugees from the Syria-Iraq region is disproportionate to the proportion of Christians who have been displaced from the war-torn region. It points to a refugee law selection process that is skewed against Muslims. Muslims form a distinct cultural group that is far-removed from Australian values. Due to their cultural identification, Muslims cannot be integrated and assimilated enough to commit to Australian values. It is why Muslim refugees are often deemed unsuitable for Australian citizenship.

The persecution of Rohingya Muslims in Burma is a flagrant example of religious persecution near Australia's region. However, instead of protecting them and granting them asylum, the nation has mostly ignored them.⁵⁹⁵ Instead, the Australian humanitarian program has

⁵⁹⁵ Refugee Council of Australia. "Submission on The Status of The Human Right to Freedom of Religion or Belief" www.refugeecouncil.org.au. (2018).

focused more on protecting refugees from far-off regions so long as they are Christians.⁵⁹⁶ The main reason why this prejudice is directed at Muslim refugees is the belief that Islam is an intolerant religion. Apparently, Muslims expect the rest of society to tolerate Islam but are unwilling to show equal tolerance to non-Muslims in return. Another reason is that many Westerners, including Australians, perceive Islam as inseparable from the threat of terrorism.

Australia's refugee program seeks to transform migrants rather than the nation, through integration and assimilation. Considering that Australia is a Judeo-Christian nation, Muslims-mostly migrants- are perceived as cultural and religious "others". They are perceived to hold values that are incompatible with the nation's values, such as wearing head coverings (Muslim women) and following Sharia law. As such, they are deemed unable to understand the privileges, responsibilities, and commitment demanded of them as Australian citizens. Other Islamic values that are considered to be incompatible with Australian values include gender inequality and religious fundamentalism. Many Australians believe that if the country accepts many Muslim immigrants, they would seek to impose their religious preferences on the rest of society, a phenomenon widely referred to as "Islamization".⁵⁹⁷ It explains why the government is keen to harmonize its immigration policies with citizens' interests through imposing more stringent measures on Muslim asylum seekers. Other fears stem from the perception that in order to accommodate Muslims' religious sensibilities, Christian-oriented Australian traditions must be watered down. It explains why non-Christian values are deemed to be secondary to national interests and the moral compatibility of Christianity and Australianness. In conclusion, while Australia remains largely multicultural, there are reasonable concerns on the treatment of Muslim refugees, which differs from refugees from other religions. The country is largely accepting to Christians who are perceived to be easily compatible with Australianness and not the Muslims who are thought to find it challenging to assimilate.

⁵⁹⁶ Ibid.

⁵⁹⁷ Muller, Denis. 'Islamization' and other anxieties: voter attitudes to asylum seekers. University of Melbourne. 2016. <https://socialequity.unimelb.edu.au/__data/assets/pdf_file/0007/2598460/Islamisation-and-Other-Anxieties.pdf

Chapter 5: A Comparative Analysis of Australian and Saudi Arabian Refugee Legal Regimes

5.1 Overview

5.2 Current Situation of Refugees and Asylum Seekers under Saudi Refugee Law

5.3 Current Situation of Refugees and Asylum Seekers under Australian Refugee Law

5.4 Similarities in Saudi and Australian Refugee Laws

5.5 Differences in Saudi and Australian Refugee Laws

5.6 Impact of Sharia on Saudi and Australian Refugee Laws

5.7 Does Saudi Refugee Law Incorporate Humane Values of Sharia?

5.8 Does Australian Refugee Law Incorporate the Humane Values of Sharia?

5.9 Summary of the Chapter

5.1 Overview

The chapter aims at employing comparative law to explore similarities and differences in Saudi and Australian Refugee Laws. The technique of comparative legal research is used to compare various legal norms and case laws to analyze refugee laws of both the countries for suggesting changes to strengthen the existing legal jurisprudence and legislation. Comparative study of law from Saudi Arabia and Australia is helpful in providing recommendations for each country to learn from the experience of the other and integrate useful clauses in the refugee law. The study will help synthesize a comprehensive law to protect the rights of refugees and asylum seekers. Doctrinal legal research is used to search the relevant principles from the legal documents and concepts of both the countries. The researcher has identified and analysed case law from Common law in Australia and examined their application in different court decisions from appellate courts. Additionally, sources of Sharia including Quran, Sunnah, conventions, statutes, has been evaluated in the context of refugee problems. Peter D Cruz's framework of comparative legal study has been used as a guide for the study to conduct the analysis of legal documents in accordance with doctrinal legal research.⁵⁹⁸

The qualitative research methodology is used to determine relevant sections of laws, court decisions, and courts' interpretation of refugee laws in different cases of asylum seekers. The qualitative approach of reviewing legal documents and literature from Australia and Saudi Arabia through comparative analysis has helped researcher to ascertain the status of refugees and asylum seekers in both the countries. Additionally, the cases and court decisions have also been located in association with the research problem for identifying similarities to facilitate objective conclusions. The royal decrees issued by Saudi Arabia are also analysed for their relevance with Sharia principles protecting the refugee rights. The analysis has been helpful in exploring a common premise from the refugee laws of both Saudi Arabia and Australia and its relevance with Sharia principles.

⁵⁹⁸ Oderkerk, Marieke. "P. de Cruz, A Modern Approach to Comparative Law, Kluwer, Deventer, 1993. X+ 350 pp., Dfl. 90. ISBN 90-65-44-662-1." *Netherlands International Law Review*, vol. 42, no. 1, 1995, pp. 139-144.

5.1.1 Immigration

Encouraging immigration laws enables Australia to become a culturally vibrant country as migration has brought contrasting food, music, dressing, values, and beliefs to ensure multiculturalism in the country.⁵⁹⁹ Australian culture has accepted these values and integrated them into their society. Now the different cultural values are a part of the national identity of Australia. Australia can be considered as the amalgam of various ethnic groups immigrated to the country in search of better future prospects.

5.1.1.1 Psychological Migration

A national community uses citizenship as a sense of belonging to a specific country. The national identity is directly associated with citizenship. Regardless of the fact that people immigrate for financial or humanitarian purposes, psychology of migration begins during the planning phase.⁶⁰⁰ Just like immigration, psychology of migration is multidimensional including future expectations about their social and economic life. Migration can have a negative or positive impact on the life of individuals depending on their ability to adapt the new cultural and social norms of the host country. If the immigrants are unable to adjust in the conditions, they are likely to become socially isolated. The isolation may result in certain psychological complications, which can have negative consequences on the health as well. However, immigrating people can find a community consisting of the people from their country of origin and form communities in the host country.

The example of two different communities can be cited who migrated to Australia after World War II. The British immigrants coming to Australia found different commonalities in the history, culture, and sports between their country of origin and host country. The similarities provided them an opportunity to integrate into the Australian society without any difficulty. However, Yugoslavian people migrating to Australia felt substantial challenges to settle into the country due to the dissimilar political, social, cultural, and natural atmosphere.⁶⁰¹ Even the climate of the country was a barrier for the Yugoslavian nationals to adjust in the new

⁵⁹⁹ Kymlicka, Will, *Multiculturalism: Success, Failure, and The Future*, Migration Policy Institute, 2006, 4.

⁶⁰⁰ Tabor, Aidan and Taciano Milfont, Migration change model: Exploring the process of migration on a psychological level, *International Journal of Intercultural Relations*, 2011, 818-820.

⁶⁰¹ Commonwealth of Australia. "Serbia-born community information summary." *Australia Government Department of Home Affairs*. 2018.

environment. Remarkable difference in the summer and winter temperatures makes it difficult for people emigrating from Yugoslavia to adopt the lifestyle of Australia.⁶⁰²

In the case of refugees migrating to Australia or Saudi Arabia, similar psychological issues discourage immigrants to integrate into the society of both the countries. Saudi Arabia is an Islamic country with legal framework based on the teachings of Islam and Sharia. Moreover, the religious and cultural values of the country are dissimilar to the other nations, which create different psychological issues for the refugees. Similarly, people entering Australia through boats are not welcomed and placed in different detention camps. The inhuman treatment of the refugees at such camps results in various physical and mental health issues for the inhabitants. Thus, psychological migration is significantly relevant in the case of refugees seeking asylum in Saudi Arabia and Australia.

5.1.1.2 National Immigration Policy

Although some differences exist in the immigration rules of Saudi Arabia and Australia, national immigration policies of both countries consider economic and humanitarian assistance under international conventions. Legal framework of the two countries ensures that national identity is not influenced by the increased number of immigrants seeking residency rights.

Australia

Australia's current immigration policy aims at strong border protection especially against the boat people. Australian law is quite strict for discouraging boats entering Australian territory due to the fear of human trafficking. The strong laws focus on sending a clear message to the world that Australia will not allow illegal entry in the country through sea. The increasing population of the country that could reach 35 million by 2050⁶⁰³ is already having a negative impact on the economic growth of the country. Additionally, the large population also has direct influence on the pace of urbanization and environmental protection through various social and cultural outcomes.⁶⁰⁴ Consequent immigration policies of Australia after WWII are interrelated with the state's citizenship policy to preserve the national identity through controlling the number of immigrants on annual basis.

⁶⁰² Ibid

⁶⁰³ Productivity Commission, Population and Migration: Understanding the Numbers, Research Paper, Australian Government, 2010, 1.

⁶⁰⁴ Ibid.

Different regional and international events have an integral role in the evolution of the Australian immigration policy. Yugoslavian problem, Vietnam War, and the Middle Eastern issue specifically Syrian crisis have compelled Australia to face major influx of refugees in the country.⁶⁰⁵ Therefore, it is an issue that the country has been dealing with for several decades. Additionally, Australia's status of an ideal student destination has also helped in increasing student population in the country. Moreover, volatile political condition of Afghanistan and Iraq has also resulted in the mass influx of refugees. Thus, the entry of various ethnic groups in the country as immigrants has a significant influence on the concept of the national identity of Australia.⁶⁰⁶ Stephen Castle describes the Australian nation as having multicultural citizenship, where everyone is equal and their beliefs have similar value.⁶⁰⁷ However, the country has experienced different social unrests due to the conflicts among various ethnic communities having contrasting values. Hence, it can be regarded that Australia lacks effective association between its immigration policies and citizenship.

Saudi Arabia

Currently, Saudi Arabia is host to refugees from a number of countries including Ethiopia, Yemen, Pakistan, and Indonesia along with labour force from other countries.⁶⁰⁸ The country has an established *Kafala* system, which grants every Saudi citizen the right of hosting immigrants from other nations. The *Kafala* system is used to regularize the refugees in the country by allowing them to reside and work in the country.⁶⁰⁹ Under the system, every foreign national can be sponsored by a Saudi citizen to live and work in the country. Although the current arrangement cannot be regarded as close to a refugee settlement, it provides the best option for the immigrants to stay in Saudi Arabia and work. Hence, it can be compared to the Islamic principle of *aman*, which grants safety to the foreigners in a Muslim country.

Nevertheless, the Saudi government has used the *Kafala* system to facilitate specific refugee groups in the country. Saudi-American Oil Company (ARAMCO) was particularly ordered by the government to employ Palestinian refugees in 1949 to help them support their families.⁶¹⁰ In 1979, *Kafala* system was used through a royal decree to help Eritrean refugees

⁶⁰⁵ Department of Immigration and Citizenship. "Refugee and Humanitarian Issues: Australia's Response." 2009.

⁶⁰⁶ Ghassan Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society*, Pluto Press Australia, 2003.

⁶⁰⁷ Stephen Castles, *Migration and Community Formation Under Conditions of Globalisation*, *International Migration Review*, 2005, 1143-1166.

⁶⁰⁸ Migrant Refugees. Country profiles: Saudi Arabia. <<https://migrants-refugees.va/country-profile/saudi-arabia/>>

⁶⁰⁹ Charlotte Lysa, 'A recent history of refugees in Saudi Arabia,' *Refugee History*, 2020.

⁶¹⁰ *Ibid.*

enter Saudi Arabia without visa processing and documentation.⁶¹¹ Yemeni nationals have also enjoyed a kind of general amnesty in Saudi Arabia until 1990.⁶¹² The government has also issued a number of royal decrees to regularize the status of Syrian refugees in Saudi Arabia in the backdrop of Syrian crisis of 2011.⁶¹³ Thus, history exhibits that Saudi laws consider the Islamic principle of *aman* as a legal instrument to support refugees in the country as it requires both the country and individuals to accept and assist any asylum seekers who come into the nation.

5.1.2 Migration Legislation

Australia's *Migration Act 1958* has 507 clauses spanning more than 800 pages, which deal with economic and humanitarian aspects of immigration. Although current migration laws reinforce the national identity of Australia through various provisions by carefully selecting the individuals for entering, staying, and applying for the citizenship, the visa framework needs to be revised and simplified to assist refugees willing to settle in the country.

Similarly, Saudi *Kafala* system is based on the Islamic principle of *aman*, but it lacks effective mechanism to fulfill the needs of all the refugees. The Saudi government has to issue additional instructions to adjust the immigrants of the specific national origins. The examples of royal decrees for Saudi-American Oil Company (ARAMCO) to employ Palestinian refugees in 1949, using *Kafala* system in 1979 to help Eritrean refugees enter Saudi Arabia without visa processing and documentation, and granting general amnesty to Yemeni nationals can be presented as the shortcomings of the current immigration system. Although Saudi government has also issued a number of royal decrees to regularize the status of Syrian refugees in Saudi Arabia in the backdrop of Syrian crisis of 2011, it should extensively revise its immigration policy to incorporate humanitarian aspect in the legislative framework.

5.1.3 Entry to Saudi Arabia and Australia

Entry into Australia is through air or sea as it is an island continent.⁶¹⁴ Australian government strongly prohibits entry of non-citizens without valid travel documents such as passport and visa.⁶¹⁵ However, specific temporary visa arrangements are also provided for the people who are employees of some airlines or shipping vessels. Additionally, the provisions of

⁶¹¹ Ibid.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Migration Act 1958, s42.

⁶¹⁵ Ibid , Division 3, section 29.

the *Migration Act of 1958* also include certain territories into the migration zone, where the immigration laws are applicable. In addition to the mainland and Tasmania, areas such as Ashmore Reef, Keeling Islands, and Christmas Islands are also part of the Australian territory.⁶¹⁶

Entry into Saudi Arabia is mainly for religious purposes. Hence, the government has started an e-visa service for people belonging to different countries. However, the individuals must possess valid travel documents such as passport to avail the opportunity. Additionally, the Saudi government allows labour visas for the nationals of different countries. The immigrants coming to Saudi Arabia are required to obtain a resident permit, *Iqama*, to make their stay as legal. Saudi government has divided travellers from different countries into two categories with dissimilar visa requirements. Immigration under humanitarian category is processed under *Kafala* system to assist refugees fleeing their country due to political and racial oppression. The government uses *Kafala* system for regularizing the refugees in the country by allowing them to reside and work in the country.⁶¹⁷ However, undocumented entry into the country is strictly prohibited, which can be regarded as an effort to safeguard the country's security. An influx of undocumented individuals would pose a security risk in the country, which explains the need for documenting all individuals getting into the nation.

5.1.4 Visas

Entry of non-citizens in Saudi Arabia and Australia is not possible without valid travel documents usually consisting of a passport and visa. A visa is the legal permission of residing in the country. The Australian visa framework has different classes and subclasses divided according to the purpose of visit.⁶¹⁸ Saudi government has two visa categories for the visitors under the *Iqama* and *Kafala* system. While Saudi visa framework requires a visitor to have an individual sponsor, Australia uses different permits based on the nature of the entry and stay. Therefore, in the case of Australia, sponsorship by a local is not mandatory as it is with Saudi Arabia.

The Australian visa framework is more complicated than that of Saudi Arabia, which has 10 classes with more than 100 subclasses.⁶¹⁹ Saudi Arabia has a relatively simple visa framework, which can help Australia review its current system to reduce the number of

⁶¹⁶ Migration Amendment (Excision from Migration Zone) Act 2001.

⁶¹⁷ Lysa, Charlotte, 'A recent history of refugees in Saudi Arabia,' *Refugee History*, 2020.

⁶¹⁸ Migration Act 1958 s31

⁶¹⁹ Migration Regulations 1994.

categories and subcategories through easy documentation process. It can also be argued that the existing visa frameworks of Australia and Saudi Arabia facilitate the governments to accept and reject immigration applications randomly. Hence, the system of visas in both countries should be brief and meaningful with uniform standards to respect the right of equality for all immigrants. The current system includes multiple possible options that not only create confusion for the asylum seekers, but applying for an incorrect system will only extend the period and result in denied entry.

Currently, the Australian government is following a points system for encouraging highly-skilled workers to get immigration. The system is efficiently guiding the required workforce to the desired regions, which has a positive impact on the national economy. The government has also developed State Nomination Occupation list for highlighting the preferred skills required in various states.⁶²⁰ Individuals belonging to the professions mentioned in the list are preferred for Australian visa. They are believed to offer additional input into the Australian work environment, which is necessary for continued growth in the expansive nation.

Similarly, the visa class 457 and 417 deal with people seeking employment in Australia to obtain temporary or permanent resident status. However, both visas require sponsor from an established business in Australia to issue the visa. The sponsoring business should fulfil certain regulations to ensure that the individual will be secure while working in a specific organization. Such conditions make it difficult for the immigrants to enter Australia.

Both Australian and Saudi Arabian visa frameworks provide statutory rights to the state to remove or deport non-citizens residing in the country. However, the ambiguity in such cases should be analysed deeply. In Australia, the *Migration Act 1958* has two specific sections dealing with the issue of deportation. Section 201 applies to the cancellation of visa of a person who has committed some criminal offence, whereby section 501 allows cancellation of visa on moral grounds. Once the visa is cancelled, the government automatically removes a person from its territory. However, the two sections provide the government an opportunity to deport a person even after a long stay in the country, which can be regarded as the violation of basic human rights. The Australian courts have given numerous decisions in deportation cases to protect the rights of non-citizens. For example, in *Shaw*, the court clearly ruled that a person should not be

⁶²⁰ Victorian Government, State Nomination Occupation List for Graduates in Victoria 2012 & 2013, www.LiveInVictoria.vic.gov.au/graduates, accessed 9 March 2021.

deported after exceeding the ten-year requirement for residency.⁶²¹ Thus, the issue of removing or deporting non-citizen with lengthy stay in Australia is a matter of concern for the government, which needs an immediate solution. It is vital to assess matters in details since some of the non-citizens have been in the country in their current status due to the system being uncondusive to them and their applications for permanent status.

5.1.5 General Requirements

General requirements for obtaining a visa in Saudi Arabia and Australia include public interest test, health check, and character test. Similarly, health requirements in both the countries require that individuals must produce a valid certificate from a designated medical officer to show that they have no major diseases. Australian government also demands a valid health insurance from the immigrants as a requirement of the visa.⁶²² Similarly, individuals immigrating to Saudi Arabia have to provide certificates about vaccination against certain diseases. The health requirements ensure that citizens of both the countries are safe from contagious diseases.

5.1.6 International Protection

The most common reasons for immigrants to leave their country of origin include poverty⁶²³, war⁶²⁴, political oppression, and natural disaster.⁶²⁵ According to the United Nations Convention of 1951, a refugee can be ‘any person who owing to a well-founded fear of being persecuted for reasons of race, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country’.⁶²⁶ Australia like other European countries, defines refugees according to the international refugee laws, but Saudi Arabia employs Islamic and Sharia principles for determining the refugee status of an individual. The countries like Australia and Saudi Arabia are concerned about the continued influx of illegal immigrants. Particularly, Australia feels a kind of xenophobia due to the impact of illegal entrants seeking international protection.⁶²⁷ Interestingly, individuals entering the country illegally are more

⁶²¹ Shaw v Minister for Immigration and Multicultural Affairs [2003] HCA 72.

⁶²² Article 6 Council Directive 2004/114/EC, Official Journal of the European Union L 375/18.

⁶²³ Joseph Carens, Migration and Morality: A Liberal Egalitarian Perspective, in Brian Barry and Robert Goodin (eds), Free Movement: Ethical Issues in the Transnational Migration of People and Money, New York, Harvester Wheatsheaf, 1992, 25 - 47.

⁶²⁴ 8 Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equity, Oxford: Martin Robinson, 1983, 25-40.

⁶²⁵ Alan Wolfe, Whose Keeper: Social science and moral obligation, Berkley and Los Angeles: University of California Press, 1991, 1-23.

⁶²⁶ Article 2, Convention relating to the Status of Refugees 1951, vol. 189, p. 137.

⁶²⁷ Crock, Mary, A sanctuary under review: where to from here for Australia’s Refugee and Humanitarian Program? University of New South Wales, Law Journal, (2000), 246-250.

visible than the legal entrants over-staying in the country. Moreover, illegal immigrants should be dealt with compassionately due to their horrible experiences in their home countries. Both Australia and Saudi Arabia are facing increased numbers of illegal immigrants arriving at their borders without any documentation due to unrest in the Middle East and Syrian crisis. The uprising in Syria is threatening the Islamic ideology of Saudi Arabia, and also posing a significant challenge for Australian multicultural identity.

5.1.6.1 Humanitarian Visa

According to Australian immigration policy, temporary safe haven visas are issued to some refugees. A number of visas, both temporary and permanent, and their issue, depend on whether the refugees apply onshore or offshore, and, if onshore, whether they are cleared by the immigration authorities or not. The Australian government has classified seven offshore and three onshore visas to facilitate asylum seekers in the country.⁶²⁸ People placed in the category of onshore visa are placed in detention camps while their case regarding establishment of the status of refugee is not decided. On the other hand, the offshore visa applies to those individuals who have been intercepted by the law enforcement authorities within the territory or in a boat outside Australian jurisdiction. Such refugees are placed in the offshore or onshore detention centres depending on the situation and the incumbent government.

The overall situation in the detention camps is quite alarming as officials of the camps treat refugees with oppressive measures, which results in physical and mental health issues for them. A number of media reports have emerged about inhumane treatment in the onshore and offshore camps. The Australian government has specifically established its offshore camps in far-off destinations to avoid public attention from the situation of these camps. The government has specifically taken harsh measures to discourage the illegal entry through boats. Thus, it can be argued that the Australian government takes strict action against people trying to enter the country illegally.

The Australian government requires that an individual should be assessed and approved by the United Nations High Commissioner for Refugees to qualify for a refugee visa.⁶²⁹ Currently, the Australian visa framework has no provisions for accommodating refugees displaced from

⁶²⁸ *Migration Act 1958*, s36.

⁶²⁹ 9 Migration Regulations 1994, schedule 2. Department of Parliamentary Services, Parliamentary Library, United Nations High Commissioner for Refugees, Frequently asked Questions about resettlement, 2011, 1-29, www.aph.gov.au/library/pubs/bn/law/RefugeeResettlement.pdf.

their native countries due to climate change and natural disasters. Therefore, it can be argued that the refugee laws should be revised to integrate all possible reasons for seeking asylum in Australia.

The situation for refugees is totally different in Saudi Arabia. Under the influence of Islamic law, Saudi government has a sympathetic view about refugees. The United Nations High Commissioner for Refugees admitted that Saudi Arabia approved all the asylum applications, which had a majority of Syrian and Yemeni applicants in 2019.⁶³⁰ It can be noted that sources of Saudi refugee policy are deeply rooted in Islamic Law because the country does not have a separate domestic policy about refugees. The country has an established *Kafala* system, which grants every Saudi citizen the right of hosting immigrants from other nations. The *Kafala* system is used to regularize the refugees in the country by allowing them to reside and work in the country.⁶³¹ Under the system, every foreign national can be sponsored by a Saudi citizen to live and work in the country. Although the current arrangement cannot be regarded as close to a refugee settlement, it provides the best option for the immigrants to stay in Saudi Arabia and work. Hence, it can be compared to the Islamic principle of *aman*, which grants safety to the foreigners in a Muslim country.

Currently, Australia is considering a proposal of imposing application processing fee for asylum seekers.⁶³² Although the idea is being widely criticized due to its non-conformity with the international laws, it can be used to reiterate Australia's right of selecting individuals for granting asylum without risking its national identity. However, such condition of charging fee for visa application can potentially exclude numerous deserving people trying to flee their homeland due to fear of life and property. Therefore, such options should not be explored to deprive the rights of genuine refugees who cannot pay the application processing fee.

Humanitarian visas can be terminated or withdrawn any time by the government if refugees commit serious crimes. The refugees will immediately lose right for applying and obtaining citizenship upon termination or withdrawal by the state. However, the principle of non-refoulement requires states to ensure that the refugees will not be subjected to torture or personal harm, if they are returned to their native countries. The refugee status should only be

⁶³⁰ Olawale Lawal, 'The roles of tradition and culture in the application of refugee and asylum laws in Germany and Saudi Arabia', *International Journal of Social Science and Economic Research*, 5(4), 962.

⁶³¹ Lysa, Charlotte, 'A recent history of refugees in Saudi Arabia,' *Refugee History*, 2020.

⁶³² Hasham, Nicole, 'Government plan to fast-track refugees in exchange for potential \$19,000 fee' The Sydney Morning Herald, 2015, <https://www.smh.com.au/politics/federal/government-plan-to-fasttrack-refugees-in-exchange-for-potential-19000-fee-20150729-gin9g0>.

terminated if an asylum seeker voluntarily returns to the country of origin.⁶³³ The state should only cancel the refugee status and withdraw international protection if an individual provides false information to obtain asylum.

5.1.7 Administration

In Saudi Arabia, the Ministry of Foreign Affairs mainly deals with migration policy and legislation matters. However, the government also issues royal decrees in the absence of specific laws in a specific situation. Royal decrees have been issued in the past to accommodate Palestinian, Yemeni, and Eritrean refugees by instructing different companies to issue them work permits. Under the *Kafala* system, various government or non-government organizations are requested to issue work permits to the refugees of different countries to accommodate them in the country through resident visa.⁶³⁴ Saudi consulates in different countries are issued specific instructions in this regard to verify the documents of asylum seekers to process their applications.

On the other hand, Australia used to handle its migration matters through the Department of Home Affairs to safeguard the national integrity and state's sovereignty. Various related departments are delegated administrative powers to issue visas and permits through onshore and offshore arrangements. The administrative arm attached with the Department of Home Affairs has sub-offices in different states to manage the affairs of asylum seekers and refugees such as rehabilitation after the grant of visa. The asylum seekers can benefit from the services of such sub-offices for applying for a permanent residence or citizenship. The salient feature of Australian immigration policy is that the Home Office has the complete control over different components of visa issuing process, which works in a centralized manner. The arrangement allows a large country like Australia to manage the issues of immigration, naturalization, and citizen through effective and efficient administration.

5.1.8 Residency

Migration only permits non-citizens to enter in a specific country and stay for a specific period of time. However, migration cannot be regarded as a guarantee for citizenship. It can be noted that Saudi government does not allow citizenship rights to a non-citizen, even the

⁶³³ Fitzpatrick, Joan and Rafael Bonoan. 'Cessation of refugee protection.' *Refugee Protection in International Law UNHCR's Global Consultations on International Protection*. Cambridge/New York/Geneva Cambridge University Press and UNHCR, 2003.

⁶³⁴ Lysa, Charlotte, 'A recent history of refugees in Saudi Arabia,' *Refugee History*, 2020.

residency permit or *Iqama*. In the case of Australia, permanent residents are allowed to apply for citizenship if the applicant is 18 years old and has completed a period of 4 years in Australia.⁶³⁵ However, certain requirements in English language proficiency, finances, and health are essential. The individual is also required to demonstrate that he/she will not be a threat to the state. The requirements can be fulfilled through passing an examination particularly developed for evaluating the level of knowledge of the applicants.

Residence arrangements for the refugees in Saudi Arabia are managed through *Iqama* system, where the sponsor has the responsibility of the individual. The sponsor contacts the relevant department to submit required documentation for issuance of the *Iqama* certificate, which allows immigrants to enjoy certain amenities of life during their stay in Saudi Arabia. The refugees are advised to keep their *Iqama* papers with them as proof of their legal status while moving from one area to another within the country.

5.2 Current Situation of Refugees and Asylum Seekers under Saudi Refugee Law

Protection of basic human rights has been the focus of the Islamic teachings contained in Quran and Sunnah. The Islamic literature suggests that the religion champions fundamental rights both for the citizens of Islamic states and the refugees in time of war and peace.⁶³⁶ The issue of refugee rights has been the topic of discussion since early Islamic era, which witnessed occasional migrations of the Muslim population to neighbouring countries. Additionally, peace and harmony in the Islamic states attracted non-Muslims to immigrate to these countries to escape tyranny and oppression of their homelands. Islamic rulers have traditionally been gracious to the people emigrating from other areas irrespective of their ethnic background, religious belief, and cultural values. Thus, Islam has always been safeguarding the rights of refugees and asylum seekers through different religious and legal clauses.

The Holy Quran specifically instructs Muslim rulers to protect the rights of their non-Muslim subjects. The concept of refugee rights has been drawn from the Quranic term *aman* used in the verse 9:6 of the Holy Quran, which means protection or safety.⁶³⁷ Thus, Muslim governments incorporate the concept into their legislation for safeguarding the rights of refugees.

⁶³⁵ Australian Citizenship Act 2007, sections 21 and 22.

⁶³⁶ Ahmad Zaki Yamani, 'Humanitarian International Law in Islam: A General Outlook,' *Michigan Yearbook of International Legal Studies*, 7, 204. 1985.

⁶³⁷ *The Qur'an*, Sahih International tr (<https://quran.com/>), 9:6.

The term *aman* is considered as an agreement between the government and a refugee, which ensures that the rights of an asylum seeker will be protected. The peace agreement is called *Muwada'a* by Kamal ibn al-Human that ensures the suspension of hostilities. Muslim scholars such as the author of *Enayat 'ala al-Hidaya* regard the term *aman* as a legal framework, which can be used to safeguard the rights of any individual coming from a Muslim or Non-Muslim country.⁶³⁸ The principle of *aman* can be applied to a small group travelling in the form of a caravan or confined within the boundaries of a fort.⁶³⁹ Thus, Islamic jurisdiction provides complete protection to its subjects whether they are citizens or refugees.

However, Islamic tradition classifies *aman* into two major types: general and specific. Although general *aman* can be applicable to all the individuals, the specific category deals with a particular person or group. The second interpretation can be associated with refugees and asylum seekers. Admittedly, general *aman* can only be granted by an *Imam* or head of an Islamic state. Nevertheless, different Islamic schools of thought have dissimilar opinions about the specific *aman*. The two notable scholars of the Maliki school of thought, Ibn Habib and Ibn Majishun, argue that specific *aman* should also be ratified by the government head (*Imam*) before enforcement. However, jurists such as Ibn Juzi contend that specific *aman* granted by an individual to a person should be respected by the Muslim government.

Saudi Arabia has an established *Kafala* system, which grants every Saudi citizen the right of hosting immigrants from other nations. The *Kafala* system is used to regularize the refugees in the country by allowing them to reside and work in the country.⁶⁴⁰ Under the system, every foreign national can be sponsored by a Saudi citizen to live and work in the country. Although the current arrangement cannot be regarded as close to a refugee settlement, it provides the best option for the immigrants to stay in Saudi Arabia and work. Hence, it can be compared to the Islamic principle of *aman*, which grants safety to the foreigners in a Muslim country.

Nevertheless, the Saudi government has used the *Kafala* system to facilitate specific refugee groups in the country. The Saudi-American Oil Company (ARAMCO) was particularly ordered by the government to employ Palestinian refugees in 1949 to help them support their families.⁶⁴¹ In 1979, the *Kafala* system was used through a royal decree to help Eritrean refugees

⁶³⁸. Akmal ud Din & Mahmood al-Babarti, *Al-Enaya ala al-Hidaya with Fath al-Qadeer*, Beirut: Bolaq, 1316.

⁶³⁹. Ibid.

⁶⁴⁰ Charlotte Lysa, 'A recent history of refugees in Saudi Arabia,' *Refugee History*, 2020.

⁶⁴¹ Ibid.

enter Saudi Arabia without visa processing and documentation.⁶⁴² Yemeni nationals also enjoyed a kind of general amnesty in Saudi Arabia until 1990.⁶⁴³ The government has also issued a number of royal decrees to regularize the status of Syrian refugees in Saudi Arabia since the Syrian crisis of 2011.⁶⁴⁴ Thus, history shows that Saudi law considers the Islamic principle of *aman* as a legal instrument to support refugees in the country.

It can be argued that the Saudi government's legal instrument *Kafala* is based on the Islamic teachings that protect refugees who have been offered general or specific *aman*. Hence this legal statute should be considered as legal framework, which is used to deal with the issue of refugees in the country. The system has its roots in the Islamic teachings of Quran and Sunnah, which encourage Muslim citizens and governments to protect the rights of immigrants. The *Kafala* based on the principle of *aman* encourages people to welcome refugees and make arrangements for their living and financial resources without oppressing them.

5.2.1 Significance of Saudi Refugee Law

Under the influence of Islamic law, the Saudi government has a sympathetic view about refugees. The United Nations High Commissioner for Refugees admitted that Saudi Arabia approved all the asylum applications, which had majority of Syrian and Yemeni applicants in 2019.⁶⁴⁵ It can be noted that sources of Saudi refugee policy are deeply rooted in the Islamic Law and Sharia because the country does not have a separate domestic policy about refugees. Moreover, the country is not a UN Convention and Protocol Relating to the Status of Refugees signatory. Thus, Saudi Arabia is not obliged to follow the basic tenets of the UN Convention in matters relating to refugees and asylum seekers.

Thus, the Saudi national policy on refugees cannot be regarded as based on international law. Saudi Arabia claims that the government recognizes refugees' rights and their problem in accordance with Islamic teachings and Sharia principles. The government asserts that Saudi Arabia has an established mechanism to deal with refugee crises in accordance with the teachings of Quran and Sunnah.⁶⁴⁶ Islamic scholars such as Al-Wafa contends that all the principles of modern international law such as protection of refugees along with their families

⁶⁴² Ibid.

⁶⁴³ Ibid.

⁶⁴⁴ Ibid.

⁶⁴⁵ Olawale Lawal, 'The roles of tradition and culture in the application of refugee and asylum laws in Germany and Saudi Arabia', *International Journal of Social Science and Economic Research*, 5(4), 962.

⁶⁴⁶ Ibid.

and property, the right of asylum, the non-refoulement principle, and voluntary repatriation can be found in Islamic Sharia.⁶⁴⁷ Thus, it can be argued that although Saudi Arabia is not signatory to the international laws, it has a personalized mechanism of dealing with refugee crisis in the country according to Islamic teachings.

The *Kafala* System based on the Islamic principle of *aman* is significant because it has provided assistance to refugees from different nationalities. Volatile political situations in the neighbouring countries of the Middle East compelled their citizens to seek refuge in Saudi Arabia. The Saudi government issued different royal decrees in the light of Islamic law to welcome the refugees. Currently, Saudi Arabia is hosting about 250,000 to 500,000 Rohingyans, 300,000 to 400,000 Palestinians, and 750,000 to 1,000,000 Syrians.⁶⁴⁸ The statistics indicate that Saudi Arabia is a preferred destination for refugees fleeing from their countries due to prevailing political crises in the Middle Eastern region. The favorable conditions in the country and refugee-friendly legal system attract immigrants from the neighboring countries to seek asylum to escape political and religious oppression in their homelands. Although the *Kafala* system is not necessarily a refugee law, it provides work and living assistance to migrants. The Saudi government has effectively used the system to accommodate refugees of various nationalities.

Nevertheless, the *Kafala* system cannot be regarded as a permanent solution to the refugee issue. Although the system provides refugees access to economic, educational, and healthcare facilities, it does not guarantee permanent protection as established under international refugee laws. Syrian refugees in Saudi Arabia can be cited as the most appropriate example of the arrangement under the *Kafala* system. Syrian political turmoil since 2011 forced almost 700,000 refugees to migrate to Saudi Arabia.⁶⁴⁹ The government issued several royal decrees to grant temporary visitor status to the immigrants, which cannot be regarded as asylum. Yemeni refugees were also permitted to enter into Saudi Arabia under the same arrangement that was converted into work permits later. Hence, it can be argued that Saudi immigration laws seek to resolve the refugee issue through a short-term approach that can be extended if needed.

The close analysis of the relevant clauses of the *Kafala* system reveals that it is significant because the system is based on the philosophy of *aman*. The government grants amnesty to the

⁶⁴⁷ Olawale Lawal, 'The roles of tradition and culture in the application of refugee and asylum laws in Germany and Saudi Arabia', *International Journal of Social Science and Economic Research*, 5(4), 964.

⁶⁴⁸ Ibid.

⁶⁴⁹ Charlotte Lysa, 'A recent history of refugees in Saudi Arabia,' *Refugee History*, 2020.

refugees from other countries in accordance with the Islamic principles, which require citizens and the government to accept the responsibility of protecting the refugees against foreign oppression. The *Kafala* system allows people from other countries to live peacefully in Saudi Arabia without involving in lengthy and complicated documentation process. Saudi policy towards refugees is in accordance with the Islamic laws of Holy Quran based on the values of charity and hospitality. Islamic teachings require that all Muslims should assist and protect refugees through a proper mechanism of care and support. Sharia also stresses that every individual has a right that his/her life and property must be protected against any potential threat. Thus, Saudi *Kafala* system employs the philosophy of Islamic Law to protect refugees from aggression by allowing them to seek refuge in the country and provide them a sustainable economic condition.

5.2.2 Recognition of Refugees Rights in International Law

According to various international and regional human rights instruments, states have the ultimate responsibility to protect the rights of people living within their territory. The human rights instruments provide guidance to the governments for identifying and protecting the refugees by adopting a specific mechanism for integrating them into the society. The Human Rights Committee also recognizes the need to extend the citizen rights to asylum-seekers and refugees. The UNHCR's Executive Committee also asserts that the governments have an "obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments." The history of refugees in Saudi Arabia establishes that government tries to provide maximum possible assistance to people arriving in the country as refugees. Although international laws demand all the rights of citizenship for asylum seekers and refugees, Saudi Arabia treats refugees according to Islamic law, which requires that refugees must be welcomed graciously.

Nevertheless, the refugees in the country are not entirely treated according to international guidelines. Specifically, Syrian refugees are required to submit their visa application before entering into Saudi Arabia. That is against the directions of the UN Refugee Convention. Nevertheless, the government officials insist that visa requirements are essential for protecting the integrity of refugees by safeguarding them against the threats of deportation in the absence of documentary evidence to stay in the country. The efficacy of the visa model is also

established through the fact that about 2.5 million Syrian refugees are currently settled in Saudi Arabia with unrestricted access to health and housing facilities.⁶⁵⁰

It can also be noted that Saudi law about refugees is also influenced by sectarianism. The specific treatment to Syrian refugees reflects that the policy is based on prejudice and sectarian dichotomy. It can be observed that Syrian Sunni community is favoured in the visa system as compared to the Shiites.⁶⁵¹ The treatment of refugees in Saudi Arabia is also affected by the fear of terrorists as the law enforcement agencies do not want to allow miscreants into the country under the cover of refugees. Thus, the Saudi asylum system applies the concept of national security in processing the applications. Like other countries, Saudi Arabia is also concerned about defence, so it acts cautiously while determining the beneficiaries of the refugee scheme. Hence, the Saudi government superimpose their national interests on humanitarian considerations while making decisions about granting residential rights to refugees.

5.2.3 Granting Legal Rights to Refugees in Saudi Arabia

It has been observed that religion plays a vital role in refugee administration and settlement. It effectively suggests that refugees are granted their legal rights after their application for a visa is approved. Even though the statistics reflect that mostly Syrian and Yemeni refugees have access to Saudi asylum, it cannot be taken as evidence to prove that refugees from other countries are not accepted due to religious bias.⁶⁵² Saudi Arabia helps refugees integrate and settle after obtaining a valid visa through an established *Kafala* system, which provides them a sponsor through the grant of work permit in the country to resolve their issues.

5.2.4 Differences between Saudi Refugee Law and Sharia

Although Islamic countries including Saudi Arabia confer basic human rights to refugees by acknowledging their legal status in accordance with the provisions of the Holy Quran and Sharia, the refugee policy also seek guidance from existing treaties and international laws. Refugees in Islamic states are required to acquire their identity cards and travel documents according to the national jurisprudence, which may or may not have Islamic relevance. Saudi

⁶⁵⁰ Olawale Lawal, 'The roles of tradition and culture in the application of refugee and asylum laws in Germany and Saudi Arabia', *International Journal of Social Science and Economic Research*, 5(4), 964.

⁶⁵¹ Ibid.

⁶⁵² Ibid.

Arabia is signatory of Arab Convention on Regulating Status of Refugees in the Arab Countries, which asserts that “contracting States shall issue to refugees lawfully residing in their territories identification cards and travel documents in conformity with the United Nations Convention relating to the Status of Refugees ... to enable them to travel from and return to such territories.”⁶⁵³ Even though Saudi Arabia is not a signatory to the UN Convention, it has to follow the directions for issuing identity papers because of the similarity in Arab and UN Conventions. Issue of identity documents is a basic requirement of the international treaties rather than Islamic teachings.⁶⁵⁴

However, Saudi laws seek guidance from the Islamic principle of *aman*, which provides that refugees cannot be sent to their homeland after granting them general amnesty. The Saudi law allows the prosecution of refugees who commit an offence in the courts of the country rather than deporting them. The Islamic scholars such as Al-Wafa contend that all the principles of modern international laws such as protection of refugees along with their families and property, the right of asylum, the non-refoulement principle, and voluntary repatriation can be found in Islamic Sharia.⁶⁵⁵ Thus, it can be argued that although Saudi Arabia is not a signatory to the international laws, it has its own mechanism of dealing with refugee crisis in the country according to Islamic teachings.

Saudi Arabia also seeks guidance from the Cairo Declaration on Human Rights whose Article 12 declares that “Every man ... if persecuted, is entitled to seek asylum in another country.”⁶⁵⁶ Article 28 of the Arab Charter on Human Rights dealing with political asylum is also contradictory to Sharia principles. The article clearly states that “political refugees shall not be extraditable.”⁶⁵⁷ The definition of a refugee is also borrowed from Article 1 of the Arab Convention on Regulating Status of Refugees in the Arab Countries, which is used to determine the status of an immigrant whether he/she has the fear of being persecuted as one of the reasons for seeking asylum.⁶⁵⁸ Thus, justification of persecution and fear are based on the principle of the

⁶⁵³ The United Nations Refugee Agency, *Convention and Protocol Relating to the Status of Refugees* (2010).

⁶⁵⁴ Ibid.

⁶⁵⁵ Olawale Lawal, ‘The roles of tradition and culture in the application of refugee and asylum laws in Germany and Saudi Arabia’, *International Journal of Social Science and Economic Research*, 5(4), 964.

⁶⁵⁶ Organization of Islamic Cooperation (n 26).

⁶⁵⁷ League of Arab States (n 15). Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008. <http://hrlibrary.umn.edu/instreet/loas2005.html>.

⁶⁵⁸ League of Arab States (n 14).

humanitarian character of the right to asylum. The philosophy of asylum is developed to rescue people having their life in danger, which shows the mercy of the Saudi government to people whose liberty and other basic rights are being violated. The tool of asylum is focused on protecting life and property of refugees by addressing sources of harm and distress.⁶⁵⁹ Hence, granting asylum to vulnerable communities is considered a humanitarian act, which is the defining principle of various international laws and conventions.

5.2.5 Sections of Saudi Refugee Law Preventing Asylum

The Basic Law of Governance of 1992 grants certain rights and protections to immigrants in Saudi Arabia, but it clearly indicates the people excluded from the right of asylum. The law was further amended through Royal Decree No. M/51 in 2005, which extends protection to all foreign nationals in the country.⁶⁶⁰ A number of Laws have been introduced from time to time for regulating inward migration. The legislation specifically categorizes the rights of foreign workers and asylum seekers by articulating the conditions to be fulfilled before a person is allowed to seek asylum. Law no. 17/2/25/1337 explicitly declares that refugees entering into Saudi Arabia will be required to produce a valid travel document.⁶⁶¹ Article 50 of the law elaborates that person entering the Kingdom illegally without proper travel documents will be imprisoned and deported to their country of origin. The government has also signed or acceded to various treaties to discourage illegal entry into the country. The agreements include United Nations Convention against Transnational Organized Crime (January 18, 2005), Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons (July 20, 2007), and Palermo Protocol against the Smuggling of Migrants by Land, Sea and Air (July 20, 2007).⁶⁶²

5.2.6 Changes Required to Improve the Substantive and Procedural Rights of Refugees in Saudi Arabia

Although Saudi Arabia has hosted refugees from different countries for decades, the current COVID-19 pandemic has exposed various flaws in its refugee laws. Refugees at different deportation centers fear corona virus outbreak due to crowded conditions. Human Rights Watch argues that Ethiopian refugees detained at a deportation centre in Riyadh are living in poor

⁶⁵⁹ Ahmed Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study* (UN High Commissioner for Refugees 2009).

⁶⁶⁰ Maysa Zahra, *Saudi Arabia's Legal Framework of Migration*, (Gulf Labor Markets and Migration 2013), 3.

⁶⁶¹ Maysa Zahra, *Saudi Arabia's Legal Framework of Migration*, (Gulf Labor Markets and Migration 2013), 5.

⁶⁶² Ibid.

conditions.⁶⁶³ The overcrowded rooms are a serious threat for the detainees in the context of corona virus. Moreover, Human Rights Watch also points to the forceful campaign started in 2013 to detain and deport migrants who are living in Saudi Arabia without proper documentation. The international body claims that the migrants are being abused during an extradition campaign.⁶⁶⁴ Human Rights Watch also reported that migrants were returned to places where their security was compromised.

The above observations suggest that Saudi Arabia needs to reform its current refugee laws to include more humanitarian considerations for the migrants who fail to arrange identity papers. Such persons should be treated sympathetically and must be supported to manage the documentation. The substantive and procedural rights of refugees in Saudi Arabia should be recognized and they should be treated with respect and decency. The existing laws must also be relaxed for the undocumented migrants to assist them through a fair legal process so they can challenge their deportation in Saudi courts of law. The deportation procedure also needs to be transparent and migrants should be deported in a manner that respects their basic human rights. It can be observed that migrants are not permitted to prevent their deportation by applying for asylum. The Saudi government should also amend the existing refugee laws to ensure that migrants may not be returned to their country of origin if their safety is threatened.

The mass deportation campaign has attracted worldwide criticism of Saudi authorities because serious human rights violations occurred during the process. Saudi police and labour authorities possess unlimited powers under the current law to locate, detain, and deport migrants who do not possess documentary evidence about their sponsor under the *Kafala* system. Human Rights Watch asserts that most of the detainees in the deportation camps have been arrested due to the unavailability of valid residency permits.⁶⁶⁵ The Saudi government should intervene into the matter and introduce effective legislation to help such refugees. The new laws should ensure that refugees are not detained in the camps for minor issues and the matter of their identity should be resolved without violating their basic human rights.

⁶⁶³ Human Rights Watch, *Saudi Arabia Migrants held in inhuman, degrading conditions*, 15 December 2020.

⁶⁶⁴ Human Rights Watch, *Saudi Arabia Mass expulsions of migrant workers*, 9 May 2015.

⁶⁶⁵ Human Rights Watch, *Saudi Arabia Migrants held in inhuman, degrading conditions*, 15 December 2020.

5.3 Current Situation of Refugees and Asylum Seekers under Australian

Refugee Law

Australia is considered as an ideal country for immigration because of its longstanding and proactive approach. Australia allocates a carefully planned quota for immigrants on a yearly basis to facilitate foreign nationals seeking settlement in the country.⁶⁶⁶ Apart from accepting skilled migrants, students, and temporary workers, Australia welcomes selected number of refugees for resettlement through the scheme called offshore arrivals. The program provides targeted resettlement facilities to the refugees through a specified criterion. It must be remembered that the refugees entering Australia through this scheme are entitled to permanent residency and citizenship status.⁶⁶⁷

Contrary to the lenient policy of Australian government regarding regular immigrants, it observes a significantly harsh approach for undocumented refugees. Unlike other European countries, Australia has detention camps for the refugees and asylum seekers who arrive spontaneously in the country. The punitive criterion is specifically applied to people who attempt to arrive by boat. The mandatory detention camps are established onshore at remote locations such as Villawood IDC (in Sydney) and Yongah Hill IDC (in WA), as well as offshore in Nauru and Papua New Guinea.⁶⁶⁸ Thus, Australian refugee laws concerning asylum seekers cannot be considered as commendable.

The Australian government specifically adopts a hard line attitude towards refugees arriving or attempting to arrive by boat. This inhuman treatment is clearly against Islamic principles. Just like Saudi Arabia, Australia's policy of deporting refugees to their country of origin is against their basic human rights, which can endanger their security in an oppressive environment. The Australian government needs to revise its policy to make it consistent with Islamic principles and international laws by integrating the non-refoulement principle into its refugee laws for protecting all refugees from expatriation.

⁶⁶⁶ Claudia Tazreiter, 'The unlucky in the 'lucky country': asylum seekers, irregular migrants and refugees and Australia's politics of disappearance,' *Australian Journal of Human Rights*, 2017, 5.

⁶⁶⁷ Ibid.

⁶⁶⁸ Claudia, Tazreiter, "The Unlucky in the 'Lucky Country': Asylum Seekers, Irregular Migrants and Refugees and Australia's Politics of Disappearance." *Australian Journal of Human Rights*, vol. 23, no. 2, 2017, pp. 242.

Arguably, Australia's signatory status of the 1951 Convention makes it obliged to resolve the issue of refugees in accordance with the guidelines provided by the agreement. Currently, the majority of the country's refugee laws are derived from International law.⁶⁶⁹ Additionally, Article 1A(2) of the Refugee Convention has been incorporated into Australia's *Migration Act 1958* (Commonwealth) for safeguarding refugees against refoulement. The Act requires that refugees should be protected in the host country.⁶⁷⁰ Nevertheless, the laws of the Australian government allow law enforcement agencies to create inhuman conditions in refugee camps. Australian laws also contain discriminatory terms to deal with the grant of residency status to refugees, the right of access to the free legal counsel, and other basic rights.

5.3.1 Connection between Grant of Asylum and manner of Entry into Australia

Australia is generally regarded as a favourable destination for immigrants because of its successful immigration policy attracting all categories of immigrants. The country's economic wealth and cultural diversity makes it an ideal place to live. However, Australian refugee laws emphasize the mode of entry into the country to adopt a course of action for treating foreign nationals regarding asylum. Individuals seeking entry through legal means as students, skilled workers, and temporary workers are encouraged to apply offshore and wait until their case is decided before travelling to Australia. Such migrants are welcomed into the country. Conversely, asylum seekers arriving without prior permission are dealt with according to the laws introduced in 1992, which includes mandatory and unlimited detention at onshore and offshore camps.⁶⁷¹ Such people are subjected to inhumane treatment as they are systematically dehumanized away from the public empathy.⁶⁷² This policy is in complete contrast to Islamic and international principles of equal human rights.

The Australian government responded to the new global migration flows in the context of refugee crises by focusing on the irregular migrants seeking asylum in the country. The country has adopted the policy of offshore application processing to discourage people from trying to enter Australia without documents. Further, the refugees have been categorized in the administrative and legal domains to aggravate the problems of individuals trying to escape

⁶⁶⁹ Ibid.

⁶⁷⁰ Claudia, Tazreiter, "The Unlucky in the 'Lucky Country': Asylum Seekers, Irregular Migrants and Refugees and Australia's Politics of Disappearance." *Australian Journal of Human Rights*, vol. 23, no. 2, 2017, pp. 242.

⁶⁷¹ Ibid.

⁶⁷² Claudia, Tazreiter, "The Unlucky in the 'Lucky Country': Asylum Seekers, Irregular Migrants and Refugees and Australia's Politics of Disappearance." *Australian Journal of Human Rights*, vol. 23, no. 2, 2017, pp. 242.

persecution in their countries.⁶⁷³ Such vulnerable people are detained in inhumane and oppressive conditions in onshore or offshore camps to discourage undocumented refugees from entering Australia. Furthermore, random categorization of “good” and “bad” migrants to distinguish deserving from undeserving asylum seekers results in dehumanization of irregular migrants. Thus, developing the national refugee policy on the basis of mode of entry has attracted global criticism of the Australian government’s inhuman treatment of migrants.

5.3.2 Laws against “Boat People”

The history of people arriving in Australia by boat is quite long. Indeed, the British colonisers arrived by boat from 1788. More recently, refugees and asylum seekers have come by boat. The government had considerable concerns about the authenticity of the issues faced by the migrants arriving by boat. As the initial boat people fled from Vietnam that was Australia’s adversary, their cases were processed immediately.⁶⁷⁴ The boat people mainly arriving from Vietnam were granted visas under various humanitarian and refugee programs. Gradually, doubts about the country of origin of boat people increased, so even the Vietnamese people were kept at the East Arm Quarantine Station in Darwin. After the introduction of the Comprehensive Plan of Action (CPA) in June 1989, member countries including Australia were allowed to detain the boat people in camps established in various countries of the region.⁶⁷⁵

The second wave of boat people started arriving in Australia from Cambodia who were also held at a holding centre primarily established for illegal fishermen. A number of boat people escaped from the holding centre due to incomplete security arrangements. Hence, the government was compelled to categorize the boat people as “illegal maritime arrivals” or “unauthorized maritime arrivals.” The government was also forced to amend legislation, which allowed authorities to “intercept, detain, and process” such people.⁶⁷⁶ Through subsequent legislation, the government decided that boat people would not be allowed to obtain temporary or permanent residence visas in Australia. The government claims that the decision is taken to discourage the “people smugglers” who exploit vulnerable people for monetary gains. Although the Australian policy for boat people is significantly harsh and dehumanizing, it has substantially helped the country to reduce the number of refugees arriving illegally without documentation.

⁶⁷³ Ibid.

⁶⁷⁴ Adrienne Millbank, *The detention of boat people*, (Parliament of Australia, 2020).

⁶⁷⁵ Ibid.

⁶⁷⁶ Library of Congress, *Refugee Law and Policy*

Australia introduced a mandatory detention policy in 1992 in response to the remarkable increase in number of people arriving in the country by boat. The policy not only resulted in a significant rise in the number of refugees held in detention camps, but the figures keep on rising with each passing year.⁶⁷⁷ A range of legislative provisions were in force before 1992 to enable detention, which primarily focused on the mode of entry rather than status of the refugee. Section 38 of the *Migration Act 1958* and sub-section 12 (2) of the *Immigration (Unauthorized Arrivals) Act 1980* provided the authority to of arrest the individuals having no entry permit.⁶⁷⁸ A number of detention centres were established to improve the security arrangements at migration reception centres. Legislation has also been introduced to keep asylum seekers arriving by boat in mandatory detention offshore in inhuman conditions, which clearly violates basic human rights ensured through the UN Refugee Convention of 1951.

The provision for the repatriation of boat people can also be regarded as contrary to the principle of non-refoulement, which requires that governments should not return asylum seekers to their homeland to face the oppression of a tyrannical regime. The Australian government needs to extend the non-refoulement principle in its policy against boat people to protect their basic human rights as stated in international refugee law. The boat people should be protected through incorporating relevant clauses of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) into the legislation aimed at dealing with the boat people.

5.3.3 Refugee Camps

Australia introduced the policy of mandatory detention in 1992 to reduce the number of arrivals by sea. Although the initial instances of boat arrivals were from neighboring countries, the recent wave of immigrants is considered as an organized effort to smuggle people from countries of considerably farther regions. Thus, the government introduced legislation to establish detention camps for people who had arrived by boat. However, the inhumane conditions in the camps with instances of riots and allegations of child abuse have attracted criticism from the world community and civil society in Australia. The media reports are also questioning the ethical significance of detaining significantly large number of people on the

⁶⁷⁷ Adrienne Millbank, *The detention of boat people*, (Parliament of Australia, 2020).

⁶⁷⁸ Ibid.

perception of being illegal who are legitimate refugees in accordance with the provisions of the Refugee Convention of 1951.⁶⁷⁹

However, the Australian detention policy has been evolving for more than 25 years despite public reaction and appears to have bipartisan political support. The security upgrading at the migration reception centres and establishing specific purpose detention centres can be regarded as important developments in the history of detention centres in Australia. The government has established six detention centres at remote places to keep the condition of asylum seekers concealed from the general public. The Woomera detention centre is particularly situated at an isolated place with its overcrowded refugee population and harsh environment. The government is also considering building new detention centres in Darwin and Brisbane.⁶⁸⁰

Australia's detention mechanism was strengthened by the policy decision of declaring it mandatory for all unauthorized refugees to be detained in the camps. The law provisions also emphasize that the detained people will only be allowed to leave the facility if they are granted a visa. The *Migration Act 1992* also established that refugees placed in detention camps will be deported to their country of origin if their visa application is rejected. Although different clauses provide the possibility for the detainees to be released on compassionate grounds, only a limited number of refugees have been released from detention camps. Additionally, the Act allows the authorities to keep visa overstaying individuals in detention camps.

5.3.4 The Inhumane Nature of Australian Refugee Law

The refugee system in Australia is one of the most penalizing systems in the modern world designed to discourage asylum seekers from entering Australia. The main objective of the Australian refugee laws is to deter individuals through different measures including intercepting the boats of refugees. The "Operation Sovereign Borders" delegates to the Australian Navy powers to forcefully stop asylum seekers from entering into the territorial waters of the country. A UNHCR report suggests that the government used enhanced screening procedures to return 41 asylum seekers to Sri Lanka in 2014.⁶⁸¹ It can be argued that such enhanced screening procedures have no legal basis as per the international law provisions.⁶⁸² Thus, such actions of

⁶⁷⁹ Adrienne Millbank, *The detention of boat people*, (Parliament of Australia, 2020).

⁶⁸⁰ Ibid.

⁶⁸¹ United Nations High Commissioner on Refugees. "Returns to Sri Lanka of Individuals Intercepted at Sea." *Www.unhcr.org*. 2014.

⁶⁸² Ibid.

the Australian Navy to send refugees back are against the Non-Refoulement Clause of the 1951 Convention.

The *Migration Act 1958* is the basis of all immigration laws of the country, which guides Department of Home Affairs to deal with different types of refugees according to their specific scenarios. Australia approaches the refugee issue through the offshore and the onshore resettlement program. The community support program (CSP), a special humanitarian program, and a refugee program are categorized under the offshore program, which are processed under the categories of visa subclasses 200, 201, 202, 203, 204, and 866. The onshore visa category applies to non-citizens seeking asylum after entering the country through different visa category such as a tourist or student visa. Under the onshore program, these people are eligible for a permanent protection visa to live and work in Australia. However, the people entering Australia through irregular immigration are not permitted to utilize the facility.

Section 5 of The *Migration Act 1958* defines refugees in accordance with Article 1 of the 1951 UNHCR Convention.⁶⁸³ The Act provides complete instructions for offshore and onshore resettlement applications. Although Australia deals with offshore applicants compassionately, it adopts a harsher stance for onshore refugees entering Australia by boat without legal documents. People fleeing their home countries and arriving in Australia without valid visas are detained in designated facilities.⁶⁸⁴ The Australian refugee laws explicitly require that asylum seekers have to apply for refugees status before entering the country to avoid deportation. The Australian laws strictly ensure that all the non-citizens in the country must have a valid visa. The government places all the illegal asylum seekers in offshore detention camps of Nauru or Papua New Guinea.

As already stated, Australia has harsher policy for the people arriving under the onshore program when compared to the individuals applying through the offshore program. The policy is reflected through the fact that the successful visa ratio for offshore programs is relatively higher.⁶⁸⁵ Contrarily, onshore visa procedure is significantly lengthy with nominal success rate and limited visa options. Additionally, people seeking onshore visa access have to face different challenges because of adverse public attitude, political resistance, and negative media

⁶⁸³ Klaus, Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

⁶⁸⁴ Ibid.

⁶⁸⁵ Klaus, Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

coverage.⁶⁸⁶ The Australian general public expresses emotions of mistrust for people trying to enter the country through irregular means and apply for a visa under onshore program. Australians do not show sympathy for the refugees who try to infiltrate the society through illegal means because they consider such asylum seekers as threat to the security and cultural identity of the country.⁶⁸⁷

Additionally, the officials consider that fewer immigration facilities will be available for the genuine asylum seekers applying through offshore process, if onshore refugees are given opportunities to obtain legal status. People arriving by boat breed the perception that they are forcefully trying to become part of the Australian society. However, the method of prioritizing offshore applicants does not align with the international refugee laws, which disregard the manner of arrival while considering the case of a refugee. Nevertheless, Australia has adopted a kind of arbitrary system of granting easy access to offshore applicants by introducing complicated offshore visa processing arrangements and the issue of temporary protection visas.⁶⁸⁸ The government has established the Refugee Review Tribunal and limited judicial review and appeal rights for asylum seekers.

It can be argued that asylum seekers entering Australia cannot be regarded as illegal according to international law. The Australian government is bound to grant basic human rights to the refugees seeking asylum irrespective of their mode of entry as per provisions of the 1951 UN Refugee Convention. Additionally, the UN convention reiterates that refugees entering a country seeking asylum without valid travel documents should not be regarded as illegal. Australian law does not consider people arriving by boat as criminals. Still, the government adopts a strict policy to deal with boat people, which is against the principle of equality. Australia has no right to term boat people as illegal and place them in detention camps or deport them. Australia should incorporate the clauses of the UN Convention and relevant Islamic principles to provide refugees their legal rights and welcome them by understanding their issue compassionately.

⁶⁸⁶ Lisa, Hartley, and Pedersen, Anne. "Asylum seekers and resettled refugees in Australia: Predicting social policy attitude from prejudice versus emotion." *Journal of Social and Political Psychology* 3, no. 1 (2015): 148.

⁶⁸⁷ Ibid.

⁶⁸⁸ Klaus, Neumann. *Across the seas Australia's response to refugees A history*. Black Inc., 2015

5.3.4.1 Offshore Processing

Mandatory detention policy can be regarded as the most inhumane practice, which allows the Australian government to detain asylum seekers in Papua New Guinea and Nauru while their applications are processed. The policy, introduced by Prime Minister John Howard in 2001, has not only distorted the image of Australia as land of opportunities, but also is heartbreaking for the refugees aspiring to escape oppression in their homeland.⁶⁸⁹ Ironically, inclusion of new clauses has made the policy more damaging and draconian than its original draft. Although the detained asylum seekers used to be determined as genuine refugees under the original policy, the current procedure never allows people kept in detention camps of Nauru and Papua New Guinea to resettle in Australia. The new policy implies that the government will keep people in detention camps for years even though their status of genuine refugees is established. The current law establishes that asylum seekers arriving without a visa should be detained.⁶⁹⁰ Thus, refugees without a valid visa have almost no chance to get immigration under the existing policy. Such a punitive policy tarnishes Australia's image as signatory to international conventions and humanitarian obligations.

It is pertinent to mention that international law is against the idea of using immigration detention to punish people. According to the provisions of international conventions, refugees should be kept at such camps during the process of health, security, and identity checks and verification of their claims.⁶⁹¹ However, refugees should not be placed in detention camps during such procedures.⁶⁹² The Australian government has established a system of detention camps for those refugees who seek asylum in the country. The system is not consistent with the government's commitment to various international treaties and refugee conventions. Australian law allows authorities to keep refugees in the camps until their applications are decided without specifying maximum limit of detention. The Australian Refugee Council suggests that the average length of stay at the detention camps reached 545 days in 2020, which is an inhumane practice.⁶⁹³ Such lengthy stay in the adverse conditions of detention camps has negative impacts on the physical and emotional health of the refugees.

⁶⁸⁹ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁶⁹⁰ Ibid.

⁶⁹¹ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

⁶⁹² Ben, Doherty. "UN official says Australia responsible for inhuman treatment of asylum seekers." *Www.theguardian.com*. 2017

⁶⁹³ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

5.3.4.2 Offshore Processing of Asylum Applications

In an effort to divert attention of the general public from the plight of refugees in detention camps, the Australian government establishes these camps in far off areas of the territory or even in areas outside the national jurisdiction. In order to encourage offshore processing of asylum seekers, the government requires that refugees apply for the grant of a visa from their homeland and travel to Australia with valid travel documents. Hence, refugees entering Australia without a visa are kept in the detention camps, which have harsh living conditions for the inhabitants. The refugees are placed under strict security conditions until their protection claims are established. If the case is decided against an individual, he/she is deported from the country without any judicial review of their application. Thus, Australian refugee system is considered among the most harsh legal frameworks in the world.

The Australian government strictly follows its policy of offshore processing of asylum applications by appointing officials in various countries to monitor the refugees. The Department of Home Affairs conducts operations in foreign countries particularly in the Asia-Pacific region to keep a check on illegal immigrants aspiring to reach Australia. The government also conducts a number of campaigns on different media platforms to highlight the official policy of arresting people coming by boat. Security personnel from other countries are also involved in the process of detecting and preventing asylum seekers from entering Australia without valid documents. The Australian government appoints different liaison officers at the airports of neighboring countries for spotting potential passengers planning to reach Australia and restrict their travelling. Airline staff are also involved in the process to ensure that no refugee reaches Australia without a valid visa. Thus, the government wants to ensure that all the asylum seekers obtain a valid visa before travelling to Australia through offshore visa processing. The asylum seekers who somehow escape the barriers and reach Australia are considered illegal and placed in detention camps until their protection claims are verified and a proper visa is granted.

5.3.4.3 Element of Religious Favoritism in Australian Refugee Law

Although the Australian government propagates its humanitarian efforts by asserting that more than 12,000 refugees from Syria have been settled in the country, it is a proven fact that the majority of these resettled refugees were Christians. Selecting only Christian refugees for asylum from a predominantly Muslim country is a clear indication of favouritism. ISIS has targeted

Muslim and Christian populations alike. Even though both Muslims and Christians have been persecuted during the Syria-Iraq confrontation, Australia considered Christian refugees as genuine asylum seekers. Furthermore, Christians are a minority in both Syria and Iraq with less than 10 per cent and 1 per cent of the population respectively.⁶⁹⁴ Thus, Australia's decision to accommodate more Christians disproportionately can be considered as religious favouritism. According to the UNHCR estimates, only 15% of the displaced refugees from Iraq are Christians, whereas the percentage in case of Syrian refugees is only 1 percent. However, Christians make up about 80 per cent of the total resettled refugees in Australia from the Middle East.⁶⁹⁵ The statistics highlight the discriminatory practices of the Australian refugee system.

Successive reforms in the Australian migration system introduced substantial changes in the process of obtaining citizenship. Different citizenship tests have been included in the criteria to assess ability of the migrants to stay in the country by integrating into the society.⁶⁹⁶ The government claims that the changes incorporated into the existing immigration laws ensure that migrants and refugees have better knowledge of Australian values, which can help them be a suitable candidate for Australian citizenship. The government asserts that the implemented reforms are intended for eradicating allegations of racial, national, and religious discrimination. The government declared that the new criteria would be applied to all applicants irrespective of their religious affiliation.⁶⁹⁷ However, the "Australian values" needed for citizenship status are defined in racial and religious context, which differ from the concept of Muslim otherness and Islamic ideology.

The Australian government introduced an extended residency period for the eligibility for citizenship to provide sufficient time to the immigrants to understand the social and cultural values of the country that can help them to transition smoothly and integrate successfully into the host society. Thus, the citizenship tests were introduced in 2007 to ensure that all Australians are committed to the lifestyle of the nation.⁶⁹⁸ The immigration reforms aimed to encourage non-citizens to adopt Australian social values rather than seeking to change them. Hence, the citizenship tests were to be used as an assurance that immigrants will not be a threat for

⁶⁹⁴ Tony, Caravella. "Fortress Australia – barriers facing intending migrants." 2nd *Global Conference- Migration and Diasporas*. (2018).

⁶⁹⁵ Ibid.

⁶⁹⁶ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations* 15 (2012).

⁶⁹⁷ Ibid.

⁶⁹⁸ Ibid.

Australia's national identity. The reform bill focused on transforming the migrants through integration and assimilation to establish Australian society on the principles of multiculturalism. However, Muslim migrants are perceived as cultural and religious others in a Judeo-Christian nation like Australia.⁶⁹⁹ Cultural and religious values such as Muslim women wearing scarves and following Sharia laws are inconsistent with the values of the native Australians.

The Australian government believes that having dissimilar religions and social norms, Muslim migrants are unable to understand the privileges, responsibilities, and commitment required as Australian citizens. Moreover, other Islamic values are also regarded as incompatible with Australian ideals.⁷⁰⁰ Such problems do not surface in the case of Christian refugees, so the Australian government prefers them as suitable candidates for asylum and citizenship. On the other hand, various assumptions about Muslim fundamentalism encourage Australia to disregard them for resettlement and resident status. Muslim identity is considered in contrast with Australian culture. Thus, Muslims are not welcomed in Australian society due to their inability of integrating and assimilating in alien country.⁷⁰¹ Therefore, Muslim migrants are not favoured for granting citizenship. Despite this prejudice, there are many Muslim Australian citizens.

Although the reforms are not specifically introduced to exclude Muslim refugees from seeking asylum, the lengthy process of determining the protection claims and citizenships are clearly against them. There are perceptions that Australian and Islamic values cannot coexist, which makes Muslim migrants as threat to Australian culture. The prevailing Islam phobia in the contemporary society is also a barrier to the entry of new Muslim migrants.⁷⁰² Apparently, the current reforms program has raised concerns about Muslim religious practices among the general public, so they can be considered as a catalyst for promoting religious and racial discrimination.

Recent evidence of religious favouritism can be observed by analyzing the Australian policy of handling the issue of Rohingya Muslims refugees. The gap between the percentage of accepted Muslim and Christian asylum seekers in Australia is continuously widening. Notably, the humanitarian visa program is accepting Christian refugees even from predominantly Islamic regions while ignoring Muslim applicants from the same countries.⁷⁰³ Immigrants from Iraq,

⁶⁹⁹ Ibid.

⁷⁰⁰ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations* 15 (2012).

⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ Refugee Council of Australia. "Submission on The Status of The Human Right to Freedom of Religion or Belief" www.refugeecouncil.org.au. (2018).

Syria, and Afghanistan are the prime example of the discriminatory practice. It is interesting to note that Australia grants visas to Christians belonging to the most remote regions of the world, but is not ready to consider the sufferings of Muslims closer to its borders. Rohingya Muslims are subjected to oppression near Australian borders, but their persecution is being constantly ignored by the government. Alternatively, the Australian humanitarian program focuses on the problems of refugees from far-off regions if they are Christians.

5.3.4.4 Changes Required to Improve the Substantive and Procedural Rights of Refugees in Australia

Australia's offshore detention camps can be regarded as among the most punitive systems in the world. Refugees and asylum seekers looking for protection in Australia are placed in offshore detention centers in Nauru and Papua New Guinea. All these camps are designed like jails with inhumane conditions. The Australian government has to find a better solution for the issues of their immigration system. The government should look for to abolish the detention centers and make alternate arrangements for the refugees and asylum seekers waiting for the outcome of their visa application. Presently, living conditions at the detention centers are substandard, which result in various physical and mental health issues. The detainees are not provided access to healthcare facilities, while cases of sexual abuse, homosexuality, and abortion in the detention centres of Papua New Guinea and Nauru are constantly rising.⁷⁰⁴ Thus, the state needs to address the issue on urgent basis to improve the substantive and procedural rights of refugees in Australia.

The unlimited stay at the detention camps is raising the number of psychological issues in inhabitants such as pain, suffering, trauma, and anxiety. The detainees are not provided access to the judicial services and the cases decided against them cannot be reviewed. Such laws are completely against the principle of equality and basic human rights provided by the international conventions. The recent restrictions on communication further isolate the detainees of the camps. Thus, the government is deciding the cases of the refugees without providing them the opportunity to establish their claims. Hence, the reforms should be introduced to amend the existing system of detention camps and a separate judicial framework should be incorporated to offer the refugees complete legal assistance for determining their protection claims. Such

⁷⁰⁴ Ben, Doherty. "UN official says Australia responsible for inhuman treatment of asylum seekers." *www.theguardian.com*. 2017.

procedural reforms will be helpful in promoting the positive image of the country in the world community.

The current situation of compulsory detention for onshore refugees makes their future uncertain. The asylum seekers are forced to live in conditions which result in a monotonous and directionless life without any control and independence. Their apprehensions about the outcome of detention are further aggravated by witnessing the negative effects of detention on fellow detainees.⁷⁰⁵ The administration of the detention camps does not even consider the psychological issues of the refugees as they intervene in extreme cases. Furthermore, the lack of access to information and legal assistance deters refugees' efforts to successfully pursue their cases. Thus, the government should develop a mechanism to allow refugees access to different services such as legal experts, doctors, interpreters, and educators to help detainees prove their claims effectively. Providing such facilities to the detainees will substantially reduce the stay at the camps, which will eliminate various health issues. The proposed changes will improve the substantive and procedural rights of refugees in Australia.

The Australian government can also extend bridging visa facilities to the onshore immigrants instead of sending them to detention camps. Australia can establish facilitation centres for the refugees, which can replace the infamous offshore mandatory detention. The existing system is likely to deprive genuine asylum seekers of their right to obtain resident status in Australia. Thus, such refugees are returned back to their respective country of origin in life-threatening conditions. Such actions on the part of Australian government are against the principle non-refoulement, which is reflected in the international Refugee Convention. As most asylum seekers face assault, torture, and persecution in their homeland before arriving in Australia, they should not be treated inhumanely in detention camps. The government should establish specific desks on the airports of neighbouring countries for issuing bridging visas to such asylum seekers. The arrangement will be helpful in resolving the issue of illegal refugees entering Australia without valid travel documents. Hence, no detention camps will be required for undocumented onshore immigrants. Thus, the proposed changes will improve the substantive and procedural rights of refugees in Australia.

⁷⁰⁵ Australian Refugee Council (a). "Australia's Detention Policies." *Www.refugeecouncil.org.au*. 2020.

5.4 Similarities in Saudi and Australian Refugee Laws

Under Islamic law, the government should welcome refugees for asylum in any condition. However, international laws enforce definite limitations on the process of accepting refugees for asylum. Saudi Arabia and Australia are ideologically different, because Saudi Arabia follows Islamic laws while Australia seeks guidance from international laws for resolving the refugee problem. Although onshore immigration for a refugee is acceptable in Saudi Arabia, the Australian government considers such refugees as illegal. Apart from the fundamental difference in the approach of the two countries, various similarities exist in the refugee laws of Australia and Saudi Arabia.

Saudi Arabia follows the provisions in the Sharia law and international conventions for providing asylum to Muslims and non-Muslims refugees. Sharia allows Saudi Arabia to provide asylum to non-Muslims who are facing oppression and persecution in their country. The religious teachings require Muslims to allow non-Muslim refugees to acclimatise with the Islamic and cultural values of the country. If the refugees refuse to accept the social, religious, and cultural values of the host country, they are returned to their homeland with dignity. The principle is similar to the citizenship tests introduced by the Australian government, which are used to determine the integration of a refugee into the society. Australia does not grant citizenship status to a person who fails to pass the citizenship tests.

Another similarity between the two countries is that entry of non-citizens in Saudi Arabia and Australia is not possible without valid travel documents usually consisting of a passport and visa. A visa is the legal permission of residing in the country. The Australian visa framework has different classes and subclasses divided according to the purpose of visit.⁷⁰⁶ Saudi government has two visa categories for the visitors under the *Iqama* and *Kafala* system. While Saudi visa framework requires a visitor to have an individual sponsor, Australia uses different permits based on the nature of the entry and stay.

Sharia law also provides that Muslims should allow refugees to immigrate in Muslim countries if they willingly invest their financial and human resources for the government. Similarly, Australia not only grants visas to skilled migrants, students, and temporary workers, but also welcomes a selected number of refugees for resettlement through the scheme for

⁷⁰⁶ Migration Act 1958 s31

offshore arrivals. The program provides targeted resettlement facilities to the refugees through a specified criterion. It must be remembered that the refugees entering Australia through this scheme are entitled to permanent residency and citizenship status.⁷⁰⁷ Both Saudi Arabia and Australia allow territorial asylum. Both countries permit refugees who fear persecution in their homeland provided they have valid travel documents.

5.5 Differences in Saudi and Australian Refugee Laws

One of the main differences in Saudi and Australian refugee laws is their foundation on the two dissimilar ideologies. While Saudi laws are based on the principles of Islamic and Sharia Law, Australia follows different international and regional conventions. Saudi Arabia adopts similar policy for all the refugees irrespective of their religion and country of origin, but Australian refugee policy is apparently based on religious favouritism. Although the Australian government propagates its humanitarian efforts by asserting that more than 12,000 refugees from Syria have been settled in the country, it is a proven fact that a majority of these resettled refugees were Christians. Selecting mainly Christian refugees for asylum from a predominantly Muslim country is a clear indication of favouritism. The government has introduced new reforms and asserts that the implemented reforms are intended to eradicate allegations of racial, national, and religious discrimination. The government declares that the new criteria would be applied to all applicants irrespective of their religious affiliation.⁷⁰⁸ However, the Australian values needed for citizenship status are defined in a racial and religious context, contrary to Muslim otherness and Islamic ideology.

Another prominent difference in the refugee laws of Saudi Arabia and Australia is the latter's strict adherence to the principle of offshore visa processing for refugees. The Australian refugee system is considered among the most harsh legal frameworks in the world. In an effort to divert the attention of the general public from the plight of refugees in detention camps, the Australian government establishes these camps in far off areas of the territory or even in areas outside the national jurisdiction. In order to encourage offshore processing of asylum seekers, the government requires that refugees apply for the grant of a visa from their homeland and travel to Australia with valid travel documents. Hence, refugees entering Australia without visas are kept

⁷⁰⁷ Ibid.

⁷⁰⁸ Anne, Macduff. "The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims." *No Foundations* 15 (2012).

in detention camps, which have harsh living conditions for the inhabitants. The refugees are placed under strict security conditions until their protection claims are established. If the case is decided against an individual, he/she is deported from the country without any judicial review of their application.

5.6 Impact of Sharia on Saudi and Australian Refugee Laws

The Saudi government strongly believes in the Islamic teachings explained through a *Hadith* in which Holy Prophet Muhammad (SAW) guided Muslims that *aman* extended by any Muslim to an individual needs to be respected because a person ignoring this protection will be facing the curse of God and his angels.⁷⁰⁹ The principles of Islamic Sharia demonstrated by Holy Prophet (SAW) and his Caliphs are completely documented by Shaybani in his work titled, *Kitab al-Siyar al Kabir*.⁷¹⁰ Shaybani further asserts that a refugee availing *aman* will be given amnesty even if he/she commits crime. However, he/she will be tried under Islamic law and will be awarded punishment if the charges are proved.⁷¹¹ Shaybani's assertions and explanation about the principle of *aman* are currently valid under Saudi law, which grants resident status to refugees who obtain a visa and work permit. Thus, Saudi government employs Sharia principles as the foundation for its refugee laws.

Currently, Saudi Arabia is host to refugees from a number of countries including Myanmar (Rohingya), Palestine, and Syria along with a labour force from other countries who are being treated according to the Islamic principles. Although the current arrangement cannot be regarded as close to a refugee settlement, it provides the best option for the immigrants to stay in Saudi Arabia and work. Hence, it can be compared to the Islamic principle of *aman*, which grants safety to the foreigners in a Muslim country. Thus, history exhibits that Saudi laws considers the Islamic principle of *aman* as a legal instrument to support refugees in the country.

However, Australia being a predominantly Christian country, the impact of Sharia laws is not visible. Even Muslim refugees are ignored during the processing of their applications. Selecting mainly Christian refugees for asylum from a predominantly Muslim country is a clear indication of favouritism. Thus, Australian refugee laws are not consistent with Sharia principles.

⁷⁰⁹ Muhammad Ibn Isma'el Al-Bukhari, *Sahih Bukhari*, (3rd ed.), Edited by Muhammad Daib, Beirut: Dar ibn Kathir, 1987. 3:1160, hadith no. 3008.

⁷¹⁰ *Ibid.*, 201.

⁷¹¹ Shaybani, *Siyar al-Kabir*, 215.

5.7 Does Saudi Refugee Law Incorporate Humane Values of Sharia?

Having a closer look at the history of immigration in Saudi Arabia, it can be asserted that the national laws clearly incorporate humane values. The guiding principle of the Saudi refugee law is the Sharia ideal of *aman*, which provides protection to any foreign citizen seeking asylum in the country to flee from the persecution in their homeland. The well-established *Kafala* system facilitates the refugees to contact a sponsor for their job and residence in Saudi Arabia in accordance with the philosophy of granting individual *aman* to the refugees. Additionally, the government also issues royal decrees to accommodate refugees through special arrangement, which is consistent with Sharia law of group *aman*. Many examples are available in recent history, where the Saudi government dealt with the issue of refugees through following Islamic teachings.

Saudi Arabia has employed certain clauses of Islamic Sharia to integrate Syrian and Yemeni refugees into the mainstream society through providing them economic self-sufficiency. Islamic teachings are incorporated into the asylum process based on the wider principle of *aman*. The current system of granting residence and work permits to refugees considers it a religious obligation to protect the rights of refugees under the influence of Islamic history. The Saudi government regards it as the revered duty to grant protection, *aman*, or asylum to the Syrian, Yemeni, or refugee from other nationalities to stay safely in Saudi Arabia. The Saudi government has also aligned their local laws according to the Islamic provisions and traditions to facilitate refugees. Most of the current Saudi jurisdiction is based on the commentaries of Islamic scholars such as Shayabani, Al Juzi, and Ibn Hajr for ensuring the fundamental rights of the persecuted and oppressed Muslim and non-Muslim populations. The scholars have devoted a substantial amount of literature to help Muslim states understand Islamic Sharia principles regarding refugees and the grant of asylum and employment to them and has enacted relevant laws accordingly. The approach is useful for developing self-reliance in displaced populations by subjecting them to a unique system of reception and integration.

5.8 Does Australian Refugee Law Incorporate the Humane Values of Sharia?

Australia being a predominantly Christian country, the impact of Sharia laws is not visible. Even Muslim refugees are ignored during the processing of their applications. Selecting mainly

Christian refugees for asylum from a predominantly Muslim country is a clear indication of favouritism. Thus, Australian refugee laws are not consistent with Sharia principles.

Thus, it can be argued that humane values of Sharia are relatively ignored in Australian refugee law. The system of compulsory detention and inhumane treatment of the refugees in the camps is against the principle of *aman*, which requires the host country to protect the life and self-respect of the refugees. The lengthy stay at the offshore detention camps without any contact from the outside world violates basic human rights of the refugees. Additionally, deporting the asylum seekers to their native countries without providing them an opportunity to defend their case is also against the fundamental rights of the refugees as stated in Sharia. Islamic law does not allow the government to return the refugees to their homeland to face oppression, but the Australian harsh policies deport asylum seekers in the name of national security.

5.9 Summary of the Chapter

Australia and Saudi Arabia are the two countries which deal with refugees through their specific legal frameworks. While Saudi Arabia primarily follows Sharia principles and Islamic law for dealing with refugee issues, Australia has various regional laws to resolve refugee and asylum seekers' problems. Comparing the refugee laws of both the countries has helped explore new methods of protecting procedural rights of asylum seekers in both the countries. A comprehensive comparative analysis of current refugee laws of the two countries has been conducted in the chapter to determine their significance in facilitating refugees and asylum seekers in Saudi Arabia and Australia. The detailed evaluation has enabled the researcher to assess the contemporary laws of both the countries for their potential to protect the basic human rights of the refugees. The flaws and loopholes in the existing legislation have been highlighted effectively to guide policy makers suggest meaningful reforms in Australian and Saudi refugee laws.

The detailed discussion in the chapter reveals that Saudi refugee laws are relatively simple because they are based on the Sharia principle of *aman*. The chapter examines the history of the *Kafala* system applied in various instances to facilitate Syria, Yemeni, and Palestinian refugees. The historical roots of *Kafala* system has also been explored through various Islamic scholarly texts, which establish the significance of *aman* principle in the Muslim society. The historical analysis reiterates that every foreign national can be sponsored by a Saudi citizen to live and

work in the country under the *Kafala* system. Although the Saudi government does not allow resettlement and citizenship to refugees according to the current arrangement, it provides the best option for the immigrants to stay in Saudi Arabia and work. Thus, the current refugee laws provide all the procedural, legal, and basic human rights, which can be compared to the most effective refugee systems in the world.

In comparison, Australian refugee laws contain different issues, which give the impression of the visa framework of refugees being punitive. The government's insistence on offshore visa processing of refugees can be regarded as the violation of basic human rights. Australia's harsh stand on sending the refugees back to their homeland is also against the non-refoulement principle of International Refugee Convention of 1951. Additionally, the system of compulsory detention is also against equality and fundamental rights. The inhumane treatment of the detainees is attracting global criticism, but the government is not willing to reform the system. Furthermore, the Australian government ignores various clauses of the international refugee laws despite being signatory of various global treaties. Australia has also introduced citizenship tests through reforms, which are specifically designed to favour specific religious groups. The government uses the tests as a tool to grant asylum and citizenship to refugees from certain communities. Thus, Australia's refugee laws need significant changes to make them conform to international laws.

The chapter also highlights the element of religious favouritism and bias against the boat people apparent from the analysis of Australian refugee laws. The chapter examines that while the Australian government helps Syrian Christians obtain asylum, it clearly ignores Muslim refugees coming from the same war-torn region. The practice is against the universal principles of equality and basic human rights. Similarly, the Australian government is particularly against the entry in the country through a sea route. Usually, the refugees without legal documents try to reach Australia by boat to seek asylum. However, the government diverts all such individuals to the compulsory detention camps established on neighbouring islands. The inhabitants of the camps have to face adverse health conditions resulting in physical and emotional consequences. Such instances make Australian refugee law flawed and in need of thorough revision.

Therefore, the detailed exploration of the chapter helps the researcher to argue that Australia should simplify its visa system to facilitate the refugees and asylum seekers. Moreover, the country should abolish the system of compulsory detention to protect the rights of the

refugees entering Australia. The existing system should be replaced by an efficient bridging visa system, which can allow refugees to live freely in Australia during the period of their visa processing. Such arrangement will allow asylum seekers to avoid the atrocities of the detention centres. Moreover, the current flaws of the Australian refugee laws will be addressed effectively through the reforms.

Chapter Six: Conclusion and findings

6.1 Introduction

6.2 Conclusion

6.3 Findings

6.3.1 Similarities and Differences Between International and Islamic Law on Refugees

6.3.2 Saudi Arabian Law and Practice on Asylum Claims

6.3.3 Australian Law and Practice on Asylum Claims

6.3.4 Changes to Improve Substantive and Procedural Rights of Refugees

6.3.5 Actual Situation Facing Refugees and Asylum Seekers in KSA and Australia

6.3.6 Compatibility of Refugee Law in KSA and Islamic Law and Comparison between

Application Procedures in Australia and KSA

6.4 Justice and Fairness

6.5 Implications of the Study

6.6 Limitations of the Study

6.7 Recommendations

6.1 Introduction

This chapter forms the culmination of the research process. The researcher gives an overview of the research process, concludes the findings, indicates whether the research objective was met, and offers recommendations to the relevant bodies on how the research problem can be tackled in real life. The researcher also expresses research gaps and areas where future research can focus. The motivation for writing this thesis was mainly the humanitarian issues affecting refugees in the world. The researcher needed to delve into the legal and humanitarian guidelines affecting refugees, with a focus on Islamic and international law. The aim of the research project was to conduct a comparative analysis of the refugee status under Islamic law and international law. To make the comparative analysis, the researcher chose to base the paper on two countries, Saudi Arabia and Australia. The reasoning behind the choice was that Saudi Arabia operates under the Islamic law while Australia implements the international laws when addressing the refugee problems. In a nutshell, Islamic laws, as set out in the Quran and Hadith, direct that refugees should be given asylum in any condition while international law has several restrictions for an individual to qualify as a refugee. Therefore, in this chapter, the researcher will answer the main research questions, highlight the study implications, offer final recommendations to authorities and for future study, and suggest future directions for further research.

6.2 Conclusion

In general, the research found that seeking asylum in Australia or any other country is not illegal, it is in fact a basic human right. The research is a conclusion that each refugee is eligible to protection of their human rights. It does not matter how or where they got in any country. Theory, policy and practice that connects with refugees' rights and concerns from a development perception are infrequent. Migration is up to date an emerging concern, which is usually considered as a development issue and remains in the hands of global policy. As indicated in the first chapter, the research aimed at undertaking a comprehensive comparative analysis of the status of refugees subject to Islamic and international laws. Over the chapters, it has been depicted on the differences, using Australia and Saudi Arabia, where significant differences has been noted. For instance, in this first chapter, it is evident that there is a compatibility issue of both laws. Mostly because of the religion difference, where the Muslim

law have been portrayed to be non-inclusive of other religions. On the other hand, Muslim laws are hardly integrated into the international laws. The five chapters have broadly answered the research questions used to derive a conclusive approach of the research. In the second chapter of the research, the literature review has focused on the theories of Islamic and international Refugee Law. The highlight of the chapter is that the theories have developed organically through the offering of asylum over time, and through other interventions, such as, the enactment and adoption of conventions. The bottom line is that all the theories are based on the understanding of two principles, first, the beneficiary of the law and second, the grounds of non-refoulement. Consequently, understanding of the concepts and perspectives has helped the research have light on the similarities, differences and the impacts of both laws.

The third chapter of the research highlights that KSA has its laws entrenched in Islamic theology and tradition that give them perspective while dealing with refugees. Additionally, in prior research done on the Sharia law, scholars have pointed that it is an obligation for the country to provide safety, protection and sustenance to all refugees and asylum seekers. Dodging the responsibility is particularly considered as a sin. Conclusively, KSA has a generous system, which plays a helpful role in addressing the challenges faced by refugees due to policies around the world, effectually.

The fourth chapter of the research paper gave an overview of the Australian law. It highlights the country's acceptance of the 1951 Convention and how it has been implemented in its domestic legislation. In a historical analysis of the Australian Refugee Law which indicates that asylum seeking has been there for a long time. The country is a signatory to the 1951 Convention and the 1967 Protocol. Surprisingly enough, Australia established its standard refugee policy later in the 1970s. Currently, Australia's domestic legislation on the issues linking to refugees is found in the *Migration Act 1958*. However, the same chapter highlights how it does not comply with either the Convention or the Protocol. The outcome of the chapter is evidence of the system applying a biased selection process. Testament to this is racism and religion-based discrimination experienced by the refugees.

The fourth chapter indicates that the Australian Refugee system might be punitive. First, it highlights on the way that Australia handles the refugees according to how they access the country. Over time, the country has been committed to providing assistance to vulnerable refugees. However, refugees receive different handling under the humanitarian program. The

particular reason for this circumstance is that the Australian system requires entrance with permission. That is, to be in possession of a legitimate visa. Otherwise, the refugees are put under an obligatory detention which does not have a set time limit. Thus, it might be close to impossible for those without visas to be reunited with their people, unlike those with visas. Additionally, the government in Australia has cancelled their visas and denied them permanent settlement and citizenship. The outcome is that whenever asylum seekers do not feel safe in the country they sought safety in, the system becomes punitive. Particularly because, to these refugees, protection goes beyond being free of the issues that made them flee.

Moreover, the chapter indicates religious favouritism of refugees, particularly of those from the Christian denomination. For instance, during the Iraqi-Syria conflict, Australia's humanitarian program managed to help a lot of refugees. However, most of the refugees who were settled at this time were Christians, despite the fact that both countries in conflict have a majority of their population as Muslims. Such unequal treatment points out how the system is skewed against the Muslims fleeing to Australia. The fact that the government is harsh to Muslim asylum seekers as compared to Christians because the Muslim are rendered as too different, is penal. Thus, this chapter finds that Australia should seek to transform the system and be more assimilating to all people.

In the fifth chapter, the research evaluates and compares Saudi Arabian and Australian Refugee Law in the grounds of Sharia and the Law. Despite the two countries being ideologically distinct, essentially because Saudi is guided by Islamic law while Australia is guided by the international law. The chapter highlights that the Islamic law necessitates the Saudi government to assist all asylum seekers, whatsoever. For example, the chapter concludes that, both countries disregard the principle of non-refoulement, which is given utmost weight in the 1951 Convention. Evidently, in Saudi, all refugees are welcome, Muslim or not. However, if they do not conform to the cultural, social and religious values, they are sent to their original countries. Similarly, in Australia, if the asylum seeker does not qualify for refugee status, they may be sent back to their original country. The chapter further outlines the differences. The prevailing differences are the bases of different ideology and the harshness of Australian policies on Muslim asylum seekers. This chapter finds that the impacts of the two laws are felt by the refugees. It is certain that the Australian Refugee laws are not in alignment with the Sharia Principles. Conclusively, the values of Sharia are not acknowledged in Australia.

Moreover, the fifth chapter also highlights the difference in how the two countries handle boat people. Favouritism on the basis of religion is apparent in the Australia policies, as the chapter has examined how the Australian efforts in helping the Christian Syrian asylum seekers, disregarding Muslim refugees who are just as susceptible to harm. This action of inequality and distortion of basic human rights concludes on how flawed the Australian system is. This chapter aids the researcher in making a conclusion that Australia has a harsh system which is discriminatory in nature, especially on the basis of religion. It would do the refugees greater good if the government subjected their system to thorough amendment including exercising leniency on their visa conditions. Precisely because, the safety of the refugees and asylum seekers should be the top priority of a system and its policies. These reforms are well detailed in the recommendations discussed later in this chapter.

6.3 Findings

When the researcher set out to complete this research project, they developed six research questions. In these Findings, the researcher outlines responses to the questions as illustrated by the project findings.

6.3.1 Similarities and Differences Between International and Islamic Law on Refugees

Based on the fact that the two sets of laws have outlined guidelines and principles of dealing with refugees, there are multiple similarities relating to how these matters must be handled. The similarities and differences are covered based on a variety of matters related to the principles of refugee laws, both Islamic and international.⁷¹²

6.3.1.1 Similarities

Firstly, both the Islamic law and international law on refugees agree on the inadmissibility of returning a refugee or an asylum seeker to a country where they may face the risk of persecution. Under the international law, there is the principle of non-refoulement, which demands that a refugee or an asylum seeker cannot be returned to a country of origin if they are still in fear of potential persecution and inhumane treatment. The same is available in Islamic law through *aman*, which protects a refugee or asylum seeker from repatriation, unless they wish to return to their country on a voluntary basis. Therefore, it is a generally, accepted rule that a

⁷¹² Munir, Muhammad. "Refugee Law in Islam." *Journal of Social Sciences*, vol. 4, no. 2, 2011, pp. 10

refugee should not be repatriated if they feel that their lives could be at risk if they were to return to their country.

Secondly, both laws disallow discrimination against refugees. It appears as the principle of non-discrimination. According to the Islamic law, asylum must be granted to any person who solicits it without considering their religion, race, colour, or opulence. It is premised on the Islamic principle that indicates that before the calamities of the world, all human beings are equal. Therefore, Islamic law protects the needs of all human beings and rights without discriminating. As a result, any person who is tyrannized or persecuted has the right to seek asylum or refuge, and the right is granted to all human beings, and it cannot be removed on the basis of race, religion, gender, colour, or any other element of diversity. In Islamic law, equality for all people is among the most significant foundations. It leads to the elimination of distinctions based on any other factor other than piety. A similar approach is adopted in international law of human rights, and the refugee convention. Non-discrimination is a basic human right law principle, and when it comes to refugee matters, it is expounded under Art. 3 of the 1951 Refugee Convention. Similarly, it outlines that all states that contract to the convention and its provisions shall apply them to refugees without discriminating based on country of origin, race, or religion. Therefore, the two sets of laws disallow discrimination of refugees.

Thirdly, both laws prohibit the repatriation or penalty on refugees based on the method of arrival or entry into a country, or their presence in a state territory. The idea is that a person seeking asylum is fleeing danger, and they feel that they can get solace in the country where they seek refuge. Failure to grant them asylum would be equivalent to denying them a human right, and it would go against the principle of non-refoulement. Therefore, allowing entry and offering refugees the basic needs would enable them to continue with their lives until the danger they are fleeing subsides or they seek to return to their country on a voluntary basis. An important point to note here is that not all countries that agreed to adopt the international law on refugees, that is the 1951 Convention and its protocols, did it without exemptions. Therefore, while the international law requires all countries to accept refugees regardless of their entry method, some nations have internal laws that limit acceptance.

Fourthly, both laws have the principle of humanitarian character embedded in their pronouncements. The right to humanitarian character is justified since the aim is to rescue people who are in need or distress. Giving asylum entails expressing mercy towards another individual

whose basic rights and freedoms are at risk of violation. Therefore, the humanitarian aspect relating to how asylum seekers need to be treated like other human beings are outlined in both laws. Asylum seekers should be guaranteed human rights and freedoms while in the foreign state, and they should be handled not dissimilarly to other human beings.

6.3.1.2 Dissimilarities

While there are various similarities between the two sets of laws on refugees, there are also various points highlighting some differences. The most evident differences emanate from the sources of authority in the two sets of laws. For Islamic law, Hadith and Quran are the main sources of information and guidance in relation to treatment of asylum seekers. Islamic principles are guided by the life and teachings of Prophet Mohammed (SAW). Therefore, most of the issues raised in the law align to the rules within the holy books. It also means that most of the details are given with the assumption of their being an Islamic state, and non-Islamic state. As indicated throughout the analysis of the law, anyone is allowed to enter the Islamic state and receive asylum regardless of their faith. It also recognises that Muslims can be in any part of the world, and they can enter and live in the Islamic state from whichever part of the world they originate without requiring any approval. On the other hand, the international law is founded, primarily on the 1951 Convention and its subsequent protocols. It also borrows heavily from other international laws, like the international humanitarian law.

Secondly, the laws dictate the person who holds the authority to grant asylum. In Islamic law, the state and ordinary people are required to grant asylum to any person seeking the same. The concept of *jiwar* requires that any person grants protection and refuge to another person who seeks it as they flee persecution from their home. Since the international refugee law is modern and was adopted by states, they hold the authority to grant asylum. Therefore, the government of a country holds the authority to grant asylum, and its citizens do not have similar capacity. It aligns to the need for a country to maintain its sovereignty and rule over its citizens.

Thirdly, there is a significant difference in the foundations of the two sets of laws. In principle, Islamic law is based on religion while the international law on refugees is secular. Therefore, the operations of these laws are based on the guiding principles. While Islamic states can opt to adopt versions of the laws according to the Islamic laws and introduce new aspects given the modernity and changes over time, they cannot alter the teachings or foundations found in the Islamic law. The international law on refugees is founded on conventions, and only states

that have signed the conventions and protocols are required to follow them. Nonetheless, most of the countries adopt the principles and guidelines in the convention and also forms their own laws relating to immigration, which are superior to the international law.

6.3.2 Saudi Arabian Law and Practice on Asylum Claims

6.3.2.1 Consistency of Saudi Arabian Law with Islamic Law

Saudi Arabia is a host to multiple refugees from different parts of the world. The country operates under some principles of the Islamic law, but it bases its rules on specific laws developed over time. The country has a recognised *Kafala* system, which allows its citizens the right to host individuals from other nations. Essentially, the system allows any Saudi national to sponsor and host a foreigner as a resident and worker in Saudi Arabia. While not a direct system to deal with refugees, it allows foreign immigrants to reside and work in Saudi Arabia. It aligns to the Islamic law where any individual in the Islamic State has capacity to offer refuge and protection to an asylum seeker. This is an advantage not found in other countries.

Nonetheless, there are sections of the Saudi law on refugees that bar asylum. For instance, there is a law that indicates that individuals seeking asylum in Saudi Arabia must produce the required valid travel documents. It is the Law no. 17/2/25/1337, and it indicates that individuals without proper travel documents will be imprisoned and deported to the country of origin. This law goes against the principle of non-refoulement which is also found within the Islamic law on refugees. Except, If the refugee commits dangerous acts that harm him or the security of the state, the asylum may be terminated, and the refugee forcibly returned to his country. Or if the reason for which the refugee came to the country ceases to exist, then the refugees may be forcibly returned to their country. While emphasizing that it is not permissible to abruptly terminate asylum without excuses, as this becomes a kind of treachery. It is not permissible in Islamic law to return a refugee to his country in a situation where the refugee is in danger of being persecuted. Nor is it permissible in Islamic law to impose a penalty on refugees fleeing the conflict zone who enter or are in the country in an irregular manner. Muslims must contain and honor them. This is a very important principle, which is that penalties may not be imposed on a refugee who enters or is present illegally in the territory of the Islamic State if it is proven that he intends to seek refuge and safety.

The country also has agreements with various international entities for the discouragement of illegal entry of refugees into the country.

6.3.2.2 Consistency of Saudi Arabian Law with International Law

Similar to the Islamic law on refugees, the international law requires countries to give asylum to individuals regardless of the legal or illegal nature of their entry into the host country. In the case of Saudi Arabia, there are requirements to provide proper travel documents or risk imprisonment and repatriation. It goes against the principle of non-refoulement as outlined in the Refugee Convention and subsequent Protocols. On the other hand, the country receives thousands of refugees annually and abides to most of the international law requirements, which are part of the local refugee law. There are several limitations for individuals seeking refuge in Saudi Arabia, and they add to the inconsistencies from the international law. For instance, proper documentation is necessary, and considering that some refugees flee their war-torn nations without time to get such documents, they risk rejection by the country. While there are areas of inconsistency, the law has multiple consistencies with the international law.

6.3.2.3 Awareness of Substantive and Procedural Rights by Asylum Applicants

For most countries in the world, it is not always clear what one needs to provide as an asylum seeker. In the case of Saudi Arabia, asylum seekers can seek such information through different avenues including the immigration department. In the past, the government has issued decrees allowing certain immigrants non-conditional or conditional entry into the country as asylum seekers. Since the national security is paramount to the country, the country puts its national interests ahead of the humanitarian considerations when screening the refugees. There is an assumption that the country is ruled using Sharia law, and that all Islamic teachings on how to deal with refugees must apply. However, this is not the case and while the Saudi refugee law borrows from the Sharia law, it also has some inconsistencies.

6.3.2.4 Awareness of Rights and Responsibilities for Successful Applicants

Essentially, the Sharia law provides the rights and responsibilities of refugees, and it is from this that Saudi Arabian refugee law borrows many of its regulations. The Sharia law provides the principles of justice and equity as the main guidelines when dealing with refugees. It considers that the most vulnerable people should receive additional support, and it, especially, applies to women and children. There is also that non-Muslims could be at a higher risk level, which leads to the need to offer them additional protection. In addition to protection, asylum

seekers are also guaranteed basic needs including food, water, and shelter. The Quran is also explicit on its prohibition of forcing non-Muslims into converting into Islam. All the refugee rights are outlined in the Arab Charter of Human Rights, and KSA is a signatory. Successful applicants should be aware of these rights and responsibilities. To answer this question, a direct practical study should be conducted with the refugees, such as an interview or a questionnaire, and this is a suggestion for researchers to do.

6.3.3 Australian Law and Practice on Asylum Claims

6.3.3.1 Consistency of Australian Law and Practice with International Law

Australia's immigration law has undergone several development phases. At one point the country has the *Immigration (Restriction) Act* that was abolished in 1973 and it was replaced by a less discriminatory immigration law. As the refugee law developed further, several principles emerged to guide the process. The country has a humanitarian commitment and responsibility to resettle refugees. Australia retains the final decision on the acceptance or rejection of refugees, and it also caters for the movement and resettlement. It also recognises that some refugees may be better-off resettled in countries other than Australia. Essentially, there are elements of the Australian law that do not align to the international law. For instance, the assignment of resettlement spots is specific to Australia, which does not comply with international law. The same applies to some screening procedures as it was reported by UNHCR in 2014 after 41 Sri Lankan asylum seekers were returned to their country.

6.3.3.2 Consistency of Australian Law and Practice with Islamic Law

Australia is a secular nation, which means that its practices are not governed by religion. Nonetheless, the similarities between Islamic law and international law on refugees would be expected to appear in the country as well. While that is the case, the most glaring issue in relation to Islam in Australia, is how much the country's practices are significantly anti-Islam. The country has leeway in choosing who gets asylum, and it opens up an opportunity for discrimination. The surge in terrorist activities in the last two decades and the link to Islam has led to stereotypes. Unfortunately, Australia has adopted policies that discriminate against Muslims in the issuance of asylum. It results in religious favouritism in the migration program, which is inconsistent with the Islamic law.

6.3.3.3 Awareness of Substantive and Procedural Rights by Asylum Applicants

The country has a formal procedure indicating the rights of asylum seekers, but not everyone is aware of them. Section 35A and 36 of the Migration Act 1958 requires asylum seekers to apply for visas before traveling to Australia. It leads to the multiple cases of asylum seekers being considered illegitimate due to their failure to follow the procedure, or their actions are considered illegal. They are considered to be a threat to the Australian identity and security by many citizens. Any asylum seekers who arrive by boat, or those who are referred to as “onshore” asylum seekers are always detained, and are seen as taking places that would have been allocated to offshore refugees. The failure to consider the pressure and conditions of these refugees is unfair and not in line with the international law. Nonetheless, the fact that asylum seekers keep doing it means that they may not be aware of their substantive and procedural rights.

6.3.3.4 Awareness of Rights and Responsibilities for Successful Applicants

In line with the provisions of the *Migration Act 1958*, successful applicants are granted protection visas. There are clear rights and responsibilities that the refugees should follow, but the actual assimilation process is not without its hardships. However, previous studies on acculturation of the refugees indicate that those who fail to do it successfully may develop stress and other mental issues. It is noted that Christian refugees have a higher success rate for acculturation and assimilation in Australia than their Muslim counterparts.

6.3.4 Changes to Improve Substantive and Procedural Rights of Refugees

In both Saudi Arabia and Australia, there is a lot that should be done to improve the substantive and procedural rights of the refugees. The two countries hold refugees in deportation detention areas, which are, in most cases, overcrowded. A case in point is the deportation centre in Riyadh reported by Human Rights Watch. The residents were exposed to multiple health problems, including potentially contracting COVID-19 due to overcrowding.⁷¹³ In Australia, these deportation camps are situated offshore in Papua New Guinea and Nauru. Inhumane living conditions that the asylum seekers have to endure and end up back in the countries where their lives are at risk of persecution are unexplainable. The aspect of deporting asylum seekers due to documentation or illegal entry status is against the provisions of the international law, as well as

⁷¹³Human Rights Watch, *Saudi Arabia Migrants held in inhuman, degrading conditions*, 15 December 2020.

Islamic law. Where the security of the country is not being compromised, this is an area that requires improvement. The governments of Australia and KSA need to improve the living conditions in any of the refugee camps, and should also establish legal frameworks to avail legal assistance to asylum seekers. Assisting the asylum seekers to get the required documentation will go a long way in according humanity.

6.3.5 Actual Situation Facing Refugees and Asylum Seekers in KSA and Australia

Through the current research, various issues affecting refugees in both Australia and KSA have emerged. As mentioned in the previous section, the issue of documentation and asylum seekers getting deported is a major point of concern. These individuals face hardships in the screening and deportation camps, which makes life intolerable despite the multiple hardships they have faced in their countries of origin to the point where they opt to seek refuge elsewhere. In the case of Australia, there are multiple cases of its policies ignoring international refugee laws that it is a signatory to. For instance, the introduction of citizenship tests that favour certain groups or discriminate against some asylum seekers should be eliminated. The favouritism and bias reported against boat people and Muslims should be eliminated. For Muslims seeking asylum in Australia, or a person who gets there by boat, life can become unbearable. There is a need for reforms in all matters relating to refugee treatment.

6.3.6 Compatibility of Refugee Law in KSA and Islamic Law and Comparison between Application Procedures in Australia and KSA

The KSA refugee law has a clear inclusion and insertion of the Islamic law through the concept of *aman*. There are actual cases where the Saudi government applied the well-established *Kafala* system enabling asylum seekers and refugees to link up with Saudi sponsors, which enables them to reside and work in the country. The government has also previously directed Aramco, a government-owned oil corporation to employ Palestinian refugees as a way of giving them an opportunity to work and earn a living and support their families.⁷¹⁴ The country's leadership has also issued several Royal decrees aimed at regularising the status of refugees, for instance, Syrian nationals. Evidently, the country has exhibited the incorporation of humane values into its legal system in line with Sharia law. Nonetheless, the issue of repatriating or deporting undocumented asylum seekers goes against the Islamic law on refugees. Nonetheless, one significant difference is the absence of Islamic law impact in the Australian

law. Its adversity has led to bias against Muslim asylum seekers, and a favouritism approach during the application process. In Australia, there is a lengthy application process, which also involves compulsory detention and inhumane treatment of applicants. In addition, asylum seekers who get to the island nation via sea and unannounced get detained in camps in Nauru and Papua New Guinea. Therefore, there is a significant difference where religion plays a different role in the application procedures in the two nations.

6.4 Justice and Fairness

This research sought to establish whether there was fairness and justice for the two countries, with respect to the rights of refugees and asylum seekers. In Saudi Arabia, the research found the Islamic principles as fair and just. However, it is important to acknowledge that these rules can only be fair and just if they are exercised towards the asylum seekers. Moreover, fairness and justice are evident in the Saudi Arabian law because they are not only domestic, but also international solutions to solving disputes. The research indicates that the refugees and asylum seekers are usually in pursuit of peace and safety, and the Islamic law grants it to every seeker. Moreover, the principle of non-discrimination is further evidence of fairness and justice. In this case, it is a fact that the Muslim law protects the right of every human regardless of their religion, race, colour or gender. The right to equality for all human beings is the foundation of fairness and justice.

It is critically important that asylum seeker and refuge claims are carefully assessed. If the system is fair and just, then it is too absolute to make a wrong decision that returns a refugee to persecution. According to the research, the Australian system has been seen as punitive. Moreover, the research indicated that Christian refugees get better treatment than Muslim refugees in Australia. While seeking fairness and justice in Australian law of human rights towards refugees, the findings are not exactly fairness and justice.

6.5 Implications of the Study

The research highlights that every refugee has a right to human rights in the country they flee to. Thus, the study poses implications to policy makers and the government to ensure international safety and physical safety. There is a need for the governments to develop approaches of determining the status of each individual's legal position when considering their

rights as asylum seekers. Thus, the government and policy makers must adopt a fair and secure system for all, adapted from the Islamic and international system.

Additionally, the research provides the basic standards on which principled handling can be founded. The action has a political implication because, it provides an authentic global context within which countries can be able to share responsibilities whenever displacement occurs. This provides security for the refugees.

6.6 Limitations of the Study

The research has highlighted a number of limitations. The first limitation is that, Islamic law is flexible and the study does not really consider its effectiveness on other aspects that affect immigrants. Therefore, future researchers should consider this issue as a research gap. Secondly, the Islamic law is ambiguous and one clause might be subject to more than one meaning. The ambiguity can lead to different understanding of the message conveyed, making it less reliable. Lastly, the data to provide information for the refugees in Saudi Arabia is not found in any of the official government websites. This hinders comprehensive analysis for the research and it also makes it difficult for refugees and asylum seekers to get the information they require.

Moreover, the Australian laws are under the 1951 Convention relating to the status of refugees. The Convention itself is limited. The first limitation is that the Convention provides that a refugee is unable or unwilling to seek safety in their original country due to persecution. However, the term persecution is subject to narrow definition. Refugees face the lack of rights and security it provides to them. Lastly, the principle of non-refoulement prevents a country from returning the refugee to their original country with their safety at risk. Nonetheless, it does not give the asylum seeker a direct right to enter a foreign country and acquire permanent residence. Therefore, as much as Australia does not depict fairness and justice, it might be due to these limitations.

6.7 Recommendations

After conducting the analysis, the project offers a few recommendations related to the results of the paper. Firstly, there is a need for the authorities in the two nations to develop laws and regulations that align their way of doing things to the international law on refugees. The treatment that asylum seekers get has been seen not to follow the international law on refugees in a few instances, which necessitates the move. It is still important for these nations to recognise

the modern risks associated with movement of people, especially immigrants. Nonetheless, these nations should identify humane approaches of handling asylum seekers, especially relating to the detention of refugees in the camps. Secondly, the current research could not cover all the potential areas of research, which limited the researcher's scope. As a result, all areas that were outside the scope should be considered and researched in the future using the current research as a foundation. For example, the issue of refugee deportation due to diverse reasons is an important area that the current project could not cover. Given the principle of non-refoulement, future research should focus on understanding the reasoning behind the deportations, and whether they are going against this principle. Additionally, the refugees in both KSA and Australia are experiencing multiple issues due to their situation. Analysing their problems and plight is a prime area of focus that future research can look into and discuss. The international community needs to be made aware of these issues, and possibly their intervention can alleviate some of the problems. As highlighted, the movement of people, especially refugees, introduces a problem with national security in both KSA and Australia. There are also interests related to both Islamic Law and international law on refugees. These matters should be explored through future research.

The Australian government should avoid discrimination based on religious backgrounds when resettling refugees. The research has evidenced major issues causing problems for the refugees based, primarily, on the decisions by the Australian government to favour Christians over Muslims during refugee resettlement. More precisely, non-Christian refugees receive poor handling as compared to Christian refugees. The Humanitarian Program will protect in Australia those who are found to be refugees with respect to the 1951 convention. If the government facilitates the funding of such a program that will be characterized with flexibility, it will be at par with their response to the evolving humanitarian issues and the general need for the resettlement. The Australian government needs to increase the slots available for refugee resettlement. It should be an opportunity to avail additional spaces for individuals seeking refuge to get into the country. In relation to the first recommendation, since the program provides a safer environment, it is advisable for the government to provide more room for the refugees to feel safer. A non-discriminating program that is free of religion based or any other form of discrimination, will facilitate a safer and fairer treatment of refugees.

The next recommendation relates to the Australian government, and it entails the potential to adopt diplomacy when availing safe routes for the refugees to arrive in the country. It entails the reunion of families that may have been split up as individuals sought refuge or moved around, and also awarding the refugees the necessary assistance to get their visas to prevent the decisions such as using boats to reach the Australian coast. It also means that everyone who seeks assistance is in need of resettlement, and getting them the necessary help resolves and alleviates some of the pressure in their lives. Early resettlement is also critical since it means that the refugees and asylum seekers can access help including access to basic services and health services. Prioritizing the needs of the refugees is an appropriate approach to reaching fairness and justice toward the refugees.

Fairness is an essential principle when dealing with the refugees and their problems. Consequently, there is a need for the government to ensure that all refugees get fair treatment even when in detention regardless of their religion. Therefore, there is a need for freedom of religious practice, for instance, through availing prayer rooms, among others. In so doing, the refugees feel safer and included in the country they have sought safety in. Moreover, allowing the refugees maintain their individualism is a positive way of handling them, especially the time of their vulnerability. With all these issues put into consideration, the Australian government must adjust its operations to protect the refugees against religious persecution, which in most cases is part of the reasons they escaped from their countries. It will be fair to make it a duty or obligation to not discriminate especially on the basis of religion. The regulation provides security to all refugees especially those that are non-Christian. This upholds safety and fairness towards the refugees in the country. Furthermore, justice and fairness need to be integrated into the process. It will be the most ideal approach to ensure that freedom of religion is not only promoted, but it also gets the requisite protection. The government of Australia must also vocalise its rejection of political disclosures that demonise specific individuals seeking asylum based on their religious beliefs.

The Saudi Arabian Government should urgently address the persecution of the Syrian and Yemeni refugees. It can be done through the use of diplomacy, the existing aid programs, and the country's role and influence in regional forums for these governments to act and cease the humanitarian suffering of their people. Secondly, engage constructively in dialogue with our neighbours and with UNHCR to improve the conditions of Syrian and Yemeni people

forced to flee. Lastly, review of the refugee resettlement program. Moreover, the Saudi Government should urgently exempt refugees from taxes on basic goods to improve their economic conditions. Providing refugees with more lenient policies allows the refugees to feel safer at the country.

The two governments should not blame the refugees for their social and economic concerns. Rather they should handle all forms of discrimination and find mechanisms to ensure they do not exist. Otherwise, it is unfair and unjust to the asylum seekers who are in fear due to their status as refugees, and in some cases, these individuals face death in the host nation. The refugees are seeking safety and may not be in a position to secure any properties. With that perspective, the governments should establish a charitable fund that is interested in collecting *zakat* or charity funds and disbursing them such as a monthly salary to them. Also, they should build adequate housing for refugees and enact a system of property rights for them.

Appendix One - sample interview transcript

The first interview was conducted with (INTV 1)

1- What are the communities fleeing the wars received by Saudi Arabia?

The answer is: Syrian, Yemeni and Burmese communities.

The number of refugees is 1.07 million (we call them ‘visitors’). This number includes 561,911 Yemenis, 262,573 Syrians, and 249,669 Burmese.

The number of Burmese in Saudi Arabia in 2019 who have improved their conditions and obtained residence cards is about a quarter of a million.

Some of them acquired Saudi citizenship and, in 2005, the mass Burmese immigration stopped but the individual immigration remained.

2- How many years can a community fleeing the conflict zone in Saudi Arabia live?

The answer is: Linked to the end of the conflict in the country when the Burmese entered the Saudi territory since 1970 AD, most of them obtained permanent residence and some of them obtained Saudi citizenship. As for the Syrians and Yemenis, they obtained temporary residence cards for five years from the beginning of the conflict with a possibility to renew them until the end of the conflict in their countries. However, those with relatives in Saudi Arabia have permanent residence without obtaining Saudi nationality.

3- What factors do officials consider when processing permanent /temporary refugee applications?

The answer is: There are several factors related to permanent and temporary residence for refugees. It is because some groups obtained permanent residence as refugees, such as Turkmen - Baluchi - Burmese.

Factors that officials consider when processing residence requests for refugees are as follows:

- Has a legal passport issued by his country’s government.
- Political asylum. A foreigner must immediately present himself to the nearest police station to treat his condition.
- Refugees must present to government representatives abroad before traveling to be permitted to enter Saudi Arabia with the following notes:

- A- The reason or purpose of entering Saudi Arabia.
- B- The money a person carries when entering it in cash or checks.
- C- The party that will provide this person with money in case he is unable to spend it on himself in Saudi Arabia.
- D – A person’s sponsor for his pledges and obligations:
 - Sponsorship of the guarantor is no way to be removed.
 - Not to be undesirable religiously, morally and politically.
 - A permanent residence permit may be granted to the two neighbors of the Two Holy Mosques for a period not exceeding four years.
 - The right to residency is granted on the following conditions:
 - 1) To enter the country, at least with a general expense for a person and his family members, if any.
 - 2) The competent authority has the right to discuss its financial resources for any other year for the sake of survival. If it becomes clear that the authority is incapable of spending on itself, a person is charged with leaving the country so that he is not dependent on it.
 - 3) Must provide a financial balance or sponsor to deport him to the country in which he was granted the entry visa if need.

4- Is the refugee entitled to apply for Saudi nationality? How many years does it take to get citizenship?

The answer is: The applicant should legitimately come to Saudi Arabia and carry a valid passport allowing him to return to his country without restriction or condition.

Also, suchlike persons should live in Saudi Arabia for no less than ten consecutive years, according to a regular residence permit. Also, this person should qualify for one of the professions that the country needs.

5- What are the steps of applying for asylum in Saudi Arabia?

The answer is: A refugee must have a work visa issued by the representatives of the Kingdom of Saudi Arabia abroad or as a subordinate to the head of the family to be granted residency.

6- How long does it take to process residency request in Saudi as a refugee?

The answer is: Usually, it takes not much time if the required justifications and conditions are met.

7- What obstacles do applicants face when applying for asylum?

The answer is: Refugees who are applying for asylum face a wide range of obstacles that can severely impact their asylum requests and delay their entry into the nation. First, refugees are required by law to have documentation to identify them. Many do not have this documentation, or their documentation is insufficient, outdated, or not approved by the state. This can hold up their asylum case for weeks or even months; sometimes it can result in them never gaining asylum seeker status. For obvious reasons, it is imperative that Saudi Arabia be able to identify who is coming into the nation, but refugees often fail to produce adequate, acceptable documentation for logical reasons. When you are fleeing your homeland for your life, you often do not think to pick up your documentation. Others simply never had formal documentation due to systemic issues in their home nation such as corruption or poverty.

Another obstacle faced by asylum seekers is their past histories and criminal background. Saudi Arabia is a nation that takes crimes seriously and strives to maintain a safe, secure society. Saudi Arabia is harsher than most nations on addressing crime and keeping it at bay. If a refugee has a criminal background or even any nefarious incidents in their past, they might be denied entrance into the nation.

A third obstacle is a lack of resources and guarantor. Refugees have to possess some means of money and resources. The nation does not want to support new people who have no financial backing. Many asylum seekers lack resources and a guarantor who will vouch for their behavior and needs while in the nation. These are just some of the roadblocks that asylum seekers face.

It is a true translation done by researcher

The third interview (INTV 3)

1- What are the consequences of an unsuccessful asylum application? Are there appeal rights for unsuccessful applicants?

The answer is: The Kingdom of Saudi Arabia received all the refugees who arrived in the country and were given a visitor ID due to the circumstances in their countries. Those who refuse because of the lack of conditions are entitled to apply again when the required conditions are met.

2- Is the asylum process in accordance with law?

The answer is: The asylum process in Saudi Arabia follows a strict law that is detailed in many documents, proclamations, and other formalities. Refugees have many protections under the Saudi law that serve them well when they are claiming a case of asylum. All refugees are subject to the laws and regulations set forth by the Ministry of Labor and Social Development. Not only do the ministry's laws and regulations monitor who can and cannot come into the nation based on asylum, they also serve to guarantee certain protections for seekers.

Importantly, like other Persian Gulf states, Saudi Arabia has not signed on to the 1951 United Nations Refugee Convention. This means that the nation is not required, by international law and covenant, to take in refugees and offer them protections. However, the nation has pledged to help thousands of refugees and has laws and regulations domestically to protect asylum seekers. Most recently, Saudi Arabia has pledged to issue 100,000 residency permits to Syrian refugees who are fleeing the horrific conditions in their homelands. Currently, the number of Syrian refugees in Saudi Arabia far exceeds these numbers and is likely over 500,000 Syrians. Most of these individuals are temporary foreign workers who are protected by laws and regulations that aim to ensure that they are treated fairly and justly. Syrians are referred to in the official law as 'Arab brothers and sisters in distress.' Once in Saudi Arabia, they are legally entitled to gain access to many social services to include healthcare and education. These are just some of the benefits refugees obtain when they enter into Saudi Arabia. They are also permitted to work in Saudi Arabia even if they are not Saudi citizens, which greatly serves the refugees who need money to survive.

3- Is the asylum process in accordance with morality?

The answer is: Everyone has a different understanding and definition of morality but, in general, the Saudi government acts very humanely towards refugees and asylum seekers. The government appreciates the plight of many people, to include Muslim brothers and sisters, throughout the world, and feels that it is the obligation of stable nations to care for and help those in need.

Importantly, the Saudi government is grounded in strict Sharia law that aims to follow the Quran and uphold basic moral principles of Islam. In Islam, there is a strong focus on charity and taking care of foreigners by showing hospitality. These values and ethics are reflected in Saudi asylum and refugee policies and protocols. The policies aim to provide for those without resources and ensure that the government is acting in an ethical manner towards all people, whether they are Muslim, Christian, or any other religion.

Currently, the Saudi government has invested millions of dollars into providing refugees with the resources they need to start a new life. The government provides facilities to all refugees that serve as shelter and places to procure food, healthcare, and other essentials for life. These are costly, but the Saudi people feel that it is their ethical and moral duty to provide for those in distress and need. The moral compass of the nation requires the government to extend services to refugees and to allow each person the opportunity to live a life of value and dignity.

The Saudi government tries to approach each asylum case fairly and with respect for human life and the suffering of others. Each case is evaluated individually to determine if the asylum seekers is entitled to resources and support. Most of the time, the person seeking asylum receives some help and oftentimes the aid is comprehensive. In general, the government acts very morally upright.

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Fourth interview with immigration lawyer (INTV 4)

What are the advantages of asylum to the Kingdom of Saudi Arabia?

- The Saudi people are characterized as being socially cohesive, adhering to the principles of freedom, and opposing all forms of racial discrimination. Therefore, forming friendships and neighborly relations with Saudi citizens is easy.
- The refugee can benefit from the high-quality Saudi health insurance, which covers everything related to the refugee's medical and health issues free of charge. During his stay as a refugee in Saudi Arabia.
- Children of refugees can benefit from Saudi education for free. Even those who excel academically can continue their university education by obtaining scholarships from Saudi universities.
- The Saudi citizen who is financially able to host the refugee with his family from his country and be under the responsibility of the Saudi citizen. This is an advantage not found in other countries.

What are the disadvantages of asylum in Saudi Arabia?

- One of the main disadvantages of asylum in the Kingdom is the **high living expense in it**. This is because of the increase in the rate of added tax on goods in Saudi Arabia, due to the Corona pandemic. This has negative and exhausting repercussions for the refugee on all areas of life, especially the economy.
- **Suitable job opportunities, for refugees, is very difficult** in Saudi Arabia. The eligibility to work first is for Saudi citizens because of Vision 2030, which supports Saudization and supports companies by employing Saudi citizens, who have the right to choose suitable jobs for them. In addition, the jobs that have the lowest financial returns and difficult conditions, which the Saudis abandon, go to the refugees.
- It is also clear that the Saudis are **intolerant of their mother tongue**. The majority of official transactions, economic, social, and commercial activities and workplaces in Saudi Arabia are conducted in Arabic, while the rest of the languages are used on a very small scale. It is imperative for refugees in Saudi Arabia to learn the Arabic language before anything else. This is so that they can adapt and integrate into Saudi society.
- It is also one of the main disadvantages of asylum in Saudi Arabia, the issue of **lack of direct financial support with a monthly salary** for refugees. The refugee receives support through

social solidarity and zakat funds, which are a legally obligatory right from the wealth of the rich Muslim to the poor at an annual rate of 2.5%. He may receive in-kind subsidies such as food and clothing, which are charity from the rich for the weak. So, he must begin to integrate into society, because he will not depend on zakat money for his whole life.

Continuing to receive aid from individuals also means the difficulty of integrating into Saudi society.

- The question of estimating persecution or not is with the **government's assessment and its comprehensive view of the situation in the conflict area**. And not in appreciation of the conditions of individuals seeking asylum, for example: Yemenis were asked to return to their country, which is an area of poverty, conflict, war and insecurity, and this is considered a forcible return.
- At the end of the asylum period, asylum seekers are given a period to leave Saudi Arabia. **Failure to leave the country** voluntarily will result in forcible deportation by the police. Anyone who does not reside legally in the country will be punished with imprisonment, a fine and deportation.
- If the refugee is **without identification documents** for his origin and name, and unclear identities make deciding on the asylum application more difficult, according to the Saudi passports policy.

What does someone who lost his identification papers do? Can he enter Saudi Arabia?

Unfortunately, **it is not possible** under any circumstances to enter Saudi Arabia. If he enters illegally, he may be punished with imprisonment, a fine, and deportation. In narrow cases, he may obtain a pardon from the king, as happened in 2015 to ease the burdens on Yemenis.

King issued an order to take the necessary measures to rectify the conditions of those residing in the Kingdom in an irregular manner from the people of Yemen by granting them residence visas for a period of six months, extendable for five years. After obtaining travel documents from the embassy of their country's government, they are also allowed to work.

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The fifth interview with the Mufti: (INTV 5)

Q: At the end of the asylum period, asylum seekers are given a period to leave the country, Failure to leave the country voluntarily will result in forcible deportation by the police. Any person who does not reside legally in the country will also be punished with imprisonment, a fine and deportation. What is the ruling on forcing refugees to leave the country at the end of the asylum period and forcibly deporting them? And punishing and violating any person who does not reside in the country legally?

The answer is in two cases:

If the refugee commits dangerous acts that harm him or the security of the state, the asylum may be terminated, and the refugee forcibly returned to his country.

If the reason for which the refugee came to the country ceases to exist, then the refugees may be forcibly returned to their country.

While emphasizing that it is not permissible to abruptly terminate asylum without excuses, as this becomes a kind of treachery.

It is not permissible in Islamic law to return a refugee to his country in a situation where the refugee is in danger of being persecuted. Nor is it permissible in Islamic law to impose a penalty on refugees fleeing the conflict zone who enter or are in the country in an irregular manner. Muslims must contain and honor them.

This is a very important principle, which is that penalties may not be imposed on a refugee who enters or is present illegally in the territory of the Islamic State if it is proven that he intends to seek refuge and safety.

What is the Islamic ruling on receiving refugees and supporting them financially and morally?

Answer: In the verse we find: (9) And [also for] those who were settled in the Home [i.e., al-Madīnah] and [adopted] the faith before them. They love those who emigrated to them and find not any want in their breasts of what they [i.e., the emigrants] were given but give [them] preference over themselves, even though they are in privation. And whoever is protected from the stinginess of his soul - it is those who will be the successful. Al-Hashr.

This is evidenced by the necessity of showing pleasure and benevolence, and even altruism when receiving refugees, and not rejecting them from Islamic countries. What is inferred on the obligation to emigrate for Muslims who live in a land in which they are vulnerable, which essentially entails the necessity of accepting their emigration and helping them from the Islamic countries, otherwise what is meant by their emigration if the land becomes narrow for them with what it welcomed, and the people of their religion and their state do not receive them?

Just as a refugee has rights over the host authorities, they vary from securing his material needs, from feeding the poor, orphan and captive to food for his love, to preserving the refugee's money and property, to medical treatment, education, safety, and morally supporting them with the tongue, and demonstrating the bond of Islamic brotherhood that the Prophet, may God's prayers and peace be upon him, established and defined its framework in He said: "The believer to the believer is like a building, one part of which strengthens the other."

What are the conditions of Sharia to support refugees?

This support requires the ability to be obligated, and the security of harm. The meaning is that no one should leave aiding refugees with the ability to do so.

Is a Muslim sinning if he does not receive and support refugees?

Whoever was able to support the oppressed and did not do so, then he did something forbidden because he violated the Shariah order. The Prophet Muhammad said: Help your brother who is oppressed.

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