The Evolution of Refugee Status in International Law: 1920-1950

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IN INTERNATIONAL LAW: 1920–1950

JAMES C. HATHAWAY*

I. INTRODUCTION

A refugee is usually thought of as a person compelled to flee his State of origin or residence due to political troubles, persecution, famine or natural disaster. The refugee is perceived as an involuntary migrant, a victim of circumstances which force him to seek sanctuary in a foreign country. Since Rome’s reception of the fleeing Barbarians, States have opened their doors to many divergent groups corresponding in a general way to this description of what it means to be a refugee.

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.

This freedom of international movement accorded to persons broadly defined as refugees came to an abrupt halt after the First World War. The existence of massive groups of refugees who had been dislocated during the war coincided with the rise of political and economic nationalism throughout the Western world. Governments responded to this new social situation by adopting more guarded approaches to immigration in general and to refugee movements in particular.

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5. R. Nathan–Chapotot, op.cit. supra n.2, at p.33.
8. Ibid.
the struggle to reconcile traditional liberal principles and concern for genuine human suffering with dramatically altered political and economic situations came the more narrow definitions of a refugee which were incorporated in the international legal instruments of the twentieth century. By carefully establishing the hallmarks of refugeehood, it was hoped that assistance could be afforded to those in the greatest need without risking the serious domestic political problems likely to result from continued open immigration.

The purpose of the present study is to distil from the international definitions adopted between 1920 and 1950 a conceptualisation of the manner in which claims to refugee status were decided. It is not suggested that the international decision-makers of this era were consciously motivated by a desire to attain moral or philosophical consistency in defining the classes of persons to be considered refugees. Nonetheless, there are discernible trends in the definitions adopted which shed light on the evolving nature of refugeehood.

Analysis of the international legal accords pertaining to refugees entered into between 1920 and 1950 reveals three distinct trends in refugee definition. Each of these trends—juridical, social and individualist—was predominant during a part of the period under study.

From 1920 until 1935, refugees were defined in largely juridical terms. The juridical approach treats as refugees groups of persons outside their State of origin who have been effectively deprived of the formal protection of their government. The purpose of refugee status conceived in juridical terms is to facilitate the international movement of persons who find themselves abroad and unable to migrate because no nation is prepared to assume responsibility for them.

The social approach to refugee definition was dominant between 1935 and 1939. Refugees defined from the social perspective are the helpless casualties of broad-based social or political occurrences which separate them from their home society. Assistance in migration is

9. "Refugeehood" is a term of the author's invention to denote the condition of being a refugee.
afforded refugees not, as during the juridical period, with a view to correcting an anomaly in the international legal system, but rather in order to ensure the refugees' safety or well-being.

Refugees were defined in primarily individualist terms between 1938 and 1950. A refugee by individualist standards is a person in search of an escape from perceived injustice or fundamental incompatibility with his home State. He is fearful\(^\text{15}\) of the authorities who have rendered continued residence in his country of origin either impossible or intolerable\(^\text{16}\) and desires the opportunity to pursue the development of his personality freely.\(^\text{17}\) Refugee status is viewed by proponents of the individualist school as a means of facilitating international movement for those in search of personal freedom.

The juridical, social and individualist conceptions of refugeehood overlap and blend to a significant extent during the three periods identified. Viewed together, these perspectives offer important insight into the types of dilemma which international law-makers have judged to be sufficiently compelling to warrant a relaxing of immigration restrictions in order to admit involuntary migrants.

II. THE JURIDICAL PERSPECTIVE: 1920-1935

The initial series of international refugee definitions was primarily concerned with the juridical phenomenon of refugeehood, that is, with the notion that the refugee is a member of a group that has no freedom of international movement because its members have been effectively deprived of the formal protection of their government.

A. The Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees: 5 July 1922

The increasing disinclination to admit refugees and other immigrants which followed the conclusion of the First World War coincided with a migration of approximately one and a half million people from Russia beginning in 1917.\(^\text{18}\) These migrants consisted of individuals, families and entire armies fleeing the destruction and suffering caused by the Russian Revolution.\(^\text{19}\) Some individuals left their homeland in order to avert material devastation and famine;\(^\text{20}\) others fled because they held

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19. Ibid.
20. Idem, pp.4-5.
political convictions fundamentally at odds with those of the Bolsheviks.21

The refugees' circumstances in the countries of first reception were desperate:22 the value of the roubles they brought with them deteriorated quickly and dramatically, most were without employment and illness was rampant. The vast majority of the Russians had no valid travel documents23 as a result of which they lacked the mobility to search out better living conditions elsewhere in Europe or overseas. The prospects for repatriation with a guarantee of freedom from retaliation by the Soviet authorities were bleak.24

The predicament of the Russian emigrés was intensified by the 1921 decree of the All Russian Central Executive Committee and the Council of People's Commissars25 which deprived of Russian citizenship inter alios persons who had resided abroad for more than five years or who had left Russia after 7 November 1917 without the authorisation of the Soviet Government.26 The Russians who had fled in the wake of the Revolution were rendered stateless.

The response of the world community to the Russian emigrant crisis was the adoption of the first instrument of international scope to afford some measure of protection to refugees.

The International Red Cross Committee appealed to the Council of the League of Nations in February 192127 to take action on behalf of the "Russian refugees scattered throughout Europe without legal protection or representation".28 The need for action was characterised "not so much [as] a humanitarian duty"29 but rather as "an obligation of international justice".30 The decision of the Red Cross to address the refugee crisis in juridical rather than strictly humanitarian terms prompted a positive response from the Council31 which, after soliciting the views of member governments,32 established the office of High Commissioner for Refugees33 to deal with questions of legal status, repatriation and the co-ordination of externally-financed relief operations.

21. Ibid.
22. Idem, p.5.
24. Conférence des organisations russes, op. cit. supra n.18, at pp.5-6.
26. Ibid.
27. (1921) 2(2) League of Nations O.J. 227.
28. Ibid.
30. Ibid.
31. (1921) 13 League of Nations C.M. 53-54.
32. (1921) 2(2) League of Nations O.J. 225.
The culmination of the League of Nations' efforts on behalf of the Russian refugees was the convening of a conference at Geneva in July 1922 which drafted the Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees. This accord provided for the issuance of international travel documents to "Russian refugees" desirous of emigrating from countries of first reception in search of improved living conditions.

B. Plan for the Issue of a Certificate of Identity to Armenian Refugees: 31 May 1924

In September 1923, the Council of the League of Nations was called upon to extend the identity certificate programme to refugees from Armenia. The Armenians were originally established in north-east Turkey and adjoining areas of Asia Minor. Since the late nineteenth century, this people had been systematically persecuted and massacred by the Turkish Government as a result of its distinctive religion and culture. In February 1915, Turkey commenced a series of mass deportations and indiscriminate killings of Armenians. While the subsequent Allied occupation afforded a degree of protection to the Armenians, the massacres began again in October 1921 following the withdrawal of French troops. A mass exodus of Armenians to Greece, Bulgaria, Constantinople, Syria and Russia ensued during 1921 and 1922.

By June 1924, the High Commissioner for Refugees, Dr Fridtjof Nansen, estimated that there were some 320,000 Armenians in need of identity certificates. These included persons who fled with no form of passport, those whose Turkish passports had been issued with a validity period of only one year, holders of Allied travel documents with no passport value beyond Constantinople and individuals in possession of passports issued by the defunct Armenian Republic of Erivan. The League of Nations Council responded to Dr Nansen's report by adopting a resolution calling for the "... provision to Armenian refugees of an emergency certificate ..." substantially the same as that provided to Russian refugees.

34. Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees, 5 July 1922, 355 L.N.T.S. 238.
35. Ibid.
38. Ibid.
40. Ibid.
41. Idem, p.967.
42. Ibid.
43. Idem, p.969.
C. Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees: 12 May 1926

The certificate arrangements for both Russian and Armenian refugees were generally well-received: 54 nations agreed to recognise the certificates for Russians and 38 States approved the system's extension to Armenians. It was soon noted, however, that governments were encountering difficulties in administering the certificate programme because there were no definitions of the categories of persons entitled to receive refugee documentation. Rather, the eligible groups were referred to simply as “Russian refugees” and “Armenian refugees”. In response to this problem, High Commissioner Nansen proposed the adoption of the following definitions to member governments of the League of Nations:

**Russian refugee:** Any person of Russian origin who does not enjoy the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired any other nationality.

**Armenian refugee:** Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy the protection of the Government of the Turkish Republic and who has not acquired any other nationality.

An intergovernmental conference convened in May 1926 elected to incorporate the suggested definitions in the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees in substantially verbatim form. The central element in both definitions is for the refugee claimant to have been deprived of the “protection” of his nation of origin and not to have acquired the nationality of any other State.

The Council of the League of Nations voted to recommend the Arrangement for favourable consideration by Member States. Only 23

45. Ibid.
47. *Op. cit. supra* n.34.
50. Ibid.
51. (1925) 6(10) League of Nations O.J. 1535.
53. The only substantive change was the addition of the words “or who no longer enjoys” following the words “who does not enjoy” in each definition. Cf. *idem* and *op. cit. supra* n.46, at p.11.
54. *Op. cit. supra* n.52, at p.49. The notion of protection is discussed at length in Part II, Section F infra.
55. *Op. cit. supra* n.46, at p.3.
States agreed to be bound by the accord, significantly fewer than had adhered to the earlier agreements. The definitions of "Russian refugee" and "Armenian refugee" incorporated in the 1926 Arrangement were not altered by the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees which established a clearly defined legal and personal status for these refugees.

D. Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in favour of Russian and Armenian Refugees: 30 June 1928

In December 1926, the Council of the League of Nations resolved to extend protection "to other categories of refugees who, as a consequence of the war, are living under analogous conditions [to those of the Russian and Armenian refugees]." Dr Nansen prepared a list of what he believed to be analogous categories of refugees. In so doing, he was guided by a Council report which expressed the view that:

All the other categories of refugees . . . who hitherto have had no means of subsistence and are unable in their present position to obtain any, will come within the sphere of activity of the permanent organisation of the League of Nations.

The High Commissioner's report suggested that League of Nations protection be extended to some 155,000 people falling into seven categories.

The first group consisted of some 150 Assyrians who had been forced to abandon their homeland in 1922 and had moved successively to Novorosik, Constantinople, Smyrna and Marseilles. This community was now required to leave France and had no passports on the basis of which to travel to a new settlement location.

Second, Dr Nansen advocated inclusion of the 19,000 Assyro-Chaldaeans who had fled to Caucasus and Greece only to find
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re-establishment in those locations impossible. They were in need of travel documents.67

Third, assistance was to be extended to approximately 9,000 Ruthenians who had fled Galicia during or since the First World War and gone to Austria and Czechoslovakia.68

The fourth group comprised an uncertain number of Montenegrins living in France who were reported to be unable to return to the Kingdom of the Serbs, Croats and Slovenes.69

Some 16,000 Jews living in Bukowina, Bessarabia and Transylvania claimed to be unable to obtain Rumanian citizenship. The High Commissioner accordingly suggested that they should fall within the ambit of the protected refugee class in order that they might obtain the travel documents required for emigration.70

The sixth category consisted of 150 Turks referred to as “Friends of the Allies” who were living in Greece and the Near East and who had been barred from returning to their homeland by the Protocol to the 1923 Declaration of Amnesty71 signed at Lausanne.72

Finally, Dr Nansen estimated that there were some 110,000 refugees dispersed throughout Central Europe, especially former Hungarians, many of whom were desirous of emigrating but were unable to do so because they lacked passports.73

The High Commissioner’s report met with substantial disapproval when considered by the League of Nations Council in September 1927.74 In presenting his recommendations on the extension of refugee categories, the rapporteur, Mr Comnène, stated that

> the mere fact that certain classes of persons are without the protection of any national Government is not sufficient to make them refugees; for on that theory all classes of persons without nationality would have to be included.75

It was accordingly his view that

> a certain number of groups of refugees, namely, Assyrians, Assyro-Chaldaeans, Montenegrins and Turks, are actually refugees and, under the terms of the earlier Council resolutions, come within the class of refugees who are in a condition analogous to that of Russian and Armenian refugees as a consequence of the war or events directly connected with the war.76

67. Ibid.
68. Ibid.
69. Ibid.
70. Ibid.
73. Ibid.
74. (1927) 8(10) League of Nations O.J. 1137.
75. Idem, p.1137.
76. Idem, p.1138.
Mr Comnène's view that Dr Nansen's proposal was over-comprehensive was echoed by another Council member who "feared that there [was] a tendency to go beyond not what was reasonable, but what was possible". 77 He felt that the League of Nations should confine its efforts to

helping those whose needs were greatest, those in fact whose needs had been caused by political circumstances, more especially the consequences of the war. 78

In his revised report to the Council, 79 Dr Nansen advised that protection should not be extended to the Montenegrins as he had learned that they were

entitled to obtain passports on the same conditions as other subjects of the Kingdom of the Serbs, Croats and Slovenes and are not therefore living under analogous conditions to those of the Armenian and Russian refugees. 80

The question of extending League of Nations protection to additional categories of refugees was placed on the agenda of the June 1928 Intergovernmental Conference. 81 The High Commissioner proposed the following definition of the new categories of refugees to whom protection should be afforded: 82

*Toute personne d'origine assyrienne, assyro-chaldéenne ou turque qui ne jouit pas ou ne jouit plus de la protection du Gouvernement de son pays d'origine et qui n'a pas acquis une autre nationalité.*

The Conference adopted a somewhat more comprehensive definition of the Assyrians and Assyro-Chaldaeans to be assisted. 83 In contrast, the delegates narrowed the reference to Turkish refugees to precisely the 150 individuals contemplated by the High Commissioner in his original report to the Council. 84 The final versions of the extended refugee definitions included: 85

*Assyrian, Assyro-Chaldaean and assimilated refugee:* Any person of Assyrian or Assyro-Chaldaean origin, and also by assimilation any other

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77. Ibid.
78. Ibid.
80. Ibid.
82. *Documents préparatoires et procès-verbaux de la conférence intergouvernementale pour le statut juridique des réfugiés*, League of Nations Doc. 1930.XIII.1 (1930), p.100. This definition was circulated in French only.
person of Syrian or Kurdish origin, who does not enjoy 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, who under the terms of the Protocol of Lausanne of
July 24, 1923, does not enjoy the protection of the Turkish Republic and
who has not acquired another nationality.

E. Convention relating to the International Status of Refugees:
28 October 1933

The Twelfth Assembly of the League of Nations, 86 in recognition of the
need for a more permanent system to protect refugees, resolved to seek
the adoption of a refugee convention. Unlike the previously enacted
arrangements which constituted mere recommendations to govern-
ments, the proposed convention would impose a series of obligations
upon signatory States. The International Office for Refugees suggested
that the refugee definitions found in the 1926 and 1928 Arrangements 87
be incorporated in the convention. 88

During the 1933 Intergovernmental Conference which drafted the
refugee convention, 89 the delegates of Czechoslovakia 90 and Poland 91
voiced strong objection to the retention of the 1926 and 1928 refugee
definitions which they saw as both imprecise 92 and inappropriately
drafted for inclusion in an international legal convention. 93 The
Chairman of the Conference, while admitting that the definitions were
"imparfaites", 94 argued that they should be incorporated in the
convention given that governments were accustomed to their
interpretation 95 and that the question of a revised meaning constituted
"un terrain délicat". 96 His remarks were sufficiently persuasive to
convince a majority of delegates not to tamper with the pre-existing
refugee definitions. 97

88. Report of the Governing Body of the Nansen International Office for Refugees,
League of Nations Doc. 1933.XIII.1 (1933), p.3.
89. Procès-verbaux de la conférence intergouvernementale pour les réfugiés, League of
95. Ibid.
96. Ibid.
97. Idem, p.64
F. Commentary

The first refugee definitions\(^{98}\) were formulated in response to the international legal dilemma caused by the denial of State protection. The withdrawal of *de jure* protection by a State, whether via denaturalisation or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system. As customary international law does not recognise individuals as subjects of international rights and obligations,\(^{99}\) the determination of responsibilities on the international plane devolves to the sovereign State whose protection one enjoys.\(^{100}\) When the bond of protection between citizen and State is severed, no international entity may be held accountable for the individual's actions. The result is that States are reluctant to admit to their territory individuals who are not the legal responsibility of another State.\(^{101}\) The refugee definitions adopted between 1920 and 1935\(^{102}\) were designed to correct this breakdown in the international order and accordingly embraced persons who wished to have freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any State.

The most fundamental form of *de jure* withdrawal of state protection is, of course, denaturalisation.\(^{103}\) It was the general policy of the League of Nations to extend protection to persons without a nationality\(^{104}\) in circumstances where nationality had been involuntarily withdrawn.\(^{105}\)

In 1929, the Advisory Commission for Refugees clearly indicated that the characteristic and essential feature of the problem was that persons classed as "refugees" have no regular nationality and are therefore deprived of the normal protection accorded to the regular citizens of a State.\(^{106}\)

Refugee status was not, however, granted to victims of denaturalisation who subsequently acquired another nationality,\(^{107}\) on the theory that such individuals would no longer be legally unprotected. While it was suggested that a stateless person who declined an offer of naturalisation

\(^{98}\) See *supra* Part II, Sections A–E.

\(^{99}\) Grahl-Madsen, *op. cit. supra* n.16, at p.57.

\(^{100}\) Ibid.

\(^{101}\) J. Vernant, *op. cit. supra* n.13, at p.14

\(^{102}\) See *supra* Part II, Sections A–E.

\(^{103}\) (1930) 11(11) League of Nations O.J. 1463.

\(^{104}\) *Op. cit. supra* n.79, at p.1000, and *op. cit. supra* n.61, at p.9.

\(^{105}\) *Op. cit. supra* n.82, at p.183.


should be excluded from international refugee status, the policy adopted was to afford protection to the stateless individual until and unless he in fact acquired a new nationality.

The second prevalent means of withdrawing state protection was the refusal to issue or renew a passport. The League recognised that persons who could not obtain valid passports were entitled to receive identity certificates.

Only persons applying from outside their country of origin were eligible for a grant of refugee status. This is consistent with the notion of the refugee as an international anomaly; while the unprotected individual remained within the boundaries of his home State, there was no question of another country being confronted with a person outside the bounds of international accountability and, accordingly, no need to include him within the scope of League of Nations protection.

The strong juridical focus of refugee law from 1920 to 1935 is also borne out by the manner in which the definitions of that period were worded. While the Arrangements of 1922 and 1924 did not expressly define "Russian refugee" or "Armenian refugee", the identity certificates were structured to restrict issuance to persons meeting certain criteria defined by origin and territory. Specifically, the applicant was required to demonstrate either that he was of Russian territorial origin and outside the boundaries of the USSR or that he was of Armenian ethnic origin and outside the territory of Turkey.

The definitions governing the agreements of 1926, 1928 and 1933 contained a criterion of ethnic or territorial origin in addition to a stipulation that the applicant should not enjoy de jure international protection. The origin requirements were phrased to restrict the

109. See supra n.107
112. See supra nn. 52 and 58 (these are the accords which contain express definitional schemes).
118. (1922) 3(5) League of Nations O.J. 399.
124. Ibid.
eligible group as much as possible to precisely those persons suffering from a denial of formal state protection. For example, whereas Russian refugees included individuals from a variety of ethnic, religious and social groups,\textsuperscript{125} thus necessitating the insertion of an all-inclusive territorial origin criterion, only certain Turks, that is, those of Armenian ethnic origin\textsuperscript{126} and the 150 "Friends of the Allies",\textsuperscript{127} were denied the legal protection of that State. It was thus possible to circumscribe the definitions for the latter refugee groups more narrowly.

Given that the juridical conception of refugeehood as a condition resulting from the withdrawal of \textit{de jure} national protection was dominant between 1920 and 1935, to what extent did the social\textsuperscript{128} and individualist\textsuperscript{129} approaches to refugee definition determine which classes of involuntary migrants were deemed to be refugees during this period?

The social conception of refugeehood did play an important part in delimiting the application of the principle of assisting those from whom state protection had been withdrawn. As indicated previously,\textsuperscript{130} the Council of the League of Nations decided in 1926\textsuperscript{131} to accord refugee status to only three\textsuperscript{132} of the seven groups which High Commissioner Nansen believed to be suffering from the same problems of lack of international legal status as the Russians and Armenians.\textsuperscript{133} One category of persons, the Montenegrins, were excluded when it was ascertained that they were eligible to receive passports.\textsuperscript{134} The remaining three groups—the Ruthenians,\textsuperscript{135} the Jews of Bukowina, Bessarabia and Transylvania\textsuperscript{136} and the Central European refugees\textsuperscript{137}—however, were rejected not because they enjoyed state protection (they did not)\textsuperscript{138} but rather because of a decision to bar certain sub-groups from League of Nations assistance. Both of these excluded categories were defined in social terms: persons whose unprotected status did not result from events directly connected with the First World War\textsuperscript{139} and

\textsuperscript{125} Memorandum on Russian Refugees in Poland, League of Nations Doc. C.483.M.305,1922 (1922), p.2.
\textsuperscript{126} Op. cit. supra n.52.
\textsuperscript{127} Op. cit. supra n.85.
\textsuperscript{128} See supra at nn. 13 and 14.
\textsuperscript{129} See supra at nn. 15-17.
\textsuperscript{130} See supra at nn.74-78.
\textsuperscript{131} Op. cit. supra n.60.
\textsuperscript{132} See supra Part II, Section D. These were the Assyrians, the Assyro-Chaldaeans and the Turks.
\textsuperscript{133} Op. cit. supra n.61, at p.14.
\textsuperscript{134} See supra at n.80.
\textsuperscript{135} See supra at n.68.
\textsuperscript{136} See supra at n.70.
\textsuperscript{137} See supra at n.73.
\textsuperscript{138} See supra at n.75 and op. cit. supra n.61, at p.14.
\textsuperscript{139} See supra n.60, op. cit. supra n.61 at p.7, and op. cit. supra n.74, at p.1138.
individuals whose situations could not be classified as among "the most urgent cases".\footnote{140}

The individualist view of refugee status, that is, the approach which seeks to accord protection to persons who find continued residence in their country either impossible or intolerable, was of no appreciable influence. Refugee status was defined strictly on the basis of group as opposed to individual characteristics. The only attempt to incorporate the individualist perspective in the refugee definition was made by the Government of Switzerland in its response to the definitional proposal circulated by the High Commissioner in December 1925:\footnote{141}

The proposed definition is too wide. There are Russians who, without being subject to the Soviet Government, support it. The Swiss Government therefore proposes the following definition for Russian refugees: "Any non-Bolshevist person of Russian origin who has not acquired the nationality of the USSR nor any other nationality."\footnote{142};

The Swiss proposal was not considered at the Intergovernmental Conference\footnote{143} which drafted the definition for the 1926 Arrangement.\footnote{144}

The period 1920–1935 may therefore be characterised as a time of international resolve to assist the victims of the legal phenomenon of the withdrawal of \textit{de jure} protection with limited attention accorded to the social causes underlying the refugees' legal predicament.

III. THE SOCIAL PERSPECTIVE: 1935–1938

The second phase in the evolution of the international refugee definition was characterised by a move away from the earlier preoccupation with loss of \textit{de jure} state protection. The new definitions were designed to encompass the victims of broad-based social and political upheaval, whether or not there were problems of international legal status.

A. Plan for the Issue of a Certificate of Identity to Refugees from the Saar: 24 May 1935

Approximately 3,300 inhabitants of the Saar Territory departed for neighbouring France and Luxembourg in 1935.\footnote{145} Their flight was prompted by the result of a plebiscite held in January of that year to determine the fate of the territory upon the termination of the League
of Nations administration mandated by the Treaty of Versailles. The majority of those residing in the Saar voted for a union of the territory with Germany rather than either a merger with France or the retention of international administration. Most of those who opted to leave the Saar Territory on the morrow of the plebiscite were either politically opposed to the German Government or concerned that religious freedoms would be curtailed by the new regime.

The initial response of the League of Nations, prompted by a feeling of "direct responsibility" for the Saarlanders fleeing the territory, most of whom had voted for the maintenance of the League's administration, was to instruct the International Office for Refugees to assist the Saar refugees by appealing for funds and undertaking negotiations to establish resettlement locations. Shortly thereafter, when it became apparent that the passports issued by the former Governing Commission of the Saar were not being honoured at borders notwithstanding the inability of many individuals to obtain alternative travel documents, the benefits of the identity certificate system were extended to "all persons who, having previously had the status of inhabitants of the Saar, have left the Territory on the occasion of the plebiscite and are not in possession of national passports".

B. Provisional Arrangement concerning the Status of Refugees coming from Germany: 4 July 1936

The era of National Socialism in Germany gave rise to a massive refugee problem. Long before the advent of the concentration camps, the National Socialist Party declared that:

None but the members of the nation may be citizens of the State. None but those of German blood, whatever their creed, may be members of the nation. No Jew, therefore, may be a member of the nation.

The systematic harassment and measures of economic proscription directed against "non-Aryans" during the mid-1930s were accompanied by the ruthless suppression of all political opposition. Tens of

146. J. Simpson, op. cit. supra n.37, at p.66.
147. (1935) 16(2) League of Nations O.J. 134.
148. J. Simpson, op. cit. supra n.37, at p.66.
149. Ibid.
152. (1935) 16(6) League of Nations O.J. 634.
156. Idem, p.60.
thousands of victims of Nazi intolerance emigrated from Germany each year. 157 primarily to the United States, Palestine and the nations of Western Europe. 158

In 1933, the Assembly of the League of Nations, noting that the exodus of Germans had become "an economic, financial and social problem", 159 established the Office of the High Commissioner for Refugees (Jewish and Other) coming from Germany. 160 The High Commissioner was responsible for co-ordinating relief efforts in member countries. 161

It was not, however, until 1936 that steps were taken to remedy the legal difficulties of German refugees. In January of that year, 162 the Council of the League, recognising the hardships experienced by the German emigrants by reason of lack of passports and juridical status, 163 voted to convene a conference in order to establish a system of international legal protection for the refugees. 164

In anticipation of the conference, the High Commissioner prepared a draft convention 165 in which a "German refugee" was defined to include any person having left German territory who does not enjoy or no longer enjoys the protection of the Government of the Reich and who does not possess any nationality other than German nationality. 166

In the explanatory notes accompanying the draft, 167 the High Commissioner elaborated on the three conditions embodied in the definition. First, only persons who had already migrated from Germany could apply for refugee status. 168 Second, the person must not enjoy the protection of the German Government in that he had never been a German citizen, had been denaturalised for ordinary or persecutory reasons or, even though still nominally a German citizen, could no longer realistically expect to receive the protection and assistance of the Reich Government. 169 Finally, persons who possessed the nationality of

158. Ibid.
161. Ibid.
162. (1936) 17(2) League of Nations O.J. 129.
164. Idem, p.128.
166. Idem, p.2.
167. Ibid.
168. Ibid.
169. Ibid.
a country other than Germany were excluded.\footnote{170}

The definition adopted by the Conference of July 1936 and incorporated in the Provisional Arrangement concerning the Status of Refugees coming from Germany\footnote{171} differed somewhat from that proposed by the High Commissioner. The Arrangement required the refugee to have been "settled"\footnote{172} in Germany rather than merely "having left"\footnote{173} that country. Further the definition spelled out clearly that either \textit{de jure} or \textit{de facto} loss of state protection sufficed to establish refugee status.\footnote{174} Finally, notwithstanding the retention of the wording suggested by the High Commissioner, the Conference debates indicate an intention to exclude from the scope of the Arrangement stateless persons who had never possessed German nationality.\footnote{175}

C. Convention concerning the Status of Refugees coming from Germany: 10 February 1938

In March 1937\footnote{176} the League of Nations invited governments to participate in a conference to draft a more comprehensive plan for the protection of German refugees. While the definition of a German refugee contained in the draft convention\footnote{177} circulated was nothing more than the 1936 formula\footnote{178} with a clause allowing governments to modify it upon signature or accession,\footnote{179} a fundamentally new definition was proposed in November 1937.\footnote{180} The modified proposal included:\footnote{181}

1. Persons 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 Government of the Reich; [and]

2. Stateless persons not covered by previous conventions or agreements who have left the territory of the Reich after being established therein.

\footnote{170}{\textit{Ibid.}}
\footnote{171}{Provisional Arrangement concerning the Status of Refugees Coming from Germany, 4 July 1936, 3952 L.N.T.S. 77 (1936-1937).}
\footnote{172}{\textit{Ibid.}}
\footnote{173}{\textit{Op. cit. supra} n.165, at p.2.}
\footnote{174}{\textit{Op. cit. supra} n.171, at p.77}
\footnote{175}{The wording is most certainly ambiguous. The delegates of Norway and the Netherlands attending the 1936 Conference were of the view that the definitions adopted excluded stateless persons; see League of Nations Doc. Conf./S.R.A./1st Session/P.V.2, pp.5 and 9. \textit{Contra} League of Nations Doc. Conf./C.S.R.A./P.V.4 (1938) where the British delegate to the subsequent Intergovernmental Conference indicated that he believed stateless individuals to have been within the scope of the 1936 definition.}
\footnote{176}{\textit{Communication from the Secretary-General}, League of Nations Doc. C.L.58.1937.XII (1937).}
\footnote{177}{\textit{Idem}, Annex 2.}
\footnote{178}{See \textit{supra} at nn.171–175.}
\footnote{179}{\textit{Op. cit. supra} n.176, Annex 2.}
\footnote{180}{\textit{Communication from the Secretary-General}, League of Nations Doc. C.L.58.1937.XII (1937).}
\footnote{181}{\textit{Idem}, pp.5–6.}
The new definition was designed to extend protection both to Germans who had been residing outside Germany for an extended period and to stateless persons who had been living in Germany.\textsuperscript{182}

Delegates to the Intergovernmental Conference of February 1938\textsuperscript{183} were in substantial agreement with the liberalisation of refugee policy proposed in the draft convention.\textsuperscript{184} The Conference rejected motions to narrow the scope of the refugee definition by way of the establishment of a "direct flight" requirement,\textsuperscript{185} a "cut-off" date for departure from Germany,\textsuperscript{186} or a requirement for migration to have been premised on political, religious or racial grounds.\textsuperscript{187}

The version of the definition incorporated in the Convention concerning the Status of Refugees coming from Germany\textsuperscript{188} differed from the model proposed by the League in only two substantive ways.\textsuperscript{189} First, it was felt that stateless individuals should, like German nationals, be required to establish that, "in law or in fact, they do not enjoy the protection of the Government of the Reich".\textsuperscript{190} Second, persons "leaving Germany for reasons of purely personal convenience"\textsuperscript{191} were excluded from the refugee definition.\textsuperscript{192} The Conference discussion indicates clearly, however, that the persons envisaged by the exclusion clause were not the victims of economic sanctions or proscription, but rather "persons who had left Germany for economic reasons but without being compelled to do so, or [who] had gone abroad in order to evade taxation".\textsuperscript{193}

\textsuperscript{182} Idem, pp.1-2.
\textsuperscript{183} Provisional Minutes of the International Conference for the Adoption of a Convention concerning the Status of Refugees Coming from Germany, League of Nations Doc. Conf./C.S.R.A./P.V.1-4 (1938).
\textsuperscript{185} Idem, pp.3, 7 and 9.
\textsuperscript{186} Idem, p.12.
\textsuperscript{187} Ibid.
\textsuperscript{188} Convention Concerning the Status of Refugees Coming from Germany. 10 Feb. 1938, 4461 L.N.T.S. 61 (1938).
\textsuperscript{189} There were also differences in phraseology not affecting the meaning of the provision; cf. op. cit. supra n.181 with Propositions du comité de rédaction, League of Nations Doc. Conf./C.S.R.A./5 (1938).
\textsuperscript{191} Idem, p.2.
\textsuperscript{192} Ibid.
\textsuperscript{193} Idem, p.7
Territorial annexations by the German Reich in 1938 encompassing part of Czechoslovakia and all Austria gave rise to significant new refugee movements. Approximately 80,000 people fled their homes in the Sudeten region of Czechoslovakia when that region was relinquished to Germany in September 1938. The Council of the League of Nations in January 1939 extended the mandate of the High Commissioner to include persons who, having formerly possessed Czecho-Slovak nationality, and not possessing any nationality other than German nationality, have found themselves compelled to leave the territory formerly part of the Czecho-Slovak State, where they were established.

The 1938 Convention, however, was never amended to accommodate the needs of the Sudeten refugees. Like the Sudetenlanders, many Austrians sought to escape from their country when it was incorporated into Germany in March 1938. The population of Austria in 1934 comprised numerous groups with reason to fear Nazi rule, including 192,000 Jews, 800,000 "non-Aryans" and a spectrum of political dissidents including Hapsburg legitimists, Fatherland Front partisans, Liberals, Social Democrats and Catholics.

In May 1938 the Council of the League enlarged the mandate of the High Commissioner to include "refugees coming from Austria".

195. Ibid.
196. (1939) 20(2) League of Nations O.J. 73.
197. Idem, p.72.
198. Quaere the necessity of such an express extension given that the Sudetenland became a part of Germany, the inhabitants of which were protected by previous agreements. See comments to this effect at (1938) 19(5-6) League of Nations O.J. 367; contra the express amendment to include refugees from Austria subsequent to the German annexation, discussed infra.
199. Holborn, op. cit. supra n.7, at p.698, n.80.
201. (1938) 19(5-6) League of Nations O.J. 368.
202. Ibid.
Furthermore, noting that "it would be difficult in [the] future to distinguish between refugees coming from Austria and those coming from other parts of Germany," the Council opened for signature in September 1939 a protocol to the 1938 Convention including a definition of Austrian refugees which echoed that already enacted for German refugees:

The expression refugees "coming from Germany" in ... the Convention covers (a) persons, having possessed Austrian nationality and not possessing any nationality other than German nationality, who are proved not to enjoy, in law or in fact, the protection of the German Government; and (b) stateless persons not covered by any previous Convention or Arrangement and having left the territory which formerly constituted Austria after being established therein, who are proved not to enjoy, in law or in fact, the protection of the German Government.

Persons who leave the territories which formerly constituted Austria for reasons of purely personal convenience are not included in this definition.

E. Commentary

The juridical phase in the evolution of the international refugee definition was marked by its emphasis on consequence as distinguished from cause. The definitions formulated during this period were designed to include within the scope of assistance persons who found themselves abroad without de jure national protection; involuntary migrants who continued to benefit from the formal legal protection of their country of origin—whether or not the State could in fact be counted upon for protection and assistance—were ineligible for international assistance.

In contrast, the refugee definitions established between 1935 and 1939 reflect a significantly stronger orientation to respond to the social phenomenon of refugeehood. The categories of persons eligible for international assistance encompassed groups adversely affected by a particular social or political event, not just those united by a common status vis-à-vis the international legal system.

This process of redefinition did not in any sense disenfranchise those lacking de jure state protection; on the contrary, the 1938

204. Additional Protocol Concerning the Status of Refugees Coming from Germany, 14 Sept. 1939, 4634 L.N.T.S. 142 (1939) 144.
205. See supra Part II, Sections A–E.
206. See supra Part III, Sections A–D.
207. This view of refugeehood defined supra at nn.13 and 14.
208. See e.g. op. cit. supra n.184, at p.12. See also generally supra Part III, Sections A–D.
Convention\textsuperscript{209} extended the \textit{de jure} protection principle to provide assistance to long-term non-residents from whom state protection had been withdrawn:\textsuperscript{210}

\ldots it was necessary to take into account the position of certain German nationals who, although they had been established abroad for a certain length of time, had been deprived \ldots of the protection of the Government of the Reich for the same reasons as refugees properly so-called.\textsuperscript{211}

The essence of the new definitional approach, then, was to continue to encompass persons without international legal protection, but to assist as well the victims of social and political events which resulted in a \textit{de facto}, if not a \textit{de jure}, loss of state protection.

The League of Nations approach to the Saar crisis was the first sign of an emerging social conceptualisation of refugeehood. The League Council recognised the Saar migrants as refugees and accorded them international assistance\textsuperscript{212} before being advised of the difficulties experienced by the Saarlanders in obtaining passports.\textsuperscript{213} For the first time, debate centered on the League's responsibility to assist a group of persons who had reason to fear that they would be denied the \textit{de facto}—rather than the strictly formal—protection of their government.\textsuperscript{214} While the definition adopted for purposes of the issuance of identity certificates reflects the continuing influence of the juridical conception of a refugee,\textsuperscript{215} the League's approach to the Saar migration demonstrated an openness in awarding refugee status based upon social as opposed to strictly legal criteria.

The League's desire to accord refugee status to those deprived of actual state protection is clear from the eligibility criteria adopted for refugees from Germany.\textsuperscript{216} First, assistance was extended to individuals who, while still enjoying the formal legal protection of a State, had been denied the \textit{de facto} protection of their nation.\textsuperscript{217} As noted by the High Commissioner during the 1938 Intergovernmental Conference, it was important to recognise that "those who did not enjoy the protection of the Reich, though they might hold a German passport"\textsuperscript{218} were \textit{bona}

\begin{itemize}
\item 209. \textit{Op. cit. supra} n.188.
\item 210. \textit{Ibid.}
\item 211. \textit{Communication from the Secretary-General}, League of Nations Doc. C.L.214.1937.XII (1937), Annex 1, at p.2.
\item 212. \textit{Note Dated 1 April 1935 from the Secretary-General to the Members of the Council of the League of Nations}, League of Nations Doc. C.143.1935.XII (1935).
\item 213. (1935) 16(6) League of Nations O.J. 633.
\item 214. (1935) 16(2) League of Nations O.J. 277.
\item 215. That is, the definition included only persons not in possession of national passports; see \textit{op. cit. supra} n.152.
\item 216. See \textit{op. cit. supra} nn.171 and 188.
\item 217. \textit{Ibid.}
\end{itemize}
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fide refugees. Both the 1936 Arrangement\textsuperscript{219} and the 1938 Convention\textsuperscript{220} explicitly accorded refugee status to persons lacking the protection of their State either in law or in fact.\textsuperscript{221}

Second, the benefits of international protection were extended by the 1938 Convention\textsuperscript{222} to stateless persons who had been established in Germany.\textsuperscript{223} While some felt that such individuals may have been eligible for assistance under the terms of the 1936 Arrangement,\textsuperscript{224} the express reference in the 1938 accord to persons who had never enjoyed the \textit{de jure} protection of the German Government\textsuperscript{225} but who were swept up in the social disorganisation and turmoil of Naziism marked an important departure from the original approach\textsuperscript{226} to refugee definition.

Moreover, the general tone of the League debates was indicative of a social conception of refugeehood. Relief was extended to the Sudeten\textsuperscript{227} and Austrian\textsuperscript{228} refugees because "they were refugees whose departure . . . was due to the same reasons as those which had led to the departure of other refugees from Germany".\textsuperscript{229} Suggestions by various delegations to the 1938 Conference that technical limitations be imposed to stem the migration of persons suffering from the social consequences of Naziism\textsuperscript{230} were roundly rejected in an effort to provide comprehensive assistance to the entire spectrum of victimised individuals.

While the essence of the new approach was expansive, restrictions were also imposed to ensure that only those truly caught up in the social upheaval caused by National Socialism were eligible for international aid. The 1938 definition excluded persons leaving Germany "for reasons of purely personal convenience".\textsuperscript{231} The report of the drafting committee emphasised the social rationale for this limitation:

\[\ldots\text{these words in no way relate to the categories of persons whom the Conference desired to protect, but on the contrary to persons departing Germany for reasons wholly unconnected with persecution.}\]

The influence of the social view of refugeehood was not, however, absolute. Much as social considerations had to some extent limited the

\begin{itemize}
  \item \textsuperscript{219} Op. cit. supra n.171.
  \item \textsuperscript{220} Op. cit. supra n.188.
  \item \textsuperscript{221} Op. cit. supra nn.171 and 188.
  \item \textsuperscript{222} Op. cit. supra n.188.
  \item \textsuperscript{223} Ibid.
  \item \textsuperscript{224} See op. cit. supra n.184, at pp.7–8.
  \item \textsuperscript{225} Op. cit. supra n.188.
  \item \textsuperscript{226} See supra Part II.
  \item \textsuperscript{227} Op. cit. supra n.196, at p.73.
  \item \textsuperscript{228} Op. cit. supra n.204.
  \item \textsuperscript{229} Op. cit. supra n.196, at p.73.
  \item \textsuperscript{230} Op. cit. supra n.184, at pp.3, 7, 9 and 12.
  \item \textsuperscript{231} Op. cit. supra n.188.
  \item \textsuperscript{232} Op. cit. supra n.190, at p.2.
\end{itemize}
juridical definitions of the 1920–1935 era, the juridical conception circumscribed the development of a wholly social definitional scheme during the 1935–1939 period. In particular, a proposal that persons of foreign nationality (de jure status) who had "lost all contact with their country of origin owing to long residence in Germany" be included in the scope of League protection was not adopted. Notwithstanding that these persons were undoubtedly victims of the Nazi upheaval, their remaining juridical ties to another State were seen as providing a sufficient basis for exclusion from the refugee definition.

The individualist view of refugeehood was not a significant force during the second phase of the definition's evolution. Suggestions that the motives for flight of individual applications for refugee status should be scrutinised in detail were rejected. Although an attempt was made to exclude individuals whose motivation for migration was viewed as an abuse of the refugee assistance plans, the focus of attention remained the social or political group to which the refugee claimant belonged.

By 1939, then, the refugee was seen as a member of a group victimised by events in his society which deprived him of either de jure or de facto state protection.

IV. THE INDIVIDUALIST PERSPECTIVE: 1938–1950

The third stage in the development of the international refugee definition is distinguished by its move away from concern with group disenfranchisement, whether de jure or de facto, and toward a consideration of the relationship between a particular individual and his State. The essential characteristic of the refugee came to be the existence of fundamental incompatibility between the claimant and his government.

A. Intergovernmental Committee on Refugees: 1938–1947

The international conception of refugeehood was fundamentally reshaped by the terms of reference of the Intergovernmental Committee on Refugees. This refugee aid organisation, established in July 1938, sought to facilitate the involuntary emigration from Germany and Austria of persons fleeing Nazi persecution. The initial scope of the Committee's activities comprehended:

233. See supra at nn.130–140.
237. Idem, pp.7 and 9, and op. cit. supra n.171.
1. Persons who have not already left their countries of origin (Germany including Austria), but who must emigrate on account of their political opinions, religious beliefs and racial origin, and

2. Persons as defined in (1) who have already left their country of origin and who have not yet established themselves permanently elsewhere.240

This definition was innovative in two ways. The Intergovernmental Committee on Refugees was the first international body to recognise that persons still in their countries of origin might qualify as refugees worthy of protection and assistance.241 Second, the Committee’s refugee definition included only persons fleeing their homelands because of political opinions, religious beliefs or racial origin.242 Rather than broad references to either de jure or de facto lack of protection as in previous refugee accords,243 the ICR definition focused on personalised criteria of political opinion, religious belief and racial origin to evaluate the merits of claims to refugee status.

The Committee’s mandate, interpreted to include refugees from the Sudetenland upon the ceding of that region to Germany,244 was substantially extended by the decision of the Executive Committee in August 1943245 to include

as may be found necessary and practicable, in addition to those already within its mandate, those persons wherever they may be who, as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs.246

The principal beneficiaries of this enlargement of the refugee definition were the Spanish Republican refugees and a variety of stateless persons residing outside the territory of the German Reich.247

The protective functions of the Committee were enlarged yet again in July 1946248 to include “those persons within the Committee’s mandate who are unwilling or unable to return to their country of nationality or of former habitual residence”.249 The recognition as refugees of persons who chose to remain abroad even after they were able to return to their

240. Ibid.
243. See supra Parts II and III.
246. Ibid.
247. L. Holborn, op. cit. supra n.11, at p.58; and J. Vernant, op. cit. supra n.13, at p.28.
249. Ibid.
nations of origin safely was made in view of an impending transfer of operations to the International Refugee Organisation\textsuperscript{250} whose definitional scheme\textsuperscript{251} was more subjectively individualistic\textsuperscript{252} than that of the Committee.

Persons falling within the Committee’s mandate were eligible to receive maintenance and transportation assistance.\textsuperscript{253} In addition, a conference convened in October 1946\textsuperscript{254} established an international travel document available to persons meeting four conditions.\textsuperscript{255} First, the applicant was required to fall within the scope of the Committee’s general mandate.\textsuperscript{256} Second, the individual had to be stateless in law or in fact.\textsuperscript{257} Third, refugees entitled to receive identity certificates pursuant to prior international accords were ineligible to receive Intergovernmental Committee travel papers.\textsuperscript{258} Finally, only applicants lawfully residing in the territory of a State bound by the new travel document could benefit from the scheme.\textsuperscript{259}

\textbf{B. United Nations Relief and Rehabilitation Administration: 1943–1946}

The United Nations Relief and Rehabilitation Administration (UNRRA) was not created in order to provide assistance to refugees.\textsuperscript{260} Rather, the 44 governments which established the organisation in November 1943 sought to co-ordinate the repatriation of their nationals dispersed during the Second World War.\textsuperscript{261} The initial policy adopted by UNRRA was that individuals unable for any reason to return to their countries of nationality or former residence should be referred to the Intergovernmental Committee on Refugees.\textsuperscript{262}

\textsuperscript{250} The functions of the Intergovernmental Committee on Refugees were assumed by the International Refugee Organisation on 1 July 1947: \textit{Memorandum from the American Resident Representative}, ICR Doc. (30 June 1947).

\textsuperscript{251} See infra Part IV, Section C.

\textsuperscript{252} \textit{Ibid.}

\textsuperscript{253} \textit{Op. cit. supra} n.238, at p.2.


\textsuperscript{255} \textit{Idem}, p.81.

\textsuperscript{256} \textit{Idem}, pp.81–82.

\textsuperscript{257} \textit{Idem}, pp.83–87.

\textsuperscript{258} \textit{Idem}, pp.87–88.

\textsuperscript{259} \textit{Idem}, p.89. A proposal to deny documentation to ex-enemy collaborators who had been denaturalised in retaliation for their wartime activities was rejected: \textit{idem}, pp.90–91.

\textsuperscript{260} However, among the displaced persons for whom UNRRA was responsible there were individuals who feared persecution were they to be repatriated: see J. Vernant, \textit{op. cit. supra} n.13, at pp.30–31.

\textsuperscript{261} (1943) UNRRA Journal 186 for the text of Resolution 10 which established the nature of the mandate.

\textsuperscript{262} \textit{Idem}, p.65.
UNRRA Resolution 71,263 enacted in August 1945, resulted in a shift in the focus of the organisation's work to include refugee protection. This measure provided inter alia that UNRRA aid might be extended to "other persons who have been obliged to leave their country or place of origin or former residence".264 The Washington office of UNRRA interpreted the vague wording of Resolution 71 to apply to political dissidents. In a December 1945 directive, field officers were advised to interpret the Resolution to include:

Post-war refugees... if they were displaced from their home during the war they are entitled to UNRRA assistance. In other words, if their internal displacement (i.e. displacement from their homes) occurred during the war, it is immaterial that their external displacement (i.e. displacement across international frontiers) only occurred post-war.265

The London office of UNRRA was sharply critical of the effort to include "post-war political refugees"266 within the ambit of the refugee definition:267

The interpretation of the Resolution on which [the Washington] instructions are based appears open to serious criticism in that no connection would seem to exist between internal displacement and migration across the frontier... As [the US] directive now stands, any inhabitant of a liberated area who wishes to leave his country for economic reasons qualifies for UNRRA care on what appears to us the purely fortuitous circumstance of internal displacement. This leaves the door wide open to political refugees of every kind, which is likely to cause a strong reaction against the use of UNRRA funds for the support of malcontents.

Following a strong attack on the extended definition led by East Bloc countries who resented UNRRA assisting the emigration of their nationals who refused to participate in post-war reconstruction efforts,268 the policy was narrowed by a July 1946 directive269 which required applicants for post-war refugee status to establish "concrete evidence"270 of persecution271 before being admitted to the care of UNRRA. The defeat of the attempt to define refugee status in wholly subjective terms meant that only persons suffering from objectively

263. (1945) UNRRA Journal 152 for the text of Resolution 71.
264. Ibid.
265. UNRRA Incoming Cable No. 8855 (28 Dec. 1945).
266. UNRRA Outgoing Cable No. 1675 (9 Feb. 1946).
268. (1946) UNRRA Journal 82–83 and 85–86.
269. UNRRA European Region Order 40(I), 3 July 1946.
270. The requirement of "concrete evidence" of persecution was contrary to the opinion of the Counsel General that oral evidence alone might be admitted to establish persecution; see UNRRA Outgoing Cable No. 49, 2 Jan. 1946.
271. No concrete evidence of persecution was, however, required of victims of "discriminatory Nazi legislation" including Jewish refugees: see supra n.269.
demonstrable incompatibility with their State of origin could receive the benefits of refugee status.

C. International Refugee Organisation: 1946–1951

The establishment of the United Nations provided an appropriate forum for the creation of an international organisation for the protection of refugees. In recognition of the global importance of the refugee phenomenon, it was judged appropriate to found an office with a more wide-ranging character and scope of activity than either the Intergovernmental Committee or UNRRA.272

The result of this consensus was the creation of the International Refugee Organisation. The Constitution of the IRO,273 adopted by the General Assembly in December 1946,274 contained the most detailed definition of a refugee drawn up during the era under consideration.275 The complexity of the definitional provisions was the result of an attempt to reconcile the divergent views of Member States voiced in a myriad of organs and committees which participated in the year and a half long drafting process.276

The heart of the definition provided that only persons who could not be repatriated or who "in complete freedom and after receiving full knowledge of the facts . . . expressed valid objections to returning to [their countries of origin]"277 might be assisted by the IRO.278 The establishment of the "valid objections" criterion of refugeehood was the result of anything but unanimous approval. The United States and its allies argued strongly that individuals had the right to choose to migrate in search of personal freedom.279 The Soviet Union and its supporters countered that, while individuals had the right to seek asylum from another State,280 it was unjust to "indirectly saddle democratic

272. L. Holborn, op. cit. supra n.11, at pp.29–30.
274. 1(2) UNGAOR (67th Plen. Mtg.), p.1454.
275. That is, between 1920 and 1950. Cf. the definitions discussed supra Parts II and III.
276. The constitution was the product of the Special Committee on Refugees and Displaced Persons, the Committee on the Finances of the International Refugee Organisation, the Third Committee of the General Assembly, the Economic and Social Council, and the General Assembly.
278. An exception to this rule was made in the case of Spanish Republican refugees and Germans and Austrians who were detainees or returnees during the Nazi era: see idem, Parts I(A)(1)(b) and I(A)(3).
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governments with liability for the maintenance of their emigrated enemies”.281

The compromise achieved recognised the possibility that political émigrés might be eligible for IRO assistance.282 However, the dissident was to have access to full information, including adequate information from the government of his country of origin, before being recognised as a refugee.283 Further, the leaders of movements hostile to a member government of the United Nations were excluded from the IRO mandate.284

What, then, were “valid objections” to returning to one’s country of origin? First, the applicant might demonstrate that he had been persecuted or feared persecution on reasonable grounds because of his race, religion, nationality or political opinion.285 Alternatively, the dissident could be admitted to assistance if he raised “objections of a political nature judged by the Organisation to be ‘valid’ ”.286 In the case of pre-Second World War refugees and the victims of Naziism and Fascism, “compelling family reasons arising out of previous persecution, or compelling reasons of infirmity or illness”287 might be invoked.

The “valid objections” concept of refugeehood was both open-ended and highly discretionary. This indefiniteness was, however, constrained in three ways.

First, the “valid objections” test could be applied288 only to specified categories of persons.289 Included were the victims of Naziism, Fascism and similar regimes,290 pre-war refugees,291 persons outside their country of origin and unable or unwilling to avail themselves of its protection,292 war orphans293 and displaced persons.294

Second, a refugee applicant might be excluded from protection by reason of one of the definition’s cessation clauses. Refugees returning to their country of origin,295 acquiring a new nationality,296 becoming

289. Spanish Republicans and Nazi detainees or returnees were to be accorded refugee status without having to demonstrate “valid objections” to returning home: see idem, Parts I(A)(1)(b) and I(A)(3).
294. Idem, Part I(B).
firmly established.\textsuperscript{297} unreasonably refusing to accept IRO repatriation or resettlement proposals,\textsuperscript{298} failing to make a substantial effort towards earning a living when able to do so\textsuperscript{299} or otherwise exploiting the IRO\textsuperscript{300} ceased to be of concern to the Organisation.

Finally, certain classes were inherently ineligible to receive refugee status: war criminals, quislings and traitors,\textsuperscript{301} enemy collaborators,\textsuperscript{302} ordinary criminals,\textsuperscript{303} persons of German ethnic origin having gone to or left Germany,\textsuperscript{304} individuals in receipt of financial assistance from their country of origin,\textsuperscript{305} persons in the military or civil service of a foreign State\textsuperscript{306} and, as previously mentioned, leaders of movements hostile to a Member State of the United Nations.\textsuperscript{307}

The basic notion, therefore, underlying the IRO definition was that an individual who might be described as a victim of recognised state intolerance or as a genuinely motivated political dissident was a refugee until he either did not require or was determined to be unworthy of international protection and assistance.

By mid-1947, the IRO definition of refugeehood was the only effective international standard. By agreement, the International Refugee Organisation had assumed the responsibilities of UNRRA,\textsuperscript{308} the Intergovernmental Committee\textsuperscript{309} and, indirectly, of the League of Nations High Commissioner for Refugees.\textsuperscript{310}

\textbf{D. Commentary}

Whereas the first phase in the evolution of the refugee definition focused on the international legal system,\textsuperscript{311} and the second stage emphasised social phenomena,\textsuperscript{312} the period from 1938 to 1950\textsuperscript{313} was

\begin{itemize}
  \item 297. \textit{Idem}, Part I(D)(c).
  \item 298. \textit{Idem}, Part I(D)(d).
  \item 299. \textit{Idem}, Part I(D)(e).
  \item 300. \textit{Idem}, Part I(D)(e).
  \item 301. \textit{Idem}, Part II(1).
  \item 302. \textit{Idem}, Part II(2).
  \item 303. \textit{Idem}, Part II(3).
  \item 304. \textit{Idem}, Part II(4).
  \item 305. \textit{Idem}, Part II(5).
  \item 306. \textit{Idem}, Part II(6)(c).
  \item 307. \textit{Idem}, Parts II(6)(a) and II(6)(b). See also supra at n.284.
  \item 308. L. Holborn, \textit{op. cit. supra} n.11, at p.23.
  \item 309. \textit{Ibid}.
  \item 311. See supra Part II.
  \item 312. See supra Part III.
  \item 313. See supra Part IV.
\end{itemize}
characterised by a tremendous individualisation of refugee law. The transition first affected the determination procedure: the decision as to whether or not a person was a refugee was no longer made, as in the period up to 1938, strictly on the basis of political and social categories. Rather, the accords of the immediate post-war era prescribed an examination of the merits of each applicant's case.\textsuperscript{314}

Moreover the move to a more personal conception of refugeehood altered substantive notions. The essence of refugee status came to be discord between the individual refugee applicant's personal characteristics and convictions and the tenets of the political system in his country of origin.\textsuperscript{315}

The origin of the individualist approach to refugee status was the founding resolution of the Intergovernmental Committee on Refugees.\textsuperscript{316} The delegates to the Evian Conference\textsuperscript{317} which established the Committee agreed that assistance should be rendered to Germans and Austrians “who must emigrate on account of their political opinions, religious beliefs or racial origin”.\textsuperscript{318} Thus, only individuals who were forced to emigrate for one of the enumerated causes were assisted. In keeping with the notion of a particularised examination of the merits of each case, no categorical distinction was made between those who had emigrated from and those who remained in their countries of origin.\textsuperscript{319} Upon extending the scope of the Committee's work to the whole of Europe,\textsuperscript{320} the Director observed that

the emergent necessity was to save and preserve persons who were in imminent peril because of their race, creed or political beliefs.\textsuperscript{321}

The refugee policy of the United Nations Relief and Rehabilitation Administration established by interpretation of Resolution 71\textsuperscript{322} was similarly focused on individual as distinguished from group concerns. The guidelines which restricted the application of the Washington directive on political dissidents,\textsuperscript{323} however, required all applicants\textsuperscript{324} for post-war refugee assistance to show that the internal displacement they had suffered was “because of race, religion, or activities in favour

\textsuperscript{314}. Described in detail infra.
\textsuperscript{315}. \textit{Infra} at nn.326–330.
\textsuperscript{316}. \textit{Op. cit. supra} n.239.
\textsuperscript{317}. This conference took place from 6-15 July 1938.
\textsuperscript{318}. \textit{Op. cit. supra} n.239
\textsuperscript{319}. \textit{Agenda of the Committee, ICR Doc. C.I./E.1.} (5 July 1938).
\textsuperscript{320}. \textit{Ibid.}
\textsuperscript{322}. See supra Part IV, Section B.
\textsuperscript{323}. \textit{Supra} n.269.
\textsuperscript{324}. An exception was made in the case of victims of Nazism; see \textit{supra} n.271.
of the United Nations”.

It was thus made clear that while refugee applications would be assessed on an individual basis, refugeehood was an objectively demonstrable as opposed to a purely subjective condition.

The International Refugee Organisation went beyond either the Intergovernmental Committee or UNRRA in advancing the individualist conception of refugeehood. The IRO came very close to adopting a subjective refugee determination scheme by considering as refugees persons outside their country of origin who expressed valid political objections to returning. It was sufficient if the expatriate’s political beliefs caused him to be “unwilling to avail himself of his country’s protection”.

The extension of protection to political dissidents was premised on the belief that

... political opponents had a right to aid and protection ... the State was the servant of the individual, whatever his political convictions might be ... the community could not withhold its support from human beings simply because they held and expressed opinions differing from those of the authorities in power.

It was further asserted that “to refuse aid to political refugees would be to undermine the principles of the United Nations”.

This subjective conception of a refugee was not universally embraced by members of the United Nations. The French delegate joined the Soviet bloc in recognising the right of asylum while asserting the impropriety of including political dissidents among the ranks of refugees protected by international law:

... he had wanted to distinguish between refugees and displaced persons, on the one hand, and political émigrés on the other, as he did not think that countries of origin could be expected to support the latter. He had therefore suggested that the new organisation should be responsible for the people in the former categories and the receiving countries, and they only, should be responsible for those in the latter, under such international agreements as they could conclude.

325. Supra n.269.

326. It should, however, be noted that the ill-fated UNRRA policy allegedly based on Resolution 71 did not require an allegation of either de jure or de facto loss of protection, but this practice ceased after only seven months: see supra Part IV, Section B.


332. Ibid. and op. cit. supra n.329, at p.156.


At the close of the first half of the twentieth century, an ideological split precluded a clear consensus on the fundamental characteristics of a refugee. While there was general agreement on a basically individualist approach to refugee definition, a significant minority of the Member States of the United Nations did not accept the notion of making assessments of subjective incompatibility between an applicant and his nation of origin, and insisted instead that refugee status be awarded only where the breakdown in relations between State and individual had resulted in externally verifiable prejudice to the claimant.

V. CONCLUSIONS

In the face of dramatically changed social and economic conditions, 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 be 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.

The initial approach was to offer assistance only to those groups considered to be international anomalies because they lacked the de jure protection of any State. Refugee status was conceived as a means of providing international freedom of movement to persons who would otherwise have been unable to migrate by reason of the principles of international accountability.

This view of refugeehood was replaced by a socially-based philosophy of the refugee which accorded status to those groups which were in fact, if not in law, without state protection. The object of international refugee assistance was to facilitate the migration of groups whose personal safety or basic human rights were seriously jeopardised by the actions of their governments.

The third phase in the definitional evolution consisted of a shift away from the approach of definition by group. The refugee was instead viewed as an individual whose beliefs or personal characteristics brought him into a situation of fundamental conflict with the government of his home State. A person was declared to be a refugee in order to permit him to migrate in search of freedom of expression and action.

Over the course of just 30 years, three quite distinct approaches to

refugee definition were evident. While each was designed to facilitate involuntary migration, the precise approach was determined by the perceived nature of the dilemma faced by the international community. The presence of masses of stateless and undocumented aliens who wanted to migrate in search of decent living conditions in the years following the end of the First World War dictated a refugee definition based upon considerations of formal legal status. The exodus of persons fleeing Nazi persecution in the 1930s called for the extension of refugee protection to all members of the groups targeted for abuse. Finally, the establishment after the Second World War of governments in Eastern Europe with institutionalised ideologies to which many individuals were either unable or unwilling to adapt suggested an approach to refugee definition which accorded relief to those persons for whom continued residence in their own countries was unthinkable.

Refugee status, then, is an extremely malleable legal concept which can take on different meanings as required by the nature and scope of the dilemma prompting involuntary migration. If properly defined, refugeehood enables the maintenance of a delicate balance between domestic policies of controlled immigration and the moral obligation of the international community to respond to the plight of those forced to flee their countries. In order that refugee status may continue to play this role, the definitional framework must, as during the period analysed here, evolve in response to changing social and political conditions.