THE ORIGINALLY INTENDED FUNCTION OF THE SO-CALLED EXCLUSION CLAUSES IN THE CONVENTION RELATING TO THE STATUS OF REFUGEES

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INTRODUCTION

1. Refugee Protection and the Concept of Exclusion Clauses(1)

Present-day cognition of refugee protection is usually comprised of fear of threats to the security and social order of the refugee receiving society and the international peace and order. To respond to this fear, the international community, the United Nations High Commissioner for Refugees (UNHCR), and the states have encouraged and invoked the application of exclusion clauses to exclude perpetrators(2) from refugee status and, as a result, from refugee protection. The relevant legal concept of the exclusion is found in Article 1 paragraph F of the Convention Relating to the Status of Refugees,(3) which stipulates that:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."(4)

Though, the text of the exclusion clauses does not render the concept of definite exclusion when there is conflict with the inclu-

sion clause,[5] the contemporary tendency to interpret the exclusion clauses has made the inclusion clause inapplicable when there is conflict between the two. This has also brought about contradictions between the exclusion clauses and the believed principle that refugee protection is surrogate protection for fundamental human rights that one ordinarily expects from the state of which he or she is a national or habitual residence.[6]

Exclusion Clauses from the Perspective of International Co-operation and Exclusion of the "Undeserved" from Refugee Protection

Since the September 11 terrorist attack in New York, the international community has showed great concern for the danger that terrorists might abuse the refugee protection system by making use of the system to avoid being punished. From the perspective of international cooperation and state-centric refugee law, the international community invokes the concept to prevent state powers from granting protection to perpetrators. It reaffirms the safeguard against any of such potential abuses by proclaiming that states should not let those involved in terrorist acts hide behind the cloak of refugee protection system.[7] In this school of thought, the objective of exclusion is just to ensure co-operation among states. To be secured from the threat of terrorism, the international community requests states to cooperate with each other and to deny protection for perpetrators, especially the suspected terrorists. It does not explicitly demand that perpetrators who are facing anticipated persecution be excluded from protection. Though the vaguely defined term 'terrorist' might lead to abuses, exclusion clauses viewed in this way do not make it necessary to confront the issue of conflict between the exclusion clauses and the inclusion clause.

But, when the exclusion clauses are regarded as part of the refugee definition, there is evident conflict between the exclusion clauses and the inclusion clause. In this regard, UNHCR asserts that the refugee protection does not require states to grant protection to perpetrators. Consequently, Refugee Convention singles out and excludes

perpetrators involved in terrorist acts from refugee protection by the spirit of the exclusion clauses. UNHCR interprets the function of the exclusion clauses to be provisions that guarantee the integrity of the refugee definition and explicitly encourages States to apply the exclusion clauses to exclude from refugee status those who have committed "serious crimes."[8] In order to argue for the maintenance of the existing refugee definition, UNHCR states that the exclusion clauses play the role of excluding perpetrators from refugee status and to refuse "safe haven" to such persons, including terrorists, so there is no need to re-define the refugee definition, and the protection obligations imposed by the Refugee Convention should be duly respected since it only requires states to protect the genuine victims.[9] In view of this perception, the exclusion clauses indicate that some categories of individuals are "undeserved" for refugee status and should not be protected as refugees even though his or her situation might meet the conditions of being refugees.

2. The Trend towards Disregard of Inclusion Clause

Like UNHCR, the textual interpretations by some national courts have explicitly separated the issue of exclusion from inclusion. They asserted that the exclusion clauses required a separate consideration of the committed crimes from determination of refugee status.[10] As a result, the exclusion clauses are to single out persons considered as perpetrators of certain crimes or offences and to have them excluded from the protection of Refugee Convention without having to take into account whether or not they would face persecution subsequently. One of the arguments for such interpretation is that the provisions of the exclusion clauses exclude persons rather than refugees so that the well-founded fear of being persecuted is irrelevant and need not be examined at all. In other words, the exclusion clauses can be applied without having to take into consideration also the relevant qualifications for refugees, and the refugee status will not be granted to the excluded once the exclusion clauses are decided to be applicable in a particular case.[11]

Such interpretation has gained supports from the current leading

refugee law commentators, such as G. S. Good-win Gill and James C. Hathaway. They both interpret the exclusion clauses to be alternative elements for determining refugee status. In this regard, Goodwin Gill's argument is quite similar to the above-mentioned interpretations. He considers that the exclusion clauses are "integral to the refugee definition, if the exclusion applies, the claimant cannot be a Convention refugee, whatever the other merits of his or her claim."[12] Moreover, "[a]rticle 1F excludes 'persons', rather than 'refugees' from the benefits of the Convention, suggesting that the issue of a well-founded fear of being persecuted is irrelevant and need not be examined at all..."[13] Hathaway argues that the entitlement of the refugee status is linked to the genuine risk of persecution though, once an individual is considered fallen under one of the provisions of the exclusion clauses, he/she would not be regarded as worthy of the protection and therefore, would be outside the scope of the refugee definition.[14]

In spite of the argument for definite exclusion, some contend that there must be compromise between exclusion clauses and inclusion clause before deciding the definite exclusion to be applicable. To ensure the integrity of the refugee protection system in the situation of so-called new "threats and challenges," Contracting States to the Refugee Convention warned against any application of the exclusion clauses without deliberation, while they called for their application to definitely deny the perpetrators the entitlement to refugee status and refugee protection.[15] UNHCR held that the function of the exclusion clauses is to exclude "people otherwise having the characteristics of refugees, as defined in Article 1, Section A," from refugee protection. Therefore, given that the people concerned would face serious consequence after being excluded, the interpretation of the exclusion clauses must be restrictive.[16] So, in order to ensure that application of the exclusion clauses would not undermine the objectives and purpose of the Refugee Convention, UNHCR has suggested the incorporation of the "proportionality test." This test means that the nature and gravity of the offence must be taken into account and the post-exclusion consequences must be examined to decide on the issue of excludability, and the consequences should include the

degree of persecution fear as one of the elements for consideration.(17) In case the act in question does not constitute the reason leading to persecution, account has to be taken also of the reason on which fear of persecution is based, and of the balance between the act in question and the persecution fear.(18)

3. Refugee Protection from the Perspective of Human Rights Protection

Refugee law commentators and UNHCR have so far utilized the term "undeserved" for convenience in justifying the definite exclusion from refugee protection of perpetrators who might otherwise have well-founded fear of being persecuted. This term takes its origin from the concept that refugee law relates to "humanitarian principles" rather than human rights, and humanitarianism only extends its scope of application to the victims of persecution, who are not undeserved for refugee protection. Nehemiah Robinson, member of the Israeli delegation to the drafting Committee and one of the active supporters of the exclusion clauses introduced the concept of definite exclusion which is justified by the term "undeserved." Arguing for this concept, he portrayed that the protection of refugees is to invoke humanitarian principles and the international nature of refugee status. Persons, such as, the German origins residing abroad, who had no hesitation to assist Nazi to commit the crimes from overseas during the Second World War, were undeserved for protection as refugees and, moreover, war criminals should not be protected as refugees from punishment.(19)

But the text of the Refugee Convention does not enumerate humanitarian principles of refugee protection. The only mention of "humanitarian" is found in the preamble, which tries to justify burden sharing of States to prevent the problem of refugee from becoming cause of tension among states.(20) The reading of the phrase "social and humanitarian nature of the problem of refugees" refers to granting refugee protection as State's implementation of social and humanitarian scheme. The concept of "humanitarian" here does not constitute any explanation for refugeehood and neither does it sub-

sequently make refugee protection necessary. The drafting process indicates that the incorporation of the term "social and humanitarian nature" is to reflect the '*de facto* situation' and nature of the need for international assistance to refugees or asylum seekers.(21) So the term 'humanitarian' found in the preamble refers nothing to the reason and the need for refugee protection performed by state members under the auspices of the Refugee Convention. It merely portrays the factual situation in which the Refugee Convention was drafted and the need for international co-operation in resolving refugee problems instead of reasoning why some categories of person should be granted refugee status and therefore be protected.

The judicial, practical and academic interpretations of the causes for refugeehood and the need for refugee protection have developed into the sphere of human rights protection. It is the common understanding that the sufferings incurred by persecutory acts constitute sufficient reason to invoke refugee protection. In this theory, the term "being persecuted" means being suffering from "sustained or systemic violation" of human rights and lack of state protection.(22) Consequently, refugee law is considered to be back-up to the protection that the refugee status claimant expects from the state of which he or she is a national or a habitual resident.(23) Refugee Convention is the international community's commitment to the assurance of basic human rights without discrimination.(24) In sum, as portrayed by Professor James C. Hathaway that "...refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard."(25)

The rationale behind the linkage between human rights violation and causes of refugeehood (condition of being refugee) is that the refugee law enables, as a substitute for the human rights law, individuals whose human rights cannot be guaranteed at home country to benefit from the protection abroad.(26) But the international community does not intend to grant safe-haven for all suffering individuals, so the "built-in limitations" is introduced to qualify only some specified victims of human rights violations as refugees.(27) Taking into account the understanding that any form of persecution involves

a basic attack on human rights and the principle that human rights are owed to everyone whatever their past actions, it is hardly convincible that the fear of being persecuted and the need for refugee protection is irrelevant once the exclusion has been determined applicable against the refugee status claimant.(28)

Human Rights for the Suspects and, to Some Extent, Criminals in International Law

Some provisions of both regional and international human rights instruments guarantee the rights of the suspects.(29) These rights also possess their positions in the provisions of the international criminal legal instruments.(30) The rights of the suspects, for instance, consist of protection against arbitrary arrest and detention,(31) treatment with humanity and dignity when detained,(32) and entitlement to procedural guarantees in criminal trials.(33) In the international criminal law, the rights of the suspects during investigation and of the accused are guaranteed. For the former, there is the right to be protected from forced confession; from torture or any form of cruel, inhuman or degrading treatment or punishment; from arbitrary arrest or detention; and the right to be informed, to have legal assistance, etc.(34) As to the latter, the right to public and impartial hearing; adequate time and facilities for preparation of defence; legal assistance; and presumption of innocent, etc.(35) Besides, there is also protection against retroactive application of criminal law.(36)

In case, conviction has been imposed, there are also restrictions on some forms of criminal sanctioning. The most apparent prohibited way of punishment is the act of torture.(37) There are also "cruel," "inhuman or degrading treatment or punishment"(38) and "medical or scientific experimentation" without free consent of the victims concerned. Among these, the prohibition against torture has become an issue of particular concern and developed further than the others. Acts of torture are explicitly prevented and criminal law should criminalize any of such acts.(39) Once the acts of torture have been committed the right to complain against such acts by the alleged victims is recognized and guaranteed.(40) In addition, there is also

limitation on the practice, and even tendency towards the abolishment, of death penalty.[41]

So, even if the refugee status claimant is considered a criminal suspect or offender, he or she will still be subject to some sorts of human rights protection. The human rights based interpretation of refugeehood demands that the asylum state commit to respecting the asylum seeker's human rights and calls for its willingness to grant surrogate remedy to those victims who flee their country because of some specified human rights violations. If that is the case, why should the criminal suspect or offender be singled out and denied protection in case he or she is threatened with acts that are of disrespect for these very rights guaranteed by the relevant human rights instruments? Further, the Refugee Convention can only operate when there is conflict of values between states. An act may be considered punishable in the country of origin, but punishment of such act in the country of asylum may amount to persecution.[42] Likewise, treatments considered to be in conformity with the social norms in the country of origin may be considered unacceptable and amount to persecution in the country of asylum. That is to say, it is illogical to argue that, from the view of the country of asylum, a treatment that is originally unacceptable should be accepted to be proper for the "undeserved," for instance, in the case where the perpetrator is denied due process or is subject to unduly hard punishment purely for acts which are perceived by the country of asylum that punishment for which amounts to persecution.[43]

In this article, the author argues that the original meaning of the exclusion clauses consists of two distinctive characters. The first was to prevent States from referring to international obligations as an excuse to grant protection to war criminals or persons who have committed other equivalent crimes. The second was to ensure the respective meaning of persecution and prosecution at the time when the notion of human rights protection had not been developed to the level of what we see today. Consequently, the concept of being "undeserved" for refugee status and subsequently being excluded from refugee protection does not find its basis in the current context of understanding refugeehood either. In conclusion, there should not be

a simple compromise between the conditions for applying the inclusion clause and the standard for implementing the exclusion clauses. Rather, the functions of exclusion clauses and inclusion clause must be discrete and the two should not be treated as single and separate elements in clarifying refugee status. The former must serve as a preventive guard against protection of fugitives from justice and the latter must be let to play its full role of identifying victims of persecution for any of the grounds stated by the Refugee Convention. Concerning cases which both exclusion and inclusion clauses are simultaneously applicable, attention should be paid to the legal arguments both for and against application of either of the clauses.

Having this in mind, the conceptual evolution of refugeehood and exclusion clauses both prior to and after the adoption and entering into force of the Refugee Convention will be examined and analyzed. The finding will show that the exclusion clauses serve nothing more than guidelines for states to make the difference between victims of being persecuted and fugitives who attempt to escape from justice.

I. HISTORICAL EVOLUTION OF REFUGEEHOOD IN INTERNATIONAL ARRANGEMENTS

1. Pre-Refugee Convention Refugeehood – Refugee Definition by *Ad Hoc* and Nationally Specified Groups

Refugee law commentators might trace the origins of the law on refugee protection and asylum granting prior to the League of Nations from various sources. This encompasses the arguments of refugee and asylum law within the thought of humanity,[44] 'political offence exemption,'[45] and from an immigration perspective.[46] However, international arrangements through inter-governmental organizations to cope with refugee problems as cooperative actions had not existed until the adoption of Arrangement concerning the Issue of Certificates of Identity to Russian Refugees of July 5, 1922; the Plan for the Issue of Certificates of Identity to Armenian Refugees of

May 31, 1924; and the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees of May 12, 1926.[47]

Shift in Refugee Definition from "Russian Refugees" and "Armenian Refugees" to "Lack of Protection"

None of the instruments prior to the First World War included provisions on exclusion except definitions of refugees based on specific groups of persons who were exiled from some particularly identified countries of origin. Though Russian and Armenian refugees were not precisely defined in the Arrangement concerning the Issue of Certificates of Identity... to Russian and Armenian refugees of July 5, 1922 and of May 31, 1924 respectively,[48] they were later classified as persons of Russian or Armenian origins who did not enjoy or no longer enjoyed the protection of the government of their countries of origin.[49] Lack of protection as precondition to refugeehood appeared also in *the* Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures Taken to Assist Russian and Armenian Refugees of June 30, 1928, which defined as refugees persons of specific origins and in lack of either *de facto* or *de jure* protection.[50] Moreover, the assistance were only applicable to those who had been present outside of their countries of origin according to the Arrangement concerning the Legal Status of Russian and Armenian Refugees of June 30, 1928, which stated that 'identity certificate for refugees' should cease to be valid if the bearers entered the territories of their respective countries of origin.[51]

Though the definitions in the Convention relating to the International Status of Refugees of October 28, 1933[52] almost reiterated the definitions rendered by the various previous arrangements, their validity and contents were different. The former imposed not only recommendation, as what the latter had also done, but also series of obligations upon its member states.[53] This was the very early Convention that guaranteed refugee's rights in the country of asylum or refuge besides issuing Nansen certificates.[54] This was also the very early document that indicated the development of the notion of refugee protection into the form of a legally binding obligation

for states to grant refugees some basic rights, and into the sphere of international co-operation, whereas the previous arrangements were mere agreements between signatory states and the High Commissioner for Russian and Armenian refugees to allow representatives of the High Commissioner to operate as consuls to whom the refugees could have recourse.(55) What was the most evident change within the period from 1922 to 1933 was the respect, *inter alia*, for refugee's right to freedom of movement. There was a clear statement in the arrangements concerning Russian and Armenian refugees that "[t]he grant of the certificate does not in any way imply the right for the refugee to return to the State in which he has obtained it...",(56) whereas such rule gradually eased and the instruments up from 1926 recommended the affixing of the return visa on identity certificates(57) and the including of a formula authorizing exit and return without requiring any further authorization respectively.(58)

A formula similar to the 1933 Convention was later adopted by the Convention concerning the Status of Refugees Coming from Germany of February 10, 1938, which defined refugees as "[p]ersons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government" and "[s]tateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government."(59) However, none of these instruments contained provisions of exclusion that was later provided in the exclusion clauses of the Refugee Convention. The only exception was the exclusion of persons leaving Germany for reasons of purely personal convenience.(60)

2. Shifts in Characteristics of Refugeehood

The sub-section above showed that the evolution of refugeehood prior to the end of the Second World War symbolized a profound shift from refugeehood through nationally based *ad hoc* arrangements e.g. the "Russian Refugee" and the "Armenian Refugee" to refugeehood

through nationally based *ad hoc* arrangements plus protective principles e.g. the Russian or Armenian origins who did not enjoy or no longer enjoyed the protection of the government of their countries of origin – namely specified national groups plus "lack of protection".

The refugeehood between the two world wars had its distinctive characteristics comparing with that developed following the end of the Second World War. Besides the *ad hoc* characteristics, the application of most of these arrangements had retrospective nature. The definitions were decided on the basis of the already existing context of refugee outflows, which could be briefly identified as; 1) Russian prisoners of war and civilians captured, detained or displaced during the international conflict between 1914 and 1918, and Russian combatants and civilians fleeing from the Soviet forces during the civil war in Russia;(61) 2) Russian Armenians who declared Armenian Republic as independent state going into exile after all the attempt to create an independent Armenian state failed;(62) 3) Assyrians who were refused to return as well as expelled from their place of residence by the Turkish Government following the failure of war against Turkey and the failed attempt to claim autonomy; and the Assyro-Chaldeans who were forced to flee from the territory controlled by Turkey;(63) and Italian, Jewish, German, and Spanish refugees going into exile for various reasons including input political opinions and ethnic cleansing imposed by the Fascist and Nazi regimes, etc.(64) Hence, the drafter of a definition for refugees characterized the term 'refugees' as some specified groups of national origins, who were vulnerable and enjoyed no protection of any state or international institutions.(65)

Moreover, it is remarkable that the *ad hoc* characteristic of refugeehood was often accompanied by the notion of temporary protection, and the refugees or stateless persons were often the unwanted and the denationalized created by their countries of nationalities. The protection granted to them usually ended when there is either a repatriation or settlement in the country of asylum or resettlement in the third countries.(66) With regard to the phenomenon of refugee outflows, we can quote the words of Michael R. Marrus that, "... the growth of the modern nation-state implied not only the naming

of certain people as enemies of the nation, but also the expulsion of significant groups for whom the state would not or could not assume responsibility. With the First World War, this process accelerated powerfully. The war itself schooled the new masters of the state apparatus: civilians could become dangerous enemies; fighting can not stop simply because they were there; on the contrary, it was best to eject unwanted or menacing groups when they threatened to weaken the beleaguered [n]ation."(67)

Arguments and Counterarguments on the Individual-Rights Approach to the Need for Refugee Protection

Following the end the Second World War, the phenomenon had changed and there were contradictory opinions between refugee sending and refugee receiving states. The question of granting protection to refugees was one of the controversial issues that led to disputes between the Western and Eastern bloc of states. The Western bloc favored the creation of a system to grant protection for refugees, for whom repatriation would be deemed improper because of the lack of national protection. In this regard, the United Kingdom proposed the creation of an international organization, which would provide protection for refugees from repatriation.(68) As opposed to this proposal, the Yugoslavian delegation to the Third Committee of the United Nations General Assembly asserted that, with the exception of the victims of fascism,(69) the displaced persons should return to their countries as soon as possible for the interest of good relations among the members of the United Nations.(70) The reason was that the Fascist oppressors had been defeated and there was no reason why those who fled from the Axis-controlled countries should not return to their home countries.(71) Another reason was that by allowing those political dissenters to stay abroad would endanger their home countries.(72)

The Communist bloc of states was in favor of refugee protection for only the victims of fascist such as the Spanish Republican Refugees and German Jews. According to their argument, the protection of refugees from Member States of the United Nations would create

conflicts between states. However, the Western – non-communist – states contended that the notion of refugee protection was not made for the benefit of states but for the rights of the individuals.(73) Subsequently, the refugee definition included not only the specifically classified groups but also categories of persons who had been in lack of protection or threatened by persecution for reasons of race, religion, nationality, political opinions, or membership of a particular social group and had been outside the countries of their nationality or habitual residence.(74) Despite the promising development of a definition for refugeehood in both the Constitution of the International Refugee Organization (IRO Constitution) and the Refugee Convention, towards establishment of a scheme for protecting human rights, the validity of the IRO Constitution terminated in 1949 and the Refugee Convention was subjected to geographical and temporal limitations.(75)

Ad Hoc Classifications and Categorization Standardized by the Principle of Protection

Even though, the concept of individual rights was fundamental to refugeehood and refugee protection, they were subjected to restrictions in reality. During the drafting process of the Refugee Convention, one of the hot issues that led to a lot of disputes was the scope of the refugee definition. The term 'blank-check' was used to portray critically a vague refugee definition(76) and from this critical point of view the dilemma that whether a general and broad definition, which was possible to include large number of refugees, or an enumerated and narrow definition, which might attract a large number of states to accept the Convention, arose.(77) At least four categories of solutions to the questions of definition were proposed and examined by the delegates during the negotiation of the Ad Hoc Committee on Stateless and Related Problems.(78) These were the proposals submitted by the Secretary General, France, the United Kingdoms, and the United States of America. The draft proposals of the Secretary General had its foundation of the definition in the Constitution of IRO(79) and definition flexibly based on decisions of the United Na-

tions General Assembly.[80] The French proposal had its approach to human rights under the Universal Declaration of Human Rights (Declaration), especially Article 14 of the Declaration.[81] The United Kingdoms proposed a definition based mainly on actual or input fear of persecution, enunciating that "...the expression 'refugee' means... a person who, having left the country of his ordinary residence on account of persecution or well founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country."[82] And the United States of America's draft suggested a definition with historical perspective and explicitly dividing between recognized groups of refugees and neo-refugees.[83]

At the very beginning of the negotiation, the delegates already showed their concerns over the scope of the Convention that they were going to draft.[84] The first phase was to exclude *de jure* stateless persons from beneficiaries of the Refugee Convention for the reasons that solution to the problem of refugees was of higher priority than that to the problem of '*de jure* stateless persons' and that a convention dealing only with refugee matters would gain more State acceptance.[85]

The second phase was to limit the applicability of the Refugee Convention to the scope framed by the refugee definition. There were two main schools of thought regarding the drafting of the Refugee Convention.[86] The first one proposed to draft a convention, which would be able to embrace as many categories of persons in exile as possible with the emphases on two different but relevant concepts, namely refugeehood determined by incidents of human rights violations[87] and forms of treatments in countries of exile.[88] The second school of thought sought to ensure the largest possible number of state acceptance of the convention by tightening its scope of application to exclude stateless persons and only deal with refugees under enumerated and precise definitions.[89]

Neo-Refugee Defined in the Context of the "Principle of Protection"

Mr. Rain of France had the meaning of neo-refugee in his mind, which could cover all "new" refugees and was applicable even to categories of refugees whose status had already been so defined in agreements and conventions concluded between the First and the Second World War.(90) Instead of categorizing refugees from specified national groups, the French proposed definition consisted of the general concept of victims of persecution that was applicable to any person who suffered from being persecuted. The reason was that it could not be predicted that democratic countries would not in the future fall into the administration of the authoritarian regimes whose acts of persecution would cause the outflow of refugees. Subsequently, those refugees of future events should be indiscriminately entitled to the same protection as what the existing groups of refugees were receiving.(91)

Refugeehood Classified by Ad Hoc Arrangements

The meaning of being precise and enumerated was that: the refugees should be those who were identified and recognized as refugees by instruments prior to the Refugee Convention, the protection should not be extended to refugees already receiving protections, and neo-refugees should not be determined as such but only on the basis of concluding agreements on their status in accordance to each specific situation.(92) The idea was that the states should know in advance to what they were committing themselves by signing the Refugee Convention.(93) The argument for this idea was that governments would find difficulties in ratifying a convention which otherwise would amount to "a kind of document signed in blank to which could be subsequently added new categories of beneficiaries without number."(94) In order to make a compromise between these two schools of thought, the refugee definition was adopted in a flexible but restrictive formula.

II. THE EMERGENCE AND THE INTENDED FUNCTION OF THE EXCLUSION CLAUSES

It is clear from here that the idea to exclude perpetrators from refugee status and refugee protection did not exist before the Second World War.(95) The first time that the exclusion clauses to bar certain types of perpetrators from refugee protection were inserted in the international refugee instrument was after the Second World War. These clauses were first conceptualized in the General Assembly Res. 8(I) and then included in the IRO Constitution (96) because the drafters wanted to avoid conflicts between the asylum seeking system and the implementation of the international criminal law.(97) In other words, the drafters had in mind an ambiguous definition of refugees and refugee protection, therefore they incorporated the provisions to exclude perpetrators into the Annex I Part II of the IRO Constitution, to prevent the IRO, and the States indirectly, from granting refugee protection to those perpetrators who had to face criminal sanctions. In a later stage, at the drafting of the Universal Declaration of Human Rights, the exclusion of perpetrators with regard to the right to seek asylum was explicitly stipulated.(98)

The trend reached its peak right after the end of the Second World War as a result of the changing concept of international criminal justice and the subsequent development of the definition of refugee.(99) During the negotiation, the drafters did not explicitly bring up the question of possible conflict between exclusion and inclusion for consideration. What they did was to identify the categories of people to be considered refugees and to be entitled to the guaranteed rights. Reflecting on this background, examination of the General Assembly Res. 8(I); Part II of the Annex I of the IRO Constitution; and Article 14 (2) of the Universal Declaration of Human Rights are relevant for understanding better the function of subsequent developments of the exclusion clauses in the Refugee Convention, especially when it comes to the question of conflict between inclusion and exclusion.

1. Pre-refugee Convention Exclusion Clauses

Yugoslavia was the state that proposed, at the very beginning of the negotiation to draft and adopt the Assembly Res. 8 (I), the incorporation of a clause to exclude perpetrators from any assistance for refugees. The justification for such a clause was to ensure peace, "good relations among the United Nations and social stability".(100) The Yugoslavian representative, Mr. Bebler, was actually demanding the exclusion of perpetrators within the context of repatriating all refugees except Spanish Republican Refugees and German Jews. His attempt was to deliver clear message to other states that they should not grant protection to these perpetrators from criminal sanctions.(101) Part II of the Annex I of the IRO Constitution explicitly referred to persons "who will not be the concern of the Organization"(102) and the justification was that, firstly, the Organization should not protect perpetrators such as 'traitors', because by protecting them it obliged states to maintain their own enemies in contributing to the funds of the organization;(103) and, secondly, the IRO – a special agent of the United Nations – was bound to protect only those in fear of persecution for reasons of their political opinions provided these opinions were not in conflict with the principles of the United Nations.(104) There was also opinion that the exclusion of perpetrators in the IRO Constitution was based on the concept that perpetrators were considered unworthy for international protection and assistance.(105)

Before turning to consideration of Article 14 (2) of the Universal Declaration of Human Rights, some points need to be clarified. First of all, the function of Article 14 of the Declaration is not identical to that of Article 1 of the Refugee Convention. Article 14 of the Declaration contains two paragraphs – the first provides the right to 'seek' and to 'enjoy' asylum from persecution,(106) and the second stipulates exceptions to the rights mentioned in the first paragraph. It does not deal with the issue of refugee status and other relevant rights besides the right to 'seek' and to 'enjoy' asylum.(107) From this perspective, the function of Article 14 (2) of the Declaration is significantly different from that of the exclusion clauses of Article 1F

of the Refugee Convention. The former refers to the exclusion from nothing more than the right to 'seek' and to 'enjoy' asylum, while the latter refers to the exclusion from protection of all rights warranted in the Refugee Convention. That is to say although Article 14 (2) was one of the original sources of the concept to exclude perpetrators,[108] the seriousness of harm caused by the exclusion clauses in Refugee Convention is more than that of Article 14 (2).[109]

Furthermore, the reading of Article 14 (2) infers that it is more a safeguard than an exclusion of the right of anticipated victims of persecution to 'seek' and to 'enjoy' asylum. The phrase "prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" clearly divides the concepts between persecution and prosecution – in other words, the function of Article 14 (2) is to make clear-cut distinction between exiles from persecution and fugitives. Given the exceptional nature of Article 14 (2), it is inevitable to examine the function of Article 14 as a whole in order to conclude this argument.

The drafters of the Universal Declaration of Human Rights perceived that general ignorance of the fundamental human rights and freedoms of mankind was the cause for wars. Therefore, a maximum safeguard against future happening of wars was the main objective of the Declaration.[110] The motif of the adoption of the Declaration was to avoid another Holocaust or similar abomination.[111] Thus, the genesis of the concept of right to seek asylum was largely influenced by the atrocities of the Second World War. The refusal to admit German Jews to seek asylum in the 1930s had clearly had catastrophic consequences, which led to the death of thousands.[112]

There were controversies over the issues of the sovereign right of state to decide on admission of foreigners and the right of individual to obtain asylum from persecution. India and the United Kingdom initially proposed that the right of individuals to seek asylum be included into the draft Article 14. The clause was later amended by China to read that "[e]veryone has the right to seek and may be granted, in other countries, asylum from persecution."[113] The terms "may be granted, in other countries, asylum from persecution" were proposed to be rewritten as to "be granted asylum from persecution"

by China.[114] In addition to this, representative of the Soviet Union proposed that these terms be modified to read "[t]he right of asylum shall be granted to everyone persecuted because of his activity in defence of democratic interests, because of his activity in the field of science, or because of his participation in the struggle for national liberty."[115] The right to obtain asylum was supported for at least two reasons. First, respect for the right to asylum was considered necessary in the promotion and protection of rights provided in other provisions of the Universal Declaration of Human Rights. And the second reason was in order to ensure the proper implementation of the right to asylum. The first reason included the argument that "the right to asylum from persecution was a natural corollary to the right to hold or change one's beliefs" therefore the cause for claiming this right should be interpreted as broadly as possible to cover also persecution for philosophical and political reasons,[116] and "the right to asylum was implicit in the concept of the right to life," which did not require permanent settlements but only a temporary safety from persecution.[117] Further, delegate from Pakistan argued that the right to obtain asylum relates to the right of freedom of thought and expression.[118] The second argument was that the right to seek asylum would become meaningless if such right was not guaranteed with the right to be granted asylum.[119] Anyway, these reasons could not finally be persuasive enough to make the states approve the right to be granted asylum because of the objection initiated by Mr. Wilson of the United Kingdoms. He opposed the individual right to be granted asylum and pointed out that the right of state to prevent foreigner admission to their territories was "one of the most jealously guarded rights."[120] Mr. Lassin of France also expressed doubt on the right of individual to be granted asylum. He noticed that it was not the problem of whether the individual should have the right to be granted asylum but who would be responsible for ensuring the respect for such right. In his opinion, the answer would only be the Member States under series of agreements with the United Nations.[121]

Subsequent to these contradictory opinions on the concept of the right to asylum, British delegation proposed an amendment in which the words "and be granted" would be substituted by "and

to enjoy."[122] The Saudi Arabian proposal was simply to delete the words "and be granted."[123] The logics of these two proposals had their origins from the statements of Mrs. Corbet of the United Kingdoms and Mr. Baroody of Saudi Arabia respectively.[124] Mrs. Corbet explained her amendment that the United Kingdoms delegate "desired to make it clear that its intention was not to grant to a person fleeing persecution the right to enter any and every country but to ensure for him the enjoyment of the right of asylum once that right had been granted him."[125] The reasoning was "no foreigner could claim the right of entry into any state unless that right were granted by treaty...[That was to say, it was the right of states] to offer refuge and to resist all demands for extradition."[126] Mr. Baroody stated that it was obvious that if the persecuted would have the right to seek asylum from persecution in a foreign country, it would be a violation of the concerned state's sovereignty in case every individual could enter a country along what he/she desired.[127] As a result, the text of Article 14 of the Universal Declaration of Human Rights finally leaves open the question whether an individual has the substantial right to asylum and protection from persecution in other countries. Johannes Morsink depicted the adoption of the text that "the lesson learned from the Holocaust was once again lost."[128]

The current Article 14 (2) had its early thought proposed by the Union of Soviet Socialist Republics to take careful steps in defining the type of individuals entitled to the right to be granted asylum.[129] This also resulted from the vague concept of "humanity," which was, at the time, proposed as a reason for the right to asylum that representative of Byelorussian Socialist Republic intended to explicitly block the application of "humanity" to war criminals.[130] In the context with proposed right to asylum, which stipulated that "the right of asylum shall be granted to everyone persecuted because of his activity in defense of democratic interests, because of his activity in the field of science, or because of his participation in the struggle for national liberty,"[131] Mr. Pavlov of the Union of Soviet Socialist Republics emphasized "the impossibility of granting the right to asylum to war criminals."[132] It meant that the granting of the right of asylum should not be granted to war criminals, which indicated that it was the states

that were subjected to the limited right of granting the right to asylum. Mr. Vilfan of Yugoslavia delivered a clearer statement on this by criticizing the granting of asylum to war criminals by the States in Europe.(133) On the other hand, Mr. Klelovkin of the Ukrainian Soviet Socialist Republics emphasized the safeguard of receiving state's right to decide on the granting of asylum. He challenged the Chinese delegation, who was one of the few delegations that opposed the incorporation of the exclusionary clauses found in the current Article 14 (2), that "if the Chinese people would be prepared to grant asylum to Japanese war criminals."(134)

The vagueness of the term persecution was the very reason that created disagreements within the delegations during the negotiation of the current text of Article 14. Mr. Lopez of the Philippines pointed out that different people would want to seek asylum for different kinds of persecution. Dissidents from the Communist bloc would want to seek asylum in a country of non-communist bloc and vice versa Communist sympathizers might want to seek asylum in the Communist bloc. So, as stated by Mr. Lopez that, "it would be inadvisable to try to specify the persons who were entitled to asylum."(135) Nevertheless, Mr. Pavlov of the Union Soviet Socialist Republics kept arguing for the inclusion of the exclusion of war criminals. He asserted that the "declaration should explain what was understood by the right of asylum, so that war criminals, fascists, and nazis hiding abroad and particularly in occupied Germany, could not claim to be persecuted persons."(136) Finally, the paragraph to exclude remained undeleted with a vote of eight to eight,(137) though Mr. Chang of China implicitly argued that the clause was unnecessary when he replied to Mr. Klekovkin of Ukraine that "the question of Japanese war criminals in China did not arise, because article 11 [now Article 14] dealt with refugees from persecution"(138), i.e., the Japanese war criminals would not be granted asylum in any circumstances.

2. The Incorporation of Exclusion Clauses in the Refugee Convention

In this section, three issues will be examined, e.g. the reasons

why exclusion clauses were inserted in the Refugee Convention, the reasons why the phrase 'serious reasons for considering' was applied and what was the prospected meaning of 'serious reasons for considering' when this phrase was included. The following description of the entire drafting process that led to the inclusion of the exclusion clauses and 'serious reasons for considering' into the Refugee Convention would serve as basic pictures on how and why the clauses and the phrases were incorporated into the Refugee Convention.

The exclusion clauses now as it appears in the Refugee Convention has its origin in the United Nations Secretary General's study,(139) where the Secretary General recommended that the Economic & Social Council (hereafter: ECOSOC) arranged the drafting of a convention, which defined the status of stateless persons, but with exception to war criminals.(140) The content of this study was later referred to as an initial collection of views leading to the drafting of the Refugee Convention(141) and the incorporation into the Refugee Convention of the exclusion clauses to bar perpetrators from the benefit of refugee protection system was proposed by the Secretary General during the drafting process of the Convention.(142) Thus, with the original purpose of the exclusion against criminals or perpetrators in the IRO Constitution coupled with the fact that these exclusion clauses were one of the sources of the current exclusion clauses of Article 1F of the Refugee Convention, there is strong indication that the concept to exclude persons who violated international criminal law as a measure to avoid conflicts between the refugee protection system and the international criminal tribunals was also considered and finally introduced into the Refugee Convention.(143)

But, of course, the reason to exclude criminals from refugee protection system was not solely based on the avoidance of conflicts between the international criminal law and the law on refugee protection, it was also for other reasons, such as, to uphold the principle that criminals should not deserve protection under the international convention for refugees;(144) to ensure that the High Commissioner [UNHCR] and the United Nations are not obliged to provide refugee protection to the criminals;(145) and, as of non-political crimes, to warrant public order and to keep the moral value attached to the concept

of 'refugee'.[146] Viewing from the reason that the United Nations not being obliged to provide protection to criminals, it is of evidence that the drafters failed to consider separately refugee protection by states from those protections by United Nations agencies. This neglect led to the contradictory opinions of the exclusion clauses.

3. 'Serious Reasons for Considering' – the Discretionary Right of States to Avoid Compliance with the Exclusion Clauses

During the negotiations, the United States representative did not agree that it was necessary to put the text of exclusion clauses of Article 1F into the Convention, while representatives of Israel and France particularly actively argued for a need to insert the provision to exclude criminals or perpetrators.[147] Following the French and Israeli representative's successful argument for the inclusion of the provision to exclude criminals from the Refugee Convention, the drafted provision was read as "the benefits of this convention shall not be available to any person who has committed a crime specified in article VI of the London Charter..."[148] Referring to the phrase 'the benefits of this convention shall not be available...', the United States representative explicitly and strongly disagreed with the draft. He disagreed with the provision that rendered accusation against member states, which sheltered war criminals, and he requested for discretionary power of receiving states to decide on who were war criminals for the purpose of exclusion.[149] He argued that in reality only states had the power to grant or refuse asylum to aliens in their territories, and nothing could prevent a state from granting protection to war criminals, therefore, the discretion should be left to the states.[150] He later reasoned that war criminals were difficult to define, and some countries used the term loosely, that was why, the determination should be left to the relevant states.[151] He proposed an amendment to the draft that would give the states free right to determine the application of exclusion clauses and opposed the idea of restricting the states power in granting protection to war criminals. Then, the United States proposed the text, which was read, "The High Contracting Parties shall not be bound to apply the present convention to any

person..."[152]

Anyway, the French representative, though agreeing with the United States, stated, "the disturbing factor in the text proposed by the United States, however, was not its legal scope, but its possible moral consequences. Some signatories to the Convention might in fact consider a notorious war criminal to be a refugee and protect him as such."[153] Therefore, he proposed an amendment, which placed restriction on the state's discretion in applying the Refugee Convention to grant protection to accused war criminals but granted states their discretionary power to exclude the accused. The text was read as "The High Contracting Parties shall not apply the present convention in the case of a person they consider a war criminal."[154] The text was subsequently changed to "No Contracting State shall apply the benefits of this Convention to any person who in its opinion has committed a crime..."[155]

In contrast to the United State's suggestion for more discretionary power, the Canadian, Chilean, Belgian, and Pakistani representatives challenged the provision that gives almost absolute discretion to the contracting states with regard to persons who have committed acts contrary to the purpose and principles of the charter of the United Nations. They argued that the provision 'the benefits of the Convention would not apply to any person who, in the opinion of the contracting states, had committed any act contrary to the purposes and principles of the Charter of the United Nations' was too vague, easily abused, and had no "legal meaning".[156] Representative of Chile warned against the refusal to grant refugee status to person, who was simply presumed to have committed an act contrary to the purposes and principles of the United Nations, to be without "legal meaning".[157] In order to reach a compromise the French representative admitted that the phrase 'who in its opinion' was obviously rather vague,[158] so he proposed the requirement of 'serious reasons to consider' especially for the provision that bars the right to seek asylum for reasons of having committed non-political crimes or acts contrary to the purposes and principles of the United Nations.[159] This phrase was designed later to apply also to the exceptional provision of the other excludable crimes by an informal working party

composed of Belgium, Canada, France, Israel, Turkey, the United Kingdoms, the United States, and Venezuela.(160)

Besides, the French representative also argued that the decision on criminal responsibilities should not be based on the proof of judicial proceedings conducted by the country of origins but on the receiving state's power of discretion.(161) He reasoned "[i]t was possible that a petty tyrant, after committing a crime against humanity, might not be prosecuted by his country of origin, where his crimes against the United Nations might be considered as a normal act. Conversely, the fact that proceedings had been started should not be regarded as conclusive, since they might be instituted by a country on unjust grounds in order to injure a person who had fled from it."(162) He asserted further "...in the absence of a world government and of a sovereign international court of justice, that power of discretion, which was an essential safeguard both for the real refugee and for the country of refuge, must, perforce, be left to states. The only practical solution was to trust the countries which were willing to grant hospitality."(163)

The above drafting process shows that 'serious reasons for considering' was an uneasy fruit of various attempts to compromise the controversial ideas of incorporating exclusion clauses of Article 1F in the Refugee Convention. It was deemed to be the best applicable phrase by the states to balance between the power of state discretion to protect perpetrators and limits of state power to apply the exclusion clauses against genuine refugees or asylum seekers. The adoption of 'serious reasons for considering' by deleting the phrase that rendered absolute state discretion coupled with the Canadian representative's challenges of the ambiguity of the previous phrase, strongly indicates that 'serious reasons for considering' does not imply more state discretion but rather a less ambiguous and more neutral condition for the operation of the exclusion clauses of Article 1F. Though the phrase 'serious reasons for considering' itself is vague and might be subject to abuses,(164) it was accepted as the only norm that could compromise the differing views of the concept to exclude perpetrators. Further, it also proves the indefinite nature of the exclusion clauses and therefore not to be the integrated part of

the refugee definition.

The French delegation was indeed mixing the protection by UNHCR and that by the Member States when arguing for exception of the definition. Mr. Rain argued to support French proposal for a definition in general terms that embraced all existing groups of refugees and groups, which might be created in the future, that "[t]he High Commissioner, representing the moral authority of the United Nations, should exercise control personally, with the assistance of a small number of representatives of the countries with the largest groups of refugees."(165) Also in this context, the French delegation criticized the United States draft that set exception to "German ethnic origin residing in Germany" from refugee protection, calling it "exception unfortunate...classification along racial lines,"(166) and instead proposed such an exception to war criminals.(167)

There were contradictory opinions about the incorporation of the provision to except war criminals and "common law criminals." Reasons to oppose the incorporation included that there were no more unpunished war criminals at the time and therefore no need to except them. For the "common law criminals," the principle of extradition law would continue to be applicable as usual.(168) Mr. Robinson of Israel contended that given the humanitarian principle of the refugee protection there was no need to extend the protection to individuals whom in no way deserved being granted the status of "international refugee."(169) In addition to Robinson's argument, Mr. Rochefort of France forwarded the idea of including exclusion clauses with comprehensive reasoning. He firstly responded to the United States representative's assertion of state discretion to decide whom to be protected. From the perspective of international nature of refugee law, he stated that the object of the exclusion clauses was not to specify what treatment each country must mete out to individuals who had placed themselves beyond the pale, but to ensure sovereign right of states not transcending their frontiers to the extent of compelling other states to act as they themselves intended to act.(170) That is to say, while the United States representative was arguing for discretion of granting protection to war criminals, French representative argued for non-binding obligation to protect criminals

or perpetrators.(171)

In his justification for the proposed incorporation of the exclusion clauses, French representative raised the practical issues of the IRO and real situation of refugee outflows during the end of the Second World War. Under the practice of the IRO, the refugees and displaced persons, who had committed serious crimes, would be warned against by recording the criminal acts and notifying them to the countries of immigration. The concept was that in case there was no expressed exclusion of the criminals or perpetrators, there would be tantamount to include them all.(172) The other case would be especially where the citizens of the refugee receiving countries being arrested, tortured and imprisoned on political grounds by the refugee claimants, who had committed all the perpetration before being persecuted themselves. It would be intolerable in case where these suffered found, upon returning to their home countries, that the officials who had been responsible for the suffering they faced enjoyed the status of refugees.(173) However, it did not mean that the perpetrators should be left unprotected from persecution without possibility of enjoying benefit of extenuating circumstances.(174)

The law on refugee protection or Refugee Convention has played the role to identify persons in need of refugee protection. The accurate and comprehensive refugee definition has so far been the primary concerns of the refugee receiving states while the exclusion clauses is originally the guide to identify persons not considered refugees and not under the protective obligation of states. The conceptual source of the exclusion clauses was to provide a clear distinction between genuine refugees and perpetrators so it did not support the meaning so as to exclude genuine refugees.(175)

CONCLUSIONS

The law on refugee protection emerged as international legal accords to limit qualified refugees to those who were in "greatest need" of sanctuary and had been declared to be so.(176) The history of

codifying solutions to refugee problems in international legal sphere has shown the great efforts of states to define the group of persons to whom they have an international obligation to grant protection from persecution. The pursuit of a definition for refugees evolved from *ad hoc* classifications of nationally specified groups and on a case by case basis to a categorization standardized by the concept of "fear of being persecuted" for any of the five conventional grounds.

This evolution in the definition of refugees led to a perceived need to qualify the new meaning with the exclusion clauses to prevent states from giving sanctuary to pure criminals under the disguise of refugee protection or to avoid placing unjustifiable burden on states to protect persons, who have no fear of being persecuted. The states might have to bear unjustified burden due to ambiguous definition of refugees, especially at a time when the condition of 'being persecuted' was not understood as a form of human rights violations and when the concept of human rights violations was not as universally accepted as today.(177) Consequently, during the drafting of the Refugee Convention, the state delegations attempted to define the word "refugee" simply by referring to the group of persons generally considered as refugees at that time, rather than based the definition on the principle that refugees should be defined as anticipated victims of persecution for any of the five conventional grounds or adjudged to be victims of some specified human rights violations.

On the understanding that the definition had to refer to a specified group of people and that the meaning of "being persecuted" was to be distinguishable from the ordinary punishment for one's criminal or wrongful acts, the state delegations decided to incorporate the exclusion clauses in order to distinguish between persons in need of protection as refugees and those simply fleeing from punishment for their criminal or wrongful acts. Since the intention then was to provide for the distinctions, the problem of conflict of norms between protection from persecution and exclusion for criminal punishment did not come under scrutiny.

Whereas the international cooperation to fight fugitives and the restriction of state's sovereign right to protect criminals were the primary grounds for stipulation of the exclusion clauses in order to

prevent an unduly broad interpretation of the need for refugee protection, the views and practice nowadays have broadened the scope of the exclusion clauses to cover the exclusion of refugees. As a result, these views and practice have gone against the current understanding of human-rights-based concept of refugeehood and refugee protection. Moreover, they do not logically reflect the rationale behind the need for development of law on refugee protection on the international plane. Since the decision to admit or expel aliens was and still is cohesive rights of states, the Refugee Convention was drafted in order to oblige its member states to limit their own sovereign right to expel refugees and, to some extent, to open up their borders for asylum seekers. On the contrary, the sovereign right of states to admit and grant protection of aliens is limited by the extradition law and, in some cases, the international criminal legal arrangements. Therefore, the concept of limiting a state's right to grant protection to criminals should have come from the need for international co-operation to fight against fugitives from justice, not from the need for refugee protection.

In sum, the text of the exclusion clauses, the historical revolution of refugeehood, and the intention of the drafters of the Refugee Convention do not sustain the argument that the protected principles or protection of refugee against anticipated persecution for particular reasons should be ignored and give way to the exclusion clauses to operate against refugees or persons who are considered perpetrators even though their situation could otherwise well meet the condition of being refugees. From this point of view, it may be concluded that the exclusion clauses are nothing more than reiterating the principles of international co-operation to deal with those who are purely fugitives from criminal justice. So, what should be deemed of considerable relevance is a clear distinction between the functions of the two different systems – the refugee protection on the one hand and the implementation of criminal justice on the other. The Refugee Convention only obliges states to protect victims or potential victims from being persecuted and it is the task of the criminal justice to deter criminals from further committing crimes or to seek justice on behalf of the victims.

Endnotes

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(1) In this article, the term 'exclusion clauses' means Article 1 paragraph F of the *Convention Relating to the Status of Refugees*, if it is not otherwise specified.

(2) In this article, the term 'perpetrator' is used to indicate any person, whom there are "serious reasons for considering" to have committed any of the acts stipulated in the Article 1 paragraph F of the *Convention Relating to the Status of Refugees*.

(3) *Convention Relating to the Status of Refugees* (Refugee Convention), 189 U.N.T.S. 137, adopted on July 28, 1951 and entered into force on April 22, 1954.

(4) The Refugee Convention contains provisions of refugee definition and the rights and obligations enjoyed and undertaken by declared refugees. In order to obtain refugee status and be subject to these rights and obligations, the applicant's situation has to meet any of the conditions enunciated in Article 1 (A) of the Refugee Convention, which states: "A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization... (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it..." Whereas the so-called exclusion clauses states that person, with respect to whom there are "serious reasons for considering" to have committed "a crime against peace", "a war crime", "a crime against humanity", "acts contrary to the purposes and principles of the United Nations", or "a serious non-political crime", should not entitle to the

rights and benefits guaranteed in the Refugee Convention: Article 1 of the Refugee Convention, *id.*

(5) The term 'inclusion clause' refers to provisions of conditions which an applicant need to fulfill in order to be granted the refugee status and to enjoy refugee protection.

(6) *See infra*, sub-section 3.

(7) It is unambiguously stated in the United Nations Security Council Resolution 1373 that the states bear duty to ensure that refugee status will not be abused by persons involved in terrorist acts. The text of the relevant part of the Resolution reads: "3. Calls upon all States to...(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;": UNSC resolution 1373, S/RES/1373 (2001), at para. 3 (g), September 28, 2001.

(8) "Dealing with the terrorist threat in the context of asylum does not, however, call for an amendment of the refugee definition, since provision is explicitly made for serious crimes to be excluded from refugee status under the 1951 Convention. UNHCR believes that a review and tightening of procedural and security measures may, however, be necessary. In some countries, the formal incorporation of exclusion clauses into national legislation for the first time was a welcome development...": Executive Committee of the High Commissioner's Program, "Note on International Protection", A/AC.96/965, at 11–12, September 11, 2002.

(9) "...appropriate mechanisms need to be put in place in the field of asylum as in other areas.. in the process of adopting new measures to combat terrorism, governments should make extra efforts to take into account the safeguards that are already built into the 1951 Refugee Convention and other areas of international refugee law...The international refugee instruments do not provide a safe haven to terrorists and do not protect them from criminal prosecution...On the contrary, they render the identification of persons engaged in terrorist activities possible and necessary, foresee their exclusion from refugee status and do not shield them against criminal prosecution or expulsion.": United Nations High Commissioner for Refugees, "UNHCR makes proposals to enhance security of asylum systems", UNHCR Press Release, December 6, 2001.

(10) "Article 1F excludes persons, rather than refugees from the benefits of the Convention, suggesting that the issue of a well-founded fear of persecution is irrelevant and need not be examined at all if there are 'serious reasons for considering' that an individual comes within its terms.": *Gonzalez v. Canada (Minister of Employment and Immigration)* (1994), No. A-48-91, 1994 ACWSJ LEXIS 18624, para. 29–31 & 34 (Federal Court of Appeal). And, in applying 'serious nonpolitical crimes' provision to bar refugee status claimant from enjoying refugee protection, the Supreme Court of the United States bases its argument on the national statute that; "the statute...requires independent consideration of the risk persecution facing the alien before granting withholding...this factor can be considered on its own and not also as a factor in determining whether the crime itself is a serious, nonpolitical crime. Though the BIA in the instant case declined to make findings respecting the risk of persecution facing respondent [refugee status claimant]...this was because it determined respondent was barred from withholding under the serious nonpolitical crime exception.": *Immigration And Naturalization Service v. Juan Anibal Aguirre-Aguirre* (1999), No. 97-1754, 119 S. Ct. 1439, at 1446 (Supreme Court), Further, in *Canada v. Sinnathurai*, the Federal Court asserted that "[p]erhaps the modifier "serious" in Article 1F(b) would make possible of balancing... Article 1F(c) contains no such modifier...[and that] While torture is perhaps the most grievous form of persecution, ...nothing in the Convention which would authorize a different interpretation of its terms by reference to the type or extent of the persecution involved.": *Canada (Minister of Citizenship and Immigration) v. Sinnathurai* (1998), No. IMM-1111-97, 1998 A.C.W.S.J. LEXIS 82343, para. 21, 22, & 23 (Federal Court Trial Division).

(11) *See Gonzalez v. Canada, id.*

(12) Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press, 2nd ed., at 97 (1996).

(13) Guy S. Goodwin-Gill, *id*, at 106.

(14) "...refugee status was not envisaged as the entitlement of every person genuinely at risk of persecution. Serious criminals and persons whose actions have exhibited flagrant disregard for the purposes of the United Nations may face the possibility of persecution in their state of origin, but they are outside the scope of the refugee definition. The Convention's exclusion clauses are framed so as to bar persons who pose a critical risk to the receiving state, or whose own breach

of fundamental standards of humane conduct renders them unworthy of protection." James C. Hathaway, *The Law of Refugee Status*, Butterworths, at 189 (1991).

(15) "We, representatives of States Parties to the 1951 Convention relating to the status of Refugees and/or its 1967 Protocol...[7.] Call upon States to continue their efforts aimed at ensuring the integrity of the asylum institution, inter alia, by means of carefully applying Articles 1F and 33 (2) of the 1951 Convention, in particular in light of new threats and challenges": *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol Relating to the Status of Refugees*, HCR/MMSP/2001/09, at para. 7, January 16, 2002.

(16) "The 1951 Convention, in sections...F of Article 1, contains provisions whereby persons otherwise having the characteristics of refugees, as defined in Article 1, Section A, are excluded from refugee status... Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.": Office Of The United Nations High Commissioner For Refugees, *Handbook On Procedures And Criteria For Determining Refugee Status*, UNHCR, Geneva, at 33 & 35 (1979). For the later developments, see also, the United Nations High Commissioner for Refugees, "Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", HCR/GIP/03/05, para. 2, September 4, 2003.

(17) "In reaching a decision on exclusion, it is therefore necessary to weigh up the gravity of the offence for which the individual appears to be responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This being said, such a proportionality analysis would normally not be required in the case of crimes against peace, crimes against humanity, and acts contrary to the purposes and principles of the United Nations, as the acts covered are so heinous that they will tend always to outweigh the degree of persecution feared. By contrast, war crimes and serious non-political crimes cover a wider range of behaviour. For those activities which fall at the lower end of the scale, for example, isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent return is likely to lead, for example, to the individual's torture in his or her country of origin.": Office of the United Nations

High Commissioner for Refugees, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", para. 78, September 4, 2003. (Full version of "Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", *id.*)

(18) "...The provision [Article 1F (a)] must have at least the effect that no one may claim to be a 'refugee' because of a war crime or its equivalent. If, on the other hand, the suppliant may claim refugee status for another reason than fear of repercussions for his war crimes, it would seem that the reasons...may be invoked...in favour of considering him a bona fide refugee, provided that his criminal character does not, in the circumstances, outweigh his refugee character...The major war criminal may be found to be incapable of ever overcoming his past, while the lesser war criminal may have been able to regain his position as a common man and a law-abiding citizen, and consequently be in a position to substantiate fear of persecution on an equal footing with other members of the community." Concerning Article 1F (c) and (b), Madsen furthered that "We are not convinced that it is warranted to give Article 1F (c) such sweeping application...a serious non-political crime in the sense of Article 1F (b) will only disqualify a person from refugee status if it is so serious that in the circumstances of the case the criminal character of the person concerned outweighs his refugee character. It would seem reasonable to apply Article 1F (c) in the same liberal and generous spirit, in so far as the persecution feared is not in fact sanctions for the act in question.": Atle Grahl-Madsen, *The Status Of Refugees In International Law – Refugee Character*, Vol. 1, A. W. Sijthoff-Leyden, at 281–289 (1966).

(19) "Mr. Robinson felt that the exceptions should also be maintained with regard to persons of German origin residing abroad. It was known that a number of such persons had helped to carry out Hitler's policy even more than the Germans residing in Germany, as they had been able to act under the cover of their new nationality, while preserving their original German nationality. When called upon, they had not hesitated to join the German army, and it was perhaps among them that the most fanatical nazis had been found. There was no need, therefore, to invoke humanitarian principles in favour of that type of individual who in no way deserved to be granted the status of international refugee...As regards war criminals, quislings and other traitors covered

by paragraph 1 of the second part of annex 1 of the IRO Constitution, the Israeli representative thought that it was premature to say that the category no longer existed. Not all of those criminals had as yet been punished, as recent events had shown. A five-year period of exclusion would be too brief." U.N. Doc. E/AC.32/SR5, para. 44–45, January 30, 1950.

(20) "Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States": Preamble to *the Convention Relating to the Status of Refugees*, *supra*, note 3.

(21) This paragraph was incorporated as an attempt to encourage international cooperation in settling refugee problems. During the negotiation for inserting the paragraph on burden-sharing and international cooperation, French representative stated "what the French delegation wanted was the recognition of a de facto situation, rather than a statement of a specific obligation. There were, in fact, countries which might be confronted with a situation in that connection so serious as to exceed the scope of the protection of refugees and come within the field of international assistance..." Consequent to this explanation the term 'humanitarian' appears in the preamble. *See*, Paul Weis, *The Refugee Convention, 1951 – The Travaux Preparatoires Analysed, with a Commentary by the Late Dr. Paul Weis*, Cambridge University Press, at 33 and see generally at 28–34 (1995).

(22) "...persecution...has been ascribed the meaning of "sustained or systemic violation of basic human rights demonstrative of a failure of state protection", ...[this] comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights, ...and the enumeration of specific foundations upon which the fear of persecution may be based to qualify for international protection parallels the approach adopted in international anti-discrimination law.": *Canada (Attorney General) v. Ward* (1993), No. 21937, [1993] 2 S.C.R. 689, at 733–734 (Supreme Court of Canada).

(23) "International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national...The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged.": *Canada*

(Attorney General) v. Ward (1993), *id*, at 709.

(24) "...the Convention is the international community 's commitment to the assurance of basic human rights without discrimination. This is indicated in the preamble to the treaty as follows: CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights...have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination," See *Canada (Attorney General) v. Ward*, *id*, at 733. This statement is quoted with approval later in *Pushpanathan v. Canada* (1998), No. 25173, 1998 Can. Sup. Ct. LEXIS 29, at 64, para. 56 (Supreme Court of Canada).

(25) James C. Hathaway, *supra*, note 14, at 108. This statement is quoted with approval in both *Pushpanathan v. Canada* and *Canada (Attorney General) v. Ward*. *See Pushpanathan v. Canada*, *id*, at 63, para. 56, and *Canada (Attorney General) v. Ward*, *id*, at 733.

(26) "...even though international human rights law provides for the protection of an individual in the International Bill of Rights, the international human rights system is notoriously ineffective in many ways. The purpose of refugee law could be to serve as a backup system. Individuals, whose human rights cannot be guaranteed in their country of origin, benefit from protection abroad, granted through refugee law.": Niraj Nathwani, *Rethinking Refugee Law*, Martinus Nijhoff Publishers, at 17 (2003).

(27) "...the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for "persecution" in order to warrant international protection...results in the exclusion...of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home state is unable to provide assistance...": *Canada (Attorney General) v. Ward*, *supra*, note 22, at 731–732.

(28) "At the level of principle, some may object to a discussion of whether persons genuinely at risk of persecution should nonetheless be returned to their home state because they do not "deserve" refugee status. The concern is that the suggestion runs directly counter to the contemporary position that at least some human rights are owed to everyone whatever their past actions.": James C. Hathaway and Colin J. Harvey, "Framing Refugee Protection In The New World Disorder" (2001), 34 Cornell Int'l L. J. 257, at 313.

(29) Among these instruments are the *American Convention on Human Rights*, *African Charter on Human and Peoples Rights*, *European Convention on Human Rights*, and *International Covenant on Civil and Political Rights*. Due to the non-regional and international nature of the Refugee Convention, the provisions in the *International Covenant on Civil and Political Rights* will be focused on and analyzed.

(30) The most relevant instruments at the meantime are the *Statutes of the International Criminal Tribunal for the Former Yugoslavia* (ICTY), http://www.un.org/icty/legaldoc-e/index.htm (last accessed December 13, 2005). The *International Criminal Tribunal for Rwanda* (ICTR), http://65.18.216.88/ENGLISH/basicdocs/statute.html (last accessed December 13, 2005). and the *International Criminal Court* (ICC), http://www.icc-cpi.int/about.html (last accessed December 13, 2005).

(31) "...No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law...Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him...Any arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful...": Article 9 (1)–(4) of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, adopted and opened for signature, ratification and accession by G.A. res. 2200 A (XXI) of 16 December 1966, entered into force March 23, 1976.

(32) "...All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person... Accused persons shall...be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons...The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation...": Article 10 of the *International Covenant on Civil and Political Rights*, *id.*

(33) "...All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him...everyone shall be

entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law...In the determination of any criminal charge against him, everyone shall be entitled to...a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; c) To be tried without undue delay; d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance, assigned to him...; e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witness against him; f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; g) Not to be compelled to testify against himself or to confess guilt...Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law...No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.": Article 14 of the *International Covenant on Civil and Political Rights*, *id.*

(34) *See* Article 55 of the *Statute of the International Criminal Court* and *Rule 42 of the Rules of Procedure and Evidence of the International Criminal Tribunal of the Former Yugoslavia*, *supra*, note 30.

(35) *See* Article 67 of the *Statute of the International Criminal Court*, Article 20 of the *Statute of the International Criminal Tribunal of Rwanda*, and Article 21 of the *Statute of the International Criminal Tribunal of the Former Yugoslavia* respectively, *id.*

(36) "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed...": Article 15 (1) of the *International Covenant on Civil and Political Rights*, *supra*, note 31.

(37) "No one shall be subjected to torture or to cruel, inhuman or degrad-

ing treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.": Article 7 of *the International Covenant on Civil and Political Rights*, *id.*

(38) *See* Article 7 of the *International Covenant on Civil and Political Rights*, *id*; The prevention and the right to complain of its victims are provided in Articles 10–13 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85.

(39) Articles 2 and 4 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *id.*

(40) Article 13 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *id.*

(41) "...In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court....": Article 6 (2) of the *International Covenant on Civil and Political Rights*. Further development in this provision has taken place in the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty. Article 1 (2) of the Protocol stipulate that "Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction" and its Article 2 (1) allows exception only in case of "...war pursuant to a conviction for a most serious crime of a military nature committed during wartime.": *Second Optional Protocol to the International Covenant on Civil and Political Rights*, Doc. A-RES-44-128.

(42) Though it was said in the context of right to asylum, it is deemed in some way analogous to the concept of being persecuted in the Refugee Convention. "An inhabitant of Latvia or Estonia who did not agree with the Soviet regime and therefore was in danger of persecution might seek asylum in Sweden or the United States...On the other hand, a person with Communist sympathies in Greece or some other country who was threatened with persecution might seek asylum in the Ukrainian Soviet Socialist Republic or in Yugoslavia. The right of asylum would thus be available in different countries for exactly

the opposite reasons.": Statement of Mr. Lopez of the Philippines, U.N. Doc. E/CN.4/SR57, at 8, June 7, 1948. This theory has been reaffirmed by Justice Kirby of the High Court of Australia, "...the following categories have been upheld as particular social groups, the membership of which gave rise to a well-founded fear of persecution:...homosexual and bisexual men and women in countries where their sexual conduct, even with adults and in private, is illegal [underline added by the author].": *'Applicant A' and Anor v Minister for Immigration and Ethnic Affairs and Anor* (1997), No. FC 004 of 1997, 1997 AUST HIGH CT LEXIS 4 (High Court of Australia).

(43) "Some representatives had stressed that the right of asylum should be granted only to the persecuted persons who were deemed desirable from the point of view of the recipient states.": Statement of Mr. Lopez of the Philippines, U.N. Doc. E/CN.4/SR57, at 8, June 7, 1948.

(44) "...international refugee law is an elaboration of the concept of "asylum", which comes from the Greek word asylon, meaning a sanctuary, or an inviolable place of safety. Thus, refugees were originally protected under the religious concept that a sanctuary, as a sacred place, was barred to the secular authorities. The basis of a refugee law was therefore initially humanitarian.": Ricardo C. Puno, "The Basis And Rationale Of International Refugee Law" (1981), 7 Philippines Y. B. Int'l L. 143, at 144.

(45) The conceptual evolution of 'political offence exemption' is analyzed as the source of the concept of political asylum. *See* generally: 芹田健太郎『亡命．難民保護の諸問題Ⅰ－庇護法の展開』（北樹出版2000年）: "...refugees were subsequently protected under the legal concepts of State sovereignty and territorial supremacy. Until the eighteenth century, these concepts allowed common criminals to enjoy the protection of a foreign state, until the rise of the institutions of extradition in the nineteenth century, which resulted in the surrender of criminals and fugitives from justice to a State which interposed such a request, with the exception of political offenders.": Ricardo C. Puno, *id*, at 144.

(46) Refugee law only deemed necessary when the amount of refugees is considerably large and immigration policy is restricted by states. In his word, James C. Hathaway states, "During a period of more than four centuries prior to 1920, there was little concern to delimit the scope of the refugee definition. Groups of refugees tended to be relatively small and many of them chose to migrate to the Americas and other

newly-discovered lands. Moreover, the reign of liberalism with its individualistic orientation and respect for self-determination led most European powers to permit essentially uncontrolled and unrestricted immigration.": James C. Hathaway, "The Evolution Of Refugee Status In International Law: 1920–1950" (1984), 33 I.C.L.Q. 348, at 348.

(47) Yukio Shimada, "The Concept Of The Political Refugee In International Law" (1975), 19 Jap. Ann. I.L. 24, at 24–25.

(48) "...governments were encountering difficulties in administering the certificate programme because there were no definitions of the categories of persons entitled to receive refugee documentation.": James C. Hathaway, *supra*, note 46, at 353.

(49) "Russian: Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired any other nationality" and "Armenian: Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy or no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired any other nationality": Paragraph 2 of the *Arrangement modifying and completing the Arrangements concerning the Issue of Certificates of Identity to Russian and Armenian Refugees of July 5, 1922 and May 31, 1924*, 89 L.N.T.S., at. 47, opened for signature in Geneva, May 12, 1926.

(50) "The measures taken on behalf of the Russian and Armenian refugees in virtue of the Arrangements of 5 July 1922, 31 May 1924 and 12 May 1926 shall be extended to the Turkish, Assyrian, Assyro-Chaldæan and assimilated refugees;...For the purpose of defining these refugees, the Conference adopts the following definitions:...Any person of Assyrian or Assyro-Chaldæan origin, and also by assimilation any person of Syrian or Kurdish origin, who does not enjoy or who no longer enjoys the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality;...Turkish refugee: Any person of Turkish origin, previously a subject of the Ottoman Empire,...does not enjoy or no longer enjoys the protection of the Turkish Republic and who has not acquired another nationality.": Paragraphs 1 & 2 of *the Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures Taken to Assist Russian and Armenian Refugees*, 89 L.N.T.S. 63, signed on June 30, 1928.

(51) "...the identity certificates of refugees be visited and extended in the

simplest possible manner and with the minimum formalities;...This certificate is valid for the return journey to the country by which it was delivered during the period of its validity. It shall cease to be so valid if at any time the bearer enters the territory of the Union of Socialist Soviet Republics (in the case of Russian refugees) or of Turkey (in the case of Armenian refugees)...": Paragraph 9 of the *Arrangement concerning the Legal Status of Russian and Armenian Refugees,* 89 L.N.T.S. 53, signed on June 30, 1928.

(52) "The present Convention is applicable to Russian, Armenian and assimilated refugees, as defined by the Arrangements of May 12th, 1926, and June 30th, 1928, subject to such modifications or amplifications as each Contracting Party may introduce in this definition at the moment of signature or accession.": Chapter I, Article I of the *Convention concerning the International Status of Refugees*, 159 L.N.T.S. 199, opened for signature on October 28, 1933.

(53) While the term "recommends" was used repeatedly in the various "Arrangement(s)", the term "undertake" was used in the Convention to ensure the issuance of the refugee certificates and to the non-refoulement principle. *See* and compare in general and, in particular, Paragraph 5 and 7 of *the Arrangement modifying and completing the Arrangements concerning the Issue of Certificates of Identity to Russian and Armenian Refugees of July 5, 1922 and May 31, 1924*, *supra*, note 49, with Article 2 and 3 of the *Convention concerning the International Status of Refugees*, *id.* Concerning the comment of this issue, *see* James C. Hathaway, *supra*, note 46, at 357.

(54) Some core rights guaranteed in this Convention included: right to freedom of "exit and return" (Article 2), right to be free from being "expulsions or non-admittance at the frontier (refoulement)" (Article 3), right to access to "courts of law" and to "enjoy the benefit of legal assistance" (Article 6), right to be relieved of restrictions, for some refugees, on labour market against non-nationals (Article 7), and right to welfare and relief, as well as right to education, etc...(Articles 9, 10, 11, & 12): *supra*, note 52.

(55) U.N. Doc. E/1112;E/1112/Add.1, August 1949, in UNHCR, ed., *Refworld 2004*, CD one (2004).

(56) Paragraph 3 of the *Arrangement concerning the Issue of Certifications of Identity to Russian Refugees*, 13 L.N.T.S. 237, opened for signature on July 5, 1922, and the *Arrangement concerning the Issue of Certificates of Identity to Armenian Refugees*, (1924) 5(7) League

of Nations O.J. 967.

(57) Paragraph 3 of the *Arrangement modifying and completing the Arrangements concerning the Issue of Certificates of Identity to Russian and Armenian Refugees of July 5, 1922 and May 31, 1924*, *supra*, note 49.

(58) Article 2 of the *Convention concerning the International Status of Refugees*, *supra*, note 52.

(59) Article 1 of the *Convention concerning the Status of Refugees Coming from Germany*, 200 L.N.T.S. 572, opened to signature on February 10, 1938.

(60) "Persons who leave...for reasons of purely personal convenience are not included in this definition": *id*, *see* Article 1 (2) & (3).

(61) Gunnel Stenberg, *Non-Expulsion and Non-Refoulement, The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, Iustus, at 27 (1989).

(62) Sir John Hope Simpson, *The Refugee Problem: report of a survey*, Oxford University Press, at 29–36 (1939).

(63) *Id*, at 51.

(64) Gunnel Stenberg, *supra*, note 61, at 27–29.

(65) The lack of protection and nationals of each specific state were the very condition of refugee status. James C. Hathaway portrayed "refugee law [then] ...constituted a largely humanitarian exception to the protectionist norm, with the screening of immigrants eliminated for large groups of fleeing persons." The meaning of humanitarian was perceived by Hathaway as being "politically neutral response to the needs of suffering persons who have in some way been forced to leave their homes" and "[requiring] states to make a meaningful and needs-based contribution to the human welfare of all involuntary migrants, whatever the cause for their flight": James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990), 31 Harv. I.L.J. 129, at 130–131 & 137.

(66) *Supra*, note 55.

(67) Michael R. Marrus, *The Unwanted – European Refugees in the Twentieth Century*, Oxford University Press, at 51 (1985).

(68) Proposing for the consideration of creating a new International Organization to replace Inter-Governmental Committee and UNRRA to deal with refugee issues, the statement prepared by the United Kingdom's delegation stated: "...UNRRA...is a purely temporary institution and

its concern with refugees arises mainly from its duty of repatriating and, pending repatriation, caring for, persons displaced...It is not authorized under its present Constitution to deal...with person who, for any reason, definitely cannot return to their homes, or have no homes to return to, or no longer enjoy the protection of their Governments...": UNGA C.3, A/C.3/5, at 10, January 3, 1946.

(69) "We wondered what criterion to adopt in distinguishing between those who deserve help...and those whose residence abroad is harmful to good understanding between nations. The answer...is simply; we have only to determine who is the victim of fascist aggression and who is not...": Statement of Mr. Bebler of Yugoslavia, 1 (1) UNGAOR, (plenary meeting), at 416, February 14, 1946.

(70) UNGA C.3, A/C.3/7, at 1, January 25, 1946.

(71) "The United Kingdom proposal failed to take account of the fundamentally new situation that had been brought about by the victory of the United Nations. With the Fascist oppressors defeated, there was now no reason why displaced persons who had fled the Axis – controlled countries should not return home...": Statement of Mr. Bebler of Yugoslavia, 1 (1) UNGAOR C.3 (4th Meeting), at 9, January 28, 1946.

(72) "Repatriation was the essential solution of the refugee problem. The League of Nations, on the contrary, had tended to perpetuate the problem after the last war, by giving assistance and encouragement to those who for political reasons stayed away from their homes and even pursued hostile policies against their country of origin.": Statement of Mr. Arutiunian of Union of Soviet Socialist Republic, 1 (1) UNGAOR C.3 (7th Meeting), at 20, February 4, 1946.

(73) "...we here in the United Nations are trying to develop ideas which will be broader in outlook, which will consider first the rights of man, which will consider what makes man more free: not Governments, but man.": Statement of Mrs. Roosevelt, *supra*, note 69, at 418.

(74) *See*, ANNEX I, Part I of the IRO Constitution, *Constitution Of The International Refugee Organization*, 18 U.N.T.S. 3, adopted on December 15, 1946 and Article 1 A (1) and (2) of the Refugee Convention, *supra*, note 3.

(75) "A (2) As a result of events occurring before 1 January 1951...B (1) For the purposes of this Convention, the words "events occurring before 1 January 1951...shall be understood to mean either (a) events occurring in Europe before 1 January 1951...(b) events occurring in

Europe or elsewhere before 1 January 1951...": Article 1 A (2) and B (1) of the Refugee Convention, *id.*

(76) Mr. Kural of Turkey cautioned against a too broad definition, which would involve obligation on the signatory states to admit refugees to whom they were not in a position to grant entry. This warning was approved by Mr. Henkin of the United States of America and reasoned: "Too vague a definition, which would amount, so to speak, to a blank check, would not be sufficient...any unduly inexact definition would be likely to lead subsequently to disagreement between the Governments concerned.": U.N. Doc. E/AC.32/SR3, at 7 & 9, January 26, 1950. And Mr. Cha of China stated that "it would be difficult for the Governments to ratify a convention which otherwise would amount to a kind of document signed in blank to which could be subsequently added new categories of beneficiaries without number." This was furthered by Mr. Robinson of Israel that "very broad and vague definitions...might raise strong political opposition....and it was unlikely that the Governments of the States concerned would agree to sign such a convention.": *Supra*, note 19, at 2 & 9. And "a broad, general definition would frighten many Governments and that he should therefore favour the enumerative approach.": Statement of Mr. Larsen of Denmark, U.N. Doc. E/AC.32/SR6, at 5, January 26, 1950.

(77) "He [Mr. Van HEUVEN GOEDHART, United Nations High Commissioner for Refugees] while would like to see the Convention drafted to cover as many refugees as possible, he nevertheless appreciated how difficult it would be for governments to provide what the Ad hoc Committee had described as a blank cheque, and he considered that the retention of the limiting date would facilitate the accession of certain governments.": U.N. Doc. A/CONF.2/SR21, at 12, November 26, 1951.

(78) U.N. Doc. E/AC.32/SR3, at 14, January 26, 1950.

(79) The refugee definition of the Constitution of the International Refugee Organization was the point of departure, where the scope of the definition of neo-refugee was debated over during the meetings of the Ad Hoc Committee on Statelessness and Related Problems. The issue was whether the concept of neo-refugee should be limited within the definition of the Constitution of the International Refugee Organization or somewhat beyond. See U.N. Doc. E/AC.32/SR4, at 7, January 26, 1950 and *supra*, note 19, at 5–6.

(80) "[First solution] For the purpose of the present Convention, the term "refugee" means any person placed under the protection of the United Nations in accordance with the decisions of the General Assembly..." and "[Second solution] The refugees entitled to the status laid down by the present Convention are the refugees covered by the definitions contained in the Constitution of the International Refugee Organization (Annex I, Part 1, Section A).": U.N. Doc. E/AC.32/2, at 15, January 3, 1950.

(81) "(1)...the signatories to the present Convention recognize the status of refugee entitling him to the supreme protection of the United Nations to any person who: (a) seeking asylum under the conditions specified in Article 14 of the Universal Declaration of Human Rights; or (b) having left his country of origin and refusing to return thereto owing to a justifiable fear of persecution, or having been unable to obtain from that country permission to return..." and "(2) No person to whom Article 14, paragraph 2 of the aforesaid Declaration is applicable shall be recognized as a refugee.": U.N. Doc. E/AC.32/L.3/Corr1, January 18, 1950.

(82) U.N. Doc. E/AC.32/L.2/Rev.1, January 19, 1950.

(83) "A. For the purpose of the present Convention, the term "refugee" shall apply to: 1. Any person defined as refugee for purposes of the... intergovernmental arrangements and conventions...2. Any person who is and remains outside his country of nationality or of former habitual residence, because of persecution or fear of persecution on account of race, nationality, religion or political belief, and who belongs to one of the following categories: (a) German, Austrian, Czechoslovak and Italian refugees...(b) Spanish refugees...(c) Neo-refugees. Any person...who as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the government of his country of nationality or former nationality, and who has not acquired another nationality.": U.N. Doc. E/AC.32/L.4, January 18, 1950.

(84) For instance, right during the second meeting of the Ad Hoc Committee on Statelessness and Related Problems, the delegates were ready to limit the scope of the Refugee Convention by separating the problem of statelessness from status of refugees. As Mr. Rain of France stated that "question of the elimination of statelessness was basically different from that of the status of refugees. It was rather a continuing concern of the world community than an acute situation

which required immediate remedial measures." Such suggestion got approval of delegates from Israel, United States of America, United Kingdoms and so on. Canadian delegate made it very clear by saying "...the Committee should not attempt too much; a limited convention that was generally acceptable was worth more than one which aimed at impossible ideals and was not ratified by Member States." See generally and p. 9 of U.N. Doc. E/AC.32/SR2, January 26, 1950.

(85) "The United Kingdom representative had suggested that the definition of the categories of persons to be protected by the convention should include...refugees and stateless persons...That proposal was obviously based on the logical consideration that there was a certain similarity in the position of refugees and that of stateless persons. It was nevertheless indisputable that refugees...were more unfortunately placed than de jure stateless persons, and it was therefore more urgent to remedy their situation...[and] that many Member States would be prepared to ratify a convention relating to refugees but might not be prepared to ratify one covering all categories of stateless persons.": Statement of Mr. Gulrrfiro of Brazil, U.N. Doc. E/AC.32/SR3, at 4, January 26, 1950. Further, see also statements of Mr. Perez Perozo of Venezuela, Mr. Larsen of Denmark, Mr. Kural of Turkey, and Mr. Chance of Canada, at 5–7 of the same document.

(86) Within the delegates from 10 Member States, namely Canada, Brazil, China, Denmark, France, Israel, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela being present in the third meeting of the Ad Hoc Committee, where the question of scope of the definition was raised, only delegates of France and United Kingdom favored a refugee definition that could be "as all-embracing as possible" and a refugee definition that could permit the Refugee Convention to cover both refugees and stateless persons. *See generally id.* The view to include stateless persons in the drafted convention was later shared by Mr. CUVELIER of Belgium, U.N. Doc. E/AC.32/SR4, at 5, January 26, 1950.

(87) "...a fresh start should be made in connexion with refugees and stateless persons in the spirit of the Universal Declaration of Human Rights...The French delegation urged the adoption of a very broad formula which would avoid any reference to previous conventions and any enumeration of the categories of refugees no contemplated. The definition to be adopted should be as all-embracing as possible.": Statement of Mr. Rain of France, *id*, U.N. Doc. E/AC.32/SR3, at 7.

(88) "...the problem of the refugees was more urgent than that of de jure stateless persons, but he thought that, since refugees were usually either *de jure* or *de facto* stateless persons, the difference between refugees and stateless persons was quantitative rather than qualitative. Theoretically, hardly any distinction could be drawn between the treatment to be applied to refugees and to stateless persons who were not refugees.": Statement of Sir Leslie BRASS of the United Kingdom, *id*, at 8.

(89) "...definition; if were too broad, it would involve an obligation on the part of signatory States to admit into their territory refugees to whom they were not in a position to grant entry at that particular time.": Statement of Mr. Kural of Turkey and "The United States Government considered that the categories of refugees to which the draft convention...should be clearly enumerated...any unduly inexact definition would be likely to lead subsequently to disagreement between the Governments concerned. Further, it was perfectly reasonable for States signatory to the convention to wish to know precisely to whom it should apply.": Statement of Mr. Henkin of the United States of America, *id*, at 7 and 9.

(90) "It was also the opinion of the French delegation that all conventions and agreements made between the two wars should be abrogated and replaced by the new convention to be drawn up...the meaning given to the "neo-refugees": if the expression covered all new refugees who were not otherwise defined, the United States proposal met the wishes of the French delegation, which asked that in addition to the categories already known, which might or might not be enumerated in the convention, the latter should also apply to other categories not covered by previous conventions and agreements.": Statement of Mr. Rain of France, *supra*, note 85, at 11.

(91) "The world situation was such that it could not be predicted that countries which were currently model democracies would not in the future come under the yoke of an authoritarian regime whose persecutions would cause a certain number of their nationals to flee. Justice demanded that the latter should be entitled automatically to claim the protection of the United Nations, and that there should be no discrimination between them and the existing categories of refugees. If the term "neo-refugees" was to include all new refugees victims of such persecutions who would thus be covered by the convention the French delegation could only concur in that definition...": Statement

of Mr. Rain of France, *id*, at 11.

(92) *See* in general, statement of Mr. Henkin of the United States of America, *supra,* note 85, at 9–13.

(93) "The essential idea was that Member States should know in advance to what they were committing themselves by signing the convention.": Statement of Mr. Henkin of the United States of America, *id*, at 13.

(94) Statement of Mr. Cha of China, *supra*, note 19, at 2.

(95) Office Of The United Nations High Commissioner For Refugees, *Handbook On Procedures And Criteria For Determining Refugee Status, supra*, note 16, at 35.

(96) Resolution 8 (I) was the very early document that indicated explicitly some categories of persons being outside the assistance as refugees. In this regard, it stated: "...(d) considers that no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors, in conformity with present or future international arrangements or agreements," "Question of Refugees", UNGA res., 8 (I), para. (d), February 12, 1946. And Part II of Annex I of the IRO Constitution says "Persons who will not be the concern of the Organization; (1) War criminals, quislings and traitors. (2) Any other persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations. (3) Ordinary criminals who are extraditable by treaty...(6) Persons who, since the end of hostilities in the second world war: (a) have participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization; (b) have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin;...": *Constitution Of The International Refugee Organization*, 18 U.N.T.S. 3, adopted on December 15, 1946.

(97) UNGA res., 8 (I), para. (d), February 12, 1946.

(98) "(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the

purposes and principles of the United Nations.": Article 14 (2) of the *Universal Declaration of Human Rights*, UNGA Res. 217 A (III), December 10, 1948.

(99) Though there were suggestions of establishing "High Court of International Justice" with competence to try crimes constituting breach of international public order or against the universal law of nations, such court or equivalence had never come into existence up until the conclusion of the Second World War. For information concerning the suggestions, see generally J. L. Brierly, O.B.E., "Do We Need An International Criminal Court?" (1927), 8 Y. B. Int'l L. 81.

(100) UNGA C.3, A/C.3/7, at 2, January 25, 1946.

(101) "...In connection with the fears expressed by the Yugoslav and other delegates that a refugee organization would serve to protect war criminals and collaborators...": Statement of Mr. Egeland of Union of South Africa, 1 (1) UNGAOR C.3 (6th Meeting), at 16, February 4, 1946.

(102) The function of the IRO is described, "...by virtue of Article 2 of its Constitution...to give all refugees within its mandate legal and political protection. This protection was guaranteed by Article 4, which stipulated the general support the member governments were to give the work of the Organization. Moreover, according to the Article 13, the Organization was to enjoy, in the territory of each of its members, such legal capacity as was necessary for the exercise of its functions and the fulfillment of its objectives. IRO had a position somewhat similar to a diplomatic representation and could exercise its rights to initiate protective measures as far as they were laid down in the Constitution." Louise W. Holborn, *The International Refugee Organization, A Specialized Agency Of The United Nations, Its History And Work 1946–1952*, Oxford University Press, at 311 (1956). The nature of excluding persons from refugee protection is fundamentally different from the ones stipulated in the Universal Declaration and the Refugee Convention though. For the former, it only sets the individual concerned beyond the pale of protection of an international organization, like the IRO, whereas the latter exclude the persons from protection of sovereign states.

(103) Mr. Bebler of Yugoslavia, the state that initiated the concept of exclusion clauses during the process to the drafting of the IRO Constitution, stated, "...if the United Nations became responsible, directly or indirectly, for perpetuating the presence outside their own countries of groups of persons who were either war criminals...it was unthinkable

that Yugoslavia should be asked to share in the protection of these undesirable elements.": 1 (1) UNGAOR C.3 (4th Meeting), at 10, January 28, 1946. *See also,* Felice Morgenstern, "Asylum For War Criminals, Quislings, And Traitors" (1948), 25 B.Y.I.L. 382, at 385.

(104) Felice Morgenstern, *id.*

(105) James C. Hathaway, *supra*, note 46, at 376.

(106) "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.": Article 14 (1) of the Human Rights Declaration, *supra*, note 98.

(107) Besides the guarantee of exemption from punishment for illegal entry and non-refoulement, the Refugee Convention also provides rights such as: the right to religious freedom, the right of access to court, the right to education, and the right to engage in wage-earning employment, etc.

(108) During the drafting process, French representative, Mr. Rain, proposed a "flesh start" of the refugee definition under the spirit of the Universal Declaration of Human Rights and subsequently Mr. Rochefort, also of France, argued for the incorporation of the exclusion clauses of Article 1F against persons "falling under the provisions of Article 14 (2) of the Universal Declaration of Human Rights.": *Supra*, note 78, at 7 and U.N. Doc. E/AC.7/SR166, at 7, August 22, 1950.

(109) Article 14 (2) of the Human Rights Declaration excludes fugitives from justice from the right to seek and to enjoy asylum without denying the other rights, e.g. right to fair trial (Article 10) and right to be presumed innocent (Article 11), etc. Exclusion Clauses of Article 1F saying "[t]he provisions of this Convention shall not apply to..." indicates that all the benefits and rights guaranteed by the Refugee Convention will not be applicable to the individual concerned. The rights stipulated in the Refugee Convention can be categorized into five levels of attachment, namely: First, rights applicable at the moment a refugee becomes subject to the authority of a state and failure to specify any degree of attachment are Articles 3 ("non-discrimination"), 5 ("rights granted apart from this Convention"), 12 ("personal status"), 13 ("movable and immovable property"), 16 (1) ("access to courts"), 20 ("rationing"), 22 ("public education"), 29 ("fiscal charges"), 30 ("transfer of assets"), 31 ("refugees unlawfully in the country of refuge"), 33 ("prohibition of expulsion or return – 'refoulement'"), and 34 ("consideration for naturalization"): Second, rights arising only once the refugee is actually physically present within the

territory of a state party are Articles 4 ("religion") and 27 ("identity papers"): Third, rights granted "when the refugee is lawfully within its territory" are Articles 18 ("self-employment"), 26 ("freedom of movement"), and 32 ("freedom from expulsion"): Fourth, rights granted "when the refugee is lawfully residing or staying there [in the territory of the member state] are Articles 14 ("artistic rights and industrial property"), 15 ("right of association"), 16 (2) ("access to courts"), 17 ("wage-earning employment"), 19 ("liberal professions"), 21 ("housing"), 23 ("public relief"), 24 ("labour legislation and social security"), 25 ("administrative assistance"), and 28 ("travel documents"): And fifth, rights granted once after the satisfaction of a durable residence requirement are Articles 7(2) ("exemption from reciprocity") and 17(2) ("exemption from alien labor restrictions"). See James C. Hathaway and R. Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection" (1997), 10 Harv. H.R. J. 115, at 157–158.

(110) See U.N. Doc. E/CN.4/AC.1/SR.7, at 5, June 19, 1947; U.N. Doc. E/CN.4/SR.28, at 11, December 4, 1947; U.N. Doc. E/CN.4/SR.38, at 11, December 15, 1947; U.N. Doc. E/CN.4/AC.1/SR.21, at 6, May 7, 1948; U.N. Doc. E/CN.4/SR.48, at 12, June 4, 1948; and U.N. Doc. E/CN.4/SR.49, at 9 and 11, June 2, 1948.

(111) "The motif that runs throughout these adoptions and rejections is that the Universal Declaration was adopted to avoid another Holocaust or similar abomination. Hearing about and experiencing the horrors of the war convinced the drafters of the rightness of what they were doing. The moral outrage thus created gave them a common platform from which to operate and do the drafting. While they often differed on the specific wording to be used, once it was shown that a violation of a certain clause or article had in some way helped create the horrors of the war, the adoption of that clause or article was virtually assured.": Johannes Morsink, *The Universal Declaration of Human Rights – Origins, Drafting and Intent*, University of Pennsylvania Press, at 37 (1999).

(112) Mr. Easterman of the World Jewish Congress stated in the fifth meeting of the Working Group on the Declaration of Human Rights "Many refugees from Germany had been denied this right which had resulted in the death of thousands." U.N. Doc. E/CN.4/AC.2/SR/5, at 4, December 8, 1947. This statement gained support later of Ms. Eleanor

Roosevelt, Chairman of Human Rights Commission. See U.N. Doc. E/CN.4/SR56, at 9, June 4, 1948.

(113) U.N. Doc. E/CN.4/99, at 4, May 24, 1948.

(114) U.N. Doc. E/CN.4/102, at 4, May 27, 1948.

(115) U.N. Doc. E/CN.4/104, at 74, May 27, 1948.

(116) "The permissive character of the phrase "may be granted asylum" deprived the article of any real value...The right to asylum from persecution was a natural corollary to the right to hold or change one's beliefs, which was mentioned more than once in the draft Declaration. The USSR proposal was too limited in scope, for persons could be persecuted for philosophical as well as for political reasons.": Statement of Miss. Sender of American Federation of Labour, U.N. Doc. E/CN.4/SR56, at 7, June 4, 1948.

(117) "...the right to asylum was implicit in the concept of the right to life. In demanding the right to asylum, refugees were not asking for permanent homes but for temporary safety from persecution.": Statement of Mr. Bienenfeld of World Jewish Congress, *id*, at 7.

(118) "...If everyone had the right of freedom of thought and expression, a person could obviously preserve his intellectual and moral integrity only by seeking refuge abroad, should his own country deny him the enjoyment of those essential liberties.": 3 (1) UNGAOR C.3, (84th–180th meetings, September 21–December 8, 1948), at 337.

(119) Statement of Mr. Lopez of the Philippines, who supported the view that the right to seek asylum had to be balanced by the right to be granted it and it should be guaranteed in the broadest possible terms. *Supra*, note 116, at 10 & 11, *see* also *supra*, note 43.

(120) "..one of the most jealously guarded rights of a State was the right to prevent foreigners from crossing its border.": *id*, U.N. Doc. E/CN.4/SR56, at 10.

(121) "The Geneva text was impractical because it did not solve the problem of who would be responsible for ensuring that the right to asylum would be granted. The responsibility rested with the whole world and not just with the State which happened to be in close geographical proximity to another in which persecution was being practised. It would be useless merely to state the principle, however magnificent, the practical question of responsibility would have to be worked out in a series of agreements between the United Nations and Member States.": Statement of Mr. Lassin of France. In this regard, Mr. Azkoul of Lebanon supported the proposal and explained that "it proclaimed

the right to asylum and at the same time safeguarded the interests of States who would have to receive refugees." *Id*, at 8–9.

(122) U.N. Doc. A/C.3/253, October 11, 1948.

(123) U.N. Doc. A/C.3/241, October 7, 1948.

(124) The Saudi Arabian amendment passed by a vote of eighteen to fourteen, with eight abstentions, and the British amendment passed by a vote of thirty to one with twelve abstentions. *Supra*, note 118, at 343–344.

(125) *Id.*, at 340.

(126) *Id.*, at 330.

(127) See *id.*, at 331 and (in Japanese) 法務府人権擁護局編 『世界人権宣言成立の経緯』 (法務府人権擁護局, 1951年), 55頁.

(128) Johannes Morsink, "World War Two and the Universal Declaration" (1993), 15 Hum.Rts.Q. 357, at 384–85.

(129) "...great care should be taken to define the type of individual entitled to that right [right to be granted asylum]. It should only be accorded to persons persecuted on racial and religious grounds. Many supporters of the Hitler regime had posed as refugees in order to escape their own countries and intigue against them.": Statement of Mr. Bogomolov of the Union Soviet Socialist Republics, U.N. Doc. E/CN.4/AC.2/SR5, at 5, December 8, 1947.

(130) "...the defence at the Nuremberg Trials had invoked the 'law of humanity' in order to mitigate the punishment of war-criminals; nevertheless, the Military Tribunal had pronounced, and humanity had approved...While the right of asylum...could not apply to fascists and other criminals against humanity. Consequently the article needed specific provision excluding war-criminals from the right of asylum.": Statement of Mr. Stepanenko of Byelorussian Soviet Socialist Republic, *supra*, note 43, at 4.

(131) *Supra*, note 114.

(132) *Supra*, note 116, at 11.

(133) "...because of the experience of the war the right to asylum could not be allowed to be too freely interpreted. One of the most famous Yugoslav war criminals was wandering freely around Europe at this moment.": Statement of Mr. Vilfan of Yugoslavia, *id*, at 10.

(134) *Id.*

(135) *Supra*, note 43.

(136) *Supra*, note 118, at 327.

(137) *Supra*, note 116, at 12.

(138) *Id*, at 11. The text then adopted was also quite clear about the questions concerned. Second paragraph of the Article 11, now Article 14, unambiguously divorced the concept of persecution from prosecution, which said "Prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations do not constitute persecution.": See docs. *supra*, note 115, *supra*, note 114 and *supra*, note 116.

(139) United Nations, "A Study of Statelessness": *Supra*, note 55.

(140) "...To recognize the necessity of a convention, based on the agreements now in force, determining the legal status of stateless persons as such, but excluding war criminals and such other categories of persons as are specified in the convention....": *Id*, at 59.

(141) "Study of Statelessness", ECOSOC Res. 248 (IX), B, August 8, 1949.

(142) Second solution of refugee definition as proposed by Secretary General was read as: "The refugees entitled to the status laid down by the present Convention are the refugees covered by the definitions contained in the Constitution of the International Refugee Organization (Annex I, Part I, Section A)": *Supra*, note 80, at 17. Though, there was no mentioning of the exceptional provision on criminals by the Secretary General, the representative of Secretariat confirmed that the proposal included also the exceptional provisions in the Constitution of IRO, see *supra*, note 19, para. 20.

(143) *See supra*, sub-section 1 of section 1.

(144) Israeli representative, Mr. Robinson, stated, when he was arguing to exclude German origin residing abroad who had no hesitation to assist Nazi to commit the crimes from overseas, that "there was no need, therefore, to invoke humanitarian principles in favor of that type of individual who in no way deserved to be granted the status of international refugee.": See *supra*, note 19, para. 44.

(145) French representative stated that "...the object was not to specify in the convention what treatment each country must mete out to individuals who had placed themselves beyond the pole, but only to state whether a country was entitled, in granting refugee status to such individuals, to do so in the responsibility of the High Commissioner and of the United Nations." U.N. Doc. E/AC.7/SR166, at 4, August 22, 1950.

(146) *Id*, at 4, *see* also, U.N. Doc. A/CONF. 2/SR24, at 8, July 17, 1951, Mr. von Trutzschler of the Federal Republic of Germany asserted that "the real purpose of article E [now F] of article 1 was to exclude from

the scope of the Convention persons regarded as criminals, on the grounds that they should not be placed on an equal footing with bona fide refugees."

(147) *Supra*, note 19, para. 16, 17, 25, 43, 44, 45, & 73.

(148) U.N. Doc. E/AC.32/L.6 & E/AC.32/L.6/Corr.1, January 23, 1950.

(149) "...the text in order to forestall accusations which might be directed against the receiving coutry on the grounds that it was sheltering war criminals. Accordingly, he [Mr. Henkin of the United states of America] proposed that the first part of the paragraph should read: The High Contracting Parties shall be under no obligation to apply the terms of this convention to any person... Thus, the question would remain within the discretion of each receiving country.": U.N. Doc. E/AC.32/SR17, para. 37, 6 February 6, 1950.

(150) "...There was nothing to prevent a State from going beyond the convention and sheltering war criminals. The basic issue was to determine who would decide that a person was a war criminal. It might be left to the discretion of the receiving country.": Statement of Mr. Henkin of the United States of America, *id*, para. 39.

(151) Mr. Henkin of the United States of America stated in the Social Committee meeting that "the object of the provision was to deny the United Nations mantle and international refugee status to war criminals, but as war criminals were difficult to define, and some countries used the term loosely, the determinations was left open to the Contracting States in question.", U.N. Doc. E/AC.7/SR159, 16 August 1950, p. 13.

(152) U.N. Doc. E/AC. 32/SR18, 8 February 1950, para. 1.

(153) *id*, para. 4.

(154) *id*, para. 5.

(155) U.N. Doc. E/1618 – E/AC. 32/5, 17 February 1950, Annex I.

(156) U.N. Doc. E/AC.7/SR165, 19 August 1950, p. 23–24.

(157) "He [Mr. Bernstein]...felt it his duty to warn the Council against a clause like that at present discussion, by the provisions of which the status of refugee could be refused to a person, who had not been sentenced, or even tried, by a national or international court, simply on the presumption that he had done something as vague as an act contrary to the purposes and principles of the United Nations. Since he felt that that phrase had no legal meaning...": *id*, at 24.

(158) *Supra*, note 145, at 6.

(159) "No Contracting State shall be obliged, under the provisions of this

Convention, to grant refugee status to any person whom it has serious reasons to consider as falling under the provisions of Article 14 (2) of the Universal Declaration of Human Rights. That text would enable immigration countries, should they so desire – which was highly improbable – to classify any common criminal or political tyrant as a refugee, but on their own responsibility.": Mr. Rochefort of France, *id*, at 7.

(160) "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in Article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of Article 14, paragraph 2, of the Universal Declaration of Human Rights.": U.N. Doc. A/C.3/L.131/Rev.1, December 1, 1950.

(161) Concerning this perception, Lord MACDONALD of the United Kingdoms expressed his objection to the exclusion decided by the administrative branch. He criticized that "[t]he question whether or not a person was a war criminal should not be decided administratively by a government but by a duly constituted tribunal. Paragraph C [now Article 1 paragraph f] cited article 14, paragraph 2, of the Universal Declaration of Human Rights, but it omitted to mention articles 10 and 11 of the Declaration.": 5 UNGAOR, (324th meeting), at 331, November 22, 1950.

(162) *Supra*, note 145, at 6–7.

(163) *Id.*

(164) Mr. Moodle of Australia in the Third Committee of General Assembly, stated during the negotiation to draft the Refugee Convention that the sentence "The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that...was too vague." He argued that, "at the very least, persons should not be excluded from the scope of the draft convention on mere suspicion, as was possible under the phrase 'serious reasons for considering'...He thought the first Australian amendment took matters as far as they could reasonably be taken without opening the door to a large number of abuses," 5 UNGAOR, (332nd meeting), at 377, December 1, 1950. This statement was supported by Mr. Lequesne, representative of the United Kingdom government. He said that "the term 'serious reasons' was too vague to justify an important decision," 5 UNGAOR, (334th meeting), at 390, December 4, 1950.

(165) Statement of Mr. Rain of France, *supra*, note 86, at 7–8, January 26,

1950.

(166) Mr. Henkin of the United States of America understood French critic of the exception as being "discrimination among refugees, certain groups of which would be protected to the exclusion others." He defended the proposed exception by arguing that it had existed for years under the work of the International Refugee Organization. It was the contemplation to avoid, in Mr. Henkin's word, "too general a definition which, including, without exception, all the refugees of the world would place upon the High Commissioner an administrative burden the practical result of which would render any protection impossible.": *Supra*, note 19, at 3–4.

(167) "...the convention would apply to all persons who had become refugees as a result of events subsequent to the outbreak of the Second World War with the exception...of persons of "German ethnic origin residing in Germany". The French delegation found that exception unfortunate; classification along racial lines surely had no place in a definition of refugees. On the other hand, war criminal would naturally be excluded from the protection of a convention.": Statement of Mr. Rain of France, *supra*, note 86, at 8.

(168) "[T]he United States Government was of the opinion that at the present time there were no longer any war criminals who had not been punished and there was therefore no need to except them. On the other hand, the exception of common law criminals subject to extradition would naturally continue to be applicable.": Statement of Mr. Henkin of the United States of America, *supra*, note 19, at 5.

(169) "...the exceptions should also be maintained with regard to persons of German origin residing abroad. It was known that a number of such persons had helped to carry out Hitler's policy even more than the Germans residing in Germany, as they had been able to act under the cover of their new nationality, while preserving their original German nationality. When called upon, they had not hesitated to join the German army, and it was perhaps among them that the most fanatical nazis had been found. There was no need, therefore, to invoke humanitarian principles in favour of that type of individual who in no way deserved to be granted the status of international refugee.": Statement of Mr. Robinson of Israel, *id*, at 10.

(170) "...The sovereign right of states entitled them to do as they wished in their own territory, but not to transcend their frontiers to the extent of committing other states – or compelling them to act as they them-

selves intended to act.": Statement of Mr. Rochefort of France, *supra*, note 145, at 4.

(171) "If mention was made of refugees, that was to say of victims of persecution, it was because it was assumed that there were also authors of such persecution. By a turn of events, the persecutor might himself become a refugee, and it might be that humanity and charity required that he be given asylum. But there could be no compulsion on a state to provide asylum and in no case could it be provided in the name of the Charter or of the Universal Declaration of Human Rights...": Statement of Mr. Rochefort of France, *id*, at 6.

(172) "...in the event of an increase of crime among refugees and displaced persons; all refugees might have to be warned that serious crimes would be recorded in their dossiers and notified to the selection boards sent by the countries of immigration...That was clearly an important consideration, not only for the countries of refugee, but also for the countries of immigration...The fact that IRO had thought fit expressly to exclude ordinary criminals showed that it had deemed such a provision essential. Not to exclude them expressly was tantamount to including them. That would be an extremely important innovation, which would prejudice the requirements of public order in the various countries, and diminish the moral value attached to the name "refugee".: Statement of Mr. Rochefort of France, *id*, at 5.

(173) "States, however, could not be compelled to grant refugee status to persons guilty of the acts referred to in article 14 (2) of the Universal Declaration. If, for instance, the citizen of a given state were to return to it after having been arrested, tortured and imprisoned on political grounds in another country, it would be intolerable if, on returning to his own country, he found there, enjoying the status of a refugee, the official who had been responsible for his sufferings.": Statement of Mr. Rochefort of France, *id*, at 9.

(174) "...the question was whether a neo-Hitler, who was not guilty of any war crimes, merely because there had been no war, would have the right to be classified as a refugee after torturing, persecuting and reducing a people to slavery...The fact that they had themselves become suspect to their superiors and were in their turn a prey to the fear which they had themselves created, would perhaps entitle them to the benefit of extenuating circumstances, but certainly not to the automatic benefit of the international protection granted to refugees.": Statement of Mr. Rochefort of France, *id*, at 6.

(175) Although report A/265 only pertained with the drafting of the Constitution of the International Refugee Organization, the forms of refugee definition as well as exclusion clauses that exclude perpetrators had its very basis for discussions during the drafting of the Refugee Convention. The report made it clear that "RECOGNIZING...the problems of refugees and displaced persons of all categories is one of immediate urgency and recognizing the necessity of clearly distinguishing between genuine refugees and displaced persons, on the one hand, and the war criminals, Quislings, and traitors...on the other": United Nations General Assembly, "Refugees and Displaced Persons Report of Third Committee", U.N. Doc. A/265, at introductory remark of rapporteur: Mrs. Aase LIONAES (Norway), December 13, 1946.

(176) "...States felt obliged to abandon the centuries-old practice of permitting the free immigration of persons fleeing threatening circumstances in their home countries. In an effort to limit the number of persons to b classified as refugees while still offering sanctuary to those in greatest need, international legal accords were enacted which imposed conditions requisite to a declaration of refugee status.": James C. Hathaway, *supra*, note 46, at 379.

(177) Conflict of values and disagreement of the meaning of persecution were obvious. Mr. Pavlov of the Union of Soviet Socialist Republic stressed, "...the Union of Soviet Socialist Republic did not persecute its citizens for not agreeing with the Government. They were liable to punishment for treason and similar crimes.": *Supra*, note 43, at 9.