INTERNATIONAL REFUGEE LAW AND HUMAN RIGHTS:

A STUDY OF THE STATUS OF REFUGEES IN NORTH-EAST INDIA

DISSERTATION

Submitted in the Partial Fulfilment for the Degree of

MASTER OF LAW'S (LL.M.)

SESSION: 2019-20

BBD UNIVERSITY

UNDER SUPERVISION OF:

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It is certified that the work contained in this Project entitled **"INTERNATIONAL REFUGEE LAW AND HUMAN RIGHTS (A Study of the Status of Refugees in North-East India)"** by Jagriti Yadav(Roll No. 1190997024), for the award of **LLM** from Babu Banarasi Das University has been carried out undermy supervision.

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ACKNOWLEDGEMENT

On the completion of this project, I want to acknowledge to a lot of people who have helped me in preparing it and making my endeavors worthwhile. Without their help, assistance and guidance in the preparatory process of this assignment it would have been a daunting task to complete it.

I would like to thank,Asst.Prof. Ms.Sonali Yadav who gave me the privilege to peep in to the realms of this project and made me to increase my knowledge in this particular field of **"INTERNATIONAL REFUGEE LAW AND HUMAN RIGHTS"**

Sincere thanks to our Head of Institution Dr. T. N. Prasad who has been constant force of inspiration. It would be failure on my part if I don't convey my gratitude to her for her encouragement and support throughout the course of this dissertation.

It would not have been possible to complete this study without the constant support of my parents and friends especially Saurabh who installed confidence in me at every step of this work and motivated me to manifest my ideas into this structural form.

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LIST OF ABBREVIATION

AIR : ALL INDIA REPORT

e.g. : EXAMPLE

LJ : LAW JOURNAL

NGOs : NON GOVERNMENTAL ORGANIZATIONS

NHRC : NATIONAL HUMAN RIGHT COMMISSION

OAU :THE ORGANIZATION OF AFRICAN UNITY

Prof : PROFESSOR

UN : UNITED NATION

UDHR : UNITED DECLARATION OF HUMAN RIGHT

UNHCR : UNITED NATIONS HIGH COMMISSIONERS FOR REFUGEES

SLORC : THE STATE LAW AND ORDER RESTORATION COUNCIL

Vol : VOLUME

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CHAPTER-I

INTRODUCTION

CHAPTER-1

1.1 INTRODUCTION

The human evolution to civilization was central to its inception and primum mobile of its existential survival on this planet. Subsequently, human needs and development propelled the universality of a better mode of living in deference to the basic paradigms and principles of equality, liberty and fraternity. Therefore, human mobility has become quintessential in a society adhered to certain values and norms of rule of law, democracy and human rights. Thus, human mobility is dictated by certain positive and negative factors. These factors have produced some specific groups of people having peculiar requirements. At the positive side of argument, migration takes place due to economic reasons and in search of employment from rural to urban places, which is, generally, known as economic migration. On the other hand, at the negative side of the argument human exodus from one place to another is caused by the rapid and reckless inceptives and enterprises taken by the state and its instrumentalities. The humanity since its existence on this planet has been a story of power struggles, confrontations and armed conflicts between nations, peoples and individuals which rendered millions of people homeless and forced to seek shelter in another country or another place within the country. The refugee problem is a phenomenon of our age. It is the product not only of the most destructive and diabolical wars of history, two World Wars, of modem dictatorial regimes, and of the national awakening of the peoples, but also of the closed frontiers which was a characteristic of the 20"' century. There were refugees in earlier centuries but no refugee problem in the modem sense, for the involuntary migrant could merge with those who by choice sought new homes elsewhere, from time, the refugee problem has been distinguished from refugee movements of earlier days by its scope, variety' of causes, and difficulty of solution. An ideogenetic attempt has been made in this study while examining and analysing international refugee law issues in the light of contemporary refugee problems in India in general and in northeastern part of the country in particular. The study of refugee crises in its entirety based on present day needs and re-formulation of international refugee definition, laws (substantive and procedural) and instruments based on existing realities coupled with a catena of pragmatic suggestions have been put forward for humanitarian and legal perusal so that a legal surgical exercise could be completed for once and all. The present study has been completed in five chapters apart from

introduction, conclusion, suggestions and appendixes therewith. Modern democracies espouse these actions in the name of welfare, human rights, social justice, irrigation, rural and urban development and in the garb of affirmative action such as swift industrialization, indiscriminate colonization, noxious nuclear catastrophes, obnoxious environmental pollution, construction of big dams, tampering with the eco-systems, atomic radio activation, morbid gaseous emissions, inconsiderate deforestation, depletion of ozone layer, industrial disasters, hexicological imbalances and perfunctory mining activities in the seismological prone areas are the few manifestations of human mobility & displacement apart from terrorism, insurgency, civil strife, cultural intolerance and armed conflict of national and international ramifications resuscitated by a terra firma of persecution owing to race, religion, nationality, political opinion, ethnic tensions, socio-economic disparities, membership of a social group, out of national residence and lack of national legal protection. Hence, there is no dearth of sedimentary instances, which have aggravated human sufferance, free industrialization has disturbed the sociometry and produced familial instability and social disorder. Deforestation and industrial accidents like Chernobyl Atomic disaster in Russia, dropping of atom bomb on hiroshima and Nagasaki in Japan and Union Carbide Corporation accident at Bhopal in India etc. have led to global warming resulting in the depletion of ozone layer thereby countries like Maldev and other Island Nations may not have their territorial existence in future. India's littoral area is also shrinking due to the same reasons. Big dams like Tehri Dam project and Narmada Valley project etc have caused a huge human displacement. Militancy and insurgency in Jammu and Kashmir and North East india have displaced a large chunk of local population forcing them to move in other parts within the country. These developments have contributed the human displacement in various parts of the world making millions of people homeless and stateless. Following are some of right provided to refugees in universal declaration of human rights.

Article 14

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

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations[1].

[1]Universal Declaration of Human Rights

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality[2].

1.2 OBJECTIVE

The refugees of northeastern India are facing colossal hardships, which the "proposed study" plans to examine and evaluate the entire International Refugee Regime with regard to the status of the refugees thereof They are gripped by a fear psycosis, which stems from their present mode of living and created innumerable problems for them. A Damocles' sword is hovering over them. They are destined to face social, economic, political and psychological problems, which they did not create. Even they lack essential amenities for life.

1.3HYPOTHESIS

The gaps in legal protection resulted from an experience of last more than fifty years have necessitated efforts to broaden the scope of international protection involving broadening of the mandate of UNHCR based on the contemporary refugee problems. The present International Refugee law is not sufficient to cater the needs of contemporary refugee movements. There is no universally accepted definition of refugee applicable to all refugees and refugee like-situations devoid of geo-political, ethno-religious and Lego-political demarcations. The definition of refugee as contained in Article 1 of 1951 U.N, Convention Relating to the Status of Refugees requires to be re-defined and restructured inter-alia reformulation of the entire refugee law inconformity with present day realities of the refugee problems.

1.4 RESEARCH METHODOLOGY

[2] Universal Declaration of Human Rights

The Chapter-I has been designated as Refugee Law: Historical prospect wherein normative and conceptual framework of refugee law under various perspectives is traced and subsequent evolution, development and expansion of refugee concept and reception thereof under international legal regime and under regional legal arrangements have been analysed. The issue of definition of refugee is a contention, which is transcending and pervading all the juridical, social, individualist and international statesmanship.

Methods and application thereof is sine qua non of any research endeavour for realising the objectives envisioned in the hypothesis. Primarily it is a doctrinal research study keeping in view the socio-economic and geopolitical conditions of region and of refugees. It was also incumbent to undertake this research while taking into account the gravity and enormity of the refugee problem in the northeast region of India. Therefore, doctrinal method of study has been resorted to complete the present research study. Primary as well as secondary sources of studies inter-alia Books, Newspapers, Magazines and Lok Sabha Debates have also been consulted and examined which has helped in identifying the gaps, inadequacies and obstacles in the contemporary Lego-institutional framework meant for the protection of refugees and human rights thereof which proved to be of immense importance and paved the way towards the reformulation of the existing international law which was hitherto oblivious of the deficiencies and dimensions of the problem. Thus, doctrinal research methodology has proved to be the bedrock of the present study.

1.5REVIEW OF LITERATURE

The present study is a often about V- chapters inter-alia Introduction, Conclusion, Suggestion and Appendixes having a synchronisation of issues, systematisation of problems, schematisation of normative framework and the nratisation of a trajectory of treatment with a catena of cases.

The Chapter-I has been designated as Refugee Law: Historical Retrospect wherein normative and conceptual framework of refugee law under various perspectives is traced and subsequent evolution, development and expansion of refugee concept and reception thereof under international legal regime and under regional legal arrangements have been analysed. The issue of definition of refugee is a contention, which is transcending and pervading all the juridical, social, individualist and international statesmanship.

The Chapter-II has been captioned as Human Displacement and Human Rights where under issue of human displacement has been addressed which results in violating an important human right not to be displaced. The intellectual premise of human displacement in an age of human rights advocacy has been examined under international and national perspectives.

The Chapter-III has been titled as Determination of Refugee Status and Human Rights whereat issues and concerns arising out of the process of determination of refugee status have been investigated and entire criteria for determination and termination of refugee status on the basis of the determinants enumerated in the definition of refugee under-Article 1 of the 1951 Convention Relating to the Status of Refugees have been given a jurisprudential analysis.

The chapter-IV mention about conclusion, suggestion and bibliography.

CHAPTER-II

REFUGEES LAW:HISTORICAL PROSPECT

2 Chapter-II

HISTORICAL PROSPECT

2.1EVOLUION,DEVELOPMENT AND EXPANSION OF REFUGEES

The concept of refugee has been expanded in practice through the development of the institutional competence of the United Nations High Commissioner for Refugees, the effort to prepare a United Nations Convention on Territorial Asylum, the establishment of regional refugee protection arrangements and the practice of states. While these developments do not constitute formal amendments to the convention definition, they are nonetheless indicative of a widening of the circumstances in which persons may be addressed genuinely to be dire need of institutional international protection.

A. Cumulative Competence of the UNHCR

Developments in the refugee definition employed by the UNHCR are salient particularly because the same organs of the United Nations drafted this institutional definition and the convention definition simultaneously. Since the adoption of 1967 Protocol, moreover, the two definitions are quite identical. The individualistic nature of the refugee definition contained in the 1950 UNHCR statute made it difficult initially for the organization to respond in a pragmatic manner to the needs of refugees outside Europe. Since refugees in Africa and Asia tend to move in large groups, the type of individualised, case-by-case application of a refugee definition contemplated by the statute, like the convention, was not practically possible. The UNHCR was, thus, technically unable to exercise its universal mandate, and sought the authority to deal with refugee situations outside Europe in more collective fashion that would not involve a process of individualised assessment. UNHCR has been authorised to aid the full range of involuntary migrants, including the victims of all forms of both manmade and natural disaster. Moreover the organisation has been requested to assist refugees who remain within their country of origin and to contribute to the resettlement of refugees who are returning home. The essential criterion of

refugee status under UNHCR support has come to be simply the existence of human suffering consequent to forced migration. While this cumulative definition has same meaning primarily to competence and eligibility for material assistance, UNHCR has also been authorised with augmented frequency to extend international legal protection to persons within its wider mandate, In functional terms and specialisation, few distinctions are now made between the role of UNHCR in regard to refugees within its statutory mandate and those within its extended and cumulative competence.

B.U.N. Convention on Territorial Asylum

A second indication of the expanded scope of refugee status derives from the abortive effect to draft a convention to define the circumstances in which territorial asylum'^^ should be guaranteed to refugees. The need for such a convention stems from the failure to include in the convention any obligation beyond non-refoulement i.e. the duty to avoid the return of a refugee to a country where he/she faces a genuine risk of serious harm. While willing to provide emergency protection against return to persecution the states that participated in the drafting of the convention insisted that they be allowed to decide who should be admitted to their territory, who should be allowed to remain there, and ultimately who should be permanently resettled. In view of this deficiency in the convention, and in an effort to effectuate the right to seek and enjoy asylum contained in the United Declaration of Human Rights (UDHR) and the Declaration on Territorial Asylum, a draft convention on territorial asylum was prepared and submitted to a conference of plenipotentiaries in 1977. The purpose of the proposed accord was essentially to enhance the scope of protection available to convention refugees, its most noteworthy achievement may in fact have been the degree of consensus attained on changes to the definition to the definitional standard derived from the Convention, as amended by the Protocol. Clarifications of the nations of "political opinion" to include opposition" to embrace prosecution grounded in persecutory intent were proposed. During the meeting of the ninety-two states, moreover, it was agreed inter alia that asylum should be accessible also to persons at serious risk of persecution due to kinship or as a result of foreign occupation, alien domination, and all forms of racism. An important clarification of the definition agreed to by delegates was the replacement of the "owing to a well-founded fear of persecution convention based standard with a requirement that a refugee be faced with a definite possibility of persecution. The expanded

scope of protection as a whole, including both the expert group and conference amendments, which was approved by 47 votes to 14 with 21 abstentions, provided that:

"Each contracting state may grant the benefits of this convention to a person seeking asylum, if he, being faced with a definite possibility of (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and "apartheid". Foreign occupation, alien domination and all forms of racism; or (b) Prosecution or punishment for reasons directly related to the persecution set forth in (a); is unable or unwilling to return to the country of his nationality or, if he has no nationality, the country of his former domicile or habitual residence"[3].

2.2 DEFINITION OF REFUGEE UNDER VARIOUS REGIONAL AND RELATED REGIMES

Hitherto the 1951 U.N. Convention and the 1967 Protocol remains the principal international instruments whereunder refugees are protected and the definition, which they offer, has expressly been adopted in a variety of regional arrangements directed at further improving the condition of recognised refugees.

A. The Organisation of African Unity (OAU)

The first regional arrangement was established by the Organisation of African Unity (OAU) in 1969 in Africa where the international community was confronted with the most intricate and complex challenge and to which it had to devote a gigantic and colossal share of its social and economic problem. The flow of refugees in Africa became an acute problem in the 1960's coinciding with the struggle for an attainment of independence by most African States. Since the establishment of the Organisation of African Unity the refugee question has been of concern to the organisation. Therefore, it was decided to draw up a convention, which should reflect and resolve the specific concerns of the African refugee problem. In October 1967 a conference on Legal, Economic and Social aspects of African Refugees Problems was held in Addis Ababa. However, the recommendations on the matter adopted by the Conference only stated that:

[3]Goodwin-Gill, G., International Law and the Movement of Persons Between States (1978).

"In addition to the definition contained in the 1951 United Nations Convention relating to the Status of Refugees, as extended by the United Nations Protocol of 1967, African States should take into account the specific aspects of African refugee situations with regard in particular to the definition of an African refugee"[4].

" In Junel968, the OAU Refugee Commission met in Addis Ababa in order to complete a final draft of an African Refugee Convention, which was finally adopted by the Assembly of Heads of State and Government in September 1969. This is the first internationally accepted agreement which issues absolute and unqualified requirements stipulating that no refugee shall be subjected to measures, such as rejection at the frontier, which might compel him to return or remain in a territory where life, physical integrity or liberty would be threatened[5].'The most interesting aspect of the OAU Convention is its two-fold definition of a "refugee". It incorporates the same definition as in the 1951 convention without the dateline and without the possibility of geographical limitation. At the same time it includes explicitly person who are victorious of manmade disasters like international armed conflicts or civil wars etc. whether or not they can be said to fear persecution. It runs as follows:

The term "refugee" shall also apply to every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality[6].

Therefore, it is axiomatic that the unlike the two universal conventions, this one does not speak of subjective conditions and fear of the individual, but refers only to the objective conditions prevailing in the country of the refugee. This standard represents an important conceptual adaptation of the convention refugee definition, in that it successfully translates the core meaning of refugee status to the reality of the developing world. From its inception, refugee status has evolved in response to changing social and political conditions - the initial concern with "de jure " statelessness shifted to embrace "de facto" unprotected groups arid further to protect individuals at ideological odds with their state. The common thread is a recognition that it is

[4] Recommendation II of the Conference on the Legal, Economic and Social Aspects of African Refugee Problems, 1967.
[5]Gunther Beyer, "The Political Refugee: 35 Years Later", International Migration Review, 1981, Vol. 15,p.32.
[6]Article 1. OAW Convention, 1969.

reasonable for groups and individuals to disengage from fundamentally abusive national communities, at which point refugee law exists to interpose protection by the international community whether the particular form of abuse consists of a denial of formal protection, a campaign of generalised disfranchisement, refusal to allow individuals political self determination, or calculated acts of deliberate harm, the definitional framework of international refugee law has evolved to respond to the imperative to protect involuntary migrants in flights from states which fail in their basic duty of protection. The OAU definition accepts this rationale for refugee status. It does not, for example, suggest that victims of national disasters or economic should become the responsibility of the international community, as a shift away from concern about the adequacy of state protection in favour of a more generalised humanitarian commitment might have dictated. Rather, the OAU definition recognises that four important modifications of the convention definition are required in order to accommodate the specific context of abuse or states of the developing world. First, the OAU definition acknowledges the reality that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee's state of origin, but also as a result of that government's less of authority due to external aggression, occupation, or foreign dominators. The anticipated harm is no less wrong because it is inflicted by a foreign power in control of a state rather than by the government of that state per se. This modification simply recognises that need to examine or refugee claim from the perspective of the de facts rather than the formal, authority structure within the country of origin[7]."

Second, the OAU definition reverts to the pattern of pre-world war II refugee accords in recognising the concept of group disfranchisement. By its reference to persons who leave their country in consequence of broadly based phenomenon such as external aggression, occupation, foreign domination, or any other event that seriously disturbs public order, the OAU recognises the legitimacy of flight in circumstances of generalised danger. While the accommodation of abuse at the hands of or de facto government is little more than an extrapolation from the intent of the convention definition, and while group-based refugee determination has its historical

[7] Woodward, P., "Political Factors Contributing to the Generation on Refugees in the Horn of Africa" (1987), 9 (2) International Relations, pp. 111-112.

antecedents in European practice, there are two additional features of the OAU definition that are unprecedented in international refugee law[8].

The convention definition and all of its predecessors link refugee status to the prospect of above resulting from some form of personal or group characteristic. The OAU definition, on the other hand, leaves open the possibility that the basis or rationale for the harm may be indeterminate. So long as a person "is compelled" to seek refuge because of some anticipated serious disruption of public order, she need not be in a position to demonstrate any linkage between her personal status and the impending harm.

The OAU convention also extends international protection to persons who seek to escape serious disruption of public order "in either part or the whole" of their country of origin. This, too, represents a departure from past practice in which it was generally assumed that a person compelled to flight should make reasonable efforts to seek protection within "safe part of her own country before looking for refuge abroad. There are at least three reasons why this shift is contextually sensible. First, issues of distance or the unavailability of escape routes may foreclose travel to or safe region of the refugee's own state[9]."

Underdeveloped infrastructure and inadequate personal financial resources may reinforce the choice of a more easily reachable foreign destination. Second, the political instability of many developing states may mean that what is a "safe" region today may be dangerous tomorrow. Rapid shifts of power and the consequent inability to predict accurately where safe haven is to be found may lead to a decision to leave the troubled state altogether[10].''

Ultimately, the artificiality of the colonially imposed boundaries in Africa has frequently meant that kinship and other natural ties stretch across national frontiers. Hence, persons m danger may see the natural safe haven to be with family or members of their own ethnic group in an adjacent state. The relevance of the OAU definition to conditions in the developing world has made it the most influential conceptual standard of refugee status apart from the convention definition itself.

[8]Ibid.
[9]Okechukwn Ibeanu, "Apartheid, Destabilisation and Displacement: The Dynamics of Refugee Crises in Southern Africa". Journal of Refugee Studies. Vol. 3, No.l., 1990, pp. 47 &63.
[10] Ibid.

B. The Organisation of American States (OAS)

The American states have a long tradition of providing humanitarian treatment to persons seeking protection and asylum. A century ago, the "Treaty of International Penal Law" was signed in Montevideo on January 23, 1889 on the occasion of the first South American Congress on Private International Law[11]. It contains the first provision on Asylum in International Treaty Law with a stipulation to the effect that Asylum for persons persecuted for political crimes is inaviodable."[12] Thus, in recognition of the inadequacy of the convention definition to embrace the many involuntary migrants from generalised violence and oppression in Central America, the state representatives agreed to a refugee definition that is similar to that enacted by the Organisation of African Unity. In addition to convention refugees, protection as refugees was extended to: -

-----Persons who have fled their country because their lives, safety, or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order[13]".

This definition was approved by the 1985 General Assembly of the Organisation of American States, which resolved, "to attend the plight of flight of humanity. The OAS definition shares some of the innovative characteristics of the OAU convention. First, it acknowledges the legitimacy of claims grounded in the actions of external powers by virtue of its reference to flight stemming from foreign aggression. Second, it offers a qualified acceptance of the nations of group determination and claims in which the basis or rationale for harm is indeterminate. The qualification stems from the fact that while generalised phenomenon are valid basis for flight, and while acceptance of a claim is not premised on any status or characteristic of the claimant or a group to which he/she belongs, all applicants for refugee status must nonetheless show that "their lives safely or freedom have been threatened." This requirement that the putative refugee be demonstrably at risk due to the generalised disturbance in his/her country contracts with the OAU convention's deference to individuated perceptions of peril. Finally, the OAS definition, unlike its African counterpart, does not explicitly extend protection to persons who flee serious disturbance of public order

[11] The Montevideo Treaty on International Penal Law, 1889 (It was the first regional instrument, which dealt with Asylum. See, OAS Official Records OEA/Ser. X/1

[12] Article 16, Montevideo Convention on International Penal Law, 1889.

[13] Article 1, Organisation of American States Convention.

that affects only part of their country. Any situation of interval conflict would surely "disturb public order" and hence be included within the general language of both the OAU and OAS definitions. Moreover, while the granting of refugee status based simply on the existence of massive violations of human rights would have been a major innovation, this ground of claim as codified adds little to the convention definition in view of the obligation of refugee dominants to show that their lives, security and freedom have been threatened by such human rights violations and excesses. Moreover, the OAS definition of refugee status marks something of a compromise between the convention parameter and standard and the very wide OAU conceptualisation. It expands the "persecution" concept and standard of the convention to take into consideration that can result from socio-political turmoil and tribulation in developing countries, yet constraints are there in the protection obligation to cases where it is possible to show that there is some real risk of harm to the persons similarly situated to the refugee claimant.

C. The Council of Europe Instruments

The Council of Europe adopted several instruments concerning refugees and their protection safeguards therein. Some of the most important are:

i. European Agreement on the Abolition of visa for Refugees (1959);

ii. Resolution 14 (1967) on Asylum to persons in danger of persecution;

iii European Agreement on Transfer of Responsibility for Refugees (1980);

iv Recommendation on the Harmonization of National Procedures Relating to Asylum (1981)

V. Recommendation on the Protection of Persons satisfying the criteria in the Geneva Convention who are not formally Refugees (1984); and

vi. Dublin Convention (1990).

The Council of Europe has also introduced standards of refugee protection that go beyond the convention definition, although the changes and metamorphosis are significantly more modest than those of the OAU or OAS. In the Parliamentary Assembly's recommendation

773 in 1976, the Council of Europe expressed its concern in regard to the situation of "de facto" refugees that is, persons who either have not been formally recognized as convention refugees (although they meet the convention's criteria), or who are "unable or unwilling for —other valid reasons to return to their countries of origin". Member governments were insisted to "apply liberally the definition" refugee in the convention and "not to expel de facto refugees unless they will be admitted by another country where they do not run the risk of persecution[14].

But, unfortunately, this recommendation has been only partially implemented. While the Committee of Ministers has stipulated that convention refugees not formally recognized as such should be protected from return, no text has been concluded dealing with the rights of the broader class of refugees outside the scope of the convention definition. At this stage, it can apathy be summed up that the council of Europe has acknowledged the legitimacy and sanctity of the claim to protection of an expanded class of refugees whose status and rights have not been standardized and formalized.

D. Bangkok Principles

The definition of the term "refugee'' under the Bangkok Principles made applicable to:

"A person who owing to persecution or well founded fear of persecution for reasons of race, color, religion, political belief or membership of a political social group-

(a) leaves the state of which he is a national, or the country of his nationality, the state or country of which he is a habitual resident; or

(b) being outside such state or country is unable or unwilling to return to it or to avail himself of its protection.

Two explanations assident to the Article supra state which are as under: i) the dependents of a refugee shall be deemed to be refugees; and ii) the expression 'leaves' includes voluntary as well as involuntary leaving.

E. The Cartagena Declaration,

[14]Marcus, M., "The Unwanted: European Refugees in the Twentieth century, pp. 6-7.

1984 The process was advanced further with the holding of a colloquium in Cartagena Declaration on Refugees" which contains or set of Principles and Criteria for the protection of and assistance to refugee was adopted. Recognising the particular characteristics of the flow of displaced persons in the region, the Cartagena Declaration extends the motion of refugees to include apart from those covered by the universal"refugees concept, also other externally displaced persons who are in need of protection and assistance. Consequently, the Declaration also considers as refugee persons who have fled their country because their lives, security or liberty have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously affected public order."

However, the Cartagena Declaration taken the individual's need for international protection and in particular, the need to protect the physical integrity of the person as the starting point for developing the refugee definition; it is the "right to life, security and liberty of a person including the right not to be subjected to arbitrary arrest or detention or to torture as defined and protected in international law. Although the Cartagena Declaration is not a legally binding instrument for states, it is nevertheless of fundamental importance as it reflects consensus on particular principles and criteria and has guided states in their treatment of refugees for the last five years. In fact, the Declaration revitalised the tradition of Asylum in America while aiming at consolidating a regional custom for the treatment of refugees and displaced persons.

CHAPTER-III

HUMAN DISPLACEMENT AND HUMAN RIGHTS

CHAPTER-III

HUMAN DISPLACEMENT AND HUMAN RIGHTS

3.1THE REFUGEES CONCEPT UNDER INTERNATIONAL LAW

Traditionally and by definition, therefore, reftigee protection is reserved for those who have left their countries of origin. The decision to leave and cross a national border transforms an individual into an object of international concern under refugee law when he or she lost, or been deprived of, protection under law in the country of origin, and is in need of another source of protection from persecution[15].

Occasionally, however, at the request of the Secretary-General and, or, the General Assembly of the United Nations the Office of the United Nations High Commissioner for Refugees extends its mandate to such displaced persons under good offices jurisdiction, which is based on the UNHCR statute. UNHCR provided humanitarian assistance, as directed by the resolutions 39/106 and 40/136 of the United Nations General Assembly to displaced persons in Chad, Sudan, Guinea-Bissan, Mozambique, Angola, Laos and Ethiopia. A recent extension of UNHCR's mandate regarding assistance to internally displaced persons concerns the former Yugoslavia. The Statute provides UNHCR with a mandate for assistance and protection outside the framework of international refugee treaties. Acting through the United Nations, governments have also established special authorities to assist displaced persons, such as the United Nations Border Relief Operation (UNBRO). UNBRO was created in 1982 along the Thai Cambodian border to coordinate assistance to Cambodians held in border campas. In addition, those individuals who cross a border while fleeing war or civil disturbance are outside the scope of international refugee law; they are also denied legal protection from return and the other rights promulgated in the treaties. Such persons are considered not to have a sufficiently individualized fear of persecution. Member states of the Organization of African Unity (OAU), however, subscribe to a broadened refugee definition, which includes those displaced by war and civil

[15] Arthur C. Helton, DISPLACEMENT & HUMAN RIGHTS, Journal of International Affairs, Winter 1994, 47, No. 2, p-381

disorder[16]. In general, movements of people caused by deforestation, desertification and other environmental factors would not be covered by either the expanded or conventional refugee definitions. Governments and refugee experts in Latin American and Asia[17] also recognise the merit of a broadened definition addressing causes such as external aggression or civil conflict. But even in these regions, such arrangements have not yet been adopted. However, environmentally displaced persons may be included within the existing defmition of refugees in 1951 Refugee Convention with its Additional Protocol of 1967.

3.2 LAW OF ASYLUM AND NON-REFOULEMENT

A. Admission and Asylum

For refugees to enjoy basic protection, it is essential that they be admitted into the territory of a State and granted at least temporary asylum.

The main international refugee instruments, however, contain no provisions dealing directly with admission and asylum. The closest they come to addressing the issue is in their non-refoulement provisions that protect a refugee from forceful return to a country where he or she may face persecution, as well as in articles that hold that refugees should not be penalized for having entered the territory of a State in an illegal manner if they come directly from their country of origin. The Universal Declaration of Human Rights embodies the principle that everyone has the right to seek and enjoy in other countries asylum from persecution. A similar provision is contained in the 1967 United Nations Declaration on Territorial Asylum, contained in General Assembly resolution 2312 (XXII) of 14 December 1967. Asylum remains, however, an attribute of State sovereignty and the right to be granted, as opposed to seeking asylum, has not been translated into a binding international legal norm. Given the absence of firm legal obligations to grant asylum, it is encouraging to note that many States continue liberal asylum policies. Whether persons flee their countries for fear of persecution in the sense of Article 1 of the United Nations Convention of 1951 Relating to the Status of Refugees, or as a result of armed conflict,

[16] Article I (2), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Head of State and Government at its Sixth Ordinary Session on No. 14691, p. 45; text in UNHCR (1979), p. 193.

[17] H. Gross Espiell et al, "PRINCIPLES AND CRITERIA FOR THE PROTECTION OF AND ASSISTANCE TO CENTRAL AMERICAN REFUGEES, RETURNEES AND DISPLACED PERSONS IN LATIN AMERICA", International Journal of Refugee Law, 2, (1990), p.83.

foreign aggression or occupation, gross violations of human rights or internal upheavals, there is widespread recognition that they should be admitted and granted at least temporary asylum. Thus, the majority of today's asylum-seekers continue to be admitted into the territory of States and granted, de jure or de facto, some form of asylum. It should be noted that the majority of these countries - particularly those accommodating large scale influxes-are among the world's poorest. If the overall situation with respect to admission and asylum remains on the whole positive, some worrying trends "need to be highlighted. One of these involves asylum seekers who sought asylum in countries far away from their own. Sometimes they travelled uninterruptedly from their country, travelling through some other States to a third country[18]. In other instances, they travelled from a country where they might appear already to have found protection, in order to seek asylum or a durable solution in another State, without first obtaining the consent of the authorities of the State. In many instances, the concerned asylum-seekers, in addition, travelled on forged documents and/or destroyed their documents on route with a view to misleading the authorities and frustrating their efforts to return the asylum-seekers to an intermediate country.

Partly as a result of these movements, a growing number of states introduced, or further reinforced, measures aimed at restricting the entry of asylum-seekers. These included: visa restrictions for growing numbers of nationalities, penalties on airlines carrying insufficiently documented asylum-seekers, penalties on persons assisting in organizing the illegal entry of asylum-seekers into the territories of States, screening procedures at national borders, restrictions in assistance and the right to work, and systematic and prolonged detention of asylum-seekers[19].

At the same time, some States also continued to resort to much stricter interpretations of the notion of a refugee, as defined in the United Nations Convention of J 951 Relating to the Status of Refugees and its 1967 Protocol. Some of these States, furthermore, required that asylum-seekers meet unduly high or unrealistic standards of proof'[20] The combined effect of such measures was that large numbers of persons were frustrated in their efforts to seek asylum from persecution and, even, when fulfilling refugee criteria in the sense of the United Nations

[18]Refugees, Encyclopaedia of Human Rights, 2000, p. 1253.
[19] Ibid,p.l253
[20] Ibid.

Convention of 1951 Relating to the Status of Refugees, were denied the protection stipulated in that Convention.

An equally worrying trend consisted in the practice of some States to refuse admission to asylum-seekers on the grounds that they could, or should, have sought it elsewhere. In some instances[21], this led to the creation of "orbit" situations, some of which eventually resulted in re-foulement. In one particular case involving asylum-seekers travelling by small boats, a comparable practice adopted by one country was reported to have resulted in the deaths of more than 100 persons.

A fundamental tenet of the international system for providing protection to refugees is that the granting of asylum is a peaceful and non-hostile act. Nevertheless, in one instance, as a result of the pressure exerted on neighbouring countries by one particular State, refugees from that country could not, for reasons of national security, be granted asylum in those former countries. Other States in the region offered asylum, however, and several hundred asylum-seekers were relocated to these States during the reporting period.

Upon leaving his or her country, a refugee becomes subject to the jurisdiction of the authorities in the country of reception. Under international refugee law, refugees have no categorical right to asylum. The term "asylum is not defined in the refugee treaties, but one may understand it to mean the act of providing protection" to -refugees seeking entry to a territorial jurisdiction[22]. Although, the "right to seek and to enjoy in other countries asylum from persecution" is proclaimed without elaboration in Article 14 of the Universal Declaration of Human Rights which was adopted and proclaimed by the United Nations General Assembly resolution 217 (A) (III) on 10 December 1948.

Nevertheless one may interpret the concept of "protection" again not defined in the refugee treaties - as the act of upholding fundamental human rights, such as the core rights declared in the covenants on civil and political rights[23] and on economic, social and cultural rights[24]. There

[21] The case of Vietnamese Boat People.
[22] Arthur C. Helton, DISPLACEMENT & HUMAN RIGHTS, Journal of International Affairs, Winter 1994, 47, No. 2, p. 380.
[23] International Covenant on Civil and Political Rights, adopted by UNGA RES. 2200 (XXI), 16 December 1996, entered into force 23 March 1976.

are human rights, from which no derogation may be made by treaty, or which have achieved the statusof customary international law, are ordinarily considered "basis""core" or "fundamental" rights.

B.Non-refoulement and Other Rights

The most fundamental of protection principles and the first of refugee rights is that of non-refoulement, which provides that no person shall be subjected to measures such as rejection at the border, or; if already in the territory of a country of refuge, expulsion or compulsory return to any country when he or she may have reason to fear persecution or danger to life, liberty or freedom because of reasons pertinent to refugee status. Apart from being embodied in a large number of international treaties and declarations, this principle is today considered as part of general international law[25].

As in previous years, most States continued to adhere to the principle of non-refoulement. Nevertheless, the reporting period also saw several noteworthy exceptions. Thus, some countries continued their practice of pushing back asylum-seekers. Other States occasionally resorted to the refoulement of larger groups of asylum-seeker and even some recognized refugees[26]. The total number of refugees and asylum-seekers who were subject to refoulement during the reporting period exceeded several thousand. This constitutes an extremely worrisome and noteworthy deterioration in recent years. Another basic principle of refugee protection embodied in article 32 of the 1951 United Nations Convention prohibits States from expelling refugees who are lawfully in their territory except on grounds of national security or public order. During the reporting period, expulsions in disregard to article 32 were limited in number but nevertheless affected several groups of refugees. In one instance, many of the expelled refuges were allowed to return to the asylum country concerned after seeking judicial remedy. Unjustified detention of refugees and asylum-seekers is contrary to basic principles of refugee

[24] International Covenant on Economic, Social and Cultural Rights, adopted by UNGA RES. 2200 (XXI), 16 December 1996. entered into force 3 January 1976.
[25] Refugees, Encyclopaedia of Human Rights, 2000, p. 1253.
[26] Refugees, Encyclopaedia of Human Rights, 2000, p. 1253.

protection. It will be recalled that, in 1986, the Executive Committee of the Programme of the High Commissioner, at its thirty-seventh session, adopted a conclusion on this matter. Through this conclusion, the members of the Executive Committee confirmed that detention of refugees and asylum-seekers should only be resorted to if necessary and only on grounds prescribed by law for certain purposes. Those purposes were defined as being to verify identity; to determine the elements on which the claim to refugee status was^ based; to deal with cases where refugees and asylum-seekers have destroyed their travel and/or identity documents or have used false documents; and to protect national security or public order. Even so, many hundreds of refugees and asylum-seekers were detained during the reporting period for no other reason than illegal entry from having overstayed the validity of their entry visa. Such detentions were in violation of article 31 of the United Nations Convention of 1951 Relating to the Status of Refugees and disregarded the fact that their illegal entry or presence was the entirely to the need to find asylum[27].In several instances detention measures were enforced as a means of discouraging further arrivals and were part of a deliberate governance policy to deny asylum to persons coming from certain countries or regions. In some instances, the conditions of detention gave rise to particular concern, as they did not meet internationally recognised minimum standards of detention. Also worrisome were the facts that many refugees and asylum-seekers had to spend considerable periods in detention, sometimes exceeding one year, with no possibility of judicial or administrative review of the detention measure, and that detention measures were applied equally to refugee children.

Economic and Social rights of refugees are important, not only so as to facilities their integration, but also to preserve their dignity and selfrespect; these latter reasons applying equally to asylum-seekers and those who have only received temporary asylum. The most fundamental of these rights-the right to gainful occupation which is reflected in both the United Nations Convention of 1951 Relating to the Status of Refugees and in other international instruments, such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights[28].The enjoyment by refugees of economic and social rights is, however, fraught with limitations. In some situations, this is due to the absence of specific programmes aimed at assisting refugees to find work, obtain trainings and other

[27]Refugees, Encyclopaedia of Human Rights, 2000, p. 1253.
[28] Refugees, Encyclopaedia of Human Rights, 2000, p. 1253.

facilities, all of which may be required in countries with high rates of unemployment. In some countries, the sheer number of refugees makes the enjoyment of these rights meaningless as no employment is to be found. The difficulty of finding work may be further increased by the absence of appropriate mechanisms whereby refugee status can be recognized, thereby putting the refugees at par with ordinary aliens or illegal immigrants. As regards asylum-seekers whose status had not been determined, their situation was even more difficult, particularly in countries, which introduced or strengthened already existing restrictions on their right to work. Limitations also existed on the refugees' right to education. Many countries do not have enough educational institutions to meet the needs of their own citizens let alone these refugees and asylum-seekers. Special assistance programmes have gone a long way to meet the basic education needs of refugees living in settlements and camps, whereas the needs of refugees living in urban centres were largely unmet.

At its thirty-eight session, the Executive Committee of the Programme of the High Commissioner considered the issue of Convention travel documents. Although the great majority of States parties to the United Nations Convention of 1951 Relating to the Status of Refugees follow the provisions of article 28 of Convention on the issuance of such documents, certain problems remained. These are relating to particular to the issuance and renewal of Convention travel documents, their geographic or temporal validity, their recognition for visa and admission purposes and the transfer of responsibility of their issue. In its conclusion on travel documents for refugees, the Executive Committee, inter alia, urged States parties to the United Nations Convention of 1951 Relating to the Status of Refugees and its 1967 Protocol to take appropriate legislative or administrative measures to implement effectively the provisions of these instruments concerning the issue of Convention travel documents.

Many States continued to issue identity documents to refugees during the reporting period, sometimes with UNHCR assistance. In most instances, these documents attested not only to the holders' identity but also to their refugee status, thereby enabling them to benefit from various rights of refugees.

The minimum content of the international protection of refugees consists in the enjoyment of fundamental human rights necessary for survival, safety and dignity. This implies, as the non-refoulement principle recognizes, protection from loss of life, injury and other bodily harm as

well as from any other action that might endanger, or threaten endanger, the safety and dignity of refugees. As a fundamental element of this protection, the right of refugees to security is fully recognized in international law[29].

At its thirty-eight session, the Executive Committee, for the sixth consecutive year, considered the problem of military and armed attack on refugee camps and settlements. The Executive Committee adopted a conclusion on this subject which, inter alia, condemned all violations of the rights and safety of refugees and asylum-seekers and, in particular, military and armed attacks on refugee camps and settlements; urged States to abstain from these violations, which are against the principles of international law and cannot, therefore, be justified; called upon States and competent international organizations to provide all necessary assistance to relieve the plight of the victims of such attacks; and urged States to take every possible measure to prevent the occurrence of attacks, including measures to ensure that the civilian and humanitarian character of refugee camps and settlements are maintained.

In some refugee situations, the security of refugees is jeopardized through their forced recruitment into armed groups, guerrilla bands and regular armies. Such practices continued during the reporting period and affected considerable numbers of young male refugees. Coercing refugees to take part, as active combatants in an armed struggle, amounts to a clear threat to their survival and integrity, is incompatible with their status as refugees and undermines their access to international protection. Furthermore, these violations are contrary to the concept that refugees are civilians as reconfirmed by the Executive Committee in its conclusions on military and armed attacks on refugee camps and settlements, that such camps and settlements have a strictly civilian and humanitarian character and that it is essential that States of refuge do all within their capacity to ensure that this character is maintained.

Further examples of violations of the security of refugees were found in the waters of South-East Asia where pirates continued, during the reporting period, to attack asylum-seekers travelling in boats. Efforts to curb such attacks were maintained under the Anti-Piracy Programme previously established by the Royal Thai Government, in co-operation with UNHCR and funded by several donor countries. Similarly, the Rescue at Sea Resettlement Offers

[29]United Nations General Assembly Resolution 2200 A (XXI).

(RASRO) scheme and the Disembarkation Resettlement Offers (DISERO) scheme benefited large numbers of asylum seekers in distress at sea. Elsewhere, national authorities and UNHCR increased their vigilance along flight routes to ensure that refugees in search of protection were not killed, injured, raped or abducted. Even so, during the period under review, several reports reached the Office of violation of refugees' right to security[30].

A host country's treatment of refugees must respect these basic rights, including the right not to be returned to a territory where one may be subjected top persecution. This right embodied in the concept of non-refoulement. Non-refoulement imposes a duty upon host governments to protect refugees present within their borders. This limit or sovereign prerogative is the foundation of, virtually; all refugee protection[31]. Non-refoulement provisions are also included in several U.N. documents, including the 1951 Convention and its 1967 Protocol (Article 33). A similar provision is also in Article 3 of the Declaration of Territorial Asylum, which was adopted by UN General Assembly resolution 2313 (XXII) on 14 December 1967. U.S. domestic law also reflects this policy. Even states not parties to U.N. instruments are bound to respect non-refoulment as a fundamental principle of customary international law[32].

At times, countries have instituted policies towards asylum-seekers specifically designed to discourage those who would seek refuge within their borders. But host countries' failure to provide tolerable conditions of asylum can force refugees to return prematurely and thus undermine the cardinal principle of non-refoulement. The governmental Executive Committee, which oversees the work of UNHCR, stresses that all individuals given refuge be allowed to enjoy human standards of treatment?" Refugees thus should be permitted to remain in the host country, at least temporarily, under having conditions that meet their essential humanitarian needs. The principle of non-refoulement prevents states from turning away refugees at a border and in certain circumstances may even limit a country's power to intercept refugees en route to its territory and return them to their place of origin[33].

[30] Refugees, Encyclopaedia of Human Rights, 2000, p-1260
[31] Refugees, Encyclopaedia of Human Rights, 2000, p-1260
[32] A. C. Heltan, ""ASYLUM AND REFUGEE PROTECTION IN THAILAND", International Journal of Refugee Law, (1989), pp. 21, 39.
[33] G. S. [33] Refugees, Encyclopaedia of Human Rights, 2000, p-1260
Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW (1983), p. 97.

Regardless of whether host governments recognize persons seeking i asylum as "refugees" or classify them somewhat more pejoratively as illegal aliens, states must provide essential legal protection and respect basic individual rights. The standard of treatment to which non-citizens are entitled is generally the same as that applied to a state's treatment of its own nationals[34].Whether a non-national's entry into a state was lawful affects only his or her claim to immigration status or other benefits above and beyond the right to essential protection to which all persons within a state's borders are entitled[35].

3.3 INTERNATIONAL DISPLACEMENT

International or external displacement embodies migration from one country to another or where an international border is crossed and refuge is sought in the reception country. International displacement is caused by civil disorder and armed conflict. The international refugee law protects such displaced people and they can appeal to international legal standards regulating the refugees.

India continues to host a large refugee population from different countries of the region. It has remained particularly hospitable to 1,10,000 Tibetan refugees as reported by the State of World Refugees, 2000, UNHCR, Geneva. Although some refugees have been; allowed to approach the UNHCR mission in New Delhi for protection and humanitarian assistance, the government of India does not allow the representatives of the UNHCR and other international humanitarian organisations like the ICRC to visit refugee camps in the country. There have been complaints that India has used coercive measures to send Sri Lankan Tamil refugees back to Sri Lanka. Afghan, Iranian and Myanmar refugees have not also made similar complaints. India is not a party to 1951 Convention and nor signed the 1967 Protocol. India also has no National Law for Refugees. However, the Indian Supreme Court judgements and several other judicial orders passed by Indian courts provide some legal protection and security to refugees in India.

In 1999 India hosted more than 2,92,000 refugees. This includes 16,000 persons from Afghanistan, 65,000 Chakmas from Bangladesh, 30,000 Bhutanese of Nepali origin, 50,000 Chin indigenous people from Myanmar and nearly 300 former prodemocracy student activist from

[34] Helton (1989) p. 41; C. Amerasingle, State Responsibility for Injuries to Aliens (1967) p.44. AND Barcelona Traction and Light Co., I.C.J. Rep. (1970) p.32 (state bound to protect foreign national admitted into its territory).
[35] Ibid. p.42.

Rangoon and the Mandalay region of Myanmmar, 1,10,000 Sri Lankan Tamils (70,000 in camps and 40,000 outside), 1,10,000 Tibetans and some 700 refugees from other countries. More than 5,20,000 people are internally displaced in India due to political violence, including some 3,50,000 Kashmiris and more than 1,70,000 others of various ethnicities displaced in northeast India[36].

A. Sri Lanka's Tamil Refugees in India

In this connection, Tamil people's exodus from Sri Lanka to India is a glaring instance of international displacement. The recent escalation of violence in Sri Lanka has thrown a spanner into the Indian Government's repatriation scheme for Tamil refugees. The past four years have seen marked decline in the hospitality extended to Sri Lankan Tamils in Tamil Nadu, India, fleeing from the ethnic violence in their island home. Though the refugees were originally welcomed to Tamil Nadu, the assassination of Rajiv Gandhi by a suspect of Liberation of Tamil Tigers Ealam (LTTE) suicide bomber turned public sentiment and government authorities against them. Subsequently, India commenced a program of voluntary repatriation.

Over 23,000 refugees were repatriated without the benefit of international supervision. It is now apparent that most of those refugees were coerced in various overt and covert ways to leave the refugee camps in Tamil Nadu. Consequently a court order forced the government to halt the repatriation program and gave the United Nations High Commissioner for Refugees (UNHCR) the right to interview the returnees. However, UNHCR is not allowed access to the camps and cannot speak to the refugees until they have already consented to leave India[37].

The fact that the Indian Government has not acceded to the Refugee Convention means that refugees are subject to the whims and megrims of the party in power. The Tamil Nadu Government, though originally sympathetic to the refugee's cause, has failed on numerous fronts to maintain the refugee camps in accordance with well-recognised international standards. Camp conditions vary from district to district depending on the sympathies of local officials. The camps closest to Madras are, for the most part, well maintained, while in Pooluvapath Camp near

[36] Tapan K. Bose, "Protection of Refugees in South-Asia: Need for Legal Framework", South Asian Forum for Human Rights (SAFHR) Paper Series-6, January 2000, p.22.
[37] The bi-Monthly Newsletter of the South Asia Human Rights Documentation Centre (SAHRDC News) Vol. 1 No. 2, July/August 1995.

Coimbatore, 4,7000 refugees are using eight latrines. Accumulated waste, cramped quarters, lack of electricity and sanitation all contribute to the degraded state of the camps. The health of the refugees has significantly deteriorated since NGOs were banned from entering the camps. Previously. NGOs had been allowed to provide primary health care and supplement the meagre government rations. The Government of Tamil Nadu is supposed to provide monthly stipends and food subsidies. However, the rations, which consist of rice, sugar and kerosene, are insufficient. Most refugees are forced to spend what little money they have on black market food because payment of the stipend rarely coincides with the arrival of rations. Camp officials are known to use the stipends and rations as bargaining chips, telling the refugees that they will only receive their stipends if they agree to leave the country. Obtaining permission to leave the camps often depends on the vagaries of the camp authorities. Travel restrictions also make visits to the offices of the UNHCR or the Sri Lankan Deputy High Commissioner in Madras virtually impossible for refugees confined to outlaying camps.

In addition to the regular refugee camps, the state government has established several so-called "Special Camps" in former jails. Since 1990, hundreds of refugees have been detained in these facilities. The National Human Rights Commission (NHRC) of India has compiled numerous reports of non-militant refugees, particularly young Tamil males, being arrested and detained under the Foreigners Act 1946. Many of these individuals have been languishing in detention facilities for more than two years and still do not know why they were arrested. When pressed, the government justifies these Special Camps as necessary measures to deal with LTTE terrorists. Though some detainees have agreed to repatriation, Mr. Anis Uddaula, a repatriation officer with UNHCR in Madras says that the UNHCR had blocked similar repatriation on the ground that it is impossible to "voluntary" opt for repatriation when the alternative is prolonged detention[38].

Most reports of overt coercion ceased about the time the UNHCR was allowed to participate in the repatriation program. Nevertheless, reports of coercion continue, despite government claims to the contrary. In February 1995. the Principle commissioner for Revenue and Refugee Rehabilitation Mr. Bugenga Rao denied that refugees had been forcibly repatriated. He said the conditions in the camps were so good that "he himself was wishing to be a refugee." It is patently

[38]Ibid.

obvious that the policies of India and the State of Tamil Nadu contravene the Refugee Convention and a host of other international conventions and standards, not to mention well-established customary international law regarding refoulement[39].

Now UNHCR, used to treading lightly in India where it is not an officially recognised U.N. agency, should arm itself with the international conventions to which it owes its creation and take a more pro-active role in the protection of the Sri Lanka refugees. Executive Committee of the UNHCR should make it difficult for India to justify abuses of refugee conventions, whether they have acceded to them or not.

It is estimated that 1,10,000 Sri Lankan Tamil Refugees were still living in India to the end of 1998. Of these, approximately 70,000 were in camps where they received some assistance from the Indian government and the local authorities while the rest were living outside the camps without any governmental support. According to local NGOs the number of Sri Lankan Tamil refugees living outside the camps was substantially higher. In 1998, according to the UNHCR, 3,839 Tamil Refugees fled to India and sought admission to refugee camps. It was not known how many unregistered Sri Lankans might have fled to India. A report of desperate asylum seekers drowning in the Palk straits is a grim reminder of the continuing influx. On July 26, 1998, 40 Sri Lankan asylum seekers drowned in the Palk Strait when the boat carrying them from Sri Lanka to India capsized in stormy waters. Only 10 passengers survived.

From 1983 to 1990, waves of Sri Lankan Tamil refugees fled to India. The first wave commenced on July 24, 1983 and continued till 1987. These were the refugees of die First Eelam War, numbering about 1,34,953. Following the signing of the India-Sri Lanka accord of 1987, approximately 25,000 camp and non-camp refugees returned to Sri Lanka. The Second Eelam War triggered the next wave of refugees in August 1989 to 1990 when l,22-,000 refugees crossed over to India. Of these 1,16,000 were housed in government run camps in Tamil Nadu. From January 1992 to March 1995 some 54,188 refugees were repatriated to Sri Lanka[40].

Initially the Indian authorities, the government of the state of Tamil Nadu and the local people were sympathetic to the Sri Lankan Tamil Refugees. There were 122 refugees' camps in the

[39]Ibid.

[40] Tapan K. Bose, "Protection of Refugees in South-Asia: Need for Legal Framework", South Asian Forum for Human Rights (SAFHR) Paper Series-6, January 2000, p.24

southern state of Tamil Nadu for whose maintenance the government incurred annual expenditure ofvRs. 150 million. The camp residents were given cash grants and provided with some non-food items at subsidized rates. A few camps were well maintained which other lacked proper housing and sanitation facilities. The refugees were allowed to work outside the camp but some restrictions were imposed on their movements in and out of the camps. UNHCR and other international groups were not allowed regular access to the camps.

However, the attitude of the Indian authorities towards the Sri Lankan Tamil refugees changed substantially following the involvement of LTTE in the assassination of former Indian Prime Minister Rajiv Gandhi in 1991. Sri Lankan Tamils overnight became unwelcome in Tamil Nadu. The movement of the refugees in and out of the camps was completely restricted and all refugees living outside the camps were ordered to register with the local police stations. Several were subjected to arbitrary arrest, detention and coercion. Local humanitarian organizations that were running schools for small children in the camps and providing health services were harmed from entering the camps. The Tamil Nadu government stepped up pressure to get the refugees repatriated to Sri Lanka.

Repatriation: Forced or Voluntary?

When the government of India in January 1992 resumed the repatriation of Tamil Refugees there was criticism that India was pressuring the refugees to leave. Indian and International human rights organisations complained that camp officials were forcing the refugees to puck their signature on option forms printed in English, which most refugees could not read. They also pointed out that due to Rajiv Gandhi's assassination food rations in the camps were drastically reduced to punish the Sri Lankan Tamil Refugees. Even these meagre quantities were often withheld to pressurise the refugees to return voluntarily.

In the face of International criticism, India temporarily halted the repatriation program. It was resumed again in 1993 after India agreed to permit the UNHCR to interview refugees before their departure, to ensure that they were being repatriated voluntarily. UNHCR was not allowed to interview the refugees in the camps. They talked to them on the ships, which were talking the refugees back to Sri Lanka. According to local NGOs, after the UNHCR became involved, the authorities stopped using overtly coercive tactics to promote repatriation, but continued to

pressurise the refugees by deliberately allowing conditions in the camps to deteriorate. A total of 54,059 refugees were repatriated to Sri Lanka between 1992 and 1996. Some of the returnees benefited from the UNHCR's Special Program for returnees and IDPs in Sri Lanka. According to the UNHCR 7,464 persons were staying in UNHCR supervised government centres as of April 30, 1996, while the remainder had returned to their home areas in Sri Lanka[41].

India does not allow the UNHCR regular access to the camps. Beginning in 1993, India also barred NGOs from assisting the refugees. However, the following a change of government in India in February 1998 the restriction was lifted. The UNHCR sought access to the camps but was denied. Apparently, the government did -not grant UNHCR access for fear that it would be critical of conditions in the camps; that it might encourage the free movement of refugees which the government views as a security threat and also because the UNHCR's presence in the camps might make refugees more resistant to repatriation. But India did permit the UNHCR a limited role with refugees wishing to be repatriated. According to the UNHCR, 14 Tamils were repatriated with UNHCR assistance in 1998. An estimated 100 others may have repatriated by their own means.

B. Myanmar's Chin Refugees in India

The Chin nationals, recognised by the United Nations as "indigenous peoples", fled their homeland in Burma to escape widespread and systematic persecution at the hands of the country's ruling junta, the State Law and Order Restoration Council (SLORC). The atrocious'. human rights record of the SLORC regime requires no reiteration here. Often re-forced to as one of the worst human rights abuses in the world, the SLORC is repeatedly admonished by the international community. UN Special Rapporteur to Myanmar, Yozo Yakota, has documented the absence of any progress toward SLORC compliance with UN General Assembly Resolutions and UN Commission on Human Rights Resolutions. Since the well-publicized pogrom of pro-democracy activist in 1988 fear of forced labour, arbitrary detention extra-judicial executions, and torture drove the Chins in ever increasing numbers from Burma to Mizoram in India[42].

[41] Ibid

[42] Tapan K. Bose, "Protection of Refugees in South-Asia: Need for Legal Framework", South Asian Forum for Human Rights (SAFHR) Paper Series-6, January 2000, p.25

The state government of Mizoram in North-Eastern India and the Union government of India initiated a campaign to expel from Mizoram 40,000, Chin refugees. Order No. 37 of the Champhai sub-Divisional office of the government of Mizoram officially closed the Myanmmarese refugee camp at Champhai on 1 June 1995. This abrupt closure left thousands of Chins without housing or adequate provisions.

Additionally, a Task Force under the Chairmanship of the Deputy Commissioner has already been created for the express purpose of crafting effective and efficient plan for the mass expulsion of the Chins. The first batch of refugees was sent back from India to Burma in September and October 1994. At least 1000 refugees, with estimates ranging up to 10,000 were expelled from India over a one-month period. Myanmar military personnel received these repatriated refugees whereupon the deportees were jailed pending hearings to be scheduled before military tribunals. Reports indicate that the returnees endured six months of pre-trial detention followed by grossly unfair military trials.'

The Government of India temporarily discontinued this repatriation programme in October 1994 only to reinitiate, the j deportation of Chin refugees as of 15 June 1995. The present repatriation takes place in the wake - of Indo-Myanmar meetings on border trade at Rihkhawdar village, Myanmar. The trade pact established said meeting included on informal understanding calling for the repatriation of Chin refugees to Burma as well as joint Indo-Myanmar operations to quell both the domestic insurgency movements in North-East India and the Burmese democratic forces currently living in India. The armies of India and Burma have begun on 12 April 1995 a series of Joint-military campaigns code named Operation Golden Bird.

The Government of India maintains that members of the Chin National Front (CNF) have joined forces with domestic insurgent groups, the United Liberation Front of Assam (ULFA) and the People's Liberation Army (PLA). However, no evidence of this collaboration exists and the military commander of ULFA, Paresh Barua, has repeatedly denied any CNF involvement. The substance of the border trade agreement and the details of the military encounters under the Operation Golden Bird point to a different rationale. The Government of India seeks the cooperation of the SLORC in combating insurgency groups from the Northeast who are based on

the Burmese side of the border. In return, the Government of India agreed to deport not less than 30 persons per week as part of a larger cooperative effort between the two countries to eradicate their respective insurgency movements.

The Chin National Front, it must be remembered, is a pro-democracy movement resisting one of the most brutal regimes in the world and, at most, comprises only a very small percentage of the 40,000 Chins in India. The SLORC will receive deportees from Thingsai Village, Lunglei district at Thatpang, Myanmar and deportees from Chakkhang, Chlimtuipui district at Hwawngthang, Myanmar[43].

At present, these refugees are denied the international legal protections embodied in the Convention Concerning the Status of Refugee. Remarkably, the Government of India has not as yet certified the Chin as refugees. The predicament of the 40,000 Chins in this regard is gravelycomplicated by the fact that the Government of India also denies UNHCR access to the seven states of the Northeast including Mizoram. The UNHCR has certified the refugee status of over 2000 Burmese who were able to reach New Delhi to apply in person; however, this strategy is simply unworkable for the vast majority of the refugees. Following the closing of the Champhai refugee Camp, nearly 600 families who were unable to assimilate swiftly and directly into the Mizo community have been left to die without food, shelter, or medical provisions. Despite such unforgiving; conditions, the Chin refugees will not voluntarily return to Myanmar.

Following the 1998 military coup, an estimated 1000 Burmese prodemocracy student activist took refuge in the northeastern states of Mizoram and Manipur in India. Indian authorities did not welcome them and some 80 students including young girls were forcefully sent back to Myanmar. It is reported that the Myanmar Army arrested a few of these deportees on the border and their fate remains unknown .The other deportees sneaked back into India[44].

Eventually, late in 1988, Indian authorities opened a camp in Leikhun in Manipur and another in Champai in Mizoram for Burmese student activists who had entered India. The government did not permit the UNHCR or any other international organisation to visit these camps. Indian authorities provided small quantities of rice, dal, salt and mustard oil for the inmates of the

[43] The bi-Monthly Newsletter of the South Asia Human Rights Documentation Centre (SAHRDC News) Vol. 1 No. 2, July/August 1995.
[44] Ibid

camps. Health care facilities were not provided. The camps had very poor housing and sanitation. Some of the inmates said they felt like prisoners of war as the Indian Army and other security forces constantly surrounded them. Some of the Burmese students sneaked out of these camps and were able to reach Delhi. They contacted the office of the Chief of Mission of the UNHCR in India and applied for refugee status. A few were arrested on their way to Delhi and sent back to Manipur where they were jailed for violation of the Foreigner's Act, 1946.

In addition, an estimated 50,000 Chin indigenous people from the Chin state of Myanmar are living in India's Mizoram state in refugee-like circumstances. Some have been living in India for as long as 44 years and may have initially left Myanmar primarily for economic reasons[45].However, after the military crackdown in 1988, a large number of Chin people fled Myanmar to escape religious persecution, summary arrests, extortion and forced labour. The majority of the Chin indigenous people are Christians.

The Indian government does not recognise the Chins as refugees. Most of the Chin refugees are working as weavers, housemaids and porters in Mizoram. Some of them were able to find better-paid jobs as schoolteachers. The Mizo and Chin peoples belong to a common ethnic and linguistic group-Zo. However, the xenophobic grounds well, which was sweeping across the northeast states in Mizoram, targeted the Chins. In August 1994, in response to an anti-foreigner campaign started by the local Mizo politicians and youth, the local government of the state of Mizoram arrested approximately 5000 Chins and deported them to Myanmar. In 1995 India and Myanmar entered into a border trade agreement. Three trading posts were created on Mizoram's borders with Myanmar. Chin National Front, the political organisation of the Chin nationalists, called for an economic blockade of Myanmmar and the closure of these trading posts. This angered the local Mizo population, which expected to benefit from this trade. There were clashes between groups of Mizos and members of Chin National Front. A Mizo youth leader and a village pastor were killed. The government of Mizoram arrested several Chin refugees on suspicion of being members of Chin National Front. Chin refugees claim that under the pretext of handing over "wanted criminals" the government of Mizoram has turned over several hundred

[45]The bi-Monthly Newsletter of the South Asia Human Rights Documentation Centre (SAHRDC News) Vol. 1 No. 2, July/August 1995.

Chin refugees to the Myanmar Army[46]. They fear that the Myanmar Army executed most of these deported persons.

Other refugees from Myanmar, particularly the former student activists, feel insecure in India particularly after the Indian government has mended its fences with the military regime in Myanmar. There is concern that UNHCR will not be able to protect them against deportation by Indian authorities. In August 1996, a few recognised refugees and others whose applications were pending with the UNHCR, were handed over to the Myanmar Army by the Indian authorities. Ten of these deportees were deserters from the Myanmar Army who had fled Myanmar and joined the pro-democracy groups in India. They had applied to the UNHCR in Delhi for refugee status. Along with these 10 persons six other Burmese refugees recognised by the UNHCR were also deported. According to reliable sources, these 10 persons were taken to Mizoram from Delhi by a unit of Indian military intelligence and handed over to the Myanmar Army. The entire operation was done in a clandestine manner and it has been reported that a senior member of the Burmese government in exile was forced to cooperate with the Indian intelligence agency, which conducted this operation. According to reliable sources inside Myanmar, one student activist who was handed over to the Myanmar Army has become paralysed from waist down due to severe torture. Of the 10 Army deserters six were sentenced to death and the rest were convicted to life. No other incident of such deportation or handing over Burmese refugees has been reported since 1996.

C. Bangladesh's Chakma Refugees in India

Since the creation of Bangladesh, its people are infiltrating in India. These people are known as Chakma refugees. They are living in the Northeastern region of India. As we have seen above that India's record with regard to refugees has not been very appreciative. Meaning thereby, Chakma refugees are also being treated very badly. They are languishing between India and Bangladesh. Their country of origin does not show any inclination to welcome them back. Even then some of them recently repatriated to Bangladesh. Although, those who participated in the Bangladesh War and supported Pakistan, which led to the independence of Bangladesh are still stranded in Bangladesh and they also wish to leave for Pakistan but later is quite reluctant due to

[46] Ibid

its own domestic political ramifications. But UNHCR has been denied its due role in the entire episode and no respect is paid to the international refugee conventions and international legal standards.

There are an estimated 50,000 Chakmas who have fled persecution in their native Chittagong Hill Tracts after the flooding caused by the Kaptai project. This group is said to be about 40,000 strong in Arunachal Pradesh, lightly organised and outnumber the local and traditional communities of the area. The original inhabitants, the Singpyos, are not more than 5,000 and these groups are located in eastern Arunachal Pradesh[47]. The Chakmas are being denied their basic rights: health, rations and education even after being there for 32 years. They remain stateless although many have been born in India. And the problem seen nowhere near a solution within demands by the powerful students union and all political parties for their ouster.

The Chakmas live in fear and face intimidation and threats from the Arunachalese. The concern is growing over their future. But one must take into consideration too, the concerns of the local people who fmd themselves saddled with a problem they did not create, with a group of people they do not want, with the Indian Government unwilling to push out the settler, and a growing anger at their own helplessness in changing the situation. The conditions appear right for a fresh confrontation but cooler heads must counsel restraint and negotiations.

In early 1986, 51,000 refugees belonging to ethnic and religious minority groups, mostly Buddhist Chakmas (one of the several ethnic groups that comprise the Jumma people) fled the Chittagong Hill Tracts (CHT) region of Bangladesh. They ran away from alleged massacre, gang rape, arson and harassment by security forces and the Muslim Bangladeshis settlers in the Chittagong Hill Tracts by the Bangladesh Army and the settlers to suppress the Jumma peoples' demand for regional autonomy. There was fighting between Bangladesh security forces and the Shanti Bahini, a Jumma insurgent group. The number of Chakma/Jumma refugees increased to 70,000 in June 1989 when the former President, Mr. R. H. Ershad held elections to constitute three "district councils" in Chittagong Hill Tracts[48]. The refugees were sheltered in six camps in India's remote northeastern state of Tripura. Although India allowed them to stay on, it did not

[47]The bi-Monthly Newsletter of the South Asia Human Rights Documentation Centre (SAHRDC News) Vol. 1 No. 2, July/August 1995

[48]Tapan K. Bose, "Protection of Refugees in South-Asia: Need for Legal Framework", South Asian Forum for Human Rights (SAFHR) Paper Series-6, January 2000, p.22.

permit the UNHCR or any other international agency to visit the refugee camps. The government and local authorities assisted the refugees but the conditions in the camps were bad. Food distribution was often delayed and medical facilities were "practically non-existent". Education facilities were minimal. During the eighties and early nineties Bangladesh goverrmient sources claimed the Indian intelligence agencies were supplying arms and providing military training to the cadres of Shanti Bahini, the armed wing of Parbotiya Chattagram Jana Sanghati Samiti, the political organisation of the hill tribes spearheading the regional autonomy movement.

Since 1993, India has been pressurising the Chakma refugee leadership and the government of Bangladesh to arrange for the return of the refugees. In 1994 an agreement was reached. The government of Bangladesh agreed to take them back. The returnees were to be provided assistance for re-integration. The government also promised to remove the settlers from the land of the returnees. Over 5028 refugee families comprising more than 25,000 Chakmas returned home in two phases. However, in March 1995 when the refugee leaders visited the returnees they found that very little was done for the rehabilitation of the returnees. The refugee leadership felt that the government led by Begum Khaleda Zia and her Bangladesh National Party which was close to severe right wing political groups, was not serious about the return and resettlement of the Jumma refugees. Consequently, the repatriation process was suspended.

Two years later, under the leadership of the newly elected Awami League government led by Begum Hasina, the dialogue was resumed. In March 1997, a 12-member, high level Bangladesh team led by Bangladesh Parliament chief whip Abul Hasnat Abdullah visited the six refugees camps in south Tripura and held talks with both the refugee leaders and Indian officials at the Takumbari camp in south Tripura. After a series of close door meetings, the Bangladesh government and the Chakma refugee leaders signed a treaty for the repatriation of 43,000 refugees who had been sheltered in six camps in Tripura for the past 11 years. Under the agreement, each of the repatriated family was to be provided with a total of 15,000 Taka (nearly US $375) as house building and agricultural grants, free ration for nine months and an additional 10,000 Taka for the purchase of a pair of bullocks. The repatriation programme began on March 28, 1997[49].

[49]Repatriation of Chakma Refugees, The Hindu, New Delhi Edition, March 30, 1997.

On June 17, 1997, Mr. Ranjit Narayan Tripura leader of the Chakma refugees informed the Indian and Bangladesh authorities that the refugees had decided not to return to the Chittagong Hill Tracts as the Bangladesh government was not implementing the provisions of the 20-point programme of resettlement. They said that of the 1244 families, who had returned to CHT in June 585, had yet to receive their land. The Bangladesh government rejected the demand of the refugees that UNHCR and ICRC be asked to supervise the rehabilitation of the returnees. On December 2, 1997, Bangladesh signed a peace agreement with the armed wing, the Shanti Bahini, following which all the remaining Chakma refugees in India were to be repatriated. Immediately, following the agreement, some 13,500 Chakma returned home in December 1997 and within three months the remaining Chakma refugees repatriated to Bangladesh[50].

About 65,000 stateless persons belonging to Chakma and Hajong tribes are still living in India's northeastern state of Arunachal Pradesh. These people had migrated to India in 1964 from erstwhile East Pakistan present Bangladesh. Their villages and farmlands had gone under the reservoir of the Kaptai Dam that was built hi the Chittagong Hill Tracts by the Pakistan government. The Indian government gave them shelter and settled them on lands near the sensitive Indo-Chinese border of India's northeast. The area was then known as Northeast Frontier Agency (NEFA) and was under the control of the central government of Delhi. Later NEFA WAS GRANTED "STATEHOOD" UNDER THE Indian Constitution and renamed as Arunachal Pradesh. Arunachal Pradesh has its own state government and a Legislative Assembly. The Chakma and Hajong tribes people have become the target of local political parties of Arunachal Pradesh which have been threatening for forcibly drive out "foreigners who are occupying their land and eating up their resources". Despite giving these asylum seekers shelter nearly 25 years ago, the Indian government has yet to grant these stateless people citizenship. The Supreme Court[51] of India has upheld the rights of these stateless people. On the appeal of the National Human Rights Commission in 1995, the Supreme Court directed the state of Arunachal Pradesh to ensure the life and personal liberty of every Chakma and Hajong.

D. Tibetan refugees in India

[50]Ibid
[51]National Human Rights Commission V. State of Arunachal Pradesh. AIR 1996. SC.

Tibetan refugees first fled to India in 1959 when they refused to accept Chinese sovereignty over Tibet. Subsequently, thousands more arrived. More recently, refugees have come seeking a traditional Tibetan education or religious life, which they are allegedly unable to pursue freely m Tibet. Tibetan refugees have to undertake a perilous journey over the Himalayan Mountains in Nepal to reach India.

Within three years of the arrival of the first batch of Tibetan refugees in India, China and India were at war with each other. Inevitably Sino-Indian relations have hemmed in the Tibetan refugee question in India. Initially the government of India allowed the UNOHCR to assist the Tibetan refugees in India. However, after the entry of Mainland China into the United Nations, the UNHCR unilaterally withdrew its support to the Tibetan Refugees. This soured India-UNHCR relationship.

According to the office of the Dalai Lama there are more than 1,10,000 Tibetan refugees in India although this figure varies from year to year as new refugees arrive and old ones leave for resettlement in other countries. Some 3,100 Tibetans came to India in 1998 via Nepal. The Tibetan refugees are scattered throughout India but most of them live in and around Dharamsala, the home of the Dalai Lama, the spiritual leader of the Buddhists of Tibet and the seat of the principal Tibetan political and relief organization. The Indian government has been generous to the Tibetan refugees. It has given them residential permits and work permits along with identity documents to travel in and out of the country. Though refugees in general are not allowed to be involved in politics, the government of India has tacitly tolerated the Tibetan refugees' campaign for the freedom of their country from Chinese domination. The Indian government recognizes Tibet as a part of China. Officially the Tibetan refugees are not allowed to engage in political activities against China from inside India. Nonetheless, the Dalai Lama has been permitted to run a de facto Tibetan government in exile from Dharamsala. This government is also not recognized by the government of India.

Although India has been yielding and flexible toward the Tibetans, refugee leaders worry that a constant increase in the Tibetan refugee population could eventually strain relations with their hosts. Many Tibetans in India have achieved economic self-sufficiency, but some, includingelderly persons, women-headed families, and recent arrivals are struggling. Also the substantial improvement in India's relations with China has impacted on its attitude of the

Tibetan refugee community in India. It is noticeable that while the Indian authorities have been continued to permit Tibetan refugees to enter, most of those who have arrived in recent years have not been granted legal residence. In January and February 1998, 21 Tibetans were arrested in Dharamsala for not holding valid residence permits. Tibetan advocacy groups feared that India might be signalling a change in policy toward Tibetan refugees. The detainees were released after a few days. No further arrests were made during the year. Apparently, the arrests were prompted by the Indian authorities' concern for the security and safety of the Dalai Lama in the wake of reports about Chinese authorities sending infiltrators to Dharamsala.

E. Bhutanese Refugees in India

More than a hundred thousand ethnic Nepalese inhabitants of Bhutan fled to India in the beginning of 1991. These persons who claimed to be a bona fide citizens of Bhutan said that they were running away from a reign of terror let loose in south Bhutan by the government of Bhutan in an apparent effort to make them leave the country. India's central government and the state governments of West Bengal and Assam were not sympathetic to the fleeing Bhutanese refugees of Nepali ethnicity as they were afraid that these persons would swell the ranks of the existing Nepali population in their territories. They were afraid that if these people settled down on the Indian Territory adjacent to Bhutan, it would adversely affect the fragile demographic balance of the region, which was hemmed in by Bhutan and Nepal. As a result, bulk of these refugees from Bhutan, about 100,000 were obliged to move on to Nepal and seek refuge in that country. Nepal and Bhutan do not share a common border.

India, therefore, was the first country of asylum for the Bhutanese refugees. However, not all of the Bhutanese refugees crossed over to Nepal from India. About 30,000 of these refugees settled down close to India's border with south Bhutan, in the states of West Bengal and Assam. Under the terms of the Indo-Bhutanese friendship Treaty of 1949, India allows Bhutanese citizens to live and work freely in India. Therefore, Indian government did not provide the refugees any assistance nor did it require 49 them to live in camps.

Between 1996 and 1997, Bhutanese refugees from camps in Nepal exercising the right to return to one's own country undertook a series of Peace Marches of Bhutan. Indian authorities

intercepted the Peace Marchers at the Indo-Nepal border on the bridge on river Mechi. Prohibitory orders under Section 144 Cr. Pc were promulgated despite the fact that the refugees were traversing the same land route that they had taken while fleeing from Bhutan. The Bhutanese refugees were arrested and detained in Siliguri, Jalpaiguri and Berhampur in West Bengal. Also, the Indian police deported those Peace Marchers who had succeeded in entering Bhutan, first to India by Bhutanese forces and then to Nepal.

F. Afghan Refugees in India

An estimated 16,000 Afghan refugees still remain in India. Most of the Afghan refugees are Hindu, Sikhs, and Punjabi speaking people of Indian origin who had settled in Afghanistan. The majority of them were engaged in business, while a few were in service. They fled when fighting broke out between rival Afghan factions vying for power. They have been recognised as refugees by the UNHCR. The majority of Afghan refugees live in Delhi. While the Hindu and Sikh refugees from Afghanistan have benefited from the support of the local people, ethnic Afghan refugees in India face many difficulties. They are debarred from seeking employment or conducting any business. They are solely dependent on the meagre monthly subsistence allowance provided to them by the UNHCR. As the UNHCR has been cutting down on its financial support programme, the ethnic Afghan refugees have been hit badly.

G. The Palestinian Refugees

War began in Palestine on November 29, 1947 when the U.N. General Assembly voted in four for a plan to partition Palestine into separate states, one Jewish and the other Arab[52]. In Cairo, the Ulema of the AIAzhar Moslem University declared jihad (holy war) against the Jews and Arab riots against Jews spread throughout Palestine[53].In its opening phase, the conflict was characterised mainly by Arab attacks on Jewish convoys destined for Jerusalem and outlaying settlements in Galilee and the Negra. Through December, an average of fifty Jews per week were killed, riiainly when travelling in unprotected convoys. Although the British continued to search Jewish convoys for arms, the mandatory government refused to provide escorts for the convoys

[52] . SANJOY HAZARIKA, Refugees, Migrants & India's Far East, Health Magazine, Mar/Ap. 1996, Vol. 22 No. 2.
[53] General Assembly. Res. 181, UN Doc. A/519, at 322 (1947).

because as a senior government official informed the Jewish Agency on December 3, "that might be interpreted as British implementation of partition".

The Jewish offensive against Jaffa, the largest purely Arab city in Palestine, began on April 25. On the 28th British artillery began shelling Jewish positions, and British troops moved into positions, between Jewish and Arab lines, thereby creating a deadlock, which lasted until their final evacuation on May 12. When the British finally did depart, nearly the whole of the Arab population left with them. Of the city's 70,000 Arab inhabitants, less than 4,000 remained behind.

The British mandate over Palestine ended on May 14 when there were already some 200,000 Arab refugees. The following day, the Jewish community of Palestine proclaimed the state of Israel, and with that -the regular armies of Egypt, Iraq, Syria, Lebanon and Trans Jordan entered Palestine. In the ensuing "official" war, nearly the entire Palestine Arab community was swept away. In Jewish-controlled areas, where according to one estimate some 7000,000 to 900,000 Arabs had lived, only some 170,000 Arabs remained.

In the aftermath of the exodus of refugees, each side caused the other of having caused the Palestinian flight by calculated means. On one side it was argued that Arab leaders themselves encouraged the refugees to leave in order to clear the way for the advancing Arab armies and to demonstrate their opposition to the establishment of a Jewish state, while, on the other side, it was alleged that refugees were driven from their homes by Jewish terrorism as part of a "campaign calculated to make Palestine as free of its Arab population as possible". Although the first theory (which ironically seems to have originated among the Arabs themselves) has by now been generally discounted the belief persists that the refugees were expelled and, if it were true, would undoubtedly provide a moral argument for repatriation and arguably a legal one as well.

In 1975 the UN General Assembly established a 20 member Committee on the Exercise of the InaUenable Rights of the Palestinian People[54] to prepare a program of implementation to enable the Palestinians to exercise the rights recognised in Resolution 3226 adopted by the General Assembly the previous year[55]. Among the rights affirmed in that resolution is "the inalienable

[54]General Assembly. Res, 3376, 30 GAOR, Supp. (No. 34) 3, UN Doc. A/10034 (1975)
[55]General Assembly Res. 3236. 29 GAOR, Supp. (No. 31) 4, UN Doc A/9631 (1974).

rights of the Palestinians to return to their homes and property from which they have been displaced and uprooted..." The Committee's report and recommendations were completed and submitted to the Secretary General for transmittal to the Security Council in June 1976[56].

3.4NATIONAL DISPLACEMENT OF REFUGEES FROM KASHMIR

Individuals who are made to leave their places of origin within the boundary of their country are called internally displaced persons. Kashmir is highly infested with insurgency which is being facilitated by our adjacent. Kashmir once known for its scenic beauty and centre of tourism now acquired a name for assassinations, abductions, extortions, diabolical carnage and terrorism, which made thousands of Kashmiri Pandits to leave their beautiful place of origin and sought shelter in Delhi and other parts of the country. They are living a very miserable and squalid life. Although Government of India is striving hard to create a conducive environment to start a political process so that state of J & K could limpback to normalcy. But there are certain human rights violations and excesses committed by the Para-military forces.

The Indian Government's recent decision to allow the International Committee of Red Cross (ICRC) to visit detainees in Jammu and Kashmir is a welcome step towards transparency. On 22 Jun 1995, ICRC signed a memorandum of understanding (MoU) with the Government of India, laying down the procedure for visits to Kashmir. The memorandum states that the visits are to be conducted in an independent, impartial, and constructive spirit. The government says that it has agreed to the ICRC's presence in the Valley on purely humanitarian grounds to provide access to ICRC to visit persons in detention centres, arrested in connection with the situation prevailing in Jammu and Kashmir. The ICRC will not perform a vigilant role, but will look at humanitarian aspects with an eye on the victims of terrorism as well. It also added that safeguards would prevent the misuse of the organisation for external propaganda.

Notwithstanding, internally displaced persons have a moral right to approach UNHCR on the humanitarian ground for the redressal and mitigation for their woes, plights, hardships and resettlement. But Government of India did not allow to these displaced persons to appeal to the office of the United Nations High Commissioner for Refugees. Though the Statute provides

[56]The recommendations of the Committee were submitted to the Security Council in the form of a draft resolution, which, however, failed of adoption by the Council because of a U.S. veto. UN Doc S/PV. 1938 at 52 (1976).

UNHCR with a mandate for assistance and protection outside the framework of international refugee regime.

3.5PROTECTION UNDER HUMAN RIGHTS TREATIES

In addition to the U.N. Charter[57] and related treaties a number of human rights treaties - which speak in broad terms of minimum standards of treatment for all persons extend to refugees seeking asylum, who are still entitled to fundamental rights although they have left their home countries. Concern with basic individual rights is clearly expressed by the Universal Declaration does not contain a specific provision regarding treatment of nonnationals, it can be inferred that they are covered, because the Declaration is couched in universal terms which either state affirmatively that "everyone" shall be subjected to a particular deprivation. It follows that, except for those provisions, which explicitly grant benefits solely to nationals, the Declaration extends its protection to refiigees. Furthermore, in 1985, the U.N. General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, guaranteeing security of person and freedom from arbitrary arrest or cruel, inhumane or degrading treatment[58].

Although the United Nations has not adopted a declaration dealmg specifically with refugees who are women or children, several instruments extend protection to them. The UNHCR Executive committee has noted that most of the world's refugees are women and children, and has recognised that female refugees are particularly vulnerable to physical violence, sexual abuse and discrimination. Accordingly, UNHCR recommended that states establish programs to ensure their physical safety and equality of treatment[59].In 1974, the General Assembly drafted a Declaration on the Protection of Women and Children in Emergency and Armed Conflict, which proclaims populations affected by such disorders shall not be deprived of shelter, food, medical and or other fundamental rights, in accordance with the provisions of human rights treaties[60].

[57] U.N. Charter, Articles 1,2,55.56.
[58]UNGA, Res. 40/144, 13 December 1985 Art.5 and 6 resp.
[59]UNHCR Executive Committee Conclusion No. 39, note 32, para (h).
[60]DECLARATION ON THE PROTECTION OF WOMEN AND CHILDREN IN EMERGENCY AND ARMED CONFLICT: UNGA, Res. 3318 (XXIX), 14 December 1974.

3.6PROTECTION TO REFUGEES UNDER CUSTOMARY INTERNATIONAL LAW

Countries not under treaty obligations are nevertheless still bound to deserve them insofar as these instruments reflect customary international law. For example, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Standard Minimum Rules for the Treatment of Prisoners[61] prohibit arbitrary prolonged detention. The International Court of Justice has cited the Charter of the United Nations, as well as the Declaration of Human Rights, in holding that such confinement violates international law by depriving persons of freedom of movement and by detaining them in conditions of hardships. The plethora of legal instruction condemning arbitrary and prolonged detention under inhumane conditions, widely adopted by the international community and recognized by the International Court of Justice, demonstrates that customary international law prohibits such confinement. Therefore, normative precepts of international human rights law protect refugees as they do all other persons.

[61]Standard Minimum Rules for the Treatment of Prisoners, adopted at the first United Nations Congress on the Prevention of Crime and Treatment of Offenders.

CHAPTER-IV

DETERMINATION OF REFUGEE STATUS AND HUMAN RIGHTS

CHAPTER IV

4. DETERMINATION OF REFUGEE STATUS AND HUMAN RIGHTS

4.1 REFUGEES AND HUMAN RIGHTS

In the past there was a tendency, at times, to see refugee law as a branch of law quite separate from that of human rights. This was, perhaps, part of a more general tendency during the post-war period to compartmentalize law, breaking it up into different and even autonomous branches, so much so as almost to suggest that there was no one law but only a number of different and separate laws. In such a view, with its strong *positivists* approach, refugee law

possessed its own special purposes and principles which were determined essentially by its own constituent instruments and which were thus independent of those of human rights law. This view, of course, was an over-simplification, as the human rights instruments not only contained no limitations excluding their application to the refugee situation but also, to the contrary, contained provisions, which were either explicitly or implicitly applicable to that situation.[62]

Such a separation of refugee 'law from human rights law was unfortunate, and inevitably it had harmful effects. Basically, it overlooked the fundamental principle that the refugee, like every other category of human being, is ultimately a person possessing, as such, basic rights which are independent of "positive" refugee law for their application. An absolute separation of the two is inconsistent with any principle of the fundamental unity of law in regard to its general purposes and principles; further, it served as a block to the progressive development of refugee law by closing off arbitrarily the application of general principle of law which are properly apt to fill in the lacunae of conventional refugee law. These lacunae inevitably existed by virtue of the fact that the conventional law is necessarily a product of a .particular time and place and so becomes, in different or changing circumstances, incomplete, even, finally, obsolescent. Moreover, the separation served to deny refugee law a general purposive context, the absence of which threatened to make that law in different and changing circumstances both in just and impractical. With the decline of the strict *positivist* approach to law, which has accelerated during the last two decades, the law has been liberated from the stultifying effects of those elements of the past, which only served to act as shackles, impeding the law from responding in a just and practical way to new human and social needs. Now human rights conceived as general principles of law assure the continuing relevance of law to those in needs.[63]

From a universal perspective, traditional or conventional refugee law was seriously incomplete, even unbalanced, by reason of the fact that *inter alia* it was primarily directed, and thereby limited, to the rights of the individual in relation to the receiving country. Essentially it was a law for the institutionalization of exile. Excluded entirely from its scope were the rights of the individual in relation to the country of nationality, especially in regard to the basic aspect of freedom of movement. The latter rights were considered as belonging, for example, to human

[62]G.J.L. Coles, Human Rights and Refugee Law, a staff member. Office of the United Nations High Commissioner for Refugees.
[63]Ibid

rights law, but were considered *a priori* is not belonging to refugee law. In practice, they were often considered as inapplicable to the refugee situation. Although in recent years, the international community's traditional approach, which was essentially the product of the Cold War era, has developed significantly as it has been increasingly realized that, in a changing world, it is both possible and necessary to address the refugee issue *as a whole,* i.e. its causes and the aspect of solution *generally,* including the primordial aspects of prevention and return as well as its principle and limited traditional focus of concern, i.e. the need for external palliative measures. This development has correspond to considerations of both justice and practically.

The development at the universal level began with the Canadian initiative within the United Nations Commission on Human Rights in 1980 to examine Human Rights and mass exoduses with a view to the elimination. of the causes of exoduses, and with the concurrent measures to avert mass flows. Both these initiatives have since been joined together under the item "Human rights and mass exoduses" which is now on the agenda of both the General Assembly and the Commission on Human Rights. At the regional level, however, the necessity of a comprehensive and coherent approach has been insisted upon from the late 1940s onwards by newly independent States, especially in the context of refugee situations arising from the denial of the right of self-determination.[64]

At the initial debate in the Commission on Human Rights, the representative of Canada observed that the duty of expressing international solidarity in the face of the problem of massive movements was two fold to assure protection and assistance and to share the burden placed on countries of the first refuge, and to contribute to the elimination of the causes of exoduses. These two aspects, the Canadian representatives added, were inextricably linked and were to equal importance. In emphasising that international solidarity required a contribution to the elimination of the causes of exoduses, as well as to extend protection and assistance, the Canadian proposal broke significant new ground in the post-war Western thinking on the refugee issue.

In its observations to the Secretary-General on its own proposal, the German Government observed that its initiative was an integral part of a comprehensive concept transcending humanitarian action and embracing the establishment of a system of preventive measure. From

[64] Ibid

the conceptual point of view, it said, the efforts of the intemational^community had until now centred on the humanitarian task of mitigating the consequences of flight and expulsion. Measures to eliminate the causes of flows of refugees were not seriously considered. With the inescapable recognition that the refugee issue involved basic aspects of indi\'idual human well-being as well as the aspects of peace and security, it had gradually been accepted that a comprehensive and coherent as the inter-State issues, and that it must do so in a balanced and integrated manner which reflected the flindamental interdependence of both aspects. This recognition flowed logically from the United Nations Friendly Relations Declarations of the late 1960s, which .included within a general framework of basic principles, the principle that States shall co-operate in the pro-recognition which was reflected also in the 1986 report of the Group ofExperts which was set-up by the General Assembly under the German **in** initiative. The 1986 recommendations included two key provisions:

a) In view of their responsibilities under the Charter of the United Nations and consistent with their obligations under the existing international instruments in the field of human right rights, States, in the exercise of their sovereignty, should do all within their means to prevent new massive flows of refugees. Accordingly States should refrain from creating or contributing by their policies to causes and factors which generally lead to massive flows of refiigees; and
b) States should co-operate with one another in order to prevent future massive flows of refugees. They should promote international co-operation in all its aspects, in particular at the regional and sub-regional levels, as an appropriate and important means to avert such flows.

It was with this opportunity in mind that UNHCR, in conjunction with *International Institute of Humanitarian Law at San Remo,* convened in 1989 a round table of experts to examine the issue of the solution of refugee problem and the protection of refugees. The stated purpose of the round table was to consider law; policy and action could be solution in a manner, which was in accord with the purposes and principles of protection. In explaining its initiative, UNHCR observed that various aspects had so far been dealt witli separately but there had never been a comprehensive examination of the subject. Such an examination had become imperative- as the international community was increasingly dealing with protection problems

not separately but in the overall context of solutions. It said that the refugee problem should be seen as a whole and any international efforts in this regard should take into account all aspects of the problem, including the causes of refugee flows, the interim protection requirements and the solution. This round table resolved.[65]

1. Solution should not be seen as an aspect independent and separate from protection. It should be seen as the final purpose of protection, and protection should be seen as governing the entire process towards solution and as determining what was or what was not a solution.
2. In broad terms, the problem of the refugee was basically that of the denial of freedom of movement to' the individual by reason of conditions in the country of nationality which compelled him to depart from that country or to stay abroad and the inability or unwillingness of the individual to avail himself of the protection of the countiy of nationality.
3. Solution, therefore, was either the prevention of conditions occurriag within the country of nationality, which compelled a national to depart or remain outside the country of nationality *so that the* national was without national protection or the remedying of such conditions having that effect (i.e. the "basic solution"). It was only in the eventuality that the basic problem of denial of freedom of movement could not be solved that the solution of the resulting problem (but not the basic problem) became the ennoblement of the refugee to settle in another country (i.e. the "contingent solution").
4. This concept of solution, including the two orders of solution, had import implications for law, policy and action. It was clearly impossible in the light of this defmition of solution, to treat the three traditional "solutions" of voluntary repatriation, local settlement or resettlement as of equal order. Voluntary repatriation was the basic or primordial solution. Moreover, prevention was a further aspect of solution, which should not be ignored in an approach, which was comprehensive and balanced.

[65]Report of Experts, "Intemational Institute of Humanitarian Law, San Remo, 1989.

It seems clear that the acceptance of the refugee problem as, by and large that of *coerced* movement, a characterization adopted recently by the *United Nations General Assembly* in its consideration of the German item, poses directly the human rights issue of freedom of movement, including such particular aspects of that freedom as the right to remain in, or to return to one's country of nationality and to enjoy therein one's rights and the related prohibitions of exile, expulsion and the arbitrary deprivation of nationality.

It must be recognized that exile is generally an evil, since it is, by defmition, an involuntary separation from the homeland. It should not be confused with voluntary separation from the homeland. It is not be confused with voluntary migration. While it may sometimes be the lesser of two evils nonetheless the coerced character of the movement cannot be considered unobjectionable let *lone positive.* In the vast majority of cases of coerced movements, the individual's decision to leave, where the individual is not actually expelled, is a difficult and painful one, frequently involving considerable risks and sacrifices. Exile necessarily involves the loss or deprivation of almost all rights that are enjoyable solely, in whole or in part, within the country of nationality.

Furthermore, conditions of exile today for most of the world's refugees are desperately hard sometimes dire, relatively few reach heavens of peace and prosperity where they can begin a new and meaningful life. Most of them are confmed in the camps on the borders of their countries of nationality, having precarious existence and dependent for their survival on outside charity. Some fmd themselves in situations worse than they knew at home, with no immediate hope of return. Many of them have been without a solution of their problem of *de facto* or *dejure* statelessness for decades. For most, the only solution will be their voluntary return one-day to their country of nationality, when conditions permit.

Political realism, too, requires such an approach today. The number of refugees world-wide have reached such proportions that in many cases the economies of the receiving countries are overstrained, their internal public order is endangered and international peace and security are threatened. In many cases today, the receiving countries have no political or economic interest is often seen as laying in the early return or the resettlement of the refugees else where, where that is possible.

The human and political cost of the contemporary phenomenon of exile is high. Many million of homeless people are undergoing traumatic ordeals and not only the stability and peace of regions are being affected, but also the stability and peace of the entire international community. The refugee issue now far surpasses a simple issue of charity: in every sense, it is a major international political issue, hi the present situation, it is imperative that international law and cooperation be developed in a broad and balanced way so as to meet the basic issues of freedom, justice and peace, which are directly raised by the refugee problem.

Since exile cannot be considered, either in justice of with realism, as the main solution for today's refugee problem, the rights of the individual in relation to the country of nationality must now be examined in the specific context of the refugee issue, especially in regard to the principle of freedom of movements.

Within the *Sub-Commission on Prevention Discrimination and Protection of Minorities of the United Nations Commissions on Human Rights* the right of everyone to leave any country, including his own and to return to that country is now being considered for the first time within the refugee context as well as within other contexts. When the Sub-Commission first examined this subject *nearly 30 years ago, the "immigration" issue was excluded from the scope of its work.*

It is to be hoped that in its treatment of the aspect of return, the Sub Commission will deal not only with the problem of deprivation of nationality but also with the problems of expulsion and exile, and that it will consider not only the problem of direct denial of rights or violation prohibition but also with the problem of indirect denial or violation. This latter aspect has largely been ignored until now but is especially relevant to the refugee problem today, and an increased understanding of its significance may lead to a major and beneficial development in international thinking in regard to human rights and state responsibility."

4.2. PERSECUTION AND THE LAW OF HUMAN RIGHTS

Is the international refugee definition's focus on the existence of a "well-founded fear of persecution" of continuing relevance in the past-cold war era?

The persecution standard evolved from the legitimate concern first stated in the *J938 Convention concerning the Status of Refugees* coming from Germany to exclude from protection those persons who were leaving their country for "reasons of purely personal convenience". The *Constitution of the International Refugee Organisation (IRO)* rephrased this principle in positive terms and required the putative refugee to show "valid objections" to returning to his or her country of origin, which might include fear of persecution. The modem *Convention Relating to the Status of Refugees,* in turn, adopted the basic approach of the IRQ precedent, but made persecution the exclusive bench-mark for international refugee status.

It is generally acknowledged that the drafters of the Convention intentionally left the meaning of "persecution" undefined because they realized the impossibility of enumerating in advance all of the forms of maltreatment, which might legitimately entitle persons to benefit from the protection of a foreign State. Bits and pieces of insight into the intended meaning of "persecution" can nonetheless be gleaned from the Convention's drafting history.'[66]

First, the drafters clearly viewed persecution as a sufficiently inclusive concept to capture the spectrum of phenomena, which had induced involuntary migration during and immediately after the Second World War, ranging from the deprivation of life and liberty inflicted by the Nazis. From the beginning there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard of human dignity might constitute persecution. Refugee status was premised on the risk of serious harm, but not on the possibility of consequences of life or death proportions. In addition to the Convention's acceptance of deprivation of basic civil and political freedom as sufficient cause for international concern, serious social and economic consequences were also acknowledged to be within the purview of persecution?'[67]

Second, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a State to its own population. As a holistic reading of the refugee defmition demonstrates, the drafters were not concerned to respond to certain forms of harm, *per se* but were rather

[66]James C. Hathaway, The Law of Refugee Status, Butterworths co. 1991.
[67]Ibid

motivated to intervene only where the maltreatment anticipated was demonstrative of a break down of national protection[68]. The existence of pattern of or anticipated suffering alone, therefore, does not make one a refugee, unless the State has failed in relation to some duty to defined its citizenry against the particular form of harm anticipated.

These basic tenets a liberal sense of the types of past or anticipated harm which might warrant protection abroad, and a fundamental preoccupation to identify forms of harm demonstrative of breach by a State of its basic obligations of protection are of continuing relevance today. For persecution to remain a meaningful concept, it must be interpreted in the light of these principles as they apply in modem context. As noted by the Council of Europe: "

" the concept of persecution should be interpreted and applied liberally and also adopted to the changed circumstances which may differ considerably from those existing when the Convention was originally adopted —account should be taken of the relation between refugee status and the denial of human rights as laid down in different international instruments."[69]

This approach will not eliminate the danger of political distortion inherent in the retention of the persecution standard, but it may at least prevent the Convention from becoming a mere anachronism

Drawing on these basic precepts, persecution may be defined as the sustained or systematic violation of basic human rights demonstrative of a failure of State protection. A well-founded fear of persecution exists when one reasonably anticipates that the failure to leave the county may result in a form of serious harm which government cannot or will not prevent, including either "specific hostile acts or — an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear of the nature of basic human rights which constitute a State's duty of protection, the application of these standards in a number of specific contexts and the circumstances in which a state may be said to have failed in its duty to ensure those basic human rights.

[68]This limitation on the definition of refugee owes its origin to the fact that the refugee is designated as a person who stands in need of intemational protection because he or she is deprived of that in his or her own country.
[69]Cited in Remarks by J. Thomas in A. Woods (Ed.); "Refugee: A New Dimension in Intemational Human Rights", A.S.L.P. (1976), 70, 58, p.69.

4.3 HUMAN RIGHTS LAW, HUMANITARIAN LAW AND REFUGEE LAW: A SYNTHESIS

It is very clear that refugee law is an inseparable part of human rights law as follows from *Article 14 (1) of the Universal Declaration of Human Rights.* "Everyone has the right to seek and to enjoy in other countries asylum from persecution". Persecution can be denied as a violation of basic human rights. The *1951 Convention Relating to the Status of Refugee*[70]alongwith many other international and national legal instruments referring to or relying on it spells out in details the right to seek asylum from persecution. The 1951 Convention does not solve the problem of territorial asylum [71], however, it remains a fact that the definition of a refugee under the Convention revolves around our understanding of human rights.

Most of the unhappy millions who have been forced to flee their country of origin have not been exposed to direct persecution. They have been uprooted by a variety of other causes even more complex and variable than the recognised methods of persecution. This, only a minority of the world's refugees is covered by the 1951 Convention. Still, it is an undeniable fact that they have been forced to flee. Hence the term *de facto* refugee, generally accepted by experts all over the world, but shunned by Governments and their spokespeople in rich western countries.

The confusion in the rich countries over who the *de facto* refugees are in relation to the Convention refugees and to the human rights system has inspired much attention. One way to resolve this might be to see Convention refugees as victims of denial of humanitarian law protection. Though this might be helpful in some situations and it might lead to oversimplified or erroneous conclusions[72]

> If a prisoner of war is tortured because of his race or his religion, is that not a violation of both humanitarian law of human rights law?

[70]U.N. Treaty Series, Vol. 189, p. 1377.
[71]Atle Grahl-Modsen, "Territorial Asylum", Oceana Publication Inc. London and New York, 1980.
[72]Peter Nobel, Jur, D.H.C. Swidish Ombudsman Against Ethnic Discrimination.

If an ethnic minority in a remote part of a country is being persecuted by a majority and the central Government does not have the means of the power to interfere, is that a situation which generates convention refugees or *defacto*

If villagers are killed, raped, robbed, by criminals, irregular armed forces or army troops gone completely out of control, those villagers are not persecuted by a Government or its agents and they are clearly entitled to protection as *de facto* refugees, but have their human rights not been violated at the hands of the perpetrators of these deeds?

These examples made it clear not only that humanitarian law and human rights law are branches of the same tree but also that these branches are intertwined and that they do have relevance for both categories of refugees.

There are situations where the humanitarian law criterion is not sufficient to establish refugee status. There are many examples of armed conflict or other political events causing serious and widespread environmental destruction, which uproots the local population, aggravated by political neglect or incompetence, and drives people away to safety. Many of these victims could and should be considered *de facto* refugees, but one caimot say that they have been exposed to violations of humanitarian law. So, it can be said that the key concept in the definition of a Convention refogee is a *"well-foundedfear of persecution"* and the key to understanding that is a *de facto* refugee is the existence of *events are seriously disturbing public order.* Both categories are still related to both human rights and humanitarian law just as they are sometimes intertwined in the field of practical application.

4.4 DETERMINATION OF THE REFUGEE STATUS

During the past few years, it has become increasingly obvious that the mass influx of refugees has outgrown the possibility of solution on the national level and has to be solved at the international and regional levels respectively.

As a consequence of recognising the urgent need to assist the hundreds to thousands of refugees fi-om South East Asia, a number of States have recognised that granting collective

asylum to liie refugees from South-East Asia is a humanitarian act directly based on the prevention of further acute jeopardy to the lives and physical well-being of such refugees.

Here it may be mentioned that 1951 Refugee Convention does not apply to persons fleeing from *generalised violence* or *internal turmoil* in, rather than persecution by, their home countries. Such persons are generally considered to be *humanitarian* refugees rather than political or social refugees as defmed in the 1951 Refligees Convention. A Practical difficulty in applying the Convention defmition confronts states receiving mass influx humanitarian refugees because "there simply is no tim-C to do the individualised screening commonly necessary to apply the Convention defmition...." Recently, the ExUnited Nations High Commissioner for Refugees, Mrs. Sadako Ogata expressed her view by observing that –

> "The refugee issue has become part of a much large movement of people across frontiers and within them. The mass exodus of migrant workers, evacuees, refugees and internally displaced which the Gulf-war produced represents a microcosm the kind of movements with which we are increasingly confronted as we come to the end of the twentieth century.... In many parts of the world refugees are victims of civil war and political conflict rather than of persecution... Communal strife and civil war intensify famine and food shortages forcing people to move in search of safety and survival.[73]"

In the large-scale influx situations - the determination of individual status becomes largely impossible. Group determination is the only possible solution. Of course, in principle, there would not seem to be any objection to a group determination it if conferred refugees status on all members of the group.

Here it may be noted that international bodies have already reacted to this growing problem of mass influx of humanitarian refugees. Originally, the competence of the United Nations High Commissioner for Refugees (UNHCR) was restricted to refugees as defined by the 1951 Refugee Convention, i.e.. *Convention Refugees.* Since 1959, however, the UNHCR's competence has been extended"'[74] gradually to cover all refugees, including "Persons who have

[73]Miss Sadako Ogata, "Refugees in the 1990s: Changing Reality, Changing Response", Lecture delivered at Georgetown University on June 25,1991.
[74]U.N. General Assembly Resolution, 3454, 30 UN GAOR Supp. (No. 34) at 92, UN Doc A/10034 (1975).

fled their home country due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights.

The Report of the working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, 1981, noted that the definition of the term 'refugee' in Article I of the 1969 OAU Convention, alongwith the extended responsibility of the UNHCR after 1975, had the effect of including within the ambit of its protection provisions, virtually, all victims of man-made disasters, including 'displaced persons', and approved it in relation to the definition of the term 'refugee' in Asia.

The Cartagena Declaration on Refugees of November 1984 proposed an extension of the concept of *refugee* as applied to Central America, stipulating that a 'massive violation of human rights' should be considered as a legal basis for extended definition *of refugee.*

The requirements for the determination of refugee status envisaged that the competent immigration or border police officer should have clear instructions for dealing with refligees on the basis of adherence to the principle of *non-refoulement* and should be required to refer refugee cases to a higher authority the applicant should receive guidance on procedures to be followed, he should be given the necessary facilities including the services of an interpreter, for submission of his case to the authorities as well as permission to remain in the country pending a decision on the initial request when the applicant is recognised as a refugee, he should be so informed and issued with appropriate documentation. If the applicant is not recognized as a refugee, he should be given time to appeal for reconsideration of the decision. He should be permitted to remain in the coimtry while the appeal is pending. National Sovereignty requires that all persons, including refugees conform to the Jaws and regulations of the country of asylum as well as to the measures taken for the maintenance of public order.[75]

According to the 1951 Convention, in time of war or other grave and exceptional circumstances, a state may take provisional measures essential to national security in the case of a particular person, pending a determination by the contracting state that the person is in fact a

[75]Igor Khokhlar, Professor, Moscow State Institute of International Relation, "The Rights of Refugees under International Law:.

refugee and that the continuance of such measures is necessary in his case in the interests of national security.

This provision should be read together with Article 44 of the *Fourth Geneva Convention pertaining to the Protection of Civilian Persons in Time of War, of 12 August, 1949,* according to which in applying the measures of control the Power in whose jurisdiction protected persons fmd themselves shall not treat as enemy aliens, exclusively on the basis of their nationality *dejure* of a enemy state, refugees who do not, in fact, enjoy the protection of any Government. This applies to aliens in the territory of a party to an international armed conflict. In the situation of belligerent occupation. Article 70 of the Fourth Geneva Convention is operative. It states that protected persons (a notion which includes refugees) shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.[76]

Nationals of Occupying Power who before the outbreak of hostilities sought refuge in the territory of the occupied State shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities or for offences under common law committed before the outbreak of hostilities, which, according to the law of the occupied State, would have justified extradition in time of peace.'[77]

A. <u>Criteria For the Determination of the Refugee Status</u>

(i) General Principles

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee. Determination

[76] Ibid
[77] Ibid

of refugee status is a process, which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the defmitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained. The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively "inclusion", "cessation" and "exclusion" clauses. The inclusion clauses define the criteria that a person must satisfy in order to be a refligee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses.

(ii) **Interpretation** of **terms**

(a) ***"Events occurring before 1 January 1951"***

The origin of this 1951 dateline is explained in the Preamble to the Convention. As a result of the 1967 Protocol this dateline has lost much of its practical significance. An interpretation of the word "events" is therefore of interest only in the small number of States parties to the 1951 Convention that are not also party to the 1967 Protocol. The word "events"' is not defined in the 1951 Convention, but was understood to mean "happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes."""" The dateline refers to "events" as a result of which, and not to the date on which he left his country. A refiigee may have left his country before or after the datelines, provided that his fear of persecution is due to "events" that occurred before the dateline or to after effects occurring at a later date as a result of such events.

(b) ***"wellfoundedfear of beingpersecuted"***

The phrase *"well-foundedfear of being persecuted"* is the key phrase of the defmition. It reflects the views of its authors as to the main elements of reftagee character, ft replaces the earlier method of defining refugees by categories (i.e.

persons of a certain origin not enjoying the protection of their country) by the general concept *of fear* for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of reftigee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin. To the element of fear-a state of mind and a subjective condition - is added the qualification *well founded.* This implies that it is not only the frame of mind of the person concerned that determines his reftagee status, but that this fi-ame of mind must be supported by an objective situation. The term *well-foundedfear* therefore contains a subjective and an objective element, and in determining whether well-funded fear exists, both elements must be taken into consideration, ft may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression *owing to well-founded fear of being persecuted* - for the reasons stated - by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

An evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his

own interpretation of his situation, and his personal experiences - in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.'[78,] As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. Knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his Mends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is *wellfounded.*

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is *regarded prima facie* (i.e. in the absence of evidence to the contrary) as a refugee. Apart from the situations of the type referred to in the preceding

[78]Handbook on Procedures and Criteria for Determining Refugee Status. Geneva, Jan, 1992, p.l2.

paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but those who wish to avoid a situation entailing the risk of persecution.'*^ The expressions *fear of persecution* or even *persecution* are usually foreign to a refugee's normal vocabulary. A refugee will indeed only rarely invoke *fear of persecution* in these terms, though it will often be implicit in his story. Again, while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms. A typical test of the well foundedness of fear will arise when an applicant is in possession of a valid national passport. It has sometimes been claimed that possession of a passport signifies that the issuing authorities do not intend to persecute the holder, for otherwise they would not have issued a passport to him. Though this may be true in some cases, many persons have used a legal exit from their country as the only means of escape without ever having revealed their political opinions, knowledge of which might place them in a dangerous situation vis-a-vis the authorities.

Possession of a passport cannot therefore always be considered as evidence of loyalty on the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously. In conclusion, therefore, the mere possession of a valid national passport is no bar to refugee status. If, on the other hand, an applicant, without good reason, insists on retaining a valid passport of a country of whose protection he is allegedly unwilling to avail himself, this may cast doubt on the validity of his claim to have "well-founded fear". Once recognized, a refugee should not normally retain his national passport. There may, however, be exceptional situations in which a person fulfilling tlie criteria of refugee status may retain his national passport - or be issued with a new one by the authorities of his country of origin under special arrangements. Particularly where such arrangements do not imply that the holder of the national passport is free to return to his country without prior permission, they may not be incompatible with refugee status.

There is no universally accepted definition *of persecution*, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention,

it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution." Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to *well founded fear of persecution* on *cumulative grounds.* Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities. Where measures of discrimination are, in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.

Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should

be recalled that a refugee is a victim - or potential victim - of injustice, not a fugitive from justice. The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition (for example, in respect of "illegal" religious instruction given lo a child) may in itself amount to persecution. Secondly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have *well founded fear of persecution.* In such cases the person concerned is a refugee. It may, however, be necessary to consider whether the crime in question is not of such a serious character as to bring the applicant within the scope of one of the exclusion clauses.

In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against "public order", e.g. for distribution of pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to make decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for tlie States parties and are instruments to which many States parties to the 1951 Convention have acceded.

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country' concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

(c)"*for'reasons of race, religion, nationality, membership of a particular social group ofpolitical opinion'*''

In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of *two* or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared to decide whether the definition in the 1951 Convention is met with in his respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.

Race, in the present connection, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found worldwide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution."^ Discrimination on racial ground will frequently amount to persecution in the sense of the 1951 Convention. This will be the case if. as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences. The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.

The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance. Persecution for *reasons of religion* may assume various forms, e.g. prohibition of membership of religious community, or worship in private or

in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community."^ Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.

The term *nationality* in this context is not to be understood only as *citizenship.* It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term *race.* Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well founded fear of persecution.'

The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific "nationality". Whereas in most cases persons belonging to a national minority fear persecution for reason of nationality, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.

A *particular social group* normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

Holding *political opinions* different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This pre-supposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions - in so far as this can be established from all the circumstances of the case - will also be relevant. While the definition speaks of persecution for *reasons of political opinion* it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on *opinion.* More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

Persecution *for reasons of political opinion* implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

Where a person is subject to prosecution or punishment for a political ojffence, a distinction may have to be drawn according to whether the prosecution is for political *opinion* or for politically motivated *acts.* If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee. Whether a political offender can also be considered a refiigee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof Again, there may be

reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution.

In determining whether a political offender can be considered a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; fmally, also, the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment - within the law - for an act committed by him.

(d) ***"is outside the country of his nationality"***

In this context, *nationality* refers to *citizenship.* The phrase "is outside the country of his nationality" relates to persons who have a nationaUty, as distinct from stateless persons. In the majority of cases, refugees retain the nationality of their country of origin. It is a general requirement for reftigee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country. Where, therefore, an applicant alleges fear of persecution in relation to the country of his nationaUty, it should be established that he does in fact possess the nationality of that countty. There may, however, be uncertainty as to whether a person a nationality. He may not know himself, or he may wrongly claim to have a particular nationality or to be stateless. Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.

As mentioned above, an applicant's *well-founded fear of persecution* must be in relation to the country of his nationality. As long as he has no fear in relation to the country of his nationality, he can be expected to avail himself of that country's protection. He is not in need of international protection and is therefore not a refugee. The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific national group may occur in only one part of the country, hi such situations, a person will not be

excluded from refugee status merely because he could have sought refugee in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so. Nationality may be proved by the possession of a national passport. Possession of such a passport creates *di prima facie* presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example, by showing that the passport is a so-called "passport of convenience" (an apparently regular national passport that is sometimes issued by a national authority to non nationals). However, a mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality. In certain cases, it might be possible to obtain information from the authority that issued the passport. If such information cannot be obtained, or cannot be obtained within reasonable time, the examiner will have to decide on the credibility of the applicant's assertion in weighing all other elements of his story. (e) *"and is unable or, owing to such fear, is unwilling to avail himself of theprotection of that country"* The present phrase relates to persons who have a nationality. Whether unable or unwilling to avail himself of the protection of his Government, a refugee is always a person who does not enjoy such protection. Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution. What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g.. refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition. The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality.^" It is qualified by the phrase *owing to such fear.* Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country *owing to*

well-founded fear of persecution. Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.

(f) "or *who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.''*

This phrase, which relates to stateless^" refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of stateless refugees, *the country of his former habitual residence* replaces the *country of nationality,* and the expression *unwilling to avail him of the protection...* is replaced by the words *unwilling to return to it.* In the case of a stateless refugee, the question of "availment of protection" of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return. It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

Such reasons must be examined in relation to the country *of former habitual residence* in regard to which fear is alleged. The drafters of the 1951 Convention as the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned defined this. A stateless person may have more than one country of former habitual residence, and he may have a feai' of persecution in relation to more than one of them. The definition does not require that he satisfied the criteria in relation to all of them. Once a stateless person has been determined a refugee in relation to *the country of his former habitual residence,* may further change of country of habitual residence will not affect his refugee status.

(iii) Dual or multiple nationality

Article 1 A (2), paragraph 2, of the 1951 Convention states that:

> "In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and **a** person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national".

This clause, which is largely self-explanatory, is intended to exclude from refugee status all persons with dual or multiple nationalities who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.

In examining the case of an applicant with dual or multiple nationalities, it is necessary, however, to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country is regard to which he alleges no fear, but such nationality may be deemed to be ineffective, as it does not entail the protection normally granted to nationals. In such circumstances, the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal.

(iv) Geographical Scope

At the time when the 1951 Convention was drafted, there was a desire by a number of States not to assume obligations the extent of which could not be foreseen. This desire led to the inclusion of the 1951 dateline, to which reference has already been made. In response to the wish of certain Governments, the 1951 Convention also gave to Contracting States the possibility of limiting their obligations under the Convention to persons who had become refugees as a result of events occurring in Europe.

Accordingly, Article 1 B of the 1951 Convention states that:

(1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either-

(a) "events occurring in Europe before 1 January 1951"; or

(b) "events occurring in Europe and elsewhere before 1 January 1951". and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purposes of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative

(a) may at any time extend its obligations by adopting alternative

(b) by means of a notification addressed to the Secretary General of the United Nations.

Of the State parties to the 1951 Convention, at the time of writing still adhere to alternative (a), "events occurring in Europe". While refugees from other parts of the world frequently obtain asylum in some of these countries, they are not normally accorded refugee status under the 1951 Convention.

(v) Exclusion of Certain Persons

The 1951 Convention, in Sections D, E and F of Article 1, contains provisions whereby persons otherwise having the characteristics of refugees, as defined in Article 1, Section A, are excluded from refugee status. Such persons fall into three groups. The first group (Article 1 D) consists of persons already receiving United Nations protection or assistance; the second group (Article 1 E) deals with persons who are not considered to be in need of international protection; and the third group (Article 1 F) enumerates the categories of persons who are not considered to be deserving of international protection.

Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously

taken.

(a) Persons already receiving United Nations protection or assistance

Article 1 D of the 1951 Convention states:

"This Convention shall not apply to persons who are at present receiving fi-om organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

"When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipsofacto* be entitled to the benefits of this Convention".

Exclusion under this clause applies to any person who is in receipt of protection or assistance from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees. Such protection or assistance was previously given by the former United Nations Korean Reconstruction Agency (UNKRA) and is currently given by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). There could be other similar situations in the future.

With regard to refugees from Palestine, it will be noted that UNRWA operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refUgee status under the criteria of the 1951 Convention. It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses.

(b) Persons not considered being in need of international protection

Article 1 E of the 1951 Convention states:

"This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and

obligations which are attached to the possession of the nationality of that country".

This provision relates to persons who might otherwise qualify for refugee status and who have been received in a country where nationals, but not formal citizenship have granted them most of the rights normally enjoyed. (They are frequently referred to as "national refugees"). The country that has received them is frequently one where the population is of the same ethnic origin as themselves.^' There is no precise definition of "rights and obligations" that would constitute a reason for exclusion under this clause. It may, however, be said that the exclusion operates if a person's status is largely assimilated to that of a national of the country. In particular he must, like a national, be fully protected against deportation or expulsion. The clause refers to a person who has "taken residence" in the country concerned. This implies continued residence and not a mere visit. A person who resides outside the country and does not enjoy the diplomatic protection of that country is not affected by the exclusion clause.

(c) Persons considered not to be deserving of international protection

Article I F of the 1951 Convention states:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations".

The pre-war international instruments that defined various categories of refugees contained no provisions for the exclusion of criminals. It was immediately after the Second World War that for the first time special provisions were drawn up to exclude from the large group of the then assisted refugees certain persons who were deemed unworthy of international protection. At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war

criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order. The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his reflagged status. For these clauses to apply, it is sufficient to establish that there are "serious reasons for considering" that one of the acts described has been committed. Formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.

In mentioning crimes against peace, war crimes or crimes against humanity, the Convention refers generally to "international instruments drawn up to make provision in respect of such crimes". There are a considerable number of such instruments dating from the end of the Second World War up to the present time. All of them contain definitions of what constitute *crimes against peace, war crimes and crimes against humanity.* The most comprehensive definition will be found in the 1945 London Agreement and Charter of the International Military Tribunal.

The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature of has committed a political offence. In determining whether an offence is "non-political" or is, one the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature. Only a crime committed or presumed to have been committed by an applicant "outside the country of refuge prior to his admission to that country as a refugee" is a ground for exclusion. The country outside would normally be the country of origin, but it could also be another country, except the country of refiige where the applicant seeks recognition of his refugee status.

A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. In extreme cases. Article 33 paragraph 2 of the Convention permits a refugee's expulsion or return to his former home country if, having been convicted by a final judgement of a *particularly serious* common crime, he constitutes a danger to the community of his country of refuge. What constitutes a *serious* non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term *crime* has different connotations in different legal systems. In some countries the word *crime* denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a *serious* crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned.

In applying this exclusion clause, it is also necessary to strike a balance between the natures of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether his criminal character does not outweigh his character as a *bona fide* refugee. In evaluating the nature of the crime presumed to have been committed, all the relevant factors including any mitigating circumstances must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

Considerations similar to those mentioned in the preceding paragraphs will apply when a crime- in the widest sense - has been committed as a means of, or concomitant with, escape from the country where persecution was feared. Such crimes may range from the theft of a means of locomotion to endangering or taking the lives of innocent people. While for the purposes of the

present exclusion clause it may be possible to overlook the fact that a refugee, not finding any other means of escape, may have crashed the border in a stolen car, decisions will be more difficult where he has hijacked an aircraft, i.e. forced its crew, under threat of arms or with actual violence, to change destination in order to bring him to a country of refuge.

As regards hijacking, the question has arisen as to whether, if committed in order to escape from persecution, *it* constitutes a serious non-political crime within the meaning of the present exclusion clause. Governments have considered the unlawful seizure of aircraft on several occasions within the framework of the United Nations, and a number of international conventions have been adopted dealing with the subject. None of these instruments mentions refugees. However, one of the reports leading to the adoption of a resolution on the subject states that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States under instruments relating to the status of refugees and stateless persons". Another report states that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States with respect to asylum."^'"

The various conventions adopted in this connection deal mainly with the manner in which the perpetrators of such acts have to be treated. They invariably give Contracting States the alterative of extraditing such persons or instituting penal proceedings for the act on their own territory, which implies the right to grant asylum. While there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well founded, will have to be duly considered in determining his possible refugee status milder the 1951 Convention. The question of the exclusion under Article 1 F (b) of an applicant who has committed an unlawful seizure of an aircraft will also have to be carefully examined in each individual case.

It will be seen that this very generally worded exclusion clause overlaps with the exclusion clause in Article 1 F (a); for it is evident that a crime against peace, a war crime or a crime against humanity is also an act contrary to the purposes and principles of the United Nations. While Article 1 F (c) does not introduce any specific new element, it is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken in conjunction with the

latter, it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature.

The purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. They enumerate fundamental principles that should govern the conduct of their members in relation to each other and in relation to the international community as a whole. From this it could be inferred that an individual, in order to commit an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles. However, there are hardly any precedents on record for the application of this clause, which, due to its very general character, should be applied with caution.

(vi) Special Category of Persons

(a) War refugees

Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol. They do, however, have the protection provided for in other international instruments, e.g. the Geneva Conventions of 1949 on the Protection of War Victims and the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the protection of Victims of International Armed Conflicts. However, foreign invasion or occupation of all or part of a country can result - and occasionally has resulted in persecution for one or more of the reasons enumerated in the 1951 Convention. In such cases, refugee status will depend upon whether the applicant is able to show that he has a "well-founded fear of being persecuted" in the occupied territory and, in addition, upon whether or not he is able to avail himself of the protection of his government, or of a protecting power whose duty it is to safeguard the interests of his country during the armed conflict, and whether such protection can be considered to be effective. Protection may not be available if there are no diplomatic relations between the applicant's host country and his country of origin. If the applicant's government is itself in exile, the effectiveness of the protection that it is able to extend may be open to question. Thus, every case has to be judged on its merits, both in respect of well-founded fear of persecution and of the availability of effective protection on the part of the government of the country of origin.

(b) Fugitives and Evaders of Conscription

In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute *well-founded fear of persecution* under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his reUgious convictions are genuine, and that such conviction are not taken into account by the authorities of his country in

requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.^^ In the light of these developments; it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army, as a volunteer may also be indicative of the genuineness of his convictions.

(c) Persons having resorted to force or committed acts of violence

Persons who have used force or committed acts of violence frequently make applications for refiigee status. Such conduct is frequently associated with, or claimed to be associated with, political activities or political opinions. They may be the result of individual initiatives, or may have been committed within the framework of organized groups. The latter may either be clandestine groupings or political cum military organizations that are officially recognized or whose activities are widely acknowledged. Account should also be taken of the fact that the use of force is an aspect of the maintenance of law and order and may by definition be lawfully

resorted to by the police and armed forces in the exercise of their functions. An application for refugee status by a person having (or presumed to have) used force, or to have committed acts of violence of whatever nature and within whatever context, must in the first place - like any other application - be examined from the standpoint of the inclusion clauses in the 1951 Convention.

Where it has been determined that an applicant fulfils the inclusion criteria, the question may arise as to whether, in view of the acts involving the use of force or violence committed by him, he may not be covered by the terms of one or more of the exclusion clauses. These exclusion clauses, which figure in Article 1 F (a) to (c) of the 1951 Convention, have already been examined. The exclusion clause in Article 1 F (a) was originally intended to exclude from refugee status any person in respect of whom there were serious reasons for considering that he has *committed a crime against peace, a war crime, or a crime against humanity* in an of social capacity. This exclusion clause is, however, also applicable to persons who have committed such crimes within the framework of various non-governmental groupings, whether officially recognized, clandestine or self-styled. The exclusion clause in Article 1 F (b), which refers to "a serious non-political crime", is normally not relevant to the use of force or to acts of violence committed in an official capacity. The exclusion clause in Article 1 F (c) has also been considered. As previously indicated, because of its vague character, it should be applied with caution. It will also be recalled that, due to their nature and the serious consequences of their application to a person in fear of persecution, the exclusion clauses should be applied in a restrictive manner.

(vii) The Principle of Family Unity & Re-unification

Beginning with the Universal Declaration of Human Rights, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

The Final Act of the Conference that adopted the 1951 Convention states:

"Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

The 1951 Convention does not incorporate the principle of family unity in the defmition of the term refugee. The above mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol. If the head of a family meets the criteria of the defmition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

As to which family members may benefit from the principle of family, unity the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.

The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unity has been temporarily disrupted through the flight of one or more of its members. Where the unity of a refligee's family is destroyed by divorce, separation by death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees. If the dependant of a refugee falls within the terms of one of the

exclusion clauses, refugee status CO should be denied to him.

4.5 TERMINATION OF REFUGEE STATUS

Article I. C. (1) to (6) of the 1951 Convention spell out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary that

Article I-Cofthe 1951 Convention provides that-

This convention shall cease to apply to any person falling under the tenns of Section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it: or

(3) He has acquired a new nationality, and enjoys the protection of the Country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refiigee have ceased to exist, continue to refuge to avail himself of the protection of the country of his nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

The 1951 Convention, in Sections D, E and F of Article I, contains provisions whereby persons otherwise having the characteristics of refugees, as defmed in Article-I, Section A, are excluded from refugee status. Such persons fall into three groups:

The first group (Article I-D) consists of persons already receiving United Nations' protection or assistance; the second group (Art. I-E) deals with persons who are not considered to be in need

of international protection; and the third group (Art. I-F) enumerates the categories of persons who are not considered to be deserving of international protection.

Normally it will be during the process of determining a person's refiigee stams that the facts leading to exclusion under these clauses will emerge. However, exclusion under the clause D of Article I applies to the persons who are in respect of protection or assistance from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees. Such protection or assistance was previously given by the former United Nations Korean Reconstruction Agency (UNKRA) and is currently given by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

ChapterV

CONCLUSION

CONCLUSION

International refugee law rests on a humanitarian premise. It is a premise tragically inadequate for our time, but one, which remains a *terra incognita* despite the frequency and enormity of contemporary refugee crises. The problem of the refugee is today profoundly different. The persecutors are not defeated and defunct regimes. Instead persecutors are existing governments, able to insist on the prerogatives of sovereignty while creating or helping to generate refugee crises. When labeled as persecutors, they react as governments always react. They assert their sovereignty and castigate as politically motivated the human rights claims made against them. To censure these governments as persecutors is often the surest route to exacerbating a refugee crisis because it diminishes the opportunity to

gain their necessary cooperation. In the face of dramatically and cataclysmically changed social and economic conditions, States felt obliged to abandon the centuries-old practice of permitting the free immigration of persons fleeing threatening circumstances in their home countries. In an effort to limit the number of persons to be classified as refugees while still offering sanctuary to those in greatest need, international legal accords were enacted which imposed conditions requisite to a declaration of refugee status. This approach of humanitarianism, the attempt to affect events by asserting the claims of individual human rights, is largely doomed to failure when dealing with refugee problems. In other contexts, human rights claims concern rights of citizens within a state, even if voiced in international forums. However, in the refugee context, human rights law produces an unusually negative tension with the principle of sovereignty. The problem of the refugee, by its very nature, concerns the relations between states because it involves the movement of persons between states. The perspective of state-to-state relations, not the relation between the individual and the state, becomes critical for the mitigation or solution of refugee crises. Over the course of more than 50 years, three quite distinct approaches to refugee defmition were evident. While each was designated to facilitate involuntary migration, the precise approach was determined by the perceived nature of the international community. The presence of masses of stateless and undocumented aliens who wanted to migrate in search of decent living conditions in the years following the end of the World War-I dictated a refugee defmition founded upon considerations of formal legal status. The exodus of persons fleeing Nazi Holoucast and persecution in the 1930's called for the extension of refugee protection to all members of the groups targeted, tortured, victimised and abused. Ultimately the inception of the institutionalised ideologies to which many individuals were unable and unwilling to emulate in the wake of World War-II suggested an approach to refugee definition, which accorded relief to these persons for whom continued residence in their own countries, was unthinkable. Refugee status, then, is an extremely malleable legal concept, which can take on different meanings as required by the nature and scope of the dilemma prompting involuntary migration. If properly defined, refugeehood enables to maintenance of a delicate balance between domestic policies of controlled immigration and the moral obligation of the international community to respond to the plight of those forced to this role, the definitional framework must, as during .the period analysed here, evolve in response to changing social and political conditions. The definition of the term "refugee' given by the UNHCR Statute or 1951 Convention has led some to consider that these

definitions are essentially applicable to individuals and are of little relevance for today's refugee problem, which are primarily problems of refugee groups. Despite the character of the problem of the refugee, contemporary efforts to improve international refugee law continue to address the problem as essentially a problem of human rights. Indeed, commentators who argue for expanding the capacities of the international community to deal with refugee crises generally insist on enlarging the human rights basis of international refugee law.

SUGGESTIONS

Traditionally the main reason for granting asylum was the abuse of state power *vis a vis* individuals who were regarded by the state authorities as their opponents. Therefore, many asylum states linked refugee protection to persecution attributable to the state and some still continue to do so. They perceive international protection as a substitute in situations where the authorities of the country of origin are unwilling to provide adequate protection to their citizens at home or abroad. In recent years, however, there has been a significant increase in situations where very serious harm is inflicted by various kinds of non-state actors and where state authorities no longer are in a position to provide adequate protection to those under their jurisdiction. The breakdown of public order, internal strife, civil war, ethnic cleansing and genocide are increasingly the cause of refugee movements.

Asylum states have reacted to this challenge in three different ways-

1. Many countries in Africa and Latin America continue to apply the regional refugee instruments, which cover such situations.

2. Countries in North America and some in Europe and the Pacific have expanded the traditional reading of the refugee definition as contained in article lA para 2 of the 1951 Refugee Convention, to include persons fleeing persecution in situations where the country of origin is unable to provide effective protection or no longer exists.

3. Other European countries including India insist that a 'refugee' is a person who is fleeing his country because of harm that can be attributed to the State. They recognise that this requirement is met where state authorities encourage, tolerate or acquiesce in violations carried out by private actors or, in the absence of legitimate state power, by *de facto* governments exercisiag control over a particular territory in a stable and permanent manner. They maintain, however, that persons fleeing situations where the authorities of the country of origin are unable to control private actors or where governmental structures have collapsed are not refugees in terms of the 1951 Convention.

Therefore, reason that refugees fmd it increasingly difficult to obtain international protection in Europe and India in this manner in which some European states interpret the refugee

definition. As a result, refugees and their advocates turn increasingly to human rights treaty bodies and courts in order to find alternative forms of protection after rejection of their claims to refugee status. Human rights bodies have had to assume a role they were not initially meant to play, as they are now dealing more frequently witli cases relating to asylum. Given the different procedures 'available and the length of these procedures, persons in need of international protection are forced to apply to various bodies until they eventually find protection against *refoulement.* When they do find protection, this is not always asylum. At the same time, persons not deserving international protection also use the same bodies — in effect misusing the human rights system as much as the asylum system. Consequently, some governments and courts continue to apply a narrower interpretation of who is entitled to refugee status, in full awareness that many persons who are not refugees will remain in any event and eventually be granted some sort of status. As a result, they are depriving persons who otherwise would qualify as refugees of the fliU range of benefits guaranteed by the 1951 Refugee Convention and other instruments. Rejected asylum seekers are increasingly resorting to regime/forum shopping. Human rights bodies are fmding themselves overburdened and under-resourced. This compromises the effective and fair functioning of their procedures and increases pressure on them to apply stricter tests, higher evidentiary standards and stricter doctrinal positions. This essentially negative cycle does not serve the interests of eligible asylum seekers, human rights bodies or the governments themselves, and it is governments, which risk public censure for policies that are incompatible with their human rights commitments.

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