The Criteria For Determination Of Refugee Status In International Law: A Critical Appraisal

Mohammad Naqib Ishan Jan

Ahmad Ibrahim Kulliyah (Faculty) of Laws, International Islamic University Malaysia.

ABSTRACT

The twenty first century has witnessed disastrous events in different parts of the world causing millions of people to leave their countries of origin hoping to seek refuge and protection against ‘persecution’ from other countries. However, their hopes are often shattered when their status as refugees is not recognised and thereby effectively denied protection which international refugee law accord to them. One of the reasons for inaccessibility to refugee status in most of the host states is the adoption of restrictive interpretation of the criteria for the determination of refugee status that are laid down in the 1951 Convention relating to the Status of Refugees as amended by its 1967 Protocol. As will be discussed in this paper, if states have adopted a broader interpretation of these criteria many of the asylum seekers would face no problem in acceding to refugee status and the benefits that accrue from it. Broad interpretation of these criteria, as this paper advocates, would be inline with humanitarian idealism of international refugee law, provide a pragmatic solution to the problem faced by millions of desperate people and uphold the spirit and protective nature of international refugee law.

Key words: Criteria, determination, refugee status, well-founded fear of persecution, United Nations, international law, Convention relating to Refugee Status, Protocol of 1967.

Introduction

International refugee law is a specialized area of public international law. It consists of rules and procedures that aim to protect ‘refugees’. Its primary source is treaty law, notably the 1951 Convention Relating to the Status of Refugees which was adopted by the United Nations (UN) in 1951 (hereinafter cited as the 1951 Convention) and its 1967 Protocol. There are few rules of refugee law which can be said to have crystallized into customary international law. The main difference between customary international law and treaty law is that the former generally binds all states while the later binds only the contracting parties, i.e., parties to the treaty. A treaty does not bind a third state, i.e., a non contracting state while customary international law does not bind a persistent objector state, i.e., a State that object the custom from its inception to its formation and beyond. One of the rules of international refugee law which arguably crystallized into customary international law rule is the definition of a refugee as contained in the 1951 Convention, as amended by its 1967 Protocol. The other rule of refugee law which has crystallized into customary international law is the principle of non-refoulement – a principle which protects refugees against forcible return to a country in which they fear persecution. The reason for considering these two rules as customary international law is consistency, uniformity and generality of practice among states, as these rules are reflected in the 1952 Convention, which has 147 member States as well as the regional treaties and declarations. The principle of non-refoulement protects ‘persons seeking asylum from ‘persecution’ up to the determination of their status as refugees and the protection is available to them so long they stay in their host country as refugees. Refugees are also entitled to some other benefits under international refugee law after the recognition of their status as refugees. They are also entitled to human rights protection simply because they are human like the rest of us are and by that virtue they possess dignity that states must respect, protect and fulfill at all time, irrespective of whether their status as refugees is recognized or not.

Where a person’s status as refugee is recognized by a host country he can then enjoy special rights under the 1951 Convention. The recognition of refugee status is not, however, automatic. There are certain criteria that a person has to fulfill before he is granted refugee status entitling to the rights under the Convention. But often States have adopted restrictive interpretation of the criteria resulting in the denial of refugee status to most of the eligible people and consequently deprived these people the special rights the 1951 Convention accord to refugees. This paper does not deal with the rights of refugees but it rather discusses the criteria for the determination of refugee status. The most important criteria for the determination of refugee status is ‘well-founded fear of persecution’ which a claimant, who is outside the country of his origin, has to fulfill before he...
can be granted refugee status. The ‘persecution’ which he fears in his country of origin must be based on the ground of his race, religion, nationality, social group or political opinion and because of such fear he is unwilling or unable to return to that country. Is the term well-founded fear of persecution capable of being given a liberal interpretation to accord refugee status to people who escape their countries of origin due to extreme violation of human rights, foreign occupation and armed conflicts? Who determines refugee status, the host country or the United Nations High Commissioner for Refugees (UNHCR)? These are vital questions to be discussed simply because limited rights that are guaranteed under international refugee law accrue from a person’s status as a refugee. So it is important to know who is a refugee and the legal criteria for the determination of refugee status before discussing the substantive questions relating to the refugee’s rights and obligations.

**Definition of Refugee:**

The term ‘refugee’ is defined in the 1951 Convention – a Convention its drafters, oblivious of the fact that refugees were not confined to a particular region or to a particular event, but a world phenomenon, initially give a restricted definition to the term refugee to include only European refugees who were displaced from their countries of origin due to ‘events occurring before 1 January 1951’, i.e., events which occurred in Europe since the time of the First World War. However, after realising that refugees were not confined to a particular event or to a particular continent but rather had a global dimension, in 1967 the UN adopted the Protocol relating to the Status of Refugees to discard the temporal and geographical limitations of the Convention so as to enable the Convention to apply globally. The Convention, in spite of its weaknesses, remains the only international treaty having a direct application to refugees and as a treaty it imposes obligation upon its member States, though not upon third States, to protect persons who comes within the definition of the term ‘refugee’. Under Article 1A (2) of the UN Convention, as amended by its 1967 Protocol, the term ‘refugee’ applies to any person who:

Owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or, who not having a nationality and being outside the country of his former habitual residence, is unable, or owing to such fear, is unwilling to return to it.

Article 1, which is supplemented by the provisions regarding cessation and exclusion from refugee status, is an important provision concerning the definition of the term refugee (M. Hamalengwa, C. Flinternam and E.Y.O. Dankwa, 1988). This is so because of the fact that large number of States have acceded to the 1951 Convention and its Protocol and also because of the prominence given to the provision of Article 1 in the Convention itself. No Member State, as provided by Article 42 of the said Convention, can make reservation to Article 1. Also the provisions of this Article have been reproduced in several regional instruments dealing with refugees (Bronne, 1993). This Article, however, is a treaty provision and as such it may bind only those States that are party to the 1951 Convention or its 1967 Protocol. It does not bind States that are not party to the Convention unless it is shown that it has achieved the status of customary international law-an issue which we may discuss later.

The definition of the term refugee in Article 1 of the 1951 Convention is said to be rigid to be pervasive and as such a lot of persons who have been compelled to flee their countries of origin, either due to armed conflicts or generalized human rights violations, and who deserve some form of international protection would be excluded from the ambit of the definition and thereby excluded from the protective provisions of the 1951 Convention. The problem of the rigidity of the definition can be solved, however, by expanding the definition. One way to expand the definition to make it all inclusive is to amend the definition. This approach was followed by certain regional groups of States. For instance, in 1969, the Organization of African Unity (OAU) adopted its own Convention on refugees, following this approach. The OAU treaty, in addition to respecting the 1951 Convention definition of a refugee, expressly recognizes as refugees, persons who are outside their country of origin because of external aggression, occupation, foreign domination or other circumstances, which have seriously disturbed public order (Hilton, 1993).

This approach at the international level may not, however, be feasible as it would be difficult, though not impossible, to convene another international conference for the purpose of amending the definition. Furthermore, it would be hard to convince States, who are already reluctant to implement their obligation under the current Convention, to agree on the amendment and even if they do so the possibility is that they would adopt a further restricted definition in which case the matter may become worse. How can one, for example, expect change for the better when many States around the globe are applying a more restrictive interpretation of the various criteria established in the present definition. Even refugees who meet these criteria often find it difficult to establish their status and receive protection in such countries (Linda Dale Beris, 1988).

Thus, the better way to expand the definition to make it all-encompassing, covering not only victims of ‘persecution’ but also those who escape armed conflict and generalized human rights violation, is to expand our understanding and application of the wording of the present refugee definition itself. This approach, which avoids tampering with the 1951 Convention definition, is a better approach – an approach that advocate a liberal
interpretation of the criteria of the refugee definition. In fact the circumstances of the adoption and application of
the 1951 Convention suggest that the difficulties the definition presents to current refugees do not stem from the
restriction intended by the drafters of the Convention. The Recommendation E of the Conference that adopted the
1951 Convention, as well as the consistent broadening of refugee definition over time, imply that the current
definition of “refugee” can accommodate all refugees if it is liberally interpreted (Guy Goodwin Gill 1983). This
paper, concentrates in examining the present definition of “refugee” contained in the amended Article 1A(2) of
1951 Convention and tries to apply a liberal interpretation of the various criteria established in it in order to
convince States to accord refugee status to a wide category of persons who need international law protection.

Criteria for Refugee Status:

Article 1A (2) of the 1951 Convention contains some criteria for the determination of a person’s status as a
refugee. Four criteria are mentioned in this Article. They are: ‘a well-founded of fear of persecution’; the
persecution to be based on either one’s race, religion, nationality, membership of a particular social group or
political opinion; the claimant to be outside his country of origin and owing to that fear is unable or unwilling to
avail himself of the protection of his country of origin. These criteria will be discussed in turn and in doing so
attempt is made to give them a liberal interpretation so as to enable the definition to become as pervasive as
possible covering a wider range of deserving people for the protection accorded under the international law
which international refugee law is a part.

Well Founded Fear of Persecution:

The key criterion for the determination of refugee status is the criterion of ‘well founded fear’ of persecution’.
There is no universally accepted definition of ‘well-founded fear’. However, it is generally agreed that ‘well-
formed fear’ of persecution refers to sincere or reasonable fear of persecution. The term ‘persecution’ will be
discussed after we clarify the ‘fear’ of it which is required to be well-founded.

Fear must be ‘well-founded’ but need not be actual:

‘Fear’ is a subjective term representing the state of mind of a person claiming refugee status. It must be sincere
and reasonable fear so as to constitute well-founded. It is not a requirement that either the ‘persecution’ or the fear
of it to be actual. Guy Goodwin-Gill says: “Fear and the degree to which a particular individual feels it are
incapable of precise quantification. It may be exaggerated or understated but still be reasonable. If the applicant’s
statements in regard to that fear are consistent and credible, then little more can be required in the way of formal
proof. The next question is whether that subjective fear is well founded: Whether there are sufficient facts to permit
the finding that the applicant would face a serious possibility of persecution” if is returned home Grahl-Madsen
(1966) noted that well founded connotes a fear based on reasonable grounds of persecution. In his view, this term
suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugee status,
but that this claim should be measured with a more objective yardstick. “In general, the applicant’s fear should be
considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin
has become intolerable to him for reasons stated in the definition or for the same reasons be intolerable if he
returned there”.

Some judicial decisions suggest that ‘well founded fear’ of persecution refers to ‘a reasonable possibility’ of
persecution not necessarily actual persecution (I. N. S. V. Cardoza-Fonsera ). So long the claimant establishes that
if he is to be returned to his country of origin he would possibly be persecuted there he can fulfill this criterion. In
other words, what he needs to show is a reasonable possibility of persecution in his country of origin. A claimant
who fled a country where one in ten of the population is murdered or sent to a labour camp; such a person does not
have a 51% probability of being persecuted but his fear of persecution is undoubtedly well-founded as there is
reasonable possibility that he would be persecuted upon return (Grahl Madeen).

Judicial decisions in some countries, such as United States, England and Canada, confirm that ‘the
requirement in Article 1A(2) of the UN Convention that an applicant for refugee status had to have a well founded
fear of persecution if returned to his country meant that there had to be demonstrated ‘a reasonable likelihood’ that
he would be so persecuted’ (R. V. Secretary of State for the Home Department, ex parte Sirakumarvan ). Whether
an individual applicant is able to show this depends on the evidence before the officers of the host countries
charged with the task of refugee status determination. The evidence can be gathered not only from the applicant
himself/herself but also from the relevant human rights bodies having the necessary information about the human
rights situations in the country from which the claimant come from.
Determination of ‘well-founded fear’: Individuals v. large exodus:

The individualized and case by case evaluation for establishing a well-founded fear of persecution is possible in cases of individual claimants but not so in cases involving large groups of people who either because of their racial, religious, social or political inclination are forced out of their country of origin necessitating an urgent action to provide them with the necessary protection – a protection which their country of origin failed to provide and is to be substituted by a host country. Such situations, which occurred in the past and may possibly occur in future, requires a ‘prima facie’ group determination of refugee status - a determination which is done in the light of the circumstances that have led to the groups’ departure from their country of origin entitling them to a prima facie refugee status, that is “a status at first glance” in the absence of evidence to the contrary. Prima facie determination of refugee status is a practical, time saving and cheapest way of determining refugee status in situation of mass influxes as in such a situation the individual screening would not practicable.

The irony, however, is that the authorities of many host countries are reluctant to adopt the prima facie’ group determination of refugee status and thereby denying refugee status to those whose fear of persecution is generalized. Some countries, particularly the rich and the industrialized ones, contend that well-founded fear exists only when an applicant to refugee status shows that he has been personally singled out (S. Lamaas, 1983) for persecution, that is that he fears something more than a generalized denial of human rights and can recount a personal history of persecution (Roth, 1981). This is an erroneous contention and is neither supported by the UN Convention nor logically acceptable. The historical framework of the 1951 Convention makes it clear that it was designed to protect persons within large groups whose fear of persecution is generalized, not merely those who have been personally singled out for persecution. The primary intended beneficiaries of the Convention were many victims of the Second World War and the ideological dissidents from Eastern Europe, virtually all of whom were assumed to be worthy of protection by reason of their group defined predicament. When the refugee law evolved through the 1967 Protocol to protect refugees from outside Europe, no new conceptual limitations was added, as a result of which there is no basis in law for excluding from refugee status a person whose fear of persecution is generalized (Loescher and Scanlan, 1984). Also the notion of restricting refugee status to persons who have been singled out for persecution would help only the elites to get refugee status for they would be able to show that they have been the target of concrete measures amounting to persecution by the authorities. It is an established fact that situations of heinous human rights violations, genocide and ethnic cleansing do affect groups rather than individuals. So denying refugee status to such groups would marginalize international refugee law (James, 1991). In facts case law in some countries suggest that “[t]he applicant [for refugee status] does not have to show that he himself been persecuted in the past or would himself be persecuted in the future” (Salibran V. Mei). The singled out standard is therefore an inappropriate standard and should be rejected. Rejecting a refugee claim merely because the applicant came from a country where the lives and freedom of a large number of people were at risk is described as a reasoning that ‘turns logic on its head’. According Grahl-Madsen “once a person is subjected to a measure of such gravity that we consider it ‘persecution’ that person is persecuted in the sense of the UN Convention, irrespective of how many others are subjected to the same or similar measures”.

Persecution:

Definition of persecution:

The key term in Article 1 (2) of the 1951 Convention is ‘persecution’. But neither this Article nor any other provision of the UN Convention defines persecution. It was deliberately left undefined simply because the drafters of the UN Convention “realized the impossibility of enumerating in advance all of the form of maltreatment which might legitimately entitle persons to benefit from the protection of foreign State”. (K.E. Mahoney and P. Mahoney, 1993) For this reason scholars of international refugee law are reluctant to define the term in question. Nevertheless, it is agreed that a threat to life, liberty and human dignity on the ground of either race, religion, nationality, social or political group constitute persecution. This view has been accepted by some prominent international refugee law scholars like Weis as well as by the UNHCR. Thus, in determining whether a person is a refugee within the meaning of article 1(2) of the UN Convention the primary attention should be given on the question whether the applicant will face serious and unacceptable risks to life or liberty or human dignity if returned to his country of origin. This liberal interpretation of the term persecution links refugee status to the denial of basic human rights. In fact the 1951 Convention is based on humanitarian ideals embellished in the concept of human rights as its preamble affirms the principle enunciated in the Charter of the UN that human beings shall enjoy fundamental rights and freedoms without discrimination. Even the grounds on which persecution is recognized in the UN Convention are to those on which discrimination under human rights standards prohibited in general international law.
Palestinians to become refugees. (Cultur , 1973) More than a quarter of a million Burmese Muslims fled from deliberate violation of human rights by the Zionist state of Israel has forced an estimated two and a half million of religious, social or political groups of people from their homes and from their country. For example, such a where human rights are being deliberately and arbitrarily violated with the aim of forcing or expelling entire racial, has forced people to flee their home countries seeking to become refugees. There have been too many instances
fundamental human rights regardless of the identity of the perpetrator.(

Thus, persecution subsists in the violation of basic human rights. It is in fact the violation of human rights that has forced people to flee their home countries seeking to become refugees. There have been too many instances where human rights are being deliberately and arbitrarily violated with the aim of forcing or expelling entire racial, religious, social or political groups of people from their homes and from their country. For example, such a deliberate violation of human rights by the Zionist state of Israel has forced an estimated two and a half million of Palestinians to become refugees. (Cultur , 1973) More than a quarter of a million Burmese Muslims fled from Rakhine State in predominantly Buddhist Myanmar (Burma) to escape the brutal excesses of the military government, which intensified a ruthless persecution of the Muslims since 1991. Hundreds were killed, field and crops were confiscated, homes and mosques were destroyed, and women were dragged off to army camps and raped, while, men, women and children were tortured or ill-treated after being conscripted for poster services or other forced labour. Likewise, the horrendous human rights violations amounting to persecution were committed in Bosnia-Herzegovina forcing hundreds of thousands of Muslims and Croats to seek refuge in neighbouring countries and elsewhere. The oppression and persecution of Bosnian Muslims began in April 1991, when the Serbian led Yugoslavian army started an assault on Bosnia Herzegovina after the Bosnian government declared its independence from Yugoslavia. Practice of "ethnic cleansing", aimed at achieving ethnic homogeneity through the forcible uprooting of people from their homelands, directed against Muslims was reported on a scale unlike anything seen in Europe since World War II (Petrovic , 1994). Mazowiecki, the United Nations Special Rapporteur on the former Yugoslavia, reported the systematic deliberate and methodical character of ethnic cleansing committed by Serbs in Bosnia-Herzegovina in order to expel Muslims, Croats and other smaller ethnic groups from areas under their control. Confiscation of property and the razing of homes and farms to the ground were carried out to preclude any possibility of return. Persons who were forced to flee were often compelled to sign a statement that their departure was voluntary. Thus confusing the legal status of their property as well as the evidence of ethnic cleansing. Holy sites were destroyed to erase any trace of their presence. The systematic killing, rape, torture; passing discriminatory and repressive legislation; refusal of treatment in hospital, prohibiting women from giving birth in hospitals, practiced in this context were carried out with a view to force people to flee with the aim being to accomplish the one single objective of creating ethnically pure territories. Practices such as these, no matter where they occur or who are the perpetrators may be, amount to persecution necessitating the protecting of the victim. The massacre of half-a-million minority Tutsi by the Hutu-dominated militiamen in Rwanda (during Rwanda’s civil war) is another example of persecution. (Roy Chowdary, 1995)

These tragic situations clearly demonstrate that human rights violations amounting to persecution often occur during wars or civil strife. Further a civil war against a minority race inside a country, verging on genocide, is without doubt evidence of racial persecution. The governing authority of the country using unlawful means to terrorize ethnic, religious, social or political groups can be the occasion for the gravest form of persecution. To this effect, the UNHCR points out that nothing in the 1951 Convention definition automatically excludes its application to persons caught up in civil war or civil strife. Moreover, if persecution or fears of such can be related to one of the specific ground outlined in the refugee definition, this creates a strong presumption of persecution under Article 1A (2) of the 1951 Convention. UNHCR emphasizes that one must distinguish between unlawful acts committed by government or its agents during civil war situations, which may be a violation of basic human rights, and lawful actions taken to protect the state’s interest.

Persecution or the fear of it need not extend to the whole country:

The persecution or the fear of it need not extend to the whole of the territory from which the refugee has fled. Where there is a civil war or civil strife in a particular region, a person will not necessarily be excluded from refugee status merely because he could have sought refuge in another part of the same country, i.e. if it would not be reasonable for him to move for example, because of family ties, lack of housing or employment, and so forth, he does not cease to qualify as refugee. However, some countries restrict refugee status to those whose fear of
persecution at the hands of a "legal government" or its "agent" extend to the whole of the territory from which they have fled. According to this restrictive and unholistic interpretations of many western governments, people fleeing the horrific humanitarian and human rights abuses prevalent, for example, in the former states of Yugoslavia, have no claim to refugee status either because they fear various kinds of persecution at the hands of one or more parties to that conflict not at the hands of the legal governments - or because their fear of persecution does not extend to the whole territory from which they have fled. "This whittling away at the [1951] Convention is absolutely deadly," comments Karim Landgren, UNHCR "General Legal Advice Coordinator." Governments asked were they really compelled to leave the country? Was the agent of persecution the legal government or some other authority? And as a result you have a Muslim woman who has been raped and who is issued a deportation order because she is allegedly not a refugee"

**Persecution can be committed by State apparatus as well as non-State actors:**

The notion of restricting the concept of persecution to acts done by or on behalf of the government of the territory has no basis in international law. In fact, the source of persecution is unlimited. (Gilber, 1983) It emanates not only from government or its apparatus, such as police or military, but it also emanates from non-state actors. Yet in Western Europe and North America some countries restrict refugee status to those who fear being persecuted by State organs. According to this restrictive and unholistic interpretation of the 1951 Convention, victims of persecution by non-state actors, such as rebel groups or terrorist organizations, for example- have no right to refugee status. (Berthaume, 1995) Further, victims of generalized violence, civil war and human rights abuse are often refused refugee status on the ground that they do not face an individual threat from the State organs. Thus, Liberians who fled five years of vicious civil war could be denied refugee status. So could Bosnians who were considered by UNHCR to be textbook example of the 1951 Convention definition. The German Federal Office for the Recognition of Foreign Refugees, for example, rejected Thomas, a 29-year-old Liberian, and his wife’s refugee claims on the ground that their persecutors were not part of a government force, but belonged to a faction "in a country without a functioning government." (Colville, 1995) Thomas and his wife arrived in Germany in January 1993. Back home Thomas father had been killed by one of the largest of the armed factions which had torn Liberia apart since the government collapsed in 1990. Shortly afterwards, Thomas was forcibly recruited by the same faction. Subsequently, suspected of spying for a rival group, he was made to watch as his wife was raped. As another test of his loyalty, he was forced to kill a number of children who had also been accused of spying. Fearing their days were numbered, Thomas and his wife managed to stow away on a cargo ship that took them to Italy. They then travelled by car to Germany, where they applied for refugee status. Their experiences would appear to qualify them as refugees. Or so one might think, given the very reasonable fears they expressed for their personal safety and the fact that, by 1993, the system of "national protection" a functioning police force and judicial system-was extinct in Liberia. Unfortunately for Thomas and his wife, "in several European countries, including Germany it is who you fear may persecute you that matters - rather than what they may do to you." The German Federal Office for the Recognition of Foreign Refugees rejected Thomas and his wife’s refugee claims as “manifestly unfounded” despite the fact that they were manifestly in danger if forced to return to their home country. Like many other asylum seeker from states in disarray, they are victims of a highly contentious interpretation of the refugee definition contained in the 1951 Convention. Thomas and his wife’s big mistake was to be persecuted by a faction rather than by official authorities such as the army or secret police. Because their persecutors were not part of a government force, but belonged to a faction in a country without a functioning government, the couple somehow, according to some European countries, ceases to be victims of persecution and therefore fail to qualify as refugees.

The problem, as stated earlier, lies in an extremely restrictive interpretation by some asylum countries of the term persecution in Article 1A(2) of the 1951 Convention. Persecution, according to the restrictive interpretation, can only be carried out by a government or - a recent concession in some asylum countries - by some other state-like authority. In addition, some countries grant refugee status if they feel the state was actively unwilling- rather than unable - to prevent persecution by a non-state agent. In parts of Liberia or Somalia, however, warring clans factions and sub-factions have been operating in situations close to anarchy rather than running identifiable, if unofficial, state lets with functioning administrations. As a result, despite the fact that some 150,000 Liberians are estimated to have been killed since 1989, in Germany only one Liberian was recognized as refugee in 1994 while 1,850 were rejected; and in Switzerland, the statistic shows a similar pattern as in 1994, a total of 143 Liberian asylum seekers were rejected and non were a-accepted; two Angolans out of 854 were accepted, the rest were rejected. In France, the Refugee Appeals Commission has recognized a few Liberians and Afghans on the grounds that they were victims of persecution by factions which held de facto, state-like authority in given regions, or because de facto authority was shared by two different factions, which meant that the asylum seekers in question could not seek protection from the public authorities.

Most of the countries in Europe deny refugee status to individuals who fear persecution at the hand of non-state actors. For instance, France does this practice and has systematically rejected refugee status to asylum seekers
from Somalia and other third world countries on the same ground. The reasoning given for the rejection of a Somali asylum seeker in 1993 illustrates the French interpretation of the Convention on the non-state agent issue. The asylum-seeker in question, Mohammad, had been a mechanic in the army of the deposed president Said Barre. In 1991, after the president fled and the country splintered into an all-out civil war, one of the largest sub-clan wanted Mohammad to maintain its armed vehicles. Mohammad refused because he did not want to take part in a war he considered to be fratricidal. On 10 October 1991, members of the sub-clan arrived at his home and killed two of his brothers. After this, Mohammad fled the country and made his way to France. The French Refugee Appeals Commission rejected his case on the grounds that the clans and sub-clan in Somalia, although fighting to create or extend zones of influence, had failed to reach the point whereby they exercised enough organized control to be considered de facto authorities. The Commission did not consider whether or not Mohammad’s fear for his personal safety was justified. As was the case with Thomas, the focus was entirely on the status of the persecutor. If the persecutor does not pass muster, the possible fate of the persecuted is considered irrelevant. And when it comes to warring clans and factions their status appears to be dependent on the eye of the beholder.

Restricting persecution to acts done by State or State-like actors has no basis in law:

The notion of restricting the concept of persecution to acts done by state or state-like actors has no basis in international law. Nowhere does the definition contained in the 1951 Convention—which was cited in support of the French Refugee Appeals Commission’s rejection of Mohammad-say or even hint that only states or state like authorities can persecute. To qualify as a refugee a person must have a well-founded fear of being persecuted for one of a given set of reasons; be outside his own country; be unable or, owing to such fear unwilling to avail himself of the protection of his country of origin. The 1951 Convention does not talk about the identity of the persecutor. Refugee protection is a substitute to national protection. Clearly, if a state or state like authorities exists in a country and some people fear persecution at their hands these people are entitled to refugee status. But if such authorities do not exist in a state there would be a total failure of national protection and if people flee this type of situation they should be provided with a substitute protection. Refugee protection is a substitute for the national protection. Such a protection should not be denied to refugees even if persecutors are non-state actors. Non-state actors are as capable as the state actors in persecuting people. The inability of the State authorizes to prevent persecution at the hand of non-state actors means lack of national protection. The persons fearing persecution at the hands of non-state actors and are unable to avail themselves of any form of national protection, they too are protection by the 1951 Convention. However, courts in several European countries have got into the habit of totally ignoring the victim’s predicament while constructing labyrinthine legal arguments over the status of state and factions, using logic which no reasonable man would use it. As UNHCR’s Director of International Protection, Dennis McNamara, points out, “the restrictive interpretation can give rise to situations whereby someone who defects from an armed opposition group, but is still identified with it by his government, can be recognized as a refugee under the 1951 Convention. However, innocent people -women and children - who were persecuted by his group when he was still with them will be refused refugee status, under restrictive interpretation”.

Restricting refugee status to those who fear persecution at the hands of state actors is cold war mentality. In the Cold War, persecution normally emanated from a state authority. People now argue that, at the time the Convention was framed the type of persecution that existed came from the state. That is true. Nevertheless, the world has changed considerably since then. The Convention has been applied in all sorts of situations that did not exist in 1951- and it has been shown to work. According to Ivor Jackson, an authority on refugee law, refusal of refugee status on the grounds of non-state actors of persecution is a vicious interpretation. Jackson has travelled through all the travaux préparatoires - or background working papers, which document the negotiations and proposals that took place prior to the acceptance of the final version of the 1951 Convention. In the travaux préparatoires, he said, there is nothing to support this interpretation. They never addressed their minds to the question whether persecution can only emanate from the state.

The position of UNHCR on the issue of non-state actors of persecution is crystal clear, and has been for years. Its 1979 Handbook on Procedures and Criteria for Determining Refugee status is generally accepted as the main international guidelines for interpretation of the 1951 Convention, and in particular of the definition. In paragraph 65 it states: “Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. Where serious discrimination or other offensive acts are committed by the local populace, they can be considered as persecution. If they are knowingly tolerated by authorities or if the authorities refuse, or prove unable, to offer effective protection”.

Commentators also affirm the view that refugee status may be recognized even where the State is merely unable to offer effective protection. Grahl-Madsen says:

There are actually valid reasons for contending that even if a government has the best of intentions to prevent atrocities on the part of the public (or certain elements of the population), but for some reason or other is unable to do this, so that the threatened persons must leave the country in order to escape injury, such persons shall be
considered true refugees. As a matter of fact, they may be just as destitute, just as much in need of help and assistance as any other groups of refugees.

Guy Goodwin-Gill makes the same argument:

Cause and effect are yet more indirect where the government of the country of origin cannot be immediately implicated. Refugees, for example, have fled mob violence or the activities of so-called ‘death squads’. Government may be unable to suppress such activities, they may be unwilling or reluctant to do so, or they may even be colluding with those responsible. In such cases, where protection is in fact unavailable, persecution within the 1951 Convention can result, for it does not follow that the concept is limited to the actions of governments or their agents.

Further support for recognition of refugee status in situations where persecution results from the actions of non-state actors can be found in *Rajudeen v. Canada (Minister of Employment and Immigration)*. Rajudeen was a citizen of Sri Lanka, of Tamil origin and Muslim persuasion. He claimed refugee status for reasons of race and religion and that he had been persecuted by members of the Senegalese majority in Sri Lanka who were Buddhist. The persecution consisted of looting, burning and destroying Tamil property by Senegalese thugs, and the claimant had also been personally attacked and beaten by some individuals. There was no evidence, however, that any of the persecutors had any connection with the state; there was evidence that police had been present at, and had witnessed some of the atrocities, but had not offered help or done anything to stop them. In the circumstances, the Canadian Federal Court agreed that the applicant had proved that he had a well-founded fear of persecution based on race and religion. It also agreed that even though the state had not been a participant in the harassment, those acts nonetheless amounted to persecution since the state, through the police, had refused or been unable to protect the applicant.

The Rajudeen doctrine was approved by the Canadian Federal Court of Appeal in *Surujpal v. Canada (Minister of Employment and Immigration)*. In this case the court allowed a claim based upon beatings and harassment of the applicants, even where there was no proof of direct, or even strong indirect participation of State agents. Surujpal involved a husband and a wife from Guyana. They sought refugee status based on harassment and atrocities committed by suspected supporters of the political party in power who were not directly connected to the state machine. The atrocities and harassment consisted of beating the husband, for which he had been hospitalized for a month, and killing the wife’s grandmother in the cause of searching for the husband. Both incidents had been reported to the police but the police had taken no effective measures in response. The court concluded that the acts of harassment amounted to persecution and the applicants had satisfied the definition of refugee contained in the 1951 Convention notwithstanding the absence of state involvement.

The decision of the United States Court of Appeals (9th Cir.) lend further weight to the view that refugee status can be recognized in situations where persecution results from action of a non-state actor. In the 1981 case of *McMullen v. INS*, the Court held that persecution within the meaning of the United States Refugee Act, 1980, included persecution by non-governmental groups, such as the Provisional Irish Republican Army (PIRA), where it was shown that the government of the proposed country of deportation was unwilling or unable to control that group. The facts in McMullan are as follows. McMullan was an Irish Catholic born in Northern Ireland and raised in Great Britain. He had joined the British Army and had been sent to Northern Ireland as part of the British peacekeeping troops. He became increasingly sympathetic to the PIRA’s cause and subsequently deserted from the British forces and joined the PIRA ranks. After engaging in military and other activities as a member of the PIRA for some time, he resigned from the organization. A short while later he was arrested by the Republic of Ireland Police for activities committed while he was an active member of the PIRA. He was imprisoned for three years, during which time he was held in the maverick wing, segregated from PIRA member prisoners. After his release he was coerced into continuing to help the PIRA. He occasionally hosted PIRA members in his house and made trips to the United States to obtain arms. However, McMullen later refused to obey a PIRA order to plan and execute the kidnapping of a United States citizen. He was court martial led by the PIRA for the disobedience and sentenced to execution. He fled to the United States and claimed refugee status in the course of the proceedings seeking to deport him to Ireland. The court agreed that the PIRA systematically tortured and murdered traitors; that the PIRA perceived McMullen as a traitor, and that the Republic of Ireland was unable to control the PIRA. For purposes of the deportation proceedings under the United States Refugee Act, 1980, McMullen had chosen the Republic of Ireland as the country of deportation. However, it was later submitted on his behalf and the court agreed, that McMullen faced certain persecution if he was returned to the United Kingdom and Northern Ireland. Subsequently, he was granted refugee status.

In *Bolanos-Hernandez v. INS* claimant’s life was threatened in El-Salvador by guerrillas he had refused to join. The United States government did not contest the fact that the government of El Salvador was unwilling and/or unable to control the guerrillas campaign for terror and was unable and unwilling to protect the human rights of its citizens. In the view of the court: “The evidence is uncontroversial that Bolanos is likely to be persecuted by a politically motivated group that frequently engages in terrorist tactics directed at those who refuse to join its armed political struggle. In light of Bolanos’s refusal to join, and in light of the fact that his refusal represented a conscious political choice, the conclusion is inescapable that Bolanos’s life is endangered because of his political
opinion. Therefore, he may not be deported.” The lack of governmental complicity in the persecution feared did not disqualify the claimant from refugee status. The Bolanos Hernandez court established the principle that state complicity is irrelevant. It does not matter where the persecution comes from or whether the state has a role in its perpetration provided the subjects are not effectively protected.

In Canada (Attorney General) v. Ward, Ward, a member of the Irish National Liberation Army (INLA), had been assigned to guard hostages held by INLA in order to encourage one of their arrested members not to turn informer, but he allowed them to escape when he learned of their impending execution. When Ward’s role in the escape was discovered by the INLA, Ward himself was detained, tortured and sentenced to death. Though he eventually escaped and sought protection from the Irish Police, he was in turn charged for his role in the initial hostages taking. He pleaded guilty to forcible confinement and was sentenced to three years in prison. At the expiration of his prison term, he obtained the assistance of a personal chaplain in arranging his flight to Canada, where he eventually claimed refugee status. His claim was successful before the Canadian Immigration Appeal Board, but was overturned and sent back for rehearing by the Federal Court of Appeal. Ward appealed against that decision to the Supreme Court of Canada. The Supreme Court allowed the appeal. Ward, it should be noted, did not apprehend persecution at the hands of the Irish government. Rather, he feared persecution by the INLA (for his effective defection from that organization) from which the Irish Government could not protect him. This raised the following issue for the Supreme Court of Canada to consider: “Is the element of State complicity either through direct persecution, collusion with the persecuting agents, or willful blindness to the action of the persecuting agents, a requisite element in establishing a refugee claimant’s unwillingness to avail himself - or herself of the protection of his or her country of nationality”? The short answer is no. Writing for the Supreme Court, Justice La Forest declares that “state complicity in persecution is not a pre-requisite to a valid refugee claim”. Put another way, serious violations of human rights by non-State agents can ground a finding of persecution under the 1951 Convention definition of refugee if the state cannot or will not protect nationals from such mistreatment. In coming to its conclusion, the Supreme Court examined the drafting history of the 1951 Convention, the UNHCR Handbook and Scholarly commentary. With the exception of the travaux préparatoires, which La Forest J. found inconclusive, the remainder of the sources supported the position that state inability to protect can trigger a finding of persecution. He further approved the position that persecution within the meaning of the 1951 Convention definition subsist in the violation of fundamental human rights regardless of the identity of the perpetrator.

Grounds of Persecution:

Persecution in accordance with the 1951 Convention definition cannot, however, be considered to establish refugee status unless it is based on one of the grounds enumerated in that definition, namely, race, religion, nationality, membership of a particular social group, and political opinion. The term ‘race’ has a social more than an ethnographic concept, and is applicable whenever a person fears persecution because of his ethnic origin. This interpretation is supported by the modern international usage. Article 1 of the 1951 International Convention on the Elimination of All Forms of Racial Discrimination, for example, defines racial discrimination as including differential treatment based on “race, colour, descent or national or ethnic origin”. Similarly, the clear majority of the delegates to the 1977 Conference on Territorial Asylum agreed to grant refugee status to persons persecuted for reasons of race, colour, national or ethnic origin. The Executive Committee of the UNHCR adopted this perspective and added that race, often entails “membership of specific social group of common descent forming a minority within a large population”. The equation of race with minority status is viewed in the context of effective power, not just numbers. Because the 1951 Convention is concerned with the absence of national protection against serious violation of human rights rather than minority status per se, the members of a country’s ethnicity may be protected as racially defined refugees if they are disfranchised in terms of respect for human rights. While, for example, Tutsi ethnic minority were recently persecuted by Hutu ethnic majority who held effective power in Rwanda, the Muslims ethnic minority are currently persecuted by Serbs ethnic minority who held, by force, seventy percent of the territory of Bosnia Herzegovina. Thus majority status alone does not negate a claim to racially defined refugee status.

Religion is the second ground for persecution listed in the 1951 Convention definition of refugee. This term should also be interpreted widely to include membership of a religious community; private or public worship, as well as religiously motivated actions. Religion has indeed been the basis upon which government and people have persecuted others. For example, the late nineteenth century witnessed pogroms of Jews in Russia, and the present century had likewise seen large-scale persecution of Jews under the hegemony of Nazi power up to the 1945, while right now we are witnessing the brutal persecution of Palestinian Muslims by the Jewish state of Israel; the persecution of Burmese Muslims by the predominantly Buddhist Myanmar (Burma)’s military government; and the persecution of Bosnian Muslims by Serbs- the mother of all criminals. Thus, persons from these countries or other persons who fear persecution because of their religion can undoubtedly qualify for refugee status.

Nationality is the third ground for persecution listed in the 1951 Convention definition of refugee. This term embraces not only citizenship (nationality in the formal sense) but also an ethnic or linguistic group. Gypsies who
were subject to persecution during the Nazi occupation of Europe because of their ethnic affiliation could have been granted the protection of the 1951 Convention. (Plender, 1980) A Dutch court has held that the treatment experienced by Eritreans in Ethiopia amounted to persecution for reason of nationality. Persecution for reason of nationality also includes persecution for lack of nationality, that is, persecution of stateless persons.

Membership of a particular social group is the fourth ground for persecution listed in the 1951 Convention definition of refugee. The social group category is a safety net intended to guarantee security from persecution to all refugees, without unnecessary distinctions on the basis of race, religion, nationality or gender. It is an all inclusive category consistent with the contemporary philosophy and ideology of the United Nations, which was to protect many disenfranchised and marginalized groups from persecution. The UN is against persecution and discrimination against women, children, the elderly, the young, the adopted, the illegitimate, the disabled, the family, the workers, the unemployed, the trade unionist and many other groups. The social group category was adopted as a catchall provision to protect all individuals, men, women and children against all types of persecution which an imaginative despot might conjure up.

In Secretary of State (UK) V. Kwame Otchere et al, the respondent, a citizen of Ghana, had been a member of a military intelligence group under a government that had been overthrown by a military coup. He applied for asylum in the United Kingdom on the basis of his membership in that group arguing that there was a reasonable chance he would suffer persecution if returned to Ghana. The tribunal said that “the phrase a particular social group had been added to the Convention in 1951 and had been deliberately left vague so that it could be a ‘catchall provision which would be interpreted by countries as necessary to fit any particular case. Thus, in the past, in Canada it had been held to include families assisting the poor. And in West Germany to include ... family members in service to a Royal family; and businessmen. In the United States, in a case called Acosta Int. Dec. 986 (BIA 1985), it had been held to include membership of taxi drivers cooperative [sic].”

A liberal interpretation of the social group can also be inferred from the decision of the Canadian Immigration and Refugee Board in E (H.K.) (Re) case. In this case the applicant, a member of Hwaiye clan from Magadishu and a citizen of Smalia, claimed that she and her brother were accused of aiding the United Somalia Congress and were therefore detained by Muhammad Syed Buare’s soldiers. They were only released after the payment of a large bribe. After her departure to Canada, in 1991, she learned that members of the warring factions raped her sister. She claimed that her father and brother had fled Somalia and, since there was no government to protect her, she was afraid to return, as women without male protection were vulnerable to rape and murder, as her sister had been. The Canadian Immigration and Refugee Board decided that the claimant to refugee status established a well-founded fear of persecution by reason of her membership in a particular social group, young women without male protection.

Political opinion is the fifth ground for persecution listed in the 1951 Convention definition of refugee. This ground, like the other four grounds discussed above, should be defined broadly and flexibly so as to accommodate all of its reasonable interpretations; the 1951 Convention relating to the status of refugees embodies the goal of protecting all persons who have a wide range of political reasons for fleeing their country of origin. According to James C. Hathaway, the Ad Hoc Committee on Refugees and Stateless Persons, which was responsible for the draft text of the 1951 Convention, was of the opinion that “in addition to diplomats thrown out of office and persons whose political party had been outlawed, individuals who fled from revolutions ought to be encompassed by the political opinion category”. What it means is that refugee status on ground of political opinion is to be extended not only to those with identifiable political affiliations or roles but also to other persons at risk from political forces within their home community. Political opinion in the sense of the 1951 Convention definition can be expressed negatively as well as affirmatively.

In other words, choosing to remain neutral in a political conflict or civil war is no less a political decision than choosing to affiliate with a particular faction. This was the decision of the United States Court of Appeal in Bolanos_Hernandez V. INS. In this case, the applicant attempted to remain neutral in the El Salvador civil war by ending his association with a right wing party and resisting pressure to join guerrillas. When the guerrillas tried to recruit the applicant and threatened him with death upon his refusal, he fled to the United States where he claimed refugee status. The United States Board of Immigration Appeals (BIA) denied the applicant’s request for refugee status on the ground that he had adopted no political opinion that placed him in danger, and thus his situation was indistinguishable from that of any other Salvadoran. The Court of Appeal reversed that decision. The court found that the applicant had not only produced general evidence of violent conditions and terror prevailing in El Salvador, but he had coupled that evidence with specific threat to his life made by the guerrillas. Indeed, the significance of the threat might well be greater because it was made in a country in which violence was so widespread. The court further held that the applicant had expressed a political opinion by asserting his neutrality. The court said that “[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular faction”. The court decidedly rejected the U.S. government’s argument that neutrality exists only by virtue of a conscious political decision, stating that the “the motive underlying any political choice may, if examined closely, prove to be, in sole or in part, non-political. Certainly a political affiliation may be undertaken for non-political as well as political reasons.... Similarly, a decision to remain neutral may be made, in whole or in...
part, for non-political reasons [yet still constitute] a manifestation of political opinion.” The court further decided that if an applicant makes a conscious choice to be neutral, there is no need to further enquire into the motivations behind the choice. The court stated that contrary holding would mean that only people at political extremes could be refugees and would violate one of the objectives of the Refugee Act to provide protection to all victims of persecution regardless of ideology.

By classifying political passivity as political opinion, the court made it clear that an applicant can garner refugee status on the claim that he will be persecuted because he refused to choose sides in a political conflict or civil war. This proposition was reaffirmed by the same court in Turcios V. INS and Argueta V. INS. The court in Turcios said choosing not to support guerrillas and to remain neutral in El Salvador’s civil war constituted a political opinion. In the case of Argueta, the court concluded that Argueta’s testimony of non-agreement either with the guerrillas or the government establishes his political opinion. The court noted that the immigration judge had apparently misconstrued Argueta’s lack of commitment to either side as lack of any political opinion; instead, the court equated a decision to remain neutral with an expression of political opinion.

The United States Court of Appeals decision extended the interpretation of political opinion still further to include a silent neutrality expressed in a victim’s non-commitment to the persecutor’s opinions. In Lazo-Majano V. INS the court reasoned that a victim’s silence constituted political opinion if the persecutor perceived political opposition in it. The same court took a similar view in Hernandez-Ortiz V. INS. After explaining that governments persecutes those whose views are apparently dissentient, the court continued by pointing out that it is irrelevant whether a victim actually possesses any of these opinion as long as the government believes he does.

Thus, political opinion is something that may be non-ideological and neutral, held for whatever reason (since motivation is irrelevant), and may be expressed either actively or passively (since silent adoption of neutrality in a political conflict amounts to an expression of political opinion). By this thinking, anyone who flees political conflicts in his country of origin possesses political opinion for purposes of the 1951 Convention.

In fact the United Nations Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees accepted that “individuals who fled from, inter alia, alien domination, foreign armed intervention ... occupation ... colonization, oppression [and] apartheid...” are political refugees within the meaning of the 1951 Convention. (Lee, 1986) Further both the 1969 OAU Convention and the 1984 Cartegena Declaration expressly recognizes as political refugees persons who are outside the country of their nationality because of external aggression, occupation, foreign domination or other circumstances that have seriously disturbed public order.

Likewise, the majority of the delegates to the 1977 Conference on Territorial Asylum have accepted that participation in the struggle against colonialism, apartheid, foreign occupation alien domination and all forms of racism is valid expression of political opinion which can lead to a grant of refugee status. Grahl-Madsen has observed: “The [1951] convention seeks to protect persons who would be subjected to political persecution through no fault of their own. In this connection the struggle for certain political convictions is not to be regarded as fault but as a right founded in the law of Nature.”

The one who fears persecution on any one of the stated grounds must be outside his/her country of nationality. Article 1A(2) of the 1951 Convention stipulates that a refugee is a person who, owing to a 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... or ...not having a nationality [he must be] outside the country of his former habitual residence. This provision must be read in conjunction with Article 1A(2)(a) of the 1951 Convention which provides that in the case of a person who has more than one nationality, the term country of his nationality shall mean each of the countries in which he is a national. This latter provision is obviously intended to cover the possibility of dual nationality. To be regarded as a refugee under the 1951 Convention the dual national must be outside each or all of the countries whose nationality he possesses. The reason behind this is natural that the person in question is usually able to avail himself of the protection of his other country of nationality. The prerequisite is therefore that it can be established that he, in actual fact be granted this protection. The most important feature is that he will be granted the right to enter and stay in the country. If this feature is missing, as is the case in some former colonial mother countries, he cannot be considered as a national of that country in the sense of Article 1 of the 1951 Convention.

This issue has been discussed with particular reference to the Asians expelled from Uganda during the 1970's after Idi Amin came to power there. Although most of these Asians possessed the status of British protected persons, they were excluded from the right of “abode” that is the right of entry and residence in the United Kingdom. The question whether United Kingdom immigration authorities would have to consider British protected persons as refugees in accordance with the 1951 Convention was dealt with in R. V. Chief Immigration Officer, Gatwick Airport, ex parte Harjender Singh. In this case it was submitted on behalf of the immigration authorities that British protected persons, although they do not possess the right of abode, were, nevertheless, to be regarded as United Kingdom nationals according to the 1951 Convention and could therefore not be regarded as refugees. Nolan J. refuted this submission by stating: “I can see no reason why a British protected person should be excluded for the status of British national for all purposes save those of the Convention on Refugees. The word must have a meaning for the purpose of the Convention.... I cannot construe it in the context of the convention as including...
those who have no right of abode in this country nor even a right of entry into it”. Consequently, the court found that Singh was a refugee according to the 1951 Convention.

The 1951 Convention also stipulates that the person in question must be outside his country of nationality in order to qualify for refugee status. The term outside alludes to two categories of persons: Those who have fled from their country of nationality in order to avoid persecution, and those who were not refugees when they left their home countries, but who after that become refugee due to latter event (refugee surplace). The two categories of persons are protected by the 1951 Convention on an equal footing. This position is in accordance with the general rule that the requirement of the Convention is indeed to identify those refugees within the effective reach of international law: Whether already present or arriving in a foreign state the refugee is clearly able to benefit from the right to non-refoulment, as explained in chapter four of this thesis.

The final element of the 1951 Convention definition of refugee is that the person claiming refugee status must be “unable or owing to ... fear [of persecution], unwilling to avail himself of the protection of [the country of his nationality]”. According to La Forest J in the case of inability, protection is denied to the claimant, whereas when the claimant is unwilling, he or she opts not to approach the state by reason of his or her fear on an enumerated basis. The UNHCR says “being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbances, which prevents the country of nationality from extending protection or make such protection ineffective.” Protection by the country of nationality may also have been denied to the person in question. What constitutes a denial of protection must be determined according the circumstances of the case. If it appears that the person has been denied services (e.g. refusal of a national passport or extension of its validity, or denial of admittance to the state of nationality) normally accorded to his co-nationals, this may constitute a refusal of protection within the meaning [of the 1951 Convention] definition.

Those who have dual nationality they do not qualify as refugees if they lack protection of one of their countries of nationality, but without a valid reason based on a well-founded fear of persecution have not sought the protection of the other country of nationality. In such circumstances they cannot be said to lack the protection of their country of nationality. To be regarded as refugees the dual nationals must be unable or unwilling to avail themselves of the protection of each of the countries whose nationality they possess.

Generally, a person would be regarded as unwilling to avail himself of protection if he is unwilling to ask the authorities in his country of origin for any kind of protection normally afforded to nationals. This unwillingness must stem from a well-founded fear of being persecuted for either racial, ethnic, religion, social or political reasons upon eventual return to the territory of that state. When refugees are unable or unwilling to return to their state of origin because they fear persecution or danger to life or freedom, a state of refuge must not force them to do so. If it does, it will be in violation of one of the fundamental principles of international law, i.e. non-refoulement, which prohibits the return of refugees to a country where they fear persecution or danger to life or freedom.

Conclusion:

The legal criteria for the determination of refugee status are clearly laid down in the 1951 Convention – a treaty the aim of which is to protect people everywhere who are outside their country of origin because of fear of persecution. Sadly, however, governments around the world interpreted those criteria restrictively, violating the spirit of the Convention, defeating its protective purpose and effectively turned their back on refugees. In turning their back on refugees, states largely failed to observe their obligations vis-a-vis the refugees under international refugee law as well as international human rights law. The later law applies to refugees simply because refugees are human and by that virtue they, like all human beings, possess an inherent dignity that states must respect and protect. The protection and respect to the dignity of most of refugees would be a distance dream unless states adopt a broad interpretation of the legal criteria recognizing their status as refugees and thereby entitling them to enjoy minimum rights under international refugee law.

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