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# **Consultation with Lawyers on Prevention and Response to Detention of Refugees and Asylum Seekers**

**7<sup>th</sup> December, 2014**

**Hotel Hindustan International, Kolkata**

**Organised by**

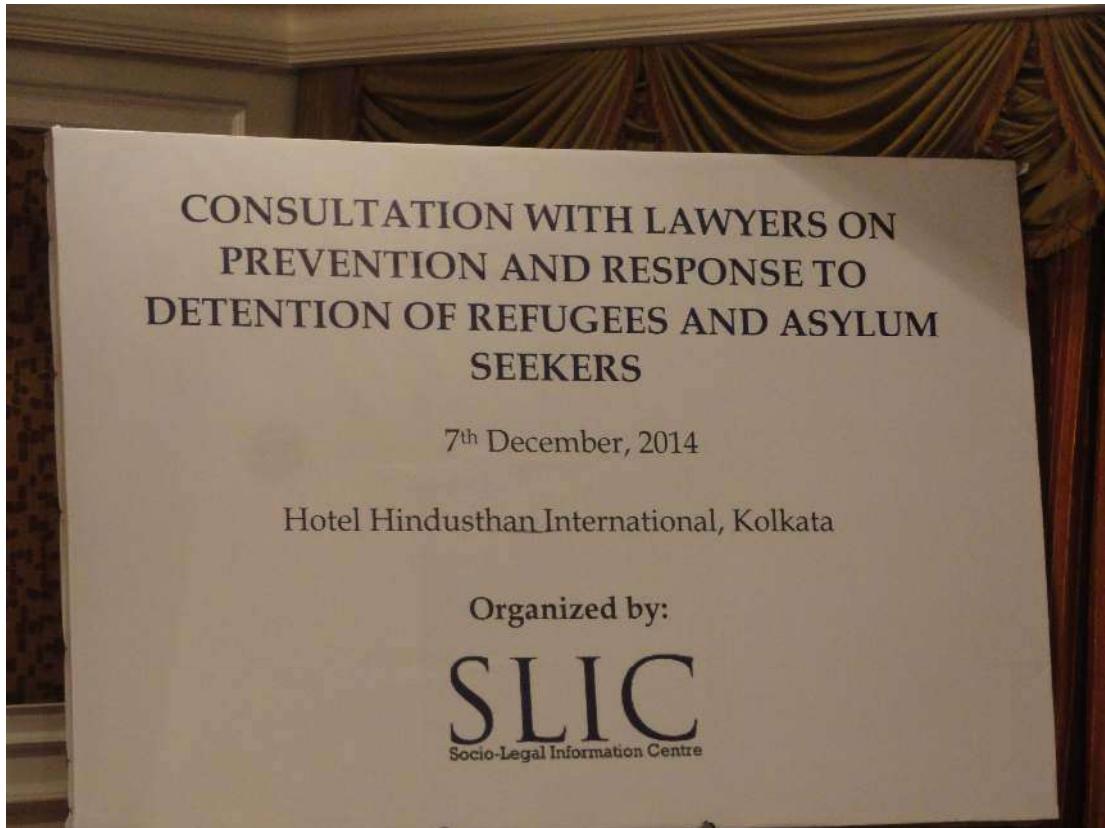


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## **Background**

Despite the fact that India is a host to diverse groups of refugees, India is not a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The protection of refugees is confined to ad-hoc measures taken by the Government of India, leaving refugees with little protection for their basic human rights and virtually no legal provisions for their safety and welfare. In the absence of a central enactment on refugee, The Foreigners Act, 1946 governs the entry, stay and exit of foreigners in India. The outdated Foreigners Act poses a severe challenge to the rights of refugees in India as it does not distinguish between refugees fleeing persecution from illegal immigrants. Under such laws it is a criminal offence for a non-citizen to be in India without valid travel or residence documents. Consequently, refugees suffer deportation and detention.

In recent years there have been several instances in West Bengal where asylum seekers have been arrested and subjected to criminal proceedings under Foreigners Act. Asylum seekers of Burmese origin have been entering India through Indo-Bangladesh border in the recent years. They are often mistaken as Bangladeshis by the authorities and are arrested at the border. Many including women and children are languishing in jail and juvenile homes in West Bengal with little or no access to legal remedies or access to United Nations High Commissioner for Refugees (UNHCR) for protection. Asylum seekers are thus being deprived of access to UNHCR to claim refugee status.



BANNER FOR THE CONSULTATION

In this backdrop, a consultation was organised by Socio-Legal Information Centre (SLIC) with the assistance of UNHCR. The aim of the consultation was to facilitate comprehensive discussions to identify effective tools for judicial intervention to address the plight of hundreds of refugees and asylum seekers imprisoned in West Bengal.

The consultation was attended by lawyers practicing in the various district and sub-divisional courts in the State of West Bengal as well as lawyers practising in the High Court at Calcutta. Apart from this, the attendees included some of the social workers who are associated with SLIC and working in the various districts of West Bengal. Some lawyers associated with other civil society organisations such as Banglar Manabadhikar Suraksha Mancha (MASUM), International Justice Mission (IJM) and Justice & Care were also present.

## Introductory Session



A SEGMENT OF THE PARTICIPANTS

The consultation started with a brief description of UNCHR and the work they do. Through a documentary video, the participants were informed that the Office of the United Nations High Commissioner for Refugees (UNHCR), also known as the UN Refugee Agency, is a United Nations agency mandated to protect and support refugees at the request of a government or the UN itself and assists in their voluntary repatriation, local integration or resettlement to a third country. It was further explained that the headquarters of UNHCR are in Geneva, Switzerland and that UNHCR is a member of the United Nations Development Group. It highlighted the plight of refugees who had suffered different forms of atrocities by officials. It discussed how they were wrongfully detained in prisons where they had to bear both mental and physical torture. The documentary highlighted the various steps taken by UNHCR to rehabilitate such victims. They are provided with legal aid, medical help, shelter,

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education and UNHCR specially sees to it that these refugees are sent back to their countries, if possible.

The documentary was followed by a round of introduction facilitated by Ms. Ragini Trakroo Zutshi. Previously Ms. Zutshi used to work in SLIC, Delhi. At present she is associated with UNHCR. She has years of experience in working for the protection of the refugees in India. She made the session an interactive one by asking members of the audience what they learnt from the documentary.

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## **Session I: Introduction to UNHCR and Refugee Situation in India**

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The session was facilitated by Ms. Ragini Trakroo Zutshi. She discussed about the origin and development of UNHCR. The UN Refugee Agency emerged in the wake of World War II to help Europeans displaced by that conflict. Optimistically, the Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly with a three-year mandate to complete its work and then disband. The following year, on July 28, the United Nations Convention relating to the Status of Refugees - the legal foundation of helping refugees and the basic statute guiding UNHCR's work - was adopted. However even after 60 years of its existence, forced displacement still exists in different parts of the world and so does the organisation. Later, the UN came up with a protocol doing away with the time limitation and the geographical barrier that was set by the UN General Assembly. Then she moved on to explain the Indian scenario regarding refugees and how UNHCR work for them.

In India there is no domestic legislation for refugees. In countries where they have domestic regulations, they have separate courts or immigration tribunals. In countries that do not have separate courts UNHCR takes up the cases of refugees. It acts as a quasi-judicial body. UNHCR's mode of work differs from country to country according to the legal framework of that country. UNHCR works along with the Government and the civil society organisations. It alone cannot solve all the refugee related problems in India and worldwide so it needs

lawyers and social workers from across the globe to solve the issue of refugees and asylum seekers. She highlighted that years back the refugees used to live in camps but now things have changed and so they live in an urban, non camp set up. But still in countries where there are no proper health care facilities, no educational policy for refugees, camps are made and the refugees take shelter in those camps. It such a situation creating a parallel structure becomes inevitable. Today UNHCR has 8600 staff working in 125 countries and globally it works for 33.9 million people. The organisation mainly works with different communities, stateless people, refugees, internally displaced people.

Ms. Zutshi read out the definition of refugee as mentioned in the 1951 Refugee Convention: A refugee is any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country. She complained that everyone uses the term 'refugee' very loosely. It is often seen that the words 'refugee', 'migrants', 'immigrants' are used interchangeably, but this should not be the case. As lawyers it is very important to know what the basic difference among the three is. In India very few colleges teach Refugee Law. However outside India the scenario is a bit different, they have a different branch of studies on Refugee Laws. According to the definition of Refugee provided by the 1951 Refugee Convention there are certain elements that are to be satisfied in order to be considered as a 'refugee'.

1. People cannot be refugee in their own country. They have to move from one country to another crossing international border. Crossing the international border is an essential. For example - People who have been displaced as a result of the riots in Muzaffarnagar are termed as refugees. But they should not be called so because these people have not crossed international borders.
2. They are displaced or forced to leave the country. They leave their country out of fear.

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3. The fear which drives them out of their own country should be well founded fear, i.e. justified fear. This fear should be the fear of persecution. Ms. Zutshi explained the term 'persecution' for the convenience of the audience. There is no definition of persecution mentioned in the convention. She pointed out that maybe the drafters did not define persecution so that it is open to liberal interpretation. Persecution may mean anything that causes grave violation of human rights or systematic violation of smaller rights.
  
  4. The reasons of persecution are also specified:
    - A. Race** - In Myanmar the Buddhists who are in majority treat the Rohingya Muslims as non citizen though they are nationals of Myanmar. They face problems only because they belong to a different ethnicity.
  
    - B. Religion** - This is a well known reason of persecution. So it did not need further explanation.
  
    - C. Nationality**- Almost 500 years back there was Indian community in Uganda who became nationals of Uganda. They were legally citizens of Uganda but still the Government considered them as Indians and when the regime changed the Government instructed to kill these Indians.
  
    - D. Political opinion**- It does not necessarily mean political opinion has to be associated with politics. It may also refer to challenging what is accepted. Suppose in a country violence against women is an accepted norm. Now if an activist comes and protests against violence, then this may be considered as a political opinion.
  
    - E. Members of a particular social group**- It is flexible. It has scope for liberal interpretation. Other reasons for persecution are too narrow and rigid so the fifth reason was made flexible which can be amended with changing times. Family can

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be a social group, women can be a social group. Another important and active social group is the student group. For e.g. in 1988 in Myanmar there was a student's uprising. The students who took active part in the uprising were arrested but the innocent students who were not a part of it were also arrested and tortured. In Iran in 2007 there was Green Revolution in Iran where the students protested against the President. So in this case also all students were perceived to be anti President. In the two cases mentioned above students can be treated as a social group. LGBT community can be another example of social group. Though this particular social group was previously neglected but now special emphasis is being given to protect the rights of the LGBT community.

Ms. Zutshi explained that when a system declares someone refugee that means that all the five elements have been satisfied. If a state has a functional judiciary and if the state provides protection to the people of the country then they do not need to take refuge in other countries. For e.g. If Sikhs come from USA to India as they are a minority community then India will not give them shelter because USA has a functional State and judiciary. In Somalia in the year 1991 the Government failed as a result of which many people were displaced. But in this case they were given refugee in other countries because the State was dysfunctional. It may so happen that the State is the perpetrator. For example in Myanmar the state is driving the Rohingya Muslims out of the country so they have no other option but to take refuge in other countries. She put special emphasis on the role of the State of protection to its citizen so that they don't have to seek refuge in other countries.

She discussed the difference between refugees and economic migrants. Economic Migrants normally leave a country voluntarily to seek a better life for themselves and their families. Should they decide to return home, they would continue to receive the protection of their government. Refugees flee because of the threat of persecution and cannot return safely to their homes. For e.g. the Bangladeshis who come to India to work can go back to their country without any problem because they have economic reasons for migrating.

Ms. Zutshi stated that where there are no courts judicial principles are followed but the threshold of proof is quite limited. In Afghanistan the State is mainly controlled by Taliban. Taliban is a non state actor. State is present but still the country is largely controlled by Taliban. In a country like Afghanistan the State fails to protect its citizen. So large number flee to other countries to avoid torture.

Next the exclusion clause of the 1951 Refugee Convention was discussed by Ms. Zutshi. 1951 Convention mentions that those who cannot benefit from unintentional protection are person who committed crimes against peace, a war crime or crime against humanity or committed a serious non political crime before entering the country of refugee or those who have been found guilty contrary to the UN Convention.

**Q. If a person is arrested by the police and produced before the Court under the 14 Foreigners' Act and during trial he claims he is refugee and after enquiry it is found out that it is a genuine case can he be sent to tribunal?**

**A.** Unfortunately there are no refugee tribunals in India. Mostly refugee related work is managed by UNHCR. Govt has marked all Tibetans, Sri Lankan Tamils coming to India as Refugee. But UNHCR specifically looks into each and every case to decide who is a Refugee.

UNHCR also works with Stateless people. Ms. Zutshi gave a brief description of Stateless people. A stateless person is a person who is not considered as a national by any State under the operation of its law. Some stateless people recognition as a refugee grants him/her better protection. These stateless people have legal bond with no country. For e.g. Rohingya Muslims coming from Myanmar are refugees as well as stateless people. Previously Biharis in Bangladesh were considered to be stateless. But at present the Bangladeshi Government is changing laws which will hopefully improve the condition of the Bihari population living there. There are approximately 20 million stateless people in the world.

There is another category of people who are called the IDP (Internally Displaced People). An internally displaced person (IDP) is a person who has been forced to flee his her home for

similar reasons as a refugee, but remains in his or her own country and has not crossed an international border. As the nature of conflict has changed in the last few decades, the number of IDPs has increased globally. In countries where the Govt wants UNHCR to work with the displaced people they directly work with them. However in some countries the Government may not be comfortable with the idea of UNHCR working with IDP because it is an internal issue. In some cases they work directly with the displaced people but not in case of India. In Muzaffarnagar the people who were displaced due to the riots were not refugees but internally displaced people.

Ms. Zutshi explained the pillars of International Refugee Protection in great details. Refugees are always foreigners. In most of the cases they do not have documents and sometimes their entry into another country is illegal. But they should not be punished even for illegal entry because they are compelled to leave their country, they do not cross the international border voluntarily. In Kolkata the major problem is the detention of the refugees. The seminar was organised so that lawyers from all the districts of West Bengal can come and discuss about the issue of detention. They should come together and make an action plan about how to change the system and how to make sure that the refugees have access to their basic rights. She stated that the rights of the refugee are mentioned in the Convention. The Constitution of India also recognises certain rights that can be enjoyed by refugees, for e.g. Article 14, Article 21 etc.

She highlighted that in India it works with NGOs because UNHCR cannot work alone and achieve their goal of protecting the refugees. SLIC is with UNHCR and act as its legal partner but still it needs more people, it wants to make partnership with lawyers across the country and work for the betterment in the condition of the Refugees in India. People should not pity them, they have certain rights and we should give them their share of the rights. The refugees should not be treated as burden for the country where they take refugee because they contribute to the welfare of the country. The presentation came to an end with the photograph of Einstein being shown. He was also a refugee and an example to prove that refugees can be an asset for the country where they have taken shelter.



MS. RAGINI TRAKROO ZUTSHI FACILITATING THE FIRST SESSION

**Q. Why are refugees not given the right to vote in the country where they take refuge? Has UNHCR taken any step to let them access the right to elect their choice of leaders?**

A. Refugees are not the national of the country and only citizens have the right to vote. So being a foreigner the refugees are not given voting rights. And if the question is regarding the voting rights of refugees in their own country then when they are in some other country as refugees they cannot vote but once they return to their own country they get to access all their rights including the right to vote.

Ms. Zutshi raised an important question - Once a refugee always a refugee? Does that mean they continue to be refugees throughout their life? Can the refugee status come to an end? The answer would be once a refugee does not mean always a refugee. The refugee status can come to an end. There are 3 durable solutions for this. She explained the three solutions:

1. **Voluntary Repartition** - It should not be like the repartition that is practised in West Bengal. In West Bengal it is half repartition and half push back. Ideally the refugees should have the rights to decide when to go back to their country. Once they go back to their country their refugee lifecycle will end and they can access all their rights as a citizen.
2. **Resettlement** - Globally only 0.7 % people can avail this solution. Suppose a refugee comes from Country A to Country B but the refugee cannot live in Country B. There are a few countries in the world who as a part of international burden sharing take in refugees from other countries. The third country takes the refugee to their country - this is resettlement. Eventually according to the legal framework of the country after a few years they will get the citizenship of that country. As soon as they become the nationals of that country their refugee lifecycle will come to an end. Ideally a major portion of the refugee population prefers resettlement because the resettlement countries are primarily countries like USA, Canada, Australia. In today's world almost 50 million people are displaced primarily because of what is happening in Syria. A year ago it was possible to resettle almost 1% of the total refugee population but today the percentage has come down to 0.7% only because the number of refugees is increasing so rapidly.
3. **Local Integration** - Suppose a refugee is going from Country A to Country B and if Country B allows him/her to apply for nationality then it is local integration. Camps are made and nationality documents are distributed. Countries at times amend the existing laws to give the refugees citizenship rights. Hindus and Sikhs coming to India from Afghanistan have applied for nationality in India. Some have received their certificates while others are still awaiting their turn. In last year's Parliamentary election there was a Tibetan girl born in India who wanted to make a Voter's ID Card. She was denied Voter's ID Card by the authority. They told her that she was a Tibetan and thus had no right to vote in India. So she approached the Karnataka High Court for relief. The Court came up with a decision that the citizenship law envisages that according to the Citizenship Act the children born in and around a particular time period should be considered as a citizen of

the country. Then she got voting rights but as a refugee people do not get voting rights in the country where they take refuge.

It is true that the refugee lifecycle can come to an end but there are many people who for generations may live in refugee situation. That is also the reality.

**Q. In India how can a refugee apply for citizenship?**

**A.** In India there is no concession, no amendments. The Citizenship Act has laid down the conditions that must be fulfilled for a person to be recognized as a citizen.

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## **Session II: Judicial Attitude in India and International Law relating to the Rights of Refugees and Asylum Seekers in India**

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The session was facilitated by Professor (Dr.) Manoj Kumar Sinha, who is a Professor of Law at West Bengal National University of Juridical Sciences (WBNUJS), Kolkata and the Director at Indian Law Institute, New Delhi. He has authored and edited several books on human rights, refugee law, international humanitarian law and constitutional law. His writings on international law, refugee law and human rights have been published in reputed Indian and International Law journals. He is the only Indian associated with Michigan Refugee Law Group headed by Prof. James Hathaway. Prof. Sinha is associated with International Association of Refugee Law Judges (IARLJ) for more than a decades and actively participating in the activities of the IARLJ. He was offered prestigious visiting Professorship at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden, for (2004-2005).

Dr. Sinha discussed that one of the most important case of refugee is the Tibetan refugees in India. Tibetans have entered India in 1959, they have been given identity numbers for travel because they did not want to be citizens of India. Dr. Sinha highlighted that over the years certain changes have taken place in Indian legal framework, one of them being the changes in

the Citizenship Act. There was a time when a number of refugees were coming into West Bengal, Manipur, Arunachal Pradesh. The Citizenship Act was amended once in 1986 and then again in 2003. The legal status of parents has become important in the amended Citizenship Act.

He highlighted that the mandate of UNHCR is limited to Afghans, Chins, Rohingyas and Somalis. The Govt of India, the Ministry of Home Affairs deals with the major population of the refugees in India. It gives temporary relief to refugee by providing them with residence permit but does not declare them as refugees. The Supreme Court always wants to give them protection and has stated that Article 14 and Article 21 are available to the citizen as well as the refugees. Illegally people come to India without valid documents. They want to stay back in India, if they are sent back to their countries they may be killed or tortured. If the Government knows that if the refugees are sent back to their country they may be tortured then it is their duty not to deport those refugees.



DR. MANOJ KUMAR SINHA FACILITATING HIS SESSION

However, Dr. Sinha pointed out that lack of documents is a major problem for them. He pointed out that the lawyers are not able to help them in many cases because of incomplete documents. He stated that National Courts have major contribution in refugee jurisprudence. The European Court of Human Rights, 1953 had the maximum contribution in the drafting of the refugee laws. It was mainly based on the European Convention on Human Rights. Mr. Sinha made it clear that the first and foremost protection of the refugees is through the Human Rights instrument. Then he talked about the rights that can be accessed to seek asylum. Asylum seekers may or may not be refugees but all refugees are asylum seekers. Next topic of discussion was the role of the NGOs in protection of refugees. First they need to understand the issue regarding refugees. If the Govt is not ready to widen their view then these NGOs have to make the Govt do so. He pointed out to the changing pattern of the laws and judicial framework. After Emergency and after passing the judgement of ADM Jabbalpur the courts evolved and the judgements are more on the side of human rights.

He emphasised upon the fact that if International Treaties help the Refugees then the Government should be a part of it and use the clause of the treaties to protect refugees. Lawyers also play a crucial role in this case.

He stressed on the important role of lawyers in protection the refugees. As an example of how lawyers and judges can be effective in fighting for refugee rights he shared a personal experience. Recently he visited the Manipur High Court. Chief Justice Lakshmi Kant Mishra and Nagendra Singh are the two judges there. They told him the first time in 1989 when refugees were coming from Myanmar there were a large number of intellectuals among them who were arrested and detained. They wanted to help the refugees but they did not know how to do so. After a lot of research they found the 1951 Convention on Refugee and used the definition put forward in the Convention. On the basis of this they were able to release almost 200 refugees from jail. Dr. Sinha said that the importance of international law is growing so it has become necessary to educate the lawyers practising in the lower as well as the higher courts about international law. According to Dr. Sinha Chandrima Das case is a land mark case because though she was a Bangladeshi she was not discriminated against and was given relief. Responsibility of the Government is to give the refugees there rights. But if they fail to

do so then lawyers should help. The lawyers should not feel that there is no law to protect the refugees. The Constitution of India can be of great help for the refugees, refugees can also get relief from UNHCR. So there are many ways in which refugees can be given relief.

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### **Session III: Legal Strategies for Preventing Detention of Refugees and Asylum Seekers in India**

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MR. DEBASHIS BANERJEE FACILITATING HIS SESSION

The session was facilitated by Mr. Debasish Banerjee, who is an Advocate practising at the Calcutta High Court. He is also the coordinator of SLIC in West Bengal.

Mr. Banerjee started the session by asking a question - Why has West Bengal been chosen as a centre for the discussion on refugees? He specified that in the seminar the refugees who consider India as a transit point and want to go to countries other than their own country are at the centre of discussion. He stated that in all the districts of West Bengal refugee is not a

problem. The Refugee issue is only a problem in the border areas. He asked the lawyers in the audience if there is any district in West Bengal where there is no Bangladeshi in detention. The participants agreed that in most of the districts they are detained.

He specifically discussed about the Rohingya Muslim. In West Bengal the trend is to treat the Rohingya Muslims as Bangladeshis. Thinking them to be Bangladesh police arrests them under Foreigners' Act and forces them to plead guilty and eventually they are sent back to Bangladesh. He emphasised on the ground reality. He pointed out that repartition is just an official term but lawyers working in the borders areas are aware that in reality they are pushed back. A large population of the Rohingya Muslims who have come to West Bengal are in detention as Bangladeshis. The relevance of the seminar is to discuss ways in which these refugees can come out of detention. He highlighted the fact that there are no special refugee law in India and there is no international treaty which can act as legal documents. The 1951 Refugee Convention was a remarkable event in the field of refugee rights but Indian Government did not sign or ratify it so it cannot be submitted in the court of law as a legal document. Then he briefly discussed the 14 Foreigners' Act and the clauses in the Constitution which does not specifically apply to citizens but to all the people living in India including the refugees, for e.g. Article 14 and Article 21. Importance of the Chandrima Das's case was put forward by Mr. Banerjee. In this case the Court did not distinguish between citizen and non citizen. It upheld the right to be treated as equal before law. Law did not distinguish between a Bangladeshi and an Indian. A book " Refugee and the laws" which was based on the law, reported as well as unreported judgements was being referred to as a must read by the lawyers present in the seminar. The most important judgement on refugees in India-National Human Rights Commission V. State of Arunachal Pradesh was mentioned where the Supreme Court intervened with a liberal interpretation of the law to suggest that refugees are a class apart from foreigners deserving of the protection of Article 21 of the Constitution. The Court held:

"We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life

or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, to threaten the Chakmas to leave the State."

As the 1951 Convention has little relevance in the Indian context Mr. Banerjee emphasised on the other international documents. Article 14(1) of the UDHR states that, everyone has the right to seek and to enjoy in other countries asylum from persecution. The Indian Government is bound to follow UDHR because India is an important party to UDHR. Article 13 of the ICCPR states that, an alien lawfully in the territory of a state-party to the present covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority. Indian Government is also a party to the ICCPR. Article 3(1) of the CAT states that no state-party shall expel or return a victim or torture. The Government has signed it but is yet to ratify it.

He then highlighted a few High Court Cases filed by SLIC and discussed the cases in great details.

**Ba Aung and Soe Win's case:** Ba Aung and Soe Win were members of the student wing of Aung San Suu Kyi's party. They fled away from Myanmar to West Bengal, India, though they had asylum seekers certificate still they were arrested from a place in North 24 Parganas. Lower Court did not release them and repartition orders were passed. But if they would have been sent back to Myanmar then they would have been shot at sight. SLIC filed writ petition and single judge bench of the Calcutta High Court ordered that these two students should be thrown back to Bangladesh as they had already pleaded guilty. This decision of the High Court was challenged and a petition was filed again stating that they should not be repartitioned. The Division Bench of the High Court took the case more seriously. When the case was pending the Sweden Government was approached for resettlement. High Court

released them and withdrew the repartition orders. Finally Sweden provided them with resettlement and so they flew to Sweden.

**Johura Begum Case:** Johura Begum arrested and detained. Her husband was not in jail, he was in Kashmir and had the Refugee certificate. He was successful in getting his seven children out of jail but Johura Begum was not released, she was convicted under Section 14 of the Foreigners' Act. She was taken to the High Court and as she had already pleaded guilty it was quite difficult to give her relief. But the Court did not send her back to Myanmar on humanitarian ground and ultimately she was sent to a women's home in Delhi. Mr. Banerjee stated that during the hearing of Johura Begum's case he came across the internal guidelines on refugee issued by the Ministry of Home Affairs. According to him this guideline can be of great use.

**Nurul Amin:** Nurul Amin's children (Rohingya Muslim) were in a home. They had pleaded guilty and there were orders for repatriation. Nurul Amin had asylum seekers status. He was able to release all his children except for one. This child, Hairul Amin was not produced before the Child Welfare Committee. He said that they are trying to transfer the cases which are pending with the Juvenile Justice Board to the Child Welfare Committee. Applications are being made to the Juvenile Justice Board so that the cases of Rohingya Muslim children that are being investigated by them are put on hold and these children are treated as Child in Need of Care and Protection and can be produced before the Child Welfare Committee. In North 24 Parganas there are not a single Rohinya Muslim child whose case is pending in the Juvenile Justice Board. In Hairul Amin's case as repartition orders were already passed there was no scope for the lawyers to write an application to the Juvenile Justice Board. So the only option left was to write to the Child Welfare Committee. The Child Welfare Committee claimed the custody of the child but the home where the child was kept was not ready to hand over his custody. The lawyers approached the High Court. The High Court called for a report from the Child Welfare Committee and on the very next day miraculously the child's custody was handed over.

Important guidelines put forward by the advisory of MHA were discussed. Mr. Banerjee pointed out the most important point that on the very first sight women and children refugees cannot be prosecuted under Foreigners' Act without proper enquiry. It has to find out whether the person is a trafficked victim or has he/she voluntarily left their country. Trafficked victims cannot be prosecuted under the Foreigners' Act. In case of children they should be declared Child in Need of Care and Protection and produced before the Child Welfare Committee and in case of women they should be kept in temporary shelter homes and their lawyers have see to it that they are repatriated. This procedure should be followed in case of Bangladeshis. In case of Rohingya's they should not be repatriated under any circumstances. He stated that initially the advisory of the Ministry of Home Affairs had no binding effect but later Calcutta High Court passed an order saying that the advisory has to be followed.

**Sukhoranjan Bali case:** Mr. Banerjee highlighted the case of Sukharanjan Bali, who is a Bangladeshi and had pleaded guilty at his trial under the Foreigners' Act. When he was awaiting repartition SLIC got to know that he was a key witness in the war crimes trial of Jamaat-e-Islami deputy leader Delwar Hossain Sayeedi. Though he was a witness of the prosecution he was going to the court to testify in favour of Sayeedi. But he was abducted from the premises of the International Crimes Tribunal. After 3 days when he opened his eyes he found himself in a BSF Camp. He was tortured on both sides of the border. In such a situation if he is repatriated to Bangladesh he would be killed. They approached the Calcutta High Court and eventually the Supreme Court to see to it that this man is not repatriated. This case is important because it highlights the point that if a person wants a refugee status then the lawyers should support them even if they are Bangladeshis.

**About Children:** He stated that the procedure that is followed in case of children is very simple the reason being the Juvenile Justice Boards and the Child Welfare Committees are very active in this matter. In case of children there is another international document - Special protection under UNCRC that can be of great use. The Government of India has not only signed it they have also ratified it. As under-age recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the

right to life, State obligations deriving from Article 38 of the Convention, in conjunction with Articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entail extraterritorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment or participation, directly or indirectly, in hostilities.

**Q. There is a gross violation of International Law. In Geneva Convention it was said that if a person crosses border he should not be treated as a criminal but the Foreigners' Act has been a violation of this rule. In a case Bankshall Court has given acquittal according to the guideline of the Convention but the Calcutta High Court did not give any importance to the Geneva Convention.**

**A.** As a large population of refugees come to Kolkata if the Geneva Convention is to be submitted as a supporting document in each case then the judiciary may not take the Convention sportingly.

**Q. A Bangladeshi woman carrying her 1 or 2 years children has fled to West Bengal in fear of persecution. She is prosecuted. There is another law that says a child of that age needs the mother. So if the children are separated from the mother in such a tender age then it will be violation of child right. How will the child get the basic nutrition that is required?**

**A.** The R. D. Upadhyay judgement may be a relief in this matter. It is an excellent piece of judgement with specified rights of women in jail. There should be an 'Anganwari', ICDS operated scheme in the jail premises. The police must verify that she was a trafficked victim or not, if she is a trafficked victim she can claim remedy under the particular advisory.

**Q. Recently there was a case where Bangladeshi children were registered as juveniles and were produced before the Juvenile Justice Board. What is the basic step to transfer the case from Juvenile Justice Board and declare them as Child in Need of Care and Protection?**

A. Once a child is declared as Child in Need of Care and Protection then the Juvenile Justice Board loses its control and the child is sent to the Child Welfare Committee.

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## Session IV: Developing an action plan

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This session was facilitated by Ms. Ragini Trakroo Zutshi and Ms. Praveena Nair. Ms. Praveena Nair works with the UNHCR on the issue of detention of refugees and asylum seekers.

Ms. Zutshi informed everyone present in the seminar that India has signed the 1951 convention and has voting rights in the U.N. India has always been hospitable in the matters of refugees. In fact, India was itself created due to a refugee movement. Glaring example is the partition. Absence of refugee law in our country is not a barrier. In an audit, UNHCR observed the number of conventions India follows. India always abides by these conventions better than other countries. India has been always performing it's International Obligations.

She stated that in India, there is a lacuna in the law as Foreigners' Act does not define the term refugee. A foreigner always falls under Section 14 of the Foreigners' Act. But all foreigners do not need protection of refugee law. Only specific group of foreigners need the protection of refugees. The legislature didn't make this distinction, but the judiciary has made this distinction. The oldest orders were during the time when Burmese refugees came in India. By reading the constitution and application of laws, the judiciary has made a clear distinction as to who is a refugee and who is a foreigner. It's similar to the Vishakha judgment, which is a relevant logic as Supreme Court said that there is a vacuum in the domestic law, but there is an international law for sexual harassment without any conflict.

Ms. Zutshi highlighted that other courts in India have also used the same logic as obligations of India under International Law. India has a vibrant judiciary and many precedents have evolved. Practically, India has been hospitable to refugees when there were large numbers involved. She pointed out that UNHCR does not work directly but works with the government. She stated UNHCR performs the process of interview. There is an assessment

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about the present, past and a future condition of a person's home country and then, the person is defined under the term refugee. UNHCR tallies the information provided by the concerned person and the present data of the home country. In the system of administration, there are state lawyers, courts. The persons from foreign countries have to produce circumstantial evidence to UNHCR. There was a Ministry of Home Affairs order on refugees but due to the bureaucratic system, it takes a long time to reach to the local authorities of bordering states. The Ministry has also classed certain groups as Refugees. She mentioned about the case of Johura Begum fought by advocate Mr. Debarshish Banerjee where the MHA guidelines were used. She mentioned there is flaw in the Foreigners' Act, but India as a vibrant democracy, with a vibrant judiciary has created safeguards for the refugees.

In Delhi, many refugees have started receiving visas. But there is delay in the order sending process. She gave an example where an order issued in 2011 reached a small town in the year 2014. There is confusion regarding refugees. The enforcement agencies perceive all foreigners as illegal. But as per International Law, a person fleeing from his home country to India is perceived to do the act of entering the Indian Territory without any *mens rea*. So, it is wrong to arrest them. But practically, people sometimes do get arrested. She highlighted that a BSF jawan does not have a degree in law. So, he can't make a distinction as to whether the person is a refugee or not. He does not have information or mechanism. Those countries with refugee laws already have trained immigration officers at the borders and have provided them with proper knowledge and information. In India, the reasons of arrest are lack of information and lack of a proper system. That's why UNHCR is present in India. But the question is how lawyers can ensure that UNHCR can help those accused. In Indian Courts, International Laws do not function and it functions rarely at the level of High Courts and Supreme Courts. It does not function in district courts. An arrested asylum seeker is charged under the Foreigners' Act. But, lawyers can play a key role in influencing the judge regarding the treatment of these persons, because it's an injustice if they are made to plead guilty. It changes their motives as well. And, we provide our system to treat these persons as criminals. The worst thing is if there is a deportation order against that person. For an asylum seeker, this is as good as death penalty. The legal strategy is defending them from repatriation and pleading guilty.

Ms. Zutshi stated UNHCR has classified some refugees as Myanmar Refugees. They are known as Rohingyas, who enter India through Bangladesh. A map was shown to the participating lawyers and it was explained. She explained about their reasons of coming to India. She said that lawyers need to give a brief of their background to the judge, otherwise they may be treated under the Foreigners' Act. They sometimes get arrested because by chance, they fall under mixed migration and get arrested with the illegal migrants, victims of trafficking. But, the Foreigners' Act does not differentiate these people. There are many administrative orders and judicial orders to create these differences.

These Rohingyas look as same as Indians and so they are booked as Bangladeshis. The root cause of their discrimination in Myanmar is because of their looks. They are separate ethnic groups in Myanmar. They are denied citizenship in their country. Majority of the Myanmar population look like Mongols. But, the Rohingyas look different and are insulted with derogatory terms such as "kalas".

The Myanmar government does not recognise them as citizens. There are many ethnic minorities recognised under the Myanmar constitution, but these Rohingya Muslims are not recognised. The nationals of Myanmar receive a pink card, but these people don't receive the pink card. They receive a white card. It is a temporary registration card. They can't access any service because they don't have a pink card as it is necessary for access to health, jobs, education etc. In Myanmar there is a family list of every family in the country. This list is possessed by the local authorities, in village it is possessed by the village headman. Each person has to inform the headman before leaving the village. But Rohingyas have to seek permission to leave their place. The currency is very weak as the cost of basic living is very high. The cost of rice, wheat, salt is very high. They need to pay in lakhs to seek permission and to pay bribes to the authorities. They face restricted movement.

They can't marry without permission from the government and they need to pay bribes in lakhs to apply for permission. They face indignity and humiliation. They have to marry secretly. As a result, when the Rohingya woman moves to her husband's family, her name

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does not appear in that family list. There is unannounced verification from the authorities and when the concerned woman is not found in her paternal home, her name is deleted from the list, which means that she is non-existent. There is a limit on the number of children in a Rohingya family. If the number of children exceeds, their names do not appear on the family list. Many ethnic minorities are facing discrimination, but still they receive a national identity card. Residents in the village have to visit the military camps for odd jobs without any pay. There is sexual violence on women.

Thus surviving in Myanmar is next to impossible for them. So, from the past few years, the Rohingya people have started leaving their country. In 2010, they moved in large numbers due to a massive violence, in which lakhs were displaced in their own country. There are rough estimates of these people from the UNHCR camps in Bangladesh. West Bengal has become important because these groups enter India through West Bengal. The problem is that these people speak different language. It's more or less similar to the language spoken in Chittagong hill tract. These people can't register themselves with their Muslim names. They have to register themselves by using a Burmese name. They always change their names each and every day. So, there is confusion. The reason of their detention is because they come to India with Bangladeshis.

A lawyer shared his experience. He said that in Balurghat, Bangladeshi agents bring these people to India. These agents bring them and leave them with money, so as to travel to Delhi. In Balurghat, police arrested them. There was a case no.353 and G.R. 553 of 13, who were arrested and their children were handed over to the CWC. 5 of these people had UNHCR card. He requested the judge for bail plea as they have refugee status. He also requested to allow them to meet their children. They were bailed out and also the rest three people. In many cases, the Burmese people are treated as Bangladeshis and repatriated. But in this case he was able to secure bail for the Burmese people and sent them to New Delhi.

Ms. Praveena Nair asked the audience about how they would proceed in a case if they were handed one such case and what would their strategy be. She gave the example of a Rohingya woman from Rakhine State who does not know the language spoken in Balurghat. When her

lawyer asks her the questions about her case she is unable to answer them as she does not understand the language that is being spoken to her. She asked what the lawyer can do and how will s/he collect the facts. Practically thinking as a lawyer how will someone get to know about the details of the client in this situation and how will a lawyer get to know that she belongs from Bangladesh where she was taken at the age of 3. She asks a few questions to the lawyers present in the room:



PARTICIPANTS CONTRIBUTING TO THE DISCUSSION

**Do you meet your clients personally?**

The lawyers unanimously assented and said that all of them meet their clients personally.

**How often do you meet your clients?**

The lawyers answered that they met their clients mostly on the days of date.

She continues her speech saying that a lawyer should meet his client on a regular basis for the process of identification of the client. She continues saying that since morning the speakers

have given many tips regarding the identification of the petitioner by the way he speaks or the words and names of places that he mentions. The sheet of paper which has the basic information of the petitioner is given to the lawyer before the trial begins. It has the details of the petitioner like their names, their residential address, forwarding report, medical report etc. She asks a few more questions to the audience;

**Have you ever seen the documents of proof collected by police from the petitioner?**

The lawyers answered saying that they don't take a look at these documents but the police presents these documents in the court.



A PARTICIPANT SHARES HIS EXPERIENCE

**Do the police present these documents in the court during the trial?**

The lawyers answered saying that the police does presents all the documents in the court that they had collected from the petitioner as proof at the beginning of the trial. When asked whether they had handled any Rohingya Muslim cases except in Balurghat most of them

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denied except one who said that he had handled a case of a girl living in Liluah home for refugees where the petitioner had first stated that they belonged to Bangladesh and not Myanmar. This is a very common practice among Rohingya Muslims where they claim to be from Bangladesh and not Myanmar. They do this mainly by giving a Bangladeshi address or they come to meet their lawyers with agents.

The Rohingya Muslims are a group of very vulnerable people who can be influenced very easily and in most cases people use it against them. Most of them come under the influence of the agents who tell them to give Bangladeshi address. The officials will ask for address verification within the next six months and when they won't be able to do so they would be deported to Bangladesh. After some time they can again come to India and maybe this time they won't be arrested. But it is not that they are violating the right to asylum because they still have their right to asylum. It is on the lawyers who have direct link with them to recommend them and let them know that they have the right to seek asylum. Hence it is very important that there is proper identification of the petitioner by the lawyer and for this to happen the lawyer should interact with their clients properly and extract information from them.

Ms. Nair again discussed back to the case of the Rohingya woman in Balurghat, after identification of the client the lawyers get to know that she has 5 children out of which 3 girls presently reside in Sanlaap Home and her two sons live in Dhubashram Home. Her husband lives in Jammu. The woman wishes to meet her husband and her children. An interactive session follows where the audience was told that the aforesaid Rohingya woman had told the police that she is a Bangladeshi citizen and the same reflects in her FIR. To this information the lawyers replied that when they will handle such a case they will have to present a prayer to the judge that there has been a mistake from the petitioner's side and that she is actually from Myanmar and not from Bangladesh. Another interactive session follows where the various guidelines regarding refugees are discussed. The lawyers are given various tips on how to handle refugee cases most of whom have no idea why they are under trial.

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The first step is identification under which the lawyer has to extract basic information about the petitioner like name, address and bio data. The petitioner can also be asked why they had left their own country. If the lawyers are able to extract even basic information from the petitioner then they may get strong grounds for further arguments in court.

The next step will be to draft and present a petition in the court. The government of Myanmar cannot be approached for verification in this case because they have not protected their citizens as a result of which they are forced to leave their own country and reside in other countries as refugees. The major drawback in these cases is the absence of proper documents which can be used as proof during the trial. In case of Bangladesh, the application for verification of address of a petitioner is sent to the Bangladesh embassy but the same cannot be done in case of Myanmar. The maximum a lawyer can do in this case is to ask the LNTR to translate the facts. It is advised to claim for an asylum in the first petition itself once the lawyer comes to know that the petitioner is from Myanmar and that the petitioner has right to get asylum.

However it was advised to file a petition only after the petitioner has consented to such a petition. It is better if the petitioner writes the letter by themselves. However in most cases the letter does not reach the government officials. So the lawyers should step in as the legal advisors and do the needful for the petitioner with their consent.

To seek help from UNHCR one needs to write a letter to UNHCR regarding their location and that they need asylum. There are no publicly available forms which can be filled in order to seek help from UNHCR.

The lawyers should also recommend the help of UNHCR in these cases. Most of the refugees don't know about the help that they can get from UNHCR and so they don't apply for the same. So the lawyers should let them know about UNHCR and the help that they can provide to the refugees. They should also inform them about the extensive work done by UNHCR like allocation of asylum etc. It is now up to the refugees to decide whether they want help from

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UNHCR or not. But it is the duty of the lawyers to act as a bridge between the refugees and UNHCR.

The handbook provided to the lawyers in the event gave information that there should be an immediate release of a refugee if he wants to seek an asylum. Although the book is not a legally binding document but it is a strategy planned by UNHCR about how they can work for the welfare of the refugees in collaboration with lawyers, NGOs, judges etc. There should be an application for immediate release so that the refugee can travel to Delhi and apply for an asylum. Although most of the lawyers appeal for bail, release of refugees should be given more priority. Bail means that the criminal case in the name of the refugee still continues. On the other hand if the lawyer manages to get release then the refugee becomes free of all the criminal charges against him. So ideally the lawyer should apply for a release to access for asylum first and then if they fail to get release an application for bail should be submitted in the court.

Practically it takes about 6 months from the date of arrest to file a charge sheet and before that the lawyer cannot apply for release order but can apply for bail. There should be a law that allows the lawyers to apply for bail directly in case of refugees. One of the lawyers point out that the refugees themselves should appeal in the court that they are from Myanmar and that they should get discharge certificates from the court as it is their right to get so.

Another member of the audience points out that if they find out that an FIR has been lodged against a refugee then there should be a law which allows them to appeal against the FIR in the high court. When there are sufficient documents to prove that the person against whom the FIR has been lodged is a Rohingya Muslim then the lawyers should immediately go against such FIR. It is mentioned in the enacted laws that a Rohingya Muslim can not be prosecuted against and that they have rights to seek asylum.

According to the Foreigners Act any foreigner whether he is a Rohingya, Afghan etc found in India without proper documents of identification can be charged against. Hence as per law the lawyers cannot legally stop the police from filing a charge sheet against a Rohingya

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Muslim. But on humanitarian grounds the lawyers should be allowed to appeal to the court to stop actions against Rohingya Muslims before the filing of the charge sheet as sometimes the procedure for filing a charge sheet may take three years. Hence there should be an intervention where an appeal to crash the FIR against a Rohingya Muslim can be filed in the high court before the charge sheet is filed. The next thing that can be done is that the lawyers with the consent of the refugees can apply to UNHCR for asylum. The UNHCR in turn can come in contact with the ministries related to refugee problems and appeal for asylum.

On the basis of application sent by UNHCR the refugees can appeal for bail. They can travel to Delhi and get asylum on the basis of the letter. The second alternative for application can be used if there are many Rohingya Muslims seeking asylum. In that case the UNHCR themselves would go to the location of refugees and apply for asylum. But the main point is that information about the refugees should reach UNHCR.

However, UNHCR cannot start their work until they get information from direct source or any other official governmental source. Hence it is very important to covey to them through formal written application about any information that someone has about Rohingya Muslims. Without that the UNHCR cannot bring about any intervention. Legal representatives or NGOs can write an application to UNHCR on behalf of the applicants with their consent to such application. However the immediate family members of the applicant cannot apply on behalf of them as the identification and verification of the family members is also a sensitive issue.

But the main problem is the practical application of the solutions mentioned above. In most cases the lawyers don't get time with the applicants and sometimes it takes a month long procedure to get permission from various departments to meet the applicant. In case of Juvenile accused it's an easy procedure due to the peaceful environment. But when it comes to have access to adult convicts the procedure to meet is a very long one. In Balurghat however the legal representative can meet the accused 1 to 2 days within the application and they are subjected to very kind behavior from the police. However the problem is that there is an existing language problem between the lawyer and the Rohingya Muslims. Without

interpreters it is very difficult for the legal representatives to provide help to any refugees. And none of the law allows the legal representative to take along an interpreter with them.



MS. PRAVEENA NAIR FACILITATING THE INTERACTIVE SESSION

An executive order by ADG (Prisons) allowing the legal representative the help of interpreters will speed up the appeal of the Rohingya Muslims and will help their legal representatives to understand their situation better. If the prison welfare officer gives a petition regarding the above problem then it is the best possible scenario but they are so overburdened with their daily activity that they have no time to look into the matter. Also these problems take place only in a few jails like Balurghat, Dum Dum Central etc. It is the right of the government to keep an eye on the Rohingya Muslims because at the end of the day they are from a different country and it is necessary for them to supervise the refugees for the country's security and personal security of the refugees. It is ideal to follow the procedure and apply for a long term visa as soon as they get hold of the RSD card. In the year 2011 an order was passed by the Indian government that long term visa shall be issued for all the

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recognized refugees. Once the recognition of refugees is over the police will have no right to arrest them. In Delhi if a refugee have the UNHCR card then he faces absolutely no problem of arrest and if problems arise for the refugees then they get discharged even before the charge sheet is filed.

An interactive session follows where Ms. Zutsi and the audience discuss about various refugee that had taken place. She recommends the lawyers various things about the way an acquitted refugee should be given advice. The first step after getting acquitted would be to register themselves as refugees under UNHCR in Delhi. This would prevent them from getting arrested again. The main problem that UNHCR face is communication gap about the judgements in refugee case. So, the speaker asks the audience to coordinate with SLIC and send them the details about the refugee judgements. This will help them to update their records about the refugees. If UNHCR gets a copy of the judgements in refugee cases then they may use the reference of such cases to create precedents. This will help the refugees in future when they face detention. So the lawyers should sent the information regarding the refugee cases to SLIC and they will in turn send the information to UNHCR.

Another problem that UNHCR faces is that their office is in Delhi and so it is not practically possible for them to keep a check on the various refugee cases in West Bengal. So they asked for help from the lawyers because they have the first hand information regarding refugee cases. They should take the initiative to inform UNHCR about the judgements in refugee cases. UNHCR does not intervene in the projects undertaken by the Indian Government until they are asked to do so by the government. For example the government of India directly deals with Bangladeshi refugees and so the UNHCR lets them do so and does not interfere in their work.

In case the legal representatives apply for bail and are successful in getting the same then the refugees should be informed that they cannot leave the country because they would have to reappear in the court or jail. The next step of the lawyers will be to move for discharge. And if they fail to get discharge certificate then they may move to high court and further to Supreme Court. Recommendation was also made about a monthly meeting between SLIC,

West Bengal and UNHCR in relation with the various refugee issues. Hence it is the coordination between various organisations that will help UNHCR to succeed in their work. Precedents will help the future cases a lot. New judges will follow the judgements given by judges previously in similar cases. And so a few judgements in favour of the Rohingya Muslims will be referred in future cases related to refugees.

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## **Closing Remarks**

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Ms. Praveena Nair thanked everyone for their participation and the information that they had shared. She hoped that the seminar helped to solve the common problems that the legal representatives faced in refugee cases.