Chapter 1

WHO IS A REFUGEE?

The issue as to who precisely is a refugee has evolved over time. In this chapter the history of the concept is briefly traced.

Refugees are people who leave their homes to seek sanctuary and protection elsewhere. They have existed since historical records began - Christ and Muhammad were refugees - and these massive population movements have changed the demographic maps of the world during every century. The traditional causes are well documented: war, intolerance and persecution of ethnic, religious or political minorities (Khan, 1981). Previously, these mass movements have paid little attention to the boundaries of sovereign States. Finding a place of sanctuary or asylum did not necessarily require formal permission as it does today. The development of fixed and closed State frontiers especially since the Great War of 1914-18, has effectively barred the traditional escape routes of those fleeing oppression.

By the twentieth century, the possession of particular documentation became, in most countries, essential in order to conduct the normal transactions of life, such as marriage or obtaining employment. The provision of this necessary documentation did not only signal the first international legal response to refugees, but also led to a specific legal regime on refugees which, in itself, was later to result in the development of a specific and quite technical meaning of the term 'refugee'.

Social science research is discipline specific. Therefore, epistemological knowledge and knowledge in general have developed within specific disciplines. The study of refugees in contrast is interdisciplinary. It cuts across different disciplines and is not subject to compartmentalisation. Mostly because of this, but also due to its relative recency as a major and continuing phenomenon, little conceptual work has been developed in the area of refugees. Furthermore, no one discipline has a monopoly in regard to the position of people whose lives have been traumatised by violent events.

Refugees are not a phenomenon exclusive to our era. Both individual refugees and identifiable groups have been generated by societal intolerance since the remotest of epochs. Large, involuntary displacements of people have been associated with the grant of "territorial asylum" since antiquity (Zolberg 1989, 5-7). Understanding the concept of asylum in a historical context is therefore important in putting forth constructive ideas to deal with the complex problems relating to asylum that face us today, particularly in the developed nations.

The English word asylum derived originally from the Greek word 'a' (negative) and 'sulon' (right of pillage). Literally, it means a place where pillage is forbidden (Brewer 1978, 71). For the ancient Greeks, asylum was a way for certain individual fugitives to seek safety in places of worship. This 'internal' right of asylum existed simultaneously with an 'external' or territorial, right to asylum, afforded to foreign political refugees in different kingdoms or city-States. The Greeks maintained this right, which they considered divinely inspired, primarily to save the lives of those defeated in war (Ryan 1987, 213).

ASYLUM

Under Roman law, the right of territorial asylum was more restrictive. However, it too recognised the right of asylum for the 'maliciously pursued' and the 'oppressed' (Ryan 1987, 214). In the first millennium, at about the same time as it established some basis in Anglo-Saxon law, perhaps the most generous legal right to asylum was formed in the Arab Islamic tradition, which codified the Koran in the Islamic law of Shariah (Arnaout 1987,19).

The right of asylum as sanctuary was also accepted as a fundamental principle of Canon law, first practised by the Christian Church with the toleration of Christianity in the Roman Empire by Constantine in 313 AD. Having borrowed substantially from Roman law it was

> "... natural that the Church, both in England and elsewhere considered the concept of asylum or sanctuary as part of its patrimony. Indeed, as the pagan Roman temples were already considered asylums for refugees, it was natural that when the Christian church took over the temples, the ancient usage would continue. Moreover, in times of political commotion, those persecuted by the victorious party could find protection against violence, and the clergy meanwhile would make intercession with the authorities. Thus, the essential basis for sanctuary, protection from political violence, was carried directly into canon law and church policy from the Roman law" (Ryan 1987, 215-216).

It was not until the seventh century, however, that the right of asylum was first legally recorded in Anglo-Saxon secular law, the nature of the right varying according to the specific time and region in question. This law was primarily, though not exclusively, designed to afford protection to certain criminal fugitives in designated holy places considered to be divinely inviolable (Pope 1987, 679).

Although Canon law was largely incorporated into secular law both continued to exist concurrently (Pope 1987, 681). The Church occasionally provided protection to domestic political and even religious offenders. This 'internal' right of asylum continued during the growth of the English Common law in the early medieval period, but sanctuary became more circumscribed as the power of the secular State grew (Pope 1987, 683, 687).

From the late fifteenth century to the Jacobean period, the English Parliament increasingly opposed the right of internal church sanctuary.

> "By 1486, at least political opponents, for whom sanctuary was originally allowed under Greek and Roman Law, could no longer confidently claim its protection in England. The courts were prepared to go to whatever length necessary to limit the privilege and discredit proven sanctuaries so that the political aims of the government would be advanced. The fact that sanctuary had been a hereto untrammeled right of every English subject seems to have mattered little ... Thus, sanctuary in England, and elsewhere, was on its last legs ... and finally in 1624 [Parliament] enacted that sanctuary could not be allowed in any case. This right had already been eliminated in France in 1539 and restricted in the Papal States and Empire in 1591 (Ryan 1987, 225, 228).

The secular authorities also considered it increasingly important to limit the already restrictive practice of granting territorial asylum to States (Sinha 1971, 17) By the time of the Reformation, however, granting territorial asylum became more common, as States consolidated their internal control and sought to demonstrate their strength to other States. From the sixteenth to the nineteenth century, territorial asylum for mass movements of religious and political refugees became common practice in European States when it was perceived to be in a State's national interest (Moore 1987, 23). The French Revolution, in particular, created numerous political asylum-seekers who found refuge in neighbouring States, and went a long way toward legitimising the concept of territorial asylum (Sinha 1971, 120, 171).

During the nineteenth century many European States returned to a restrictive practice in granting territorial asylum, which largely coincided with the rise of nationalism. The First World War generated unprecedented numbers of externally displaced people,

however, with the two largest examples being almost two million Russians uprooted by the war and the Bolshevik Revolution, and approximately the same number of Greeks who fled from military defeat by the Turks in 1922. These dramatic upheavals early in the century made it clear that if the refugee problem was to be ameliorated, an independent and internationally responsible organisation was called for. It became increasingly obvious that the refugee dilemma was an international one that could most effectively be dealt with on a coordinated supernational level.

WHO IS A "REFUGEE"?

In everyday language, the definition of a refugee is extremely broad. According to the Macquarie Dictionary it is a person who "flees for safety". Using this definition, the causes and method of a refugee's flight are irrelevant. The refugee may be compelled to escape because of natural disaster, violent conflict, economic breakdown or political persecution. Jacques Vernant (1953, 2) wrote a "refugee is invariably and essentially someone who is homeless, uprooted". Guy Goodwin-Gill (1983, 1) noted that "in the ordinary meaning of the word 'refugee' lies an assumption that the person concerned is worthy of being, and ought to be assisted, and, if necessary, protected from the causes of flight."

Historically, however, the word "refugee" has a narrower meaning - it refers to a special type of international migrant. The term was first applied to the French Huguenots, victims of religious persecution who came to England after the revocation of the Edict of Nantes in 1685. Later, British patriots who fled the colonies during the American revolution came to be called refugees (Oxford English Dictionary 1971, 357). In the nineteenth century, the word "emigre" became the fashionable way to refer to political exiles, especially those from Tsarist Russia. The mass forced population movements of the early twentieth century brought the word "refugee" back into popular use, partly because it became the preferred term for the vast array of international and national relief agencies (Tabori 1972, 24). In each of these cases, a refugee is identified not simply as a person fleeing for safety, but one who crosses an international border to find it. In addition, the refugee is distinguished from other types of international migrants by his or her motivation for leaving. In contrast to the economic migrant or victim of a natural disaster, the refugee flees the home country because of intolerable conditions there.

International law tends to define refugees narrowly. This is because the definitions establish obligations of States towards refugees and entitle those granted refugee status

to certain benefits. According to Goodwin-Gill (1983, 2), "the purpose of any definition or description of the class of refugees is to facilitate, and to justify, aid and protection; moreover, in practice, satisfying the relevant criteria will indicate entitlement to the pertinent rights or benefits."

Writing on the eve of World War II, Holborn (1938, 702-3) directly countered the belief that a general definition of a refugee would encourage the creation of new refugees and that such a definition perpetuates refugeehood. According to Holborn, "refusal to grant a legal status to those who have been forced out of their countries has had no deterring effect upon governments ..." She continued by saying that "a clearly defined status for refugees would aid efforts to make refugee status transitory in character and would facilitate settlement." Holborn further argued that a general definition would depoliticise decisions about refugee status by giving local officers concerned with refugees, rather than government officials, the ability to judge who qualified as a refugee. At the time of her writing, Holborn's viewpoint constituted a minority position.

After World War II, momentum grew for the creation of a universal definition of a refugee. With this trend came increasing emphasis within the debate over refugee definitions about the causes of a refugee's flight. This reflects the dramatic impact of the Nazi era on thinking about human rights; in many minds, refugees became synonymous with victims of Nazi persecution. As a result, refugees tended to be thought of as individuals facing persecution for their religious or political beliefs or because of their association with a particular class or racial group. Vernant (1953, 6) wrote:

> "Before a man can be described as a refugee, the political events which caused him to leave, or to break with, the State to which he owed allegiance must be defined. The political events which in the country of origin led to his departure must be accompanied by persecution or by the threat of persecution against himself or at least against a section of the population with which he identifies himself."

Recognition of the role of persecution in relation to refugees led to sharp criticism of refugee definitions of the interwar period. Goodwin-Gill (1983, 4), for instance, saw interwar definitions as an abstraction, divorced from the events which actually produced refugees.

Grahl-Madsen (1966, 98) wrote:

> "As the lack of protection is not relevant unless it is caused by a deep-rooted political controversy between the authorities and the individual, the preoccupation with the refugees lack of protection leads to concerning oneself with the ambivalent symptoms rather than with the real issue, namely it is characteristic for a refugee that his relations to the authorities of his home country have become the negation of the normal relationship between a State and its nationals."

He defined (1966, 97) a refugee as "a person in whose case the normal bond of trust, loyalty, protection, and assistance between a person and the government of his country has been broken (or does not exist)".

The 1951 Convention definition of refugee is used for the purposes of this thesis. The thesis argues that the definition itself is adequate but that States including Australia and Canada interpret it in a restrictive manner. It is adequate because it provides protection. The thesis shows the world cannot cope with the number of persons who could be regarded as refugees in terms of this definition. Europe and Australia, for example, do everything they can to prevent one person gaining refugee status. Canada's approach has been somewhat more enlightened. What is the point of expanding the scope of the definition to cover, for example, the millions of displaced persons? It is stressed that the debate over refugee definitions is not an exercise in semantics. Controversy about 'who is a refugee' disguises an underlying question about 'who deserves special assistance?' The 1985 famine in Ethiopia illustrates this. At that time, United Nations officials in the Sudan had to decide whether or not the starving migrants from Ethiopia were merely victims of a natural disaster or bona fide refugees who qualified for food and other assistance. In this case defining refugees became a matter of life and death (Personal communication - Dr Dereck Cooper, Refugee Studies Programme).

STATELESSNESS

It should be noted that a person becoming a refugee does not lose his/her nationality and does not become stateless. A refugee retains the original nationality unless deprived of it by the country of origin. If a refugee has a passport, it is normally deposited with the authorities in the receiving country. If however the refugee wishes to relinquish that status, for instance in the case of repatriation, the passport will be returned to the former refugee in exchange for the Convention Travel Document which will previously have been issued. Statelessness has serious human consequences. So serious are they that the US Supreme Court held that denationalisation was

unconstitutional under Eighth Amendment protection against cruel and unusual punishment. In *Trop v Dulles* (1958) 78 Sup. Ct. 590, 598 the court held that:

> "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organised society. It is a form of punishment more primitive than torture for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights."

As Australia and Canada are Common law countries the position of the alien at Common law should be noted. In this regard, Lord Denning M.R.'s summary of the Common law in the case of *R v The Governor of the Pentonville Prison; Ex parte Azam,* [1973] 2 All E.R. 741 at 747 is helpful:

> "At Common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason: see *Schmidt v Secretary of State for Home Affairs*, [1969] 2 Ch. 49 at 168. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country: see *R v Brixton Prison (Governor); Ex parte Soblen*, [1963] 2Q.B. 243 at 300, 301. The position of aliens at Common law has since been covered by the various regulations; but the principles remain the same."

Australia, Canada and United States of America are immigrant resettlement countries. Refugees are considered as a portion of their overall immigrant intake. Australia, Canada and the United States of America are not considered by policy makers as first asylum countries. Yet all three in the 1980s and 90s have encountered situations which make them into countries of first asylum. Each country has responded to this problem by introducing different mechanisms to reduce their role as countries of first asylum.

The respective laws of each country defined the refugee problem somewhat differently and provided for different programs to meet the problems of refugees. Further, each country responded somewhat differently to the problem of distinguishing between

economic migrants, particularly those who tried to enter the respective countries through the refugee determination process, and refugees. All three were accused by refugee support groups of acting to deter genuine refugee claimants.

Australia, Canada and the United States of America have different methods of setting refugee targets and distributing the intake allotment amongst different groups of refugees. The countries also differ in the mode of dealing with the Convention as distinct from humanitarian admissions. These different procedures reflect somewhat different conceptions of refugees and yield different results. Australia and Canada have different modes of balancing the desire for a humanitarian response to refugees and the desire to control the intake of immigrants into the country while, at the same time, the integrity of the refugee system is preserved. The countries have not successfully come to terms with the need to provide a humanitarian response to refugees and recognise the right of refugees to a fair determination of their claims while putting in place an effective immigrant control mechanism.

Australia, Canada and the United States of America have somewhat different foreign policy interests and records, particularly with respect to different regions of the world. They also have different records, policies and programs with respect to assisting refugees, linking development and refugee settlement in countries of first asylum and protecting refugees in dangerous border situations.

East-west and north-south relationships are undergoing flux in ways that may have profound consequences for the handling of refugee movements. Changes are occurring in movements from Eastern Europe to the West. Encouraging free immigration from Soviet bloc countries has been an important tenet of both United States of America and Canadian foreign policy. The liberalisation of emigration policies in the former Soviet Union, Poland and Hungary has led to record numbers of asylum and resettlement applicants. Moreover, ethnic conflicts and disastrous economic policies have produced sizeable outflows from Bosnia, Croatia and Romania. The relaxed criteria for considering Eastern European refugee claims by Canada and the United States of America stand in stark contrast to policies for dealing with refugees from the rest of the world. So too does the blanket approval of refugee status for certain Chinese students by the Australian Government.

Of interest is the potential participation of Eastern European countries in international refugee affairs. Several countries are exploring the possibility of signing the UN Convention on the Status of Refugees. Hungary already has, albeit with a

geographical reservation. Poland, the Czech and Slovak Republics, Romania and Russia have also signed. If these countries sign the Convention and become more active in refugee affairs, the framework in which refugee issues are handled could very well change having regard to the current convention definition.

Although in most cases granting asylum to forced migrants does not present serious military or political threats to the host countries, large semi-permanent movements of migrants may nevertheless have adverse impacts on these countries. Domestic resentment may flow from resettlement policies and this may translate into political action and, indeed, domestic conflict.

The region in which voluntary and forced migration has most recently become linked with security concerns is Western Europe. The European Union's commitment to a single European market from 1 January 1993 created the need for stronger external border controls in anticipation of the elimination of internal border controls between member States. Concerns over terrorist activities and drug trafficking are becoming associated with migration issues. The rising numbers of illegal migrants and asylum-seekers have raised the question as to whether the situation is out of control. Since the majority of asylum requests are rejected, there is agreement among policy-makers, the general public and some refugee advocates that the asylum system is being misused as a surrogate immigration channel. This is the situation also in Australia and Canada.

Opinion surveys sponsored by the European Community in the late 1980s and early 1990s have shown that immigration and refugee issues have become more and more visible in all member countries. In a 1989 poll only 5 per cent of the respondents in the 12 member States mentioned "the immigration problem" as the most important problem facing them in their country; it ranked lowest out of six problems mentioned. By 1991 it had become the second most frequently mentioned problem (Commission of the European Communities 1989, 4; "The Response to Rising Concerns about Immigration" 1991, 11). Similarly, whereas in the 1989 survey thirty-seven percent of the respondents felt that there were too many people of another nationality living in their country (Commission of the European Communities 1989, 42-44), in a more recent survey this proportion had risen to fifty per cent (Riding 1991).

The perception of large numbers of asylum-seekers receiving economic support from the government - at a time in which the local population is also experiencing unemployment and general economic hardship - may have contributed to a rise in negative attitudes and physical violence, toward foreigners in several western

European countries. Segments of the German population have committed numerous acts of violence against members of its foreign population; both asylum-seekers and long-term migrants have been hurt. On the other hand, it is equally plausible that the violence against foreigners has little to do with the asylum problem *per se* and is really a manifestation of much deeper social tensions.

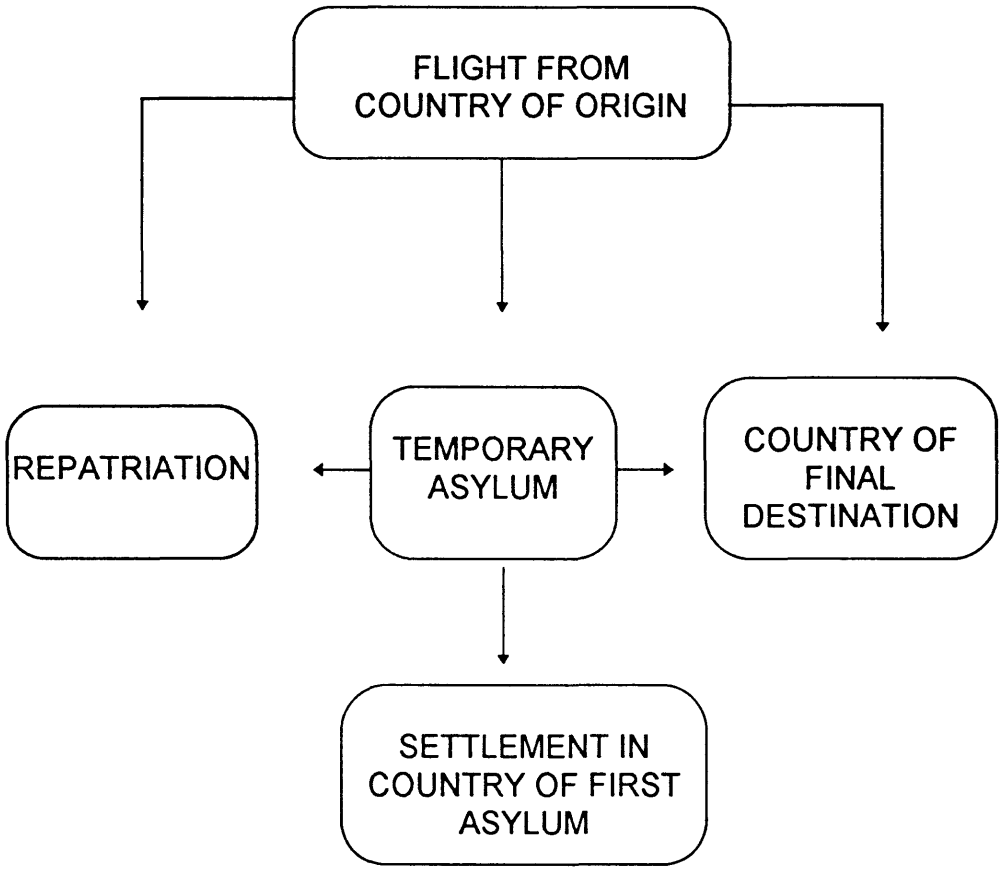
Ursula Birsl, whom *Der Spiegel* called a leading expert on the neo-Nazis in Germany has said: "Germany has four to five million foreigners, about 7 per cent of the population; less than France or England. Asylum-seekers are not the real problem here. If we had no foreigners, the far right would attack the cripples; if they got rid of all the cripples they would attack leftists, if they got rid of all the leftists, they would find some other minority to hate." In Birsl's opinion, the major problem is alienated, disenfranchised youths who after leaving school and before getting a job, turn to a movement that gives them simple answers as well as a seemingly firm grip on their fate (Birsl quoted in Jolis 1993, 431).

As host countries seek to expedite asylum decisions or to exclude some potential applicants from the process altogether, the danger arises that some who need asylum and would qualify for it will be denied access to the system. Security considerations may threaten the protection of bona fide refugees. The validity of arguments using national security considerations as justification to limit the numbers of asylum-seekers or implementing deterrent measures needs to be carefully scrutinised. For example, Frelich (1992) points out that, although the United States Government claimed that the 47-square mile Guantanamo Naval Base could not accommodate any more asylum-seekers, the 12 500 Haitians seeking asylum were all being contained on one airfield.

Over the course of centuries, but especially since Nazi Germany, the meaning of "who is a refugee" has become a matter of contentious policy. The 1951 Convention definition has served the world well. What the world community must now consider is whether the concept of refugee should be extended to persons displaced within their own country.

In the next chapter the development of international law in relation to refugees will be considered.

A REFUGEE'S JOURNEY



Chapter 2

INTERNATIONAL SCENE

In Chapter 1 the development of the concept of refugee was traced. It was apparent the term has international connotations. In this chapter the development and evolution of refugee law is considered.

It has long been a principle of Common law that international law is not part of domestic law, save as a presumption. In Australia, the general principle is that treaties do not constitute independent sources of law on which litigants may rely in proceedings before national courts (*R v Chief Immigration Officer, Heathrow Airport; Ex parte Salamat Bibi* (1976), 3 All ER 843; *British Airways Board v Laker Airways Limited* (1983) 3 All ER 375). A treaty may merely be used as an aid to the interpretation of a statute which is designed to incorporate that treaty into internal law (*Fothergill v Monarch Airlines* (1979) 3 All ER 445).

Three bodies of international law affect refugees; refugee law and to a lesser extent humanitarian law and human rights law. The main source of international law is treaties, but international law can also derive from custom, as well as from the practice of the United Nations and other international organisations. The fundamental principle of international law that serves to protect refugees is the principle of *non-refoulement* which is clearly stated in refugee law and reinforced by principles of humanitarian and human rights law as shown as follows:

Refugee Law: UN Convention relating to the Status of Refugees (1951). Article 33 states:

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

Humanitarian Law: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949):

Common Article 3 prohibits human rights violations. Common Article 1 stipulates that all parties to the Convention are requested to respect and ensure respect for humanitarian law. This rules out *refoulement* to a country in which Article 3 is being violated.

Human Rights Law: International Covenant on Civil Political Rights and (1966),
Article 13 states:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by ... the competent authority."

Initially, the role of the conventions was to provide refugees with travel and identity documents. Examples are the Arrangement of 5 July 1922 under which Russian refugees were provided with travel and identity documents (Nansen Passport System), the Convention dealing with those persons leaving Russia after the Bolshevik Revolution in 1917 (Arrangement relating to the issue of identity certificates to Russian and Armenian refugees, 12 May 1926, 89 League of Nations Treaty Series (LNTS) No. 2004), and later the Convention concerning Assyrian Assyro-Chaldean and assimilated refugees (Arrangement of 30 June 1928, 89 LNTS No. 2005). Under these arrangements, a group or category approach to the definition of refugee was adopted. The only necessary conditions were membership of a particular nationality group which no longer enjoyed the protection of its national State for whatever reason and presence outside one's country of origin. Presence outside the country of origin was not explicitly required, but was implicit in the objectives of the arrangements, namely, the issue of identity certificates for the purpose of travel and resettlement. However, the 1938 Geneva Convention on the Status of Refugees Coming from Germany (4461 LNTS 61) excluded persons leaving Germany for purely personal convenience.

Prior to the interwar period, the ambiguous legal status of refugees did not present major problems. Since the number of exiles was relatively small, States could easily incorporate them into their own legal systems. The traditional legal framework, however, proved to be grossly inadequate when the number of refugees reached the millions in the early twentieth century. Thus, the need to develop an improved system arose. This is best illustrated by the words of the legal scholar R. Yewdell Jennings (1939, 110):

> "He [the refugee] is an anomaly for whom there is no appropriate niche in the framework of the general law. It is for this reason that it has been necessary to establish a special conventional regime governing his legal status."

The literature seems to indicate a two-fold strategy followed. On the one hand, there was a movement towards creating a legal framework which would define the status of refugees in international law. On the other hand, the refugee agencies of the League of Nations attempted to protect refugees through the provision of consular services and interventions with host governments on their behalf.

DEVELOPMENT OF DEFINITIONS

The refugee definition adopted by the Intergovernmental Committee on Refugees (ICR) following the Evian Conference in 1938 represented a significant break away from previous definitions by focusing on lack of protection due to the personalised criteria of political opinion, religious belief and racial origin to evaluate claims to refugee status. The extension of the Committee's mandate in 1943 constituted the first shift away from refugee definitions based on territorial origin. The mandate was extended to include "those persons wherever they may be who, as a result of events in Europe, have had to leave ... their countries of residence because of the danger to their lives or liberties ..." (ICR Doc. 25 July 1944). The phrase "because of the danger" introduced for the first time the element of a future speculative risk as a basis for a claim to protection. A recognition of refugees as persons who choose to remain abroad despite an ability to return appeared in July 1946 when the protective functions of the Committee were expanded further to include "those persons ... unwilling or unable to return to their country of nationality ..."

In 1943 the United Nations Relief and Rehabilitation Administration (UNRRA) was established (Vernant 1953, 3). This organisation, after World War II with military assistance, had the task of repatriating and resettling the millions of refugees and displaced persons in Europe although it had primarily been established to assist with post-war reconstruction. The definition of those refugees to be assisted was very vague and included those displaced across international frontiers without specifying reasons for displacement (UNRRA Journal 152, 1945). This wide definition was attacked by the former Eastern bloc countries, and in 1946 the United Nations Relief and Rehabilitation Administration's mandate was restricted by a directive which required applicants for post-war refugee status to establish "concrete evidence" of persecution. This represented the first explicitly individualistic approach to refugee definition, and a clear statement that persecution should be a necessary condition for

determining refugee status (UNRRA European Region Order 40(1), 3 July 1946). By 1946 Western countries had realised that United Nations Relief and Rehabilitation Administration's agreement to the repatriation of nearly two million Soviet citizens in the immediate post-war months, much of which had occurred against the will of those refugees and displaced persons, had been a mistake because many of the refugees faced persecution on return.

In 1946 the United Nations established the International Refugee Organisation (IRO). It was to be concerned mainly with "the protection and resettlement of 1 620 000 persons who were reluctant to return to their homelands either because they had lost all ties there or because of a well-founded fear of persecution" (United Nations High Commissioner for Refugees 1993, 1).

The definitional provisions in the International Refugee Organisation's Constitution were complex and must be seen as a compromise between the divergent views of member States at a time when the Cold War was just emerging. According to Holborn (1956, 29-30), the West favoured a relatively broad definition which could include political dissidents on the basis that individuals have a right to choose to migrate in search of personal freedom. The Eastern bloc rejected the notion of assessing a subjective incompatibility between an applicant and his nation of origin, insisting rather that refugee status be awarded only where the breakdown in relations between the State and the individual have resulted in externally verifiable prejudice against the claimant. Paragraph Two of the Constitution applied the term "refugee" to any person "who is outside of his country of nationality ... and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality", is subject to the provision that objections to returning to the country of origin be "valid". (Text reproduced in Goodwin-Gill, 1983, 235-240). Objections were considered valid if the applicant could demonstrate that he had been persecuted or feared persecution on reasonable grounds because of his race, religion, nationality or political opinion. Certain categories of persons were deemed unworthy of refugee status, for example, enemy collaborators and persons of German ethnic origin. Refugee status had become to be related to individuals rather than groups, and it was now in essence a status pertaining to a discord between the individual's personal characteristics and convictions and the tenets of the political system in the person's country of origin. This discord could only be adequately determined when manifested in persecution.

UNHCR STATUTE

In December 1949, the United Nations General Assembly resolved to create the Office of the United Nations High Commissioner of Refugees. The Statute of the Office was adopted a year later (Annex to General Assembly Resolution 428(V) of 14 December 1950). The Statute contains a definition of the term "refugee" practically identical to that later adopted by the 1951 Convention. The main difference is that the statute definition of refugee does not include persecution due to "social group" as a reason for recognition as a refugee. In special circumstances, UNHCR may have to examine whether a refugee comes "within the competence of the High Commissioner":

* Where the State concerned is not in a position to determine refugee status for formal reasons, for example, because it has maintained the geographic limitation or has not acceded to the Protocol or for reasons of political convenience.

* Where refugee status needs to be determined before the results of the State procedure are known, for example, for resettlement purposes.

* In exceptional cases, where the refugee requires protection although the State concerned would not recognise his/her refugee status.

Refugees recognised as coming under UNHCR mandate are not legally entitled to asylum in the country of residence but their UNHCR status may assist them to stay. Neither would they benefit from the provisions of the 1951 Convention and 1967 Protocol but they might benefit from other treaties or from de facto refugee status. It is pursuant to the Statute that UNHCR has been so involved in ex-Yugoslavia. In countries that have not signed the Convention and therefore do not have an international obligation to protect refugees UNHCR can use its statute to recognise refugees.

Paragraph 7(b) of the Statute excludes "national refugees" from the High Commissioner's competence. Paragraph 7(c) excludes those Palestine refugees who receive protection or assistance from the United Nations Relief and Workers Agency for Palestine Refugees in the Near East (UNRWA).

The Office of the UN High Commissioner for Refugees (UNHCR) is a United Nations organisation set up under Article 22 of the United Nations Charter. It superseded the International Refugee Organisation and was designed to assist States in the application

of the 1951 Convention. Although the definition of refugee status under the United Nations statutory body is virtually identical to that of the 1951 Convention there is one important distinction. Chapter 1 (2) of the UNHCR Statute authorises the High Commissioner to act in relation to groups of refugees. Also, the General Assembly has authorised the High Commissioner to assist refugees who do not come within the Convention definition. The first authorisation in 1957, concerned large numbers of mainland Chinese in Hong Kong whose status was complicated by the existence of two Chinas. Authorisations of other groups outside the definitions have included Algerians fleeing to Tunisia and Morocco to escape the effects of the struggle for liberation and people fleeing the Angolan War (GA Res 1671 (xvi) 10 Dec 1961).

The General Assembly has also developed the notion of the High Commissioner's good offices function as an umbrella arrangement to cater for refugees who do not come within the "immediate competence" of the UN (GA Res 1499 (xv) 5 Dec 1960), nor the UNHCR and Convention definitions. For example, the Convention requirement that a refugee be "outside" his country would preclude assistance to refugees who had agreed to voluntary repatriation to their homeland. This was the case in the 1970s when ten million people left Bangladesh fleeing to India. They were persuaded to return to their homes under a protection arrangement between the Bangladesh and Indian Governments.

The Statute of the UNHCR is more extensive in its operation and in several respects supplementary to the Convention. However, the Statute does not necessarily make up for the deficiencies in the Convention. For instance, the determination of refugee status in terms of the Convention is a matter a State may interpret for itself without the assistance of the UNHCR (Fragomen 1970, 54).

1951 CONVENTION

The United Nations Convention relating to the Status of Refugees was opened for ratification in Geneva in 1951 and entered into force in 1954. As at 30 June 1995, 128 States were party to the Convention and 128 were party to the Protocol. The Protocol may be ratified without prior accession to the 1951 Convention. The United States of America, for example, has only acceded to the Protocol as has Cape Verde, Swaziland and Venezuela. Australia acceded to the 1951 Convention in 1954 and ratified the Protocol in 1973. Few South-East Asian nations have acceded to the Convention and ratified the Protocol. The regional signatories are the Philippines, Cambodia and China. Thailand behaves as if it had.

The 1967 Protocol extended the application of the term "refugee" to any person corresponding to the definition given in the Convention of 1951, without time limit and without specifying a particular geographic zone. In fact the purpose of the Geneva Convention was to resettle persecuted persons who were victims of the Second World War.

After the Second World War, stress was laid on more precise criteria, and the term "refugee" came to be used as a term of art, that is, one with some verifiable content according to the principles of general international law.

The 1951 Convention (Article 1A) defined a refugee as:

> "Any person who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of the country, or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable to owing to such fear, is unwilling to return to it."

It must, of course, be noted that a Convention postulates minimum not maximum criteria or obligations. Maximum can be decided by individual governments whether or not signatories to a Convention. Thus the need for a Convention is the observance and regulation of minimum standards.

The Convention has three main features. First, it provides a general definition of refugee without geographical limitations. The 1967 Protocol removed the original Convention requirement of acquiring refugee-status "as a result of events occurring before 1 January 1951". Second, it states the basic Charter of Rights afforded to persons who have been granted refugee status under the Convention. Third, it contains provisions for the implementation of these rights. Strictly speaking the use of rights is incorrect. States, not individuals, are the traditional subjects of international law. Generally, individuals do not have the direct capacity to enforce their rights before international tribunals although Article 25 of the Convention on the Settlement of Investment Disputes between States and nationals of other States (1965), which came into force in Australia on 1 June 1991 accords individual investors a "Standing" to settle disputes with another State party to the Convention. Canada is not a signatory to this Convention. Similarly, as explained later in this thesis, Article 1 of the Additional Protocol to the International Covenant on Civil and Political Rights states that

individuals: who claim to be victims of a violation by a State party of any of the rights set forth in the Covenant" and who are "subject to the jurisdiction of the State party" are entitled to have their communications considered by the Human Rights Committee. I am, therefore, inclined to agree with Hyndman (1986, 151) that it would be more accurate to say "the rights declared on behalf of refugees". It should be noted that the Convention states nothing about determination procedures.

In principle, each State Party to the 1951 Geneva Convention and the 1967 Protocol has a responsibility to examine applications for refugee status or asylum made to it. Practice, however, dictates that the concept of "safe" third country has some basis in Article 31(1) of the Convention which requires that refugees arrive directly from "a territory where their life or freedom was threatened ..." before a particular provision can apply. EXCOM conclusion 15(XXX) (1979) paragraph (h) (vi) supports this view:

> "Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum-seekers with due regard to their special situation."

Conclusion 58 (XL) (1989) on Irregular Movements, paragraphs (f) and (g), accepts that an asylum-seeker who has arrived in an irregular manner may be returned to the country of first asylum if the asylum-seeker has already found protection there, can enter and remain there, is protected there against *refoulement* and is treated in accordance with basic human standards, will not be subject there to persecution or threats to safety and liberty and has access to a durable solution.

The Convention's definition of a refugee is quite broad. It was recognised that a new criteria adopted may not necessarily cover existing refugees. It was then specifically provided that those persons given refugee status under the earlier conventions were still to be regarded as refugees (Article 1A(1)).

Second, it also appears that Recommendation E of the Final Act of the Conference of Plenipotentiaries may be invoked to support extension of the Convention to groups or individuals who do not fully satisfy the definitional requirements. As the Convention now stands, Convention refugees are identified by five basic characteristics:

(i) they are outside their country of origin;
(ii) they must be genuinely at risk;

(iii) they are unable tor unwilling to avail themselves of the protection of that country, or to return there;

(iv) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and

(v) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group or political opinion.

There are a number of limitations inherent in this definition. For example, people in refugee-type situations may have fled considerable distances but if no border has been crossed, they are not outside their country of origin and will not be considered to be refugees. This raises the question of whether or not it is appropriate to reserve refugee status for persons who successfully flee their State, instead of embracing as well those who are displaced within their own country. Refugees deprived of their nationality by their country of origin are regarded as *de jure* stateless persons. Those who no longer enjoy the protection and assistance of their national authorities while nevertheless maintaining their nationality have been regarded as *de facto* stateless persons.

To those who meet its refugee definition, the Convention gives the right of *non-refoulement*, a principle requiring that refugees should not be returned to any country where they are likely to face persecution or danger to life or freedom. The principle of *non-refoulement* is most important and is discussed in chapter 3.

UNHCR has maintained a list of "unsafe" countries - to which no-one should be refouled. In Canada this was known as the "B-1 list". Canada abolished this list on 20 February 1987 - a move rather obviously designed to stop the cross-border flow of Central Americans. Ironically, while the Immigration Department was sending claimants back to countries of danger, another government organisation, the Canadian International Development Agency (CIDA) refused to send Canadians to those same countries. CIDA had its own list of countries too dangerous for Canadian aid and development workers. CIDA does not finance projects requiring Canadians to be sent to areas of danger such as El Salvador. Yet the Immigration Department returns claimants to those countries.

The development of State practice since 1951 has recognised that *non-refoulement* applies to the moment at which asylum-seekers present themselves for entry (Young 1987, 7). Goodwin-Gill (1983, 74-78, 97) argues that "certain factual elements may be necessary (such as human rights violations in the country of origin) before the

principle of *non-refoulement* is triggered, but the concept now encompasses both non-return and non-rejection."

States have steadfastly refused, and have no obligation under international law, to accept an obligation to grant the right of asylum to refugees. Such a right is not found within the 1951 Convention and the 1977 Conference on Territorial Asylum failed to achieve recognition of such a principle (Goodwin-Gill 1983, 103-121). The 1967 Declaration of Territorial Rights (UN General Assembly Res. 2312 (XXII) 4 December 1967) appealed to States to co-operate with UNHCR in granting asylum in cases of mass influx as well as individual cases. As a result the gap between *non-refoulement* and the right of asylum often creates a situation where refugees find themselves in legal limbo, not rejected at the frontier yet not allowed rights of residence or protection.

There is no generally accepted delimitation of the scope of the term persecution. "Being persecuted" is not defined by the Convention or the Protocol. It clearly covers loss of life or imprisonment for reasons specified in the definition. Weis (1960) interprets "persecution" broadly to cover any kind of acts perpetrated on the person whether psychological, physical or economic, which are themselves severe enough to cause displeasure to the person concerned. Vernant (1953, 7-8) agrees that persecution covers severe, arbitrary measures contrary to the Universal Declaration of Human Rights. Article 14 of that Declaration proclaims that "everyone has the right to seek and to enjoy in other countries asylum from persecution" but does not offer a definition of persecution either. However, Fragomen (1970, 54) argues that as persecution is a factual issue, the "official must have broad latitude in making the determination as to whether the person claiming the benefit is in fact persecuted".

In *Chan Yee Kin v Minister for Immigration Affairs* (1989) 87 ALR 412, Mason J at 413 said the following about persecution:

> "The notion of persecution involved selective harassment. A single act of oppression may suffice. As long as the person was threatened with harm and that harm could be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or is a member of a class, that person was 'being persecuted' for the purposes of the Convention. Other forms of harm short of interference with life or liberty may constitute persecution."

McHugh J at 449 said:

> "... persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, the professions and to education or the imposition of traditionally guaranteed in a democratic society such as freedom of speech, assembly worship or movement may constitute persecution if imposed for a Convention reason."

American cases only add to the confusion. In *Dunat V Hurvey* (297 F 2d 744 (1961)) it was held that economic measures so severe as to deprive a person of all means of earning a livelihood can constitute persecution. However, the potential of experiencing economic difficulties and physical hardships in a State has been held not to constitute persecution.

The requirement of well founded fear must be both subjectively held and have the objective requirement of being reasonable. This requirement can be very restrictive. In *Immigration and Naturalisation Service v Stevic* 467 U.S. 407 (1984) it was held that aliens bear the burden of proving that they would personally be subject to persecution if deported. The court stated that this required the applicant to demonstrate he was "more likely than not" to suffer persecution but declined to offer a precise definition of well-founded fear of persecution. This is hardly surprising; there is no set definition as such for a "well-founded fear of persecution" and it is doubtful whether it is prudent to insist on a precise definition. In *Chan v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412, Dawson J at 424 said that fear can be considered well founded without any certainty or even probability that it will be realised.

Ying Zhang v Minister for Immigration, Local Govt and Ethnic Affairs (Fed C of A, 17 December 1993, No. NG 806/92) was an application by a citizen of the People's Republic of China who had entered Australia on a student visa, for review of a decision refusing her refugee status. She had arrived in Australia in March 1989, prior to the Tiananmen Square massacre. The minister's delegate found that the applicant's claims of government suspicion regarding her father and her expense in coming to Australia did not indicate that she faced a real chance of persecution for a convention-based reason if she returned to China. Hill J held that in determining whether a person has a well-founded fear of persecution, the Convention requires that the decision-maker consider whether the person has a subjective fear of the kind referred to in paragraph 2 of Article 1A of the convention, and whether that fear is well-founded. This second element is an objective question as to whether the subjective fear is in fact well-founded. Here the decision-maker had accepted there was a subjective fear, but had

concluded that the fear was not objectively well-founded. There was no failure to take into account a relevant consideration and the application was dismissed.

The "well-founded fear of persecution" must also be linked to the specific causes in the definition that is, persecution by reason of race, religion, nationality, membership of a particular social group or political opinion. People may be unwilling or unable to return to their own country because life has been rendered impossible by natural or man-made disasters, armed conflict, famines, floods or earthquakes. These circumstances are, however, outside the Convention definition and will not be sufficient for designation as a refugee in order to claim protection under this instrument. The Convention definition is thus cast in terms of individuals and really represents a response to the situation of displaced persons after World War II. Although it was hoped States would apply it flexibly, it appears acceding States were anxious to make their obligation specific in order to avoid infinite extension.

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (Fed C of A, 8 December 1993, No. NG 254/93) was an application for review of a decision refusing a claim of refugee status. Relying upon *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; (1989) 87 ALR 412, the applicant argued that the refusal decision was *Wednesbury* unreasonable (The *Wednesbury* test is discussed in some detail in Chapter 7). It was not in dispute that the applicant would have a well-founded fear of persecution if he were required to return to his family's home in the Punjab, where many members of his immediate family had been murdered due to their political activities in seeking recognition of the Punjab as a separate State.

Davies J held that in the light of the factual material before the minister's delegate, there was no error of law. It was open to the delegate to conclude that the deaths of the applicant's father and brother did not indicate a personal vendetta against the applicant's family which would follow members of the family wherever they were in India. As stated in Hathaway's *Law of Refugee Status*, a person cannot be said to be at risk of persecution if he or she can access effective protection in some part of his or her State of origin, to which primary recourse should be taken. This decision was confirmed by the Full Court of the Federal Court of Australia: *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 124 ALR 265.

Selvadurai v Minister for Immigration and Ethnic Affairs (1994) 34 ALD 347 was an application for review of a decision of the Refugee Review Tribunal that the applicant

was not a refugee. The applicant was a Sri Lankan Tamil who had been forced to assist the Tamil Tigers and whose home had been damaged by shelling. He entered Australia on a student visa and after 20 months, before the visa expired, sought refugee status. He claimed that if he returned to his home and family in Jaffna he would be persecuted by the Tamil Tigers and if he returned to Colombo where he had gone to work, he would be persecuted by the government for having assisted the Tamil Tigers.

It was first argued that there was no evidence upon which the tribunal could reach the conclusion that the applicant's claims were exaggerated. Heerey J held that the onus was on the applicant and it was open to the tribunal to conclude that a factual assertion was not made out. A second argument was that the applicant was denied procedural fairness in not having an opportunity to comment on information from the Australian High Commission that it was unlikely the Tamil Tigers would expend important resources on the elimination of civilian individuals living in Colombo from whom they had already taken property and money. Heerey J regarded this matter as insignificant since it had not been part of the applicant's case before the tribunal that the Tigers should threaten him in Colombo.

Heerey J also concluded that the tribunal had not applied an incorrect interpretation of the definition of refugee, in terms of the judgment of McHugh J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 116 CLR 379; 87 ALR 412. The fact that the applicant's wife preferred to live in Jaffna where he had work but where persecution by the Tigers might occur, could not in law dictate a conclusion that her husband was a refugee. Applying *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*, he could return to Colombo where he had worked for 30 years. Heerey J concluded that the tribunal applied the correct law, reviewed the evidence carefully and reached a conclusion on the facts which was plainly open to it.

The situation may arise where the political situation in a country changes since a person left home, making them fear persecution if they returned home. Such refugees are known as refugees *sur place*. However, applicants who undertake actions solely to get refugee status may not be considered refugees. In *Somaghi v Minister for Immigration and Ethnic Affairs* (1991) 24 ALD 671 Gummow J referred to Lockhart J's judgement in *Jafar Heshmati v Minister for Immigration and Ethnic Affairs* (1991) 22 ALD 225: "I am not persuaded ... that a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin is necessarily a refugee *sur place*."

Hathaway (1991, 37) noted that "logically visitors from abroad who exercise their right to speak out against their home government, who associate with opposition groups, or who otherwise engage in lawful activity perceived by their State of origin to be inappropriate should be protected from return where there is a serious risk of persecution as a result of those actions."

Whether or not an applicant would be persecuted if the applicant returned to the country of origin is decided on the basis of the situation existing in the country of origin as at date of determination. In *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455, Wilcox J held "that in determining an application for refugee status, the date for deciding whether the applicant had the status of a refugee was the date of determination and not the date of application. Accordingly, it was necessary to consider events that had occurred since the applicant departed his or her country of nationality and since the applicant lodged an application of refugee status, and which bore upon the question whether the applicant's fear of persecution was well-founded at the date of determination". Wilcox J relied heavily on the *Chan* case. Whilst I accept the reasoning of the High Court of Australia in the *Chan* case and of Wilcox J in the case of *Dr Lek* it does concern me that during the time that elapses between date of arrival in Australia and date of determination of status, a lot can happen. As happened in Cambodia, there can be a solution albeit shaky to a nation's problems. However, is it morally right to send back a person who has lived here for many years? I am reminded too of the view of McHugh J in *Chan* 169 CLR 432:

> "... I think that the better view of the Convention and Protocol is that whether or not a person is a "refugee" within Art. 1A(2) has to be determined upon the facts as they exist as at the date when he seeks recognition by a State party."

I think a satisfactory outcome might be to specify a time limit for the Minister to make a decision.

The first of the five persecution reasons which may also be used in combination is *race*. Hyndman (1987, 69) implies that the term "race" does not denote distinction based only on the major racial groups but is applicable wherever a person is persecuted for his or her ethnic origin. Paragraph 68 of the UNHCR Handbook states that "Frequently, it [*race*] will also entail membership of a specific social group of common descent forming a minority within a larger population."

Religion is the second potential reason for persecution. According to the 1967 Draft Convention on the Elimination of All Forms of Religious Intolerance (Brownlie 1981, 111), this notion includes "theistic, non-theistic and atheistic beliefs," whilst "discrimination on the ground of religion or belief" means "any distinction, exclusion, restriction or preference based on religion or belief which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Brownlie 1981, 112). The establishment of a religion, or the separation of Church from State cannot by itself be considered discrimination on the ground of religion. In *Atibo v Immigration Officer, London (Heathrow) Airport*, [1978] Imm. AR 93, the Tribunal held that the appellant, a member of an Evangelical Christian sect in Mozambique who could practice his religion in private by attendance unharassed at services of his church, but he was not permitted to preach and proselytise his religion publicly, did not have a "well-founded fear of being persecuted for reasons of religion". In *Woudneh v The Minister for Immigration, Local Government & Ethnic Affairs* (G86/1988, 16 September 1988, unreported) Gray J held that no reasonable person in the first respondent's position could have reached the conclusion that the applicant's fear of religious persecution was unwarranted.

Nationality, another basis of persecution, is generally interpreted in a broad way including "origins and the membership of particular ethnic, religious, cultural and linguistic communities" (Goodwin-Gill 1983, 29). Obviously, *nationality* inevitably overlaps with the notion of race. Persecution by reason of *nationality* is a rather odd phenomenon nowadays since it is not usual for a State to persecute its own nationals. However, the expulsion of Ugandan Asians from their country is a notorious recent example of this. On the other hand, persecution of citizens of another State may not normally lead to a refugee problem since these persons may be and are usually, under normal circumstances, protected by their home country.

Finally, *political opinion*, as a basis of persecution, may be understood, in a broad sense, as incorporating "within substantive limitations now developing in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged" (Goodwin-Gill 1983, 31). It is rather unusual for persecution to take place just because of a person's holding of a "political opinion". A well-founded fear of persecution "can be established only if the political opinion has been expressed and the applicant has suffered or been threatened with repressive measures..." (Goodwin-Gill, 1983, 31). The court or tribunal which looks into the question of a political refugee's persecution inevitably has to examine

the political opinions and the manner in which they were expressed by the applicant, the relevant legislation of his/her country and the punishment applied to any breach of the law that may have occurred. As Hyndman (1987, 71) observed, "these considerations will then need to be juxtaposed against the value accorded by international human rights instruments to the interests of human dignity and integrity, and to those of freedom of opinion and expression."

The characterisation, in any event, of an expressed political opinion and a subsequent "offence" as "political" has encountered difficulties both in theory and in judicial practice. In the *Schtraks* case (28MLR27 (1965)) - an extradition case - the word "political" was interpreted as indicating "that the requesting State is after [the fugitive] for reasons other than the enforcement of the criminal law in its ordinary ... common or international aspect" (Goodwin-Gill, 1983, 36-37). In *Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204, Lord Diplock at 209 observed that an offence may be observed to be political if "the ... purpose sought to be achieved by the offender ... were to change the government of the State in which it was committed, or to enable ... escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering ..." On the other hand, it is true that many offences "are inherently political" and "their commission reflects the failure of a State to protect a greater and more valued interest, so that any punishment would be equivalent "persecution" (Goodwin-Gill 1983, 38). Consequently, the notions of "political opinion" and "expression" of it, as well as, the subsequent "persecution" on these bases, can only be interpreted in relation to contemporary international human rights law.

Can a refugee status application be successful if based on evidence demonstrating persecution caused during a short period of civil unrest, unrest which is over at the time the application is made? Grahl-Madsen (1966, 192) answers in the negative:

> "If the atrocities which cause persons to flee are of relatively short duration only, for example just an episode, and they are effectively put to an end by the government, there can hardly be any reason for considering the persons concerned, political refugees. In fact, they may be considered adequately protected by the government of their home country. If, on the other hand, the disturbances continue over a protracted period, without the government being able to check them effectively, this may be considered such a 'flaw' in the organisation of the State, that may justify distrust in the government, the latter conceived not as a small group of men in exalted positions, but as the machinery which should secure tranquillity and order in the territory of the State. In such a case recognition of refugee status appears to be in place."

The refugee definition is the combination of subjective and objective elements for the determination of an individual's status. The subjective element is the fear which a *bona fide* refugee must be seized with. Fear "is a state of mind, is necessarily subjective, and its degree in any given case can seldom, if ever, be precisely ascertained" (Hyndman 1987, 68). But even this inherently subjective prerequisite can only be based on some specific objective evidence which will help the authority examining the applicant to reach a decision. Paragraph 41 of the UNHCR Handbook states that such evidence is *inter alia* "the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences - in other words, everything that may serve to indicate that the predominant motive for his application is fear."

The objective element in the Convention definition of refugee is found in the words "well-founded". As the Administrative Court of Ansbach in the case numbered 3719/58 (25/3/1959) held (quoted in Grahl-Madsen 1966, 174), a "fear" is "well-founded" "when a reasonable person would draw the conclusion from external facts that he would be subject to persecution in his home country." On the other hand, according to paragraph 41 of the UNHCR Handbook even "exaggerated fear ... may be well-founded if, in all circumstances of the case, such a state of mind can be regarded as justified." The Ad Hoc Committee on Statelessness and Related Problems (1949-1950) (11UN ESCOR AG 32 (5th Meeting) at 39, Un Doc. E/1618 (1950)) defined a refugee as a person who "has either actually been a victim of persecution or can show good reasons why he fears persecution." Grahl-Madsen (1966, 179) believes "these good reasons" may relate to any set of circumstances which may serve as an indication of the likelihood of future persecution. Consequently, each asylum application is to be examined and decided upon individually on the basis of its own particular characteristics.

As to the burden of proof of the existence of the "well-founded fear of being persecuted" for any of the five reasons contained in the Convention definition, they are well-established in international refugee law and in domestic immigration laws the principles: "*ei incumbit probatio qui dicit non qui negat*" and "*actori incumbit onus probandi*" (Weis, 1960, 986). Nevertheless, given the very status in which a refugee finds himself/herself, he or she according to paragraph 196 of the UNHCR Handbook "will rarely be in a position to submit conclusive evidence. It will essentially be a question whether his submissions are credible and, in the circumstances, plausible."

The decision-maker, on the other hand, has the resources of government available. In Australia, primary decision-makers and members of the Refugee Review Tribunal (RRT) have access to the holdings of the Country Information Service (CIS) which is part of the Department of Immigration and Ethnic Affairs. It has a most comprehensive range of information available on all of the countries from which applicants come. It is assembled without any judgment being made about its veracity or otherwise. It is up to the individual decision-maker to give weight to the particular information. Of course, if information comes from an Australian Embassy, I would imagine considerable weight would be given to it. Moreover both the CIS and the RRT often seek specific answers to additional questions from the Department of Foreign Affairs and Trade's Refugees, Immigration and Asylum Section. This specific authoritative information can be obtained in particular cases from Australian Embassies in countries of origin of asylum-seekers and is entered on the CIS database. A similar data bank is available to Canadian decision-makers.

According to Weis (1960, 988), the Ansbach Administrative Court of Bavaria in its judgment dated 4 July 1956 (No. 2174-11/55) held

> "In order to do justice to the spirit of the Convention relating to the Status of Refugees, its provisions must be interpreted sympathetically, in a humanitarian manner, and therefore liberally. When applying these provisions it must also be taken into consideration that the persons concerned are invariably in considerable difficulties if called upon to submit satisfactory proof. This unfavourable procedural situation calls for considerable understanding when the factual statements of the appellants are examined. Proof submitted in accordance with paragraph 13 of the Asylum Ordinance must therefore always be examined with the greatest care, and be made use of to the maximum extent possible and necessary."

Weis notes (1960, 988) that the same Court in 1960 (Judgment No. 2151-11/59 - 8 March 1960) stated that "the special nature of the circumstances which caused the individual to flee from his country makes it particularly difficult to prove the reasons for the granting of asylum. It is, therefore, necessary for the courts to act generously in the evaluation of such evidence provided only that the statements made appear logical and plausible."

United States case law demonstrates that despite the burden of the large flows of asylum-seekers reaching western countries in general, the Ansbach Court's teleological - humanitarian approach to refugee status applications is valid. Although it is well-established that the burden to prove probable persecution by a preponderance of evidence "rests squarely on petitioners" (*Henry v INS* (552 F. 2d. 130 (1977)), the

United States Supreme Court held in *INS v Cardoza-Fonseca* (1987) 480 US 421 at 453 that "there is simply no room in the United Nations definition for concluding that because an applicant only has a ten per cent chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening ... As we pointed out in *Stevic*, a moderate interpretation of the 'well-founded fear' standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." As a consequence of *Cardoza-Fonseca*, no alien in the United States is required to prove "clear probability" of persecution on return to home country in order to be eligible for consideration of asylum as a refugee. It should be noted that the UNHCR Handbook states that the burden of proof lies equally with the applicant and the examiner. This has evolved in Australian and Canadian practice.

The courts in Australia, Canada, the United Kingdom and the United States of America, in general, have been very cautious when dealing with asylum application cases. In *R v Secretary of State*; Ex *parte Bugdaycay* (1986) 1 All ER CA 458 at 465-466, the court accepted that it "has no role to play and there is no precedent fact" permitting it to determine questions of leave to enter. "Furthermore, the investigation of refugee status and the question whether an individual should be afforded asylum might involve the consideration of foreign policy and the assessment of regimes in foreign countries and other similar matters with which a court of law would be ill-equipped to deal."

The United Kingdom Immigration Appeal Tribunal has also on occasions emphatically stated that "the proper person to consider a claim to political asylum is the Home Secretary. It is not a matter for the court which recommends deportation" (*Ali v Immigration Appeal Tribunal and Others*, 1973 Imm. AR 33) "Whether or not there are well-founded fears in any particular case is a matter for consideration by the Secretary of State in deciding whether to make a deportation order" (*Ali v The Secretary of State*, [1973] Imm. AR 19).

A person is not by virtue of Article 1E excluded from the definition of "refugee" for the purposes of the 1951 Convention by the mere fact of having been granted refugee status in another country, unless it is found that the domestic law of the foreign country recognises refugees as having the same rights and obligations as its nationals: *Nagalingam v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 38FCR191.

In 1987, the US Supreme Court provided insight into the meaning of the "well-founded fear" criterion in *INS v Cardoza-Fonseca* (1987) 480 U.S. 421. Writing for the Court, Justice Stevens, rejected the Government's argument that applicants for asylum should be required to prove a "clear probability" of persecution upon return to their country of origin. However, while conceding "there is obviously some ambiguity in a term like 'well-founded fear'", the Court provided little further illumination of its meaning beyond saying that the term could "only be given concrete meaning through a process of case by case adjudication". The Court held that one can certainly have a well-founded fear of an event happening when there is less than a fifty per cent chance of the occurrence taking place. The risk of persecution does not need to be a clear probability of a risk of more than fifty per cent, that it is more likely than not that the claimant would be subject to persecution. US case law has repeatedly stated that a risk in the order of ten per cent can suffice.

Gaudron J in *Chan* at 437 noted:

> "If an applicant relies on his past experiences it is, in my view, incumbent on a decision-maker to evaluate whether those experiences produced a well-founded fear of being persecuted. If they did, then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant could be allayed by knowledge of subsequent changes in the country of nationality."

PARTICULAR SOCIAL GROUP

What does membership of a particular social group mean?

This term is vague. Most of the decisions that deal with social group claims also involve claims of persecution based on religious or political opinion and the majority of judicial decisions that discuss social group issues actually base their conclusions on the religion and political opinion claims. Although political opinion as a basis of persecution appears to be more easily identified and defined than persecution based on social group, the term "political opinion" has generated its own definitional problems. For example, in *Matter of Acosta*, Int. Dec. 2986 (BIA 1985) the Board of Immigration Appeals (BIA) ruled that a taxi driver, persecuted for not obeying a general strike called by the guerillas, was not persecuted for his political opinion. The BIA held that the political motive of the guerillas to disrupt society by a general strike triggered the guerilla activity against the taxi driver, and that this political motive did not constitute persecution on account of political opinion. "Whatever the

characteristic that defines the group, it must be one which members cannot change or should not be required to change because it is fundamental to their identity or beliefs".

The UNHCR Handbook describes a particular social group as a group of people of "similar background, habits or social status" (para 77). The attributes it lists are broad and cover involuntary versus voluntary group membership. The Handbook (para 78) suggests that members of a social group may become targets of persecution when the government lacks confidence in the group's loyalty (para 78). Similarly, members of a social group may face serious threats if the government views the "political outlook, antecedents or economic activity" of the group's members or the "very existence of the social group" itself as an obstacle of government policies (para 78). Thus, the Handbook expressly indicates that persecution based on membership in a social group may be combined with persecution based on public opinion. Paragraph 77 of the Handbook states:

> "A claim to fear of persecution under [the] heading [membership of a particular social group] may frequently overlap with a claim to fear of persecution on other grounds i.e. race, religion or nationality."

Hathaway (1991, 161) believes three types of groups can give rise to claims of persecution based on membership in a particular social group:

> "(1) groups defined by an innate, unalterable characteristic;
>
> "(2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and
>
> "(3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded ... are groups defined by a characteristic which is changeable or from which dissociation is possible so long as neither option requires renunciation of basic human rights.
>
> "... [The] linkage between this standard and fundamental norms of human rights correlates well with the human rights-based definition of "persecution". Most important, the standard is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without serious basis for claim to international protection."

Hathaway (1991, 162) concludes that "single women living in a Moslem country without the protection of a male relative" is a cognisable social group, pointing out that group members cannot control gender or the absence of male relatives and that choice of marital status is a fundamental human right that no-one should be required to relinquish. To the concern that gender is a trait shared by huge numbers of people, Hathaway (1991, 163) responds that race, religion, nationality and political opinion are also characteristics shared by very large groups. As another example of social groups bound together by a fundamental, immutable characteristic, Hathaway (1991, 163) points to homosexual and bisexual men and women.

It should be pointed out that in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401, Olney J disagreed with Hathaway's interpretation of social group. He stated that a group must show a certain cohesiveness and homogeneity. Generally, a group based on past experience would fail this test. His Honour's views were concurred in by the Full Court of the Federal Court in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (No. 2) (1992) 29 ALD 455.

In *Kashayev v Minister for Immigration and Ethnic Affairs* (1994) 122 ALR 503, Northrop J held that "in deciding whether a person has a well-founded fear of persecution by reason of his or her membership of a particular social group it was not sufficient to establish that others who have acted similarly are likely to be persecuted. The primary focus must be upon what a person is, rather than upon what a person has done. In that context a 'particular social group' was one whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake that association."

Fullerton (1992, 531-535) discusses a number of German claims for asylum based on social group and points out that the courts did not attempt to define a social group for the purposes of the asylum process. Rather the courts reached their decisions based on an intuitive sense of persecution based on membership in a social group.

In Canada, the Immigration and Refugee Board has recognised social groups defined by family background, gender and sexual orientation. For example, the Board has deemed single women living in a Moslem country without the protection of a male relative (In re Incirciyan No. M87/1541X and M87/1248 August 10, 1987), homosexual men from Argentina and Russia (CRDDT91-04459, April 9, 1992, CRDD M91-12609 June 2, 1992) and young men of eligible age for military duty who are

subject to mistreatment after indiscriminate recruitment (In re Valladares Escotes T87-9024X, July 29, 1987) to be members of persecuted social groups. In January 1993, the former Canadian Minister for Employment and Immigration, the Hon. Bernard Valcourt, reversed a decision of the Immigration and Refugee Board and granted asylum to a Saudi woman who had claimed persecution based on her sex. She asserted that she feared persecution based on her membership in the social group of emancipated women; those who refused to wear the veil, who attempted to travel alone and who tried to pursue a university education in the field of their choice (Farnsworth 1993 (a) and (b)).

Only a few cases have been referred to - there are dozens. Each has been decided on the facts before the Board. The difficulty in defining "particular social group" is highlighted in the Board's Position Paper "Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution." The Board suggests a two-part test for determining the existence of a social group.

The test first inquires whether the alleged social group is defined by an internal characteristic (1992, 10). The organising characteristic of the particular group might be innate, such as race, gender or kinship. Alternatively, the shared characteristic might be immutable, though not innate. For example, group members might share a common past economic or social status - a status that cannot be changed. Another shared internal characteristic might be one that is fundamental to the member's identity or to their human dignity. The religious affiliation of the group members probably falls into this category.

The standard also examines any existing external perceptions of the group (1992, 8). The test queries whether those outside the group perceive the group as threatening danger - a perceived danger that may, but does not have to be political. The standard also inquires into external perceptions about the very existence of a group. If the government believes that certain individuals form a group, but no group exists, and persecutes them for their alleged membership, the individuals could claim persecution based on membership in a particular social group.

In my view, the Board has adopted a very fair approach to this difficult issue. The Board, as have the German courts, has focused on both internal group characteristics and external perceptions of purported groups. As Fullerton (1993, 541) points out "an applicant for refugee status only needs to satisfy one of the sub-categories of either of

the two prongs of the test in order to prove a social group that meets the refugee law definition".

Reference to some recent United States cases indicates important similarities with Canadian cases. Under *Ananeh-Firempong, v INS* (766 F.2d 621 (1985)) asylum-seekers need to prove they are members of groups consisting of people who share similar backgrounds, habits or social status. There is no express acknowledgment that external perceptions of the group are relevant, nor is there an implicit requirement of fundamental or immutable characteristics.

In *Sanchez-Trujillo v INS* (801 F.2d 1571 9th Cir 1986) it was held that a voluntary associational relationship and common characteristics are fundamental to group identity. It rejected groups comprised of individuals of "different lifestyles, varying interests, diverse cultures and contrary political leanings" (at 1576).

A more recent case of *Gomez v INS*, 947 F.2d 660 (2nd Cir 1991) discussed social group (at 664):

> "The phrase 'particular social group' has been defined to encompass 'a collection of people closely affiliated with each other, who are actuated by some common impulse or interest'. A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eye of a persecutor - or in the eyes of the outside world in general. Like the traits which distinguish them in the eyes of a persecutor - or in the eyes of the outside world in general. Like the traits which distinguish the other four enumerated categories - race, religion, nationality and political opinion - the attributes of a particular social group must be recognisable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."

The Court concluded that if members of the particular group could not be identified, individuals in the group could not be persecuted for their membership in the group.

The question of membership of a particular social group was considered by the Full Court of the Federal Court of Australia in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401. The appellant sought judicial review of decisions of the Minister's delegate that the appellant not be granted refugee status of a temporary entry permit. The primary question was whether there had been

any error with respect to the determination that the appellant was not a refugee within the meaning of the 1951 Convention or the 1967 Protocol.

The appellant, a citizen of Bolivia, had been sentenced to a term of imprisonment in Australia for an offence relating to the importation of cocaine into Australia. The appellant gave evidence for the prosecution at the trial of his co-accused, who was convicted and sentenced to imprisonment. The appellant claimed that he feared for his life if he returned to Bolivia, on the grounds that his co-accused was a member of a family which the appellant asserted was heavily involved in the drug trade in Bolivia and had powerful connections in that country. It was not in dispute that the appellant had a well-founded fear of being persecuted. The question was whether he feared persecution for reasons of membership of a particular social group. Counsel for the appellant argued that he was a member of a particular social group within the meaning of Article 1A of the 1951 Convention, defined as the group of persons who have provided information to the police and have given evidence in support of the police. The Full Court, agreeing with Olney J, unanimously rejected this argument.

Black CJ, with whom French J agreed, said:

> "The convention definition ... requires that there be a fear of being persecuted for one of the specified reasons ... A critical element in the present case is that the fear of persecution relied upon must be a fear for reasons of membership of a particular social group. It is not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. The primary focus of this part of the definition is upon an aspect of what a person is ... a member of a particular social group - rather than upon what a person has done or not done" (39FCR at 404).

He observed that there must be many people in the world who, being involved in criminal activities themselves, have assisted the police and given evidence against others, but that these people "exhibit an almost limitless diversity in their personal characteristics and in their interaction with society", and that the only thing they had in common was, "by definition, that they have acted on an occasion or occasions in a particular way with respect to the enforcement of the criminal law" (Ibid, 405). On the other hand, the expression "social group" was said to connote at the very least "a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of membership of such a group." (Ibid, 406). He indicated also that to characterise any person who had engaged in an activity as a

member of a "social group" comprising others who had engaged in the same activity would be to render almost meaningless the separate reasons for fear of being persecuted enumerated in Article 1A of the 1951 Convention - it would mean that any person who feared persecution by reason of an act done could claim to be a refugee by doing no more than pointing to the existence of other persons who had done the same thing (Ibid, 405-6). Similarly, Lockhart J found that the expression "particular social group" referred to "a recognisable or cognisable group within a society that shares some interest or experience in common", (Ibid. 416) and that "there is nothing in the present case to suggest that there is an identifiable group, either in Bolivia or elsewhere, which has a common experience or characteristic which they share together of police informers or persons who have turned Queen's evidence" (Ibid, 417). Olney J at first instance had said "There is no suggestion that he is a member of a group of such people, social or otherwise, who share similar characteristics. In my opinion the application for refugee status was doomed to failure from the very outset." (34FCR at 335).

At the same time, Black CJ acknowledged that it may be possible that "over a period of time and in particular circumstances, individuals who engage in similar actions can become a cognisable social group" (39FCR at 406). Black CJ noted that the Canadian and United States courts and tribunals had adopted different approaches to the definition of "particular social class" (ibid, 404) citing Hathaway (1991, 157-169). Lockhart J added that the expression "particular social group" called for no narrow definition, and that social groups may have interests in common as diverse as education, morality and sexual preference. Examples were said to include "the nobility, land owners, lawyers, novelists, farmers, members of some associations, clubs or societies" (39FCR at 416). Black CJ said that this "can give rise to difficult questions", but that this was far removed from the present case (Ibid, 406).

OAU DEFINITION

The Organisation of African Unity Convention of 1969 (Article 1, paragraph 1, subparagraph 2) added to the 1951 Convention definition that the term "refugee" applies to any person who:

> "owing to external aggression, occupation, foreign domination or events disturbing public order in either part or the whole of his or her country of origin or nationality is compelled to leave his/her place of habitual residence to seek refuge in another place outside of his/her country of origin or nationality."

The Organisation of African Unity definition permitted the practice of accepting refugees en masse on prima facie evidence. Thus the Organisation of African Unity definition recognised that "The normal bond between the citizen and the State can be severed in diverse ways, persecution being but one". It also recognised that "Societies periodically disintegrate because of their frailty rather than of their ferocity, victims of domestic division or foreign intervention" (Shacknove, 1985).

The Organisation of African Unity Convention, unlike the 1951 United Nations Convention, assumed that refugees would want to return home. It makes explicit reference to repatriation. The need to confirm its voluntary character is emphasised and the provision is included that every possible assistance should be given by governments, voluntary agencies, international and intergovernmental organisations to facilitate the refugees' safe return. As of 1993, the Organisation of African Unity Convention had 42 signatories (United Nations High Commissioner for Refugees 1993, Annex II).

States in another world region have similarly adjusted the 1951 Convention definition to fit a new content of forced migration. In response to the upheavals in Central America in the 1980s, the non-binding 1984 Cartagena Declaration on Refugees recognised as refugees those who were threatened by generalised violence. Section III, Article 3 states:

> "The definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees, persons who have fled their country because their lives safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed the public order."

This Declaration has 10 signatories.

Another group that is not covered are professionals who live outside their countries in refugee-like conditions. They include former lecturers, researchers, highly skilled senior government officials and officials of other institutions and students. Due to power struggles, physical oppression and exploitation, professionals find themselves in a predicament and cannot cope with the existing environment. Many of them leave their country and seek refuge elsewhere, not usually due to political problems but most often due to the on-the-job frustration.

There is another category of refugees who consist of economic migrants. This population is forced to migrate because of economic hardship which may be caused by environmental calamities or wars. This migration is in search of livelihood and their destinations may be different areas within the same countries or across borders into neighbouring countries. These individuals are displaced and live in refugee-like conditions.

Shacknove (1985, 275-276) has argued that conceptually, the Organisation of African Unity definition of 1969 represents an improvement upon the United Nations definition. This is because it not only incorporates those persecuted by their governments but also victims of 'internal aggression, occupation, foreign domination' and 'other conditions seriously disturbing the public order'. But CIMADE et al (1986), amongst others, have criticised the OAU definition. After incorporating the usual criticisms levelled against the UN definition (which the OAU virtually reproduced in the first paragraph of its definition) they point out other flaws. There are factual and causal shortcomings (CIMADE 1986, 112). At the factual level, the definition sees the 'tragedy' of refugees as a problem of persons when in reality there are millions of victims. In addition, the definition says nothing either of people illegally expelled by the police or government of the country in question or of the populations which, having fled their country, are refused re-entry by the government. At the causal level, they point particularly to the ideological overtones of the causal factors enumerated by the definition.

What benefits does the Convention grant to refugees? The Convention requires that refugees be granted the "most favourable treatment accorded to nationals of a foreign country" as regards trade union membership (Article 15), entry to wage earning employment (Article 17), self employment (Article 18), and membership of the liberal professions (Article 19). They should be given "treatment as favourable as possible" as regards housing (Article 21), and education (Article 22), and approximately the same treatment as nationals with respect to public relief and assistance (Article 23), and labour legislation and social security (Article 24). Article 26 guarantees freedom of movement. Article 34 requires Contracting States "as far as possible" to "facilitate the assimilation and naturalisation of refugees". The Convention does not require that refugees be given permanent resident status under a State's domestic immigration law. Most States require non-citizens to be permanent residents for a number of years before they are eligible for the grant of citizenship. Article 34 requires States to facilitate the grant of resident status to refugees.

There is an obligation under the Convention to set up procedures for the determination of refugee status and many countries have not done so.

It has been argued that the Convention definition should be re-written to encompass more people in refugee-like situations. Is, for example, the refugee concept insufficiently attentive to dilemmas resulting from the failure of States, rather than from active forms of persecution? However, even if it were possible to obtain agreement with sufficient ratification on a more general definition, one wonders what practical difference this would make given the varied interpretations of the criteria individual status may make and the generally accepted attitude that the determination of refugee status is declaratory and not constitutive. The wording of the Convention definition is in terms of individuals, so that an individual determination must be made in each case before a country decides whether or not to grant refugee status. However, once that status is granted contracting States such as Australia have agreed to a comprehensive set of obligations concerning the protection of Convention refugees.

Many instruments of maritime law concluded by the International Maritime Organisation concern refugees, above all since the emergence of the problem of South-East Asian refugees at sea ("boat people"). The conventions relating to aerial navigation with which the International Civil Aviation Organisation (ICAO) is concerned and particularly those provisions regarding the responsibility of transporters with regard to passenger documentation, concern the grant of asylum. This also applies to conventions which penalise the seizure of aircraft.

Have the 1951 Convention and 1967 Protocol worked? It is considered, on the basis of available evidence, they have but in a negative way. The Convention covers most situations. Special circumstances not covered by the Convention can be addressed by individual Governments either by domestic legislation or by policy. Both the Governments of Australia and Canada have permitted a large number of persons not defined as refugees under the Convention to enter their countries under humanitarian programs. It must be stressed that the term "economic refugee" is unknown in law and in international diplomacy.

However, the international community is not tackling the refugee problem at the core. Resolution of the issue of refugees has deteriorated. Overall the world is ill prepared to deal with the refugee crisis. It is not tackling root causes in a co-ordinated manner, although recent conclusions are now pointing to greater UNHCR resources being devoted to causes of people movement (Personal Communication, UNHCR). The

United Nations has never been used effectively. The UNHCR, protects refugees world-wide. The Organisation of African Unity and the Organisation of American States are regional organisations but these three organisations are not knitted together in respect of refugee issues. Generally, there is a reluctance by Governments to solve problems. However, some Governments use Non-Government Organisations (NGOs) to penetrate areas which are sensitive from a foreign policy viewpoint. For example, the International Organisation for Migration has a flexible constitution. There is no definition of refugee in its constitution so that the organisation can operate outside the confines of the Convention. There is a need to set up institutions outside of the United Nations structure which at short notice can deal with situations which could lead to massive movements of people. The United Nations should have an over-riding authority to knit together its agencies, regional organisations and the non-government organisations to tackle a problem. The United Nations Department of Humanitarian Affairs is the logical organisation to administer such a policy. However to date it has not been resourced or funded adequately to undertake such a function. Such an organisation could have stepped into Rwanda, Somalia, Sudan, Haiti as the lead UN co-ordinating body.

The Rwandan crisis particularly has emphasised the need for such an organisation. The President of Médecins Sans Frontières, Dr Jacques de Milliano described the situation as "the worst humanitarian crisis I've seen in my life" (*SMH* 22 July 1994). In the same article a UNICEF spokesman said that "what we are facing, UN agencies cannot handle" and a UNHCR spokesman said that "all humanitarian organisations were ill-prepared to respond to such an enormous magnitude of crisis". The *Guardian* (21 July 1994) reported other relief organisations - notably United Nations agencies such as UNICEF, the UNHCR and the World Food Program - seemed to be floundering as a result of lack of foresight and planning. This is evidence of the need for an organisation to be available to deal with such problems at short notice.

Certainly from an international perspective the future for a person seeking asylum is not good although the Convention has achieved its aim in providing some degree of protection.

CHAPTER 3

THE PRINCIPLE OF NON-REFOULEMENT

The thesis so far has shown who a refugee is and how international law affords some protection. Indeed a body of law has evolved in Australia and Canada interpreting what the Convention means. However, probably the most important component of the definition of refugee in the 1951 Convention is the principle of *non-refoulement*. The word *refoulement* derives from the French verb *refouler*. In English it could be translated as "to drive back or to repel." In contemporary international refugee law, *refoulement*, means the returning of a refugee by a refuge country's authority to any country "where he or she is likely to face persecution or danger to life or freedom" (Goodwin-Gill 1983, 69).

Refoulement must be distinguished from expulsion and deportation, both of which procedures are used by States against aliens whose presence in the country is considered undesirable. Plender (1972, 239) defined *refoulement* "as an administrative act whereby the authorities appointed by a State refuse to admit a particular person to the State's territory, and thereupon return him to the country whence he came."

A distinction must also be made between *refoulement* and extradition. Extradition is a formal process whereby a person who commits a criminal offence in a country, flees to another country, may be returned to the country of origin to stand trial. Usually, there are formal extradition treaties between States. In international law there is no duty to extradite if there is no treaty. There is no duty in international law to extradite nationals. The requirements for extradition are that the crime the subject of the extradition proceedings must be recognised as a crime in both countries, the alleged offender will have a fair trial, and the penalty for the crime is not death. It should be noted some political offences, eg. treason, are crimes. Extradition is, however, limited by *refoulement*. The problem with extradition is that domestic courts do not care how an alleged offender is brought back. There is no redress in international law. In customary international law all acts done in the name of the State are lawful.

Repatriation is another term which should be distinguished from *refoulement.* Repatriation is dealt with later (Chapter 12). However, I would at this point stress that it is the basis on which the principle of *non-refoulement* is compromised. *Non-refoulement* is defeated if the asylum-seeker returns to his country of origin voluntarily. Indeed it is a solution for refugee problems for it pre-supposes the original cause of flight has changed. The repatriation currently being undertaken in Cambodia and Hong Kong is less than voluntary. It is coerced repatriation.

In 1946 the United Nations General Assembly in its Resolution 8(1) expressed clearly for the first time, its view on the *non-refoulement* principle stating that "refugees or displaced persons" having expressed "valid objections" to returning to their country of origin should not be compelled to do so" (Goodwin-Gill 1983, 91).

The first widely accepted conventional provision on the prohibition of *refoulement* is that of Article 33 of the 1951 Convention. Paragraph one of this Article states:

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

According to Robinson (1953, 160) this paragraph was included by the Ad Hoc Committee that drafted the Convention. No exception was included because the Committee "felt strongly that the principle was fundamental and that it should not be impaired." Nevertheless, the Conference of Plenipotentiaries was not of the same opinion (Robinson 1953, 160) and initiated the drafting of the second paragraph of Article 33 which states:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime constitutes a danger to the community of that country."

Article 33 should be read in conjunction with Articles IF, 31 and 32. Article IF states:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

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

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

Article 31(1) enjoins the contracting States not to impose penalties on refugees who enter their territory or are there illegally on the conditions that they come directly from a territory where their life or freedom was threatened and that they present themselves without delay to the authorities showing good cause for their illegal entry or presence. Article 31(2) prohibits the application to the movements of the refugees mentioned in paragraph 1 of restrictions "other than those which are necessary" and which may "only be applied until their status in the country is regularised or they obtain admission into another country." The Contracting States undertake the obligation to "allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country." Article 32 prohibits the expulsion of a refugee being lawfully in a State's territory "save on the grounds of national security or public order", and provides basic guidelines on the expulsion procedure, in favour of the expelled refugee".

Unlike Article 32 which outlaws the expulsion only of refugees being lawfully in the territory of a State, Article 33 does not contain any such limitation to the protection from *refoulement* it provides to refugees in general. As Goodwin-Gill (1983, 83) points out "In view of the normative aspects of *non-refoulement* in international law, the precise legal status of refugees under the immigration or aliens' law of the State of refuge is irrelevant, although a State seeking to avoid liability will often classify them as prohibited or illegal immigrants."

Does a refugee have to come directly from his or her country of origin or former habitual residence in order to benefit from the *non-refoulement* principle? It is in practice submitted that he or she is not obliged to fulfil such a requirement but as Goodwin-Gill points out (1983, 83-84) "other countries or territories passed through should also have constituted actual or potential threats to life or freedom". As UNHCR pointed out in *The Secretary of the State for the Home Department v Two Citizens of Chile* [1977] Imm. AR 36 at 42, "This Commission does not consider that Articles 32 and 33 of the Convention compel a Contracting State to accept a refugee who is able to go to a country where he will be free from persecution - and this applies even if such country is not a Contracting State to the Convention." In the *Yugoslav Refugee (Germany)* case 26ILR 496 at 498 it is stated" ... as far as Article 32 is concerned, a refugee is entitled to the protection of Article 33, viz. that in practice he

will only be expelled to the country in which he had previously been received and from which he as entered the territory [of the Federal Republic of Germany] illegally." As a consequence, the inability of the refugee to find any other refuge country is a *sine qua non* condition of the operation of Article 33 and the prevention of a potential *refoulement*. Of course, regard must now be had of the provisions of the Dublin Convention concerning host third country.

Despite the fact that evidentiary difficulties are inherent in a refugee's plight thus enfeebling his or her position before the Immigration Officer, there can be no doubt that the conjunctive application of Articles 32 and 33 in Hyndman's words (1986, 153), "does provide some real protection. For although an administrative act or ordering this expulsion of a refugee may not offend against Article 32, an actual expulsion may be forbidden under Article 33 if it will result in the return of the refugee to a country where he or she fears persecution."

A question raised in the context of Article 33 and which relates in general to the *non-refoulement* principle is whether a person must be formally recognised as a "refugee" in order to be able to invoke protection from *refoulement* measures. Must a refugee have been previously granted asylum, in the sense of permanent official protection? Neither the 1951 Convention nor the 1967 Protocol requires that the Contracting States should establish refugee status determination procedures nor do any of those treaties contain any substantial reference to asylum.

As a consequence, refugee status determination procedures differ widely from one country to another whilst the fact that recognition of one's refugee status by one country does not bind another State despite the opposite proposition of EXCOM (UN Doc. A/AC. 96/559 p. 17).

Another problem that any requirement of previous recognition would face is that there are as Hyndman (1982, 49) points out "vast numbers of refugees who have never been officially categorised as such." As Grahl-Madsen (1972, 224) observed, the provisions of Articles 32 and 33 "are meant to protect the persons entitled to invoke them, throughout their life as refugees, and in particular the prohibition of forcible return to a country of persecution could easily be rendered meaningless if it could only be invoked upon the formal recognition of the person concerned as a refugee".

"From the second an asylum-seeker sets foot on the territory of a State Party to the Refugee Convention, he must be able to invoke, provisionally, the benefits of Articles

32 and 33 which means that he cannot be expelled or returned (*refoule*) except in accordance with the provisions of those articles, so long as it has not been definitively decided that he is not entitled to recognition as a Convention refugee (or as a refugee in the sense of the Protocol of 31 January 1967)."

EXCOM in a declaration in October 1977 stated that the *non-refoulement* principle must be respected by States irrespective of whether or not applicants for asylum have been formally recognised as refugees. Greig (1984, 133) also agrees that the better view would seem to be that the principle of *non-refoulement* goes beyond the technicalities of the text of Article 33 and applies to potential refugees (i.e. those who are seeking to be thus classified) as well as those in respect of whom such a determination has been made. The development of the concept of temporary refuge (or temporary asylum or temporary residence, as it is variously called), though dependent upon some further duty of burden sharing by other States, is a recognition that potential refugees are entitled to a minimum degree of protection even if it is initially only against the hazards of being returned whence they came or against the dangers of an enforced further sea journey."

An interesting question related to *non-refoulement* provision of the 1951 Convention, and which was raised by the Austrian Supreme Court in 1968 (see *Expulsion of Alien (Austria)* case 28 ILR 310 at 311) and the 1959 *Refugee (Germany)* case (28 ILR 297) is whether that provision is to be taken into account by the administrative authorities only when they carry out the expulsion or when the relevant order is made. While the Supreme Court of Austria opted for the first solution the German Court observed:

> "The question may be raised whether the limitations for which Article 33 provides must be taken into account when the expulsion order is made, or whether it suffices if the provisions of Article 33 are observed when the order is carried out. Section 23(3) of the Law on the Status of Homeless Aliens contains provisions corresponding to those contained in Article 33 of the Geneva Convention. As far as the provisions contained in section 23(3) of the Law are concerned, this Court has held that they must be observed when the expulsion order is made, and that the order may be made only subject to the limitations therein contained. What prompted this decision was the idea that an expulsion order may serve as the bans of a forcible and immediate expulsion, and that the legal protection to which the person concerned is entitled may become illusory unless the expulsion order itself refers to the limitations resulting from the provisions have referred to. These considerations apply with equal force to Article 33 of the Geneva Convention. In so far, therefore, as a refugee is entitled to rely on Article 33, an expulsion order can be made only subject to the limitations resulting from this provision" (28ILR 299).

While Article 1A(2) of the 1951 Convention enables a person to be given refugee status if the person has a "well-founded" fear of persecution and is outside the country of nationality or habitual residence, Article 33 para. 1 does not refer to any kind of "well-founded fear" but to a threat to the refugee's "life or freedom". Consequently, the latter provision, lacking any subjective element like that of "fear", gives the impression that it demands more objective and, as it were, a demand which might be regarded as reasonable, since expulsion, "a wide discretionary power" of the State (Arnold 1985, 8), albeit regulated by domestic and international law, has as its aim, according to Goodwin-Gill (1978, 206), "the protection of the State and the preservation of that which in continental jurisprudence is described as 'ordre public', public morality, and public health."

The United States of America Supreme Court dealt with this problem indirectly in *Cardoza-Fonseca* ((1987) 480 US at 453) where it was stated that "... Article 33.1 does not extend this right to everyone who meets the definition of 'refugee' ... [it] requires that an applicant satisfy two burdens: first, that he or she be a 'refugee, i.e., prove at least a 'well-founded fear of persecution,' second, that the 'refugee' show that his or her life or freedom would be threatened". In the same case at page 454 the court went on to say that "Article 33.1 provides an entitlement for the subcategory that 'would be threatened' with persecution upon their return".

In the *Stevic* case ((1984) 467US 407) the Supreme Court of the United States of America dealt directly with the problem of a refugee's deportation and the standard of proof the latter has to satisfy in order to withhold the carrying out of that administrative measure. The Court did not accept that the US Congress when adopting the 1980 Immigration Act changed the standard of proof it demanded before that Act.

The refugee had, as a consequence, to provide evidence demonstrating that "it was more likely than not" that he or she "would be persecuted in the country to which (s)he was being deported." Paragraph 243(h) was amended by the 1980 Act and now corresponds with Article 33(1) of the 1951 Convention. It states that "the Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Although this provision did not specify how great a possibility of threat to an alien's life or freedom should exist in order for the alien to be able to prevent deportation, the Supreme Court interpreted paragraph 243(h) as requiring the

demonstration of "a likelihood of persecution" since the section provides for a withholding of deportation only if the alien's life or freedom "would" be threatened and not if he "might" or "could" be subject to persecution, as requires the provision relating to the granting of refugee status in the United States of America .

Even though the arguments of the Court seem to be well-founded, not only on the basis of domestic legislation but also on the basis of Article 33 of the 1951 Convention, it should always be borne in mind that the object and purpose of an international instrument which forms the basis of domestic legislation is never to be set aside in the course of the former's interpretation. This is provided for in Article 31(1) of the Vienna Convention on the Law of Treaties.

FRONTIER REJECTION

Is non-rejection at the frontier included in the *non-refoulement* principle? The preparatory works of the 1951 Convention show that "States were not prepared to include in the Convention any article on admission of refugees" and "*non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished for duty to grant asylum." (Goodwin-Gill 1978, 74). Goodwin-Gill further points out that the Swiss and Dutch Representatives at the 1951 Convention declared that they could not interpret *non-refoulement* in such a manner that they would apply it to those who have not entered their State's territory. Robinson (1953, 161-162) observed that Article 33 "concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into the territory."

The 1933 Refugee Convention included non-rejection at the frontier in the *non-refoulement* principle. Obviously, the matter was not so vital as Hyndman (1982, 50) points out in 1950 when "rejection at the borders was not really the problem as most of these persons were already in the new countries having been displaced from their own country by the war. Even where this was not the case, and the people in question were still crossing borders as a result of a desire to escape the consequences of the communist take-over of Eastern Europe, they were generally welcomed by the States of Western Europe if only for propaganda reasons."

However, this is not the case today when the tragedy of massive flows of refugees is not uncommon. We have only to think of the hundreds of thousands fleeing Rwanda to Tanzania and of the tens of thousands fleeing Bosnia and Herzegovina, Somalia,

Sudan. Refugees, as Hyndman (1982, 51) observes, "now often pour into countries with peoples whose backgrounds may be very different to their own - racially, culturally, economically, politically. In the South-East Asian region particularly, there are widely varying ethnic and cultural backgrounds. Some countries, for instance Malaysia, have a delicate balance of races. A mass influx of refugees of another race will endanger this balance, and so may be seen as a threat to the present social and political structure of the country. In addition to those problems, the host countries into which refugees are flowing today often already have a very low standard of living and their limited resources cannot easily stretch to accommodate and provide for hundreds of thousands of extra, uprooted and homeless persons. Hence one possible solution from the viewpoint of the State of potential refuge may be to reject these persons at the frontier, and so avoid incurring the expenses and difficulties which their arrival must inevitably entail."

The significance of the problem some countries face in such cases is well understood since the "principle of *non-refoulement* logically imports an obligation to permit entry to an asylum-seeker, at least for the purpose of granting temporary refuge pending a decision by the territorial sovereign to grant or withhold territorial asylum to all or some of the asylum-seekers and pending an effective opportunity to seek durable asylum elsewhere. The revolutionary nature of this development," as Feliciano (1982, 600) goes on to say, "should not escape notice, in view of what is accepted as a truism, that is, that international law imposes no duty upon States to grant asylum, understood as durable residence, to anyone, even to refugees, in the absence of a treaty obligation to do so."

Even if Article 31 of the 1951 Convention did not cover the question of rejection at the frontier it would be necessary to take into account Article 31 (3b) of the 1969 Vienna Convention on the Law of Treaties namely "the subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." State practice both on regional and international convention levels has shown that the law regarding the *non-refoulement* principle has been evolved and expanded to cover non-rejection at the frontier. Many States, wrote Goodwin-Gill (1978, 76) "have allowed large numbers of asylum-seekers not only to cross their frontiers, for example, in Africa from the early 1960s and more recently, in South East Asia, but also to remain pending a solution."

Article 3.1 of the 1967 Declaration on Territorial Asylum (UNGA Resn 2312 (xxii) of 14/12/1967) states that "No person referred to in Article 1 [persons who seek and/or

are granted asylum by a State] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." Ten years later the 1977 Draft Convention on Territorial Asylum, drawn up by the UN Conference on Territorial Asylum in Geneva in its Article 3.1 demanded that "no person eligible for the benefits of this Convention ... who is at the frontier seeking asylum or in the territory of a Contracting State shall be subjected by such Contracting State to measures such as rejection at the frontier, return or expulsion, which would compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution, prosecution or punishment for any of the reasons stated in Article 2." (Quoted in Goodwin-Gill 1978, 277-279).

In 1969, the Organisation of African Unity Refugee Convention also accepted the notion of non-rejection at the frontier as a corollary of the principle of *non-refoulement*. Article II para. 3 states that "no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2. The express mentioning of non-rejection at the frontier in the Organisation of African Unity Convention is explained by Greig (1984, 132) as follows:

> "In the African context crossing a frontier undetected is readily accomplished, so that detection at a frontier may occur at a later stage (i.e., in trying to enter a third country) when rejection would simply involve the refugee remaining in the territory of an intermediate State and not the State where the persecution took place. It would therefore be possible to argue that the principle of *non-refoulement* applies to prevent a rejection at the frontier where it would have the consequence of the fugitive remaining in the territory of the State from which he was trying to escape."

In its 1977 Report, the High Commissioner's Programme Executive Committee included the following paragraph in its conclusion on the principle of *non-refoulement*:

> "[The Executive Committee] ... (c) Reaffirms the fundamental importance of the observance of the principle of *non-refoulement* - both at the border and within the territory of a State - of persons who may be subject to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees" (Report, 28th Session A/AC 96/549, 13).

A convincing and important argument in favour of the inclusion of non-rejection at the frontier in the *non-refoulement* principle was offered by Weis (1966, 183) who wrote:

> "It should be pointed out that if Article 33 read in conjunction with Article 31 is not taken to prohibit the return of refugees who present themselves at the frontier, this would mean that the extent to which a refugee is protected - in accordance with the humanitarian aims of the Convention - against return to a country in which he fears persecution would depend upon the fortuitous circumstances whether he has succeeded in penetrating the territory of a Contracting State."

In any case, as Goodwin-Gill (1978, 46-47) notes that "States ... have recognised that the principle [of *non-refoulement*] applies to the moment at which asylum-seekers present themselves for entry", that is to say, when they are at the frontier thus reinforcing the dictum of Judge Tanaka in the South-West Africa case (ICJ Rep. 1966 p. 6 at 277) according to which "what is not permitted ... is to establish law independently of an existing legal system, institution or norm. What is permitted ... is to declare what can be logically inferred from the *raison d'etre* of a legal system, legal institution or norm."

The inclusion of non-rejection at the frontier in the principle of *non-refoulement* is today a really compelling issue. As States make it more difficult for refugees to flee their countries by means of carrier sanctions and make entry more difficult by reason of Conventions such as the Dublin Convention make such inclusion all the more important. Unfortunately, it is Western countries whose screening procedures leave much to be desired. Amnesty (April/May 1990 at 9) reports that Amnesty International was "extremely concerned to learn in January [1990] that the Home Office had conceded that four Turkish Kurds who applied for asylum upon arrival at Manchester Airport on 20 June 1989, were unlawfully sent back to Turkey without their asylum applications being properly considered". In other words, the Home Office admitted that its immigration officers had broken the law. So much for the Home Office's statements that full, meticulous examination is given to all asylum applications.

There are some exceptions to the principle of *non-refoulement*. Article 33(2) of the 1951 Convention provides that the principle may not be invoked by a refugee if there are "reasonable grounds for regarding the refugee as a danger to the security of the country in which he is" or if the refugee constitutes "a danger to the community of that country" because the refugee has "been convicted by a final judgment of a

particularly serious crime." It should be noted that the 1969 Organisation of African Unity Refugee Convention contains no limitation clause regarding "national security" or "public order" but the fourth paragraph of Article II provides that "where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the Organisation of African Unity, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum."

Robinson (1953, 164) records the words "reasonable grounds" mean "leaving it to the States to determine whether there were sufficient grounds for regarding any refugee as a danger to the security of the country and whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay."

Coles (1984, 191) makes the valid point that countries facing large-scale influxes of refugees are not few in number. Objection to accept them, at least on a permanent asylum basis, finds ground for reasons of public order and/or national security especially when the country of reception and the entry of large numbers of refugees would cause problems to its economic and social development.

Are these countries free to expel refugees considered a threat to their national security? Article 33(2) requires that there be "reasonable grounds" showing a danger to public security. Article 3(2) of the United Nations Declaration on Territorial Asylum states that *refoulement* could be carried out by a State "only for overriding reasons of national security ...", a provision that imposes a grave burden on the expelling State.

Article 33(2) also provides as a reason for *refoulement* that a refugee constitutes a danger to the community of the country where he seeks or has been granted refuge because the refugee has been convicted by a final judgment of a particularly serious criminal office is not enough for an expulsion under Article 33. The refugee must also constitute a danger to the community. It should be noted that the crime does not need to have been committed in the country of reception.

The question of *refoulement* was raised in *R. v Secretary of State for Home Department; Ex parte Yassine and others* (QB 6/3/1990). Six applicants from Lebanon arrived in the United Kingdom holding visas and tickets for admission and

travel to Brazil. They did not have United Kingdom visas and claimed asylum on arrival. The Home Secretary considered that it was reasonable to expect the applicants to apply for asylum in Brazil as there was no risk of Brazil sending them back to Lebanon and therefore did not consider their asylum applications. He directed their removal to Brazil on the basis that Brazil was a country to which there was reason to believe that they would be admitted. The applicants feared that Brazil would send them back to Britain since they had obtained their Brazilian visas by fraud. The Court held that "where a person had obtained an airline ticket and a fraudulent visa to another country, in order to apply for asylum in the United Kingdom during a stopover, the Home Secretary could not direct the removal of the asylum-seeker to the other country as he had no basis for believing that the asylum-seeker would be admitted to that country."

In 1966 the Afro-Asian Legal Consultative Committee, a body representing Afro-Asian States, which convened in Bangkok adopted the Principles Concerning Treatment of Refugees. (UNHCR 1979, 201). Article III states:

> "1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.
>
> "2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.
>
> "3. No-one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling one to return or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.
>
> "4. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country."

Article VIII of the Bangkok Principles states in relation to expulsion:

> "1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel a refugee.
>
> "2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

> "3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group."

In 1967 the Committee of Ministers of the Council of Europe adopted Resolution No. 14 regarding Asylum to Persons in Danger of Persecution. Principle 2 of the Resolution recommends that the State members of the Council of Europe should " ... ensure that no-one shall be subjected to refusal of admission at the frontier, rejection, expulsion, or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion ..."

In the same year the United Nations General Assembly adopted Resolution 23/2 and also the Territorial Asylum Declaration. As previously stated, Article 3(1) prohibits *refoulement* while Article 3(2) provides for two exceptions to the principle, namely, "overriding reasons of national security" or "mass influx of persons" which may represent a danger to the population of the country of refuge. Article 3, in my opinion, constitutes the most important part of the Declaration. The United Nations Commission on Human Rights when discussing the *non-refoulement* principle, made it clear that the relevant article would not restrict a State's "sovereignty" or "competence" to grant or to refuse asylum, in the sense of permanent refuge:

> "The voluntary restriction of sovereignty for which the first sentence of the French draft provided was of a very limited nature, since it related only to the return to the country of persecution of the person seeking asylum. The receiving country was at liberty to return such a person to an interim country, or to arrange for him to be taken over by any other State. Nothing in the draft Declaration stipulated that the first State was obliged to grant asylum" (Weis 1969, 142).

The International Conference on Human Rights, held in Tehran in 1968, affirmed in Resolution XII the "importance of the observance of the principle of *non-refoulement* embodied in the above-mentioned instruments [1951 Convention and 1967 Protocol]" being so concordant with the 1954 Final Act of the United Nations Conference of Plenipotentiaries which adopted the Convention Relating to the Status of Stateless Persons. According to the Final Act:

> "The Conference, being of the opinion that Article 33 of the Convention Relating to the Status of Refugees in 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

> nationality, membership of a particular social group or political opinion, has not found it necessary to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 [of the 1951 Convention]" (360 UNTS 124).

The major breakthrough in *non-refoulement* law was achieved by the 1969 Organisation of African Unity Refugee Convention where refugees' rights to *non-refoulement* was entrenched unqualified, that is, without any exception regarding national security or public order or the refuge country communities safety.

The principle of *non-refoulement* was considered to be the cornerstone also of the 1977 Draft Convention on Territorial Asylum. The High Commissioner for Refugees stated to the drafting Committee that *non-refoulement* is "in some cases tantamount to the right to life" (Weis 1979, 166). The 1977 Draft Convention originated from the 1971 Bellagio International Colloquium of Jurists on the Law of Territorial Asylum and the 1972 and 1975 Meetings of a Group of Experts in Geneva (Leduc 1977, 221). The "negative duty" of States regarding *refoulement* was finally, albeit qualified, expressed in Article 3 of the Draft Convention. *Non-refoulement* in that Article included non-rejection at the frontier but the exceptions to the principle ((a) national security, (b) refugee's liability to prosecution or punishment for a particularly serious crime constituting a danger to the community, (c) his/her conviction by a final judgment of a particularly serious crime and so constituting a danger to the community and (d) massive influxes of great numbers of persons who may constitute a serious problem to the security of a State) constitute, no doubt, a serious flaw in the overall protection the Draft Convention intended to provide to refugees.

In 1977 the High Commissioner's Programme Executive Committee (Report of the 28th Session A/AC 96/549 at 13) reached the following conclusions on *non-refoulement*:

> "(a) Recalling that the fundamental principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.
>
> "(b) Expressed deep concern at the information given by the High Commissioner that, while the principle of *non-refoulement* is a practice widely observed, this principle has in certain cases been disregarded.
>
> "(c) Reaffirms the fundamental importance of the observance of the principle of *non-refoulement* - both at the border and within the territory of a State - of persons who may be subject to persecution if returned to their country of origin irrespective of

whether or not they have been formally recognised as refugees."

The same year the High Commissioner in his "Note on *Non-Refoulement*" (UN Doc EC/SCP/2) submitted to the Executive Committee's Sub-committee on International Protection stated:

> "While the principle of *non-refoulement* is universally recognised, the danger of *refoulement* could be more readily avoided if the State concerned has accepted a formal legal obligation defined in an international instrument. This underlines the importance of further accessions to the 1951 Convention and the 1967 Protocol. States that have not yet acceded to these instruments should nevertheless apply the principle of *non-refoulement* in view of its universal acceptance and fundamental humanitarian importance.
>
> "In the field of *non-refoulement*, particular regard should be had to the fact that a determination of refugee status is only of a declaratory nature. It should not, therefore, be assumed that merely because a person has not been formally recognised as a refugee he does not possess refugee status and is therefore not protected by the principle of *non-refoulement*."

The 1979 Arusha Conference on the Situation of Refugees in Africa re-affirmed "a number of fundamental principles concerning the treatment of refugees and asylum-seekers, notably the principle of *non-refoulement* and ... the granting of temporary asylum" (A/AC 96/567 at 3)

In 1981 the Executive Committee adopted Conclusion No. 22 on the Protection of Asylum-Seekers in Situations of Large-Scale Influx (36 UN GAOR Supp. (No. 12A) at 31, UN Doc A/41/12 Add. 1 (1986). In Part II-A it is stated:

> "1. In situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.
>
> "2. In all cases the fundamental principle of *non-refoulement* including non-rejection at the frontier must be scrupulously observed."

The Executive Committee re-affirmed in 1986 "the fundamental importance of the observance" of the principle of *non-refoulement* in its Conclusion No. 44 (xxxvii) on

the Detention of Refugees and Asylum-seekers (41 UN GAOR Supp. (No. 12A) at 31, UN Doc. A/41/12/Add 1 (1986)).

The United Nations General Assembly in quite a number of Resolutions has consistently pointed out the importance of the *non-refoulement* principle. In its 1979 Resolution (34/60) the Assembly decided that Governments should "intensify their support for the humanitarian activities of the High Commissioner by, among other things ... facilitating the accomplishment of his tasks in the field of international protection, in particular by granting asylum to those seeking refuge and by scrupulously observing the principle of *non-refoulement.*" In its 1979 Resolution (34/61) the General Assembly endorsed the recommendations of the 1979 Arusha Conference while the 1981 Resolution (36/125) stressed yet again the importance of the Government's duty to observe scrupulously the principles of asylum and of *non-refoulement.*

In November 1984 a Colloquium on International Protection of Refugees in Central America, Mexico and Panama was held in Cartagena, Columbia under the auspices of that State's Government. The International Colloquium wished to reiterate in paragraph 5 of its conclusions (*Yearbook of the International Institute of Humanitarian Law* 1985, 186) "the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees." It continued by saying: "This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens.*"

The European Parliament in March 1987 adopted a resolution (OJ C99/170) regarding asylum-seekers in European Community countries. The first of the main principles included in the resolution was "strict respect" for the principle of *non-refoulement* and non-discrimination of "spontaneous" asylum-seekers (without visas) at the frontiers.

The principle of *non-refoulement* has moreover been accepted and entrenched in the field of international law of human rights. Article 22(8) of the 1969 American Convention on Human Rights (Council of Europe 1985, 176) provides that: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions".

The Draft Charter on Human Rights and People's Rights in the Arab World (Council of Europe 1988, 243) has also recognised the refugee's right not to be subjected to *refoulement*. Article 40 states:

> "1. Every citizen who is subjected to persecution on political grounds has the right to seek and obtain asylum in any Arab country in accordance with the law and the provisions of this Charter.
>
> "2. No person enjoying asylum or seeking it should be expelled to an Arab or foreign country where his life would be in danger or where he may be persecuted."

The practice of *refoulement* has been condemned, directly or indirectly, by the European Commission of Human Rights in various cases. Even though the European Convention on Human Rights contains no right of asylum nor does it make any direct reference to *refoulement*, relevant problems have been discussed in the context of the non-derogable Article 3 of the European Convention on Human Rights which states: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The various international instruments have been enumerated in some detail to show the importance of the principle of *non-refoulement*. Whilst a lot of time and effort has gone into drafting and agreeing to those instruments their usefulness and how much notice is being taken of them by the various States must be challenged. It is considered at the present time a refugee would not get much comfort from the principle of *non-refoulement*.

CUSTOMARY INTERNATIONAL LAW

I now propose to briefly consider the relationship between customary international law and the principle of *non-refoulement*.

Article 38(6) of the Statute of the International Court of Justice, a provision which is still generally recognised as "a complete statement of the sources of international law" (Brownlie 1990, 3), has consecrated international custom, that is, the general practice of States which is accepted as law, as one of the primary "means for the determination of rules of law on the international plane" (Brownlie 1983, 387). The material sources of a customary international law norm, which prove the existence of consensus among States, vary and may consist of "comments by governments on drafts produced by the International Law Commission, State legislation, international and national judicial

decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly" (Brownlie 1990, 5).

The two basic objective elements of custom are consistency and uniformity of the relevant State practice. As the ICJ stated in *Columbia v Peru* (1950) ICJ Rep. 266 at 269:

> "The party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practised by the States in question and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom as evidence of a general practice accepted as law.
>
> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law ..."

In *Nicaragua v USA* ((1986) ICJ Rep. 14 at 98) the Court made clear what it means by "States' conformity with a customary rule":

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of the attitude is to confirm rather than to weaken the rule."

A necessary element of custom is the psychological one usually referred to as *opinio iuris sine necessitatis*. The State must be "conscious of a duty" as the PCIJ said in *France v Turkey*, (1928) (PCIJ Rep. Ser. A, No. 10 at 28) when it follows or initiates an international customary practice.

The customary acts must be carried out "in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it ... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, eg in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition and not by any sense of legal duty." (FRG v Denmark; FRG v The Netherlands (1969) ICJ Rep. 3 at 44).

Baxter (1966, 300) observed that "the actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.

This thesis was also adopted by the ICJ in the *Nicaragua Case* (1986). It has expanded and tended to dominate international law. Meron (1989, 107) argued that the ICJ did not focus on State practice in order to find *opinio iuris* but on statements of governmental representatives to international organisations, declarations and resolutions of such organisations as well as the consent of States to nominate instruments deriving from the practice of international organisations which express the *opinio iuris communis* creating at the same time the 'soft law' that being the result of a voluntary acceptance by States of the need to adopt the methods of law-creation to the needs of the changing world community.

Whether or not *non-refoulement* has acquired customary international law status is disputed. Article 33 of the 1951 Convention does not permit reservation. The fact that over 100 States have become parties to the Convention does not in itself mean *non-refoulement* is *ius cogens* (peremptory norms of customary international law). If *non-refoulement* is customary international law, then it is binding on all States whether or not they are parties to the 1951 Convention.

Under customary international law, the relevant categories of unlawfulness are genocide, systematic discrimination, a consistent pattern of gross violations of internationally recognised human rights and interference with the right to self-determination. These form a body of *ius cogens*, obligations towards the international community as a whole that cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule with the contrary effect. The major distinguishing feature of such rules is their relative indelibility.

The large number of States that have adopted the Convention and have, consequently, accepted and conformed with the principle of *non-refoulement* constitutes clear evidence that the latter is a generally accepted legal principle, bearing, however, the limitations repeated in the intentional instruments having entrenched refoulement. The fact that no reservations may be, nor have been, made to the *non-refoulement* Article of the Refugee Convention constitutes a corroboration of the principle's customary legal character.

The fact that a convention provision may not be enfeebled by reservations has been accepted by the ICJ as evidence of that provision's customary character (North Sea Continental Shelf Cases (1969) ICJ Rep.3 at 72). Brownlie (1990, 13) argues that it may be doubted if the existence of reservations of itself destroys the probative value of treaty provisions.

The decision of the European Human Rights Commission in *X v FRG* (No 6315/73) and Altun v FRG (No 10.308/83) provided judicial reinforcement of the principle's customary character. Such decisions are only subsidiary means of interpreting international law. The view that *non-refoulement* has established customary norms is supplemented by Gill (1983, 97-98), the works of Jaeger, Greig, Weis, Vukas and Sipha quoted in Hyndman (1982, 70). Ott (1987, 144 and 252) accepts that since 1951 *non-refoulement* has become law and a rule of customary international law. Goldman and Martin (1983, 315) state the principle of non-refoulement has received widespread authorative recognition throughout the world. As such, it appears that this principle has evolved from a basic humanitarian duty into a general principle of international law that binds all States, even in the absence of an express treaty obligation. Kennedy (1986, 61)

notes that it is "on the basis of this quality of *non-refoulement*, its recognition as an international matter of law, regardless of its particular strength, status or content, that one thinks of refugee law as law at all on the international plane. If one manages to think that the key point about *non-refoulement* is its international legal character, one can think of refugee law as a legitimate sub-species of international law even if one eventually concludes that *non-refoulement* has not (yet) acquired binding force."

While Feliciano (1982, 608) accepts that "measured by the ordinary indicia, it is submitted that, with one material qualification, the *non-refoulement* principle may properly be regarded as having matured into a norm of customary international law," he qualifies his premise because "socialist countries, by and large, do not show either the rhetoric or the operational practices of *non-refoulement*. Thus it appears that *non-refoulement* is a principle not of *general* customary law but of *regional* or *hemispherical* customary law, being widely or generally acknowledged in the non-socialist part of the globe."

This line is contingent upon and attaches great importance to the practice of some States, this being viewed as the only or the most important factor in the creation of customary international law; a stance that is not concordant with the contemporary international law. States' consistent practice is not considered any more as the *conditio sine quo non* for the creation of a contemporary customary international norm. But even if this thesis rejecting the customary character of *non-refoulement* for the *de-facto* refugees were in compliance with the currently dominant international law theory, the examples of the relevant state practice which are used as evidence may not be accepted as representing the practice of the majority of the countries which face and/or cope with the problem of humanitarian refugee influences. The States which are usually referred to are all Western developed ones which it is true have adopted over-restrictive measures against all the non clearly persecuted refugees. However, the vast majority of the contemporary refugees are still, and there is ample evidence that they do find at least temporary refuge in, undeveloped African, Asian, Middle-Eastern or Latin American countries, this refuge being granted on the grounds of legal as well as humanitarian obligations. That is a large-scale State practice that provides irrefutable evidence that the contemporary

refugees' right to *non-refoulement* has matured into customary law even under the traditional, established international law theory.

Most of the conventions and treaties regarding *non-refoulement* do not make any distinction between "persecuted" or "conventional" and "humanitarian" or *de-facto* refugees, thus demonstrating that the *opinio juris communis* is in favour of a liberal, but not unrestricted, application of the principle to all *bona fide* contemporary refugees. That has been shown by the numerous United Nations General Assembly Resolutions where the States' votes constitute clear-cut evidence of the States' firm belief that the Resolutions' content are concordant with international law and any rejection of them would be unlawful (Ott, 1987, 22). Meron (1989, 92) argues that "the repetition of certain norms in many human rights instruments is in itself an important articulation of state practice and may serve as evidence of customary international law".

In the Barcelona Traction Case (ICJ Reports (1970), 3 at 32) the Court drew a distinction between obligations of a State arising vis-a-vis another State and obligations "towards the international community as a whole". The Court said:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

The Court did not include *non-refoulement*. The Universal Declaration of Human Rights does not include *non-refoulement*. Whilst quoting the above, I am cognisant of the fact that decisions of the ICJ are binding on the parties to the case but are not law in any sense. Furthermore, the Barcelona Case precedes *non-refoulement* as a general issue. This quote is included only to show the reasoning of the Court on this matter. The Court, of course, may follow such reasoning today.

It is not considered *non-refoulement* is ius cogens, that is an indelible obligation towards the international community which cannot be set aside by treaty or acquiescence. As pointed out later the elements of custom in international law are duration, uniformity,

generality of the practice and opinio jures et necessitatis. There must be shown a consistency of State practice and a belief on the part of those observing the practice that this obligation is mandatory. If obligations can be shown to exist under customary international law, those obligations will bind all nations whether or not there has been any explicit undertaking through accession to a treaty.

As discussed above, there is considerable dispute as to whether *non-refoulement* is customary international law. I am inclined to the view that *non-refoulement* has not yet acquired customary international law Status. There is neither extensive and uniform State practice nor opinio iuris to warrant an assertion that *non-refoulement* is customary international law. States, particularly in the South East Asian region are not prepared to admit a mass influx of refugees. They turn refugees away. The United States of America has also turned persons away who sought asylum. I therefore, am of the view that *non-refoulement* does not conform to the elements of custom in international law.

The principle of *non-refoulement* has as its aim the protection of the refugee's life and/or personal liberty that would be endangered upon return, that is two of their basic human rights having acquired, as far as States are concerned, the form of obligations *erga omnes*, as the International Court of Justice stated in the *Barcelona Traction Case* ((1970) ICJ Rep. 3 at 32), namely obligations borne by States towards the international community as a whole, having been generally accepted by the former as legal obligations through not only Articles 55 and 56 of the United Nations Charter but also all the subsequent human rights treaties. These obligations have many characteristics in common, especially if seen within the refugee problem context, with the obligations based upon "the elementary considerations of humanity, even more exacting in peace than in war as stated in the *Corfu Channel Case* ((1959) ICJ Rep. 4). As a consequence, the refugees 'right to and the corresponding States' obligation of *non-refoulement* cannot be said to be based 'on reciprocal interests of States' but on a far broader goal of States to establish orderly and enlightened international and national legal order" (Meron 1989, 99-100).

The imposition on States of a legal obligation not to expel refugees arriving massively at the borders may and do sometimes generate problems threatening their "public order", bearing in mind that "in the final analysis *non-refoulement* through time implies temporary refuge" (Goodwin-Gill 1988, 112). Consequently, a "safety value"

is indispensable especially in view of the contemporary international law climate where there always exists a danger that "soft law" raises over "hard law" "diluting principles and fudging standards" (Goodwin-Gill 1988, 113). This "safety valve" however should never turn a blind eye to the predominance of the principle of humanity on which the whole international refugee protection policy has been founded. *Non-refoulement* is one of the vital customary humanitarian principles which must survive.

If I were a refugee, could I be sure that the principle of *refoulement* would safeguard my interests? Unfortunately, this question must be answered in the negative.

The first hurdle to be overcome is to have a claim for refugee status heard. There is no legal requirement under the Migration Act 1958 (Cth) for border claimants to be referred to the Department of Immigration and Ethnic Affairs for a decision on their refugee claims. As a 1951 Convention signatory, Australia agrees to *non-refoulement*. However, as stated in evidence in the case of *Azemoudeh v MIEA* (1985) 8ALD 281, the plaintiff, a border refugee claimant, an Iranian Christian, a transit passenger was summarily returned to Hong Kong and from there back to Iran. After that case the Government gave an undertaking that it would not repeat that process without giving the persons who arrived at the border a formal hearing. Previously the Department took the view that a transit passenger with entry authority to another protection country should continue his journey. This was in contravention of UNHCR policy that border officials must refer all asylum applications to a central authority for determination. Paragraph 9 of the UNHCR Handbook states:

> "The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments should be required to ... refer such cases to a higher authority."

Legislation in the United Kingdom and Canada requires border officials to refer refugee claims to the determining authority, including, in the United Kingdom, claims which might give rise to a finding of refugee status. Such legislation cannot guarantee refugee claimants are not returned without proper examination and determination, but it is a safeguard to minimise the risk of such errors.

There is, in principle, no basis under the 1951 Convention and 1967 Protocol for objecting to the return of a refugee to a country in which he will be safe however

reluctant he may be to go there (*Rosenberg v Yee Chien Woo* 402 US 49 (1970)); *Hart v Minister of Manpower and Immigration* ((1978) 2 C.F. 340). Hence there has developed a widespread State practice of returning refugees to the territories of safe countries, which are regarded by the returning States as countries of "first asylum". This practice has its problems as the following case shows.

Stolijkovic v Minister for Immigration and Ethnic Affairs (7 September 1993 unreported) was an application for review of a decision refusing the applicant refugee status pursuant to s 22AA of the Migration Act 1958 (Cth). The applicant was a Yugoslav national of Serbian origin who had left Yugoslavia in 1988. His second marriage, in Australia, was to a person of Croatian origin. Following his unsuccessful application for refugee status he was arrested and convicted for trafficking in heroin. He claimed he had a well-founded fear of persecution if he were returned, since he would be conscripted to join the army and he did not wish to serve in the war; he would face death as a traitor for marrying a Croatian; and he had no family and friends there. The minister's delegate concluded that the applicant had not left his country in order to avoid conscription, and that the penalties he would face were not excessive or persecutory within the meaning of the Convention, as interpreted in paras 167-174 of Pt V of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status, which deal with conscription and evasion of military duty. The application was dismissed.

It is difficult to understand this decision. The enmity between Serbs and Croats endures. At present, hardly a day goes by when one does not read of the atrocities being committed by Serbs against Croats and against each other. Yet the Federal Court held that Stolijkovic should not be granted refugee status. The problem lies not in the principle of *refoulement* but in the narrow interpretation of domestic law by the Courts. Of course, an individual cannot bring an action in the International Court of Justice to enforce the 1951 Convention. It can be brought only by another State and what State would bring an action on behalf of one refugee? One way to avoid the problem of *refoulement* is to grant temporary protection. The policy of temporary protection is being applied in Western Europe to ex-Yugoslavia refugees. However, temporary protection generally applies to mass movements rather than a residence permit for humanitarian reasons.

TEMPORARY PROTECTION

The Convention fails to address temporary protection. A person granted temporary protection generally does not have his case for refugee protection determined. This is ultra-vires the Convention, the objective of which is to grant permanent protection. However, it must be recalled that not all States are signatories to the Convention and therefore the Convention is not binding on a non-signatory.

The concept of temporary protection took shape in the context of persons fleeing Croatia in 1991. In July 1992, the United Nations High Commissioner for Refugees formally requested States to extend temporary protection to persons who were in need of international protection as a result of the conflict and human rights abuses in the former Yugoslavia.

The grant of temporary protection is a recognition of the need for concerted international action in a spirit of humanitarian burden-sharing and solidarity in the face of a recognised humanitarian need. It ensures international protection on an emergency basis for persons involved in large-scale movements while favouring their eventual return home as the most desirable solution. The expectation inherent in the grant of temporary protection is that it will be only of a short duration and that conditions permitting the refugees to return home in safety and dignity may be attained within a reasonable period of time.

While temporary protection is not a part of the international law relating to refugees as yet, there is a growing practice to that effect amongst States receiving large numbers of refugees. The usefulness of the concept is being considered by UNHCR and governments and its application is being promoted to contexts beyond the former Yugoslavia in comparable large-scale displacement, resulting from armed conflicts and/or massive human rights abuses as a component of any comprehensive measures taken to deal with emergencies and crises. As the law now stands temporary protection is not consistent with the 1951 Convention the object of which was to grant permanent protection after each application was considered on a one-by-one basis. By granting

temporary protection to large numbers of people the Convention is not invoked and thus question of the non-refoulement obligation is by-passed.

In Australia persons fleeing from the former Yugoslavia may apply for asylum pursuant to the Migration Act 1958. However, the Australian Government also introduced a Special Assistance Category program in 1992 for citizens of the former Yugoslavia who had been displaced by fighting. This was known as the "class 200" refugee category. There is also the "Former Socialist Federal Republic of Yugoslavia Temporary Entry Permit" (class 443). Eligibility for this class of permit is that an applicant must have been a citizen and normally a resident of the former Yugoslavia; be legally in Australia on or after 31 December 1992; not have an entry permit which is valid up to or beyond 30 June 1993; nor have been issued with a deportation order.

Nationals of the former Yugoslavia who benefit from temporary protection have a right to remain in Australia until their entry permit expires. They are allowed to work but are not allowed to obtain public medical insurance, social security, to study any formal courses or to sponsor family members to join them in Australia. Ex-detainees are eligible for services including accommodation, specialised help in areas such as torture, trauma counselling and rehabilitation. Temporary protection is only issued for a maximum period of one year. If the Australian Government considers that the situation in the country of origin has improved it may decide not to renew permits. However, it has not done so. Holders of the permits from ex-Yugoslavia and Sri Lanka have had the permits extended on several occasions. They are valid to September 1996.

There are no provisions, legislative or otherwise, for temporary asylum in Canada.

In the United Kingdom in respect of ex-Yugoslavia temporary protection cases are granted leave to enter on an exceptional basis outside the United Kingdom Immigration Rules. Temporary protection status has been granted automatically by the Home Office to those individuals admitted within the ex-detainee program and also for the individuals admitted for medical treatment under the UNHCR/IOM program. Temporary protection beneficiaries are granted leave to enter the United Kingdom for six months initially. After this period, they are given 12 months leave to remain. This period may be extended unless it is decided that it is safe for these persons to return to the former Yugoslavia. Temporary protection beneficiaries have the same right to work and/or receive training as nationals, same right to education as

nationals; same right to family reunion as refugees; same right to social benefits as nationals; have no entitlement to travel documents.

Temporary protection applies in States which have ratified the Treaties on Human Rights. It stems from the concept of temporary refuge which was referred to as extra-territorial asylum granted in an embassy. It was not an absolute protection against a State and certainly not foreign asylum. Later on, it was used synonymously with the concept of temporary asylum. Strictly speaking, temporary asylum refers to the period between arrival and the decision on the application for asylum. A temporary-asylee enjoys specific status particularly against *refoulement* and also enjoys economic and social rights. The status is also referred to as provisional asylum.

Temporary protection became fashionable post-1975 during the Boat People Crisis. It permits a person to remain in a country of refuge until safe return to the country of origin can take place. Persons who have fled from areas of conflict and violence, persons who would be exposed to human rights abuses, people who have felt compelled to flee their country of origin are likely to claim temporary protection. The permission to remain continues until safe return can be arranged, that is after international consultation with the country of return. Some countries which have given some temporary protection are not in favour of family reunion. Family reunion is a fundamental human right. It is permitted in some countries but not in others. However, it is stressed family reunion is also one of the most sensitive, complex and difficult issues the world over. Politicians are extremely wary of it.

From the point of view of Refugee Law, a person has a right to ask for the formal grant of asylum. When these mass exoduses take place, as are currently happening in Rwanda, and Burundi it is simply not possible to consider individual cases at the border because so many people are fleeing (600 000 from Burundi, over 500 000 from Rwanda). In principle a refugee is entitled to ask for asylum if the country is a signatory to the 1951 Convention. The refugee may agree to postpone but not abandon the right to asylum. It is not compatible with the Convention to abrogate rights. However, if the refugee is fleeing violence for reasons unrelated to the Convention criteria, that applicant does not come within the Convention definition. If the refugee is fleeing violence and fears persecution if returned, then that applicant would be eligible for refugee status. In some countries, where temporary protection is granted, refugee status can be sought after six months.

Temporary protection ensures admission of refugees in need of immediate attention and provides time to look for further solutions. Most of those refugees are sheltered in camps. As most States do not practice generous asylum policies it would be impossible to arrange shelter other than in camps. These camps put indirect pressure on the international community to look for a solution to the causes of influx. There is also pressure for burden-sharing, that is sharing the cost of clothing and feeding the refugees.

EXCOM at its 44th Session in October 1993 decided to "support the further exploration by the High Commissioner and States of various asylum strategies, such as temporary protection in relation to persons compelled to flee their countries in large numbers and who are in need of international protection, pending the identification of an appropriate solution, and reaffirms the importance of Executive Committee Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx."

Temporary protection confers no rights. The European Union and UNHCR have surveyed the implementation of temporary protection for refugees from ex-Yugoslavia. It has been found that the most significant variations are in access to employment and family reunion. This is contrary to the spirit and letter of the European Convention on Human Rights.

Temporary protection is not a solution to the problem. It is not attractive to governments - persons granted temporary protection in western countries disappear. The cost of considering applications, renewing temporary visas and keeping track of persons to whom temporary protection has been granted is prohibitive - money which could be better spent on resettlement. It is a method of evading the need to deal with firm requests for asylum. What follows from temporary protection?

This analysis of refugee law and its position in international law shows that the definition of a refugee is being interpreted by States in a narrow, legalistic manner. Australia and Canada are only two examples of this trend. In chapters 7 and 8 it will be shown how those two countries have brought the concept of refugee into their domestic law. Pursuant to the Convention an individual asylum-seeker has no right of appeal to an international court, for example, the International Court of Justice. Under Human Rights Law there can be, in certain circumstances, an appeal by an individual to the Human Rights Committee. In the following two chapters Human Rights Law

as it affects refugees in general will be examined. It will then be demonstrated how Human Rights Law affects applicants for refugee status in Australia and Canada.