CHAPTER-II

INTERNATIONAL AND REGIONAL FRAMEWORK ON REFUGEE PROTECTION

2.1 Introduction

The refugee problem, the displaced persons and forced migration of people from one state to another have become an expounding attribute of the contemporary world. The history is full of such painful events where the people are forced to flee from their homes and to take refuge in other country. The fear of persecution is the biggest factor behind this which has made the people wander here and there in seek of shelter because their own state does not respect human rights. The recent Rohingyas and Syrian refugee crisis has shown that even in the present era of globalization we have not learnt how to respect the human rights of various communities. The year 2015 presented a sad glimpse of twin refugee crisis. The Rohingyas refugees are usually considered as stateless minority community since they are not recognized by Myanmar Government and probably the most persecuted around the world. The international media have termed them as “Boat People” as they were abandoned into the sea by human traffickers. Taking a look at the Syrian crisis, the death of a three year old child Aylan Kurdi has shaken our souls and has forced us to rethink on refugee crisis. The Syria is burning under the fire of civil war from the past four years but only in 2015 that Europe has awaken for refugee crisis. Few countries have opened their gates for refugees where as others have shown reluctance. The growing number of refugees is causing a serious anxiety to the European Union. The post cold war era has made the issue of refugee crisis as a prominent agenda of the United Nations. The refugee problem has once again become a debatable topic and burning issue of the present times. The refugee crisis has thrown challenges for the whole world and making them to seriously ponder over this issue and to find out the solutions. The economic and security challenges are the biggest one which a host country has to face because of refugees.

The disordered situation after the cold war demanded some urgent steps to be taken in this situation. Various humanitarian organizations were pressurized to deal effectively with the refugee problem. Not only the humanitarian organizations were
concerned about the refugee situation worldwide but also the Governments in every continent were expressing their concern about the increasing refugee problem. Their main anxiety was the cost burden which they have to bear because of refugees and they were reluctant in this matter and have no will to bear extra cost burden on their economy. Alongwith this the media’s pressure was not less. The vigorous coverage of media regarding the painful situations of refugees were strong enough to create pressure on various states which were responsible of creating this intense problem of displaced persons to take strong measures in this situation.\(^1\)

After the cold war a new era begun where there was reconstitution of the worldly balance of power. This new reconstruction has shown a new ray of hope and has given a fresh insight to the international community so that they can peep into the refugee problem from a different perspective altogether. In the turbulent context of the post cold war world, the United Nations, its member states and specialized agencies have found it difficult to develop coherent and consistent policies in relations to mass population displacements.\(^2\) Throughout history people have had to abandon their homes and seek safety elsewhere to escape persecution, armed conflict or political evidence. This has happened in every region of the world. Most religious incorporate concepts such as asylum, refugee’s sanctuary and hospitality for people who are in distress. But until the 20th century there was no universal standard for the protection of such people. Efforts to protect and assist them were essentially localized and adhoc in nature. It was not until the period after the First World War, when the League of Nations came into being, that the refugee issue came to be regarded as an international problem that had to be tackled at the international level.\(^3\)

**Universal Declaration of Human Rights** recognized that “*Everyone has a right to seek and enjoy in other countries asylum from persecution.*” The reason for origin of this right is the effects of World War II which has created mass groups of refugees and displacements all over the globe. In 1967 the General Assembly of United Nations unanimously adopted a resolution entitled a “Declaration on

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\(^2\) Id.at.p.12.

Territorial Asylum” which states that “No one shall be subjected to measures such as rejection at the frontier, expulsion, or compulsory return to any state where he may be subjected to persecution.” Asylum has two basic perspectives, one being that, “Every state has a right to grant asylum to an alien” and the other is that “Every person who has a well-founded fear of being persecuted in his own country for reasons of race religion, ethnicity, political opinion or member of a social group has a right to seek asylum in other countries.” Both these rights have their own importance. The former right which empowers a state to grant asylum holds importance from the aspect of customary norms of international law. Asylum means where a state can give shelter to any person as per its own wish. But once a asylum is given the state providing asylum have certain responsibilities towards the asylum seeker. Once an application of asylum seeker is accepted by the state then he gets the status of refugee and thus the provisions of 1951 Convention Relating to Status of Refugees and its 1967 Protocol applies to him. The person who is granted asylum has certain duties towards that state granting him asylum vis a vis the asylum state has certain duties towards asylum seeker and provide him certain basic rights. For example he cannot be deported back to country where there is fear of his being persecuted or there is threat to his life. The 1951 Convention holds significant importance from three aspects i.e. legal, political and ethical. Now the question arises how these three aspects are involved in the 1951 Convention? The answer lies in the fact that from legal perspective the Conventions holds paramount significance because this instrument has been globally accepted as anchor sheet for refugees and their rights. Taking the political aspect it can be said that the states who have signed this convention have agreed to take the responsibility of refugees and as far as possible to deal with them in a fair manner having humanitarian approach. The principle of non refoulement has become the core aspect of 1951 Convention and it has become the customary rule of international law. Even the states who have not signed this convention observe the principle of non refoulement. From the ethical perspective it can be stated that 147 countries have signed the Refugee Convention. They have taken it their ethical responsibility to provide shelter to the displaced persons whose rights have not been protected by their parent state. Thus the 1951 Convention is a blend of various aspects and in totality became a human rights instrument for refugees. This Convention is a shelter for asylum seekers and
therefore its importance cannot be denied. The latter aspect of concept of asylum gives right to person in fear of persecution whether based on race, religion, ethnicity etc. to take asylum in any country. But a asylum seeker cannot claim asylum as a matter of right rather he is always on the mercy of asylum giving state. But a state which gives due importance to human rights does not generally refuse to entertain asylum seekers. Moreover international scenario after post world war has leaned in the favour of refugees.⁴

After having a glimpse of the international instrument that deals with refugees and their rights and duties, there are various other instruments that are purely dedicated to refugees. These instruments were drafted keeping in mind the limitations of 1951 Convention and its Protocol in regard to the regional situations. The Organization of African Union’s (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), is quite important. The OAU Convention is different from the 1951 Refugee Convention as the former lays a broader definition of refugee. This Convention also describes a few measures that pertinently covers forced displacement. Under the patronage of the European Union, the criterion adopted by the European States was firstly to make a consistency and compatibility in their asylum policies and practices. But efforts have been in vogue since 1999 to set up a firm Common European Asylum System. A wave to set up a regional instrument for refugees also arose in Latin America supported by eminent academicians, lawyers as well as the representatives of the government which resulted in the adoption of the Convention of Cartagena in 1984. Though the provisions of this declaration are not legally binding but still its importance is realized from this fact that the incorporated principles and the broader definition of a refugee as different from the 1951 Convention have been enshrined into the national legislations and practices of many Central and Latin American States. Coming to the Asian region its worthy here to mention that in 2001 Bangkok Principles were adopted by the Asian-African Legal Consultative Organization (AALCO) for the refugees though they do not have binding force but only act as guiding factors.⁵ The 1951 Refugee Convention as well as these regional instruments are complementary to each other in some respects as they are meant to cater the needs of refugees. To be

⁴ Id.at.p.143.
⁵ Id. at.p.144.
more specific it can be said that that 1951 Convention is generic whereas other regional instruments are species of it.

2.2  League of Nations and Refugees

International protection of refugees started to take shape in the early twentieth century due to the massive changes taking place in Europe causing an influx of people seeking protection i.e. Russians fleeing to Western Europe during the Bolshevik Revolution of 1917, Muslims leaving the Balkans for Turkey and Christians moving in the opposite direction during the collapse of the Ottoman Empire. These various waves of (often forced) migration led to developing international consensus on the need to deal at the international level with the consequence of increasing population movements caused by humanitarian emergencies. However, the origin of these various waves of migration as well as their consequences differed and so the notion of the refugee’s status fluctuated and changed over time.6

In 1921, following a request from the president of the International Committee of the Red Cross (ICRC) to help in dealing with the Russian refugee problem, the Council of the League appointed Nansen as the first High Commissioner for Russian Refugees and defined the activities of its office as including protection for refugees. The Council initially was reluctant to become involved and suggested that the ICRC and the League form a joint body to address the problems. The Secretary General also requested that member states comment on the extent to which the League could contribute to this international problem. Subsequently, the Council established the office of High Commissioner and provided for a conference to settle a programme of work. The conference passed eleven resolutions, including measures directly relevant to Russian refugees: issue of passports; a prohibition on forcible return; special measures of protection of refugees who were intellectuals; the provision of special education for children and protection for women. The following year the High Commissioner secured agreement on a system movement of Russian refugees. These arrangements operated on the basis of

collectivized surrogacy; individual refugees benefited from arrangements secured by
the High Commissioner but they were not considered to hold specific rights.  

When the ICRC called on the League of Nations to establish a post of High
Commissioner for Russian refugees, it thought the job should involve co-ordinating
immediate relief, finding refugee work, defining their legal position and repatriating
them. Initially, however, the Secretary General, Eric Drummond was reluctant to get
involved because he did not feel his organization could accept the moral obligation
of dealing with the refugees. Nonetheless, Britain and France were already deeply
engaged in supporting these people financially and the longer time went on the more
desperate they became to hand on the problem to someone else. Furthermore, in
spring in 1921 the Red Cross sent its own Commissioner, General Thomson to
report on refugees in Turkey and the Balkans. The mixture of practical pressure from
Britain and France plus the desperate picture painted by Thomson led the League to
offer Nansen the post of High Commissioner in June. He took up the position in
August with a mandate to co-ordinate existing relief efforts for refugees rather than
the expectation of delivering relief directly through the League of Nations which
would have required a massive budget. To facilitate coordination during August and
September two conferences were held involving Nansen, his staff and the main
charities assisting the refugees.

Lacking the budget to provide direct relief to refugees, Nansen had to rely on
other strategies. An important step in this process had involved the provision of
identity documents to refugees- so called ‘Nansen Passports’. Many refugees lacked
official papers and it was not clear how they should be dealt with. The lack of
documents was important because without them refugees could not cross borders to
find work or homes. In July 1922, however sixteen governments had accepted the
Nansen Passports- the documents issued by his office which included photographs
and personal details of the refugees concerned. But in the early 1920’s most people
agreed that the best way to deal with Russian refugees was via repatriation. To quote
Nansen from September 1922: “In long run, there can be no final satisfactory

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7 Kate Parlett, _The Individual in the International Legal System_, 292 (Cambridge University Press,
UK, 2011).  
8 Martyn Housden, _The League of Nations and the Organisation of Peace_, 63 (Routledge, New
York, 2014).
solution to the problems created by the presence of such a large number as one and a half million refugees in Europe except by the repatriation of, at any rate, the greater part of them.”

The care Nansen took to ensure the welfare of the refugees upon return to Russia defines this event as the first modern repatriation of refugees from civil conflict. As he said to the Council of the League in March 1924: “Of the refugees repatriated with the assistance of the High Commission, no cases of unfavourable discrimination have come to the notice of the representation of the High Commission either direct or through delegates of the foreign relief societies still working in Russia.” The system actually worked at least for a short time. Unfortunately it fell apart completely in June 1923 when the Bulgarian Government accused Soviet officials working on its territory of spying. This debacle puts a stop to repatriation as a means to deal with Russian refugees since the Soviet Government entered into no more comparable agreement. At the start of January 1925, the refugee’s bureau was taken away from Nansen and was reconstituted in the International Labour Office.

There was a shift with the 1933 Convention Relating to the Status of Refugees which purported to confer rights on qualifying refugees. In 1931, the Assembly of the League had resolved to see the adoption of a binding international convention as part of its programme to ensure that the work of the League would only be temporary. The 1933 Convention applied to specified refugees it did not set out generalised criteria for refugee status. Its provisions incorporate earlier agreements relating to identity certificates and imposed obligations on contracting states to accord refugees the same treatment as aliens in respect of employment, education, taxation and welfare. It also incorporated an obligation not to expel authorized refugees and to avoid refoulement. Also in 1933, the assembly established an office to deal specifically with German refugees and subsequently it concluded agreements which applied the same criteria as the 1933 Convention to German refugees. During the war these agreements were extended to protect persons who has not yet left their country of origin but who were forced to migrate on

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9 Id.at.p.64.
10 Id.at.p.65.
account of their political opinions, religious beliefs or racial origin. In 1938, these arrangements were consolidated in a “Convention Concerning the Status of Refugees”, coming from Germany which entitled refugees to travel documents and conferred upon the rights to national treatment. Although those arguments referred to refugees in general rather than to individuals, it appears that the term refugees was used in this context to refer to qualifying individuals rather than a group of individuals i.e. the arrangement conferred right on individuals rather than on groups.\textsuperscript{11}

As a result of the creation of a number of agreements for the protection of refugees, when the High Commissioner of the League of Nations for Refugees was appointed in 1938, following the liquidating of the office of the High Commissioner’s Office for refugees coming from Germany and the Nansen Office, the League of Nations Assembly provided it with a specific supervisory responsibility related to international refugee law agreements. The High Commissioner was to superintend the entry into force and the application of the legal status of refugees, as defined more particularly in the Convention of October 28, 1933 and February 10, 1938.\textsuperscript{12}

The 1933 has evolved a new three tier rights structure which includes the following: mixed, absolute and contingent rights. There were certain rights which were provided absolutely to the refugees like providing legal status and right to have access to the courts. Alongwith this the refugees were provided certain other rights as given to the nationals of its own country like access to work and various social welfare schemes initiated by the asylum giving state. But in the matter of educational right there was a little difference as refugees were allowed to utilize this right to the extent available to the foreigners. But in the matter of taxation the refugees were subsumed to the citizens of the host state. Whereas coming to the matter of educational rights to refugees it was of limited extent as available to foreigners. Thus it can be stated that certain obligations have been imposed on the host states which they must comply with on humanitarian basis and there is no doubt that even in the present century these obligations are met with by the states. The

\begin{footnotes}
\item Id. at p.293.
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1933 Convention holds importance in lieu of the assurance and enshrinement of the rights of refugees. These rights are divided basically on two grounds: One is that there are certain rights which are absolutely been given to refugees and other is that there are some rights which are given on terms of equivalency with the citizens of most favoured states. However, from practical point of view the 1933 Convention did not remarkably expand the dimensions of refugee rights. There were only eight states in line of ratification of the treaty and other states accepted it but with major reservations. But a problem lies with the host state in regard to the assimilation of refugees as it is difficult to give a reasonable treatment in a situation where unemployment was already on peak and in such a dire situation it is not possible to give right to work and other social benefits to the refugees.\(^{13}\)

The extent of the retreat from meaning full protection of refugees can be seen in the 1936 Provisional Arrangement Convening the Status of Refugees coming from Germany while continuing the approach of stipulating legally binding duties of states, no attempt was made to guarantee refugees more than identity certificates, protection from expulsion, recognition of personal status and access to the courts. Even at that level, only seven states adhered. As it worked to establish, a more definite regime for refugees from the German Reich, the League of Nations was therefore drawn to two critical points of consensus. First, given the insecurity about economic and political circumstances, governments were likely to sign only if able quickly to renounce obligations. Second and more profoundly, it was understated that truly adequate protection would be provided only if refugee rights were effectively assimilated to those of nationals, a proposition flatly rejected by most European states. The League of Nations therefore decided that suitable distribution of refugees among the different countries might help to solve the problem.\(^{14}\)

The resulting 1938 Convention Convening the Status of Refugees coming from Germany reflected this shift. While most of the rights mirrored the comprehensive list established by the 1933 convention, two new provisions of note were included. Article 25 reversed the position of the predecessor 1933 Convention, allowing states to accede to the regime without committing themselves to give any


\(^{14}\) Id.at. p.89.
notice before renouncing it. While it was hoped that this new flexibility would encourage states to adhere for as long as circumstances and the United Kingdom ultimately agreed to be bound by it. The more prophetic notation of the 1938 Convention stipulated that "With a view of facilitating the immigration of refugees to over sea countries every facility shall be granted to the refugees and to the organizations which deal with them for the establishment of schools for professional re-adaptation and technical training. In the light of the unwillingness of European states to grant meaningful rights to refugees, there was indeed no option other than to pursue the resettlement of refugees in states outside the region.  

In seeking to evaluate the practice of the League of Nations, in regard to refugee groups considered to be of its concern, two elements need to be considered:

(a) Determination of group refugee character, (b) The criteria applied in determining whether a person belonging to such a group could individually benefit from refugee status.

(i) Determination of Group Refugee Character: In determining a particular group to be a refugee group of its concern, the competent organs of the League applied criteria based primarily on the circumstances existing in the country of origin, which had led to particular refugee exodus. It has been seen that the Russian refugee group was composed of persons who had variety of reasons for leaving or not wishing to return to their former home country and it was in the light of these different reasons that a prima facie determination of refugee character was made. As regards the Armenian refugees the exact composition of the group and the reasons why they had left or were unable to return to their former home country do not appear to have been the subject of detailed analysis as in the case of Russian refugees. There was, however, a general presumption in favour of the refugee character of the group based on the known historical events affecting the Armenian minority in Turkey. In determining whether the arrangements relating to Russian and Armenian refugees could be extended to other groups e.g. Assyrians, Assyro-Chaldeans and Turkish refugees, the applicable criterion was defined by the League in broad terms i.e.

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15 Id.at.p.90.
whether the persons belonging to these groups were without national protection in consequence of the war or events directly connected with the war.\textsuperscript{16}

\textbf{(ii) Determination of Individual Refugee Character:} There remains the question of the criteria applied in determining whether a person belonging to a refugee group could individually claim refugee status. It will be recalled that according to individual refugee definitions contained in the various instruments adopted under the League of Nations, a refugee was a person falling into the particular refugee category who did not enjoy, or who no longer enjoyed, the protection of his country of origin. In showing that he was without national protection, the individual applicant was not per se required to justify his refugee status according to the substantive reasons why he had left or did not wish to return to his country of origin, since these reasons were already implicit in the determination of the refugee character of the group to which he belonged, which created a presumption in favour of individual refugee status. It was however, still necessary for the individual to establish that he did not enjoy the protection of his country of origin.\textsuperscript{17}

The 1933 Convention, in particularly and the other early refugee agreements developed the concept of two conceptual transitions at the heart of the modern refugee rights regime. The first concept evolved the idea of “freely accepted international supervision of national compliance with human rights”. This novel idea brought a great transformation in the collective supervision of human rights from a penalty to be paid by subordinate states, as under the League of Nations Minorities Treaties System, to a means of advancing the shared objectives of states through cooperation of equal importance, the 1928 and subsequent accords reshaped the substance of the human rights guaranteed to aliens. Rather than simply enfranchising refugees within the traditional aliens law regime, states tailored and expanded those general principles to meet the real needs of refugees. The consequential decisions to waive reciprocity and to guarantee basic civil and


\textsuperscript{17} Ibid.
economic rights in law, served as a direct precedent for a variety of international human rights projects, including modern refugee rights regime.\textsuperscript{18}

2.3 Concept of Refugee Under International Law Before 1951

Starting from the year 1920 up until 1935 there was a different criteria to define refugees. To simply state a juridical term test was initiated in this era. Now it is pertinent here to define this term. It means that “the persons were treated as refugees because of their membership in a group of persons effectively deprived of the formal protection of the government of its state of origin.” The purpose of refugee status convened in juridical terms is to facilitate the international movement of persons who find themselves aboard and unable to resettle because no nation is prepared to assume responsibility for them. The first refugee definitions were formulated in response to the international legal dilemma caused by the denial of state protection. The withdrawal of de jure protection by a state, whether by way of denaturalization or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system. Because the then existing international law did not recognize individuals as subjects of international rights and obligations, the determination of responsibilities on the international plane fell to the sovereign state whose protection one enjoyed. When the bond of protection between citizen and state severed, no international entity could be held accountable for the individuals' actions. The result was that states were reluctant to admit to their territory individuals who were not the legal responsibility of another country. The refugee definition adopted between 1920 and 1935 were designed to correct this breakdown in the international order and accordingly embraced persons who wished to have freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any state.\textsuperscript{19}

As stated earlier that from 1920 to 1935 a juridical approach was adopted to determine who is a refugee where as from the period between 1935 to 1939 a socialistic approach was adopted to define a refugee. It means that there were such social or political conditions which have forced them to leave their hometown and to

\textsuperscript{18} Id.at.p.91.
take shelter in other country. The categories of persons eligible for international assistance encompassed groups adversely affected by a particular social or political event, not just those united by a common status vis-a-vis the international legal system. The essence of the second definitional approach was to continue to assist persons without formal national legal protection, but to assist as well the victims of social and political events which resulted in de facto if not de jure, loss of state protection. The substantive scope of this era's definitions was defined by an en bloc reference to general, situation specific categories of persons affected by adverse social or political phenomena.20

The 1938-1950 period was the third juncture of international refugee protection which was revolutionary in its rejection of group determination of refugee’s status. From pioneering approach a refugee is a person in search of an escape from perceived injustice or fundamental incompatibility with her home state. Refugee status viewed from this perspective is a means of facilitating international movement for those in search of personal freedom. This individualistic approach first affected the determination procedure; the decision as to whether or not a person was a refugee was no longer made strictly on the basis of political and social categories. Rather the accords of the immediate post-war era prescribed an examination of the merits of each applicant's case. Moreover, the move to a more personal conception of refugee hood altered substantive notions. The essence of refugee status came to be discoed between the individual refugee applicant's personal characteristics and convictions and the tenets of the political system in her country of origin. This initiative to define the refugee concept in a manner consistent with the ideology of the more powerful states set the stage for the development of contemporary international refugee law.21

2.4 Definition of Refugee Under 1951 Convention

In Resolution 319 (XI) the Economic and Social Council prepared for the General Assembly a draft resolution, the annex to which contained a draft statute for the High Commissioner's Office, including a definition of the persons falling within the High Commissioner’s competence. The refugee definition in the convention and

20 Id.at.p.4.
21 Id.at.p.5.
the refugee definition in the statute were, therefore, both discussed by the Economic and Social Council at its 11th session in August 1950. These discussions once again turned on the question whether the definitions should be limited to existing refugee categories or should be broad definitions covering all present and future refugees.

With respect to the convention proposals for such a broad definition were submitted by Belgium and the United Kingdom. According to the Belgian proposal; "The term 'refugee' shall be applied to any person outside the country of his nationality or of his former habitual residence, who cannot avail himself of the protection of the government of the country of his present or former nationality or who is reluctant to do so because he has good grounds to fear that he may become the victim of persecution by reason of his race, religion, nationality or political opinions". According to the United Kingdom proposal, for the purpose of the convention the term ‘refugee' would apply to: "Any person who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence owing to well founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion."

A definition by categories was proposed by France thus departing from the position it has taken in the Adhoc Committee. This French proposal was supported by a number of delegations, notably that of the United States. After some preliminary discussion in the Social Committee, the proposal that the definition should be couched in general term was rejected and the proposal that it should be based on categories accepted. According to the French proposal, the term “refugee" would apply to:

i) “Any person considered a refugee under the pre-war instruments;

ii) Any person recognized as a refugee under the constitution of the International Refugee Organization and;

iii) Any person who has had or has well founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion and as a result of event in Europe before 1 January, 1951 or circumstance directly resulting from such events and owing to such fear, has left or shall

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leave the country of his nationality before or after 1 January, 1951 or is outside that country; or if he has no nationality, has left or shall leave the country of his former habitual residence, or is outside that country, and is unable or owing to such fear, unwilling to avail himself of the protection of government of the country of his nationality.”

It will be seen that this draft definition proposed by France, like the draft definition proposed by Belgium and the United Kingdom, contained the criterion of "well founded fear of persecution". The definition proposed by France, however, also contained a 1951 dateline and referred to events in Europe. This dateline was to some extent counter balanced by the provision that the contracting states might agree to extend the definition to persons in other categories recommended by the General Assembly and might agree among themselves to extend the benefits of the convention to other categories of refugees. Indeed, the essential differences between the broad definitions (Belgium and United Kingdom) and the categories definition (France) were the 1951 dateline and not a difference as regards the substantive criteria of refugee status.24


The 1951 Convention contains a definition of 'refugee' which is similar with the draft recommended by the General Assembly. A refugee is defined as "a person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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." The only difference from the draft definition recommended by the General Assembly is the omission of a

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23 Id.at.p.58.
24 Id.at.p.60.
reference to reasons other than personal convenience as a ground for unwillingness to re-avail national protection of the country of origin.26

To be a convention refugee, one has to demonstrate a nexus between the alleged persecution and any one or combination of the five enumerated grounds provided for within Article 1 A (2). In addition, this definition requires that a person be outside his or her country of origin and therefore excludes IDPS. Furthermore, the protective ambit of the 1951 Refugee Convention does not extend to people who would find themselves in certain situations, such as natural disasters or generalized indiscriminate violence, for example wars. Nevertheless, persons who fall outside the strict refugee definition set out in the 1951 Refugee Convention may be afforded some other form of protection at the discretion of the receiving state. Nevertheless, the 1951 Refugee Convention is recognized as being based upon Article 14 of the UDHR. As the office of UNHCR has made clear, the 1951 Refugee Convention is "the centre piece of international refugee protection today."27 The bedrock right recognized by the 1951 Convention is that of non refoulement, which prohibits states from returning refugees or asylum seekers to other states in which their lives are endangered on the basis of their race, religion, nationality, membership in a particular social group, or political opinion. UNHCR has described non refoulement as the 1951 Convention’s “most important provision and the cornerstone of international protection.” The principle of non refoulement also is ensconced in customary international law, and a similar principle is articulated in the United Nations Convention Against Torture.28

Thus, the Refugee Convention is the key conventional instrument relating to the protection of refugees and marked the highest point in the development of international refugee law since the first Nansen Arrangement of 1922. As in the inter war arrangement, the essential condition of refugees is their presence outside the territory of their country of origin and their lack of protection by any state. However, the convention added to these criteria the condition of a well founded fear of

persecution based on one or more of the five grounds race, religion, nationality, political opinion and membership of social group. Refugee status determination is carried out by state parties which are free to institute procedures they see appropriate for this purpose. Article 1 of the 1951 Convention set out the conditions for granting the status of refugee under the Convention, for the exclusion of individuals from such protection, as well as for the cessation of refugee status. Article 1 (A) reads: *For the purpose of the present convention, the term refugee shall apply to any person who:*

i) “Has been considered a refugee under the Arrangements of 12 May, 1926 and 30 June, 1928 or under the Convention of 28 October, 1933 and 10 February, 1938, the Protocol of 14 September, 1939 or the Constitution of the International Refugee Organization; decisions of non eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to person who fulfils the condition of paragraph 2 of this section;

ii) As a result of events occurring before 1 January, 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; 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.”

As is made clear by this provision, the convention was originally conceived to provide a legal framework for the protection of European refugees from world War II events of the early 1960s, in particular the struggle for independence of colonized nations, demonstrated the limits of the original instrument and the temporal and geographical limitations were removed in 1967 through the signing of the Additional Protocol.  

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30 Id.at.p.14.
On 4 October, 1967 a Protocol Relating to the Status of Refugees came into force as the definition given under Article 1(A) of the 1951 Convention Relating to the Status of Refugees was criticized on the context that it was Eurocentric in nature. To remove this defect in 1967, a Protocol came into existence which stated that new refugee situations have arisen since the convention was adopted and the convention of 1951 covered only those persons who have become refugees as a result of events occurring before 1 January, 1951 so it was desirable to make some amendments in the definition of refugee so that all the refugees should enjoy an equal status and the limitations imposed by the date of 1 January, 1951 must be omitted.

It is written in the Protocol that "For the purpose of the present protocol, the term "refugee" shall except as regard the application of paragraph 3 of this Article, mean any person within the Article 1 of the Convention as if the words "....As result of such events occurring before 1 January,1951 and the words.... As a result of such events, in Article 1 (2) were omitted." The present protocol shall be applied by the states parties here to without any geographic limitation, save that existing declarations made by states already parties to the Convention in accordance with Article 1 B (1) (a) of the Convention, shall, unless extended under Article 1 B (2) thereof, apply also under the present Protocol. The 1967 Protocol achieved the formal but not the substantive, universalization of restriction in the convention definition-the requirement that the claim relate to a pre 1951 event in Europe was prospectively eliminated by the Protocol. However, there was no review conducted of the substantive content of the definition. Even after the elimination of temporal and geographical limitations, only persons whose migration is promoted by a fear of persecution on the ground of civil or political status come within the scope of the convention based protection system. This means that most of the third world refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war or broadly based political and economic turmoil than by "persecution", at least as that term is understood in the western context. While these phenomena may undoubtedly give rise to genuine fear and hence the need to seek safe haven away from one's home, refugees whose flight is not

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motivated by persecution rooted in civil or political status are excluded from the rights regime established by the convention.\textsuperscript{33}

2.5 Ingredients of the 1951 Convention Relating to the Status of Refugees

The preamble of this Convention at the outset refers to the equality principle enshrined in the Universal Declaration of Human Rights. A wish has been expressed that “All the states recognizing the social and humanitarian nature of problem of refugees, will do everything within their power to prevent this problem.”\textsuperscript{34} There are seven chapters in totality in which the provisions of the convention have been segregated. The first chapter of the 1951 Convention opens with the definition of the term 'Refugee' mentioned in Article 1. Along with it is specifically mentioned that every refugee has certain duties towards the host country in which he has taken asylum. It is an obligation on the refugee that he has to follow the rules, regulations and laws of that country and also has to follow the measures taken for the maintenance of public order.\textsuperscript{35}

Other important provisions of first chapter which needs to be highlighted here are Article 3 and Article 4 which imposes duty on the contracting state “Not to discriminate any refugee on the ground of race, religion or country of origin and also they must be accorded freedom to practice their religion and freedom in the context of religious education of their children.” The second chapter of the present convention is about the juridical status of the refugee. It is specifically mentioned that the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile by the law of the country of his residence.\textsuperscript{36} The convention has also imposed obligation on the contracting states that they should accord to a refugees treatment as ideal as could reasonably be expected and in any occasion, not less positive than that agreed to outsiders for the most part in the same circumstances as respects the procurement of movable and steadfast property and different rights relating thereto and to leases and different contracts.

\textsuperscript{35} Article 2 of the Convention Relating to the Status of Refugees, 1951.
\textsuperscript{36} Article 12 (1) of the Convention Relating to the Status of Refugees, 1951.
identifying with movable and immovable property.” Along with it in respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names and of rights in literary, artistic and scientific works, as refugee shall be accorded in the country in which he has habitual residence the same protection as is accorded to nationals of that country. Under Article 15 of the 1951 Convention the refugees have the right to form non political and non profit making associations. Also under Article 16 of this convention, refugees have given the right to have free access to the courts of law on the territory of all contracting states including legal assistance and execution from cautio judicatem solvi.

The third part of the 1951 Convention is about productive vocation of the outcasts. The convention forced the commitment on the contracting state under Article 17 to accord to displaced people legitimately staying in their region the most ideal treatment which are agreed to nationals of a foreign nation in the same circumstances, as respects the privilege to take part in wage earning business. Article 17 (3) puts another commitment on the contracting state to give considerable thought to absorbing the privileges of all evacuees as to wage earning work to those of national and specifically of those outcasts who have entered their region as per projects of work enlistment or under migration plans. Article 18 goes above and beyond by expressing that the contracting states should accord to an outcast legally in their region as positive as could be expected under the circumstances as respects industry, crafted works and business and to set up business and industrial companies. Alongside it every contracting state might accord to displaced person legally staying in their region who hold recognitions perceived by the equipped powers of that state and who are envious of rehearsing a liberal calling, treatment as good as could be allowed and in any occasion not less great than that agreed to outsiders by and large in the same circumstances.

Another important chapter of the 1951 Convention is the fourth one that is about "Welfare" of the refugees. Under the various provisions of this chapter effort
has been made to provide basic amenities to refugees like rationing, housing and public education. Article 24 of the present convention emphatically stresses upon the social security of the refugees. It is given that the contracting states might accord to displaced people legitimately staying in their region the same treatment as is concurred to nationals in appreciation of the accompanying matters like compensation, hours of work, extra minutes courses of action, occasions with pay, confinements on home work, apprenticeship and preparing, ladies' work and the work of youthful people and the satisfaction in the advantages of aggregate bargaining. Alongside it there is provision of social security, which applies to the populace everywhere and controls the general dissemination of items hard to come by, outcasts might be concurred the same treatment as nationals. In appreciation of vocation harm, occupation ailment, maternity, disease, incapacity, seniority, passing unemployment, family obligations and whatever other possibility which as per national laws or directions secured by a standardized savings plan is to be given to refugees. Another essential procurement of the 1951 Convention which should be particularly highlighted here is Article 26 which discusses the flexibility of development of displaced people. It expresses that every contracting state should accord to asylums legitimately in its domain the privilege to pick their place of home to move uninhibitedly inside its region, subject to any controls connected to outsiders for the most part in the same circumstances. This as well as the contracting states should issue refugees legally staying in their domain travel archives with the end goal of go outside their region according to Article 28 (1).

40 Article 20 of the 1951 Convention provides “Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.”

41 Article 21 of the 1951 Conventions states "As regards housing, the contracting state, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

42 Article 22 (1) of the 1951 Convention provides that “The contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.” Article 22 (2) states that “The contracting states shall accord to refugees treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and in particular as regards access to studies, the recognition of foreign schools certificates, diplomas and degrees, the remission of fees and charges and the award of scholarship.”

43 Article 24 (1) (a) of the Convention Relating to the Status of Refugees, 1951.

44 Article 24 (1) (b) of the Convention Relating to the Status of Refugees, 1951.
Article 31 acts as a shield for the refugees as it precludes the contracting state that it should not force any punishment on the outcasts by virtue of their unlawful entry or nearness who are coming specifically from a domain where their life or freedom was debilitated. The procurement of "Non Refoulement" which is the center standard of the convention is given under Article 33. It is particularly said that "No contracting state might remove or send back a displaced person in any way what so ever to the outskirts of domains where his life or freedom would be debilitated because of his race, religion, nationality, participation of a specific gathering or political supposition." The ejection of the refugee must be done on grounds of national security or public order. In any case, such removal of outcast must be in compatibility of choice came to as per due procedure of law as provided under Article 32 of the 1951 Convention. The above convention although comprehensive in many aspects was certainly followed by a major drawback that it was limited to only those persons who became refugees as per the events occurred before 1 January, 1951. In order to remove this drawback which was becoming a roadblock for refugees the time period mentioned in the Convention of 1951 was subsequently removed in the Protocol of 1967.

2.6 Regional Instruments Regarding Refugee Protection

The precarious situation of refugees and the protection afforded to them can't be comprehended without plan of action to the human rights gauges created inside international refugee law, international humanitarian law and international human rights law. There is a typical inclination to compare refugee law and refugee protection with the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. Be that as it may, investigation outlines that the issue of refugees and the answers for those issues can't be comprehended unless saw through a human rights lens, considering the different UN human rights agreements and settlements. Moreover, consideration must be attracted to the provincial courses of action that give protection to refugees, for example, African Union, the Inter American Commission and Court and the European Union. The meaning of "refugee" cherished in Article 1A of the 1951 Convention remains the foundation of International Refugee Law and speaks to the base norms as per which states are obliged to accord refugee status and the advantages and rights coming about because
of in that. That this definition is the foundation of International Refugee Law (IRL) is not to say that it is all around acknowledged as satisfactory. Regional arrangements development in Africa and Latin America namely the Convention Governing the Specific Problems of Refugees in Africa and the Cartagena Declaration so as to address perceived gaps in protection.  

2.6.1 The Organization of African Unity

At the regional level the efforts were made to redefine the term refugee and to broaden the horizon of the definition of refugee given under 1951 Convention Relating to the Status of Refugees. The Organization of African Unity (OAU) in 1969 adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees of 1984 deserves special mention here.

The quest for establishing an African regional system for the protection of refugees evolved from the agenda for African solidarity in the struggle against colonialism which lay at the heart of the creation of the then Organization of African Unity (OAU), which was succeeded by the African Union or AU in 2000. From the very beginning OAU was eager to establish a system of protection which would reflect and resolve specific refugee concerns in Africa. The genesis of this idea was first formulated in the Kampala Draft Declaration 1964 which represents a concrete initiative at defining the applicable standards of protecting refugees in Africa. That Declaration affirmed the classical persecution based standard contained in the Convention Relating to the Status of Refugees, 1951 read together with the 1967.

The extended definition adopted under OAU Refugee convention is 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".  

47 Article 1(2) of the OAU Convention, 1969.
The OAU Refugee Convention on the whole mirrors exactly the wording of the UN Convention but expands the definition of the term refugee. The global instrument requires a well founded fear of being persecuted as fundamental precondition of refugee status. In contrast, the OAU Refugee Convention extends the term to include any one who is compelled to flee a country of residence 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. It is no longer the subjective fear of the individual alone but also objectively ascertainable circumstantial compulsion that may give rise to refugee status. This expansion of the term was necessitated to overcome the restrictive nature of the initial approach to refugees. The UN Refugee Convention's definition presupposes that refugees will be screened individually in order to establish whether they have a well founded fear of persecution. Such a system is obviously only manageable when persons flee on their own or in small groups. However, in the case of mass migrations the application of such an individualized test becomes impossible. This is exactly the situation that prevailed and continues to prevail in Africa. Mass migrations necessitate an approach which uses cumulative and objective factors to determine refugee status.\footnote{Frans Viljoen, \textit{International Human Rights Law in Africa}, 243 (Oxford University Press, U.K, 2012).}

The OAU Convention on Refugees complements the UN Convention Relating to the Status of Refugees and specifically mentions that the latter is considered as the comprehensive document that not only defines who is a refugee but also reflects the will of the states at international level to have a concern about refugees, their protection and their basic rights. The preamble shows that the drafters of the OAU Convention on Refugees were of the view that the rights and fundamental freedoms of refugees that are guaranteed in international refugee law and human rights should also extend to refugees in Africa.\footnote{Manisuli Ssenyonjo (ed.), \textit{The African Regional Human Rights System}, 179 (Martinus Nijhoff Publishers, The Netherlands, 2012).}

The OAU Convention asserts the primacy of the international regime within Africa. It certainly does elaborate novel legal features geared to the specific needs and realities of the African continent. In this context, one of its most important over all values was to underpin asylum, refugee policy and practice in Africa in legal and
humanitarian terms in the face of the destabilization and subversion already evident at that time in an exilic context. However, even as it established Africa specific catalogues, the 1969 OAU Convention both affirmed and enhanced the international regime. Its ‘expanded definition’ of a refugee is undoubtedly the OAU Convention's most celebrated feature. The provision was historically novel, has influenced developments in other regions (for instance the Cartagena Declaration) and have persuasive force even in these regions where the convention otherwise does not apply. The convention’s provisions on burden sharing and solidarity, the prohibition of refoulement and voluntary repatriation were at the same time novel and representative of significant advances in both regional and global refugee law. Burden sharing, mentioned only briefly in the Preamble to the 1951 Convention is a central platform for the regime established by the OAU Convention.\(^{50}\)

The OAU Convention has served as an essential regulatory framework for refugees in Africa for thirty years. It has, above all, helped to bring coherence and predictability to asylum practice and refugee management in an environment where the refugee question often tends to become severely politicized. It has provided a reference point for dealing with refugees in an essentially humanitarian and friendly context and mandated behaviour on the part of both states and refugees themselves in favour of that construction.\(^{51}\)

### 2.6.2 The Cartagena Declaration

The 1969 OAU Convention was a direct inspiration for the 1984 Cartagena Declaration on Refugees adopted at a colloquium held at Cartagena, Colombia in November 1984, which relates to the refugee situation in Central America. Like the OAU Convention, the Cartagena Declaration was a response to mass refugee influxes, in this case arising from political and military instability in Central America in the 1970s and 1980s. The prime purpose of the Cartagena Declaration was to promote the adoption of national laws to implement the 1951 Refugee Convention and 1967 Protocol, thus festering the necessary process of systematic harmonization of national legislation on refugees (Cartagena Declaration, paragraph


\(^{51}\) Id. at.p. 33.
III [1] ). For this purpose it was suggested that the definition of a refugee for use in the region should complement the 1951 Refugee Convention. It was stated that in addition to the 1951 Refugee Convention definition, legislation should include: "Persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” (Paragraph III (3) of Cartagena Declaration). Under this definition, refugees are primarily those persons whose life, security or liberty is threatened. The inclusion of generalized violence, internal conflicts and massive violations of human rights expands the refugee definition beyond that of the OAU Convention and picks up the gap in that definition.52

As in the OAU Convention, the refugee definition in the Cartagena Declaration is linked to root causes and confirms that the granting of asylum is humanitarian in nature. The Cartagena Declaration reflected the then current experiences of refugees by expressing its 'concerns' at the problem raised by military attacks on refugee camps and settlement in different parts of the world. Additionally, going beyond the legal refugee issue, it expressed its concern at the situation of displaced persons within their own countries.53 The declaration emphasised that repatriation of refugees must be voluntary and embodies principles for their protection, assistance and reintegration. Although a non binding instrument the declaration has been endorsed by the General Assembly of the Organization of American States and some states in the region have incorporated this definition into their own national legislation.54

Although the Cartagena Declaration is not a treaty, at the time of its adoption, it evidenced emerging state practice in the America. The Cartagena Declaration calls upon countries to give refugee status to individuals who flee massive violations of human rights as well as the individualized persecution contemplated by the 1951 Refugee Convention and the insecurity associated with

armed conflict spotlight in the OAU Refugee Convention. The OAU Refugee Convention was transformative in taking the refugee definition from the 1951 Refugee Convention and making it more responsive to the realities and displacements of armed conflict. The Cartagena Declaration inspires a further expansion in the context of dirty wars or low intensity conflict in which state repression is so pervasive that any armed insurgency is effectively neutralized. Just as the OAU Refugee Convention is a source of humanitarian and refugee law, the Cartagena Declaration illustrates the interconnectedness of refugee, humanitarian and human rights law. Fundamentally, the 1951 Refugee Convention, the OAU Refugee Convention and the Cartagena Declaration are all sources of international human rights law. Each recognizes the basic rights of refugees to nondiscriminatory treatment and protection from refoulement. Moreover, all three documents recognize eligibility for refugee status on the part of individuals with a well-founded fear of persecution. The 1984 Cartagena Declaration has an additional human rights dimension because it is the only refugee instrument that explicitly refers to widespread human rights abuses as a cause of flight and a basis for asylum.\footnote{Jennifer Moore, \textit{Humanitarian Law in Action Within Africa}, 159 (Oxford University Press, New York, 2012).}

The meetings between government delegates and specialists from the Latin American nations who met in Cartagena de Indias, Colombia, to contemplate over the issue and states of refugees in Central America brought about the arrangement of the Cartagena Declaration on Refugees. It set up the essential ideas of the issue in the human rights field and launched the term 'massive violation of human rights' as a component in the more extensive meaning of refugees. The Mexico Plan of Action which denoted the twentieth commemoration of the Cartagena Declaration, proposes activities to reinforce global security for displaced people in Latin America. Keeping in mind the end goal to keep the circumstances of contentions, mass inundations of outcasts and serious humanitarian crisis the most ideal arrangement is to advance and ensure human rights and to reinforce the roots and structure of democratic set up.\footnote{L.P. Teles Barreto and R. Zerbini, “Brazil and the Spirit of Cartagena”, \textit{available at: http://www.fmreview.org/} (Visited on May 8, 2014 at 1.45pm).} The 1984 Cartagena Declaration encompasses most humanitarian crisis in its
definition of who is a refugee and offers complementary protection to those found to be in the need of international protection.\footnote{Vincent Chetail and Celine Bauloz (eds.), \textit{Research Handbook on International Law}, 422 (Edward Elgar Publishing Ltd., UK, 2014).}

Although the standard espoused in the Cartagena Declaration is not legally binding, many states in Central America have incorporated the standard into their national legislations. The Cartagena Declaration noted that "In view of the experience gained from the massive flows of refugees in the Central American area it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention and the doctrine employed in the reports of the inter American Commission on Human Rights." The expansion of the definition of a refugee by the 1969 OAU Convention and the 1984 Cartagena Declaration responded to the experience of massive flows of refugees in Africa and Central America that did not fit the earlier model of refugee flows from armed conflicts between nations. Since the end of the Cold War, the nature of armed conflicts has changed to ethnic conflicts and civil wars that increasingly have targeted civilians and non combatants including women and children. The Cartagena Declaration broadened the concept of a refugee to reflect this new nature of armed conflict and realities outside Europe.\footnote{Indrani Sen Gupta, \textit{Human Rights of Minority and Women's Human Rights and Sexual Minorities}, 118-119 (Rajdhani Printers, Delhi, 2005).}

\subsection*{2.6.3 The Bangkok Principles}

The majority of Asian states are not party to the 1951 Convention and the 1967 Protocol. There has also been no concerted attempt in Asia to develop regional instruments that would oblige states to respond uniformly to refugee crises. The vast majority of Asian states are signatories to the Asian African Legal Consultative Committee (AALCC) which instituted the so called Bangkok Principles in 1966 and reaffirmed these in 1988. The Bangkok Principles acknowledge the existence of refugees, insist that member states are expected to provide asylum and uphold the principle of non refoulement. However, an important caveat to the Bangkok principle is that refugees can exercise these rights only where the security of a state is not threatened. Moreover, unlike the regional agreements in Africa and South
America, the Bangkok Principles do not create reciprocal expectations about how refugees should be treated; the Bangkok Principles have non binding character and thus have only declaratory nature. The foremost aim of these principles is to act as guidance factor for states in treatment of refugees and to inspire them to deal fairly with the refugee problem. Thus they serve as a guide to appropriate refugee treatment but the onus remains upon each state to decide whether or not it will apply them in particular circumstances. Compliance with the principles is neither enforced nor monitored. As a result they have little discernible effect on Asian state practice in relation to refugees.59

AALCO was original known as the “Asian Legal Consultative Committee” (ALCC). It’s name changed in April 1958 to reflect the participation of countries from Africa. It was constituted on November 15, 1956 and it considered a tangible outcome of the Asian African or 1955 Bandung Conference held in Indonesia, one of the formative meetings of the Non-Aligned Movement of less developed states that sought to steer a neutral path during the cold war between the United States and the Soviet Union. The original members were Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. Subsequently, the United Arab Republic formed by the merger of Syria and Egypt became an original participating party. These historical facts are important as they suggest that AALCO reflect both a united response to colonialism and an attempt to engage with African nationalism.60 The Bangkok Principles were first formulated in 1966 after the sixth Annual Session, held in Cairo in 1964. The subject “The Rights of Refugees” was referred to the Committee by the Government of the United Arab Republic under Article 3(b) of the Statute. The UNHCR was invited to state its views on the subject of refugees and the AALCO directed the Secretariat to collect further material on inter alia, the minimum standard of treatment of asylum seekers. The Bangkok Principles were presented at the eight Annual Session in 1966 where again “The Rights of Refugees” was a priority item. At that meeting, the Legal Adviser of the UNHCR and the representatives of the League of Arab States played a key role. AALCO concluded that the Bangkok

Principles constituted an advisory document and it was up to each government to decide how it should give effect to the recommendations therein.\textsuperscript{61}

According to Fontaine, the Bangkok Principles foreshadowed the principle innovation of the OAU Convention. The 1966 draft contained an expanded version of the 1951 Convention definition, namely persons obliged to leave their state though illegal acts or invasions. It is probable however that when the AALCO was considering how to define a refugee it was within the knowledge that the OAU Convention definition was likely to be broader than that in the Refugee Convention. The understanding in the Asian region is that these principles aimed to provide a common normative framework of refugee protection for the Afro Asian region. At the 39\textsuperscript{th} Annual Session, Cairo 2000, the UNHCR representative stressed the need for a regional response on the basis that adhoc responses are no longer sufficient, noting that this was the reason for the original Bangkok Principles. A resolution urged member states to finalize the revision of the consolidated text of the Bangkok Principles and place it for final adoption at the next session. It seems then that the adoption of the Bangkok Principles in 2001 was the culmination of a long process of revision that was prompted by the 30\textsuperscript{th} anniversary of the Bangkok Principles in 1996.\textsuperscript{62}

The Bangkok Principles which are declaratory and non binding in character were revised in 2001 at AALCO's fortieth session in New Delhi. Article 1 of the Bangkok Principles defines a refugee as: "A person who, owing to persecution or a well founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group leaves the state of which he is a national, or the country of his nationality, or if he has no nationality, the state or country of which he is a habitual resident or being outside of such a state or country, is unable or unwilling to return to it or to avail himself of its protection and also 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 outside his country of origin or nationality." The broadening of the refugee

\textsuperscript{61} Id.at. p.315.  
\textsuperscript{62} Id.at. p.316.
definition in response to regional considerations has provided such needed flexibility to international action on behalf of people forced to flee their countries.63

The AALCO erstwhile Asian African Legal Consultative Committee (AALCC) in its 40th session held at New Delhi in 2001, deliberated on those principles in accordance with the changing experience on refugees of the member states. It covered some important areas like refugee definition, asylum and standard of treatment to refugees, durable solutions, burden sharing etc. Some of the initiatives taken in this forms are progressive in nature and can have far reaching consequences to refugee protection, it adopted in some binding forms. The most important and progressive elements envisaged by the AALCO are the issue of right to return, right to compensation and burden sharing.64

The Bangkok Principles have a unique feature of right to compensation. This privilege to get compensation is given to the refugee from the state from where he needs to escape or to which he can't return back as there is danger to his life. The compensation shall be “for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of refugee or of the person whose dependant the refugee was and destruction of or damage to property and assets caused by the authority of the State or country, public officials or mob violence. And where such person does not desire to return, he shall be entitled to prompt and full compensation by the government or the authorities in control of such place of habitual residence as determined, in the absence of agreement by the parties concerned, by an international body designated or constituted for the purpose by the Secretary General of the United Nations at the request of either party.”65

The other pertinent principle need to be mentioned here is about the concept of Burden Sharing. The Bangkok principles have accentuated that the refugee phenomenon which involves worldwide concern needs the backing of global group all in all for its answer and along these lines the rule of burden sharing ought to be seen in that substance. It is required that the standards of universal solidarity and

burden sharing must be connected dynamically to encourage the procedure of
durable solutions for refugees. Alongwith it ought to be seen that the idea of burden
sharing is to be applied to all aspects of the refugee situation including the
advancement and fortifying of the measures of treatment of refugees, support to
states in protection and assisting refugees, the provisions of duration solutions and
the support of international bodies with responsibilities for the protection and
assistance of refugees.\textsuperscript{66}

The provisions of burden sharing and right to compensation can be fruitful if
implemented in practicality and in true spirit. But the pathetic part is that these
Bangkok Principles of 2001 adopted by AALCO are not binding on the states. Had
these principles been made obligatory the situation in Asia and Africa might be quite
different for refugee generating country vis-a-vis refugee receiving country.

\textbf{2.6.4 The Asia Pacific Consultation}

The inter governmental legislative Asia Pacific Consultations on Refugees,
Displaced Persons and Migrants (APC) is a UNHCR and IOM (International
Organization for Migration) bolstered alliance of Asia-Pacific governments, who
look for territorial co-operation on matters identifying with populace developments
including refugees, displaced persons and migrants. The APC works in a informal,
consultative, non restricting way with facilitators from different Asia Pacific nations
taking the rules on a pivoting premise. APC was set up in 1996 to give a gathering to
the examination of issues identifying with populace developments, including
displaced or trafficked persons and migrants. Its aim is to promote dialogue and
explore opportunities for greater regional cooperation.\textsuperscript{67} It has thirty six member
countries in the Asia Pacific region and also has members as observers from the
International Organization for Migration (IOM), the United Nations High
Commissioner for Refugees (UNHCR) and the Pacific Immigration Directors
Conference (PIDC).\textsuperscript{68}

\textsuperscript{66} Article X of the Bangkok Principles on Status and Treatment of Refugees as adopted on 24\textsuperscript{th} June

\textsuperscript{67} Asia Pacific Consultation on Refugees, Displaced Persons and Migrants, \textit{available at:}
http://www.apcprocess.net/ (Visited on May 18, 2014 at 2.20pm).

\textsuperscript{68} The countries involved are: Afghanistan, Australia, Bangladesh, Brunei, Bhutan, Cambodia,
China, Fiji, Hong Kong, India, Indonesia, Japan, Kiribati, Korea, Laos, Malaysia, Micronesia,
Mongolia, Myanmar, Nauru, Nepal, New Caledonia, New Zealand, Pakistan, Papua New
2.6.5  Regional Governmental and Non Governmental Initiatives in South Asia

To talk about initiatives under the South Asian Association for Regional Cooperation (SAARC) Framework it has been found out that it has not formally taken up refugee issues at its Heads of State or Government meetings owing to the agreement among members that contentious matters between member states will not be brought up in the official SAARC discussions. However it is well known that Heads of States and Governments have discussed on a bilateral basis during SAARC meetings. It is noteworthy that at the ninth SAARC Summit, the only reference to the refugee convention occurs in Article 44 which refers to the UN Declaration on the Elimination of International Terrorism and calls for international action to prevent the abuse of the Refugee Convention by halting activities which help terrorist groups collect funds for their projects in South Asia. In November 1996 the Government of Australia took initiatives to convene an International Governmental Asia Pacific Consultation in Canberra on Regional Approaches to Refugees and Displaced Persons in Asia. The meeting was attended by twenty four countries and included Bangladesh, India, Nepal, Pakistan and Sri Lanka from South Asia. Following on the Canberra meeting a further experts meeting took place in Bangkok in July 1997 which recommended the establishment of a ‘focal point’ for the continuation of the regional consultative process UNHCR and IOM along with the Australian Government will be providing administrative support.  

An unofficial initiative commenced with the constitution of the Regional Consultation on Refugee and Migratory Movements in South Asia also known as the Eminent Persons Group (EPG) in UNHCR in November 1994. An EPG for South Asia comprising Justice P.N.Bhagwati (India), Justice Dorab Patel (Pakistan), Dr. Kamal Hossain (Bangladesh), Mr.Risikesh Shah (Nepal) and Mr. Bradman Weerakoon (Sri Lanka) was set up at the Geneva Meeting (28-30 November 1994) convened by the UN High Commissioner for Refugees, Mrs. Sadako Ogata. The meeting was in the nature of a brainstorming session providing participants with the opportunity of raising questions, reviewing current practices, querying assumptions


4th Informal Consultation on Refugee and Migratory Movements in South Asia, Dhaka, 51 (10-11 Nov., 1997).
and discussing issues without constraints. This interactive dialogue analysed the root causes of refugee flows in the region and sought to ascertain a South Asian perspective on the pathways that could lead to lasting solutions. The initial Geneva Meeting agreed that regional consultations should be held in each country to promote public awareness and identify mechanisms and strategies for moving towards accession or alternatively, formulating a regional instrument adapting the Convention to the needs of the South Asian region.  

The process of regional unofficial discussion was continued with relevant country updates and thematic presentations by the five countries on issues central to each state such as: Bangladesh- Repatriation; India- Asylum; Nepal- Statelessness; Pakistan- International/ National legal instruments and Sri Lanka- Internally Displaced Persons. The Colombo Consultation found a consensus on issues such as the need for a South Asian regional legal regime for refugees and a common declaration reconfirming the validity and relevance of the definitions contained in international refugee law instruments as well as the 1967 OAU and 1984 Cartagena Declaration. It agreed that the primary objective should be the development of a regional normative framework which would address the needs of refugees, stateless persons and the internally displaced. It also identified strategies to achieve this goal such as the agreed definition of concepts, establishing National Study Centres, utilizing existing research institutions, identifying appropriate approaches to national governments to urge adoption of Refugee Convention and creating public awareness of the need for a regional normative framework.

2.6.6 The Dublin Convention

The Schengen Implementing Convention 1990 and the Dublin Convention 1990 were designed in response to the abolition of intra Member State border controls and both included the objective of defining intra Member State borders for the purpose of allocating responsibility for asylum seekers. The Dublin Convention is a piece of European law that has two fundamental points: to set up a typical structure for figuring out which nation in the European Union (nations which are a

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70 Id. at. p.52.
71 Ibid.
part of the European Union are known as member states) chooses a asylum seeker’s application and to guarantee that only one member state ought to process each asylum application. It was initially concurred as a component of an European Union meeting in Dublin, Republic of Ireland, in January 1990, and this is the reason it is all the more generally known as the Dublin Convention. Prior to the Dublin Convention came into power, most EU member states utilized another piece of European law, called the Schengen Agreement, to choose whether or not they would acknowledge and look at someone’s refuge application. As a rule, nations had readmission concurrences with each other, which implied shelter seekers could be sent back to another European state on the off chance that they had gone through it on their way to the nation in which they had claimed asylum.73

The Member States of the then European Community first negotiated the Dublin Convention in 1990 in conjunction with the agreement of the Schengen Convention removing internal borders for most states within European Community known as the Schengen Zone. The Dublin Convention was initially signed by Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. Austria and Sweden joined in 1997 and Finland joined in 1998. The Dublin Regulation known as Dublin II replaced the Dublin Convention in 2003. Dublin II essentially maintained but clarified the criteria for determining responsibility under the Dublin Convention and brought the Dublin system fully under EU governance procedures which had evolved since the signing of the original Convention. Dublin II was accompanied by the EURODAC Regulation which established a database for recording fingerprint data of asylum applicants to aid implementation of the Dublin system. In 2013, the European Council and Parliament agreed upon a revision of the Dublin Regulation known as Dublin III that sought to address some criticisms of the 2003 legislation. In particular Dublin III further clarified the hierarchy of criteria determining member state responsibility and established a mechanism to warn of potential problems with Member States asylum systems.74 The practical effects of the amended regulation remain to be seen and will likely depend in part on the interpretation of European

74 Susan Fratzke, Not Adding Up: The Fading Promise of Europe’s Dublin System, 3(Migration Policy Institute, Europe, 2015.)
Courts; what is obvious meanwhile is that critical gaps in the system remain unfilled. Crucially the regulation does not recognize or address the main factor underlying the Dublin system’s problems, essential differences remain in the asylum procedures, reception conditions and integration capacity of the EU Member States. Such differences invalidate Dublin’s core assumption that asylum applicants will receive equal consideration and treatment wherever they submit their claims. There is a growing agreement among Member States that the Dublin System is in need of adjustment to reflect the divergent realities of Member States asylum system.  


European Union (EU) has only two tasks according to its treatise i.e. establishing a common market and an economic and monetary union. In order to achieve these tasks, the EU activities include an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital. Thus at the heart of the EU there is and has always been an ambition and duty to reconfigure the territory of the member states in order to achieve economic aims. The concepts of a common market and EMU presuppose that states relinquish sovereignty over their geographic territory in order to achieve these ends. Human rights were not part of the original scheme of the EU. The first glimmerings of concern about human rights issue come in the 1960’s via the European Court of Justice. The first reference by the Court to the European Convention on Human Rights, the foremost regional human rights instrument came only in 1974. The EU legislator did not get around to include an express reference to human rights in the EU treaties until the preamble to the Single European Act 1986, which mentions the European Convention on Human Rights. The Maastricht Treaty signed in 1991, but only ratified in 1993 created the Treaty on European Union which for the first time referred in the body of the treaty, to the human rights obligations of the member states and the European Convention on Human Rights. It required the newly created European Union to respect fundamental rights, inter alia, as guaranteed by the European Convention on Human Rights. 1991 was also the

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75 Id.at. p.2.
year in which the EU member states saw one of the highest over recorded levels of applications for asylum within their territories and for the first time reference to the Geneva Convention was made in the EU treaty. The Treaty of European Union (created by the Maastricht Treaty) which provided that:

"That matters referred to in Article K.1 (including asylum policy) shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention Relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by member states to persons persecuted on political grounds."

The failure to include refugees as a central part of the EU project was not simply an oversight by an economic entity which was focused on market integration, it was a positive choice. Asylum and immigration issues were transferred to the European Union by the Member States in the 1997 Treaty of Amsterdam. Not only did the treaty fuse asylum and immigration inextricably, it called on the European Union to come up with harmonized policies. The absence of a supervisory tribunal to oversee the application of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol has meant that states have developed their interpretations of refugee law independently; harmonization on the other hand, inevitably leads to equalizing down at the expense of the refugee when it is attempted to attune these independent approaches. While the Treaty of Amsterdam marks the start of the current EU driver policy, the Tampere European Council meeting of October 1999 added some important parameters for any analysis of the European approach to international refugee law.

The new legal order in European asylum is being shaped by a key document: "The directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees and persons otherwise in need of international protection and the content of the protection granted." The qualification directive was adopted by the Council of European Union on 29 April, 2004. It entered into force on 20 October, 2004. From the perspective of international law, the qualification directive is unquestionably the most important instrument in the

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77 Id.at.p.337.
new legal order in European asylum because it goes back to the heart of 1951 Convention Relating to the Status of Refugees. As its name indicates, the Refugee Convention is about defining who is a refugee, the rights and benefits which persons recognized as refugees are entitled to including the guarantee against refoulement. Over the years the scope of beneficiaries of asylum has been expanded to include other persons in need of international protection under human rights law, in particular the European Convention on the Human Rights and the UN Convention Against Torture. The content of this subsidiary protection nonetheless has remained at the directive of the member states. The qualification directive promises to combine these two forms of protection under one umbrella to institutionalize a common European Union definition of persons in genuine need of international protection and to provide a status for these persons.  

The purpose of this directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. For the purpose of this directive 'refugee' means “A third country national who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country or a stateless person who being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.”

One of the key elements of the directive is the firm rule guaranteeing the recognition of refugee status determination irrespective of the source or agent of persecution, hence including persecution emanating from non state actors. UNHCR has long maintained that the 1951 Convention does not restrict persecution to acts by non state agents against whom the state is unwilling or unable to offer effective protection similarly give rise to refugee status under the 1951 Convention provided of course the other criteria of the refugee definition are met. Other key elements of

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the directive are that after the determination of the refugee status a residence permit shall be issued to beneficiaries of the refugee status which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise requires. Along with it member states shall issue to beneficiaries of refugees status travel documents in the form set out in the schedule to the Geneva Convention for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require. The directive also talks about access to employment to the beneficiaries of refugee status to engage in employment or self employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted. Not only the provision is about employment but also for having access to the education system to all minors having granted refugee or subsidiary protection status under the same condition as nationals. Besides these the provisions of social welfare, health care, well being and care of minors, access to accommodation, freedom of movement within the member state and access to integration facilities have been duly recognized from under Articles 29 to 33 of the 2004 European Union's Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees.

To conclude, it can be stated that it is a welcoming step on the part of European Union Member States to create a common parlance which includes the application of the 1951 Convention. Furthermore, these directives do not intend to modify or replace the 1951 Convention rather it serves to provide the guidance for its interpretation.

2.7 Conclusion

In many instances regional approaches have been an important means of strengthening refugee protection as well as finding solutions to refugee problems, taking into account both the opportunities as well as constraints which exist at the regional level but which may not be fully appreciated or relevant at the global level.

Countries in Africa, Europe and Central America have both acceded to the international instruments and also developed regional treaties or other declarations to meet specific concerns. The countries of South East Asia have like those in South Asia largely avoided accession to the 1951 Convention or 1967 Protocol. Legally binding instruments which have adopted a regional approach include the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa which was made possible by strong political consensus on the issues. The Central American region chooses to take the path of a non binding declaration because governmental consensus was lacking in the Organisation of American States on a regional convention on refugees. Another example of a non binding instrument is the 1966 Bangkok Principles Concerning the Treatment of Refugees adopted by the Asian African Legal Consultative Committee which is an inter governmental body. Because of the advisory nature of the AALCC and the divergence among the member countries of Africa, the Middle East and Asia who comprise the AALCC, the Bangkok Principles have had less of an impact and they remain of values as the only regional refugee document applicable to Asia. The main purpose of all these instruments is to solve the refugee problems in a comprehensive manner including addressing root causes, providing effective protection to refugees and displaced persons and achieving durable solutions to their plight.\textsuperscript{85}

There is no iota of doubt that till today the 1951 Refugee Convention is considered as the key legal document meant for the protection of refugees. The convention discusses not only who is a refugee but also the social, economic and legal rights a refugee has from the states who have signed the convention. Though initially the Convention of 1951 was narrow in scope as the definition of refugee was limited to protecting European refugees but this shortcoming was removed by the 1967 Protocol which expanded the scope and removed the geographical limitations given in the definition of refugee under 1951 Convention.

In spite of all the discussion about curbing 'root causes' of human rights misuse and notwithstanding statements with respect to the lessened way of present day sovereign force, it unfortunately remains the case that the global group can just

\textsuperscript{85} V. Vijayakumar, “Developing a Regional Approach to Refugee Problems in South Asia”, 4\textsuperscript{th} Informal Consultation on Refugee and Migratory Movements in South Asia, Dhaka, 55-56 (10-11 Nov., 1997).
make a genuine certification of rights to people who are outside their own nation. This thought of alienage is critical to the making of genuine assurances of protection is incorporated with the meaning of an outcast. A refugee is in a general sense disfranchised human rights casualty, as well as is, by definition, somebody who has figured out how to get outside of his or her own particular nation. Having left their nation of inception, refugees are inside the unqualified defensive capability of the worldwide group. All things considered, the unique moral obligation towards evacuees takes after from the gravity of their dilemma, as well as from the way that it is constantly conceivable to address their predicament in ways that, tragically, regardless we can't for the individuals who stay inside their own particular nation.\(^\text{86}\)

The 1951 Convention and its 1967 Protocol are the main worldwide lawful instruments expressly covering the most critical aspects of refugee’s life. The convention likewise perceives the global extent of the refugee issue and the significance of worldwide solidarity and collaboration in attempting to determine them. The convention has demonstrated striking flexibility in the course of the most recent 60 years as the way of conflict and also patterns of migration has changed. The worldwide arrangement of displaced person assurance has secured a huge number of individuals in a wide assortment of circumstances. For whatever length of time that individuals keep on being mistreated there will be requirement for the 1951 Convention and its 1967 Protocol. These instruments have likewise helped in moving vital provincial instruments, for example, 1969 OAU Refugee Convention in Africa, the 1984 Cartagena Declaration in Latin America and the development of a common asylum system in the European Union. Today the 1951 Convention and the 1967 Protocol together remains the foundation of refugee assurance and their procurements are as pertinent now as when they were drafted.\(^\text{87}\)
