REFUGEES IN THE EYES OF INTERNATIONAL LAW: A DEFINITIONAL EXPOSITION

By
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Abstract

Refugees are one group of needy people that have found themselves outside their native country or primary country constituting their former place of habitual residence. Their immediate needs are not far from the three basic needs of man namely food, shelter and clothing. At the point of assumption of the refugee status usually they are analogous to a product, whose need for membership will readily be categorized as non exportable. This is so as most of the refugees are unavoidably forced to seek possible homes in countries whose politics and religion are at cross-roads with theirs. The destination countries in question as well; sometimes out of force of sheer moral obligation as originators or architects of the refugee status of the putative refugee(s) in the first place are unwillingly inclined to provide place of refuge. Primarily refugee law focuses on individuals who are outside their country of origin or place of habitual residence and who; as a result of well founded fear of persecution within that country seek refugee status as defined and recognized under international law; complemented by the municipal law and interpreted in judicial authorities. In the context of this paper these categories of persons in the eyes of international law is examined and delineated within international definitional boundaries.

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1.0 INTRODUCTION

Verjijil writes:

> Emigration in quest of a country of refugee has been an historic phenomenon for centuries. It was prompted by fear for persecution for religious, racial or political reasons, or the consequence of wholesale expulsion from country of residence. It would take a monograph to describe all these emigratory movements[1].

Indeed world over there have been difficulties on the part of refugees in moving to even places where they will be offered succour or taken in. During the 18th century, the Republic of the United Netherlands repeatedly experienced difficulties as consequence of the transit of emigrants on their way to English colonies because it was unwilling to allow them permanent residence in the country as indigent groups[2].

The World War I and II produced refugees of different shades. In case of the post World War I era, it has been stated in relation to international action for the assistance and protection of political refugees and displaced persons to be "one of haphazard improvisation as the need for it made itself felt".[3] Virgil further stated that, "Inter-state collaboration in this field has indeed been

[1] J.H. W. Verjijil *International Law in Historical Perspective* (Utrecht: Institute for International Law of the University of Utrecht, 1972) 264.
[2] ibid.
[3] ibid.

characterized by the ad hoc invention of devices aimed at alleviation their fate and setting up of organization for that purpose"[4]

Given that different motivations had spurred on the refugees movement, it is instructive to note that some of these refugees are victims rather than the architects of their refugee status. For example the emergence of Communist or Fascists regimes as well as the Nazi regime in Germany with its extermination policy directed on Jews created situation of forced migration and even a state of statelessness in Europe. Africa was not left out in churching out refugees during these periods. Refugee status resulted from the frustrating decolonization process in Africa as well as civil wars thereafter. Also given rise to refugee situation is:

> Racial or tribal hatred not only between white and black men, but also between Negros and Arabs, between other coloured groups of the population *inter se;* in America due to … what they feel as capitalist oppression[5]

Presently we have found ourselves at such a time that gives birth to massive international migration. This stems from the fact that no country can live in isolation, but the world in many respects is more and more becoming integrated and interdependent. The negative fallouts in the forgoing direction has not been helped by man's inability to eradicate war and its evil effects. Lessons

[4] ibid.
[5] ibid. 265.

of the first and second world wars that produced refugees and post war conflicts have not been learnt. Explanation given in relation to refugee situation for the Albanis in 1991 still holds true today for most countries. This is that there are vast refugee flows:

> As a result of international conflicts or because of civil wars, or some combination of the two,… technological innovations have significantly diminished travel and communication cost; high population growth rates contribute to heightening labour market pressures in migrant-sending countries news from most parts of the world travel fast and expectations, except in the most isolated countries in Albania are no longer shaped only by traditional local standards but are acquired in many cases from the rich industrialized countries.[6]

The world did not keep quiet over the refugee crises that generally cropped up after World Wars I and II. Under the United Nations platform the world sought to recognize the inevitability of human beings assuming a refugee status and sought to protect such person(s). By various world conventions and regional agreements status of refugees are defined and protected. Refugee law therefore basically centers on individuals who are outside their country of origin and who as a result of feared persecution within that country seek refugee status as

[6] S. Diaz-Briquets and S. Weintraub, *The Determinants of Emigration from Mexico, Central America and the Caribbean* Sergio Diquets & Sidney Weintraube (eds.) (Colorado- USA: West View Press., Inc. 1991)2.

defined by International statute to the Refugee (Refugee Convention)[7].

Every state no doubt enjoys sovereign right to exclude foreigners from its territory. States on this foregoing premise placing reliance on doctrine of state's sovereignty, state borders are policed and constraints put against all migrants, voluntary or otherwise. These restraints seem not to be absolute in view of both national and international laws that protect refugees providing qualifications. It is these qualifications relating to refugees from international definitional standpoints that this paper seeks to expose.

2.0 CATEGORIES OF REFUGEES

In the eyes of international laws there are available various instruments via which refugees can be identified or persons clothed with that tag upon meeting certain basic qualifications. These categories of Refugees are as follows:

- Convention Refugees
- Refugees by Regional Agreements
- Mandate Refugees and Persons of Concern.

2.1 Convention Refugees

The set of Refugees known as Convention Refugees refers to persons categorized as refugees under the terms of definition provided by the 1951 Convention Relating to the Status of Refugees (hereinafter referred to as Convention Refugees). Fused into the Refugee Convention are some basic human rights enjoyed by Convention Refugees. These rights include prohibition of refoulement[8], protection from punishment for

[7] Convention Relating to the Status of Refugee, 189 UNTS 150 (entered into Force 22 – April 1954) [Refugee Convention].
[8] ibid art 33.

illegal entry[9], prohibition of discrimination[10]. Freedom of discrimination, freedom of association, movement, and religion[11] and access to education[12], empowerment[13] and social assistance. These rights in question necessitate the treatment of the classified refugees in equal terms with nationals lawfully residing in the receiving country.

By the provisions of the Convention, refugees are of two categories. The first category refers to any person who:

> Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the conventions of 28 October 1933 and 10 February 1938, the protocol of 14 September 1939 or the constitution of the International refugee Organization…

The second categories are those who fall within the first international definition of a refugee. This is offered in Article 1 (2) a of the Convention where it defines refugee as a person:

> A. for the purposes of present convention, the term 'refugee' shall apply to any person [As a result of events occurring before 1 January 1951] and owing to as 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

[9] ibid art 31.
[10] ibid art 3.
[11] ibid art 3.
[12] ibid art 4, 15, 16.
[13] ibid art 17, 20, 22, 24.

> 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 of the country of his habitual residence as a result of such events is unable, or owing to such fear is unwilling to return to it

The definitional standpoints of the Refugee Convention clearly require that the seeker must not be within the territorial limits of his country or former place of residence but outside of it. It follows that the convention is in-applicable to those who are unable to leave their country of origin or place of habitual residence.

Carasco observed in relation to the convention definition that there is issue of "whether it applied to individuals involved in this large – scale movements of refugees" after 1951.[14] However, before this observation could provoke further probing, acuteness of refugees' problems of 1960s and 1970s: provided a platform for solution or response. In this direction; "The UNHCR was obliged to extent the geographical scope of its operations and respond to the needs of individuals involved in this large-scale involuntary migration."[15] This was extended under the platform of Executive Committee of the High Commissioner Programmer (Ex Com). Thereafter the gap in limitation of refugees to persons who come within the definitional elements of refugee to be dubbed the convention

[14] E. Carasco and others, *Immigration and Refugee: Cases, Materials, and Commentary* (Toronto-Canada: Edmond Montgomery Publications Limited, 2007) 469.
[15] ibid.

refugees based on pre-1st January 1951 events was finally closed in 1967 by legislative action.

This was achieved under the 1967 New York Protocol to the Convention, which made those persons who would have come within Refugee convention of 1951 but for the time limitation of pre-1st January 1951 to be accommodated[16]. In consequence time of occurrence is no longer a definitional element in refugee definition. It is apt to restate the reason for the forgoing which emerged from the Preamble to the Protocol:

> The states parties to the present protocol considering that the convention relating to the status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951 considering that new refugee situations have arisen since the convention was adopted and that the refugees concerned may therefore not fall within the scope of the convention, considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the convention irrespective of the dateline 1 January 1951; have agreed as follows…

2.2 Refugees by Regional Agreements

Sequel to the drafting of Refugee Convention two regional documents has further developed a refugee definition. These

[16] This was made effective by the deletion of the words in square bracket "As a result of events occurring before 1 January 1951 and" from article 1A (2) of the 1951 Convention by article 1 (2) of the 1967 protocol.

regional legal documents were that of OAU (now African Union) in 1969 and Organization of American States (OAS) in 1984 with a third region-Europe, under a Common Europe Asylum system including a "qualification" directive.

2.2.1 Organization of African Unity (African Union)

The Organization of African Unity (Now African Union) adopted the O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa in which the 1951 Convention was referred to as "The Basic and Universal Instrument relating to the status of refugees" by extension added protection to:

> Every person who, owning to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[17]

The implication of this addition is that in the web of refugee definition, the category of persons further accommodate are:

a. Persons from member countries fleeing indiscriminate effects of violence and war can claim the status of refugee in states that were parties to the OAU convention even in absence of individualized fear of persecution.
b. Whether there is in the main alternative option for safe haven in another region of the country.

[17] Convention Governing the Specific Aspects of Refugee Problems in Africa 1001unts 45 (entered into force 20 june 1974; art 1 (2)

c. UN Convention focus primarily at refugees escaping persecution in the context of cold war Europe but OAU Conventions more flexible as it fits situations where masses are fleeing war, civil conflict or even natural disasters[18].

2.2.2 Organization of American States (OAS) adopted Cartagena Declaration in 1984 which while taking the convention refugee definition as starting point extended Refugees definition to:

> Persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights on other circumstances which have seriously disturbed the public order.[19]

In similar fashion with OAU definition, the Cartagena definition broadens the Refugee convention definition as well. The Cartagena definition is in tandem with OAU definition relative to its broader aspects. This it does by giving qualified recognition to situations in generic sense that can lead to a flight. The asylum seeker under this score is required to demonstrate that his or her flight was propelled by risk of danger to life, safety or freedom.

[18] Richard Carver & Guglielmo Verdirame, Voices in Exiles: African Refugees and Freedom of Expression (London Article 19,2001).
[19] Cartagena Declation on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA (Serl/v/11.66/Doc. 10 rev. 1 at 190-93 (1984-85) at Conclusion 3.

European Context: Here the "qualification" directives adopts the 1951 convention definition in relation to third world country nationals and stateless persons but not applicable to European citizens. Non qualification as refugee under the convention definition will not debar such persons from subsidiary protection in so far they would face a real risk of suffering serious harm if returned to their country of former residence.

2.2.3 Mandate Refugees and "Persons of Concern" to the UNCHR

The UNHCR creates a statutory refugee termed "mandated refugee". The mandate refugees primarily take the same refugee definition in the same terms as the 1951 convention and 1967 protocol. The difference is in the determination of mandate status that is not dependant upon the state of asylum being a party to the Refugee Convention and Protocol. The three classified as mandate refugees receive assistance simplication from the UNHCR but they do not benefit from all the rights accorded to convention refugees; such full rights can only be enjoyed if they are equally recognized as refugees by a state party to the convention or protocol.

In further consequence of unfolding world events the tag "persons of concern" to the High Commissioner has evolved beyond the definitional content in the statute. In this regard persons of concerns to UNHCR include:

- Those who fled persecution in their own countries to seek safety in neigbouring states or primary/core constituency.
- Internally Displaced People (IDP) – Since the mandate does not specifically cover the IDPs the activities of UNHCR towards IDPs have been criticized on the basis that such activities amount to taking on responsibilities

> that compromise its institutional capacity to protect refugees.[20]

3.0 THE PRINCIPLE OF NON-REFOULEMENT

As noted the most fundamental and powerful protection afforded to refugees in the convention is prohibition of "Refoulement." Refoulement means the sending back of refugees to a place where they risk their life or where they would be denied the basic international protected fundamental rights or freedom.

The concept of non-refoulement is traceable to pre-Islamic traditions which are embedded in the teachings of Judaism, Islam, and Christianity among other religions[21]. It was observed that:

> [T]he first efforts of the international Community to develop a legal framework for the protection of refugees emerged in the early 20th century under the auspices of the League of Nations.[22]

The birth of league of Nation after the First World War was followed with legal instruments of 1920s and 1930s in which a group or category approach was followed in addressing refugee problem. In this sense protection was accorded refugees based on their ethnic or territorial origin.[23] In some cases provisional

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[20] See Barbara Harrell Bond 'Along the Way Home' in Times Literary Supplement, 5 May 2005, 12 Turbulent Decade P. 255

[21] Karen Musalo and others, *Refugee Law and Policy: Cases and Materials* (Durham, NC: Carolina Academic Press, 1997) at ct I.

[22] James Hathaway, *The Rights of Refugees under International Law* (Cambridge Press. 2005) 467.

[23] See G.S. Goodwin Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendor Press, 1996) 4 – 7.

system of protection was afforded.[24] Subsequent provisional arrangement reached led to a formal treaty in 1938 with the main object of affording assistance to refugees fleeing the atrocities of Nazi Germany. Under the Refugee Convention of 1951 the principle of non-refoulement were given not only was part of religious teachings or so inchoate under pre 1951 arrangement. It however, received a universal response for the first time under the 1951 Refugee convention.

Little wonder in the echelon of refugee protection ladder, the 1951 Refugee Convention, made the Principle of Non-Refoulement to be at the Zenith. It is indeed the paramount protection in that those accorded refugee status are under the obligation of the states parties to the Convention not to be returned to face danger to their lives or freedom. The convention provides that: It provides that under Article 33.[25]

> (1) 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 race, religion, nationality, membership of a particular social group or political opinion.
> (3) No State party shall expel, return (re-fouler) or extradite a person to another state where there are substantial grounds for

[24], 84: LNTS 2004; Arrangement of 30 June 1928 Relating to the Legal Status of Russian and Armenian Refugees, 89 LNTS 53. See (n. 15).
[25] Article 33: Prohibition of Expulsion or Return (Refoulement) 1951 Refugee Convention. Each contracting state shall freely declare at the time of signature whether this applies only to events occurring in Europe or also elsewhere.

> believing that he would be in danger of being subjected to torture.
> (2) Article 33 of the convention provides the only exception such exception such benefit of non-refoulement may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is, or who having been convicted by a final judgment of a particular serious constitutes a danger to the community of that country.

Non-refoulement is seen as an "integral part of customary international law" that is as a rule of customary international law, binding on all states. It should however be noted that some states refuse to extend the benefits of non-refoulement to asylum seekers who present themselves at a frontier post, or port, airport on the simple premise that their locations are not within the state territory. It is fundamentally correct to reason that the rule of non-refoulment may equally be inapplicable in the high seas.

In Nigeria, International Treaty does not take effect that is, it is not enforceable until its domestication by legislative Act of the National Assembly. In other words Nigeria adopts the transformation approach of international treaty law in municipal law. It must be said that by convention Nigeria will not readily violate the provisions of international treaty simply because it has not been domesticated. If however, Nigeria does violate treaty provisions the country will be held accountable for it.

By virtue of decree of 1989 (now Cap N21 in laws of the Federation 2004 the provision of the 1951 Refugee Convention

and the 1967 protocol where substantially re-enacted. The long title reads:

> An act to establish the National Commission for Refugees for safe guarding the interest and treatment of persons who are seeking to become refugees in Nigeria or persons seeking political asylum in Nigeria and other matters incidental thereto.

In restating the principles of Non-Refoulment section of the Act provides that:

> No person who is a refuge within the meaning of this Act shall be refused entry into Nigeria expelled, extradited or returned in any manner whatsoever to the frontiers of any territory where
>
> (a) His life or freedom would be threatened on account of his race, religion, nationality membership of a particular group or political opinion; or
>
> (b) His life physical integrity or liberty could be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in any part or the whole of that territory.

The foregoing provisions are inapplicable to a Refugee who:

(a) is a danger to the security of Nigeria; or

(b) Is convicted by a Court or tribunal for committing any serious crime as stipulated in the convections contained in first to third schedules to the Act.[26]

4.0 EXPOSITION OF ELEMENTS OF REFUGEE DEFINITION

Five elements are clearly identifiable from definitional approach to a refugee under the Refugee Convention and other international instruments that seek to identify who a refugee is. These five elements are that the refugee status seeker must be:

1. Outside the country of his nationality or place of habitual residence
2. Have fear of persecution
3. Fear must be well founded
4. Feared persecution must be based on one or more of grounds of race, religion, nationality, membership in a particular social group or political opinion.
5. The person must be unable or unwilling to avail himself or herself of the protection of the country of nationality or not having a country of nationality, be unable, or by reason of that fear unwilling to return to his or her former place of habitual residence.

4.1.The Refugee Claimant Must Be Outside the Country of Nationality or Habitual Residence

It is a condition precedent that the prospective seeker of a refugee status must be outside his or her country of nationality. This general requirement admits of no exception. The international protection afforded a refugee cannot come into

[26] A reference to the 1951 Convention 1967 Protocol and the OAU Convention (Governing Specific Aspects of Refugee Problems in Africa).

operation as long as a person is within the confines or territorial jurisdiction of his home country or place of habitual residence. It needs to be pointed out that the term country of nationality in the main refers to "country of citizenship".[27] Essentially the gamut of the international system of refugee protection as deductible in the refugee convention is hinged on the underlying precept that the first recourse of an individual primarily is to seek protection from his or her own country of nationality. International protection only comes into play when this primary source fails.

In Katkova v. Canada[28] The Canadian Immigration and Refugee Board (IRB) rejected a Russian Jewish claimant on the basis that Israel's Law of Return guaranteed her virtual automatic citizenship. The IRB inferred that Katkova was a virtual national of Israel in addition to Russia. On judicial review the Court chose to be guided by the I.C.J decision in Nottebohm[29] where the I.C.Js (International Court of Justice) concluded that the issue of nationality in international law is to be decided on the basis of whether there is a genuine and effective link between the persons and the state. Determining factors as decided by the Court for this link are as follows:

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[27] See United Nations High Commisioner for Refugees. *Handbook on Procedures and Criteria for Determination Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* UN Doc. HCR/IP/4/Eng/REV. 1 (1992) [UNHCR Handbook] at paragraph 88 states: "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country". at Para 87.

[28] [1997] FCJ No. 549(QL) [Katkova]

[29]Nottebohm Case (Second Phase) [1955] I.C.J Reports 4.

i. The habitual residence of the individual
ii. The centre of the individual
iii. The individual family ties
iv. The individual public life
v. The attachment shown by the individual for the country and whether the individual has inculcated[30] in his or her children this attachment.

Held: The Claimant in this case had no connection with Israel. The right to nationality or possibility of obtaining nationality on its own did not make an individual a national.

- If the claimant is stateless, the claim is assessed against his or her own country of former habitual residence.
- Stateless in itself does not *ipso facto* or *simpliciter* confer a refugee status.

A stateless person will be a convention refugee if such a person shows on balance of probabilities, that he or she would suffer persecution in any country of former habitual residence and that he or she cannot return to any of his or her other countries of habitual residence[31].

In construing a refugee the initial intention for the departure is inconsequential. This is so for persons who depart their country of nationality for reasons unrelated to the refugee definitions may become refugees *sur place* if a well-founded fear arises

[30]Katkova (n. 28).
[31] Thabet v. Canada (Minister of Employment and Immigration). [1998] 4 fc 21 at 40, 48 imm.LR (2d) 195 (CA). see also paragraph 102 of UNHR Handbook (n. 27) which provides that: "it will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for reasons stated in the definition. Where these reasons do not exist the stateless person is not a refugee".

after departure. In this wise, it has been noted in UNCHR Handbook that diplomats and other officials serving abroad, prisoners of war, students, migrants workers and others who were not refugees when they left their country have applied for a refugee status during their residence abroad and have been recognized as refugees[32].

4.2 Fear of Persecution

The refugee claimant must have fear of prosecution. The term "Persecution" is not defined by the Refugee Convention. As Carasco and others noted the view expressed by Hathaway that persecution in the context of "refugee law out to concern itself with action that deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard[33]". In this regard, UNCHR Handbook states that persecution occurs when there is a threat to life and other serious human rights violations on account of membership in any of the enumerated grounds (race, religion, and nationality, membership in any particular social group or political opinion)[34]. Thus there is a connection between serious harm and reasons for it. This connection must be drawn to determine the category of serious harm and protected under the convention as the Refugee Convention does not protect persons from all forms of serious harm[35].

> Persecution commonly takes the form of violations of the rights to

[32] UNHR Handbook (n. 27) para. 95.
[33] Carasco & Others (n. 14) 572.
[34] Canada v Ward [1993] 2SCR.689 (Wards Case)– Paras 64-69 See also James Hathaway, *The Law of Refugee Status* (Toronto Butterwords, 1991)1-10
[35] Hathaway (Attorney General) *ibid.*, (n 22) at 103

> life, to liberty, and to security of persons including through torture or cruel and inhuman treatment or punishment motivated by race, religion, nationality, membership of a particular social group or political opinion.[36]

Equally enjoying possibility of accommodation within this descriptive purview of those "individuals who are denied the enjoyment of other civil, political, economic, social and cultural rights"[37]

These individuals may have a valid claim for refugee status where such denial is based on any of the relevant grounds, and its consequences are substantially prejudicial for the reason concerned to the power where daily life becomes intolerable. Serious, particularly cumulative, violations of rights to freedom of opinion and expression to peaceful assembly and association to take part in the government of the country, to respect for family life, to own property, to work and to educate among other could provide valid grounds for refugee claims.[38]

Equally relevant in determination of persecutory treatment are:
a. The International Convention on Civil and Political Rights
b. The Convention on the Elimination of the Forms of Racial Discrimination.

[36] Executive Committee of the High Commissioners Programme Note on International Protection UN GA OR 49th Sess. UN DOC A1 AC 961898 (1998)
[37] *ibid.*
[38] *ibid.*

c. The Convention on Elimination of All Forms of Discrimination against women.
d. The Convention on the Rights of Child and;
e. The Convention against torturing and other cruel Inhuman or Degrading Treatment or Punishment.

4.2.1 Persecution and Prosecution

The UNHCR Handbook refers to a refugee as a victim – or potential victim of injustice, not a fugitive from justice[39]. In this case persons fleeing prosecution and punishments under a law of general application are not normally refugees. However a general law of the land that is applied in a persecutory or discriminatory manner may constitute persecution for the purposes of the application of the convention. So it always remains open for possibility of conclusion of persecution to be drawn from discriminatory application of the law rather than the law itself. In *Canada (Minister of Citizenship and Immigration) v Williams*[40]the Court took the view that persons who face persecution for the sole reason that they freely of their own accord made themselves a criminal law of general application may not receive protection, on the basis that they have "manufactured" their refugee claim.

There is however still a possibility for a general law to violate fundamental human rights and therefore have the potential to constitute persecution. When such general law is called into question it is safer to evaluate such laws of another country vis-à-vis the principles set out in the various international instruments relating to human rights.

[39]*(MCI)* [2006] *FC 420 (IMM 2168-05)* & UNCHR Handbook para 56.
[40] 2005 FCA 126

The following surmised general propositions with regards to the status of an ordinary law of general application to determine the question of persecution is helpful[41]

- The interest/principles effect of the ordinary law of general application not the motivation of the claimant should be considered
- The neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status must be judged objectively.
- The ordinary law of general application should be given the presumption of validity and neutrality leaving the onus of proving inherent persecutory nature on the claimant.
- What need to be proved is not that the regime is generally oppressive but that the law in question in relation to a convention ground is oppressive.

In *Hinzmiah v. Canada*[42] An American conscientious objector (a foot soldier) to the war in Iraq, alleged that if returned to the United States he would be persecuted and punished for desertion. He contended that punishment under these circumstances would amount to persecution. It was further argued for the claimant that the US invasion of Iraq was illegal or alternatively that the level and severity of violation of humanitarian law committed by US soldiers that had arisen would expose him to the risks of being implicated in illegal acts committed by U.S Army in the course of waging war.

[41]Zolfargharkhani v. Canada [1993] 3 FC 540 (CA).552.
[42] [2006] FC 420 IMM 2168-05)

The court held reasoned that an assessment of military action under paragraph 171 of UNCHR Handbook relates to the "on ground" conduct of the soldier in question and not the legality of the war. The focus should be on *'jus in bello'* International Humanitarian law that governs the hostilities during armed conflict. It further noted that:

> There is no evidence that U.S.A as a matter of deliberate policy or official indifference required or allowed its combatants to engage in widespread actions in violation of humanitarian law[43].

It was thus held that the fear of persecution and punishment for desertion did not in itself constitute a well-founded fear of persecution under the convention. It must be established either that the punishment feared would as a result of discriminatory application of the law or that the punishment would amount to cruel and unusual treatment or punishment.

In *Cheung's case*[44] the asylum seeker opposed a law (or cultural norm) of general application involving discriminatory treatment or a potential breach of fundamental human rights. In this case she rejected the China's one child policy. The court in considering the China's one child policy as law of general application and the potential penalty of sterilization for violation of China's one child policy described the same thus:

> If the punishment or treatment under a general application is so draconian

[43]*ibid*.

[44] Cheung v. Canada (Minister of Employment and Immigration)[1933] 2 FC 314 at 323.

> as to be completely dispportionate to the objective of law, it may be viewed as persecutory. This is so regardless of the punishment or treatment is persecution. Cloaking persecution with a render of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.[45]

4.3 Well Founded Fear

There are apparent subjectivity and objectivity as elements of "well founded fear". The reason being that:

> The element of fear connoting a state of mind and a subjective condition, is combined with the requirement that the fear be supported by an objective situation that it be well founded[46]

In situation where the case of the claimant cannot be independently ascertained from the facts on record, then evaluation of the subjective element will involve the assessment of the claimant's credibility. If it is discovered that the claimant lacks credibility, the act of finding that there is no subjective basis for the claim will be deemed a legitimate finding. It is of no moment that there is evidence of human rights violations in the claimant's country. On the issue of objective element on the other hand, reliance can be placed on evidence or proven past persecution of others or even the claimant to find and establish

[45] *Ibid.*
[46] Carasco (n. 14) 582.

the objective text of "well founded fear" of the fear of future persecution[47]. It is not for the decision makers to pass judgment on conditions in the claimant's country of origin however the claimant's statements must be viewed in the context of the relevant background situation[48].

The well founded fear is demonstrated by the claimant on a balance of probabilities that there is a good ground for fearing persecution or that reasonable chance of persecution exists[49]. Our further enquiry now is what constitutes these "good grounds" or "reasonable chance". If it is reckoned in percentage, the field it occupied may even be less that average that is less than 50% but more than a minimal or mere possibility[50]. There is the question of whether a claimant had a genuine fear to return to his or her country and whether the fear was reasonable in answer to this question, it should be noted that the answer must be contextual and it is for the claimant to establish the facts on the basis of which the decision makers will answer one way or the other. Decisions have been given contrary to the provision of the UNHCR handbook that there is a rebuttable presumption that a person, who has faced persecution in the past, faces a well founded fear of persecution in the future[51].

In a situation where the agent of persecution is not a non state actor as in the case of Ward,[52] Forest provides guidance on the

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[47]*Ibid.,* 583
[48] UNCHR Handbook (n. 27) para 42.
[49] Carasco (n. 14) 583
[50]*Ibid.*
[51] See *Pernandopaille v. Canada (Minister of Citizenship and Immigration)* [2005] FCA 91. The Canadian federal court of Appeal did not specifically accord recognition to the existence of a such rebuttable presumption.
[52]Wards case (n. 23) at para. 45.

relationship between the availability of state protection and the objective test as deducible as follows:

i. It is proper to presume that persecution will be likely and fear founded if it is established that the claimant has and that there is an absence of state protection.

ii. The persecution must be so real, the presumption must be so real, the presumption cannot be built on fictional events but the well founded fear can be established through the use of such presumption.

This question in Forest's view leans more towards the presumption of well founded fear where there is a subjective fear and the state is unable to provide protection.[53]
There are other direct approaches from the position in hand.[54] In New Zealand the approach seem to be that state protection is adequate only if it reduces the risk of persecution below the threshold of merits. In this, to accommodate the foregoing view, the Refugee Status Appeal Authority in New Zealand in clear terms rejected the approach adopted by the House of Lords in the United Kingdom.[55]

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[53]*Ibid.,* This is a view shared by Galloway, see Donald Galloway *Immigration Law* (Concord. On: Irw in, 1997) 262.

[54] In Canada (Minister of Employment and Immigration v. Villa Franca (1992), 18 Imm. LR (2d) 130 (FCA) it was held by the Federal Court of Appeal that if a stat makes serious efforts to protect its citizens the fact that it is sometimes unsuccessful will not be sufficient ground a successful refugee claim. Note in Tennekoon V. Canada (Minister of Citizenship and Immigration), 2006 FC 644 the disparity between the approach in ward's case with other decisions. Referred to in E. Carasco and others (n 14) 585S.

[55] See *Hovarth v. Secretary of State for the Home Department* (2001) 1 AC 489 at 495; 501C, 512F, and 5170 (HL).

4.4 Grounds of Feared Persecution

Persecutory harms may occur within a State, but it has been recognised that not all of them will necessitate the invocation of international system of refugee protection. There are five enumerated grounds one or more of which the feared persecution must be connected to. These enumerated grounds are race, religion, nationality, membership in a particular social group and political opinion. In drawing a parallel between the enumerated grounds of protection against persecution and international anti-discrimination law, the Supreme Court of Canada in Ward's case cited Goodwill-Gill to state that:

> The reference to "race, religion, nationality, membership of (sic) a particular social group or political opinion" illustrate briefly the characteristics of individuals and group which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights[56].

Thus in refugee law there is recognition of situation where grounds of persecution will overlap, intersect or even multiplied. The claimant may in some cases find it impossible to connect the feared persecution to a Convention ground. In such a situation the decision maker, will then have the task of finding out the reasons for the persecution feared and decide whether

[56] Wards Case (n. 34) 64, 1.

the requirements of the refugee Convention are met in the circumstances of the case[57]. There enumerated grounds are examined hereunder seriatim.

4.4.1 Race

In recipient states efforts are geared towards interpreting the concept of race broadly. This is to keep faith with the purpose of the Refugee Convention which commands that race should be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage[58].
Discrimination on grounds of race in which a person's human dignity in a matter is incomplete with tenets of rights deemed inalienable human rights or where the disregard of racial barriers is subject to serious consequences. It has been noted that ibos from Nigeria among other people such as mohajirs of Pakistan and Tamils from Srilanka satisfied the refugee definition of "race".[59] The basis of persecution on ground of race can be explained by the *Jus Congens*[60]nature of the prohibition of racial discrimination under International Law. In the Handbook it is described as thus "discrimination for reasons of race has found world wide condemnation as one of the most striking violations of human rights"[61].

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[57] This is in line with paragraph 66 the UNCHR Handbook, which stated that it is not the duty of the claimant to identify the reasons for the persecution but for the examiner to decide whether the convention definition is met; having regard to all the grounds set out therein.
[58] UNHCR Handbook (n. 27) para. 68.
[59]MarkvonSternbeg: *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law*: *Canadian and United States Case Law Compared* (The Hague: Kluwer: Law International, 2002) 24.
[60] UNHCR Handbook (n. 27) Para 69.
[61]*ibid.,* Para 68.

4.4.2 Nationality

The broad interpretation of Nationality encompasses not just citizens but also membership of an ethnic or linguistic group with possibility of overlap with the "race" ground[62]. In this wise persecution consist of adverse attitudes and measure directed against a national (ethnic, linguistic) minority in itself may result in well founded fear of persecution. Waldman made four instructive suggestions in which persecution could be based on nationality. These are:

- Persecution based on the status of a person as a foreign national
- Persecution of a stateless person who has no nationality.
- A situation where a state is composed of former sovereign states and a person is persecuted on the basis of actual or perceived allegiance to the former sovereign state[63].

In *Baffoe*[64]the source of persecution was identified as racism. In the case the claimant was able to demonstrate that a land dispute that had resulted in the murder of a number of family members had its origin in the fact that his paternal grandfather was not born in Ghana and therefore the family members were not regarded as nationals of Ghana.

4.4.3 Religion

The form of persecution on religious grounds is of varied nature. It includes among others, prohibition of membership in a

[62]*ibid*.

[63] L. Waldman, *Immigration law and Practice*, Vol. 1 (Toronto: Butterworths, 1992) at S.8. 104-5.

[64]*Baffoe v.*Canada*(Minister of Citizenship and Immigration),* (1994) FEJ No. 1429 (QL), (1994), 85FTR 68 (TD).

religious community, total ban on worship and religious instructions, of worship in public or private, or teaching or preaching of religious practices and beliefs. It has also been noted that "The cumulative impact of discrimination or harassment toward persons who practice a religion or refuse to practice a religion may also constitute religious persecution"[65] It is also possible for persecution to occur "where, over and above measures essential to maintain public order, the state also prohibits or penalizes religious activity even in private life"[66].

There is recognition of right to change one's religion, and the right to manifest one's religion in public and private through teaching, practice or observance[67]. Leverage was further given to religious freedom by the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights proclaiming the right to freedom of thought, conscience and religion. It can be inferred that laws that restrict the full expression of one's religious belief or even an element of religious practice that is central to one's faith may constitute persecution. Conversely the right to reject relying altogether when fettered can also amount to persecution. In a characteristic Lorne Waldman advocacy which the Court in *Hui Oing Yang v. Canada (Minister of Citizenship and Immigration)*[68] .

The concept of religion should be broadly interpreted to allow for claims based on a person's religious beliefs, even if those are

[65] Carasco (n. 14) 587.
[66] See Okpara Okpara "The Law of Protection of Refugee in Nigeria" in *Human Rights law and Practice in Nigeria* OkparaOkpara (ed) Vol. 11, 2007 166-167
[67] Handbook (n. 27) Para 71.
[68] [2001] FCJ No. 1463 (QL), 2001 FCT 1052 at 3.

not part of an organized religion. This can even be extended to cover cases where a person's religious beliefs are such that he or she rejects religion altogether. If a person is persecuted by reason of such belief, then there will be a sufficient nexus to the claim. In this case, the applicant feared persecution from authorities in China on ground of her practice of *Falun Gong*. The Court held that *Falun Gong* should have been found to be partly a religion and partly a particular social group. If not for any reason for the simple reason, that the government of China considered Falun Gong to be a religion, and such is classified as persecutions by restrictions on right to practice one's faith.

Fosu v. Canada[69] - a Ghanaian member of the Jehovah's witnesses was prohibited by law to engage in public activities involving his religion. Held: The Federal Court relying on the guidance of UNCHR Handbook held that the right to freedom of religion also includes the right to demonstrate one's religion or belief in public by teaching, practice, worship, and the performance of rites:

4.4.5 Political Opinion

Simply defined political opinion as basis for well founded fear in persecution of persons on the ground "that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party"[70]

A grant of refugee status based on political opinion from international perspective stems from Article 19 of the Universal

[69] 1994;27 Imm: LR (2d) 95 FCTD

[70] Grahl – Madson, The Status of Refugees in International Law (Netherlands: A. N Sythoff-Leyden, 1966) 220.

Declaration on Human Rights and Article 19 of the Covenant on Civil and Political Rights stating as follows:

> Everyone has a right to freedom of opinion and expression; the rights includes to hold opinion without interference and to seek, receive and impart information and ideas to any media and regardless of frontier.

Just like membership in a particular group, political opinion provides ground for the cultivation and development of refugee, law the parameters of the term "Political Opinion"[71]
There are different approaches to settling these parameters but that of Gill seems less restrictive. In Gill's suggestion:

> [i] The 1951 Convention "Political Opinion" should be understood in the broad sense, to incorporate, within substantive limitations now developing generally within the field of human rights, any opinion on any matter in which the machinery of the state, government and policy may be engaged. The typical account of hisor her opinion, which are an actual or perceived threat to that government of his or its institutions. Political opinion may or may not be expressed and they may be rightly or wrongly attributed to the applicant for refugee status. If they have been expressed, and if the applicant (or others similarly placed) has suffered

[71] *ibid.*

> or been threatened with oppressive measures, then a well founded fear may be made out[72]

This Gills position was the choice in wards case with two qualifications in terms of the political opinion need belief ascribed to the claimant need not conform to the claimant's true belief[73]

The Nature of Political Opinion

Political opinion in most cases is considered from the perspective of clash with government policy or positions. Thus is any opinion on any matter in which the machinery of state government and polices may be engaged as suggested by Gill on a general note may be accommodated with circumspection or refinement[74] claimant's true belief. The important consideration is whether the agent of persecution considered the claimant's conduct to be political or attributed political activities to him or her. In other words 'political opinion' is broad enough to cover all instances where political opinion is expressed or imputed attracting persecution: e.g. Persecution resulting from complaints about corruption. It is possible for political opinion to be expressed indirectly through conduct and a political opinion correctly or incorrectly imputed to the claimant by agents of persecution.

[72] Wards Case(n 33) 689 Para 64.
[73] Guy Goodwill-Gill *The Refugee in International law* (2d ed. Oxford: Oxford University Press: 1996) 49.
[74] *Ibid.*, 31

4.4.6 Membership in a Particular Social Group

The climax of the discussion leading to Refugee Convention was the inclusion of the term "membership in a particular social group" as the last category of groups of persecution for invoking the international system of refugee convention.[75] Conceptually relationship has been shown to exist between a particular social group and other grounds of persecution. In the UNHCR handbook there is recognition that the fact of the idea of social group category describes persons of similar backgrounds, habits or social status. Other tendency for overlapping with a claim on grounds of prosecution namely race, religion and nationality become possibilities.[76]

The justification for this may be implicit in the fact of the possibilities of unification of a group through its internal aspects and the negative view of a group by the Government by the mere existence of such group. The UNHCR's handbook captures it in this manner:

> Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members or the very existence of the social

[75] T. Alexander Alernokoff, "Protected Characteristics and Social Perceptions: An Analysis of the meaning ofMembership of a Particular Social Group"in **Erika Feller, Volker Thirk& Frances Nicholson, eds.,** *Refugee Protection in International Law. UNHCR'S Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 47,269.

[76] UNHCR Handbook (n. 33) 77.

> group as such, is held to be an obstacle to the Government's Policies.[77]

It must be emphasised that the absence of special circumstances "mere membership in a particular group will not normally be enough to substantiate a claim to refugee status".[78] There is however, no clear cut definition of what constitute membership or existence of a particular social group for purposes of the convention definition[79]. Unresolved issued as noted by Aleinikoff as further observed;

Unresolved issues include the circularity of defining a particular social group by reference to the common experience (or fear) of marginalization the sufficiency of immutability, and the challenge of specifying the boundaries delimiting the group.[80] However, three possible categories will embrace:

> [F]irst … individuals fearing persecution on such bases as gender linguistic background and sexual orientation, while the second would encompass for example, human right activist[81].

The third refers to groups associated by a former voluntary status unalterable due to its historical permance[82]. To this it was emphasized that:

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[77] *ibid.*, 78.
[78] *ibid.*, 79.
[79] Alexander (n. 75)
[80] Carasco (n. 14) 594.
[81] Chan v. Canada [1995] 3CCR 593.
[82] *ibid.*, Per Forest.

> The third branch is included more because of historical intensions, although it is also relevant to the anti-discrimination influences in that one's past is an immutable part of the person.

4.5 Unable or Unwilling to Avail Himself or Herself of National State's Protection

A somewhat clear nevertheless blurred distinction between 'unable' and 'unwilling' will be the ascription of physical or literal inability to the former; and for the later the undesirability to seek states protection even when such protection is possible. In a document containing the draft convention, it could be gleaned that 'unwilling' is linked with Refugee claimants who has a right to seek protection of their state, unable on other hand was used relative to stateless individual[83]. The present connotation of 'unable' is not limited to stateless persons but includes those with nationality thus blurring the earlier distinctions.

From the commentary in the UNHCR Handbook support can be drawn first from paragraph [98] thereof where 'unable' implies circumstances beyond the will of a person concerned. This includes state of war or a grave disturbance which can render a person's country of nationality impotent in offering protection. It could result equally in the denial of protection to the applicant in a way that confirms or increases the applicant's fear of

[83] See The Report of the first Ad Hoc Committee on Statelessness and Related Problems, February 17, 1950 (UN Doc. E/1618 and Corr. 1) see also Carasco (n. 14) 553.

persecution. Paragraph 99 makes refusal of protection determinable on the basis of circumstances of the case.

Paragraph [100] confines unwillingness to refugees who on their own volition refuse to accept the protection of the government of the country of their nationality. The absence of a ground based on well founded fear for refusing the protection of country of nationality when such protection is available removes the putative refugee from the precincts of those in need of international protection. Persons in this category are refugees in the contemplation of the Refugee Convention. In *Wards case*, the court rightly responded that:

> Whether the Claimant is "unwilling" or "unable" to avail him or herself of the protection of a country of nationality, state complicity in the persecution is irrelevant. The distinction between these two branches of the "Convention refugee" definition resides in the party's precluding resort to state protection: 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. In either case state involvement in the persecution is not a necessary consideration. This factor is relevant, rather in the

> determination of whether a fear of persecution exists[84]

In essence 'unwilling' and 'unable' factors in consideration of a convention refugee are interrelated in the determination of the existence of fear of persecution. In *Revenko v. Secretary of State*[85] for the Home Department, Refugee definition came up for analysis in the determination whether a stateless person claiming refugee status who is unable to return to a country of former residence is required to show well founded fear of persecution provided under Convention and Protocol Relating to Status of Refugees (1951) (cmd. 9171) and (1967) (cmnd 3906) art 1A(2).

The applicant was born in a part of the U.S.S.R which in 1991 became the independent state of Moldora. The new rule of citizenship in place does not accord him citizenship of Moldora and he was unable having left the country on a visit to the United Kingdom to return to Moldora. His application for asylum in United Kingdom was refused on the premise that though he was stateless but not a refugee within the definition in Article 1A (2) of the Refugee Convention, for if he were to be returned to Moldora, the applicant had not shown present well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.
The premises on which the special adjudicator refused the application were affirmed on Appeal by the Court of Appeal. Article 1A (2) of the Refugee Convention the Appeal court held should be read as a whole and in the context of the object and

[84] Wards case (n 34) [2000] (part 39).
[85] 3 W.L.R 1519

purpose of the convention as a whole: that it set a single text of refugee status for both persons having nationality and stateless persons; that the entire paragraph was governed by the need to show a well-founded fear of persecution on convention grounds; that such a fear was the prerequisite of refugee status; and that accordingly mere stateless or inability to return to one's country or former habitual residence was insufficient of itself to confer refugee status under the convention[86].

5.0 CONCLUSION

In language and in context, a literal connotation of who is a refugee in eyes of international law focuses on individuals. In each case therefore, an individual determination is required in the country concerned. The UNHCR merely provides procedural guidelines with the aim of encouraging uniformity and standard practice in the face of diverse structural and administrative dichotomy in polarized world and countries who are parties to the

Refugee Conventions.

In the eyes of international law refugees remain persons in need of international protection. The world community by different nation states owes to refugees certain obligation existing under international conventions and customary international law. Such obligations are not forced on Nations but are proactively realized under the concepts of international co-operation and burden sharing. The moral impetus for these was boosted sequel to Second World War chiefly evident in greater moral contents that attend most legal norms thereafter. In the present world

[86] ibid., 1534 G –H, 1536 A – E, 1537 F – G, 1544 C – E, 1545 H – 1546 A, 1547 G – 1548 A, 1554 C – H.

under international platform, there are values held sacrosanct in the Universal Declaration of Human Rights recognising that;

> [T]he inherent dignity and of the equal and inalienable rights of all members of the human family and is the foundation or freedom and justice and peace in the world.[87]

Hyndman pointed out in relation to the values in the declaration that the:

> [I]ncreasing acceptance of these values has become vital, not only from the point of view of those tragic persons who fall within the ambit of the definition of the term refugees, but also for the well-being of the entire world community[88].

In the eyes of international law no doubt refugees are needy people outside their country or usual place of residence that needs to live in dignity and safety elsewhere. Beyond that is the growing recognition that international community is a society of people in one global village where all members of the community should be accorded right to live anywhere within it in dignity and safety.

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[87] U.N. General Assemblies Resolution 217A (111) of 10 December 1948.
[88] Patricia Hydman, "Refugees Under International Law With a Reference to the Concept of Asylum," in *Australia law journal (ALJ)* 6, 1986 3(60) 155.