Refugee Status Determination Legal Framework and Human Rights: Constructing the Productive Other within the Frontier Justice

Nafees Ahmad*

Abstract: The refugees are on the tassels of municipal and international legal systems since the adoption of an international legal framework secured as the 1951 UN Convention Relating to the Status of Refugees (UNCSR) that has been developed to provide refugees some protection which is now debated to address all their grievances including the refugee status determination (RSD) in every nook and corner of the world. RSD is the process whereunder states and UNHCR determine who are entitled to have the benefits of refugee protection. The RSD process facilitates the accomplishment of their global human rights obligations to the beneficiaries under the international refugee protection regime. It is a platitude of international refugee law (IRL) that RSD does not bestow status on a refugee but merely validates it. In performing the RSD obligations, it is the treatment that is meted out to refugees and outsiders in our midst within the UNCSR refugee definition. The instant research paper addresses the issues of critical spaces in the RSD system based on the grounds envisaged in the refugee definition that poses challenges, risks, and responses for a cosmopolitan purpose. There is also a sovereignty narrative that has made the human rights subservient and the menace of persecution is being ignored within the synthesis of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Refugee Law (IRL). However, there is also a pressing question of a legal framework for the protection of refugees frontier justice for them globally that address every aspect of the refugee problem from registration and determination of status, to repatriation, resettlement and legal and political protection reassessment, interpretation, responses, risks, and challenges worldwide.

Keywords: Human rights, refugee status, United Nations.

1. Introduction

The determination of the refugee status is necessary for a refugee to avail himself of the right and protection granted to refugees. For the jurist, the status of an individual as a refugee is determined first and foremost by the reasons and factors which led to his or her condition; exile and the breaking of the relationship that trussed him to the state of his or her nationality.1 The legal foundation for the determination of refugee

* PhD, LLM, Faculty of Legal Studies, South Asian University (SAARC)-New Delhi, nafeestarana@gmail.com, drnafeesahmad@sau.ac.in

1 Jacques Vernant, "The Refugee in the Post-War World" (1953) George Allen and Unwin Ltd. 13
status in the context of an applicable legal regime is the definition of a refugee under the same regime. Therefore, any person who is a refugee within the framework of an appropriate legal system provided he fulfills the grounds of the refugee definition in that instrument whether he is formally recognized as a refugee or not. Again, the competent authority for determining refugee status will depend on the apparatus 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, 1933, 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 extent of the refugee problem in the early post-war period prompted the Allied military authorities and the United Nations Relief and Rehabilitation Administration (UNRRA)\(^2\) to specify criteria for refugee eligibility and establish machinery to apply them. The International Refugee Organisation (IRO) constitution contained a provision for determining the eligibility of refugees in Annex I and provided for the creation of some particular system of semi-judicial machinery.\(^3\) The Office of the UNHCR (United Nations High Commissioner for Refugee) replaced the International Refugee Organization (IRO). The eligibility provisions are omitted from the UNHCR Statute because the work of the High Commissioner 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. 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.\(^4\) 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.

\(^2\) G. Woodbridge, ‘UNRRA: The History of the United Nations Relief and Rehabilitation Administration’ 3 (1950) 23
\(^3\) Para-II, General Principles, IRO Constitution, 18, UNTS 3
\(^4\) Article 3, UNHCR Statute 1950
2. Refugee Definition: The Critical Test and Crucial Spaces

A person becomes eligible for the application of the UNHCR statute by meeting the requirements of Paragraphs 6 and 7 of the Statute, that is 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 UNCSR considers a person refugee for its purpose that 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 develop such methods for the purposes, as they deem fit, subject to the provisions of Art. 31(2). Since the eligibility determination is left to the States Parties 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, to determine who is a refugee, the criteria usually applied is based on the evaluation of fear and interpretation of what amounts to persecution. A general interpretation of the definition of the term “refugee” under the UNCSR along with 1967 Additional Protocol, along with the State practice, provides established criteria and procedure for the determination of refugee status. The critical test in the definition is that a person claiming refugee status should be outside the country of his origin owing to a well-founded fear of being persecuted for specific reasons. The expression “well-founded fear of being persecuted” is the key expression in the definition. It substitutes the previous mechanism of defining refugees by categories by the general concept of fear” for a pertinent attributable motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. To assess the element of fear – a subjective condition and a state of mind – is added to the qualification well founded. It entails that it is not only the mindset of the RSD official that has been given the responsibility for determining his or her refugee status, but it is an objective situation that must back this set of mind. The term “well-founded fear,” therefore, contains a subjective and objective element, and in deciding, whether “well-founded fear” is present, therefore, 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 an objective situation supports fear, 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 in a state lurking fears of persecution in the land of his or her habitual residence or nationality, the credibility and authenticity of his or her claim for refugee status is determined by examination of the general human rights situation in that country with particular reference to his application. Due to the significance of the definition that attributes importance to the subjective elements, an appraisal of reliability is obligatory where the case is not adequately clear from the facts on record. However, it will be relevant to take into consideration the personal and family credentials of the applicant, his membership of a particular social or racial, religious, national, or political group, his assessment and interpretation of his or her circumstances, and his exposures and experiences. Nevertheless, everything that may serve to indicate that the pre-conceived intention for his application is “a well-founded fear” or fear. However, the word ‘fear’ refers not only to persons who have been persecuted.

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 the 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 UNCSR, it may be inferred that intimidation to life or freedom due to the religion, race, nationality, political opinion or membership of a particular social group is always persecution. Other severe transgressions of human rights – for the similar factors – would also institute persecution. The fear of persecution and deprivation of protection are themselves interconnected 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 other fundamental human rights.

In determining whether a political offender can be considered a refugee, regard should be attributed to the elements as follows: Personhood of the applicant, his or her political opinion, the intention behind the act, the kind of the act committed, the character of the prosecution and its intentions, ultimately, also, the character of the law on which the prosecution has been grounded. Again, the requirement that a

---

7 Guy S. Goodwin-Gill, ‘International Law and the Movement of Persons between States’ (1978) 66-87
person must be outside of his or her country to be a refugee does not convey that he or she must unavoidably have left that country unlawfully, or even that he might have left it due to “a well-founded fear.” He may have resolved to ask for identification of his refugee status has already been out of the country for a limited time. A person who was not a refugee at the time when he left the country, however, who becomes a refugee subsequently, is known as a refugee “Sur place.” A person might become a refugee “Sur place” as a result of his action, such as associating with refugees – already acknowledged or articulating his political opinion in his country of nationality.

3. Refugees and Human Rights: Legal Framework and Global Standards

Therefore, it is a matter of human rights that are those minimum rights which are available to an individual by his being a member of the human family, i.e., the right to life is minimum and most fundamental human rights. Today, human rights should be recognized as central to the entire refugee issue. As has repeatedly been affirmed by the international community during the last many decades, they express the values and principles, which constitute the foundation of freedom, justice, and peace in the world. As such they are as centrally relevant to the refugee issue as they are to any other major social problem today. In the past there was a tendency, at times, to see refugee law as a branch of law entirely separate from that of human rights. It was, perhaps, part of a more general tendency during the post-war period to compartmentalize law, breaking it up into different and even autonomous branches, so much so as almost to suggest that there was no one law but only some distinct and separate laws. In such a view, with its strong positivist’s approach, refugee law possessed its particular purposes and principles which were determined mostly by its constituent instruments and which were thus independent of those of human rights law. This view, of course, was an over-simplification, as the human rights instruments not only contained no limitations excluding their application to the refugee situation.

A strict separation of the two is incompatible with any norms of the fundamental unity of law about its general objectives and principles. Further, it facilitated as a block to the progressive development of international refugee law by closing off arbitrarily the application of the general principle of law which are correctly apt to fill in the gaps of conventional refugee law. Moreover, the separation served to deny refugee law a general purposive context, the absence of which threatened to make that law in different and changing circumstances both in just and impractical. With

---

the decline of the strict *positivist* approach to law, which has accelerated during the last two decades, the law has been liberated from the stultifying effects of those elements of the past, which only served to act as shackles, impeding the law from responding in a just and practical way to new human and social needs. Now, human rights conceived as general principles of law assure the continuing relevance of law to those requirements.

From a universal perspective, traditional or conventional refugee law was seriously incomplete, even unbalanced, because *among other things* it was primarily directed, and thereby limited, to the rights of the individual about the receiving country. Mostly, it was a law for the institutionalization of exile. Excluded entirely from its scope were the rights of the individual about the state of nationality, especially regarding the necessary aspect of freedom of movement. The latter rights were considered as belonging, for example, to human rights law, but were considered *a priori* is not pertaining to refugee law. In practice, they were often considered as inapplicable to the refugee situation. Although, in recent years, the traditional approach of international community that was essentially the product of the Cold War era, has developed substantially as it has been increasingly realized that, in a changing world, it is both possible and necessary to address the refugee issue *as a whole*, i.e., its causes and the aspect of solution *generally*, including the primordial and parochial aspects of prevention and return as well as its principle and limited traditional focus of concern. This development has corresponded to considerations of both justice and practically.

The development at the universal level began with the Canadian initiative within the UN Commission on Human Rights in 1980 to assess the human rights and mass exoduses to the elimination of the factors of exoduses, and with the concurrent measures to avert mass flows. Both these initiatives have since been joined together under the item “Human rights and mass exoduses” which is now on the agenda of both the General Assembly and the Commission on Human Rights. At the regional level, however, the necessity of a comprehensive and coherent approach has been insisted upon from the late 1940s onwards by newly independent States, especially in the context of refugee situations arising from the denial of the right of self-determination. At the initial debate in the Commission on Human Rights, the representative of Canada observed that the duty of expressing international solidarity in the face of the problem of massive movements was two-fold to assure protection and assistance and to share the burden placed on countries of the first refuge, and to contribute to the elimination of the causes of exoduses. In emphasizing that
international solidarity required a contribution to the elimination of the causes of exoduses, as well as to extend protection and assistance, the Canadian proposal broke significant new ground in the post-war Western thinking on the refugee issue.

In its observations to the Secretary-General on its proposal, the German Government observed that its initiative was an inseparable part of a holistic concept transcending humanitarian action and embracing the establishment of a system of preventive measure. From the conceptual point of view, it said, the efforts of the international community had until now centered on the humanitarian task of mitigating the consequences of flight and expulsion. Measures to eliminate the causes of flows of refugees were not seriously considered with the inescapable recognition that the refugee issue involved essential aspects of individual human well-being as well as the elements of peace and security, it had gradually been accepted that a comprehensive and coherent as the inter-State issues and that it must do so in a balanced and integrated manner which reflected the fundamental interdependence of both aspects. This recognition flowed logically from the United Nations Friendly Relations Declarations of the late 1960s, which included within a general framework of fundamental principles, the principle that States shall co-operate in the pro-recognition which was also reflected in the 1986 Report of the Group of Experts which was set-up by the General Assembly under the German initiative. The 1986 recommendations included two key provisions:11

a) Given their responsibilities as per the UN Charter and consistent with their obligations under the present international instruments in the field of human right rights, States while exercising their sovereignty, must do all as per their capacity to prevent new massive flows of refugees. Accordingly, States should refrain from creating or contributing to their policies to causes and factors which lead to massive flows of refugees; and

b) States should co-operate with one another to prevent future massive flows of refugees. They should promote international co-operation in all its aspects, in particular at the regional and sub-regional levels, as an appropriate and vital means to avert such flows.

It was with the instant opportunity in mind that UNHCR, in conjunction with International Institute of Humanitarian Law at San Remo, convened in 1989 a roundtable of experts to examine the issue of the solution of the refugee problem and the protection of refugees. The stated purpose of the roundtable was to consider law; policy and action could be a solution in a manner, which was in accord with the goals and principles of protection. In explaining its initiative, UNHCR observed that

11 Report of General Assembly’s Group of Experts, 1986
various aspects had so far been dealt with separately, but there had never been a comprehensive examination of the subject. Such an assessment had become incumbent as the international community was increasingly dealing with security and protection problems not separately but in the overall context of solutions. It said that the refugee problem should be understood as a whole and any international efforts in this regard should take into consideration all aspects of the problem, including the reasons of refugee flows, the interim protection needs, and the solution. This roundtable resolved: 12

a) The solution should not be seen as an aspect independent and separate from protection. It should be understood as the final purpose of protection, and security should be seen as governing the entire process towards a solution and as determining what was or what was not a solution.

b) In broad terms, the problem of the refugee was basically that of the denial of freedom of movement to the individual by reason of conditions in the country of nationality which compelled him to depart from that country or to stay abroad and the inability or unwillingness of the individual to avail himself of the protection of the country of nationality.

c) The solution, therefore, was either the prevention of conditions occurring within the country of nationality, which compelled a national to depart or remain outside the country of nationality so that the national was without national protection or the remedying of such conditions having that effect. It was only if the fundamental problem of deprivation of freedom of movement could not be resolved that the resolution of the consequent problem became the promotion of the refugee to settle in another country.

d) This concept of solution, including the two orders of the solution, had import ramifications for law, policy, and action. It was impossible in the light of this definition of solution, to treat the three traditional “solutions” of voluntary repatriation, local settlement or resettlement as of equal order. The voluntary return was the necessary or primordial solution. Moreover, prevention was a further aspect of the solution, which should not be ignored in an approach, which was comprehensive and balanced.

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

---

enjoy therein one’s rights and the related prohibitions of exile, expulsion and the arbitrary deprivation of nationality. It must be recognized that exile is an evil, since it is, by definition, involuntary separation from the homeland. It is not be confused with voluntary migration. While it may sometimes be the lesser of two evils nonetheless the coerced character of the movement cannot be considered unobjectionable let alone positive.

Furthermore, conditions of exile today for most of the world’s refugees are desperately hard sometimes dire, relatively few reach heavens of peace and prosperity where they can begin a new and meaningful life. Most of them are confined in the camps on the borders of their countries of nationality, having precarious existence and dependent for their survival on outside charity. Some find themselves in situations worse than they knew at home, with no immediate hope of return. Many of them have been without a solution to their problem of de facto or de jure statelessness for decades. For most, the only solution will be their voluntary return one-day to their country of nationality, when conditions permit. On the other hand, the political realism, too, requires such an approach today. The number of refugees worldwide has reached such proportions that in many cases the economies of the receiving countries are overstretched, their internal public order is endangered, and international peace and security are threatened. In many cases today, the receiving countries have no political or economic interest is often seen as laying in the early return or the resettlement of the refugees elsewhere, where that is possible.

The refugee problem directly raises justice and peace. Since exile cannot be considered, either in the justice of with realism, as the leading solution for today’s refugee problem, the rights of the individual about the country of nationality must now be examined in the specific context of the refugee issue, especially regarding the principle of freedom of movements. Within the Sub-Commission on Prevention Discrimination and Protection of Minorities of the United Nations Commissions on Human Rights the right of everybody to leave any country, including his own and to return to that country is now being considered for the first time within the refugee context as well as within other settings. When the Sub-Commission first examined this subject nearly 30 years ago, the “immigration” issue was excluded from the scope of its work. It is to be hoped that in its treatment of the aspect of return, the Sub-Commission will cope not only with the problem of deprivation of nationality but also with the difficulties of expulsion and exile, and that it will consider not only the issue of direct denial of rights or violation prohibition but also with the problem of indirect denial or violation\(^\text{13}\) and beneficial development in international thinking regarding human rights and state responsibility.

\(^{13}\) Supra note 9
4. State Responsibility, Sovereignty and Human Rights: Pulls and Pressures

As far as the doctrine of “state responsibility” is concerned, the respect for human rights is, of course, an essential aspect of the substance of the law. While this area of the law is in a state of development, the procedure of its development and codification by the International Law Commission being sluggish and not without a problem; there is already a substantial and growing practice regarding its application to the refugee problem. At the formal level of progressive codification of norms and principles of state responsibility and its consequences, the important recommendations accepted and adopted in 1986 by the UN General Assembly about international co-operation and collaboration to avert further mass flows of refugees. However, it could usefully be developed to encompass not only the prevention of such flows but also the situation where such influxes had already occurred or were still in the course of happening. At present, principles have been adopted to cover these latter situations.

It is notable that within the General Assembly the general principle of international co-operation in solving refugee problem has been involved by several States in recent years in the debate on the item entitled “Development and strengthening of good neighbourliness between States.”14 This principle has also been implicit in some current international agreements or arrangements for responding to this problem. Also of particular interest in this regard are two significant provisions, which were included in the Conclusion on Voluntary Repatriation which was adopted in 1985 by the UNHCR Executive Committee and which was subsequently endorsed by the General Assembly while stating thereunder:

a) The existing mandate of the High Commission is adequate to permit him to advance the voluntary repatriation by undertaking initiatives in this regard, promoting dialogue between all the primary stakeholders, enabling communication between them, and by working as an intermediary or channel of communication. It is crucial that he establishes, wherever possible, contact with all the major parties and familiarizes himself with their contentions. From the inception of a refugee scenario, the High Commission should at all times keep the possibility of voluntary repatriation for all or part of a group under active review and the High Commissioner, wherever he deems that the prevailing circumstances are appropriate, should actively pursue the promotion of this solution; and

b) When, in the opinion of the High Commission, a serious problem exists in the promotion of voluntary repatriation of a particular refugee group, he may consider for

---

14 Supra note 9
15 Conclusion on Voluntary Repatriation Program, UNHCR, 1985
that particular problem the establishment of an informal *ad hoc* consultative group
which would be appointed by him in consultation with Chairman and the other
members of the Executive Committee and Should principle include the Countries
directly concerned. The High Commissioner may also consider involving the
assistance of other competent United Nations organs.

Especially notable are that these provisions allow to the High Commission a right
of initiative in promoting voluntary repatriation and in the taking of measures to
achieve the goal and also include the direction that the High Commissioner should
actively pursue the promotion of this solution wherever he or she deems that the
prevailing circumstances are appropriate. At the practical level, a more
comprehensive and coherent approach will entail a significant revision of the
priorities of concrete action at every relevant level, including the political, diplomatic
and assistance levels. It will require considering how the international organization,
whether universal or regional, can be utilized satisfactorily and low the role and
responsibilities of existing bodies, such as the office of the United Nations High
Commissioner for Refugees, should be seen today. It cannot aver that this revision has
yet occurred or that much of the action has been adjusted in conformity with the
newly emerging legal or policy approach. Truth requires admittance that whiles the
principles may have significantly changed; the practical action has barely altered.

A cardinal dimension of Refugee Law is the notion of State sovereignty. It is the
State, which decides on whether the reason given by the asylum-seeker conforms to
internationally recognized norms for the grant of refugee status.\(^\text{16}\) In the absolutist
sense, sovereignty would imply that each nation becomes the sole master of its
domain, leaving no scope whatever for international co-operation. But sovereignty is
not and never has been absolute. Robinson Crusoe was the only man who could
claim to be “a monarch of all he surveyed,” and much good did it to him. Mercifully,
we have not come to quite that pass. India, to take the most remarkable example, has
managed to remain clear of the worst problems. Significantly, it has done so by
preserving most of the shared and extended sovereignty of Queen Victoria’s old
Indian empire. In many other parts of the globe, too, rather than resting upon old
absolutist doctrine, people mostly take a practical, pragmatic view of sovereignty, as
something not just to had and to defend, but to use in co-operation with others.

Thus, it is that we have been able to build, slowly, patchily, piecemeal, a network
of international treaties and agreements of codes of practice, even of binding rules of
conduct. These indeed have come to regulate most of the economics of international
life. And there we have the two great trends of this century: the birth of ever more

\(^{16}\) Articles 1-3, UN Declaration on Territorial Asylum 1967
separate nations alongside the emergence of an ever more unified world economy; more political authorities, less hold on the real reins of economic power.\textsuperscript{17} In truth, sovereignty, and the integrity of the nation-state has become, is becoming steadily less absolute. Communications, culture, information technology, affluence, mobility—all are competing with each other in the demolition of time and distance. The kinds of technological advance that once made nation-states and empires governable are now achieving precisely the opposite effect. But these same factors can equally have a positive impact. They have helped, for example, to internationalize concern for human rights. The anti-apartheid movement offers a successful example of this. Sovereignty is, now increasingly intermingled across frontiers and enterprises trading and investing across frontiers intrude upon national cultures and identities. International economic rules—even rules for free trade, especially for free trade—intrude more and more across boundaries. Internationalisation of government has been accepted in the economic sphere because it is inevitable: we see in that sense, the worldwide triumph of the market economy.\textsuperscript{18}


Is the international refugee definition’s focus on the existence of a “well-founded fear of persecution” of continuing relevance in the post-cold war era? The persecution standard evolved from the legitimate concern first stated in the \textit{1938 Convention concerning the Status of Refugees} coming from Germany\textsuperscript{19} to exclude from protection those persons who were leaving their country for “reasons of purely personal convenience.”\textsuperscript{20} The Constitution of the IRO (International Refugee Organisation) rephrased this principle in positive terms and required the putative refugee to show “valid objections” to returning to his or her country of origin, which might include fear of persecution.\textsuperscript{21} The modern UNCSR, in turn, adopted the basic approach of the IRO precedent but made persecution the particular benchmark for international refugee status. It is generally recognized that the framers of the UNCSR deliberately did not define the meaning of “persecution” because they realized the futility of detailing in advance all the forms of maltreatment that might legitimately entitle persons to benefit from the protection of a foreign State.\textsuperscript{22} Bits and pieces of insight into the intended meaning of “persecution” can nonetheless be gleaned from the UNCSR’s drafting history.

\begin{footnotes}
\item[18] ibid
\item[19] League of Nations, Treaty Series, Vol. 192, No. 4461, 59
\end{footnotes}
First, the drafters viewed persecution as a sufficiently inclusive concept to capture the spectrum of phenomena, which had induced involuntary migration during and immediately after the Second World War, ranging from the denial of life and liberty inflicted by the Nazis. Refugee status was premised on the risk of serious harm, but not on the possibility of consequences of life or death proportions. In addition to the UNCSR’s acceptance of deprivation of fundamental civil and political freedom as sufficient cause for international concern, severe social and economic consequences were also acknowledged to be within the purview of persecution. Second, the motive of the drafters was not to protect people against any form of even severe harm but was instead to restrict refugee recognition to conditions in which there was a risk of a type of injury that would be inconsistent with the fundamental duty of protection owed by a State to its population. As a comprehensive study of the refugee definition demonstrates that the drafters were not concerned to respond to specific forms of harm, per se but were somewhat motivated to intervene only where the maltreatment anticipated was demonstrative of a break-down of national protection. For persecution to remain a meaningful concept, it must be interpreted in the light of these principles as they apply in modern context. As noted by the Council of Europe:

[T]he concept of persecution should be interpreted and applied liberally and also adopted to the changed situations which might differ considerably from those present when the UNCSR was initially adopted----account should be taken of the relation between refugee status and the denial of human rights as laid down in different international human rights instruments.

This approach will not eliminate the danger of political distortion inherent in the retention of the persecution standard, but it may at least prevent the UNCSR from becoming a mere anachronism. Appreciating on these fundamental precepts, persecution may be defined as the continued or systematic transgressions of fundamental human rights demonstrative of a failure of State protection. A well-founded fear of persecution exists when one reasonably anticipates that the inability to leave the county may result in the form of serious harm and has failed in its duty to ensure those fundamental human rights.

---

23 ibid
24 This limitation on the definition of refugee owes its origin to the fact that the refugee is designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country.
26 Supra note 23
6. **International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International Refugee Law (IRL): A Synthesis**

It is evident that refugee law is an inseparable part of human rights law as follows from Article 14 (1) of the *Universal Declaration of Human Rights*. “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” Persecution can be denied as a violation of fundamental human rights. The *1951 Convention Relating to the Status of Refugees* along with many other international and national legal instruments referring to or relying on it spells out in details the right to seek asylum from persecution. The 1951 Convention does not solve the problem of territorial asylum. However, it remains the fact that the definition of a refugee under the UNCSR revolves around our understanding of human rights. Only a minority of the world’s refugees is covered by the UNCSR. Still, it is an undeniable fact that they have been forced to flee. Hence the term *de facto* refugee, generally accepted by experts all over the world, but shunned by Governments and their spokespeople in wealthy western countries. The confusion in the rich nations over who the *de facto* refugees are about the Convention refugees and the human rights system has inspired much attention. One way to resolve this might be to see Convention refugees as victims of denial of humanitarian law protection. Though this might be helpful in some situations and it might lead to oversimplified or erroneous conclusions:

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

b) If a majority is persecuting an ethnic minority in a remote part of a country and the Union Government does not have the resources of the power to interfere, is that a situation which generates Convention refugees or *de facto*?

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

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

---

27. UN Treaty Series, Vol. 189, 1377
30. ibid
where the humanitarian law criterion is not sufficient to establish refugee status. There are many examples of armed conflict or other political events causing severe and widespread environmental destruction, which uproots the local population, aggravated by political neglect or incompetence, and drives people away to safety.\footnote{31} Many of these victims could and should be considered \textit{de facto} refugees, but one cannot say that they have been exposed to violations of humanitarian law. So, it can be said that the fundamental concept in the definition of a Convention refugee is a \textit{“well-founded fear of persecution”} and the key to understanding that is a \textit{de facto} refugee is the existence of events are seriously disturbing public order.

7. Determination of the Refugee Status: Constructing the Productive Other Within the Frontier Justice

During the last several years, it has become increasingly evident that the mass influx of refugees has outgrown the possibility of the solution on the national level and has to be solved at the international and regional levels respectively. As a consequence of recognizing the urgent need to assist the hundreds to thousands of refugees from South East Asia, some States have recognized that granting collective asylum to the Rohingya refugees 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 UNCSR does not apply to persons fleeing from \textit{generalized violence} or \textit{internal turmoil} in, rather than persecution by, their home countries. Such persons are generally considered to be \textit{humanitarian} refugees rather than political or social refugees as defined in the 1951 UNCSR. The practical difficulty in applying the UNCSR definition confronts states receiving a mass influx of humanitarian refugees because “there simply is no time to do the individualized screening commonly necessary to apply the Convention definition…”\footnote{32} Recently, the Ex-United Nations High Commissioner for Refugees, Sadako Ogata expressed her view by observing that –

\begin{quote}
The refugee problem has become part of a much massive 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 microcsm 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
\end{quote}

\footnote{31}{See, Supra Chapter 2}
\footnote{32}{DA Martin, ‘Large-scale Migrations of Asylum-seekers’ (1982) 76 American Journal of International Law, 598}
war intensify famine and food shortages forcing people to move in search of safety and survival.\textsuperscript{33}

In the large-scale influx situations--the determination of individual status becomes impossible mainly as the "group determination" is the only possible solution. Of course, in principle, there would not seem to be any objection to a group determination if conferred refugees’ status on all members of the group. Here it may be noted that international bodies have already reacted to this growing problem of mass influx of humanitarian refugees. Originally, the competence of the United Nations High Commissioner for Refugees (UNHCR) was restricted to refugees as defined by the 1951 Refugee Convention, i.e., \textit{Convention Refugees}. Since 1959, however, the UNHCR’s competence has been extended\textsuperscript{34} gradually to cover all refugees, including “Persons who have left their homelands due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights.”\textsuperscript{35} 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.

The Cartagena Declaration on Refugees of November 1984 proposed an extension of the concept of \textit{refugee} as applied to Central America, stipulating that a ‘massive violation of human rights’ should be considered as a legal basis for the extended definition of \textit{refugee}. The requirements for the determination of refugee status envisaged that the competent immigration or border police officer should have clear instructions for dealing with refugees on the basis of adherence to the principle of \textit{non-refoulement} and should be required to refer refugee cases to a higher authority the applicant should receive guidance on procedures to be followed, he should be given the necessary facilities including the services of an interpreter, for submission of his case to the authorities as well as permission to remain in the country pending a decision on the initial request when the candidate or claimant is identified as a refugee, he should be so informed and issued with appropriate documentation. If the claimant is not categorized as a refugee, he should be given time to appeal for reconsideration of the decision. He should be allowed to remain in the country while

\textsuperscript{33} Sadako Ogata, ‘Refugees in the 1990s: Changing Reality, Changing Response’ (1991) Lecture Georgetown University

\textsuperscript{34} UN General Assembly Resolution, 3454, 30 UN GAOR Supp. (No. 34) at 92, UN Doc A/10034 (1975)

\textsuperscript{35} Note on International Protection, Thirty-sixth Session of the Executive Committee of UNHCR’s Programme, Para 6, UN DOC A/AC. 96/660 (1985)
the appeal is pending. National Sovereignty requires that all persons, including refugees, conform to the laws and regulations of the state of asylum as well as to the measures taken for the maintenance of public order.36

According to the UNSCR, in time of war or other grave and exceptional circumstances, a state may take provisional measures essential to national security in the case of a particular person, awaiting a determination by the contracting state that the person is, in fact, a refugee and that the continuation of such actions is necessary in his case in the interests of national security. This provision should be read together with Article 44 of the Fourth Geneva Convention pertaining to the Protection of the Civilian Persons in Time of War, of 12 August, 1949, according to which in applying the measures of control the Power in whose jurisdiction protected persons find themselves shall not regard or treat as enemy aliens, exclusively on the basis of their nationality de jure of an enemy or hostile state, refugees who do not, in fact, enjoy the protection of any Government. It applies to aliens in the territory of a party to an international armed conflict. In the situation of belligerent occupation, Article 70 of the Fourth Geneva Convention is operative. It states that the protected persons shall not be apprehended, prosecuted or convicted by the Occupying State Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, except breaches of the laws and customs of war.37 Nationals of Occupying Power who before the outbreak of hostilities sought shelter in the territory of the occupied State shall not be apprehended or prosecuted or convicted or deported from the territory of the Occupying Power, except for crimes committed after the outbreak of hostilities or for crimes under the common law perpetrated before the occurrence of hostilities, which, according to the law of the Occupying Power, would have justified extradition in time of peace.38

7.1 General Principles of Refugee Status Determination

A person is a refugee within the purview of the UNCSR as soon as he fulfills the criteria contained in the definition. It would necessarily occur before the time at which his status as a refugee is formally determined. The RSD is a process, which takes place in two stages. Firstly, it is indispensable to determine the relevant facts of the case. Secondly, the definitions in the UNCSR and the 1967 Protocol have to be applied to the facts thus ascertained. The provisions of the UNCSR are defining who is a refugee consist of three parts, which have been termed respectively “inclusion,”

36 Igor Khokhlar, 'The Rights of Refugees under International Law' Moscow State Institute of International Relation,
37 ibid
38 ibid
“cessation” and “exclusion” sections. They form the favorable basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicates the conditions whereunder a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the UNCSR.

7.2 Interpretation of terms and phrases of Refugee Definition

The origin of this 1951 UNCSR dateline is explained in the Preamble to the UNCSR. As a result of the 1967 Protocol, this dateline has missed much of its practical importance. The word “events” is not delineated in the UNCSR, but was understood to mean “happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes.”39 The dateline refers to “events” as a result of which, and not to the date on which he left his country of origin. A refugee may have left his country of nationality before or after the datelines, offered that his fear of being persecuted is due to the “events” that occurred before the dateline or to after effects happening at a subsequent date as a result of such events.

The expression “well-founded fear of being persecuted” is the central phrase of the refugee definition. It reflects the opinions of its authors as to the main elements of the refugee character. It replaces the earlier method of defining refugees with categories 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. To the element of the fear-a state of mind and a subjective condition – is added the qualification well founded. This conveys that it is not only the set of mind of the person concerned that determines his refugee status, but that an objective situation must support this frame of mind. The term well-founded fear, therefore, contains a subjective and an objective element, and in determining whether well-founded fear exists, both factors must be taken into consideration. The expression owing to well-founded fear of being persecuted – for the reasons stated – by indicating a specific purpose automatically makes all other reasons for escape irrelevant to the definition. In the case of a famous personality, the possibility of persecution may be higher than in the case of an individual in obscurity. All these reasons, e.g., a person’s antecedents, his history, his reputation, his wealth or his frankness, may lead to the conclusion that his fear of persecution is well-founded.

While RSD must usually be done on an individual basis, situations have also arisen in which entire groups have been displaced under the circumstances indicating

39 UN Document E/68 page 39
that members of the group could be considered individually as refugees. In such cases, the need to assist is often extraordinarily urgent, and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Apart from the circumstances of the type mentioned in the preceding paragraph, an applicant for RSD must generally establish the good reason why he individually fears persecution. It may be presumed that an individual has a “well-founded fear of being persecuted” if he has previously been the victim of persecution for one of the reasons enumerated in the UNCSR. However, the word “fear” refers not only to persons who have been persecuted but those who wish to avert a condition that entails the risk of persecution. The phrases fear of persecution or even persecution are generally foreign to a refugee’s standard vocabulary. A refugee will indeed only rarely invoke fear of persecution in these terms, though it will often be implicit in his story.

There is no universally adopted or accepted definition of persecution, and multiple efforts to formulate such a definition have met with little success. From Article 33 of the UNCSR, it may be construed that the freedom or a threat to life on account of “race, religion, political opinion, membership of a particular social group or social origin” is always persecution. The subjective nature of fear of persecution needs an assessment of the views and feelings of the individual involved. It is also in the light of such views and beliefs that any real or anticipated actions against him must necessarily be viewed. Due to the variations in the psychological make-up of persons and the conditions of each case, interpretations of what tantamounts to persecution are bound to vary. In such situations, the different elements involved may, if taken together, produce an impact on the mind of the claimant that can reasonably justify a claim to well-founded fear of persecution on cumulative grounds. It is not possible to prescribe a general rule as to what common factors can give rise to a legitimate claim to refugee status. It will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

Persecution must be differentiated from punishment for a common law offense and people fleeing from prosecution or punishment for such a crime are generally not refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice. To determine whether the prosecution extends to persecution, it will also be important to refer to the laws of the nation-state in question, for it is possible for a law not to conform with well-recognized global human rights standards and obligations. More often, however, it may not be the law but its application that is discriminatory. Prosecution for a crime against “public
order,” e.g., for distribution of pamphlets, could be a basis for the persecution of the individual on the grounds of the political contents of the publication. Moreover, recourse may generally be had to the principles adumbrated in the various international instruments relating to IHRL which contain binding commitments for the States parties and are instruments to which many States parties to the UNCSR have acceded.

It is immaterial whether the persecution stems from any single one of these reasons or a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the causes in detail. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared to decide whether the definition in the UNCSR is met within his respect. It is evident that the cause for persecution under these various headings will frequently overlap. Usually, there will be more than one element combined in one person, e.g., a political adversary who belongs to a national or religious group, or both, and the conflation of such factors in his person may be relevant in evaluating his well-founded fear. Race, in the present connection, has to be perceived in its broadest understanding that includes all kinds of ethnic groups which are referred to as “races” in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found worldwide condemnation as one of the most apparent transgressions of human rights. Therefore, the racial discrimination represents an essential element in determining the existence of persecution. Discrimination on the ethnic ground will often amount to persecution in the sense of the UNCSR.

The UDHR (Universal Declaration of Human Rights) and the other Human Rights Covenants proclaim the freedom of a person to choose his religion and his freedom to show it or practice it in public or private, in teaching, to worship it and to observe it as per his or her choice. The persecution for reasons of religion may assume different forms, e.g., prohibition of membership of a religious community, or worship in private or in public, of religious teachings, or severe discrimination measures clamped on people due to the practice of their religion or affiliation to a specific religious community. The expression nationality in this context is not to be perceived only as citizenship. It also refers to members of a linguistic or ethnic community and may sporadically intersect with the term race. Persecution for reasons of nationality may

\[\text{ibid}\]
\[\text{ibid}\]
\[\text{ibid}\]
consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances, the fact of belonging to such a minority may in itself give rise to “well-founded fear of persecution.”\textsuperscript{44} The co-existence within the borders of a State of two or more national (ethnic, linguistic) groups may create circumstances of conflict and also circumstances of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, mainly where a political campaign is identified with a specific “nationality.”

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

Possessing the political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. It pre-supposes that the applicant possesses views not tolerated by the authorities, which are critical of their policies or working. It also presumes that such opinions have been noticed by the authorities or are credited by them to the applicant. The political views of a teacher or writer may be more evident than those of a person in a less exposed situation or setting. Persecution for reasons of political opinion denotes that an applicant holds an opinion that either has to been expressed or has come to the notice of the authorities. However, there may also be situations in which the applicant has not revealed his opinions. Due to his firm convictions, however, it may be reasonable to presume that his opinions will sooner or later find manifestation and that the applicant will, as a result, come into confrontation with the authorities. Where this can rationally be presumed, the applicant can be considered to have a fear of persecution for reasons of political opinion.

In this regard, the nationality refers to citizenship and the expression “is outside the country of his nationality” pertains to the persons who have a nationality, as different from the stateless persons. In many cases, the refugees retain the nationality

\textsuperscript{44} ibid
of their country of origin. It is a fundamental requirement for RSD that an applicant who has a citizenship be outside the country of his nationality. However, there are no exceptions to this rule as international protection cannot come into play as long as an individual is within the territorial jurisdiction of his country of nationality. Where, therefore, an applicant alleges fear of persecution about the state of his nationality, it should be ascertained that he does, in fact, possess the nationality of that country. There may, however, be uncertainty as to whether a person has a nationality. However, an applicant’s well-founded fear of persecution must be about the country of his nationality. As long as he has no fear about the state of his nationality, he can be anticipated to avail himself of that country’s protection. He is not in need of international security and is therefore not a refugee. The fear of being persecuted requirement not always extend to the whole country or territory of the refugee’s motherland of nationality. Thus in ethnic clashes or cases of grave disturbances comprising persecution of specific ethnic group, civil war conditions, or national group may happen in only one part of a nation-state. In such situations, an individual will not be excluded from the RSD merely because he could have pursued refuge in another part of the same country if under all the circumstances it would not have been possible to expect him to do so. The possession of a national passport may prove nationality and such a passport establish a prima facie assumption that the holder is a national of the country of an issue unless the passport itself states otherwise.

The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. The phrase owing to such fear qualifies it. Where an individual is willing to avail himself of the protection of his country of nationality, such willingness would generally be incompatible with a claim that he is outside that country owing to well-founded fear of persecution. Whenever the protection of the state of nationality is available, and there is no ground-based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee. The phrase, which relates to stateless refugees, is equivalent to the preceding expression, that concerns refugees with a nationality. In the matter of stateless refugees, the country of his former habitual residence replaces the country of nationality, and the expression unwilling to avail him of the

---

45 In certain countries, particularly in Latin America, there is a custom of “diplomatic asylum”, i.e. granting refuge to political fugitives in foreign embassies. While a person thus sheltered may be considered to be outside his country’s jurisdiction, he is not outside its territory and cannot therefore be considered under the terms of the 1951 Convention. The former notion of the “extraterritoriality” of embassies has lately been replaced by the term “inviolability” used in the 1961 Vienna Convention on Diplomatic Relations.

46 UN Document E/1618, 39

47 ibid
protection... is substituted by the words *unwilling to return to it*. In the case of a stateless refugee, the question of “enjoyment of protection” of the country of his former habitual residence, therefore, does not arise.

Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons mentioned in the definition, he is usually unable to return. Such reasons must be assessed about the land of *former habitual residence* regarding which fear is alleged. The drafters of the UNCSR as the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned defined this. The definition does not require that he satisfied the criteria about all of them. Once a stateless person has been determined a refugee about the *country of his former habitual residence*, may further change of state of habitual residence will not affect his refugee status.

### 7.3 The dual or multiple nationalities

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

“In the case of an individual who has more than one nationality, the expression “the country of his nationality” shall imply that every country of which he is a national of, and a person shall not be perceived or deemed to be without or lacking the national protection of the his country or country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the nation-states of which he is a national”.

This clause, which is mostly self-explanatory, is intended to exclude from refugee status all persons with dual or multiple nationalities who can enjoy themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection. In assessing the case of an applicant with dual or multiple nationalities, it is necessary, however, to distinguish between the possession of nationality in the legal sense and the accessibility of protection by the country involved. There will be cases where the claimant has the nationality of a nation regarding which he alleges no fear, but such nationality may be deemed to be ineffective, as it does not entail the protection customarily granted to nationals. In such situations, the possession of the second nationality would not be inconsistent with refugee status.

The pre-war international instruments that defined various categories of refugees contained no provisions for the exclusion of criminals. It was immediately after the World War-II that for the first time specific provisions were formulated to exclude from the large group of the then assisted refugee’s certain persons who were deemed unworthy of international protection. At the time when the UNCSR was drafted, the
memory of the trials of major war criminals was still very much afresh in the minds, and there was an agreement on the part of nation-states that war criminals should not be protected. There was also a surreptitious agenda on the part of States to deny admission to their territories of criminals who would present a danger to security and public order. The capability to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State Parties in whose territory the claimant seeks recognition of his refugee status. For these clauses to apply, it is adequate to establish that there are “serious reasons for considering” that one of the acts depicted has been committed. Formal proof of previous penal prosecution is not needed. Considering the severe consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.

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

This exclusion clause aims to protect the community of a receiving country from the danger of admitting a refugee who has committed a severe common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of less severe nature of has committed a political offense. In determining whether an offense is “non-political” or is, one the contrary, a “political” crime, deference should be provided in the first place to its nature and purpose, i.e., whether it has been carried out with real political intentions and not merely for personal reasons or benefits. There should also be a direct causal link between the crime committed and its alleged political motive and object. The political element of the offense should also outweigh its common-law character. It will not be the case if the acts committed are seriously out of proportion to the alleged objective. The political nature of the offense is also more difficult to accept if it involves acts of an atrocious nature. Only a crime committed or presumed to have been committed by an applicant “outside the country of refuge before his admission to that country as a refugee” is a ground for exclusion. The country outside would generally be the country of origin, but it could also be another country, except the state of refuge where the applicant seeks recognition of his refugee status.

---

48 A number of liberation movements, which often include an armed wing, have been officially recognized by the General Assembly of the United Nations. Other liberation movements have only been recognized by a limited number of governments. Others again have no official recognition.
A refugee committing a severe crime in the country of reception is subject to the due process of law in that country. In the most extreme cases, Article 33 paragraph 2 of the UNCSR allows a refugee’s expulsion or return to his country of nationality if, having been convicted by a final judgment of a particularly severe common crime, he constitutes a danger to the community of his state of refuge. What constitutes a severe non-political crime for this exclusion clause is problematic to define, specifically since the term crime has distinct connotations in various legal systems. In several countries, the word crime denotes only offenses of a dangerous character. In other countries, it may consist of anything from petty theft to murder. In the present context, however, a serious crime must be a capital crime or a very grave punishable act. Minor offenses punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as “crimes” in the penal law of the country concerned.

In applying this exclusion clause, it is also necessary to strike a balance between the natures of the crimes presumed to have been committed by the applicant and the threshold of persecution dreaded. If an individual has been in a state of a “well-founded fear” of profound persecution, e.g., persecution jeopardizing his life or freedom, a crime must be very grave to exclude him. If the persecution feared is less dangerous, it will be indispensable to have regard to the nature of the crime or crimes supposed to have regard to the character of the crime or crimes alleged to have been perpetrated to establishing whether his criminal character does not outweigh his role as a bona fide refugee.49 In assessing the nature of the crime presumed to have been perpetrated, all the necessary reasons including any extenuating circumstances must be taken into consideration. It is also obligatory to have regard to any aggravating circumstances as, for example, the fact that the claimant may already have a criminal history. The fact that a claimant convicted of a serious non-political crime has previously served his punishment or has been granted an amnesty or has benefited from such pardon is also germane. In the latter case, there is a presumption that the exclusion clause is no longer applicable unless it can be shown that, despite the pardon or amnesty, the applicant’s criminal character still predominates.

In the context of hijacking, the question has arisen as to whether, if committed to escape from persecution, it constitutes a severe non-political crime within the meaning of the present exclusion clause. Governments have regarded the unlawful seizure of aircraft on several occasions within the framework of the United Nations, and some international conventions have been adopted dealing with the subject. None of these instruments mentions refugees. However, one of the reports leading to the adoption of a resolution on the problem states that “the adoption and accession to

49 Supra note. 41, 37
The Draft Resolution cannot be prejudicial to any international legal rights or duties of nation-states under the instruments relating to the status of refugees and stateless persons.” Another report states that “the adoption of the draft Resolution cannot be prejudicial to any international legal rights or duties of States concerning an asylum.”

The various conventions adopted in this connection deal mainly with the manner in which the perpetrators of such acts have to be treated. They invariably give the Contracting States the alternative of extraditing such persons or instituting penal proceedings for the act on their territory, which implies the right to grant asylum. Thus, there is a probability of granting asylum, the extent of the persecution of which the delinquent may have been in fear, and the extent to which such fear is well-founded, will have to be duly pondered over in determining his possible RSD under the UNCSR. The issue of the exclusion under Article 1 F (b) of a claimant who has committed an illegal seizure of an aircraft will also have to be carefully assessed in each case. It will be perceived that this very clause is couched in generally worded language and impugned exclusion clause overlaps with the exclusion clause in Article 1 F (a); for it is evident that a crime against peace, a war crime or a crime against humanity is also an act that circumvents the purposes and principles of the UNO (United Nations Organization). While Article 1 F (c) does not introduce any special new element, it is intended to cover in a general way such acts which are against the purposes and principles of the United Nations (UNO) that might not be fully covered by the two preceding exclusion clauses. The aims and principles of the UNO are set out in the Preamble and Articles 1 and 2 of the UN Charter. From this, it could be gleaned that an individual, to commit an act against these principles, must have been in a place of power in a member State and instrumental to his State’s contravening these principles.

7.4. War refugees

People forced to leave or migrate from their country of origin due to global or domestic armed conflicts are not generally regarded as refugees under the UNCSR or 1967 Protocol. However, they do have the protection provided for in other universal human rights instruments, e.g., the Four Geneva Conventions of 1949 on the

---


51 Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963

52 Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970

53 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971
Protection of War Victims and the 1977 Additional Protocols to the Four Geneva Conventions of 1949 relating to the protection of Victims of International Armed Conflicts. However, foreign invasion or occupation of all or part of a country can result – and occasionally has resulted in persecution for one or more of the causes enumerated in the UNCSR. In such cases, the RSD will depend upon whether the claimant is able to demonstrate that he is under the state of a “well-founded fear of being persecuted” in the territory of the Occupying Power and in addition, upon whether or not he can avail himself of the protection of his national government, or of a protecting power whose duty it is to secure the interests of his country of nationality during the armed conflict, and whether such protection can be regarded to be efficacious. Therefore, the protection may not be available if there are no diplomatic relations between the applicant’s host country and his country of origin. Thus, every case has to be decided on its merits, both in respect of “well-founded fear of being persecuted” and of the availability of effective protection on the part of the government of the country of origin.

7.5. Fugitives and Evaders of Conscription

In countries where military service or policy of conscription is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is mandatory or not, desertion is invariably considered a criminal offense. The punishments may vary from country to country and are not normally considered as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute a “well-founded fear of persecution” under the UNCSR refugee definition. On the other hand, desertion or draft-evasion does not disregard an individual from being a refugee, and an individual may be a refugee in addition to being a deserter or draft-evader. A person is not a refugee if his only cause of desertion or draft-evasion is his reluctance of military service or fear of combat. However, he may be a refugee if his desertion or evasion of conscription is concomitant with other relevant intentions for migrating or remaining outside his country, or if he otherwise has reasons as per the UNCSR refugee definition, to the fear of persecution. A deserter or draft-evader may also be regarded a refugee if it can be demonstrated that he would suffer disproportionately severe sentence for the military offense due to his “race, religion, nationality, membership of a particular social group or political opinion” or otherwise.

However, there are also cases where the necessity to perform conscription may be the sole ground for a claim to the RSD, i.e., when a person can show that the
performance of military enlistment would have needed his participation in military action against his genuine political, religious or moral beliefs, or to valid reasons of conscience. Not every belief, genuine though it may be, will constitute a sufficient basis for claiming refugee status after desertion or draft-evasion. Refusal to perform conscription duties may also be grounded on religious beliefs. If an applicant can show that his religious beliefs are genuine and that such belief is not taken into consideration by the officials of his country of origin in requiring him to perform military duties, he may be able to stake a claim to refugee status. Such a claim would, of course, be backed by any additional indications that the claimant or his family may have confronted difficulties due to their religious beliefs.

The question as to whether the objection to performing the conscription duties for reasons of conscience can pander to a valid claim to RSD should also be regarded in the light of more latest developments in this area. A growing number of nation-states have introduced legislation or administrative regulations whereby persons who can invoke real reasons of conscience are exempted from military service, either completely or subject to their performing alternative service. The enactment of such legislation or administrative regulations has also been the contention of recommendations by the global bodies.\textsuperscript{56} In this context, it would be accessible to the High Contracting States, to grant refugee status to persons who object to performing military duties for the genuine reasons of conscience.

\subsection*{7.6.1 Persons having resorted to force or committed acts of violence}

Persons who resorted to force or committed acts of violence frequently make applications for refugee status. Such conduct is commonly associated with or claimed to be associated with, the political activities or political opinions. These could be the result of individual measures or may have been perpetrated within the framework of organized groups. The latter may either be surreptitious groupings or political-cum-military organizations that are formally recognized or whose activities are widely acknowledged.\textsuperscript{55} Consideration should also be taken of the fact that the use of force is a facet of the maintaining law and order and may by definition be lawfully relied upon by the police and armed forces in the discharge of their functions. Where it has been determined that an applicant fulfills the inclusion criteria, the question may arise as to whether, provided the acts involving the use of force or violence committed by him, he may not be shielded by the terms of one or more of the exclusion clauses.

The exclusion clause in Article 1 F (a) was initially envisioned to exclude from refugee status any individual in respect of whom there were profound reasons for examining that he has *committed a crime against peace, a war crime, or a crime against humanity* in an authoritative capacity. However, impugned exclusion clause is also applicable to persons who have committed such crimes within the framework of different non-governmental groupings, whether officially acknowledged, furtive or self-anointed. The exclusion clause in Article 1 F (b), which refers to “a serious non-political crime,” usually is not relevant to the use of force or acts of violence committed in an official capacity. The exclusion clause in Article 1 F (c) has also been regarded as susceptible to more one interpretation as previously signified due to its vague character; therefore, it should be resorted to with caveat.

### 7.6.2 The Principle of Family Unity & Re-unification

Beginning with the UDHR that states “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” most IHRL addressing the human rights consist similar provisions for the protection of the unit of a family. The Final Act of the Conference that adopted the UNCSR “Recommends the Governments to take the necessary measures for the protection of the family of the refugees particularly to:

1.) Ensuring that the unity of the family of the refugees is preserved especially in the cases where the head of the family has completed the necessary criteria for admission to a particular country of reception.

2.) The protection of minor refugees especially the unaccompanied children and girls, with specific reference to guardianship and adoption.”

The UNCSR does not subscribe to the principle of family unity in the definition of the term refugee. However, the recommendation mentioned hereinabove in the Final Act of the Conference is observed by the majority of States, whether or not they are parties to the UNCSR or the 1967 Protocol. If the head of a family fulfills the criteria of the definition, his dependants are generally granted refugee status as per the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his legal status. Thus, a dependent member of a refugee family may be a citizen of the country of asylum or another country and may enjoy the protection of the reception country. To grant him refugee status in these conditions would not be called for. As to which family members may benefit from the principle of family unity that is the minimum requirement for the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household.
The principle of the family unity does not the only function where all family members become refugees at the same time. It is applicable equally to cases where a family unity has been temporarily interrupted through the departure of one or more of its members. Where the family unity of the refugees is devastated by divorce, severance by death, dependants who have been provided the refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have grounds other than those of personal convenience for wishing to retain their refugee status; or if they no longer wish to be considered as refugees. If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him.\(^\text{56}\)

8. Procedures for the Determination of Refugee Status

It has been seen that the UNCSR and the 1967 Protocol define who is a refugee for these instruments. It is evident that to enable States parties to the Convention and to the Protocol to implement their provisions; refugees have to be identified. Such identification, i.e., the determination of refugee status, although mentioned in the UNCSR (cf. Article 9), is not specifically regulated. In particular, the Convention does not indicate what types of procedures are to be adopted for the determination of refugee status. It is, therefore, left to each Contracting State to establish the process that it considers most suitable, having regard to its particular constitutional and administrative structure. In some countries, refugee status is determined under formal procedures established explicitly for this purpose. In other countries, the question of refugee status is considered within the framework of general methods for the admission of aliens. In yet other countries, refugee status is determined under informal arrangements or ad hoc for specific purposes, such as the issuance of travel documents.\(^\text{57}\) Given this situation and of the unlikelihood that all States bound by the UNCSR and the 1967 Protocol could establish same procedures, the Executive Committee of the High Commissioner’s Programme, at its twenty-eighth session in October 1977, recommended that systems should satisfy specific necessary requirements. These necessary requirements, which reflect the particular situation of the claimant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with specific essential guarantees, are the following:

a) The experienced official (e.g., immigration officer or border police officer) to whom the claimant addresses himself at the border or in the territory of a High Contracting State should have clear instructions for dealing with cases which

---

\(^{56}\) Supra note. 41, 44  
\(^{57}\) Supra note. 41, 45
might come within the purview of the relevant international instruments. He should be required to act by the principle of *non-refoulement* and to mention such cases to a higher authority.

b) The applicant should obtain the required guidance as to the process to be followed.

c) There should be a recognized authority – wherever possible a single central authority – with responsibility for examining requests for the RSD and taking a decision in the first instance.

d) The applicant should be given the essential facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants must also be provided the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

e) If the applicant is identified as a refugee, he must be informed accordingly and issued with documentation certifying his refugee status.

f) If the refugee status seeker is not recognized, he should be provided a reasonable time to appeal for an official reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

g) The applicant should be allowed to remain in the country pending a decision on his initial request by the competent authority mentioned in paragraph (iii) above unless the administration has recognized that his claim is derogatory. He should also be allowed to remain in the country while an appeal to a higher administrative authority or the courts is pending.  

The UNHCR Executive Committee also expressed the optimism that all States parties to the UNCSR and its 1967 Additional Protocol shall take appropriate measures to establish the RSD procedures shortly and give favourable consideration to UNHCR participation in such proceedings in proper form. Determination of refugee status, which is closely related to questions of asylum and admission, is of concern to the High Commission in the exercise of his function to provide international protection for refugees. In some countries, the Office of the UNHCR participates in multiple forms, in procedures for the RSD under Article 35 of the UNCSR and the corresponding Article II of the 1967 Additional Protocol.

---

8.1.1 Establishing the facts

The relevant facts of the individual case will have to be provided in the first place by the applicant himself. It will then be up to the person charged with determining his status to ascertain the validity of any proof and the credibility of the applicant’s depositions. It is a general legal principle that the burden of proof lies on the person making a claim. In most cases, a person fleeing from persecution will have arrived with the barest requirements and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. Untrue depositions by themselves are not a reason for refusal of refugee status, and it is the examiner’s responsibility to evaluate such statements in the light of all the circumstances of the case.\(^{59}\) An intensive examination of the various methods of fact-finding is outside the scope of the present UNCSR. However, it may be referred that essential information is often provided, in the first instance, by completing a standard questionnaire. Therefore, it is frequently necessary to give the applicant the benefit of the doubt. The advantage of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.

8.1.2 Cases of special problems in establishing the facts

It has been perceived that in doing the RSD the subjective element of fear and the objective element of its well-foundedness required to be established. It frequently happens that an examiner is encountered with an applicant having mental or emotional disturbances that impede a reasonable examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot, therefore, be disregarded, it will call for different techniques of examination. The examiner should, in such cases, whenever possible, obtain an expert medical opinion. The medical report should provide information on the nature and threshold of mental illness and should examine the applicant’s ability to fulfill the requirements generally expected of an applicant in presenting his case. The conclusions of the medical report will decide and determine the examiner’s further approach.\(^{60}\) The investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more penetrating and probing than in a “normal” case and will call for a close examination

\(^{59}\) Supra note 41, 47

\(^{60}\) Supra note. 41, 49
of the applicant’s history and background credentials, utilizing whatever outside sources of information may be available. There is no special provision in the UNCSR regarding the RSD of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of “well-founded fear” in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor’s refugee status will be determined according to the principle of family unity.

The question of whether an unaccompanied minor may deserve refugee status that must be determined in the first instance as per the degree of his psychological and mental development and maturity. In the case of children, it will generally be necessary to enroll the services of experts well-versed in the child psychology. A child – and for that matter, an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose work it would be to advance a decision that will be in the minor’s best interests. Where a minor is no more a child but an adolescent, it shall be more straightforward to determine the refugee status as in the case of an adult. However, this again will depend upon the real degree of the adolescent’s maturity. It can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may generally be assumed not to be mature enough. They might have fear and a will of their own, but these may not have the same significance as in the case of an adult. Thus, if an unaccompanied child or minor finds himself in the company of a refugee group, this may – depending on the circumstances – signify that the child is also a refugee. The conditions of the parents and other family members including their conditions in the minor’s country of nationality will have to be taken into account. If there is a reason to believe that the parents wish their child to be outside the nation of birth on the grounds of well-founded fear of persecution, the child himself may be presumed to have such fear.

9 Termination of Refugee Status: Advocacy for Human Rights Process

Article I. C. (1) to (6) of the 1951 UNCSR delineated the conditions whereunder a refugee ceases to be a refugee. These conditions are based on the consideration of international protection that should not be granted where it is no longer necessary as Article I-C of the UNCSR provides that this 1951 Convention shall cease to apply or not applicable to any person falling under the terms of Section A if:

---

61 Supra note. 41, p. 51
(a) He has voluntarily re-acquired for himself the protection of country of origin; or
(b) Having lost his nationality, he has voluntarily re-acquired it; or
(c) Having obtained a new nationality, and enjoys the protection under the new nationality of a new country; or
(d) He has voluntarily re-habilitated himself or herself in the state of origin or outside which he remained owing to fear of persecution; or
(e) He is no longer a refugee as the circumstances whereunder he has been recognized as a refugee have ceased to exist, or continue to be a refugee to avail himself of the protection of the country of his nationality;
(f) Being a person who does not have any nationality or due to the circumstances whereunder has been acknowledged as a refugee has ceased to exist, and able to return to the country of his former habitual residence.

The UNCSR, in Sections D, E and F of Article I, contains provisions whereby persons are otherwise having the characteristics of refugees, as defined in Article I, Section A, are excepted from the refugee status. Such people come into three groups: The first group (Article I-D) comprises of people already receiving UN protection or assistance; the second group (Art. I-E) addresses people who are not regarded to be in need of international security; and the third group (Art. I-F) enumerates the categories of people who are not supposed to be deserving of international protection. Usually, 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, the prohibition under the clause D of Article I apply to the persons who are in respect of security or assistance from organs or agencies of the UNO, other than the UNHCR.

10. Desiderata for Better Promise of Human Rights: Agenda and Vaticinations

It may aptly be gleaned from the on-going discussion that it is the human rights, which are denied in any state action about the internal armed conflict, deforestation, desertification, toxification and even international armed conflict. Some of the inferences are: First, the right of an individual to assert and uphold his or her ethnic, religion, linguistic or cultural identity should be and generally is recognized in any civilized society. Such rights have been most usually declined and protected, in the first instance, in individual terms, whether by conventional or statute law or in a national or international bill or code of human rights enforceable through something like the ordinary court system. It includes in that context specialist’s bodies ranging from the US Equal Opportunities Commission and Canadian Provincial Human

62 Supra note. 18
Rights Commission right through (for the UK, among others) to the European Commission and Court of Human Rights and, most recently, India’s National Human Rights Commission. Second, the problem becomes more complicated (and more dangerous) when we come to consider in the context of a multi-ethnic society—the group exercise of these rights by those who seek quite reasonably to enjoy, practise or use their own culture, religion or language in association with each other, or in similar collective fashion to participate in public affairs.

So, thirdly, we move beyond the primarily legal to a more political or constitutional approach. There is no limit to the gamut of theoretical structures that can be designed for the potentially orderly allocation, sharing or distribution of power between different groups, minorities, communities or nationalities. At one extreme there is the right of secession, as ultimately exercised by Bangladesh, Eritrea or Ukraine or, most fundamentally, by what we now call the United States of America. Often, but happily not quite always a bloody war of independence has followed secession. Short of that, of course, there are all the options of proportional representation, federalism, inter-communal power-sharing and the like. And with such objectives or solutions in mind, there have sprung into existence bodies like India’s Commission for Minorities and, in December 1992, the CSCE’s European High Commission for National Minorities. But it noted that the first of these exist within the boundaries of a single state while the role of the second extends, with their consent, to no fewer than fifty-three independent nation-states. It is noticeable that the US has so far managed to avoid the need to develop an institution of this kind. It remains to experience how now it will be able to continue to do so, given the growth of a substantial and substantially Monoglot Hispanic community in the midst of its body politics.

Lastly, however, we are all too often obliged to recognise that there is a limit to constitutional inventiveness of this kind, or at least to the willingness of our peoples to accept it (That is just as true, incidentally, for a group of governments who are striving, for example via a place called Maastricht, moving in the opposite direction). It is in just such cases that the yearning of a national or other minority for self-determination, in the old Wilsonian phrase, can sometimes take them off the map of civilized behaviour. Innocent patriotism is suddenly transformed into malignant nationalism. The secessionist all too often follows as an unhappily current path towards terrorism. Meaning thereby, it is axiomatic that, in a broad human rights approach to the refugee problem, the stress on prevention and return as well as on the duties of the country of origin or of other nation-states in relation to the nation of birth must not detract in any way from or be allowed to underestimate the responsibility of the receiving state and the fundamental importance of principles for
the protection of refugees, including those of prohibiting *refoulement* or providing for asylum or, where necessary, the solution—the external settlement. In a broad human rights approach, it is essential to take fully into account that the refugee situation is one of exception and that international protection is necessary precisely because the individual is not able or not willing to avail himself or herself of national security for the reason that makes that individual a refugee.

Human Rights are an essential source for the development of the protection of the refugee within the receiving country. For example, the relevance of the prohibition of cruel, inhuman and degrading treatment to the application of the principle of *non-refoulement* has already been recognized by human rights bodies and by new international human rights instruments. Moreover, human rights principles apply to procedural aspects of the determination of refugee status as well as to conditions of presence regarding such elements as detention and personal status. When, in 1982, the UNHCR Executive Committee adopted a significant set of minimum basic human standards for the treatment of asylum-seekers who have been temporarily admitted in a country pending arrangements for a durable solution, express reference was made within the conclusion to the fundamental human rights globally recognised, especially those set out in the Universal Declaration of Human Rights. The Human Rights in the refugee situation serve to strengthen and enrich refugee law in a dynamic way by ensuring that the law responds humanely and practically to an actual human and social need. The respect for human rights cannot flourish in a world where oppression, injustice, and violence are widespread and endemic. Today, freedom, justice, and peace should be subsumed within a broader notion of development. While respect for human rights promotes growth, it is equally valid that solidarity and co-operation in development encourage respect for human rights.

11. Conclusion

The UNCSR was the culmination of significant historical development in the definition on the global plane of basic minimum legal norms and 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 conventional definition, which is substantially the same as that in the UNHCR Statute – was regarded as a significant step forward, compared with the definitions by categories in the Pre-war refugee instruments and 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. Therefore, Sadako Ogata, the Ex-UN High Commissioner for Refugees, observed that “The

---

63 Supra note 9.
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 Global South, from the Global South countries to the Global North countries, and from the East to the West. Even the concept which is a refugee requires new clarification.”

The definition of the term ‘refugee’ provided by the UNHCR Statute or the UNCSR has led some to consider that these definitions are essentially applicable to individuals and are of little relevance for today’s refugee problem, which is primarily problems of refugee groups. Because a \textit{prima facie} group determination of refugee character does not mean that every member of the group would satisfy the test of a well-founded fear of persecution if his or her case was individually determined. Group determination by its nature concentrates on the objective situation in the country of origin. However, to deal with these new refugee situations the High Commissioner, with the approval of the General Assembly developed and applied the \textit{good office’s} procedure. This procedure was originally employed to concerning 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. After that, in the new refugee situations in Africa, the ‘good offices’ was used to enable the High Commissioner to assist refugee groups under his regular programme. In making this \textit{prima facie} determination of refugee character, the High Commissioner used broad criteria based on the objective situations existing in the country of origin.

Here it may be noted that the UNCSR was primarily by Europeans about Europeans. A frequent criticism of the document is that it is too ‘Euro-Centric.’ Western Europe now appears among the least committed of the regions to the original humanitarian underpinnings of the UNCSR. 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 precisely who merits protection under international refugee law. Some argue that the UNCSR 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 \textit{de facto} or ‘humanitarian’ refugees, are required.

---

64 UNHCR, Press Release, Feb. 25, 1991
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, to eliminate the ambiguities of the Convention definition as far as possible. Second, and most importantly, the UNCSR 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 foreseen by the drafters of the UNCSR. 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 fundamental 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 deals. It should never be forgotten that the Convention is an essential part of our humanitarian heritage for the international protection of refugees.

---