CHAPTER II

DETERMINATION OF REFUGEE STATUS:
ANALYSIS AND APPLICATION
The problem of the status of refugees dates back to the close of the First World War. The great change in the Political and Social structure in Europe, which particularly followed in the wake of the breakdown of the Centuries-old Russian and Turkish empires, resulted in a mass exodus of persons who were refugees from the new regimes. They were mostly Russians and Armenians, whose total figures amounted to a million persons.

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 thousands of Spanish refugees. The creation of the Nazi regime in Germany and the occupation by Nazi Germany of other regions resulted in a new wave of refugees.

After the Second World War - millions of refugees from East European States sought asylum in western countries, and in the sixties, the new States in Africa had to deal with refugee problems of enormous proportions. In Latin America the flow of persecutees has increased because of political instability in the region.

Refugee status is defined in various international instruments relating to refugees. The early international instruments adopted between the two world wars defined refugees by categories, according to their national or ethnic origin. The various instruments adopted after the Second World War contain general definitions of the term 'refugee'.
Refugee status is also defined in regional instruments relating to refugees. Finally, a definition of refugee status is also contained in the constitution or in the ordinary legislation of a number of countries. However, the authority called upon to apply or implement a legal instrument relating to refugee cannot do so unless the refugees are identified as such.

A man's status as a refugee is determined first and foremost by the factors which led to his condition: expatriation and the breaking of the ties that bound him to the State of his nationality. A refugee is distinguished from an ordinary alien because of the lack of normalcy of relationship between him and the authorities of his State of origin, arising from the fear of political persecution upon his return. Again,


2. A Grahl-Madsen observed: It is characteristic for the ordinary alien that his relations to the authorities of the country of his nationality are 'normal'. He is inclined to turn to them for assistance or protection which is likely to be given; and he is not afraid that he will become a victim of political persecution upon his return to the said country. It is this 'normalcy' of the relationship between the ordinary alien and the authorities of his home country which distinguishes him from the refugee.

he is distinguished from an ordinary migrant because the reason for his leaving his country is political conditions. An ordinary migrant, or an economic migrant, as distinguished from the refugees, freely choose to live elsewhere and is capable of having a normal relationship with the authorities of his home country. The refugee is distinguished from a stateless person because he, unlike the stateless person, may still have a de jure national status. As Sir John Hope Simpson defined -

"The essential quality of a refugee is that he has sought refuge in a territory other than that in which he was formerly resident as a result of political events which render his continued residence in his former territory impossible or intolerable". 3

However, the main problem with refugee is - they are a persistent embarrassment to the international legal community. The tension between the refugees and the conventional international order is the distinctive political dynamic of refugee status. It renders protection of the refugees a unique challenge for law and legal process, particularly once the refugee is in the State where he seeks refuge.

The present chapter deals with the brief historical outline of the evolution of the refugee definition. The purpose of following discussion is to examine who is a 'refugee' as defined by the various international instruments. How does he differ from a stateless person? What are the problems concerning the determination of the refugee status and how is this status be terminated? Finally, what is the

procedure to determine the status of refugees in case of large-scale influx? The concern in this chapter is not with internal refugee who has moved from one part of the State to another, but with international political and humanitarian refugees, who move from one State to another.

2.1 Definition of the Term 'Refugee':

Refugee is not a concept of customary international law. Therefore, this law does not define him. He has been the subject of treaties and other international agreements. So, it is impossible to give one single definition which could be used in all circumstances. As prof. Goedhart rightly observed that -

"A sociological definition of the term 'refugee' differs from a legal one; the definition drafted for the purpose of the binding international agreement will look very different from the definition adopted by an association with a humanitarian aim".4

However, in general terms, a 'refugee' is usually thought of a person compelled to flee his state of origin or residence due to political troubles, persecution, famine or natural disaster.5


2.1.1 Refugees Defined in International Instruments: 1920-1950:

Analysis of the international legal accords pertaining to refugees entered into between 1920 and 1950 reveals three distinct trends in refugee definition. From 1920 until 1935, refugees were defined in largely juridical terms. The juridical approach treats as refugees groups of persons outside their State of origin who have been effectively deprived of the formal protection of their government. 6

The social approach to refugee definition was dominant between 1935 and 1939. Refugees defined from the social perspective are the helpless casualties of broad-based social or political occurrences which separate them from this home society. 7

Refugees were defined in primarily individualistic terms between 1933 and 1950. A refugee by individualist standards is a person in search of an escape from perceived injustice of fundamental incompatibility with his home State. 8

So, the initial series of international refugee definitions were primarily concerned with the juridical phenomenon of refugeehood, that is, with the notion that the refugee is a member of a group that has no

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freedom of international movement because its members have been effectively deprived of the formal protection of their government.  

Organised international action on behalf of refugees began in that year when the League of Nations was faced with the problem created by about a million refugees who had left Russia in consequence of Russian Revolution. The International Red Cross Committee appealed to the Council of the League of Nations in February 1921 to take action on behalf of the "Russian refugees scattered throughout Europe without legal protection or representation". The decision of the Red Cross to address the refugee crisis in juridical rather than strictly humanitarian terms prompted a positive response from the council. On June 27th 1921, the Council of the League of Nations decided to appoint a High Commissioner for Russian Refugees whose duty would be to co-ordinate the assistance given to those refugees by various countries. Dr. Fridtjof Nansen was appointed High Commissioner on 20th August 1921. His tasks were -

'to define the legal status of refugees,

to organise their repatriation or their allocation to the various countries.

to undertake relief work amongst them with the aid of philanthropic societies'.

9. Ibid.

The mandate of the High Commissioner was extended to Armenian refugees in 1924 and to Assyrian, Assyro-Chaldean and Turkish refugees in 1928. Between 1924 and 1929, the tasks of the High Commissioner in the field of relief of refugees were entrusted to the International Labour Office, while their protection remained his main responsibility. In 1929, both tasks were again combined in the Office of the High Commissioner, which was placed under the authority of the Secretary General of the League of Nations.

However, the first international instrument to deal with the legal status of these refugees was signed in Geneva on June 30, 1928. This agreement was worded in the form of resolutions recommending that the States accepting it, adopt certain measures for the protection of the Russian and Armenian refugees. This temporary arrangement was supplanted by the regular convention relating to the International Status of Refugees signed at Geneva on October 28, 1933. It also dealt with the other groups of refugees referred to above, but was only accepted by 8 states.

In 1936, when the Provisional Agreement concerning the Status of Refugees coming from Germany was adopted, the term 'refugee' covered all persons coming from Germany. However, a person did not qualify for Convention refugee status, if he had left Germany for reasons of purely

personal conveniences'. During the conference in 1938 - the term 'refugee' covers -

a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or 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 Govt.\textsuperscript{12}

However, at the Bermuda Conference in 1943, it was decided that the protection should be extended to persons who -

"As a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religious or political beliefs."\textsuperscript{13}

The first formal reference to persecution as part of the refugee definition came in 1946 constitution of the International Refugee Organisation. The actual part of the constitution reads:

\textsuperscript{12} Art. 1 of the 1938 Convention concerning the status of refugees coming from Germany: 191 LNTS. No. 4461. The definition was subsequently extended to cover persons coming from Austria.

\textsuperscript{13} United Nations, "A Study of Statelessness", 1949, P. 38.
"Persecution, or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations."\(^14\)

'Refugees', as defined by the constitution of the IRC, included victims of the Nazi, Fascist, or Quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi persecution, as well as persons considered as refugees before the outbreak of the Second World War for reasons of race, religion, nationality or political opinion.

Prof. James C. Hathaway observes that the movement of refugee law away from principles of humanitarianism intensified between 1938 and 1950. In particular, the determination of refugee status on the basis of a broadly defined lack of protection came to an end. No longer was it enough to be a member of a group of displaced or stateless persons, rather, a particularized analysis of each claimants' motives for flight was requisite to recognition as a refugee.\(^15\)

\(^{14}\) IRO Constitution, Annex I, Part I, Section - C.

2.1.2 Refugees within the Mandate of the UNHCR and the 1951 Refugee Convention:

The two major attempts by the United Nations to define a refugee were made in 1950 in drafting the Statute of the Office of the United Nations High Commissioner for Refugees and in 1951, when the United Nations Conference of Plenipotentiaries adopted the Convention Relating to the Status of Refugees. In both cases a reasoned attempt was made to revise and consolidate previous instruments relating to the status of refugees. To this end both definitions begin by recognizing as refugees persons so recognized by various Pre-war Arrangements and Conventions.

Art. I 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

16. *The Statute was adopted by the General Assembly on 14 December 1950 as Annex to Resolution 428 (V)*


18. *For a summary of these Arrangements and Conventions, see United Nations Doc. ST/SOA/15, 15 January 1953, pp.209-211.*
who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

Art. 6-A of the Statute of the UNHCR lays 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 Organisation.

(ii) Any person who, as a result of events occurring before January 01, 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons 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 6-B of the said statute lays down as under:

Any other persons 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 government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

This description is of universal application, containing neither temporal nor geographical limitations. However, the UNHCR statute contains an apparent contradiction as observed by Prof. Guy S. Godwin - Gill 19 "on the one hand, it affirms that the 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 refugee which is essentially individualistic, requiring a case by case examination of subjective and objective elements".

In the 1951 Convention relating to the status of Refugees 20 and for the purposes of that Convention, the term - 'refugee' applies under Article IA, to any person who:


1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation; and

2) 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".

The above Article I A of the 1951 Convention covers two groups of persons who are considered as refugees for the purpose of its application:

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 sub-groups, 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 with a nationality meeting these two tests are to be considered as refugees only if they are outside the country of their nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion and are unable or owing to the 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 two 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 the 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.

Realising the necessity of protecting the new refugees whose fear of persecution is not related to the events occurred before 1951, a Protocol relating to the status of Refugees was adopted and opened for signature in 1967\(^2\), which omitted temporal and geographical limitations.

on 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 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
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.

Thus, the Protocol had been set up to cope with the problem of the
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 - famines, floods or earthquakes - which have
rendered life there 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.
Of course, 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 those persons. The States acceding to the Convention were anxious to make their obligations 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.

2.1.3 Regional & Related Instruments:

It is in Africa where the international community is confronted with the most complex challenge and to which it has to devote a major share of its social and economic resources. The flow of refugees in Africa became an acute problem in the 1960s, coinciding with the struggle for an attainment of independence by most African States. Since the establishment of the Organisation Of African Unity (OAU) in 1963, the refugee question has been of concern to the Organisation. It was decided to draw up a convention which should reflect and resolve the specific concerns of the African refugee problem.

Here it may be mentioned that the 1951 Convention and the 1967 Protocol remain the principal international instruments benefitting refugees, and the definition which they offer has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognised - refugees.

In October 1967, a Conference on Legal, Economic and Social aspects of African Refugee Problems was held in Addis Ababa. However, the recommendation on the matter, adopted by the Conference, only stated that:

"In addition to the definition contained in the 1951 United Nations Convention relating to the Status of Refugees, as extended by the United Nations Protocol of 1967, African States should take into account the specific aspects of African refugee situations with regard in particular to the definition of an African Refugee". 23

In June 1968, the OAU Refugee Commission met in Addis Ababa in order to complete a final draft of an African Refugee Convention which was finally adopted by the Assembly of Heads of State and Government in September 1969. This is the first internationally accepted agreement which issues absolute and unqualified requirements stipulating that no refugee shall be subjected to measures, such as rejection at the frontier, which might compel him to return or remain in a territory where life, physical integrity or liberty would be threatened. 24

The most interesting aspect of the OAU Convention is its two-fold definition of a 'refugee'. It incorporates the same definition as in the 1951 Convention without the dateline and without the possibility of


geographical limitation. At the same time it includes explicitly persons who are victims of man-made disasters like international armed conflicts or civil wars etc.

As per the provision of this Convention - 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.

So, unlike the two universal conventions, this one does not speak of subjective fear of the individual, but refers only to the objective conditions prevailing in the country of the refugee.

The 1966 Bangkok Principles:

In the definition of the term 'refugee' given in Article I of the 1966 Principles concerning Treatment of Refugees adopted by the Asian - African Legal Consultative Committee, the term 'refugee' is applied to:

"A person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, Political belief or membership of a Political Social group -

a) leaves the state of which he is a national, or the country of his nationality, the state or country of which he is a habitual resident; or
b) being outside such state or country is unable or unwilling to return to it or to avail himself of its protection."

Two explanations attached to this Article state that:

1) the dependants of a refugee shall be deemed to be refugees;

2) the expression 'leaves' includes voluntary as well as involuntary leaving.

Europe:

The Council of Europe adopted several instruments concerning refugees. Some of the most important are:

a) European Agreement on the Abolition of Visas for Refugees (1959);

b) Resolution 14 (1967) on Asylum to Persons in Danger of persecution;

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

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

e) Recommendation on the protection of persons satisfying the criteria in the Geneva Convention who are not formally Refugees (1984);

Latin America:

Latin American States have a long tradition of providing humanitarian treatment to persons seeking protection and asylum. A century ago, the 'Treaty of international Penal Law' was signed in Montevideo on 23rd January 1889 on the occasion of the first South American Congress on Private International Law.25

It contains the first provision on asylum in international treaty law, with a stipulation (Art. 16) to the effect that 'asylum for persons persecuted for Political crimes is inviolable'.

The next important instrument on asylum was signed in 1954 at Caracas which is known as the Caracas Convention on Territorial Asylum.

However, in the 1980s, the outbreak of Civil strife in Central America resulted in massive exoduses of million persons to neighbouring countries in search of protection and assistance.26

Responding to the demands created by this unprecedented situation, the countries concerned initiated a process of identification and implementation of humanitarian measures for the protection and assistance of the refugees. The process was advanced further with the

25. The Montevideo Treaty on International Penal Law of 1889 was the first regional instrument which dealt with asylum. See - OAS Official Records OEA/Ser. X/1.

holding of a colloquium\textsuperscript{27} in Cartagena, Columbia in November 1984 where the \textit{Cartagena Declaration on Refugees}, which contains a set of Principles and criteria for the protection of and assistance to refugee, was adopted.

Recognizing the particular characteristics of the flow of displaced persons in the region, the Cartagena Declaration extends the notion of refugees to include, apart from those covered by the universal refuges concept, also other externally displaced persons who are in need of protection and assistance. Consequently, the Declaration also considers as refugee persons who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously affected public order.\textsuperscript{28}

However, the Cartagena Declaration taken the individual's need for international protection and, in particular, the need to protect the physical integrity of the person as the starting point for developing the refugee definition; it is the right to life, security and liberty of a person including the right not to be subjected to arbitrary arrest or detention or to torture as defined in international law which are protected rights.

\textsuperscript{27} "International Protection of Refugees in Central America, Mexico and Panama : Juridical and Humanitarian Problems".

\textsuperscript{28} Cartagena Declaration, Part III.
Although the Cartagena Declaration is not a legally binding instrument for States, it is nevertheless of fundamental importance as it reflects consensus on particular principles and criteria and has guided states in their treatment of refugees for the last five years. In fact, the Declaration revitalized the tradition of asylum in Latin America while aiming at consolidating a regional custom for the treatment of refugees, returnees and displaced persons.29

2.1.4 Refugees in Municipal Laws :-

The conventional obligation to protect political refugees is undertaken by a large number of countries. However, the obligation to protect humanitarian refugees is still moral and humanitarian for a large number of countries. In some cases, the principle of asylum for


Here it may be added that the Cartegena Declaration has acquired added prestige through different Pronouncements of recognition and support by the United Nations General Assembly (UNGA res.42/110, A/42/808), the General Assembly of the organization of American States (OAS res. AG/Res. 891, AG/doc. 2370/88), the Inter-American Commission on Human Rights (Annual Report of the Inter-American Commission on Human Rights 1984-85), the Andean Parliament, the European Parliament and the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR Executive Committee Conclusion no. 37(XXXVI) on Central American Refugees and the Cartagena Declaration.
refugees is expressly acknowledged in the constitution. In others, ratification of the 1951 Convention and the 1967 protocol may have directed effect in local law, while in still other cases, ratifying states may follow up their acceptance of international obligations by the enactment of specific refugee legislation or by the adoption of appropriate administrative procedures. 30. For example, the definition of refugee in the 1951 Convention and Protocol has been incorporated into the domestic laws of Denmark, France, Germany, Norway and Sweden. The United States and the United Kingdom have based parts of their immigration laws on these instruments.

The institution of asylum in the West is in serious crisis. 31 The number of asylum seekers has over-burdened most refugee determination systems in developed countries, undermining their effectiveness, putting in doubt their procedural fairness and objectivity, and prompting many governments to consider the revision of their procedures.

Unfortunately, one is bound to recognize that whatever be the international law on this aspect of refugee problems, states will in fact condition their policies by their ideology. They may even acknowledge the existence of the international legal rules just

31. This view was expressed by Mm. Sadako Ogata, United Nations High Commissioner for Refugees, at a Seminar on "Refugee Policy to 1992 and Beyond", in Brussels on 20-21 June 1991.
mentioned, while at the same time finding excuses, such as the need to support freedom or combat communism or fight colonialism in the name of self-determination, to justify contrary behaviour. So far the United States is concerned, it is mentioned in the Department of Justice Immigration and Nationalization Service Regulations on Refugee and Asylum procedures,\textsuperscript{32} that regardless of any convention definition, "before the beginning of each fiscal year, the President determines the number and allocation of refugees who are of special humanitarian concern to the United States and who are to be admitted during the succeeding twelve months. Any alien who believes he/she is a 'refugee' is defined in ...... [The Refugees Act, 1980] .. and is included in a refugee group of special humanitarian concern as designated by the President may apply for admission to the United States" in accordance with the Regulations. For the purpose of the Act, the term 'refugee' covers persons outside their own country, or if stateless outside the country of last habitual residence, who are unable or unwilling to return because of the fear of persecution on account of religion, nationality, or political belief, and the like - that is to say for reasons mentioned in the 1951 Convention and the Protocol thereto. The Act then provides that the President may, for the same reasons, classify as a refugee any person within his national territory or, if stateless, his place of habitual residence.

\textsuperscript{32} 10 September 1981, 20 International Legal Materials 1259.
Canada's Immigration Act, 1976, has adopted the definition of the 1951 Convention and has spelled out detailed rules for the determination of refugee status. Here it may be mentioned that Canada is also prepared to grant refugee status to persons who have not left home, but who fear they may be persecuted or because may be described as 'self-induced' refugees by virtue of changing their own Political opinions.

Although the Convention and Protocol are not formally incorporated in United Kingdom law, the rules adopted for implementation of the 1971 Immigration Act make express reference to the Convention definition in the context of applications for entry, for extensions of stay, and against deportation.

On October 22, 1992, the United Kingdom Government published its Asylum and Immigration Appeals Bill. If it enters into force, it will be the first piece of legislation focusing almost exclusively on asylum. However, it has been argued that, in the absence of specific legislation, the U.K. system is simply 'an informal administrative process'.

In Switzerland, a clear distinction is made between Convention refugees and persons having fled from civil war, internal disturbance or famine. The later category of persons does not enjoy any protection against expulsion or deportation. Australia has also admitted a large number of humanitarian refugees under special arrangements. A recent Portuguese law on asylum provides for a grant of asylum to persons not
qualifying as refugees under the 1951 Refugee Convention.

In Asia, there has so far been no such regional initiative, nor virtually any appropriate domestic legislation, except of course the restrictions on unwanted new arrivals. Although the Asian region has a large share of the global refugee problem, there is a low rate of accession among Asian countries to the international refugee instruments - the 1951 Convention and the 1967 Protocol. In addition, although African States have utilized regional arrangements, such as the OAU, to provide coordinated responses and a legal framework for the refugee problems experienced there, the Asian region has not entered into similar regional arrangements till to date.

2.2 Criteria for the determining of Refugee Status:

A determination of the refugee status is necessary in order for a refugee to avail himself of the right and protection granted to refugees. For the jurist, a man's status as a refugee is determined first and foremost by the factors which led to his condition; expatriation and the breaking of the ties that bound him to the state of his nationality. The legal basis for the determination of refugee status in the context of a given legal instrument is the definition of a refugee in that instrument. So, any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument whether he is formally recognized as a refugee or not. Again, the competent authority for determining refugee

33. Jacques Varnet, - Supra note 1.
status will depend on the instrument under which the process of
determination is conducted.

The international instruments concerning refugees until World-War
II did little more in the matter of determination of the refugee
status than authorizing certain officials or committees to certify the
refugee status of eligible persons. Thus, under the Arrangement
relating to the Legal Status of Russian and Armenian Refugees of June
30, 1928 and the Agreement concerning the Functions of the
Representative of the League of Nations High Commissioner for Refugees
of June 30, 1928, the Representatives of the League's High Commissioner
in various countries performed this certification. Under the Convention
relating to the International Status of Refugees of October 28, 193334
the certification was done either by the Representatives of the
Secretary General of the League of Nations or by the Committees for
Refugees in the various states.

The magnitude of the refugee problem in the early post-war period
prompted the Allied military authorities and the United Nations Relief
and Rehabilitation - Administration (UNRRA)35 to specify criteria for
refugee eligibility and establish machinery to apply them. The

34. See Report of the Governing body of the Nansen International Office

35. G. Woodbridge - "UNRRA : the History of the United Nations Relief
constitution of the International Refugee Organisation (IRO) contained a provision for determining the eligibility of refugees in Annex I and provided for the creation of "Some special system of Semi-judicial machinery".\textsuperscript{36}

The Office of the United Nations High Commissioner for Refugees (UNHCR) replaced the International Refugee Organization (IRO). The eligibility provisions are omitted from the UNHCR Statute because the work of the High Commissioner generally relates to "groups and categories of refugees", rather than to individuals. Upon receipt of a petition, the UNHCR office makes the determination of the person's eligibility for its assistance in a manner as it thinks fit. Generally there are no set procedures for the determination of a person's eligibility and the High Commissioner shall follow policy directives given by the General Assembly and the Economic and Social Council.\textsuperscript{37} The office does not issue an eligibility certificate to all refugees under its competence. It is issued only when the document is needed for a specific purpose. The certificate is, thus, merely declaratory, and not constitutive in its effect.

A person becomes eligible for the application of the UNHCR statute by meeting the requirements of Paragraph 6 and 7 of the Statute, that is

\textsuperscript{36} Para - 2, General Principles, Annex I, IRO Constitution, 18 UNTS 3.

\textsuperscript{37} Article 3 of the UNHCR Statute.
to say, when he flees his home country, or declares himself a refugee sur place, or ceases to be subject to a suspension clause.

The Refugee Convention of 1951 considers a person refugee for its purpose who satisfies the criteria laid down in Article I but it does not establish any particular procedures for his recognition. This is left to the states party to the Convention. They may establish such procedures for the purpose as they deem fit, subject to the provisions of Art. 31(2).38

Since the eligibility determination is left to the States Party to the Convention, various states have adopted procedures of their own for determining it. A problem would arise as to whether such determination made by a state is binding upon other states party to the convention. The Convention contains no provision obliging the states to accept the determination made by one of them.

However, in order to determine who is a refugee, the criteria usually applied is based on the evaluation of fear and interpretation of what actually amounts to persecution. A general interpretation of definition of the term 'refugee' under the 1951 Convention/1967 Protocol, along with the State practice, provides an established criteria and procedure for the determination of refugee status. The important criterion in the definition is that a person claiming refugee status should be outside the country of his origin owing to well-founded fear of being persecuted for certain specified reasons.

The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of fear for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

To the element of fear - a state of mind and a subjective condition - is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration. Examination of a claim for refugee status is thus based on two facts: (a) fear, a state of mind, which is a subjective condition, and (b) when fear is supported by an objective situation it becomes a well-founded one and is an objective yardstick. In other words when a person claims that he is subject to persecution or fears persecution in the country of origin, the authenticity of his claim for refugee status is ascertained by examination of the general human rights situation in that country with particular reference to his claim.
Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences - in other words, everything that may serve, to indicate that the predominant motive for his application is fear. However, 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.

There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. Canada, for example, recently included persecution on grounds of gender as a basis for asylum claims. The German Government maintains that a government must be implicated in the persecution if a claim for international protection is to be considered valid, while many other governments take a broader view of agents of persecution.

From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution. Fear of persecution and
lack of protection are themselves interrelated elements. The core meaning of persecution readily includes the threat of deprivation of life or physical freedom. The references to 'race, religion, nationality, membership of a particular social group, or political opinion' illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights.

In determining whether a political offender can be considered a refugee, regard should be had to the following elements: Personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives, finally, also, the nature of the law on which the prosecution is based.

Again, the requirement that a person must be outside of his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of


well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "Sur place".

A person may become a refugee "Sur place" as a result of his own action, such as associating with refugees - already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances.

2.3 The Determination of Status in Large-scale Influx Situations:

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

As a consequence of recognising the urgent need to assist the hundreds of thousands of refugees from South East Asia, a number of States have recognised that granting collective asylum to the refugees from South-East Asia is a humanitarian act directly based on the prevention of further acute jeopardy to the lives and physical well-being of such refugees.

Here it may be mentioned that the 1951 Refugee Convention does not apply to persons fleeing from generalised violence or internal turmoil
in, rather than persecution-by, their home countries. Such persons are generally considered to be "humanitarian" refugees rather than political or social refugees as defined in the 1951 Refugee Convention. A practical difficulty in applying the Convention definition confronts states receiving a mass influx humanitarian refugees because "there simply is no time to do the individualized screening commonly necessary to apply the Convention definition..."41. Recently, the United Nations High Commissioner for Refugees, Mrs. Sadako Ogata expressed her view by observing that -

"The refugee issue has become part of a much large movement of people across frontiers and within them. The mass exodus of migrant workers, evacuees, refugees and internally displaced which the Gulf-war produced represents a microcosm the kind of movements with which we are increasingly confronted as we come to the end of the twentieth century ....... In many parts of the world refugees are victims of civil war and political conflict rather than of persecution .... Communal strife and civil war intensify famine and food shortages forcing people to move in search of safety and survival."42

In the large-scale influx situations - the determination of individual status becomes largely impossible. Group determination is the only possible solution. Of course, in principle, there would not seem to be

any objection to a group determination if it conferred refugee status on all members of the group.

Here it may be noted that international bodies have already reacted to this growing problem of mass influx of humanitarian refugees. Originally, the competence of the United Nations High Commissioner for Refugees (UNHCR) was restricted to refugees as defined by the 1951 Refugee Convention, i.e., "Convention refugees". Since 1959, however, the UNHCR's competence has been extended gradually to cover all refugees, including "Persons who have fled their home country due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights".

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

43. See G.A. Res. 3454, 30 UN GAOR Supp. (No.34) at 92, UN DOC. A/10034 (1975)

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

2.4 Termination of Refugee Status:

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

Article I-C of the 1951 Convention provides that this convention shall cease to apply to any person falling under the terms of Section A if:

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

2) Having lost his nationality, he has voluntarily required it; or

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

4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

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

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

The first group (Article I-D) consists of persons already receiving United Nations' protection or assistance; the Second Group (Art. I-E) deals with persons who are not considered to be in need of international protection; and the third group (Art.I-F) enumerates the categories of persons who are not considered to be deserving of international protection.

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

2.5 Summing up:

The 1951 United Nations Refugee Convention was the culmination of an important historical development in the definition on the international plane of basic minimum legal standards for the treatment of refugees. It also constituted a beacon for the future. The adoption of a conceptual definition of the 'refugee' 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 definitions 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 difficult from the refugees of 1951. Mrs. Sadako Ogata, the UN High Commissioner for Refugees observed that -

"The context in which refugee problem rise these days is becoming increasingly complex. Tremendous migratory pressures have emerged, provoking large movements of people
between countries in the South, from the South to the North, and from the East to the West. Even the concept who is a refugee requires new clarification.\footnote{45}.

The definition of the term 'refugee' given by the UNHCR Statute or 1951 Convention has led some to consider that these definitions are essentially applicable to individuals and are of little relevance for today's refugee problem, which are primarily problems of refugee groups. Because, a prima facie group determination of refugee character does not mean that each and every member of the group would satisfy the test of well-founded fear of persecution, if his or her case were individually determined. Group determination by its nature concentrates on the objective situation in the country of origin. However, in order to deal with these new refugee situations the High Commissioner, with the approval of the General Assembly, developed and applied the 'good offices' procedure. This procedure was originally employed to with respect to refugees outside the competence of the United Nations, specifically, the Chinese refugees in Hong Kong and Tibetan refugees in India, for whom the High Commissioner was called upon to act in a limited manner, namely, for the transmission of contributions. Thereafter, in the new refugee situations in Africa, the 'good offices' concept was used to enable High Commissioner to assist refugee groups under his regular programme. In making this prima facie determination of refugee character, the High Commissioner used broad criteria based on the objective situations existing in the country of origin.

\footnote{45. UNHCR Press release, 25th Feb. 1991.}
Here it may be noted that, the 1951 Convention was primarily by Europeans about Europeans. A frequent criticism of the document is that it is too 'Euro-Centric'. Yet Western Europe now appears among the least committed of the regions to the original humanitarian underpinnings of the Convention. This is evidenced by the restrictive interpretations of controlling legal norms adopted by Government sectors, the implementation of harsh deterrent measures, and reduced financial support for international refugee aid programme. The restrictive attitudes and practices of Western European and North American nations make it unlikely that international agreement can be reached on a new, broader, definition of refugee.

There are many perspectives on the issue of exactly who merits protection under international refugee law. Some argue that the 1951 Convention refugee definition is too rigid to encompass all those fleeing to the west in need of protection and, therefore, that various other categories, such as defecto or 'humanitarian' refugees, are required. Others believe that the definition is sufficiently elastic, and that it can be applied in such a way as to provide international protection to those who need it. In resolving the problem of who is a Convention-refugee in Western countries, a two-fold approach is called for. First, more specific criteria must be developed, in order to eliminate the ambiguities of the Convention definition as far as possible. Second, and most importantly, the Convention definition must be applied uniformly.
However, an agreement on a more precise definition by Western States would ameliorate a number of other serious problems, including the substantial variations in acceptance rates among States, the over-legalization of many refugee determination procedures; and the diverging perceptions of evolving concepts of refugee law, the importance of which was not foreseen by the drafters of the 1951 Convention.46

In summing up, it may be noted that the convention may not provide an answer to many of today's problems which have a bearing on the refugee situation. But it should not be a reason for questioning its basic value in the sphere for which it was intended. The Convention should not be blamed for failing to resolve problems with which it was never supposed to deal. It should never be forgotten that the Convention is an essential part of our humanitarian heritage for the international protection of refugees.47
