Prior to the twentieth century there was little concern about the precise definition of a refugee, since most of those who chose not to move to the new world were readily received by rules in Europe and elsewhere. The proactive of sheltering those compelled to flight was not perceived as burden, but rather as a necessary incident of power, and indeed as a source of communal enrichment. The problem of refugee flow started getting concern at the close of the First World War. The changes in the political and social structure in Europe, which particularly followed in the wake of breakdown of centuries – Old Russian and Turkish Empires, resulted in Mass exodus of persons who were refugees from the new regime. They were mostly Russian and Armenians, whose total figure amounted to a million person.

The later establishment of the fascist regime in Italy resulted in tens of thousands of Italian Refugees while the Civil War in Spain added hundreds of Spanish refugees. The dawn of Nazi regime in Germany resulted in a new wave of refugees. Several attempts have been made to define the term Refugee in the course of twentieth century, particularly in treaties and arrangements concluded under the auspices of the League of Nations.

(1) **Definition of the term Refugee:**

Definition of ‘Refugee’ according to Agreements, Conventions and Protocols mentioned in Article 1A (1) of the Geneva Convention of 28 July 1951.

The following pre-war categories are included in the provision of the definition in the Statute and the Convention:
(i) The Arrangement of 12 May 1926

Category 1. Russian pre-war or Nansen refugees, defined as: “Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the USSR and who has not acquired another nationality.”

Category 2. Armenian pre-war or Nansen refugees defined as: “Any person of Armenian origin formerly a subject the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.”

(ii) The Arrangement of 30 June 1928

Category 3. Assyrian or Assyro–Chaldean and assimilated refugees defined as: “Any person of Assyrian or Assyro–Chaldean origin, and also by assimilation any person of Syrian or Kurdish origin, who does not enjoy or who no longer enjoys the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality.”

Category 4. Turkish refugees defined as, “Any person of Turkish origin, previously a subject of the Ottoman Empire, who under the terms of the Protocol of Lausanne of 24 July 1932, does not enjoy or no longer enjoys the protection of the Turkish Republic and who has not acquired another nationality.”

(iii) The Convention of 28 October 1933

Category 5. Spanish refugees. These were defined as: “Persons possessing or having possessed Spanish nationality, not possessing any other nationality and with regards to whom it has been established that, in law or in fact, they do not enjoy the protection of the Spanish Government.

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(iv) **The convention of 10 February 1938**\(^4\)

Category 6. Refugees coming from Germany defined as:

(a) “Person possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact the protection of the German Government.

(b) Stateless persons not covered by previous conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact the protection of the German Government.

“Persons who leave Germany for reason of purely personal convenience are not included in this definition."

(v) **The Protocol of 14 September 1939**\(^5\)

Category 7. Austrians refugees (Victims of Nazi Persecution) defined as:

(a) Persons having possessed Austrian nationality not possessing any nationality other than German nationality, who are proved not to enjoy, in law or in fact the protection of the German Government, and

(b) Stateless persons, not covered by any previous conventions or Arrangement and having left their territory which formerly constituted Austria after being established therein, who are proved not to enjoy, in law or in fact, the protection of the German Government.

“Persons who leave the territories which formerly constituted Austria for reason of purely personal convenience are not included in this definition”\(^6\).


\(^6\) Collection of International Instruments and other Legal Texts concerning Refugees and Displaced Person, volume I, Universal Instruments, published by the division of International protection of office to the UNHCR, Geneva 1995.
It can be noted from the above discussion that similar to other international legal principles, the sources of refugee law lie in treaty law, customary law, state judicial decisions, juristic works, decisions or determinations of the organs of international institutions or of international conferences. All these sources constitute an international legal regime for the refugees. An analysis of the International refugee accords entered into between 1920 and 1950 reveals three distinct approaches to refugee definition. Each of these perspectives, juridical, social and individualist was dominant during a part of the initial decades of refugee law.

From 1920 until 1935, refugees were defined in largely juridical terms, which meant that they 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 conceived in juridical terms is to facilitate the international movement of persons who find themselves alien in foreign countries and unable to resettle because no nation is prepared to assume responsibility for them.

These first refugee definitions were formulated in response to the international legal dilemma caused by denial of state protection. The withdrawal of de jure protection by a state, whether by way of denaturalization or the withholdings of diplomatic facilities such as travel document and consular representation, results in a malfunction in the international legal system. Because the then existing international law did not recognize individuals as subject of international rights and obligations, the determination of responsibilities on the international plane fell on the sovereign state whose protection one enjoyed.

When the bond of protection between citizen and State was severed, no international entity could be held accountable for the

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individual’s actions. The result was that states were reluctant to admit to their territory individuals who were the legal responsibility of another country. The refugee definitions adopted between 1920 and 1935 were designed to correct this breakdown wishes to have freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any state.

The most fundamental form of de jure withdrawal of state protection is, of course, denaturalization. It was the general policy of the League of Nations to extend protection to a group of persons whose nationality had been involuntary withdrawn. The League also recognized the persons who could not obtain valid passports and were entitled to international protection. Both of these groups received League of Nations identity certificates which contracting states agreed to recognize as the functional equivalent of passport.

The definition of this era contained a criterion of ethnic or territorial origin, coupled with a stipulation that the applicant does not enjoy de jure national protection. Only persons applying from outside their country of origin were eligible for refugee recognition. This is consistent with the notion of the refugee as an international anomaly. While the unprotected individual remained within the boundaries of his/her home state, there was no question of another country being confronted with a person outside the bounds of international accountability and, accordingly, no need to include him/her within the scope of League of Nations protection⁸.

In contrast to the initial juridical focus, the refugee agreements adopted between 1935 and 1939 embodied a social approach to refugee definition. Refugees defined from the social perspective are the helpless casualties of broadly based social or political occurrences, which separate them from their home society. Assistance in migration is

⁸Ibid.
afforded to refugees not only from the juridical perspective but in order to ensure the refugees’ safety or well-being. The categories of persons eligible for international assistance encompassed groups adversely affected by a particular social or political event and not just those united by common states vis-à-vis international legal systems.

The essence of this 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 a de facto, if not a de jure, loss of state protection.

The third phase of international refugee protection, comprising the accords of the 1938-1950 eras was revolutionary in its rejection of group determination of refugee status. A refugee by individualist standards is a person of an escape from perceived injustice or fundamental incompatibility with his/her home state. They distrust the authorities who have rendered continued residence in their country of origin impossible or intolerable and desire the opportunity to build a new life abroad. Refugee status viewed from this perspective is means of facilitating international movement for those in search of personal freedom.

The individualist 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 on examination of the merits of each applicant’s case. Moreover, the move to a more personal conception of refugee hood altered substantive notions. No doubt, the 1951 Convention Relating to the Status of Refugees and its Protocol of 1967 remain the principal international instruments benefiting refugees, and the definition which they offer has been expressly adopted in a variety of regional arrangements aimed at
further improving the situation of recognized refugees. Even before the 1951 Convention, the Statute of UNHCR was adopted and the term refugee was defined in the Statute.

The office of the United Nations High Commissioner for Refugees is the principal United Nations Agency concerned with refugees. UNHCR was established by the General Assembly for a period of three years, firstly to provide the necessary legal protection for refugees and to seek permanent solutions for the problem of refugees. According to its statute the work of the office shall be of an entirely non-political character. It is to be humanitarian and social and to relate, as a rule, to groups and categories. The statute first brought within UNHCR’s competence refugees covered by various early treaties and arrangements. It next included refugees resulting from events occurring before 1st January 1951, who are outside their country of origin and unable or unwilling to avail themselves of its protection owing to a well-founded fear of being persecuted or for reasons other than personal conveniences.

Art. 1 of the statute provides that the United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection under the auspices of the United Nations, to refugees who fall within the scope of the present statute and are seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organization to facilitate the voluntary repatriation of such refugees, or their assimilation within new communities.

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9 Total number of State Parties to the 1951 Convention 137, Total number of state parties to 1966 Protocol: 136.
10 General Assembly Resolution 319 (iv) of December 3, 1949 and 428 (V) of 14th December 1950.
Article 6-A of the statute of the UNHCR laid down that the competence of the High Commissioner shall extend to:

(i) Any person who has been considered a refugee under the Arrangements of May 12, 1926 and of June 30, 1928 or under the conventions of October 28, 1933 and February 10, 1938, the protocol of September 14, 1939 or the constitution of the International Refugee Organization.

(ii) Any person who, as a result of events occurring before January 1, 1951 and owing to well-founded fear of being persecuted for reason of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reason other than personal convenience, 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, is unable or owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

Further Article 6-B of the statute laid down as under:

Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or because of such fear, is unwilling to avail himself of the protection of the governments of the country of his nationality, or if, he has no nationality, to return to the country of his former habitual residence.

Development of the statutory Definition and Extension of the Mandate. The UNHCR (United Nations High Commissioner for Refugees) Statute contains an apparent contradiction as observed by Prof. Gay S. Goodwin Gill\textsuperscript{12}. On the one hand, it affirms that the

\textsuperscript{12} Ibid.
work of the office shall relate as a rule to groups and categories of
refugees. On the other hand it proposes a definition of the refugees
which is essentially individualistic, requiring a case by case
examination of subjective and objective elements. Since its
establishment, considerable changes have occurred in refugee crisis
which have made the administration of UNHCR’s mandate flexible.
Also there has been a significant broadening of concept of ‘refugees
of concern to the international community. ‘A major role in these
developments has been played by the United Nations General
Assembly and the Economic and Social Council, whose policy
directions the High Commissioner is required to follow. The same
influence has been exercised by the Executive committee of the High
Commissioners programme, established in 1957. The executive
committee’s terms of reference include advising the High
Commissioner, on request, in the exercise of statutory functions and
advising on the appropriateness of providing international assistance
through UNHCR in order to solve such specific problems as may
arise.

It was also in 1957 that the General Assembly first authorized the
High Commissioner to assist refugees who did not come fully within
the statutory definition. The case involved large number of
Mainland Chinese in Hong Kong whose status as refugee was
complicated. Assistance to other specific groups was also authorized
in the subsequent years. Concurrently the General Assembly
developed the notion of the High Commissioner’s good office as on
Umbrella idea under which to bring refugees who did not come
within the competence or immediate competence of the United
Nations. However the situations in question shared certain common

\[13\] GA Res. 1167(XII) 26, November 1957
\[14\] GA Res. 1167(XII) 26 no. 1957, see also Res 1784 (XVIII), 7th December 1962.
\[15\] The term is employed but not defined in G.A Res 1499 (XV) 5th December1960.
factors, as such the people indeed, had crossed an international frontier, as a result of conflicts or radical, political, social or economic changes in their countries of origin. In 1975 the General Assembly has spoken of UNHCR’s activities on behalf of refugees and displaced persons of concern. Displaced persons have a special meaning in the constitution of the IRO, but have otherwise been commonly employed to describe those displaced within their own country, for example by the effects of civil strife or natural disaster.

Recent refugee crises illustrate both the development in the definition and the problems, which may arise in its application to large numbers of asylum seekers. Developments in the refugee definition employed by the United Nations High Commissioner for Refugees are similar to that of convention-definition particularly because this institutional definition and the convention-definition were drafted simultaneously by the same organs of the United Nations.

The individualistic character of refugee definition contained in the UNHCR Statute of 1950 made it difficult initially for the organization to respond in a meaningful way to the needs of refugees outside Europe. Refugees in Africa and Asia tend to move in large groups and case to case application of a refugee definition was practically impossible. The UNHCR was thus technically unable to exercise its universal mandate, and sought the authority to deal with refugee situations outside Europe in a more collective fashion that would not involve a process of individualized assessment.

Since 1957, the General Assembly, the Economic and Social Council and the Executive Committee of the UNHCR have moved by a variety of means to respond to non-European refugee producing situations. Stayed variously as requests for the UNHCR to “extend its good offices” or to act on behalf of groups “of concern” to the international community, the de facto sphere of responsibility has
expanded radically from its relatively constrained statutory base. UNHCR has been authorized to aid the full range of involuntary migrants, including the victims of all forms of man-made and natural disasters. Moreover, the organization has been requested to assist refugees who remain within their country of origin, and to contribute to the resettlement of refugees who are returning home. The essential criterion of refugee status under UNHCR in regard to refugees within its statutory mandate and those within its extended competence.

**Refugee within the Mandate of 1951 Convention Status of Refugees:**

The primary standard of refugee status today is derived from the 1951 convention relating to the Status of Refugees. For the purpose of the Convention the term Refugee applies under Art. 1A to any person who:

(i) Has been considered a refugee under the Arrangements of 12 May 1926 and 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, and

(ii) As a result of events occurring 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 former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it. The above Article 1-A of 1951 Convention covers groups of persons who are considered as refugees for the purpose of its applications:

The first group could be called “Statutory” refugees, i.e. persons who have already been considered as refugees under previous international agreements or under the constitution of the IRO. The second group
embraces persons who are accorded the status of a “refugee” for the first time. It consists of two subgroups, one possessing a nationality and the other without a nationality. There are two conditions applicable to both groups:

a) They must be outside the country of their nationality or of their habitual residence, and

b) They must be there as a result of events which took place before January 1, 1951.

Persons without nationality, meeting these two tests, are considered as refugees only if they are outside the country of their nationality owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion and are unable or owing to fear of persecution, unwilling to avail themselves of the protection of the country of their nationality. Persons without nationality, meeting the first two tests, are considered refugees if they are unable or, owing to well-founded fear of persecution, unwilling to return to the country of their former habitual residence.

The Convention excludes from its application groups, those persons who receive protection or assistance from organs or agencies of the United Nations, other than the High Commissioner, during the time of existence of such protection or assistance, those persons who, although they would normally come under the definition of a “refugee” are not deemed worthy of international protection.

Realizing the necessity of protecting the new refugees whose fear of persecution is not related to the events which occurred before 1951, a Protocol Relating to the Status of Refugees was adopted and opened for signature in 1967, which omitted temporal and geographical limitations from the definition of the term ‘refugee’ Under the 1951 Refugee Convention. Article I of the 1967 Protocol defined a refugee as a person who:
“Owing to well-founded fear of being persecuted for reason 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 protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, owing to such fear, is unwilling to return to it.”

Many of these criteria have been internationally acknowledged and form the basis for determining the refugee status. The 1951 Convention is elaborate in its definition of who constitutes a refugee. The various terms used in the convention have been broadly interpreted and are briefly discussed below.

An asylum-seeker has to demonstrate that she has fled her country owing to a well-founded fear of being persecuted. The applicant must therefore furnish sound reason for fearing individual persecution. It may be assumed that a person’s fear is well founded if she has already been a victim of persecution on one of the grounds enumerated in the 1951 Convention. The word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution. The fear must be well-founded. The criteria for determining what is “well-founded” is composed of a subjective element—relating to the perceptions, emotions and experiences of the refugee claimant, and where the applicant’s statements are evaluated—and an objective element, which may be assessed from the general situation in the country of origin.

Though the emphasis of the 1951 Convention is on individualize persecution, there is no universal definition of “persecution”. Serious human rights violations are indicative of persecution. Discrimination of a serious nature on grounds of race, nationality, religion and membership of a particular social group can also amount to persecution; through
discrimination on its own is not sufficient to constitute persecution. Bona fide prosecution in the country of origin is generally not considered as persecution except when the punishment for the prosecutable offence is excessive and against international human rights standards.

Under the 1951 Convention, a person must demonstrate a well-founded fear of persecution for one or more of the following reasons:

- Race
- Religion
- Nationality
- Membership of a particular social group
- Political opinion

Persecution because of race or ethnicity is a cause of refugee movement in many parts of the world (Goodwin-Gill, 1978: 212-16). Discrimination on the basis of race, ethnicity, caste, colour or creed is all too common. At times this results in strife of such severity that the people targeted are compelled to flee persecution and suffering across international borders. The example of South African blacks fleeing the apartheid regime. In their country of origin is often cited as a classic case of flight from persecution on the ground of race. Another example is that the Uganda citizens who fled persecution from the regime of Idi Amin in 1972 and sought refuge in India where they found similar ethnic and racial groups.16 Similarly, thousands of Sri Lankan Tamil refugees in India have fled persecution based their ethnic background.

Persecution for reason of religion can assume various forms, such as prohibiting a person from worshiping in private or public, forbidding membership of a religious community or imbibing religions instruction, taking seriously discriminatory measures

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16 The Government of India enacted the foreigners from Uganda order, 1972, in exercise of its powers under sections 3 and 3-A of the foreigners Act, 1946.
against persons because they practise their religion or belong to a particular religious community. The Bahais fled Iran as a result of the discrimination they faced in their country of origin due to their religion.

Another recognized ground of persecution is *nationality*. It is interpreted, in a broad sense, to include the origin and membership of particular ethnic, religious, cultural and linguistic groups. There is a certain degree of overlap between the various grounds of persecution. Hence, factors derived from one or more of the criteria may contribute cumulatively to a well-founded fear of persecution (Goodwin-Gill, 1983:46). Iraqi nationals of Iranian ethnic origin no longer enjoyed the protection of Iraqi authorities after the government passed a decree stating that such persons could not be considered citizens of Iraq. Without the right to citizenship, many such persons fled Iraq and sought refuge in neighbouring countries.

*Membership of a social group* may also be a ground of persecution under the 1951 Convention. It is considered to be a catch of all provisions and may include any group of persons, or an individual associated with a particular group, who demonstrates common characteristics must be immutable or fundamental to a person’s identity and that the persons should not be able to change it. A particular social group may be a person’s family, trade union, social organization, or have its members individuals with an alternative sexual orientation. Membership of a particular social group has also been interpreted to include gender.

In 1985, the UNHCR Executive Committee adopted conclusion No. 39, which noted that refugee women and girls constituted the majority of the world’s refugees and that were exposed to special problems. The conclusion also recognized that states were free to adopt the interpretation that women asylum-
seekers faced with harsh or inhuman treatment for having transgressed the social mores of the society in which they lived could be considered as a “particular social group” within the 1951 Convention definition.

In October 1993, the UNHCR Executive Committee adopted conclusion No.73 on refugee protection and sexual violation. It recognized that asylum-seekers who have suffered sexual violence should be treated with particular sensitivity. Further, the conclusion recommended the establishment of training programmes designed to ensure that those involved in the determination of refugee status are adequately sensitized to issues of gender and culture. The conclusions adopted by the Executive Committee of the UNHCR each year are not binding on state parties. Though recommendatory in nature, they often, have considerable persuasive value in practice. In the Indian context, examples include women from Afghanistan who fled persecution by the Taliban forces because of the decrees curtailing their fundamental freedoms and who feared threats to their lives because of their gender.

Political opinion is understood in the broad sense to incorporate opinion on any matter on which the machinery of the state, or government, is engaged. A claim based on political opinion is one pursued by the government of the state or any other entity on account of person’s opinions, which are an actual or perceived threat to that government or its institutions. A situation may arise where the refugee does not have a political opinion in opposition to the government or state entity, but she is imputed to hold such views. The concepts of imputed behavior, believe status of the refugee as applicable to all the grounds included in the refugee definition. For example Tibetan refugees in India faced both political and ethnic persecution by the Chinese Government forcing them to flee the
region regarded by them to be autonomous.

The 1951 Convention does not restrict the definition of refugees to those who fear persecution from state agents alone. It is broad enough to include persecution due to the non-availability of state protection and *persecution by non-state agents*. Many a time, government are unable to suppress large-scale human rights violations, or are reluctant to do so collude with those responsible due to various reasons such as state politics or diplomacy, where protection is unavailable, persecution within the convention may result. The concept is not limited to the action of governments or their agents alone - persecution by non-state agents is also recognized, for consideration of a refugee claim.

Movements of persons in “refugee like” situations from one part of the country of origin to another safer part of the country of origin do not give rise to a claim for refugee status (Hyndman, 1986: 149). It is a general requirement that an asylum-seeker who has a nationality must be outside the country of her nationality to claim refugee status. There are no exceptions to this rule. The criteria is the non-availability of protection in another region within the country of origin with a chance of maintaining some sort of social and economic existence. If there is an area within the country of origin where the person would be safe from persecution, she will be expected to go there unless it is unreasonable for her to do so. The internal flight alternative is part of the general question of whether the claimant is a refugee. International protection can not come into play as long as a person is within the territorial jurisdiction of her home country (UNHCR, 1979:21). Persons who are habitual residents of a country but do not have any nationality can also quality for the refugee status provided they have left their country of habitual residence or are unable to return to it for reasons contained in the definition. Therefore, if a stateless person is able to return to such a country, she will not be able to claim refugee status.
Thus, the Protocol had been set up to cope with the problem of limitation of the personal scope of the 1951 convention, as it was felt “desirable that equal status should be enjoyed by all refugees covered by the definition in the convention irrespective of the definition of 1 January 1951.”

However, the definition contained within 1951 convention clearly does not cover everyone outside his or her country, in a situation of distress, and unable to return home. People may be unwilling or unable to return to their own country due to circumstances such as natural disasters like famines, flood or earthquakes, which have rendered within their life impossible. These circumstances however, are not included within the criteria specified in the convention definition. Hence, people in these situations are not refugees within the ambit of that definition.

It is to be noted that the 1951 Convention was primarily drawn up to deal with the situation of displaced persons in Europe immediately after the Second World War, and to provide protection for these persons. The states ascending to the convention were anxious to make their obligation specific and to ensure that those obligations could not be extended indefinitely. Today, circumstances have changed and many people who need international protection of the kind provided by the Convention do not fall within its ambit.  

The Impact of 1967 Protocol on the Convention on refugees:

The 1967 Protocol achieved the formal, but not the substantive, universalization of the Convention definition of refugee status. The obvious restriction in the Convention definition, the requirement that the claim relates to a pre-1951 event in Europe was prospectively eliminated by the Protocol. However, there was no review conducted on the substantive content of the definition.

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Even after the elimination of temporal and geographical limitations, only a person whose migration is prompted by a fear of persecution on the ground of civil or political status comes within the scope of the Convention-based protection system. This means that most 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 undoubtedly may give rise to genuine fear and hence to the need to seek safe haven away from one’s home, refugees whose flight is not motivated by persecution rooted in civil or political status are excluded from the rights regime established by the convention.

The concept of refugee Convention has been expanded in practice through the evolution of the institutional competence of the United Nations High Commissioner for Refugees, adoption of a United Nations Convention on Territorial Asylum, establishment of regional refugee protection arrangements and the practice of states. While these developments do not constitute formal amendments to the Convention definition, they are nonetheless indicative of a widening of the circumstances in which persons may be said genuinely to be in need of international protection. In keeping with Recommendation ‘E’ of the conference that adopted the convention, states, which are parties to the Convention may be expected to consider these developments in determining the extent to which persons outside the strict contractual scope of the Convention will be protected as refugees.

**Definition of Refugee under Regional and Related Instruments:**

The OAU Convention Governing the Specific Aspects of Refugees Problems in Africa. In the 1960s, and within a decade of the 1951 Convention, the decolonization process took effect in Africa. The Internationally accepted refugee definition proved to be inadequate to
deal with the problems posed by the millions, and broader refugee
definitions began to be advanced at the regional level. In 1969, reflecting
the realities to Africa during a period of violent struggle for self-
determination and national development, the Organization of African
Unity (OAU) adopted the Convention Governing the Specific Aspects of
Refugee problem in Africa. During the drafting of the 1969 OAU
Convention, most African States agreed that the meaning of ‘refugee’
had to be expanded. There was consensus that the definition in the 1951
convention was not sufficiently broad to cover all the situations resulting
in flow of refugees.

The first regional arrangement established by the Organization of
African Unity (OAU) in 1969 adopted a broader definition of refugee,
which contained a number of unprecedented stipulation. In addition to
respecting the Convention definition of a refugee, state parties to the
OAU Convention Governing the specific aspects of refugee problem
compelled to flee across national borders by reason of any man-made
disaster, whether or not they can be said to fear persecution. For the
purposes of this Convention\(^{18}\), the term ‘refugee’ shall mean 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.

The new definition of refugee is qualitatively progressive, since it
considers situations where the qualities of deliberateness and
discrimination need not to be present. These more far reaching
provisions reflected the reality of the armed conflicts so pervasive in
Africa before and during the period of the drafting of the OAU
Conventions. Also, the 1969 Conventions allowed the ground of refugee

\(^{18}\) Article 1(2) of the OAU Convention.
status to refugees in spite of dangerous intensive fighting and associated random lawlessness in their countries of origin. Since the inception of this Convention, refugee status has evolved in response to changing social and political conditions. The initial concern with de jure statelessness shifted to embrace de facto unprotected groups, and further to protect individuals at ideological odds with their state. The common thread that runs through the entire efforts is the recognition of protection of refugees by the international community. Whether the particular form of abuse consists of denial of formal protection, refusal to allow individuals political self-determination, or calculated acts of deliberate harm, the definitional frame work of international refugee law has evolved to respond to protect involuntary migrants in flight from states which fail in their basic duty of protection.

The OAU definition accepts this rationale for Refugees status. It does not, for example, suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community, as a shift away from concern about the adequacy of state protection and in favour of a more generalized humanitarian commitment. Rather, the OAU definition recognized that four important modifications of the Convention definition are required in order to accommodate the specific forms of abuses taking place in the developing world.

First, the OAU definition acknowledges the reality that fundamental forms of abuse may occur not only as a result of that Governments loss of authority due to external aggression, occupation, or foreign domination. The anticipated harm is no less wrong because it is inflicted by a foreign power in control of a state rather than by the state. This modification simply recognized the need to examine a refugee claim from the perspective of the de facto, rather than the formal authority structure within the country of origin.
Second, the OAU definition reverts to the pattern of pre-World War II Refugees accords in recognizing the concept of group disfranchisement. By its reference to persons who leave their country in consequence of broadly based phenomena such as external aggression, occupation, foreign domination or any other event that seriously disturbs public order, the OAU recognizes the legitimacy of flight in circumstances of generalized danger.

There are two additional features of the OAU definition that are unprecedented in international refugee Law. The Convention definition and all of its predecessor’s link refugee status to the prospect of abuse resulting from some form of person or group characteristic. The OAU definition, on the other hand, leaves open the possibility that the basis or rationale for the harm may be indeterminate. So long as a person “is compelled” to seek refuge because of some anticipated serious disruption of public order, he/she need not be in a position to demonstrate any linkage, between his/her personal status and the impending harm. Because the African standard emphasizes assessment of the gravity of the disruption of public order rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.

The OAU Convention also extends international protection to persons who seek to escape serious disruption of public order “in either part or the whole” of their country of origin. This too, represents a departure from past practice in which it was generally assumed that a person compelled to flight should make reasonable efforts to seek protection within a safe part of his/her own country before looking for refuge abroad. There are at least three reasons why this shift is contextually sensible. First, issue relating to distance or the unavailability of escape routes may foreclose travel to a safe region of the refugees own state. Underdeveloped infrastructure and inadequate
personal financial resources may reinforce the choice of a more easily reachable foreign destination. Second, the political instability of many developing states may mean that what is a “safe” region today may be dangerous tomorrow. Rapid shifts of power and the consequent inability to predict accurately where safe haven is to be found may lead to decision to leave the troubled state altogether.

Finally, the artificiality of the colonially imposed boundaries in Africa has frequently meant that kinship and other natural ties stretch across national frontiers. Hence, persons in danger may see the natural safe haven to be with family members of their own ethnic group in an adjacent state.

The relevance of the OAU definition to conditions in the developing world has made it the most influential conceptual standard of refugee status apart from the convention definition itself. It has provided the basis for enhanced UNHCR activity in Africa which was at the root of the proposed conventional definition of persons entitled to territorial asylum, and has inspired the liberalization of a variety of regional and national accords on refugee protection.

The Organization of American States (OAS)

The Cartagena Declaration (1984) on refugees

The most recent regional extension of the refugee definition is derived from the Cartagena Declaration, adopted by the ten Latin American States in 1984. This is the most encompassing definition of refugee for Latin America to date. The ‘1984’ Cartagena Declaration calls for the consideration of the objective situation in the country of origin and the particular situation of the person or groups of persons seeking protection as refugees. In recognition of the inadequacy of the Convention definition to embrace the many involuntary migrants from generalized violence and oppression in Central America, the State
representatives agreed to a refugee definition that is similar to that enacted by the organization of African Unity. In addition to Convention refugees, protection as refugees was extended to,

…… Persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

This definition requires that two conditions be met to be declared a refugee; that there exist a threat to life, security or liberty and that the threat results from five factors viz. generalized violence; foreign aggression; international conflicts; massive violation of human rights or circumstances seriously disturbing public order. This definition was approved in 1985 by the General Assembly of the Organization of American States, which resolved “to urge Member States to extend support and, insofar as possible, to implement the conclusion and recommendations of the Cartagena Declaration on Refugees.”

The OAS definition shares some of the innovative characteristics of the OAU Convention. First it acknowledges the legitimacy of claims on the ground of foreign aggression. Second, it offers a qualified acceptance of the notions of group determination. The qualification stems from the fact that while generalized phenomena are valid bases for flight, and while acceptance of a claim is not premised on any status or characteristic of the claimant or a group to which she belongs, all applicants for refugee status must nonetheless show that their lives, safety or freedom have been threatened. The requirement that the putative refugee be demonstrably at risk due to the generalized disturbance in his/her country contrasts with the OAU Conventions deference to individual perceptions of peril. Finally, the OAS definition, unlike its African counterpart, does not explicitly extend protection to
persons who flee serious disturbance of public order that affect only part of their country.

The reference to claim grounded in “internal conflicts” and “massive violation of human rights “provide helpful clarification of established principle, but in substantive terms do not break new ground because any situation of conflict would surely “disturb public order”. Moreover, when the granting of refugees status is based simply on the existence of massive violations of human rights, this ground claim as codified adds little to the convention definition in view of the obligation of refugee claimants to show that their lives, safety, or freedom have been threatened by such human rights abuses.

Overall, the OAS definition of refugee Status marks something of a compromise between the convention standard and the very broad OAU conceptualization. It is the first documents in the Latin American contest to establish guidelines for states faced with massive inflows of refugees. It was also the first international declaration recognizing the victims of generalized violence, internal conflicts, and massive human rights violation deserved refugee status. While, unlike the 1951 Convention and the OAU Convention, the Cartagena Declaration is not a formally binding legal instrument, its broader definition has gradually become the established norm throughout Central America.

The 1966 Asian –African Legal Consultative Organization (AALCO) principles concerning Treatment of Refugees, Even before the OAU Convention and the Cartagena Declaration evolved in 1966, the Asian African Legal consultative committee, now Organization at its Eighth Session in Bangkok in 1966 adopted the “Principles Concerning Treatment of Refugees.”

Article 1 provided for the Definition of the Term ‘Refugee’.
a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular group:

(a) Leaves the State of which he is 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

(b) Being outside such State or Country is unable or unwilling to return to it or to avail him of its protection.

In 1996, the AALCO initiated work on revising the Bangkok Principles in 1966 in order to address the realities of the African and Asian regions. A final consensus resolution was passed by member states in July 2001 accepting on expanded definition of “refugee” to include gender as a ground of persecution and flight related to generalized violence and warfare19.

The Council of Europe:

The Council of Europe has also introduced standards of refugee protection that go beyond the convention definition, although the changes are significantly more modest than those of the OAU or OAS. In the parliamentary Assembly’s Recommendation 773 in 1976 the Council of Europe expressed its concern in regard to the situation of “de facto refugees” that are persons who either have not been formally recognized as convention refugees although they meet the Conventions criteria, or who are “unable or unwilling for…………other valid reason to return to their countries of origin. “Member governments were invited

19 There are exception to this definition. 1) A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any state or country of which he is a national. And 2) A person who prior to his admission into the country of refuge, has committed a crime against peace, a war crime , or a crime against humanity or a serious non-political crime or has committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.
to” apply liberally the definition of ‘refugee’ in the Convention and not to expel de facto refugees unless they will be admitted by another country where they do not run the risk of persecution.”

To date, this Recommendation has been only partially implemented. While the Committee of Ministers has stipulated that Convention refugees not formally recognized as such should be protected from return, no text has been adopted dealing with the rights of the broader class of refugees outside the scope of the Convention definition. Overall, it can be said that the Council of Europe has acknowledged the legitimacy of the claim to protection of an expanded class of refugees, but has not moved to formalize their status or rights.

International Laws and Standards:

The 1951 Convention relating to the Status of Refugees is the foundation of International law. The Refugee Convention defines the term “refugee” and sets minimum standards for the treatment of persons who are found to qualify for refugee status. Because of Convention was drafted in the wake of World War II, its definition of a refugee focused on persons who are outside their country of origin and are refugee as a result of events occurring in Europe or elsewhere before 1 January 1951. As new refugee crisis emerged during late 1950s and early 1960s, it became necessary to widen both the temporal geographical scope of the Refugee Convention. Thus, a protocol to the Convention was drafted and adopted.

The 1951 Convention relating to the Status of Refugees details refugees’ rights. Although some refugee rights may be restricted under certain circumstances (as may be citizen’s rights), some of the important rights set out in the Convention include:
◆ non-discrimination (Article 3);
◆ freedom of religion (Article 4);
◆ free access to the courts of law on the territory of all States parties of the Convention (Article 16);
◆ the right to the work (Article 17);
◆ the right to education (Article 22);
◆ the right to public relief and assistance (Article 23);
◆ freedom of movement within the territory (Article 26); and
the right not to be expelled from a country [unless the refugee process poses a threat to national security or the public order] (Article 32).

The most important right detailed in the Convention is the right to be protected against forcible return, or refoulement, to the territory from which the refugee had fled. The Convention stipulates that...

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Article 33).

Refoulement is also explicitly prohibited in a number of other documents, including the United Nations Conventions against Torture and other Cruel, inhuman or Degrading treatment or Punishment (Article 3), the United Nations Declarations on the Protection of All Persons from Enforced Disappearance (Article 8), and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5). In fact, it is widely accepted that the prohibition of refoulement is part of customary international law. That means that all States must respect the principle of
non-refoulement, even if they are not party to the 1951 Refugee Convention.

By granting to a refugee, accepts its obligations to protect the refugee against refoulement, to respect and safeguard the refugee’s human rights, and to allow the refugee to remain in its territory until a durable solutions is found. Granting asylum is a peaceful and humanitarian act of State sovereignty and should not be as unfriendly by any State, especially the refugee’s State of origin. There is, technically, no “right to be granted asylum”:such a right does not appear in any legally-binding international document. But the Universal Declaration of Human Rights (1948) assert that everyone has “...the right to seek and enjoy in other countries asylum from persecution” (Article 14).

In addition to the rights forth in the 1951 Convention, refugees, as any other human beings, enjoy basic human rights, as well. These rights are described in various legal texts that have been signed and ratified by numerous States. Among the most important of these texts are:

◆ the International Convention on the Elimination of All Forms of Racial Discrimination (1965);
◆ the International Covenant on Civil and Political Rights (1966);
◆ the UN Convention on the Elimination of All Forms of Discrimination Against Women (1979);
◆ the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); and

The International Covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also
contain restrictions on some human rights may be legally permissible during emergencies. Consult the texts of these Covenants for specific information about such restrictions.

Among the basic rights listed in the 1948 Universal Declaration on Human Rights are:

- the right to life, liberty and security of persons;
- the right to seek and enjoy asylum;
- freedom from torture, or cruel, inhuman or degrading treatment or punishment;
- freedom from slavery or servitude;
- recognition as a person before the law;
- freedom of thought, conscience, and religion;
- freedom from arbitrary interference in privacy, home and family;
- freedom of opinion and expression;
- the right to be educated; and
- the right to participate in the cultural life of a community.

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention’s refugee definition. Together, the Refugee Convention and Protocol cover three main subjects:

a) The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status
b) The legal status of refugee in their country of asylum, their rights and obligations, including the right to be protected against forcible
return, or refoulement, to a territory where their lives or freedom would be threatened.

c) States’ obligations, including cooperating with UNHCR in the exercise of its function and facilitating its duty of supervising the application of the Convention

By acceding to the Protocol, States agree to apply most of the article of the Refugee Convention (Article 2 through 34) to all persons covered by the Protocol’s refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

Refugees & the State Practices:

There is also evidence of an expanding conceptualization of refugee status in the practice of those states, which do not participate in a formalized regional refugee protection arrangement. Refugees in flight from situations of generalized danger or serious disturbances of public are often protected through special programs or regulatory schemes, or by burden-sharing arrangements concluded between states of reception and resettlement countries. Because these voluntary initiatives are not subject to the formal constraints of the Conventions – based protection scheme, states have a substantial margin of discretion in determining the scope and practice in affording some type of protection to refugee outside the formal scope of the Convention.

In Swedish Law, persons outside the scope of the Convention who remain abroad for valid humanitarian reason may be temporarily admitted and granted residence permits. Similarly, Portugal grants asylum to persons in flight from armed conflict or broadly based human rights violation, West German law tolerates the residence of persons who face civil war, foreign occupation, or adverse political conditions in their
country of origin, and Dutch Law provides for the granting of asylum to persons at risk due to difficult political circumstances in their home state that fall short of “persecution”. Under Great Britain’s’ discretionary refugee policy, persons perceived by authorities to have a valid reason for not returning to their country may be granted asylum, whether or not they come under the definition of refugee as given by the Refugee Convention. French policy, which is also similar to the Convention definition, has nonetheless authorized the admission of Cambodian, Laotian and Vietnamese citizens, regardless of whether they meet the strict refugee definition. In general, while European states have constructed policies that safeguard national sovereignty over the admission of refugees in flight from broadly based disturbances, there is a general practice of not returning persons to state in which there is a significant risk of danger due to internal upheaval or armed conflict.

A similar range of special programs exists in the traditional countries of immigration. In Australia, no distinction exists in law between convention and other refugees, as a result of which person displaced by serious disturbances of public order may benefit from asylum. Moreover, Australia operates special humanitarian programs to facilitate the admission of persons in refugee-like situations, including Soviet Jews, East Timore, and ShriLankans, Lebanese, Latin Americans, and the victims of Apartheid in South Africa. Canadian law authorized the admission of persons “For reasons of public policy or due to the existence of compassionate or humanitarian considerations. In reliance on this authority, special measures programs have in the past been established to permit persons in Canada who are nationals of certain countries that are experiencing adverse domestic events to benefit from temporary asylum. Like Australia, Canada also operates overseas refugee selection program that results in the resettlement of members of non-Convention “designated class” refugees in accordance with regional
target allocations. The United States of America temporarily admits classes of persons outside the Convention refugee definition under the Attorney General’s parole power, based on a combination of humanitarian and foreign policy consideration.

The practice of many developing countries is based on either OAU or OAS expanded refugee concept. Even in these countries not subject to one of these regimes, however, there is evidence of a willingness to protect refugees who may not meet Convention definition. Pakistan and Iran, for example, sheltered the largest concentration of humanitarian refugees in the world, made up of persons forced to flee from the Afghanistan conflict. Similarly, Hong Kong, Thailand and other Southeast Asian states have in most cases provided temporary refugee to Indo-Chinese migrants in refugee-like situations pending their resettlement abroad. While refugee relief in developing countries has often been conditioned on the provision by the international community of either material assistance or resettlement opportunities, there is nevertheless a clear pattern of granting non-Convention refugees’ basic protection from return once the security of the receiving state has been assured.

To sum up, it can be said that, even in those states, which have not formally committed themselves to the application of an expanded concept of refugee states through one of the regional accords, there is a consistent practice of recognizing as legitimate the protection needs of a class of refugees outside the scope of the Convention on humanitarian grounds.

The 1951 United Nations refugee conventions was the culmination of an important historical development in the definition of refugees. It also constituted a platform for future. The adoption of a conceptual definition of the ‘refugees’ in the Convention- definition which is essentially the same as that in the UNHCR- Statute was
regarded as a major step forward, compared with the definition by
categories in the pre-war refugee instruments and in the constitution of
the International Refugee Organization. Until recently this definition was
readily accepted as a basis for identifying those refugees who were to be
benefited from international protection and assistance.

It is now being said that today’s refugees are very different
from refugees of 1951. Mrs. Sadako Ogata, UN High commissioner for
refugees observed that: “The concept in which refugee problems rise
these days is becoming increasingly complex. Tremendous migratory
pressures have emerged, provoking large movements of people between
countries in the South, from South to the North, and from the East to
West. Even the concept who is a refugee requires new clarification.”

Humanitarian need is not only characteristic of the refugee. The
refugee is also, in a very direct sense, in search of his or her rights: the
right to be protected against violations: the right to be recognized. The
International refugee regime stands for this: That any individual
compelled or constrained to leave his/ her country of origin should be
able, it so needs, to call on the support of other states party to the
protection regime, that states, international organization, non-
governmental organizations and all of them will co-operate in finding
solutions at both individual and global level (Goodwin-Gill, 2005). The
goal of the regime is to moderate the inherent tensions- States, their
interests, and their self-interest- to protect rights and to achieve
solutions.

Nearly 60 years after its adoption, the Refugee Convention
remains the only international instrument for the protection of refugees.
Doubt is increasingly being expressed however as to its adequacy to
meet that role. The crux of criticism is that the Convention is outdated
and inappropriate to deal with contemporary challenges. The disparity
between the coast and abuse of developed asylum system, and level of
attention paid to refugee situations in poorer countries, has become increasingly apparent (Balochn.d.6.).

The task of international protection includes the prevention of refoulement, assistance in the processing of asylum seekers, providing legal counsel and aid, promoting arrangements for the physical safety of refugees, promoting and assisting voluntary repatriation and helping refugees to resettle. Thus, the international protection function has a legal basis, and its exercise is mandatory for the High Commissioner. The right to protection, although not defined as a separate right as such, is implicit in the 1951 Convention and its fundamental provisions, particularly the principle of non-refoulement. Many universally recognized human rights are directly applicable to refugees. These include the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one’s own and to return to one’s country, and the right not to be forcibly returned. These rights are affirmed, among other civil, political, economic, social and cultural rights, for all persons, citizens and non-citizens alike in the International Bill of Human Rights.

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